EVERYONE AGREED ON SOMETHING: HOW NEW JERSEY'S TEACHNJ ACT PUTS TESTING BEFORE STUDENTS, AND FIRING BEFORE TEACHING

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I. INTRODUCTION

The Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ" or "the Act") has never been about New Jersey's students.[1] But its proponents in Trenton have always made sure to discuss the Act as if it were. Nonetheless, the Act focuses its attention squarely on teachers. Without any particular rationale, the Act makes it more difficult for teachers to attain tenure, and much easier to scrutinize and to fire teachers once they have tenure. However, the Act's scheme for achieving its actual goals lacks effective evaluation procedures and runs afoul of well-established due process rights. In short, the TEACHNJ Act does not do what it says it does, is not particularly good at what it actually does, and is without adequate procedural safeguards.

On May 23, 2011, State Senator Teresa Ruiz, a Democrat from Essex County, told *The Star Ledger* that she would introduce the TEACHNJ Act later that week.[2] In its original form, Senator Ruiz's bill effectively ended tenure in New Jersey.[3] The bill eliminated all due process for tenure removal.[4] It authorized local principals to revoke a teacher's tenure after two years of ineffective ratings if the principal felt that the teacher was not following an individualized

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[1] Although the stated goal of the TEACHNJ Act is to "raise student achievement by improving instruction," the statute's focus is the employment conditions of teachers, including its main goal of tenure reform. *Guide to the TEACHNJ Act*, NEW JERSEY DEP'T OF EDU., http://www.nj.gov/education/AchieveNJ/intro/TeachNJGuide.pdf (last updated June 2014). The New Jersey Department of Education stated that:

> At its core, TEACHNJ reforms the processes of earning and maintaining tenure by improving evaluations and opportunities for professional growth. Specifically:
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> - Tenure decisions are now based on multiple measures of student achievement and teacher practice as measured by new evaluation procedures.
> - Lengthy and costly tenure hearings are shorter, focused on process only, and less expensive.
> - Educator feedback and development is more individualized and focused on students.

Id. *See also* Jarrett Renshaw, *Gov. Christie Signs Teacher Tenure Overhaul Bill*, THE STAR LEDGER (Aug. 2, 2012), http://www.nj.com/news/index.ssf/2012/08/gov_christie_signs_teacher_ten.html (quoting State Senate President Stephen Sweeney as saying "We can't have the bad ones in schools anymore. One bad teacher is one bad teacher too many.").

[2] Jessica Calefati, *State Sen. Teresa Ruiz Pushes New Teacher Tenure Reform*, THE STAR LEDGER (May 23, 2011), http://www.nj.com/news/index.ssf/2011/05/nj_democrat_pushes_new_tenure.html.

[3] *See* Teacher Effectiveness and Accountability for the Children of New Jersey (TEACHNJ) Act, S. 2925, 214th Leg. (2011), *available at* http://www.njleg.state.nj.us/2010/Bills/S3000/2925_I1.PDF [hereinafter Sen. Ruiz TEACHNJ Proposal].

[4] *Id.*

improvement plan.[5] The bill also included a longer probationary period for teachers prior to tenure, a teacher evaluation tool based on student test scores, a two-tier teacher rating system of effective and ineffective, and a professional development piece as well.[6] Despite the bill's evident focus on firing teachers, Senator Ruiz told *The Star Ledger*, "I approached this bill through the lens of supporting and elevating the profession, but most importantly with a vision of the children whose futures are at stake."[7]

Senator Ruiz was not alone in her zeal to upend the teaching profession. This incarnation of the TEACHNJ Act came fast on the heels of separate, similar education reform legislation introduced by Republican State Senator Joe Kyrillos and supported by Republican Governor Chris Christie.[8] Senator Kyrillos' bill differed mainly from Senator Ruiz's bill in its lack of professional development for teachers.[9] Prior to Senator Kyrillos' bill, the governor himself had proposed teacher reforms mandating merit pay and ending last-in, first-out job protections.[10] Echoing Senator Ruiz, a spokesman for Senate Republicans invoked the children: "Reforming tenure is absolutely essential to making sure every student is being taught by an effective educator."[11] This rhetoric and the accompanying wave of legislative proposals suggest that New Jersey's children were in dire straits.

Yet, New Jersey's children were quite well educated at the time.[12] According to the National Center for Education Statistics

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[5] *Id*.

[6] *Id*.

[7] Calefati, *supra* note 2.

[8] *Id*.

[9] C*ompare* Sen. Ruiz TEACHNJ Proposal *with* School Children First Act, S. 2925, 214th Leg. (2011) (sponsored by Sen. Joseph M. Kyrillos, Jr.), *available at* http://www.njleg.state.nj.us/2010/Bills/S3000/ 2881_I1.PDF.

[10] *See* Matt Bai, *How Chris Christie Did His Homework*, N.Y. TIMES (Feb. 24, 2011), http://www.nytimes.com/ 2011/02/27/magazine/27christie-t.html?_r=0. The profile noted:

> The war between Christie and the union has two fronts, so closely interrelated that it's hard to separate them. First there's the fight over budgeting issues like pensions and benefits. And then there's the "year of education reform," as Christie has proclaimed 2011, in which he intends to push his case for merit pay, charter schools and the abolition of teacher tenure — all of which are, of course, anathema to the union.

Id.

[11] Calefati, *supra* note 2.

[12] *New Jersey State Profile*, NAT'L CTR. FOR EDUC. STATISTICS, http://nces.ed.gov/nationsreportcard/states/ (last visited Apr. 17, 2015). In 2013, New Jersey fourth, eighth, and twelfth graders scored higher than the national average on both Math and Reading standardized tests. *Id.*

("NCES"), in 2011, the year TEACHNJ was first introduced, New Jersey's fourth graders ranked fourth and second in the nation in mathematics and reading, respectively.[13] Eighth graders ranked third and second in those subjects.[14] In 2010, the New Jersey Education Association ("NJEA") noted, and Politifact confirmed, that New Jersey's public high school students achieved the highest average Advanced Placement test score in the entire country.[15] Without regard for this success, the governor and both parties in the legislature were clamoring for tenure reform.

On August 6, 2012, Governor Christie signed the revised TEACHNJ Act into law.[16] The Act had been passed unanimously in both the Senate and the Assembly.[17] This version of the bill saw input from both the governor and the NJEA.[18] Governor Christie went so far as to thank the union he had previously referred to as thugs for the important role they played in the bill's success.[19] An

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[13] *Id.*

[14] *Id.* The rankings are based on student scores on the National Assessment of Educational Progress. Professor Diane Ravitch described the NAEP scores in the following manner:

> [They are] [t]he only test scores that can be used comparatively . . . because [NAEP] is a no-stakes test. No one knows who will take it, no one knows what will be on the test, no student takes the full test, and the results are not reported for individuals or for schools. There is no way to prepare for NAEP, so there is no test prep. There are no rewards or punishments attached to it, so there is no reason to cheat, to teach to the test, or to game the system.

DIANE RAVITCH, REIGN OF ERROR: THE HOAX OF THE PRIVATIZATION MOVEMENT AND THE DANGER TO AMERICA'S PUBLIC SCHOOLS 125 (2013) [hereinafter RAVITCH, REIGN OF ERROR].

[15] Erin O'Neill, *NJEA Claims New Jersey Public School Students Have Best Advanced Placement Scores in Nation*, POLITIFACT (Sept. 4, 2011), http://www.politifact.com/new-jersey/statements/2011/sep/04/new-jersey-education-association/njea-claims-new-jersey-public-school-students-have/ ("The NJEA claims the state's public school students have the best Advanced Placement test scores in the country. PolitiFact New Jersey compared the average AP test scores for students across the nation and found New Jersey's public school students rank first.").

[16] Teacher Effectiveness and Accountability for the Children of New Jersey (TEACHNJ) Act, S. 1455, 215th Leg. (N.J. 2012).

[17] Salvador Rizzo, *Sweeping N.J. Teacher's Tenure Bill Passes Legislature, Heads to Gov. Christie's Desk*, THE STAR-LEDGER (June 25, 2012, 10:05 PM), http://www.nj.com/news/index.ssf/2012/06/sweeping_nj_teachers_tenure_ bi.html.

[18] *Id.*; Barbara Keshishian, Testimony Before the Senate Budget and Appropriations Committee S-1455 (Jun. 18, 2012) (transcript available at http://www.njea.org/news/2012/06/18/testimony%20by%20njea%20president%20barbara%20keshishian) (mentioning "extensive discussions over the last several months").

[19] Renshaw, *supra* note 1 ("The fact of the matter is nothing gets done without their input, support and their help. I know it's not everything they wanted to have happen, and it wasn't everything that I wanted to have happen."). The public thank you of the

NJEA spokesman said, "Everyone agreed that we needed to do something."[20] State Senate President Stephen Sweeney, a Democrat from Gloucester County, added, "We can't have the bad ones in schools anymore. One bad teacher is one bad teacher too many."[21] The national media lauded the bill's passage as an example of Governor Christie's ability to make tough compromises, even in a state where the teachers' union is quite strong.[22] Amidst all the praise, then Mayor of Newark Cory Booker and Education Commissioner Chris Cerf criticized the bill for not going far enough to reduce teachers' job protections.[23] In a statement, Senator Ruiz again looked to the children: "By strengthening our professionals, we will ensure that our students have the best teachers in the classroom so that all children—regardless of their background, their ZIP code, or their socio-economic status—will have the opportunities they deserve for educational excellence."[24]

Despite Senator Ruiz's public comments focusing on students, and the TEACHNJ Act's official purpose to "raise student achievement by improving instruction through the adoption of evaluations that provide specific feedback to educators" and

teachers' union was much different from 2011 when Governor Christie stated:

> I believe the teachers in New Jersey in the main are wonderful public servants that care deeply. But their union, their union are a group of political thugs. They should have taken the salary freeze. They didn't and now, you know, we had to lay teachers off. They chose to continue to get their salary increases rather than be part of the shared sacrifice.

Bradley Blackburn, *New Jersey Governor Chris Christie Calls His State's Teachers Union 'Political Thugs*,' ABCNEWS (Apr. 6, 2011), http://abcnews.go.com/Politics/jersey-governor-chris-christie-calls-teachers-union-political /story?id=13310446.

[20] Rizzo, *supra* note 17.

[21] Renshaw, *supra* note 1.

[22] *See* John Martin, *N.J. Gov. Christie Signs Bipartisan Reform of Nation's Oldest Teacher Tenure Law*, CNN' SCHOOLS OF THOUGHT BLOG (August 7, 2012, 2:41 PM), http://schoolsofthought.blogs.cnn.com/2012/08/07/n-j-gov-christie-signs-bipartisan-reform-of-nations-oldest-teacher-tenure-law/ ("Groups that have traditionally been at odds worked together to craft and pass the bill sponsored by both Democratic and Republican lawmakers. Not a single member of New Jersey's bicameral legislature voted against it."); Kate Zernike, *Christie Signs Bill Overhauling Job Guarantees for Teachers*, N.Y. TIMES (Aug. 6, 2012), http://www.nytimes.com/2012/08/07/nyregion /christie-signs-bill-overhauling-teacher-tenure.html?r=0 ("The new law suggests how much the landscape has changed on revising education, and on tenure, long among the most contentious issues for teachers' unions and legislatures."); *Cf.* Steve Kornacki, *What Chris Christie Didn't Tell You*, SALON (Aug. 29, 2012, 7:53 AM), http://www.salon.com/2012/08/29/what_chris_christie_didn't_tell_you/("Again, Christie can claim some credit here for pushing the issue aggressively in the public square and making it a priority.").

[23] Rizzo, *supra* note 17; Renshaw, *supra* note 1.

[24] Rizzo, *supra* note 17.

"inform personnel decisions," the legislation's actual target is teacher job protections.[25] This Note will critique the TEACHNJ Act's changes in teacher evaluations and tenure proceedings, and provide recommendations for solving those issues. Part II will provide a brief history of tenure and teacher evaluation in the United States generally, along with an explanation of its creation in New Jersey. Additionally, Part II will survey recent legislation affecting these topics, including a discussion of *Vergara v. California*, wherein a California trial court declared the state's tenure laws unconstitutional. Part III will appraise the likelihood that the Act's changes in teacher evaluations will meet the Act's goals. Part IV will analyze the constitutional issues raised by the new tenure removal scheme, along with the Office of Administrative Law's contrasting procedures.

II. TENURE: PAST, PRESENT, AND NEW JERSEY

A. Tenure's Past and Present

Tenure began as a result of the recognition that civil service employees needed protection from the vicissitudes of politics.[26] In the late nineteenth century, the National Education Association ("NEA") thought of tenure as a means of shielding teachers from parents, administrators, and boards of education.[27] The topic headlined the organization's first conference, held in Chicago in 1887.[28] By the early twentieth century, the NEA espoused tenure as an essential component of all teachers' contracts.[29] In 1946, the

[25] N.J. STAT. ANN. § 18A:6-118 (West 2014).

[26] Patricia L. Marshall, Debra V. Baucom & Allison L. Webb, *Do You Have Tenure, and Do You Really Want It?*, CLEARING HOUSE, May-Jun., 1998, at 302, 302-05. *See also* DANA GOLDSTEIN, THE TEACHER WARS: A HISTORY OF AMERICA'S MOST EMBATTLED PROFESSION 230 (2014) [hereinafter GOLDSTEIN, THE TEACHER WARS] ("But the history of American public education shows that teachers are uniquely vulnerable to political pressures and moral panics that have nothing to do with the quality of their work.").

[27] Marshall, Baucom & Webb, *supra* note 26, at 302; M. J. Stephey, *A Brief History of Tenure*, TIME, Nov. 17, 2008, http://content.time.com/time/nation/article/0,8599,1859505,00.html ("Just as steel and auto workers fought against unsafe working conditions and unlivable wages, teachers too demanded protection from parents and administrators who would try to dictate lesson plans or exclude controversial materials like *Huck Finn* [sic] from reading lists.").

[28] Stephey, *supra* note 27 ("The start of the tenure movement paralleled similar labor struggles during the late 19th century . . . . In 1887, nearly 10,000 teachers from across the country met in Chicago for the first-ever conference of the National Educator's Association, now one of the country's most powerful teachers' unions.").

[29] Marshall, Baucom & Webb, *supra* note 26, at 302. *See also* GOLDSTEIN, *supra* note 26, at 7:

NEA stated a formal position on tenure embracing both the removal of incompetent teachers and the retention of skilled ones.[30] The implementation of tenure continued across the country, firmly rooting its protections in most school districts by the late 1960s.[31]

In recent years, education reformers have attacked tenure, characterizing it as intentionally inefficient.[32] They claim that tenure shields incompetent teachers.[33] They say that it is so difficult to remove a teacher that administrators prefer to allow bad teachers to continue working, rather than begin the process.[34] Reformers attack the tenure removal process for expense, saying that even if a district begins gathering the information necessary to fire a teacher, the costs are prohibitive, often citing numbers as high as $450,000.[35] The New Jersey Department of Education's own explanatory material on the TEACHNJ Act calls tenure hearings lengthy and expensive.[36] Since tenure is inefficient, difficult to remove, cumbersome, and expensive, the argument goes, it needs to be scrapped.

These arguments have persuaded some state legislatures to become skeptical of tenure protections.[37] Laws in Alabama,

> Yet tenure predates collective bargaining for teachers by over half a century. Administrators granted teachers tenure as early as 1909, *before* unions were legally empowered at the negotiating table to demand this right. During the Progressive Era, both 'good government' school reformers and then-nascent teachers unions supported tenure, which prevented teaching jobs from being used as political patronage and allowed teachers to challenge dismissals or demotions, once commonplace, based on gender, marital status, pregnancy, religion, ethnicity, race, sexual orientation, or political ideology. Tenure has long existed even in southern states where teachers are legally barred from collective bargaining.

Id. (emphasis in original).

[30] Marshall, Baucom & Webb, *supra* note 26, at 302.

[31] *Id*.

[32] Steven Brill, *The Teachers' Unions' Last Stand*, N.Y. TIMES (May 17, 2010), http://www.nytimes.com/2010/05/23/magazine/23Race-t.html?pagewanted=all&_r=0; Stephey, *supra* note 27.

[33] Brill, *supra* note 32; Stephey, *supra* note 27.

[34] Vergara v. State of California, No. BC484642 2014 WL6478415, at *5 (Cal. App. Dep't Super. Ct. Aug. 27, 2014).

[35] Stephey, *supra* note 27; *Vergara*, 2014 WL6478415, at *5. It is difficult to find credible information supporting this figure. It is repeated often on various anti-tenure advocacy websites and by newspapers on that side of the issue as well. But aside from conclusory statements asserting the claim, the author has not been able to find a single disinterested and open accounting of the cost of tenure proceedings.

[36] N.J DEP'T OF EDUC., GUIDE TO THE TEACHNJ ACT (2014), *available at* http://www.state.nj.us/education/Achieve NJ/intro/TeachNJGuide.pdf.

[37] Laura McNeal, *Total Recall: The Rise and Fall of Teacher Tenure*, 30 HOFSTRA LAB. &

Colorado, Florida, Idaho, Michigan, and New Hampshire have all drastically weakened tenure.[38] Generally, these laws alter tenure by reducing the amount of process necessary for removal, linking significant portions of evaluations to student test scores, and increasing probationary periods.[39] Florida and Idaho's laws have explicitly eliminated tenure, while Colorado's law essentially does so without acknowledging it.[40]

Reformers have not limited their campaign to legislation. Students Matter, a pet project of Silicon Valley entrepreneur David Welch, uses the courts to advance its agenda.[41] Welch's group recruited nine public school children and paid the law firm of Gibson, Dunn & Crutcher 1.1 million dollars to challenge California's tenure removal process, two-year probationary period, and seniority rule.[42] The case became *Vergara v. California*.[43] It ended with a trial court judge declaring California's tenure laws unconstitutional, and calling on the legislature to fix the situation.[44]

EMP. L.J. 489, 496 (2013); *Vergara*, 2014 WL6478415, at *6.

[38] McNeal, *supra* note 37, at 496. *See* ALA. CODE § 16-24C-4 *et seq.* (2013); S.B. 10-191, 67th Gen. Assemb., 2d Reg. Sess. (Colo. 2010); S.B. 736, 2011 Sess. (Fla. 2011); S.B. 1327, 61st Leg., 2d Reg. Sess. (Idaho 2012) (The Students Come First Bill was repealed by voters on Nov. 6, 2012. See Vol. 13-1 Idaho Admin. Bull. 35 (Jan. 2, 2013)); MICH. COMP. LAWS § 38.83 *et seq.* (2013); N.H. REV. STAT. ANN. § 273-A:4 (2010 & Supp. 2012).

[39] McNeal, *supra* note 37, at 496.

[40] McNeal, *supra* note 37, at 496, 500.

[41] Adolfo Guzman-Lopez, *The Lawsuit's Called Vergara, but the Name You Should Know is Welch*, SOUTHERN CALIFORNIA PUBLIC RADIO (Apr. 25, 2014), http://www.scpr.org/blogs/education/2014/04/25/16461/the-lawsuit-s-called-vergara-but-the-name-you-shou/. Welch made sure to mention the children when discussing his organization, though he declined to discuss the amount of money he had poured into it:

> Despite not having a background in public education, [Welch] said he had no choice but to take on the issue. "About four years ago, I got to the point where there was [sic] too many children that were being harmed in the system," he said. "If I had the capability of doing the right thing to make life better for someone else or for my society, then I try to do it." In interviews, Welch wouldn't say how much money the case has cost him. It's no doubt been substantial. Tax records for 2012 show he loaned Students Matter nearly 1 million dollars that year alone, half of which was spent on public relations.

Id. See also STUDENTSMATTER, http://studentsmatter.org/ (last visited Feb. 1, 2016).

[42] Guzman-Lopez, *supra* note 41; *Vergara*, 2014 WL6478415, at *2.

[43] *Vergara*, 2014 WL6478415, at *1.

[44] *Id.* at *7. Regarding a legislative response, Judge Rolf M. Treu stated:

> Under California's separation of powers framework, it is not the function of this Court to dictate or even to advise the legislature as to how to replace the Challenged Statutes. All this Court may do is apply constitutional principles of law to the Challenged Statutes as it has done

In *Vergara*, the court found these statutes have a serious and negative effect on students' fundamental right to equal education, and they disproportionately affect poor and minority students.[45] As a result, the court applied strict scrutiny to the statutes, and the two-year probationary period was struck down for its unfair treatment of both students and teachers.[46] The court held that the tenure removal process was so burdensome in its complexity, length, and cost as to be unnecessary.[47] Calling the logic of the "last-in, first-out" seniority statute "unfathomable," the court stated that this part of California's tenure statute was unconstitutional as well.[48]

United States Secretary of Education Arne Duncan hailed the decision, calling it "an opportunity . . . to build a new framework for the teaching profession that protects students' rights to educational opportunities while providing teachers the support, respect and rewarding careers they deserve."[49] Students Matter is considering similar actions in Connecticut, Kansas, Maryland, New Mexico, New York, and Oregon.[50] As it stands, tenure protections

> here, and trust the legislature to fulfill its mandated duty to enact legislation on the issues herein discussed that passes constitutional muster, thus providing each child in this state with a basically equal opportunity to achieve a quality education.

Id.

[45] *Id.* at *4.

[46] *Id.* at *5.

[47] *Id.* at *6.

[48] *Vergara*, 2014 WL6478415, at *6.

[49] Press Release, U.S. Secretary of Education Arne Duncan, Statement from U.S. Secretary of Education Arne Duncan Regarding the Decision in Vergara v. California (June 10, 2014), http://www.ed.gov/news/press-releases/statement-us-secretary-education-arne-duncan-regarding-decision-vergara-v-california. Secretary Duncan's discussion of the decision invalidating teacher tenure laws focused on students:

> For students in California and every other state, equal opportunities for learning must include the equal opportunity to be taught by a great teacher. The students who brought this lawsuit are, unfortunately, just nine out of millions of young people in America who are disadvantaged by laws, practices and systems that fail to identify and support our best teachers and match them with our neediest students. Today's court decision is a mandate to fix these problems. Together, we must work to fix public confidence in public education. My hope is that today's decision moves from the courtroom toward a collaborative process in California that is fair, thoughtful, practical and swift. Every state, every school district needs to have that conversation.

Id.

[50] Jennifer Medina, *Judge Rejects Teacher Tenure for California*, N.Y. TIMES, (June 10, 2014), http:// www.nytimes.com/2014/06/11/us/california-teacher-tenure-laws-ruled-unconstitutional.html:

> Both sides expect the case to generate more like it in cities and states around the country. . . . While the next move is still unclear, [Students

are under attack in both legislatures and the courts.

B. Tenure in New Jersey

In New Jersey, tenure became the law in 1909.[51] As of 2012, New Jersey's tenure law had not changed significantly over the more than one hundred years of its existence.[52] Teachers earned tenure after a probationary period of three years of consecutive, satisfactory service in the same school district.[53] During the probationary period, teachers could be fired without cause, that is, without hearings as to the reasonableness of the grounds for their dismissals.[54]

> Matter] is considering filing lawsuits in New York, Connecticut, Maryland, Oregon, New Mexico, Idaho and Kansas as well as other states with powerful unions where legislatures have defeated attempts to change tenure laws.

Id.

[51] Rizzo, *supra* note 17. *See also* GOLDSTEIN, THE TEACHER WARS, *supra* note 26, at 7 ("Administrators granted teachers tenure as early as 1909").

[52] New Jersey School Boards Association, *The New Tenure Law: What Board Members Need to Know*, 36 SCHOOL BOARD NOTES 4, Aug. 14, 2012 (referring to the TEACHNJ Act as "the first substantial reform of teacher tenure laws in over a century.").

[53] School Officers and Employees—Improvements—Plans and Specifications, 2012 N.J. Sess. Law Serv. Ch. 26 (SENATE 1455) (West).

[54] N.J. STAT. ANN. § 18A:27-3.2 (West 2014); Donaldson v. Board of Education, 320 A.2d 857, 861-62 (1974). In *Donaldson*, the New Jersey Supreme Court held that a non-tenured teacher is entitled to a statement of reasons for dismissal upon request, but not a formal hearing. Justice Jacobs stated:

> The teacher is a professional who has spent years in the course of attaining the necessary education and training. When he is engaged as a teacher he is fully aware that he is serving a probationary period and may or may not ultimately attain tenure. If he is not reengaged and tenure is thus precluded he is surely interested in knowing why and every human consideration along with all thoughts of elemental fairness and justice suggest that, when he asks, he be told why . . . . The plaintiff does not urge before us that, in addition to a statement of reasons, she was entitled to a formal hearing before the board. For the present purposes, we assume that no such hearing was required although we hasten to suggest that a timely request for informal appearance before the board should ordinarily be granted even though no formal hearing is undertaken.

Id. See also E. GORDON GEE & PHILIP T. K. DANIEL, LAW AND PUBLIC EDUCATION: CASES AND MATERIALS 390 (4th ed. 2009):

> In fact, the vast majority of employees fall under the 'at-will doctrine,' meaning that persons can be terminated for good reason, bad reason, or no reason. This was the ruling in the case of *Castro v. New York City Bd. Of Educ.*, 777 F.Supp. 1113 (S.D.N.Y. 1990), where a non-tenured teacher challenged his non-renewal of contract, claiming a pre-termination hearing was required. The court concluded that the teacher served 'at will' in his non-tenured status and failed to prove that he was dismissed for a constitutionally impermissible purpose.

Id.; *Teachers' Rights: Tenure and Dismissal*, FINDLAW (May 12, 2015, 7:14 PM),

Before TEACHNJ was enacted, once teachers earned tenure, they were afforded due process before districts could fire them.[55] To prevail in an attempt to remove a tenured teacher, the district had to prove one of four reasons for dismissal: inefficiency, incapacity, conduct unbecoming a teaching staff member, or some other just cause.[56] The procedures were as follows: presentation of charges to the local Board of Education ("Board") by the superintendent, certification of charges by the Board, filing of charges with the Commissioner of Education ("Commissioner") by the Board, a hearing before an Administrative Law Judge ("ALJ") from the Office of Administrative Law ("OAL"), and a final decision on the ALJ's ruling by the Commissioner.[57]

C. TEACHNJ's Changes to Tenure

The TEACHNJ Act makes significant changes to tenure. The Act increases the probationary period leading up to receiving tenure from three years to four.[58] Administrators may base up to fifty percent of teachers' evaluations on student test performance.[59] This rule is satisfied through the creation of student growth objectives ("SGOs") by individual teachers.[60] The Act mandates that summative evaluations include four ratings: highly effective,

http://education.findlaw.com/teachers-rights/teachers-rights-tenure-and-dismissal.html:

> Prior to attaining tenure, a probationary teacher may be dismissed at the discretion of the school district, subject to contractual and constitutional restrictions. Laws other than those governing tenure will apply to determine whether a discharge of a teacher is wrongful. If a probationary teacher's dismissal does not involve discrimination or does not violate terms of the teacher's contract, the school district most likely does not need to provide notice, summary of charges, or a hearing to the teacher.

Id.

[55] N.J. STAT. ANN. § 18A:6-10 (West 2014):

> No person shall be dismissed or reduced in compensation, (a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle.

Id.

[56] *Id.*

[57] School Officers and Employees—Improvements—Plans and Specifications, 2012 N.J. Sess. Law Serv. Ch. 26 (SENATE 1455) (West).

[58] N.J. STAT. ANN. § 18A:28-5(a)(3)(b)(1) (West 2014).

[59] N.J. STAT. ANN. § 18A:6-123(b)(4) (West 2014).

[60] N.J. STAT. ANN. § 18A:6-123(b)(2) (West 2014); N.J. ADMIN. CODE § 6A:10-2.4(b)(1)-(6) (LexisNexis 2015); N.J. ADMIN. CODE § 6A:10-4.2(e)(1)-(6) (LexisNexis 2015).

effective, partially effective, and ineffective.[61] When a teacher receives two consecutive ratings of ineffective, or a rating of partially effective followed by ineffective, the superintendent must file tenure charges.[62] This requirement relieves the superintendent of the discretion to decide whether to file charges that she possessed under the old law. In the case of a teacher who receives ratings of ineffective followed by partially effective, or partially effective in two consecutive years, the superintendent retains that discretionary power.[63] When faced with a teacher receiving those ratings, the superintendent may file charges or may defer by filing written evidence of exceptional circumstances.[64] Thereafter, the Board may file the charges with the Commissioner within thirty days, unless the Board decides that the evaluation process was not followed.[65]

The Act completely removes the OAL from the tenure hearing process. In its stead, the Act places compulsory, binding arbitration.[66] Once the Commissioner has the charges, the teacher has fifteen days to file a response.[67] The Commissioner has ten days to submit the charges to an arbitrator.[68] A hearing with the arbitrator will then take place within forty-five days of the assignment of an arbitrator.[69] The arbitrator then has forty-five days from the start of the hearing to issue a decision.[70] The arbitrator may consider only the following four issues: (1) if the evaluation failed to substantially follow the evaluation process; (2) "if there is a mistake of fact in the evaluation;" (3) if the charges were brought only as a result of discrimination, nepotism, political affiliation, union activity, or other conduct prohibited by federal or state law; and (4) if "the district's actions were arbitrary and capricious."[71] The Commissioner may set the arbitrator's pay, though the Act suggests that the arbitrator receive no less than $1250 per day.[72] Should the Commissioner elect to pay the arbitrator a different amount, the Act

[61] N.J. STAT. ANN. § 18A:6-123(b)(1) (West 2014).

[62] N.J. STAT. ANN. § 18A:6-17.3(a)(1) (West 2014).

[63] N.J. STAT. ANN. § 18A:6-17.3(a)(2) (West 2014).

[64] *Id.*

[65] N.J. STAT. ANN. § 18A:6-17.3(a)(2)(b) (West 2014).

[66] N.J. STAT. ANN. § 18A:6-16 (West 2014); N.J. STAT. ANN. § 18A:6-17.1(e) (West 2014) ("The arbitrator's determination shall be final and binding and may not be appealable to the commissioner of the State Board of Education.").

[67] *Id.*

[68] *Id.*

[69] N.J. STAT. ANN. § 18A:6-17.1(b)(1) (West 2015).

[70] N.J. STAT. ANN. § 18A:6-17.1(d) (West 2015).

[71] N.J. STAT. ANN. § 18A:6-17.2(a)(1)-(4) (West 2014).

[72] N.J. STAT. ANN. § 18A:6-17.1(b)(2) (West 2015).

requires the Commissioner to consider "the average per diem rate of arbitrators eligible to serve on the panel, who reside in New Jersey, New York, and Pennsylvania."[73] The state bears the cost of the arbitration, and the Act no longer caps this expense.[74]

The Act received the support of the Democratic legislature, the Republican governor, and the state's major teachers' union, the New Jersey Education Association.[75] The legislative and executive branches in Trenton had not seen this level of accord at any time since Governor Christie's election.[76]

III. EVALUATIONS AND TESTS, DUE PROCESS AND HEARINGS

A. Teacher Effectiveness and Student Testing

The TEACHNJ Act compels schools to use teacher evaluations that mandate reliance on student test scores. This requirement ignores the primary role socio-economic status plays in student achievement, fails to provide specific feedback to teachers about instructional practice, and allows teachers to game an easily circumvented system.[77] Additionally, high stakes tests (such as the

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[73] *Id.*

[74] *Id.* When the TEACHNJ Act was originally passed, the costs of the arbitration were capped at $7,500. *See* School Officers and Employees—Improvements—Plans and Specifications, 2012 N.J. Sess. Law Serv. Ch. 26 (SENATE 1455) (West). This recent change calls into question the likelihood that the Act will reduce the costs of tenure proceedings. *See* discussion *infra* Part III.C.ii.

[75] *See* Rizzo, *supra* note 17.

[76] *See, e.g.*, Todd B. Bates, *One Thing N.J. Residents Agree on Is Partisanship*, DAILY JOURNAL (Jun. 6, 2011), http://archive.thedailyjournal.com/article/20110606/NEWS01/106060317/One-thing-N-J-residents-agree-partisanship:

> Last week's war of words between Republican Gov. Chris Christie and the Democrats didn't move the two sides closer to harmony. The Democrats criticized Christie for using a state police helicopter to fly to his son's baseball game and then to a political dinner. The governor, in turn, called one assemblywoman [sic] a "'jerk" over the issue and the Democrats said Christie "is unable to discuss things like a grown-up."

Id.; *Christie Weighs Budget Cuts Amid Spat With 'S.O.B.' Democrat*, NEWSMAX (Jun. 27, 2012, 2:54 PM), http://www.newsmax.com/Politics/AMERICAME-BGVTTOP-BNALL-BNCOPY/2012/06/27/id/443681/:

> Governor Chris Christie called a New Jersey Senate Democrat an "arrogant S.O.B." over the failure to guarantee a tax cut in the Legislature's $31.7 billion spending plan, without saying whether he'll veto it. Christie's comment referred to Senator Paul Sarlo, who heads the budget panel. The Republican said he "got fooled" in swapping his income-levy rollback for property-tax rebates, citing a six-month delay and conditions set by lawmakers.

Id.

[77] *See* ANYA KAMENETZ, THE TEST: WHY OUR SCHOOLS ARE OBSESSED WITH

one New Jersey will use, created by the British corporation Pearson and known as the Partnership for Assessment of Readiness for Colleges and Careers test (PARCC)) are prone to statistical errors that make them unsuitable for evaluating teachers.[78]

Student test scores do not measure teacher effectiveness. According to the Act, up to fifty percent of a teacher's evaluation must reflect student performance on standardized tests.[79] Research has long settled that the most important factors that influence a student's success as measured by testing are socio-economic, i.e.,

STANDARDIZED TESTING—BUT YOU DON'T HAVE TO BE 65 (2015). Kamenetz explains the multiple ways economic struggle affects student achievement as follows:

> Poor kids may not get the same quality sleep because they share a bed or sleep on a couch. They may come to school without breakfast. Their vision goes uncorrected. They are likely to have less educated parents who own fewer books and talk to them less from the time they are infants—a gap that's been estimated at 30 million words by the time they start kindergarten. They are more likely to suffer from "'toxic stress"'—a parent in jail, abuse, trauma, or risk of homelessness—that interferes with their ability to concentrate day to day and can distort their brain development over time.

Id. Kamanetz goes on to quote the findings of Dr. Michael Freemark, a pediatrics professor at Duke University, whose review of state test scores for students in Chapel Hill and Raleigh-Durham, North Carolina demonstrated that "'85 percent of variability in school performance is explained by the economic well-being of a child's family, as measured by eligibility for subsidized lunches.'" *Id. See also* DIANE RAVITCH, THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION 258 (rev. and expanded ed., 2010) [hereinafter RAVITCH, DEATH AND LIFE] ("Teachers can have a profound influence on their students, but on average, what families do or don't do influences academic outcomes even more.").

[78] Diane Ravitch, *Schools We Can Envy*, THE NEW YORK REVIEW OF BOOKS (Mar. 8, 2012), http://www.nybooks.com/ articles/archives/2012/mar/08/schools-we-can-envy/ (citing DANIEL KORETZ, MEASURING UP: WHAT EDUCATIONAL TESTING REALLY TELLS US (2008)). Professor Ravitch mentions the findings of several researchers in this vein: "[E]xperts like Robert L. Linn at the University of Colorado, Linda Darling-Hammond at Stanford, and Helen F. Ladd at Duke, as well as a commission of the National Research Council, have warned about misuse of standardized tests to hold individual teachers accountable with rewards or sanctions." *Id.* The PARCC describes itself as "a group of states working together to develop a set of assessments that measure whether students are on track to be successful in college and their careers." PARTNERSHIP FOR ASSESSMENT OF READINESS FOR COLLEGE AND CAREERS, http://parcc.pearson.com/ (last visited Mar. 24, 2016). Despite this characterization, Pearson alone writes the test questions, prints, delivers, and scores the exams, and bears responsbility for the security of the test's content. Kelly Heyboer, *PARCC Exams: How Pearson Landed the Deal to Produce N.J.'s Biggest Test*, NJ.COM (Mar. 22, 2015, 11:17 AM), http://www.nj.com/education/2015/03/parcc_exams_how_pearson_landed_the_deal_to_produce.html. New Jersey expects to pay Pearson up to $108 million over four years for this work. *Id.*

[79] N.J. STAT. ANN. § 18A:6-123(b)(4) (West 2014); N.J. ADMIN. CODE § 6A:10-4.1(d)(1)-(4), (e) (LexisNexis 2015).

family income, health, and neighborhood characteristics.[80] For example, a student born to a wealthy family or to educated parents will usually outperform peers on standardized tests.[81] If a student's family is both wealthy and educated, she is even more certain to excel on such assessments.[82] To the extent that a teacher's effect on a student's test score is quantifiable, teaching only accounts for between one and fifteen percent of the outcome.[83]

In this way, the Act substantially evaluates teachers using a metric they do not control. The result of the Act's focus on testing is a measurement that reflects, for the most part, the student's socio-economic status, and not her teachers' effectiveness. Since test scores have little to do with instructional ability, the half of the Act's new evaluation system that districts may base on them does not provide teachers with worthwhile feedback. Rather, this part of the evaluation only suggests to teachers information to which they are often already privy, that is, the student's situation at home.

In addition to this redundancy, the fifty percent testing component of the Act's teacher evaluation scheme falls short of the Act's goal of "provid[ing] specific feedback."[84] A student's performance on one test on one day, or even on twelve tests on twelve days over the course of an entire school year, reveals only a snapshot of that student's performance on those occasions.[85] It offers no explanation regarding what component of the teacher's practice affected the outcome.

Teachers may employ several different strategies over the course

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[80] *See* Dana Goldstein, *Can Teachers Alone Overcome Poverty? Steven Brill Thinks So*, THE NATION (Aug. 10, 2011), http://www.thenation.com/article/162695/can-teachers-alone-overcome-poverty-steven-brill-thinks-so. *See generally* Kamenetz, *supra* note 77; RAVITCH, DEATH AND LIFE, *supra* note 77.

[81] *See* Kamenetz, *supra* note 77; RAVITCH, DEATH AND LIFE, *supra* note 77, at 286.

[82] *See* Kamenetz, *supra* note 77; RAVITCH, DEATH AND LIFE, *supra* note 77, at 286:

> Unfortunately, every testing program—be it the SAT, the ACT, NAEP, or state scores—shows a tight correlation between family income and scores: Children from affluent families have the highest scores, and children from poverty have the lowest scores. On the SAT for reading, students whose family income is in the lowest bracket (under $20,000) have an average score of 437, while students whose family income is in the highest bracket (over $200,000) have a mean score of 568; the gap is as large and as regular in mathematics. The same pattern is found on international assessments.

Id. at 286.

[83] *See* AM. STATISTICAL ASS'N, ASA STATEMENT ON USING VALUE-ADDED MODELS FOR EDUCATIONAL ASSESSMENT (2014); Goldstein, *supra* note 80.

[84] N.J. STAT. ANN. § 18A:6-118(a) (West 2014).

[85] *See* Ravitch, *Schools We Can Envy*, *supra* note 78.

of a single lesson to help students. Test scores do not say which ones work. They cannot discern whether it was a teacher's cooperative learning activities or her individual conferencing that were effective. Nor do they address why they were so. This silence of test scores regarding the efficacy of particular instructional strategies frustrates the Act's stated aim to provide specific feedback. Rather than providing guidance, test scores leave teachers to guess which aspect of their practice works. For this reason, fully half of the Act's evaluation scheme fails at its stated purpose.

The above discussion shows that test scores reflect socio-economic factors more than teacher efficacy, and specify nothing in particular regarding teaching strategies. Of equal significance is the indifference of test scores to individual students.[86] The possible reasons in a student's life for her success or failure on any given day are myriad. An idiosyncratic love of Gabriel Garcia Marquez's novels, or a sibling's skilled tutelage in trigonometry might contribute to a fine grade on one occasion, just as an unexpected family upheaval or a twenty-four hour virus may sabotage the grade on another. Tests ignore the impact of the individual student's emotions, her likes and dislikes, and her personal motivation or lack thereof. These facets of a student's life profoundly influence her ability to learn.[87] However, half of the Act's evaluation scheme relies on a measurement that is unable to account for such concerns, while at the same time being, in part, encumbered by them. Just as teachers cannot control the socio-economic status of a student, they cannot alleviate a student's personal difficulties. Even so, the Act's testing mandate rates teachers as if a student's personal obstacles do not exist. The Act has created a teacher evaluation regime based on

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[86] *See* RAVITCH, DEATH AND LIFE, *supra* note 77, at 162-63. Professor Ravitch discusses the problem of student responsibility and test scores, along with that of family responsibility and test scores, with specific reference to testing under the No Child Left Behind Act ("NCLB"):

> One problem with test-based accountability, as currently defined and used, is that it removes all responsibility from students and their families for the students' academic performance. NCLB neglected to acknowledge that students share in the responsibility for their academic performance and that they are not merely passive recipients of their teachers' influence. Nowhere in the federal accountability scheme are there measures or indicators of students' diligence, effort, and motivation. Do they attend school regularly? Do they do their homework? Do they pay attention in class? Are they motivated to succeed? These factors affect their school performance as much as or more than their teachers' skill.

Id.

[87] *Id.*

student performance that ignores the agency of the student. Teachers' evaluations should not be subject to the accidents of students' lives.

B. TEACHNJ and Cheating

Since teachers lack the ability to improve the most essential components of a student's test-taking ability (i.e., her socio-economic status and her personal motivation), and because under the Act that ability constitutes half of teachers' evaluations, teachers may find other ways to survive this threat. In short, high-stakes testing often leads to widespread cheating by teachers and administrators.[88] Major district-wide cheating scandals have come to light in Georgia, Nevada, and Washington D.C.[89] In each case,

[88] *See* GOLDSTEIN, THE TEACHER WARS, *supra* note 26, at 227. Goldstein lists several disturbing findings regarding the relationship between high-stakes testing and cheating:

> Increasingly, there was evidence that a significant number of unscrupulous administrators and teachers nationwide had responded to the higher stakes attached to state-level standardized tests—evaluations, bonus pay, and public release of data—by cheating. [Jack Gilum and Marisol Bello of *USA Today*] studied six. . .states and found over sixteen hundred examples of probable test score manipulation between 2002 and 2010. (The newspaper would have almost certainly found even more cheating had it not zeroed in on only the most suspicious test score leaps. For example: At one Gainesville, Florida, elementary school, math proficiency rates jumped from 5 percent to 91 percent in three years.) A subsequent investigation by the *Atlanta Journal-Constitution* discovered 196 school districts across the country with suspicious test score gains.

Id. See also RAVITCH, REIGN OF ERROR, *supra* note 14, at 148-150 (discussing Washington D.C.'s former superintendent, Michelle Rhee, and the "major cheating scandal" caused by Rhee's "relentless pressure to raise the passing rates on tests").

[89] *See* Michelle Rindels, *3 School Staffers On Leave In Vegas Cheating Probe*, HUFFINGTON POST (Apr. 17, 2014, 10:55 AM), http://www.huffingtonpost.com/2014/04/17/clark-county-cheatingteachers_n_5166780.html; RAVITCH, REIGN OF ERROR, *supra* note 14, at 148-150; Alan Blinder, *Atlanta Educators Convicted in School Cheating Scandal*, N.Y. TIMES (Apr. 1, 2015), http://www.nytimes.com/2015/04/02/us/verdict-reached-in-atlanta-school-testing-trial.html?_r=0 (discussing a state investigation that concluded "that cheating had occurred in at least 44 schools and that the district had been troubled by 'organized and systemic misconduct,'" and resulted in the conviction of eleven public school educators on charges of racketeering). The presiding judge, Judge Jerry W. Baxter of Fulton County Superior Court, ordered most of the teachers and administrators jailed immediately, and took the opportunity to scold them thus: "I don't like to send anybody to jail . . . . But they have made their bed, and they're going to have to lie in it, and it starts today." *Id.* Atlanta Superintendent Beverly L. Hall had been charged as well, but she died before she could stand trial. *Id.* Prior to coming to the Atlanta public schools in 1999, Dr. Hall, who investigators said "created a culture of fear, intimidation and retaliation" that allowed "cheating—at all levels—to go unchecked for years," was the superintendent of the public schools in Newark, New Jersey. *See* John Mooney, *DOE Releases Two More Reports on School Cheating*

the district tied the evaluation of teachers to the performance of students on tests.[90] These states put teachers in an untenable situation: their ability to pursue a calling was subordinated to the socio-economic and emotional conditions of their students. Faced with these grim odds, teachers and administrators aided students in a variety of unethical ways to keep their own jobs.[91]

The TEACHNJ Act penalizes teachers for student test performance in ways similar to the testing regimes in Georgia, Nevada, and Washington D.C. This correspondence augurs corresponding results for New Jersey. Teachers faced with the possibility of losing their livelihoods may act to protect themselves by resorting to cheating.

One aspect of the design of the TEACHNJ Act makes it rather easy for teachers to manipulate their evaluations. Under the Act, teachers' evaluations involve SGOs.[92] These instruments allow teachers, in consultation with administrators, to determine which students must improve, how much they must improve, and on what assessments they must improve.[93] Teachers may set different goals

Scandal, NJ SPOTLIGHT (Apr. 8, 2013), http:// www.njspotlight.com/stories/13/04/07/doe-releases-two-more-reports-on-school-cheating-scandal/.

[90] *See* Stephanie Banchero, *Nearly Half of States Link Teacher Evaluations to Tests*, WALL ST. J. (Oct. 26, 2011), http://www.wsj.com/articles/SB10001424052970203911804576653542137785186; RAVITCH, REIGN OF ERROR, *supra* note 14, at 148-150; Blinder, *supra* note 89.

[91] New Jersey has already experienced cheating scandals under the previous testing regime. *See* Vernal Coleman, *Woodbridge School Principal Encouraged Cheating on Standardized Test, State Says*, NJ.COM (Mar. 20, 2015), http://www.nj.com/middlesex/index.ssf/2015/03/woodbridge_district_elementary_school_principal_ch.html:

> [The Office of Fiscal Accountability and Compliance's] investigation alleges that during the 2010 and 2011 NJ ASK examinations, [Woodbridge elementary school principal Cathie] Bedosky encouraged test examiners and proctors to interfere with the independent work of students taking the assessment, failed to properly train examiners and utilized unqualified staff to fulfill test examiner positions . . . . Previous investigations by DOE Office of Fiscal Accountability and Compliance have implicated other township elementary teachers in testing scandals. In 2012, five Woodbridge administrators [two elementary school principals and three teachers] were accused by state investigators of cheating, or encouraging students to cheat on state standardized tests.

Id. Mooney, *supra* note 89 (discussing reports from the New Jersey Department of Education finding that in two East Orange elementary schools "several teachers either breached proper security protocols or may have coached students to change answers").

[92] N.J. STAT. ANN. § 18A:6-123(b)(2)-(3) (West 2014); N.J. ADMIN. CODE § 6A:10-2.4(b)(1)-(6) (LexisNexis 2015); N.J. ADMIN. CODE § 6A:10-4.2(e)(1)-(6) (LexisNexis 2015).

[93] N.J. STAT. ANN. § 18A:6-123(b)(2)-(6) (West 2014); N.J. ADMIN. CODE § 6A:10-2.4(b)(1)-(6) (LexisNexis 2015); N.J. ADMIN. CODE § 6A:10-4.2(e)(1)-(6) (LexisNexis 2015).

for different students based on various and multiple starting points.[94] For instance, an SGO might state that eighty percent of students who turned in seventy-five percent of the homework assignments will reach the targeted score on a particular test. If, for example, only forty percent of the entire class hands in seventy-five percent of the homework assignments, the teacher has just excluded more than half the class from the equation. This SGO has shielded the teacher from her scores because the part of the class that does not turn in enough homework is also likely to be the students in need of the greatest assistance on tests.

In the 2014-15 school year, teacher-created SGOs will account for twenty percent of teachers' evaluations.[95] Given the draconian penalty of tenure removal for unsatisfactory test scores, teachers have a strong incentive to rig this part of the Act's evaluation method to their advantage.

C. Tenure Proceedings

As part of its scheme to reduce teachers' job protections, the Act removed tenure hearings from the OAL and placed them in the hands of appointed arbitrators.[96] This reduction in tenure protections does not address the Act's stated goal of increasing student achievement through better instruction. In addition, the new plan subjects the tenure hearing process to undue political influence. The Act's method for the appointment of the Commissioner's panel of arbitrators hearing tenure charges creates a patronage system that allows interested parties to adjudicate tenure proceedings, as long as they do so according to the wishes of their benefactors.

i. Dismissal, Property Rights, and Interested Arbitrators

In its stated attempt to increase the success of students through better instruction, TEACHNJ's new evaluation and removal procedures make it easier to dismiss teachers. However, there is no evidence that reducing tenure protections leads to better instruction or improved student achievement.[97] States and districts that have

[94] N.J. STAT. ANN. § 18A:6-123(b)(2)-(6) (West 2014); N.J. ADMIN. CODE § 6A:10-2.4(b)(1)-(6) (LexisNexis 2015); N.J. ADMIN. CODE § 6A:10-4.2(e)(1)-(6) (LexisNexis 2015).

[95] New Jersey Department of Education, *Student Growth Objectives: Developing and Using Practical Measures of Student Learning*, 3 (2014).

[96] N.J. STAT. ANN. § 18A:6-16 (West 2014); N.J. STAT. ANN. § 18A:6-17.1(a) (West 2014).

[97] RAVITCH, REIGN OF ERROR, *supra* note 14, at 129.

previously made similar changes to their tenure rules have not seen significant increases in student test scores.[98] Moreover, there is no guarantee that qualified replacements will be available to replace dismissed teachers.[99] In fact, firing teachers for inefficacy makes recruiting new teachers more difficult.[100] So, the greater ease with which districts can lay off teachers under TEACHNJ will not solve the problems its proponents claim exist. These measures may even cause other problems.

The new removal procedures are not only likely to be ineffective as far as improving instruction goes. By empowering interested parties to hear tenure cases, they also corrupt the independence, and therefore the legitimacy, of the proceedings overall. The New Jersey School Boards Association ("NJSBA") and the New Jersey Principals and Supervisors Association ("NJPSA") will appoint twenty-eight of the fifty arbitrators on the panel.[101] The state's two teachers unions, the NJEA and the American Federation of Teachers ("AFT"), will appoint the remaining twenty-two arbitrators.[102] Therefore, most of the arbitrators deciding tenure charges will owe their appointments to organizations whose members file and certify tenure charges, i.e., school boards and administrators.[103] Just as dangerous for

[98] Howard Blume, *Schools' Next Test is Getting Tenure Ruling to Pay Off in Class*, L.A. TIMES (June 11, 2014, 10:08 PM), http://www.latimes.com/local/education/la-me-teacher-decision-lawsuit-20140612-story.html (quoting Jesse Rothstein, associate professor of public policy at the University of California, Berkeley, noting that regarding states' tenure reform measures, "There's no evidence yet that these changes have had a beneficial effect").

[99] Ray Fisman, *How To Build a Better Teacher*, SLATE (Oct. 20, 2014, 9:37 AM), http://www.slate.com/articles/business/the_dismal_science/2012/07/how_to_improve_teaching_new_evidence_that_poor_teachers_can_learn_to_be_good_ones_.html; GOLDSTEIN, THE TEACHER WARS, *supra* note 26, at 230:

> Even if test scores were a flawless reflection of student learning and teacher quality, there is no evidence that the new teachers who replace the bad teachers will be any better—it is practically impossible to predict, via demographic traits, test scores, grades, or pathway into the profession, who will become an effective teacher.

[100] Jesse Rothstein, *Taking On Teacher Tenure Backfires*, N.Y. TIMES (June 12, 2014), http://www.nytimes.com/2014/06/13/opinion/california-ruling-on-teacher-tenure-is-not-whole-picture.html?_r=0 ("[F]iring bad teachers actually makes it harder to recruit new good ones, since new teachers don't know which type they will be.").

[101] N.J. STAT. ANN. § 18A:6-17.1(a) (West 2015) ("[Eighteen]. . . arbitrators shall be designated by the New Jersey School Boards Association, and 10 arbitrators shall be designated by the New Jersey Principals and Supervisors Association.").

[102] *Id.*

[103] N.J. STAT. ANN. § 18A:6-17.3(a)(1) (West 2014); N.J. STAT. ANN § 18A:6-11 (West 2014). The names of the arbitrators and which organizations appointed them are difficult to find. David Saenz Jr., Deputy Press Secretary at the New Jersey Department of Education, provided the following information. The NJPSA-designated arbitrators

impartiality is the prospect of arbitrators with deep ties to the unions who appointed them to hear tenure charges.

The Act's delegation of the authority to appoint the officials responsible for tenure adjudication to interested private organizations fails to satisfy the requirements of procedural due process. This appointment method, along with the lack of an explicit dismissal mechanism, vitiates the impartiality necessary to make tenure proceedings constitutionally sound. The OAL's appointment and dismissal procedure for ALJs, on the other hand, demonstrates proper regard to procedural due process standards.

Teachers, in New Jersey and elsewhere, have procedural due process rights with regard to tenure. Procedural due process rights attach when (1) the government acts, (2) against an individual, (3) to deprive her of life, liberty, or property.[104] Tenure removal meets the first two elements because the government acts through its agents (a superintendent and a board of education) to initiate the process against a particular teacher. The third element is met because the Supreme Court has said that teachers have a property right in tenure.[105]

Teachers' property rights in tenure originate in *Board of Regents v. Roth*. In that case, the Supreme Court stated that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."[106] The Court clarified that the

are Lewis R. Amis, Stephen M. Bluth, Daniel F. Brent, Thomas J. DiLauro, Jacquelin F. Drucker, Edmund G. Gerber, Gary T. Kendellen, Joseph Licata, Earl R. Pfeffer, and Ernest Weiss. The NJSBA-designated arbitrators are Peter Adomeit, Scott E. Buchheit, Dennis J. Campagna, Walter H. DeTreux, Mattye M. Gandel, Robert C. Gifford, Jay D. Goldstein, David L. Gregory, Randi E. Lowitt, Andree Y. McKissick, Arthur A. Riegel, Stephen J. Rosen, John E. Sands, Mariann E. Schick, Joel M. Weisblatt, and Perry Alan Zirkel. The NJEA-designated arbitrators are Michael A. Berzansky, Melissa H. Biren, Ralph H. Colflesh, Howard C. Edelman, Deborah M. Gaines, Thomas D. Hartigan, Carol F. Laskin, James W. Mastriani, Ruth M. Moscovitch, Susan Wood Osborn, Michael J. Pecklers, Gerard G. Restaino, Tia Schneider Denenberg, Robert T. Simmelkjaer, and Barbara Zausner. The AFT-designated arbitrator is Timothy J. Brown. The Commissioner appointed Joyce M. Klein and Alan A. Symonette. E-mail from David Saenz, Jr., Deputy Press Secretary, New Jersey Department of Education, to Author (Mar. 28, 2016, 8:20 PM) (on file with author).

[104] U.S. CONST. amend. V; U.S. CONST. amend. XIV; Goldberg v. Kelly, 397 U.S. 254, 257 (1970) (extending constitutional safeguards in the form of administrative hearing rights to welfare recipients prior to termination of benefits due to ineligibility by a government welfare agency).

[105] Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972).

[106] *Roth*, 408 U.S. at 577.

Constitution does not create property interests, "[r]ather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[107]

The Court held that the teacher in *Roth* had no property interest entitling him to due process rights under the Fourteenth Amendment, because he had been hired using a series of one-year contracts.[108] By contrast, New Jersey's tenured teachers have the proper independent source of state law that secures their tenure benefits and their entitlement to them.[109] Therefore, they must receive due process when the State seeks to deprive them of tenure.

Procedural due process protections require that an impartial authority carry out adjudications.[110] The TEACHNJ Act's new scheme for adjudication undermines impartiality by allowing the appointment of biased arbitrators. Arbitrators are chosen by the most interested parties in tenure hearings: school boards (the NJSBA), administrators (the NJPSA), and teachers (the NJEA and the AFT).[111]

Each one of these organizations has the responsibility to represent its constituents. To do so, they will appoint arbitrators

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[107] *Id.* at 572.

[108] *Id.* at 579. *See also Perry*, 408 U.S. at 602 (holding that a teacher in the Texas state college system was entitled to a hearing and notice of grounds for his non-renewal if the college had a de facto tenure system and the teacher was entitled to tenure under it).

[109] N.J. STAT. ANN. § 18A:28-1 *et seq.* (West 2014); Spiewak v. Board of Education, 447 A.2d 140, 144 (1982) (holding that N.J. STAT. ANN. §§ 18A:28-1 to 18A:28-18 make tenure a mandatory term and condition of employment that supersedes contractual terms).

[110] *See* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L. J. 455, 476 (1986) ("None of the core values of due process, however, can be fulfilled without the participation of an independent adjudicator."); Judith K. Meierhenry, *The Due Process Right to an Unbiased Adjudicator in Administrative Proceedings*, 36 S.D. L. R. 551, 554 (1991):

> Whether legislative or court mandated, most procedural due process rights give a party an opportunity to present the evidence and require notice, a hearing, representation by counsel, transcription, cross-examination, and testimony. The procedural safeguards may appear to insure [sic] due process rights; however, if the decisionmaker has prejudged the matter or relies on evidence other than that presented at the hearing, the procedural safeguards become immaterial. An independent and unbiased adjudicator is such an essential element of accurate decisionmaking that without it there may never be due process.

Id.

[111] N.J. STAT. ANN. §18A:6-17.1(a) (West 2014).

sympathetic to the interests of their members. By the time the tenure removal process makes it to an arbitrator, members of both the NJSBA and the NJPSA have recorded their support for removal.[112] It follows that the NJSBA and the NJPSA will appoint arbitrators who are likely to support the decisions of its members to strip teachers of tenure. In the same fashion, NJEA and AFT will both appoint and maintain arbitrators who have demonstrated fealty to their own ranks. While, it is possible that some teachers may present their cases before arbitrators who are biased in their favor, nevertheless, given the appointment breakdown, it is more probable that teachers will stand before an authority who owes her power to the representative of the other side of the proceeding, that is, the NJSBA or the NJPSA. The existence of this direct connection between the adjudicator and one side of the dispute renders impartiality unlikely.

Moreover, the Act's reticence on the removal process for arbitrators suggests an even greater problem for the impartial authority obligation. The Act provides only that the Commissioner may remove an arbitrator if she fails to meet the time constraints for the proceedings without asking for an extension.[113] The Act explains how arbitrators are hired, but not how they are fired. If the Commissioner cannot do it, who can? Both the Act and the regulations are silent on this important issue. The answer may be that the organizations that appoint are also the organizations that remove. In that case, school boards and administrators, as well as teachers, could dismiss arbitrators who do not rule as they see fit. This scenario forecloses the possibility of disinterested adjudication.

ii. Time and Costs

The TEACHNJ Act's removal of tenure proceedings from the OAL in favor of binding arbitration might not solve the problems of time and cost efficiency. The findings of New Jersey's non-partisan Office of Legislative Services ("OLS") show that one of the major claims reformers make to support the need for the Act's gutting of tenure protections—that removal costs hundreds of thousands of dollars—is not adequately addressed by the Act. As to the claim that firing a tenured teacher takes too long, the Act's provisions may not prevent lengthy proceedings.

With regard to expense, the OLS stated that it is possible that

[112] N.J. STAT. ANN. § 18A:6-17.3(a)(2), (b) (West 2014).

[113] *See* N.J. STAT. ANN. § 18A:6-17.1 (West 2014) (providing the method for arbitrator designation without any discussion of removal).

costs associated with tenure charges will rise as a result of an expected increase in the number of such cases.[114] The OLS also reported that the new evaluation system used to facilitate the firing of tenured teachers will cost the state more than 52 million dollars to implement, while noting that this number does not include other costs of implementation likely to be borne by both the state and local school districts.[115]

It is also not clear that the new scheme will make tenure proceedings go faster. The Act allows for extensions at the request of the arbitrator.[116] No restrictions exist regarding the number of extensions that the Commissioner may grant. Furthermore, the Act provides that the arbitrator's decision must be granted within forty-five days of the start of the proceedings.[117] No language in the Act defines the "start" of the proceedings (do they begin when the parties first discuss dates to appear before the arbitrator, when the parties actually appear before the arbitrator, when testimony is taken, or at some other point?). Whatever the speed of that component of the process, judicial review of an arbitrator's decision remains available.[118] In this way, the arbitrator's decision lacks finality, so the proceedings may continue.

At the least, there is uncertainty as to the ability of the Act to curb the purported inefficiencies of the prior scheme.

IV. THE NEW JERSEY OFFICE OF ADMINISTRATIVE LAW: THE CENTRAL PANEL SOLUTION TO TEACHNJ

New Jersey's OAL provides the best forum to adjudicate tenure proceedings. The OAL's organization as a central panel allows for judicial independence while inspiring public confidence.[119] Its ALJs have clear appointment and dismissal procedures in place, thus avoiding the due process and impartiality issues created by the TEACHNJ Act.[120]

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[114] STATE OF N.J. OFFICE OF LEGIS. SERVS., LEGIS. FISCAL ESTIMATE, S. 1455, 215th Legis. (2012).

[115] *Id.* The report estimated the cost of implementing the new evaluation scheme for principals would be 11.9 million dollars. *Id.*

[116] N.J. STAT. ANN. § 18A:6-17.1(g) (West 2014).

[117] N.J. STAT. ANN. § 18A:6-17.1(d) (West 2014).

[118] N.J. STAT. ANN. § 18A:6-17.1(e) (West 2014); N.J. STAT. ANN. § 2A:24-7 (West 2014); N.J. STAT. ANN. § 2A:24-10 (West 2014).

[119] *See* STATE OF N.J. OFFICE OF ADMIN. LAW, ABOUT THE OFFICE OF ADMIN. LAW, http://www.state.nj.us/oal/about/about/ (last visited May 4, 2015).

[120] N. J. STAT. ANN. § 52:14f-4 (West 2014); N.J. STAT. ANN. § 52:14f-5(s) (West 2014).

A. The Central Panel

In twenty-four states and the federal system, administrative law cases are handled by a department within the agency that will also be one of the litigants in those controversies.[121] The agency staffs this department with its own administrative law judges.[122] These ALJs hear and decide contested cases (though their decisions are usually subject to review by the Commissioner).[123] States attempt to ensure the independence of these agency ALJs by implementing various protections, usually concerning salary and removal. At the federal level, the Administrative Procedure Act ("APA") guards that independence in part by taking the hiring and firing of administrative law judges completely away from the agencies.[124] Two separate agencies, the Office of Personnel Management and the Merit Systems Protection Board, handle these tasks.[125]

By contrast, New Jersey, along with twenty-five other states as well as the cities of Chicago, New York City, and the District of Columbia, has established stronger protection for judicial

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[121] *See* Ann Wise, *Louisiana's Division of Administrative Law: An Independent Administrative Hearings Tribunal*, 30 J. NAT'L ASS'N L. JUD. 95, 95-96 (2010) (stating that "The 'central panel' movement has been strong, and more than half the states have adopted some form of quasi-judicial tribunal," and listing the following twenty-six states: Alabama, Alaska, Arizona, California, Colorado, Florida, Georgia, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Minnesota, New Jersey, North Carolina, North Dakota, Oregon, South Carolina, South Dakota, Tennessee, Texas, Washington, Wisonconsin, Wyoming); Administrative Procedure Act § 1, 5 U.S.C.A. § 3105 (West 2015) ("Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title.").

[122] 5 U.S.C.A. § 3105 (West 2015). *Cf.* JERRY L. MASHAW, RICHARD A. MERRILL, & PETER M. SHANE, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 463 (6th ed. 2009):

> Almost every Congress sees the reintroduction of legislation proposing to remove all ALJs from line agencies and establish them as a separate, independent corps of administrative law judges . . . . [The location of ALJs within agencies] is not only controversial, it is a unique compromise between adjudicatory independence and managerial responsibility born of the peculiar history of administrative governance in the United States.

Id.

[123] DANIEL J. GIFFORD, ADMINISTRATIVE LAW: CASES AND MATERIALS 9 (2d ed. 2010).

[124] 5 U.S.C.A. § 5372 (West 2015); 5 U.S.C.A. § 7521 (West 2015).

[125] 5 U.S.C.A. § 5362 (West 2015); 5 U.S.C.A. § 7521(a) (West 2015). Removal of federal ALJs under the APA not only involves a separate agency, it also requires good cause, a determination on the record, and a hearing:

> An action may be taken against an administrative law judge appointed under Section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.

Id.

impartiality in administrative proceedings.[126] All of these states and cities have created a free-standing central panel.[127]

A central panel is an independent office of administrative law.[128] It has a cadre of ALJs who adjudicate contested cases involving other agencies within the central panel's jurisdiction.[129] The purpose of the central panel is to provide both the public and the agencies due process and fair adjudications.[130] For example, if the state environmental protection agency and a developer have a dispute, it will be heard by an ALJ in the central panel, rather than by one of the agency's own employees. The separation of both sides from the adjudicator promotes facial and substantive fairness.[131] Some central panels have seen their legislatures increase their jurisdiction over time.[132] Executive action, rather than legislation,

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[126] *See* Wise, *supra* note 121; A. Michael Nolan, *State Agency-Based v. Central Panel Jurisdictions: Is There a Deference*, 29 NAT'L ASS'N ADMIN. L. JUD. 1, 23 n. 69 (2009) ("In addition, three cities have developed central panel hearing agencies: Chicago, Illinois, the District of Columbia, and New York, New York."); Larry J. Craddock, *Final Decision Authority and the Central Panel ALJ*, 33 NAT'L ASS'N ADMIN. L. JUD. 471, 476-77 (2013):

> The central panel's main role is to provide fair adjudications and due process to both the litigating agencies and the public. The central panel ALJ is independent of, and not subject to control or influence by, the agencies for which the ALJ conducts hearings. Instead, the ALJ reports to a chief ALJ or central panel director.

Id.

[127] *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-1092.01 (2016) (establishing an office of administrative hearings); COLO. REV. STAT. § 24-30-1001 (2015) (creating the office of administrative courts in the personnel department); GA. CODE ANN. § 50-13-40 (2015) (creating the Office of State Administrative Hearings within the executive branch of the state government); N.J. STAT. ANN. § 52:14f-4 (West 2014) (establishing the Office of Administrative Law); N.D. Cent. Code § 54-57-01 (2015) (creating a state office of administrative hearings).

[128] Craddock, *supra* note 126, at 476-78. *See also* L. Harold Levinson, *The Central Panel System: A Framework that Separates ALJs from Administrative Agencies*, 65 JUDICATURE 236, 236 (1981); Julian Mann III, *Striving for Efficiency in Administrative Litigation: North Carolina's Office of Administrative Hearings*, 15 J. NAT'L ASS'N ADMIN. L. JUDICIARY 151, 155 (1995) (referring to the central panel as an "autonomous, quasi-judicial, executive branch agency").

[129] Craddock, *supra* note 126, at 476.

[130] Craddock, *supra* note 126, at 476-77.

[131] Levinson, *supra* note 128, at 245 ("While adoption of a central panel system does not guarantee the independence of the ALJ from the agency, the central panel is likely to be accompanied by greater independence. Perhaps more importantly, the central panel system is generally perceived as a significant step toward ALJ independence."); Craddock, *supra* note 126, at 476-77; Hon. Edwin L. Felter, Jr., *Special Problems of State Administrative Law Judges*, 53 ADMIN. L. REV. 403, 405 ("The central panel structure, especially the free-standing central panel, is the preferred structure from a standpoint of adjudicatory professionalism, public confidence, and judicial/decisional independence of the ALJs.").

[132] James F. Flanagan, *An Update on Developments in Central Panels and ALJ Final*

has also increased the jurisdiction of central panels.[133]

Central panels support adjudicatory proficiency, decisional independence, and public trust.[134] They are also more efficient and less costly than their intra-agency counterparts.[135] Most importantly for this Note, the central panel structure is free of the due process and impartiality concerns created by TEACHNJ's arbitrator appointment method. The way that ALJs are appointed to New Jersey's OAL demonstrates this crucial difference.

B. New Jersey's Administrative Law Judges

The appointment and removal of ALJs to New Jersey's central OAL suffer from none of the due process shortcomings of the arbitrator selections instituted by the TEACHNJ Act. Unlike that Act, New Jersey law openly explains the procedure for hiring ALJs. The OAL's statutorily created method for these appointments and removals is transparent and subject to democratic controls. For these reasons, New Jersey should return to using the OAL for tenure proceedings.

The appointment of ALJs involves both the executive and the legislature.[136] With the advice and consent of the Senate, the governor appoints the ALJ.[137] The ALJ's term is set.[138] Her initial employment is for one year, after which the ALJ may be reappointed by the governor to a four-year term.[139] Following this period, the governor, again with the advice and consent of the Senate, may reappoint the ALJ to terms of five years.[140]

The mechanisms for disciplining and removing ALJs are clear and independent.[141] The Director and Chief Administrative Law Judge ("the Director"), who is also appointed by the governor with the advice and consent of the Senate, evaluates ALJs focusing on three areas of their performance as judges: competence, productivity, and demeanor.[142] The law commands the Director to

Order Authority, 38 IND. L. REV. 401, 405 (2005).

133 *Id.*

134 Felter, *supra* note 131, at 403.

135 Flanagan, *supra* note 132, at 405.

136 N. J. STAT. ANN. § 52:14f-4 (West 2014).

137 *Id.*

138 *Id.*

139 *Id.*

140 *Id.*

141 N.J. STAT. ANN. § 52:14f-5(s) (West 2014).

142 N.J. STAT. ANN. § 52:14f-3 (West 2014); N.J. STAT. ANN. § 52:14f-5(s) (West 2014).

consider several aspects of those parts of an ALJ's work, including impartiality.[143] Notably, the methods the ALJ uses in arriving at her decisions may be used in her evaluation, but not the results of those methods.[144]

The differences between the methods of appointment at the OAL and in the TEACHNJ Act could not be more pronounced. ALJs in the central panel are appointed in an open public forum. TEACHNJ's arbitrators are picked behind closed doors. The OAL's ALJs are appointed by politically accountable people—the Senate and the governor. TEACHNJ's arbitrators are backed by organizations that the public cannot join, lobby, or change. Under the OAL's method, an open procedure by two politically accountable branches of the government repeats for each ALJ after the first year, and then again after four years, and every five years thereafter. In this way, an ALJ's appointment is subject to predictable and regular democratic control. There is no democratic control of any kind built into the TEACHNJ Act of the school boards', the administrators', and the unions' arbitrators.

V. CONCLUSION

The TEACHNJ Act's attack on tenure does not solve the issues attributed to tenure as it existed prior to the Act's passage. The Act imposes testing to evaluate teachers, despite testing's inability to do so effectively, and in the face of voluminous evidence denouncing the practice. The Act's evaluation scheme ignores the socio-economic conditions and the diligence of the students it tests. The Act's harsh punishments for lagging test scores push teachers and administrators to cheat. Moreover, the Act infringes on constitutionally protected procedural standards by allowing the parties involved in tenure proceedings to choose their own adjudicators.

To ensure fair and effective process for teachers, tenure proceedings must be restored to the Office of Administrative Law, examined independently of student achievement considerations, and changed only insofar as such changes comport with the goals of that office.

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[143] N.J. STAT. ANN. § 52:14f-5(s) (West 2014) (Other considerations the Director must take into account include legal skills and knowledge of the law and new legal developments, analytical talents and writing abilities, settlement skills, and conscientiousness).

[144] N. J. STAT. ANN. § 52:14f-5(s) (West 2014).