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## **If Students Aren't Learning, Are Teachers Teaching?**

### **Tying New Jersey Teacher Evaluations and Compensation to Student Achievement**

Amanda Grossi

#### **Introduction**

Since taking office in 2009, President Obama has made education reform one of his top priorities. Through the Race to the Top program, his administration uses a \$5,000,000,000 incentive to challenge states to design and implement rigorous standards aligned to high-quality assessments, attract and retain high-performing teachers and leaders, and create data systems that will inform instructional decisions.<sup>1</sup> Obama has remarked, “Too many supporters of my party have resisted the idea of rewarding excellence in teaching with extra pay, even though we know it can make a difference in the classroom.”<sup>2</sup>

Chris Christie followed President Obama's lead when he assumed the office of New Jersey governor in January 2010. He is a proponent of legislation that creates a “fair, thorough, data-driven evaluation system” and on April 13, 2011, he announced legislative proposals aimed at education reform.<sup>3</sup> The proposals include a new system of teacher and principal evaluation and tenure reform.<sup>4</sup>

In implementing these reform measures time is of the essence. Approximately 1.8 million of the United States' 3.3 million teachers will be eligible to retire within the next ten

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<sup>1</sup> PL 111-5 Section § 14005 (d)(2)-(4) “American Recovery & Reinvestment Act of 2009”

<sup>2</sup> Barack Obama, President of the United States, Remarks by the President to the Hispanic Chamber of Commerce on complete and Competitive American Education (Mar. 10, 2009).

<sup>3</sup> Star Ledger Staff, Gov. Christie Pushes for Teacher Merit Pay Based on Students' Performance, NEWARK STAR-LEDGER (Sep. 28, 2011), [http://www.nj.com/news/index.ssf/2010/09/gov\\_christie\\_advocates\\_merit\\_p.html](http://www.nj.com/news/index.ssf/2010/09/gov_christie_advocates_merit_p.html).

<sup>4</sup> David Nash & Teresa Moore, *Governor's Reform Proposals Redefine Staff Evaluation and Accountability*, LEGALLY SPEAKING, <http://www.legallyspeakingmagazine.com/evals.html> (last visited December 5, 2011).

years.<sup>5</sup> As more than half of the education workforce will be replaced, now is the time to make the changes necessary to reshape the nation's educational system.

The New Jersey legislature should enact legislation requiring all New Jersey school districts to implement a performance-based compensation system for teachers using objective measurements of student performance as the primary (more than 50%) measure of teacher effectiveness. Additionally, the school at which a teacher is employed should be a significant factor in the performance-based compensation system. Thus, a teacher at an underperforming, high-needs school should receive more compensation than a counterpart at a school that has historically met its student achievement goals, consequently creating a financial incentive for the most effective teachers to teach in the schools where they are most needed.

Section I of this paper examines the theory behind performance-based compensation and conclusions drawn from studies of its effects in public schools. Section II provides an overview of how performance-based compensation and related education reform policies have been implemented in other states, and will relate the outcomes of such implementation. Section III summarizes education reform in New Jersey, including a history of statutes and case law, an overview of current teacher compensation law and practices, and a detailed examination of Governor Christie's proposed legislation. Section IV sets forth a detailed plan for creating effective student achievement-based evaluations and a corresponding performance-based compensation plan. Section V revisits the opposition to performance-based compensation in Section I and explains how the plan set forth in Section IV minimizes potential concerns related to performance-based compensation.

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<sup>5</sup> Byron Auguste, et al., *Closing the Talent Gap: Attracting and Retaining Top-Third Graduates to Careers in Teaching: An International and Market Research-Based Perspective*, 11 (2010).

## Section I: The Effectiveness of Merit-Based Compensation

The current teacher compensation system in most school districts rewards factors that are not connected to student performance.<sup>6</sup> With traditional salary schedules, salaries are fixed by district-wide or statewide schedules and provide salary increases according to the number of years of teaching experience and post-baccalaureate education.<sup>7</sup> This system is often described as “steps and lanes.”<sup>8</sup>

Charles Cotton, reward advisor of the Chartered Institute of Personnel and Development (CIPD) remarked, “A refusal to make use of bonuses in the private sector removes one of the most powerful tools the government has to drive up standards and deliver many and stretching ambitions for public service reform and improvement.”<sup>9</sup> By changing the seniority-based compensation status quo, public sector employers can incentivize increased employee performance. There is evidence, however, that compensation may not be the most effective way to motivate employees.

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<sup>6</sup> Eric A. Hanushek, *The Single Salary Schedule and Other Issues of Teacher Pay* (Hoover Institution, Stanford University, Working Paper, 2006).

<sup>7</sup> Robin Chait & Reagan Miller, *Paying Teachers for Results: A Summary of Research to Inform the Design of Pay-for-Performance Programs for High-Poverty Schools* (2009).

<sup>8</sup> Stephen Sawchuk, *Districts Try Out Revamped Teacher Pay Systems*, EDUCATION WEEK (Nov. 10, 2010) [http://www.edweek.org/ew/articles/2010/11/10/11degrees\\_ep.h30.html](http://www.edweek.org/ew/articles/2010/11/10/11degrees_ep.h30.html). The term “lane” refers to the teacher’s post-baccalaureate education. The term “steps” refers to the number of years of teaching experience. The “steps and lanes” salary schedules were first developed in the 1920s and were popular with teachers’ unions because they “prevented favoritism by administrators or discrimination on the basis of race, gender, or position.”

<sup>9</sup> Nick Huber, *Performance-Related Pay Should be Increased in the Public Sector to Drive Reforms, Says the CIPD*. PERSONNEL TODAY (June 16, 2010). <http://www.personneltoday.com/articles/2010/06/16/55960/performance-related-pay-should-be-increased-in-public-sector-to-drive-reforms-says-the-cipd.html>.

Cotton’s comments are in response to a survey that showed 36% of public sector employees believe their pay should be based on performance compared to 68% of private sector employees. Only 6% of public sector employees believe the performance of their organization should affect their pay compared to 35% of private sector employees.

American psychologist, Frederick Herzberg proposed the Motivation-Hygiene Theory of job satisfaction in 1968. The theory suggests that the factors producing job satisfaction (motivation factors) are separate from the factors leading to job dissatisfaction (hygiene factors).<sup>10</sup> Herzberg analyzed 16 on-the-job factors and their correlation to satisfaction or dissatisfaction.<sup>11</sup> Achievement, recognition, the work itself, responsibility, and growth or advancement are motivation factors, while salary is a hygiene factor.<sup>12</sup>

Of the hygiene factors, however, salary had a significant motivation component.<sup>13</sup> As Jack Jennings, Founder and CEO of the Center on Education Policy remarked, “Money is never the reason why people enter teaching, but it is the reason why some people do not enter teaching, or leave after a few years.”<sup>14</sup> The rationale for performance-based compensation for teachers is

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<sup>10</sup> Frederick Herzberg, *One More Time, How Do You Motivate Employees?*, 65 HARVARD BUSINESS REVIEW 109, (1987).

<sup>11</sup> *Id.* at 117. The study sampled 1,685 employees who experienced a total of 1,844 and 1,753 job events that led to job satisfaction and dissatisfaction, respectively. Each event was the result of one or more of the 16 factors. The factors were then classified as motivation or hygiene based on whether they were more often a factor that led to job satisfaction or dissatisfaction.

The sample of 1,685 employees included “low level supervisors, professional woman, agricultural administrators, men about to retire from management positions, hospital maintenance personnel, manufacturing supervisors, nurses, food handlers, military officers, engineers, scientists, housekeepers, *teachers* (emphasis added), technicians, female assemblers, accountants, Finnish foreman, and Hungarian engineers. The data is not disaggregated by occupation: teacher-specific data is not published.

<sup>12</sup> *Id.* at 116. The other hygiene factors are company policy and administrative supervision, relationship with supervisor, work conditions, relationship with peers, relationship with subordinates, status and security.

<sup>13</sup> *Id.* at 116. Salary was a factor in approximately 6% of events that led to extreme job satisfaction and in approximately 9% of event that led to extreme job dissatisfaction. This 3% difference is the second smallest of the ten hygiene factors and indicates that salary also has a motivational effect.

<sup>14</sup> Jack Jennings, *Higher Wages Would Attract, Keep Better Teachers*, U.S. NEWS & WORLD REPORT, website (Nov. 9, 2011) <http://www.usnews.com/debate-club/are-teachers-overpaid/higher-wages-would-attract-better-teachers>.

that it has the potential to minimize shortages in specific subject areas in schools, create a more equitable distribution of effective teachers, and improve overall teacher quality.<sup>15</sup>

There is legitimate debate regarding the effectiveness of performance-based compensation in increasing student achievement. Both proponents and opponents of performance-based compensation have empirical data supporting their positions. In 2006, a grant from the United States Department of Education's Institute of Education Science established the National Center on Performance Incentives (NCPI) to conduct research on the effects of performance incentives on teachers, students, and institutions.<sup>16</sup> NCPI has published research on performance-based compensation systems in New York City, Texas, and Nashville.

From 2008 to 2011, New York City implemented a pilot program for performance-based compensation called the School-Wide Performance Bonus Program (SPBP).<sup>17</sup> During its first two years, the results of the study showed there was no statistical significance between the performance of students whose teachers received performance-based compensation and the performance of students whose teachers did not.<sup>18</sup> In the third year of the study the students

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<sup>15</sup> Robin Chait, *Current State Policies that Reform Teacher Pay: An Examination of Pay-for-Performance in Eight States*, CENTER FOR AMERICAN PROGRESS (November 5, 2007).

<sup>16</sup> National Center on Performance Incentives, [www.performanceincentives.org](http://www.performanceincentives.org) (last visited on December 5, 2011).

<sup>17</sup> Matthew Springer & Marcus A. Winters, *New York City's School-Wide Bonus Pay Program: Early Evidence from a Randomized Trial* (National Center on Performance Incentives, Working Paper No. 2009-02, 2009).

<sup>18</sup> *Id.* at 4. Data for the 2007-2008 school year was used and is represented as the first year of the study even though there were less than three months between the date at which schools volunteered for the program and the date in which the high stakes tests were administered.

The unit of accountability was the school. Each school's rating was based on student progress in English language arts and mathematics (55%), student performance on New York's high stakes test in English language arts and mathematics (30%), and student attendance and student, parent, and teacher perceptions of the school learning environment (15%). *Id.* at 19.

whose teachers did not receive performance-based compensation outperformed their counterparts.<sup>19</sup> In January 2011, the school district suspended the program.

Teachers reported that even though the bonus was desirable, they did not change their teaching practice in response to the program.<sup>20</sup> SPBP teacher buy-in is questionable due to several characteristics of the program. First, the compensation system was unique in that a four-person committee at each school determined the bonuses of individual teachers.<sup>21</sup> Second, there was inconsistent measurement of proficiency. Of the participating teachers, 62% received a bonus in the first year, 84% received a bonus in the second year, and, due to increased proficiency thresholds, only 13% received a bonus in the third year.<sup>22</sup> Additionally, surveys showed that more than one-third of participating teachers did not understand the SPBP targets and determination of bonus amounts. Teachers also overestimated whether, and the extent to which, their school would receive an award.<sup>23</sup> Although the study indicates that performance-based compensation does not affect student performance, the short-term nature of the study, unusual determination of bonus amounts, changing levels of proficiency, and teachers' misconceptions, suggest that the data is not conclusive regarding performance-based compensation schemes, in general. Even the researchers admit that a certain set of conditions: "a

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<sup>19</sup> Julie A. Marsh, et al., *What New York City's Experiment with Schoolwide Performance Bonuses Tells Us About Pay for Performance* (RAND Corporation 2011) [www.rand.org/content/dam/rand/pubs/monographs/2011/RAND\\_MG1114.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2011/RAND_MG1114.pdf).

<sup>20</sup> *Id.* at 1.

<sup>21</sup> Springer, *supra* note 17, at 20. The program allowed each school to receive an award up to \$3000 per teacher and the four-person school committee determined the amount each faculty member would receive. The bonuses awarded ranged from \$7 to \$5,914. The rationale for this system is not given, but may have affected teacher buy-in.

<sup>22</sup> Marsh, *supra* note 19, at 253.

<sup>23</sup> *Id.* at 254.

reasonable timeline and a high degree of understanding, expectancy, valence, buy-in, and perceived fairness” were lacking in the program.<sup>24</sup>

NCPI also conducted a study of the District Awards for Teacher Excellence (D.A.T.E.) program in Texas.<sup>25</sup> Texas teachers were divided into two groups: one group was eligible for performance-based compensation and the other was not. At all grades (3<sup>rd</sup> to 11<sup>th</sup>), the students of teachers ineligible for performance-based compensation outperformed the students of teachers who were eligible. Over the five years of the study, however, the performance gap between D.A.T.E. teachers and non-D.A.T.E. teachers narrowed.<sup>26</sup>

The Project on Incentives in Teaching (POINT) was a three-year study of performance-based compensation in Nashville.<sup>27</sup> The program focused on the idea that for teachers to increase their effectiveness, the monetary incentive must be significant. Under the project, \$15,000 was the maximum bonus and was awarded to teachers whose students performed in the 95<sup>th</sup> percentile.<sup>28</sup> Again, the students whose teachers were eligible for bonuses did not outperform the students of teachers who were ineligible.

In another NCPI study of performance-based compensation, the study showed the opposite result: correlation between performance-based compensation and student

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<sup>24</sup> *Id.* at 257.

<sup>25</sup> Matthew G. Springer, et al., *District Awards for Teacher Excellence (D.A.T.E.) Program: Final Evaluation Report* (National Center on Performance Incentives, 2010).

<sup>26</sup> *Id.* at 103-107.

<sup>27</sup> Matthew G. Springer, et al, *Teacher Pay for Performance: Experimental Evidence from the Project on Incentives in Teaching* (National Center on Performance Incentives, 2010).

<sup>28</sup> *Id.* at xi. Teachers whose students performed in the 90<sup>th</sup> percentile received a \$10,000 bonus and teachers whose students performed in the 80<sup>th</sup> percentile received a \$5,000 bonus.



performance.<sup>29</sup> The Teacher Advancement Program (TAP) operates in 180 schools located in 15 states and serves approximately 5,000 teachers affecting approximately 60,000 students. TAP teachers can receive a maximum bonus of \$12,000.<sup>30</sup> In the study, TAP schools in two states were compared to their non-TAP counterparts.<sup>31</sup> In every grade except 9<sup>th</sup> grade, TAP schools outperformed non-TAP schools in a fall-to-spring test score gain at a statistically significant level.<sup>32</sup> However, as the grade level increased, the gap between TAP and non-TAP performance decreased.<sup>33</sup> While this positive association supports the argument that performance-based compensation increases student performance, a basic understanding of TAP is necessary. According to the TAP website, it has four elements of success, one of which is performance-based compensation.<sup>34</sup> Since performance-based compensation is not the only difference between TAP and non-TAP schools, it cannot be isolated as the cause of increased student performance.

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<sup>29</sup> Matthew G. Springer, et al., *Impact of the Teacher Advancement Program on Student Test Score Gains: Findings from an Independent Appraisal*, 1 (National Center on Performance Incentives, Working Paper 2008-19, 2008).

<sup>30</sup> *Id.* at note 6 and page 3. To determine bonuses, teachers are placed into one of five levels. Teachers at the same level receive the same bonus. Level 1 teachers are those whose students performed two standard deviations below the state average. Level 2 teachers are those whose students performed one standard deviation below the state average. Level 3 teachers are those whose students performed within one standard deviation of the state average. Level 4 teachers are those whose students performed one standard deviation above the state average. Level 5 teachers are those whose students performed two standard deviations above the state average.

<sup>31</sup> *Id.* at 3. The unit of accountability was the teacher. Each teacher's rating was based on classroom observation (50%), value-added measurement on a high stakes test (30%), and school-wide performance on a high stakes test (20%).

<sup>32</sup> *Id.* at 13. The study suggests that the small sample size of schools may have caused the difference in 9<sup>th</sup> grade scores due to "idiosyncratic failures in program implementation" at specific schools.

<sup>33</sup> *Id.* at 11.

<sup>34</sup> The System for Teacher and Student Advancement. <http://www.tapsystem.org/>. The other three "TAP Elements of Success" are "multiple career paths, ongoing applied professional growth, and instructionally focused accountability."

The mixed empirical results suggest that performance-based compensation has the potential to increase student achievement, but only under specific conditions.<sup>35</sup> The studies that show performance-based compensation does not lead to increased student achievement provide guidelines for future implementation of compensation systems. For example, in addition to the unique circumstances of the New York City SPBP, the maximum bonus awarded per teacher was \$3000. A \$3000 bonus for a teacher whose salary is \$70,000 is much different than a teacher who makes a base salary of \$45,000 with the potential for a \$25,000 bonus. A minimal bonus is little incentive for teachers to expend significantly more time, energy, and thought into their teaching. It is even less incentive to attract people into the field of teaching. Although opponents of performance-based compensation use this data to conclude that such programs do not affect student achievement, the only conclusion that can be drawn from this study is that bonuses equivalent to 5-10% of a teacher's salary do not affect student achievement.<sup>36</sup>

The potential of performance-based compensation to increase student performance is twofold. It not only incentivizes teachers to become more effective, but it also has the ability to attract more talented people to the teaching profession. Given the short-term nature of all studies

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<sup>35</sup> K. Muralidharan & V. Sundararaman, *Teacher Incentives in Developing Countries: Experimental Evidence from India* (National Center on Performance Incentives, 2008). The mixed empirical record is not limited to the United States. A study in India indicated a positive association between performance-based compensation and student performance. For every one percentage point increase in improvement above 5%, teachers received an incremental bonus. In addition to using a high stakes tests, the researchers created a high order-thinking assessment that they believed better assessed more "genuine improvements" in learning rather than test skills. The study also indicated that teachers were more willing to assign homework, offer time outside of class, and focus on low performing students.

In contrast, a performance-based compensation program implemented in Mexico did not show any difference in student performance between the students of teachers eligible for performance-based compensation and those who were not. L. Santibañez, et. al., *Breaking Ground: Analysis of the Assessment System and Impact of Mexico's Teacher Incentive Program "Carrera Magisterial"* (RAND Corporation (2007).

<sup>36</sup> Similarly, the conclusion that can be drawn from the POINT study is that setting an exceptionally high standard—student performance in the 95<sup>th</sup> percentile—is not an effective incentive. Teachers may not buy in to the incentive if they do not think they are capable of affecting such a drastic change in student performance.

of performance-based compensation in the United States, it is impossible to determine the effects a performance-based compensation system would have on attracting people to the profession.<sup>37</sup> Such data, however, can be found by comparing the compensation systems of countries who have extensive experience with performance-based compensation and those that do not. The Organization for Economic Co-operation and Development (OECD) conducted a multinational study and found that there is a significant association between whether teachers receive performance-based compensation and the nation's PISA<sup>38</sup> math and science test scores.<sup>39</sup> The drawback to a multinational study, however, is that the performance-based compensation systems vary drastically among different countries.<sup>40</sup> Therefore, the study only indicates the effectiveness of performance-based compensation, in general. Unlike the results from domestic studies, the OECD data does not provide guidelines for effective implementation of performance-based compensation systems.

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<sup>37</sup> Rob Taylor, Major Nashville Study Shoots Down Merit Pay. 6 No. 11 EDUCATION EMPLOYMENT LAW BULLETIN (Nov. 2010). U.S. Department of Education spokesperson, Peter Cunningham, criticized the POINT study saying that it is too narrow because it only addresses whether increased compensation motivates teachers to try harder. He remarked, "What we are trying to do is change the culture of teaching by giving all educators the feedback they deserve to get better while rewarding and incentivizing the best to teach in high-needs schools and hard-to-staff subjects. This study doesn't address that objective."

<sup>38</sup> PISA is an assessment given to 15-year-olds in 65 countries. Howard L. Fleischman, et.al., *Highlights from PISA 2009: Performance of U.S. 15-Year-Olds in Reading, Mathematics, and Science Literacy in an International Context* (National Center for Education Statistics, December 7, 2010).

<sup>39</sup> Ludger Woessman, *Cross-Country Evidence on Teacher Performance Pay* (15 IZA DP No. 5101, 2010).

<sup>40</sup> *Id.* at 5. For example, in Finland teachers receive individual bonuses based on professional proficiency and performance at work. In Portugal and Turkey, bonuses are determined by supervisors whereas in Mexico bonuses are determined by student performance.

## Section II: The Implementation of Merit-Based Compensation Outside of New Jersey

As early as the 1970s there was litigation regarding whether a teacher could be terminated for failure to meet certain student outcomes.<sup>41</sup> In *Scheelhaase*, an Iowa school district terminated a teacher for “below average scholastic accomplishment of [her] students in the area of [her] responsibility (Language Arts).”<sup>42</sup> The teacher challenged her termination arguing that using student performance as a criterion was a violation of substantive due process because the use of student test scores in evaluating teacher effectiveness is not a supported educational practice. The trial court found the grounds for termination to be arbitrary and capricious, but the 8<sup>th</sup> Circuit Court of appeals reversed finding there was no substantive due process violation because the test scores were an objective measure.<sup>43</sup> The Fourteenth Amendment requires only that an objective evaluation instrument be used to evaluate teachers.<sup>44</sup>

Minnesota created a program under which its school districts may apply for funding by implementing certain education reforms.<sup>45</sup> Currently, 50 Minnesota school districts and 54 charter schools participate in the program.<sup>46</sup> The purpose of Minnesota’s Quality Compensation

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<sup>41</sup> *Scheelhasse v. Woodbury Cent. Cmty. Sch. Dist.* 488 F.2d 237 (8<sup>th</sup> Cir. 1973). See also *St. Louis Teacher’s Union v. Board of Educ.*, 652 F.Supp 425 (1987). English language arts and mathematics teachers filed a lawsuit against the St. Louis Board of Education for using their students’ standardized assessment results in determining their “unsatisfactory” rating. The teachers alleged that there was an equal protection violation because the Board of Education only used standardized assessment results in the evaluation of English language arts and mathematics teachers. The Board of Education moved to dismiss the case. The court granted the motion in part on the grounds that there was neither an alleged suspect classification nor deprivation of a fundamental right. (The court denied the motion to dismiss the teachers’ allegation of a substantive due process violation.)

<sup>42</sup> *Id.* at 239.

<sup>43</sup> *Id.* at 242.

<sup>44</sup> LAWRENCE F. ROSSOW & JAMES O. TATE, *THE LAW OF TEACHER EVALUATION* 37 (2<sup>nd</sup> ed. 2003).

<sup>45</sup> M.S.A. § 122A.213-214.

<sup>46</sup> Minnesota Department of Education, *Quality Compensation for Teachers*, [http://education.state.mn.us/MDE/Teacher\\_Support/QComp/index.html](http://education.state.mn.us/MDE/Teacher_Support/QComp/index.html) (last visited December 5, 2011).

(Q Comp) program is to “provide incentives to encourage teachers to improve their knowledge and instructional skills in order to improve student learning and...to recruit and retain highly qualified teachers, encourage highly qualified teachers to undertake challenging assignments, and support teachers’ roles in improving students’ educational achievement.”<sup>47</sup> School districts can apply for Q Comp by creating, with the support of the teachers’ union, a restructured pay system. The compensation system must “reform the ‘steps and lanes’ salary schedule.” In 2007, the Commissioner of the Minnesota Department of Education rejected a school district’s proposal for a reformed compensation system under the Q Comp statute.<sup>48</sup> The compensation plan satisfied the statutory requirement that at least 60% of compensation increases be based on teacher evaluation. Under the school district’s proposal, however, it was still possible for a teacher to remain on the traditional “steps and lanes” compensation scheme. The Court of Appeals of Minnesota held that the compensation plan required real reform of the traditional pay schedule rather than the mere addition of a bonus.<sup>49</sup>

Arizona implemented its Career Ladder Program for over 25 years.<sup>50</sup> Similar to Minnesota’s Q Comp program, school district participation was optional. Twenty-eight districts participated in the program in which districts create the requirements of each “rung” of the salary ladder. It was similar to the “steps and lanes” notion in that it was a matrix considering multiple factors but the difference was that the “steps” and “lanes” were based on evaluations, classroom performance, student progress, and whether the teacher took on additional responsibilities. In

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<sup>47</sup> M.S.A. § 122A.414 (1).

<sup>48</sup> *Sauk Centre Educ. Ass’n v. Seagren* 741 N.W. 2d 398.

<sup>49</sup> *Id.* at 402

<sup>50</sup> Arizona Department of Education, *Arizona Career Ladder*, <http://www.azed.gov/highly-qualified-professionals/arizona-career-ladder/> (last visited December 5, 2011).

addition to voluntary school district participation, within each school district, teacher participation was voluntary as well. Among participating school districts, however, 70% of teachers chose the Career Ladder Program over the traditional “steps and lanes” system. In February 2010, a court declared the program to be unconstitutional because, due to lack of funding, the Arizona legislature would no longer allow new districts to apply.<sup>51</sup>

More recent legislation has created compulsory teacher compensation reforms. In May 2011, the Indiana legislature passed two education reform bills. The first, Senate Bill 1, establishes teacher evaluations that categorize teachers as highly effective, effective, needing improvement, and ineffective.<sup>52</sup> Teachers that are rated as needing improvement or ineffective cannot receive a raise the following year. Instead, pay increases are determined by several factors including students’ standardized test scores, students’ yearly academic growth, classroom observations, seniority, education, and school leadership roles replacing the former “steps and lanes” compensation scheme.<sup>53</sup> Senate Bill 575 limits collective bargaining to wages and wage-related benefits.<sup>54</sup> Unions cannot negotiate the means for determining compensation.

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<sup>51</sup> Center for Educator Compensation Reform, *Arizona*, <http://cecrdev2.learningpt.org/map/map.cfm?id=59> (last visited December 5, 2011).

<sup>52</sup> S.B. 1, 117<sup>th</sup> Gen. Assem., Reg. Sess. (Ind. 2011).

<sup>53</sup> Similarly, Wyoming recently enacted several new laws mandating changes to teacher employment. Teacher evaluations must be based in part on student performance. To retain tenure, teachers must earn at least a “satisfactory” evaluation under the new evaluation system. Additionally, a new law expanded the grounds for teacher termination to include “inadequate performance as determined through annual performance evaluations.” Hart Holland, *The Legislators Go Home*, 16 No. 4 WYO. EMP. L. LETTER (Apr. 2011).

In Michigan, four related bills were introduced that would affect teacher evaluation, tenure, and termination. Under the proposed law, three consecutive “ineffective” evaluations would be grounds for termination, teacher evaluation would be partially based on student growth, and teacher effectiveness would control teacher layoffs. Peter Luke, *Michigan Senate Approves Broad Overhaul to Teacher Tenure Law* (June 30, 2011) <http://www.mlive.com>.

<sup>54</sup> S.B. 575, 117<sup>th</sup> Gen. Assem., Reg. Sess. (Ind. 2011).

Florida recently passed its Senate Bill 736 requiring that student academic growth account for at least 50% of teacher performance evaluations.<sup>55</sup> A teacher's evaluation will determine, in part, the teacher's compensation. The law also eliminates previous provisions that required seniority to be a factor in determining which teachers are laid-off. After Senate Bill 736 was passed, the Florida Education Association (FEA) filed a lawsuit arguing that the law is unconstitutional as a violation of the "Right to Work" clause of the Florida Constitution.<sup>56</sup> The FEA argues that the new law violates teachers' rights to engage in collective bargaining with respect to wages and the terms and conditions of employment.<sup>57</sup> If, in fact, the law violates teachers' rights under the state constitution, in order for the law to be upheld there must be a compelling state interest in interfering with teachers' collective bargaining rights and the law must provide the least restrictive means necessary to attain that interest.<sup>58</sup>

Florida courts are familiar with litigation relating to performance-based compensation for teachers. In 1986, the FEA filed a lawsuit against Dade County School Board after the school district honored a select group of teachers with a \$3000 award for outstanding teaching.<sup>59</sup> The Court held that the award did not fall under the definition of a wage and thus was not subject to collective bargaining.<sup>60</sup>

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<sup>55</sup> S.B. 736 (Fla. 2011).

<sup>56</sup> "The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through labor organizations, to bargain collectively shall not be denied or abridged." F.S.A. Const. Art. 1 § 6

<sup>57</sup> Complaint at 8, *Robinson v. Robinson*, No. 2011CA2526 (2<sup>nd</sup> Cir. 2011).

<sup>58</sup> The Florida Commissioner of Education filed an Answer on November 1, 2011 denying all claims. Answer, *Robinson v. Robinson*, No. 2011CA2526 (2<sup>nd</sup> Cir. 2011).

<sup>59</sup> *United Teachers of Dade v. School Board of Dade County*, 1992 WL 494954 (Fla. Cir. 1992).

<sup>60</sup> *Id.* at 2.

States are following the lead of the Obama administration by incorporating student performance into teacher evaluations, creating performance-based compensation plans, and passing tenure reform. In fact, for many of these states, such changes were part of their Race to the Top application for federal funding.<sup>61</sup> By enacting analogous reform measures, New Jersey would be joining numerous other states that are making changes to increase student performance.

### **Section III: Education in New Jersey: Past, Present, and Proposed Future**

#### **A. The History of Educational Inequity in New Jersey**

New Jersey has an extensive history of educational inequity and, until recently, the judicial system has been the primary lever used by reformers. In 1875, the state constitution was amended to include, “the Legislature shall provide for the maintenance and support of a *thorough and efficient* (emphasis added) system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.”<sup>62</sup> The meaning and interpretation of the “thorough and efficient” clause in the context of educational inequity was the subject of a series of subsequent New Jersey Supreme Court cases.

In *Robinson v. Cahill*, the Supreme Court of New Jersey expanded the meaning of the “thorough and efficient” clause.<sup>63</sup> “The Constitution’s guarantee must be understood to embrace the educational opportunity which is needed in the contemporary setting to equip a child for his

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<sup>61</sup> For example, New York developed a new system of teacher evaluation that is based, in part, on student performance. Student performance on statewide measures of student growth constitutes 20% of teacher evaluations and another 20% is comprised of local measures of student achievement. *New York State United Teachers ex rel Iannuzzi v. Board of Regents of the University of the State of New York*, 2011 WL 3802147 (2011).

<sup>62</sup> N.J.S.A. Const. Art. 8, § 4, ¶ 1.

<sup>63</sup> *Robinson v. Cahill*, 62 N.J. 473 (1973).



role as a citizen and as a competitor in the labor market.”<sup>64</sup> Although the Court held that the Public School Education Act of 1975 (PSEA)<sup>65</sup> was facially constitutional in *Robinson V*,<sup>66</sup> the Court held the PSEA was unconstitutional when the legislature failed to provide the funding it required.<sup>67</sup> The legislature funded the PSEA only after the court issued an injunction.

Beginning in 1985, another series of cases further expanded the requirements of a “thorough and efficient” education. In *Abbott v. Burke* (1990), the Court found the PSEA unconstitutional as applied to poor urban school districts.<sup>68</sup> The Court held that “thorough and efficient” required that the “poorer urban districts have a budget per pupil that is approximately equal to the average of the richer suburban districts...and be sufficient to address their special needs.”<sup>69</sup> The state could not allow funding to depend on property tax. Rather, the funding for poor urban school districts must be mandated by the state. Furthermore, the funding in these districts had to sufficiently provide for the special needs of these districts given the extreme disadvantages of their students. In response, the legislature passed the Comprehensive Education Improvement Financing Act of 1996 (CEIFA).<sup>70</sup> In *Abbott v. Burke* (1997), the Court held that CEIFA did not provide sufficient funding to ensure that the poor urban districts were able to meet the “thorough and efficient” standard.<sup>71</sup> Finally, in 1998, the litigation expanded to address

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<sup>64</sup> *Id.* at 515.

<sup>65</sup> N.J.S.A. A8A:7A-1.

<sup>66</sup> *Robinson v. Cahill*, 69 N.J. 449 (1976).

<sup>67</sup> *Robinson v. Cahill* 70 N.J. 155 (1976).

<sup>68</sup> *Abbott v. Burke*, 119 N.J. 287 (1990).

<sup>69</sup> *Id.* at 389.

<sup>70</sup> N.J.S.A. 18A:7F-47

<sup>71</sup> *Abbott v. Burke* 149 N.J. 145, 152 (1997).

not only adequate funding for poor urban districts but also adequate services for the students in those districts.<sup>72</sup> The Court ordered services including technology programs, school-to-work programs, college-transition programs, full-day kindergarten, half-day preschool for three- and four-year-olds, on-site health services, and art, music, and special education programs. In effect, the Court held that the state must fund and provide services to make up for disadvantages inherent in poorer urban districts.

Despite nearly a half-century of litigation, student performance disparities still exist between richer suburban school districts and their poorer urban counterparts.<sup>73</sup> The judiciary's concentration on compensatory funding and the implementation of additional services in poor urban school districts has not eliminated educational inequity in New Jersey.

#### **B. The Current New Jersey Law and Practice Relating to Teacher Evaluation and Compensation**

New Jersey enacted tenure in 1909 to protect teachers from negative political influences in public schools.<sup>74</sup> In New Jersey, tenure is granted to teachers after three years and one day of service.<sup>75</sup> Loss of tenure may occur for “inefficiency, incapacity, unbecoming conduct, or other just cause.”<sup>76</sup> The original rationale for tenure at the university level was to safeguard academic

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<sup>72</sup> *Abbott v. Burke*, 153 N.J. 480 (1998).

<sup>73</sup> See *infra* note 101 and p. 24.

<sup>74</sup> N.J.S.A. 18A:28-5.

<sup>75</sup> N.J.S.A. 18A:28-5(a).

<sup>76</sup> N.J.S.A. 18A-26(b).

freedom.<sup>77</sup> Many argue that tenure is redundant when teachers are also afforded procedural and substantive due process protections. Furthermore, it inhibits a principal's ability to retain the most effective teachers and remove the ineffective ones. It guarantees teachers a job, even if they are ineffective. Some even argue that tenure causes lower pay for teachers: "Because tenure...is a valuable employment benefit that substitutes in part for salary, it tends to hold down teacher pay, which in turn affects who does and doesn't seek to enter this line of work and who does and doesn't stay there."<sup>78</sup> Even some teachers' unions are supportive of changes to current tenure practices.<sup>79</sup>

State law also determines the role of seniority in situations in which tenured teachers are dismissed due to staffing reductions.<sup>80</sup> When a vacancy then opens, the dismissed teacher with the longest length of service must be the first teacher reemployed.<sup>81</sup>

In contrast to the state's role in regulating tenure and seniority, teacher evaluation and compensation are almost entirely under the purview of collective bargaining. The only state-imposed regulation on teacher compensation is an \$18,500 salary floor.<sup>82</sup> In the absence of state

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<sup>77</sup> Chester E. Finn, *Nobody Deserves Tenure*, EDUCATION NEXT (February 4, 2011) <http://educationnext.org/nobody-deserves-tenure>. The corresponding rationale for public school teachers was that they wanted protection from losing their jobs over arbitrary reasons such as disagreeing with an administrator or influential parents. At the public school level tenure was more a protection from cronyism than an academic safeguard.

<sup>78</sup> *Id.* at 2.

<sup>79</sup> Trip Gabriel & Sam Dillon, *G.O.P. Governors Take Aim at Teacher Tenure*, THE NEW YORK TIMES (January 31, 2011). The American Federation of Teachers supported a Colorado law that allowed school districts to remove teachers that had been consistently rated "ineffective."

<sup>80</sup> N.J.S.A. 18A:28-11.

<sup>81</sup> N.J.S.A. 18A:28-12.

<sup>82</sup> N.J.S.A. 18A:29-5. This statute was enacted in 1985 and is outdated. Currently, the average salary of New Jersey teachers is approximately \$63,000. Statehouse Bureau Staff, *New Jersey Teacher Pay, Experience and Education* [http://www.nj.com/news/index.ssf/2010/05/nj\\_teachers\\_pay\\_freeze\\_salarie.html](http://www.nj.com/news/index.ssf/2010/05/nj_teachers_pay_freeze_salarie.html) (last visited December 5, 2011).

regulation, the current salary schedules for teachers follow the “steps and lanes” compensation scheme. Teacher evaluations have no effect on compensation. Thus, a teacher rated “distinguished” receives the same salary as a teacher rated “unsatisfactory” who is on the same “step” and “lane.”

State law allows school districts to withhold salary increments.<sup>83</sup> The Board of Education of the Township of South Brunswick withheld the salary increment from a teacher who struggled with classroom management. The court held that the school district had a reasonable basis for withholding the salary adjustment.<sup>84</sup>

State law mandates only that non-tenured teachers be evaluated three times per year and tenured teachers be evaluated once per year.<sup>85</sup> In the majority of school districts, the largest component of teacher evaluation is the classroom observation component: an administrator observes a single lesson and then evaluates the teacher’s ability to manage a classroom, engage students, clearly present academic content, etc. A smaller component of teacher evaluation is the completion of professional responsibilities: maintaining accurate records, timely submission of lesson plans, satisfactory attendance, etc. Applying this evaluation method, only teacher actions, rather than student actions and performance, are considered in the evaluation. This encourages teachers only to “dot their ‘i’s and cross their ‘t’s” rather than motivating them to make informed decisions to increase their students’ performance.

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<sup>83</sup> On a “steps and lanes” scheme, withholding a salary increment means that the teacher will stay on the same “step” the following year even though the teacher has accumulated an additional year of teaching experience.

<sup>84</sup> *Brown v. Township of South Brunswick Bd. of Educ.*, 92 N.J.A.R.2d (EDU) 560 (1992).

<sup>85</sup> N.J.S.A. 18A:27-3.1

By focusing solely on teacher actions, teachers are evaluated on factors others (principals, teachers' unions, school district administrators) deem to be the characteristics of a good teacher. Instead of encouraging teachers to strive to be highly effective, teachers are limited to the expectations of their evaluator. Furthermore, a teacher could be "highly effective" in every category of the evaluation rubric, yet that teacher's students may still not be learning. A comparison of current student achievement data and teacher evaluation results illustrate this incongruity.

Despite New Jersey's progress in school finance reform over the past four decades, the disparities in educational outcomes persist. In the 2009-2010 school year, of Newark Public School's 72 principals, 27% were rated Distinguished, 60% were rated Proficient, 10% were rated Basic, and only 3% were rated Unsatisfactory.<sup>86</sup> In the same year, of the school district's 3392 teachers, 11% were rated Distinguished, 86% were rated Proficient, 2% were rated Basic, and only 1% were rated Unsatisfactory.<sup>87</sup> Ninety-seven percent of Newark Public Schools' teachers were Proficient or Distinguished, but the passing rate of Newark students on high stakes

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<sup>86</sup> The Newark Public Schools Teachers' and Principals' Evaluation Rating for the 2009-2010 School Year. <http://www.nps.k12.nj.us/2286105610742800/blank/browse.asp?A=383&BMDRN=2000&BCOB=0&C=60169> (last visited December 5, 2011).

<sup>87</sup> *Id.* Teacher evaluations were based on Charlotte Danielson's Teacher Evaluation Framework and focused on four domains: planning and preparation, classroom environment, instruction, and professional responsibilities. Student performance was not a component of the evaluations.

The same incongruities were noted in Denver Public Schools and Cincinnati Public Schools. In the 2007-2008 school year, only 1.45% of Denver Public Schools teachers were rated "unsatisfactory" in a binary system. Seventy-five of the 88 Denver schools that did not meet AYP that year did not have a single "unsatisfactory" teacher. In the same year, 40 Cincinnati schools failed to meet AYP. Not a single teacher in any of the schools received an "unsatisfactory" rating. Daniel Weisberg, et al. *The Widget Effect: Our National Failure to Acknowledge and Act on Differences in Teacher Effectiveness* 11-12 (The New Teacher Project 2009).

tests were significantly lower than their counterparts in richer suburban districts.<sup>88</sup> Logic and reason would suggest that teacher evaluation data should mirror student achievement data.

The answers to the questions, “Is this teacher an effective teacher?” and “Are their students learning?” must be the same. If the answer to the latter question is “no,” then how can the answer to the former be “yes”? In order to see the same answer to these questions, teacher evaluations must include measurements of student achievement. Governor Christie’s proposed legislation does just that.

On March 1, 2011, the New Jersey Educator Effectiveness Task Force submitted a report to the New Jersey Department of Education outlining a proposal for education reform affecting teacher evaluations, teacher compensation, and tenure.<sup>89</sup> On April 13, Governor Christie proposed legislation based on the report’s recommendations. The proposed legislation creates a new teacher evaluation system. Teachers will be evaluated twice per year. The legislature will set parameters on the evaluation tools that measure effectiveness, which are currently negotiated through collective bargaining. Teachers will be categorized as highly effective, effective, partially effective, and ineffective.<sup>90</sup>

The recommended evaluation framework requires that teacher evaluations be split evenly between the outputs of learning and the inputs associated with learning. Under the new teacher

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<sup>88</sup> State of New Jersey Department of Education 2010 Assessment Reports (January 2011)  
<http://www.nj.gov/education/schools/achievement/2011/>.

<sup>89</sup> New Jersey Educator Effectiveness Task Force, Interim Report (March 1, 2011)  
<http://www.nj.gov/education/educators/effectiveness.pdf>.

<sup>90</sup> Nash, *supra* note 4.

evaluation system, 50% of a teacher's evaluation is derived from student performance and the other 50% is derived from teacher practice.<sup>91</sup>

In conjunction with a new teacher evaluation system, Governor Christie's proposal also calls for the implementation of a new evaluation system for school principals.<sup>92</sup> Principal evaluations would be divided into three components: measures of effective practice (40%), differential retention rate of effective teachers (10%), and measures of student achievement (50%).<sup>93</sup>

Governor Christie also proposed changes to the current tenure system in which teachers and principals would attain tenure following three consecutive years of a "highly effective" or

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<sup>91</sup> New Jersey Educator Effectiveness Task Force, *supra* note 89, at 12. Of the 50% allotted to student performance, 70-90% is based on growth on state assessments, 10% is based on a schoolwide performance measure, and 0-20% is based on other performance measures (to be determined through collective bargaining). Other performance measures may include graduation rates, SAT scores, college matriculation rates, student retention rates, etc. Of the 50% allotted to teacher practice, 50-95% is based on classroom observation tools and 5-50% is based on other measures of practice.

<sup>92</sup> R.L. Mendro, *Student Achievement and School and Teacher Accountability*, 12 JOURNAL OF PERSONNEL EVALUATION IN EDUCATION, pp. 263-264 (1998). A study conducted in Dallas Public Schools found that the most significant factor in the effectiveness of a school is its principal. "The quickest way to change the effectiveness of a school, for better or for worse, is to change the principal."

<sup>93</sup> New Jersey Educator Effectiveness Task Force, *supra* note 89, at 12. The 10% allotted to the differential retention rate of effective teachers would reward principals for hiring and retaining effective teachers and removing ineffective teachers. This empowers principals with the role of human capital manager and would require principal autonomy in making teacher employment decisions. Like tenure, this offers teachers protection from politics and discrimination without proving guaranteed job security to ineffective teachers. Of the 50% allotted to student achievement measures, 70% is based on the aggregate growth on standardized state assessments while the remaining 30% would be determined by measureable, school-specific goals.

“effective” rating.<sup>94</sup> A tenured teacher or principal could then lose tenure following two consecutive “partially effective” ratings or one “ineffective” rating.<sup>95</sup>

Although Governor Christie is an outspoken advocate for performance-based compensation for teachers, he has not formally proposed a detailed compensation plan for New Jersey.<sup>96</sup> His proposals connect student performance to teacher evaluations and connect teacher evaluations to tenure, but do not set up a connection between student performance and teacher compensation.

#### **Section IV: A Plan to Incorporate a Performance-Based Compensation System into Governor Christie’s Proposed Educational Reform Legislation**

##### **A. The Problem: United States Students Underperform Compared to Their International Counterparts; The “Achievement Gap” Persists in the United States**

The goal of any employment compensation system should be to motivate employees to perform at their greatest potential. American employers began to utilize performance-based compensation in the early 20<sup>th</sup> century when there began to be a danger of losing jobs to foreign

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<sup>94</sup> Gabriel, *supra* note 79. Governors in Florida, Idaho, and Nevada have also called for tenure reform. Nevada governor, Brian Sandoval, calls for the elimination of tenure in the face of impending layoffs because it will allow school districts to dismiss teachers based on competence rather than seniority. According to Florida governor, Rick Scott, “Good teachers know they don’t need tenure. There is no reason to have it except to protect those that don’t perform as they should.”

<sup>95</sup> Nash, *supra* note 4.

<sup>96</sup> Chris Christie, Governor of New Jersey, Remarks by the Governor at the Old Bridge Town Hall Discussion (Sep. 28, 2010). [http://www.nj.com/news/index.ssf/2010/09/gov\\_christie\\_advocates\\_merit\\_p.html](http://www.nj.com/news/index.ssf/2010/09/gov_christie_advocates_merit_p.html). “Any type of compensation that allows for anything but merit – gone.”



markets.<sup>97</sup> Employers implemented such compensation schemes to increase job performance, thus making American products more competitive.

There is evidence that U.S. students are being “out-schooled” by students in other industrialized nations.<sup>98</sup> The Program for International Student Assessment (PISA) is an assessment that measures the reading literacy, science literacy, and mathematics literacy of 15-year-olds in the 34 countries that are members of the OECD.<sup>99</sup> The United States ranked 14<sup>th</sup> in reading literacy, 25<sup>th</sup> in mathematics literacy, and 17<sup>th</sup> in science literacy.<sup>100</sup> Thus, the motivation of American employers in the early 20<sup>th</sup> century to implement performance-based compensation now faces the American education system. If our students are going to remain competitive internationally, their teachers must be motivated to create more marketable students.

Within the United States there is an achievement gap between the performance of low-income minority students and middle-class white students. Typically the achievement gap refers to the underperformance of African-American and Hispanic students. The gap appears in grades, standardized test scores, graduation rates, college matriculation rates, and other measures of academic performance.<sup>101</sup>

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<sup>97</sup> R.L. Heneman & M.T. Gresham, *Performance-Based Pay Plans* in Smither, J.W., *Performance Appraisal: State-of-the-Art Methods for Performance Management* (Jossey-Bass, 1998).

<sup>98</sup> Fleischman, *supra* note 38.

<sup>99</sup> *Id.* at 4. PISA only administers the assessment to 15-year-olds with the assumption that it provides a picture of what students know and are able to do at the end of their compulsory schooling.

<sup>100</sup> *Id.* at 8, 18, 24.

<sup>101</sup> National Governors’ Association *Closing the Achievement Gap* <http://www.subnet.nga.org/educlear/achievement/> (last visited December 5, 2011).

There is a teacher quality gap that corresponds to this student achievement gap. An international study found that out of 46 countries, the United States ranked 42<sup>nd</sup> in its ability to provide an equitable distribution of its high-quality mathematics teachers.<sup>102</sup> The research showed that 68% of upper-income 8<sup>th</sup> grade students in the United States had a high-quality mathematics teacher, compared to 53% for low income 8<sup>th</sup> grade students. The United States' 15% teacher quality gap is significantly higher than the 42-country average of 2.5%.<sup>103</sup> A national study also illustrated the teacher quality gap by showing an association between the percentage of students who are eligible for free and reduced lunch and the frequency of tenured teachers who deliver poor instruction.<sup>104</sup>

**B. The Solution: Couple Governor Christie's Proposed Legislation with a Performance-Based Compensation Scheme that Incentivizes Teaching in Underperforming Schools**

In 1985, the New Jersey Legislature declared that:

“a. Attracting and retaining the most able individuals to the profession of teaching is critical to the future welfare of our State and our citizens.

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<sup>102</sup> Motoko Akiba, et.al. *Teacher Quality, Opportunity Gap, and National Achievement in 46 Countries*, 36 Educational Researcher 369 (Oct. 2007).

<sup>103</sup> *Id.* at 372. The researchers encountered a methodological challenge in measuring teacher quality. They measured teacher quality using four binary factors: full certification, mathematics major, mathematics education major, and teaching experience of more than three years. Since the premise of this paper is that teacher quality should be measured by student performance rather than teacher characteristics, it is important to note the distinction between an effective teacher (measured through student performance) and a qualified teacher.

<sup>104</sup> Weisberg *supra* note 87, at 18. Teachers and administrators were asked, “In your opinion, are there tenured teachers in your school who deliver poor instruction?” Schools in which 76-100% of students qualify for free and reduced lunch had a “yes” response rate of 60% and 84% from teachers and school administrators, respectively. In schools in which 25%-75% of students qualify the “yes” responses decreased to 56% and 75%, and in schools in which less than 25% of students qualify the “yes” responses decreased to 42% and 65%.

b. The starting salary levels for new teachers have fallen significantly behind the starting salaries paid to other recent college graduates.

c. A competitive starting teacher salary is an additional means of attracting and retaining outstanding individuals in the teaching profession.”<sup>105</sup>

Although three decades have passed since these legislative declarations, their truth remains. To increase the academic achievement of New Jersey’s students, schools must attract and retain great teachers and remove the ineffective ones. To eliminate the achievement gap, there must be greater incentives for teachers to teach in the worst-performing schools. To this end, the New Jersey legislature should mandate that teacher compensation be based on teacher evaluations which, under Governor Christie’s proposal, would consist of student performance as the primary component.

The successful implementation of performance based compensation in New Jersey must have five characteristics: (1) the amount of the performance-based compensation is significant, (2) the performance-based compensation is incremental and predetermined, (3) a teacher’s placement is a significant factor in determining compensation, (4) teachers cannot opt out of the performance-based compensation system and (5) student performance is the primary indicator of teacher effectiveness.<sup>106</sup>

The purpose of the first two characteristics is to provide incentive for current teachers to increase their effectiveness and to attract more people to the teaching profession. The SPBP

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<sup>105</sup> N.J.S.A. 18A:29-5.2.

<sup>106</sup> Because the fifth characteristic is already an element of Governor Christie’s proposal and has already been addressed on p. 21, the fifth characteristic is not discussed further in Section IV. In Section V, however, there is a discussion of the related issue of problems that arise in measuring student performance.

study showed that a \$3000 bonus did not adequately incentivize teachers to change their behavior.<sup>107</sup> The POINT study demonstrated that even when school districts offer a large incentive of \$15,000, if the incentive appears unattainable then student performance remains unaffected.<sup>108</sup> Similar to POINT, TAP offered a large incentive, a \$12,000 maximum bonus. TAP, however, placed teachers into five levels based on the number of standard deviations their students' scores were from the mean.<sup>109</sup> The study showed the conclusive effectiveness across grade levels of the TAP performance-based compensation system. An effective performance-based compensation system will have multiple levels of rewards and a significant maximum bonus.<sup>110</sup>

An international study provides some additional guidelines as to the amount of compensation required to attract talented people to the profession.<sup>111</sup> The study focused on teachers from Singapore, Finland, and South Korea, all PISA top-performers.<sup>112</sup> These three countries view the caliber of their teachers as a national priority. They have a rigorous teacher selection process and training that is more akin to U.S. medical school and residency than to the

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<sup>107</sup> Marsh, *supra* note 20.

<sup>108</sup> Springer, *supra* note 28.

<sup>109</sup> Springer, *supra* note 30.

<sup>110</sup> Since there are a limited number of studies of performance-based compensation systems, there is no evidence as to the "optimal" number of reward levels or maximum bonus. Based on the studies cited in this paper, the TAP program provides a starting point for determining these factors.

<sup>111</sup> Auguste, *supra* note 5.

<sup>112</sup> On the PISA, Korea ranked 1<sup>st</sup> in math and reading literacy and 3<sup>rd</sup> in science literacy among OECD countries. Finland ranked 2<sup>nd</sup> in math and reading literacy and 1<sup>st</sup> in science literacy. Among non-OECD countries, Singapore ranked 3<sup>rd</sup> in math and science literacy, and 2<sup>nd</sup> in reading literacy. Fleischman, *supra* note 98 at 8, 18, 24.

typical U.S. College of Education.<sup>113</sup> In the U.S. only 23% of teachers are top-third university graduates.<sup>114</sup> Increasing the percent of top-third teachers in high poverty schools to 68% would require paying new teachers approximately \$65,000 and creating a maximum compensation of \$150,000.<sup>115</sup>

The third characteristic of an effective performance-based compensation system in New Jersey is that school and subject placement is a significant factor.<sup>116</sup> This characteristic addresses the disparities in student performance between students in poor urban districts and middle-class suburban districts and the associated teacher quality gap.<sup>117</sup> Teachers in historically underperforming schools should be paid more than their counterparts in schools that historically reach their student performance targets.<sup>118</sup> Additionally, to achieve true equality, this pay scheme must be consistent throughout the state, not just within individual school districts.<sup>119</sup>

This essential characteristic also addresses the argument that there are factors outside the teacher's control that affect student performance. One study indicates that school-level factors

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<sup>113</sup> Auguste, *supra* note 5 at 6. Additionally, students training to become teachers often receive a salary or stipend and receive competitive compensation once they become teachers. Society bestows enormous prestige on the profession.

<sup>114</sup> *Id.* at 6. Furthermore, only 14% of teachers in high-poverty schools are top-third graduates, again illustrating the U.S. teacher quality gap. *Id.* at p. 9 citing U.S. Department of Education *Baccalaureate and Beyond Longitudinal Survey* (2001).

<sup>115</sup> *Id.* at 7.

<sup>116</sup> For example, Teacher A works at an underperforming school. Teacher B does not. If both teachers receive the same evaluation rating (based on Governor Christie's legislative proposal), Teacher A makes significantly more than Teacher B.

<sup>117</sup> It is analogous to taking the *Abbott v. Burke* notion of compensatory funding and applying it to human capital.

<sup>118</sup> Even though I classify schools as "underperforming" and those that "historically reach their student performance targets," I am not implying that the compensation should be binary. Rather, it should be a spectrum also based on the extent to which each school underperforms or historically reaches its student performance targets.

<sup>119</sup> Furthermore, the state would be wise to hire professionals to determine a compensation scheme that would achieve the optimal distribution of teachers according to their effectiveness.

and teacher-level factors account for 7% and 13% of variance in student performance, respectively.<sup>120</sup> Student characteristics, such as home environment, intrinsic motivation, and prior knowledge account for the other 80%.<sup>121</sup> The pay disparity in the compensation proposal takes this 80% into account. Because of differences in the home environment, motivation, etc. it is going to require a more effective teacher to achieve the same results in one school than in another and this should be reflected in teacher compensation.

The fourth factor, making teacher participation in the performance-based compensation system compulsory, would distinguish New Jersey's system from the ones implemented in Minnesota and Arizona. If the system is voluntary, ineffective teachers will opt to use the "steps and lanes" scheme which acts as an incentive for ineffective teachers to remain in the profession.

By no means are these five characteristics the only conditions that must be satisfied in order to implement an effective performance-based compensation system. The following section addresses common problems with performance-based compensation and offers solutions that eliminate or minimize those problems.

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<sup>120</sup> R.J. Mazano, *A New Era of School Reform: Going Where the Research Takes Us* (Aurora, CO: Mid-Continent Research for Education and Learning, 2000) [www.mcrel.org](http://www.mcrel.org).

<sup>121</sup> Eva L. Baker, et al., *Problems with the Use of Student Test Scores to Evaluate Teachers* 12 (Economic Policy Institute, 2010). Other factors include the student's attendance, other teachers, the quality of the curriculum, class size, team teaching, tutoring, and out-of-school learning experiences. Parents also play a significant role in the academic performance of their children. Some students have parents who are well-educated, supportive, and able to help their children with homework. Other parents, for a variety of reasons, are not able to support their children in the same way.

## **Section V: Past Pitfalls in the Implementation of Performance-Based Compensation and Proposed Solutions<sup>122</sup>**

There are empirically-based arguments in opposition of performance-based compensation.<sup>123</sup> Those arguments, however, are not inherent in performance-based compensation itself, but rather arise in specific performance-based compensation schemes.

A common argument is that performance-based compensation creates a disincentive for teachers to work with high-need students: those that are already academically behind, students with limited English proficiency, special needs students, etc.<sup>124</sup> However, by using student growth percentiles to measure student performance, performance-based compensation will not be a disincentive to teaching the lower performing students and special needs students.<sup>125</sup> Student growth percentiles can be used to prevent a comparison between “apples and oranges.” They measure a student’s growth by comparing their current academic achievement relative to their academic peers—those students that began at the same starting point. For example, if a student earns a raw score of 20 on the pre-assessment, then his percentile will be calculated based on the post-assessment performance of all other students who also scored a 20 on the pre-assessment. This method is more advantageous than raw student growth data because the student’s starting

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<sup>122</sup> Section IV proffers five non-negotiable characteristics of an effective performance-based compensation system. Section V, on the other hand, makes suggestions of possible solutions to other issues that arise in planning and executing performance-based compensation systems. For example, in Section V, student growth percentiles are suggested as a way to measure student growth. The use of student growth percentiles, however, is not essential to the successful implementation of performance-based compensation.

<sup>123</sup> Lewis C. Solomon & Michael Podgursky, *The Pros and Cons of Performance-Based Compensation* (Milken Family Foundation, 1999).

<sup>124</sup> Baker, *supra* note 121, at 6.

<sup>125</sup> Damien W. Betebenner, *A Primer on Student Growth Percentile* (National Center for the Improvement of Educational Assessment, 2008).

point is no longer a factor that could unfairly affect the teacher's evaluation. It takes the student's past education experience and preparation out of the equation.<sup>126</sup>

The same method also applies to special needs students. A special needs student who scores a 20 on the pre-assessment will only be compared to other special need students who also scored a 20 on the pre-assessment. Therefore, a teacher's performance with respect to a special needs student will only be measured relative to the performance of other teachers with a special needs student. Using student growth percentiles to measure student performance, and ultimately teacher effectiveness, negates the potential impact that the use of test scores would have to discourage teachers from working with the students most in need of an effective teacher.

Others fear that performance-based compensation hinders teachers from working collaboratively.<sup>127</sup> Surveys of teachers that participated in the D.A.T.E. program indicated that the more years the school had participated in the performance-based compensation program, the more likely teachers were to report higher ratings of teacher competition.<sup>128</sup> One of the advantages of Minnesota's Q Comp program is that the restructured pay system must "encourage collaboration rather than competition among teachers."<sup>129</sup> As long as the compensation reward is predetermined, there will be no need for competition. Additionally, progress toward school-wide

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<sup>126</sup> Suppose Student A scores a 10 (out of 100) on the pre-assessment and a 45 on the post-assessment. Student B scores a 70 on the pre-assessment. Even if Student B scores a 100 on the post-assessment, his growth (calculated either as a percent change or as a difference in raw scores) could never exceed Student A. Student growth percentiles eliminate that situation because Student B would only be compared to other students who scored a 70 on the pretest.

<sup>127</sup> Victor Lavy, *Using Performance-Based Pay to Improve the Quality of Teachers*, 17 THE FUTURE OF CHILDREN 87, 92 (2007).

<sup>128</sup> Springer, *supra* note 25, at xii.

<sup>129</sup> M.S.A. § 122A.414-2(b)(6).



or department-wide goals could also be a component of a teacher's evaluation, thus encouraging teacher collaboration.

There is also a concern that an unintended consequence of performance-based compensation is that teachers will merely "teach to the test."<sup>130</sup> Analogous situations occur in companies where outcomes are overemphasized. "Managers praise the ends, but give greater weight to the means."<sup>131</sup> One way to avoid this effect is to create rigorous assessments that test higher-order thinking: application, analysis, synthesis, and evaluation, thus disincentivizing a teacher from merely teaching facts, skills, and test strategies. There are multiple concerns with performance-based compensation that involve the student assessment. Proposing an effective assessment program for all grades and subjects that is measurable, rigorous, and reliable, is an issue in itself. For example, New Jersey only assesses language arts literacy, mathematics and (in 3<sup>rd</sup> - 8<sup>th</sup> grade) science. Additionally, students are only assessed once in high school. To accurately implement a performance-based compensation system, each teacher's students must be evaluated at least once each year to determine their proficiency in the subject matter taught. Reforms to the current way student performance is assessed in New Jersey must accompany a performance-based compensation scheme.

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<sup>130</sup> Lavy, *supra* note 126, at 92.

<sup>131</sup> Harry Levinson, *Appraisal of What Performance?*, HARVARD BUSINESS REVIEW (July 1976) <http://hbr.org/1976/07/appraisal-of-what-performance/ar/1>. Levinson shares a story to illustrate the problem in performance appraisal and management by objectives: the misconception that only the "what," and not the "how," is being assessed. The story is of a senior executive who was placed in charge of a failing project. Within two years, the project was producing a seven-figure profit, but the senior executive had achieved it "singlehandedly, by the sheer force of his own personality." The corporate president informed him that until his approach changed, he would not be promoted. In education, how students process, learn, and understand information is equally as important as (if not more important) than what they learn.

It is critical, too, that the assessments are a reliable measure of student performance. If there is a lot of variation in a teacher's performance year-to-year, the incentive's effect will decrease, particularly if a teacher performs significantly worse one year than they did the previous year.<sup>132</sup> Those who oppose performance-based compensation argue that a student could perform differently on the exact same assessment depending on whether she had breakfast, or a good night's sleep, or a lucky guess on a multiple choice question.<sup>133</sup> Furthermore, studies show year-to-year fluctuations in the performance of the same teacher's students. One study evaluated teacher effectiveness based on student test scores in five urban districts over two years. Among the teachers ranked in the bottom 20% in year 1, only one-third were in the bottom 20% in year 2. In fact, another third were in the top 40% the following year. Similarly, among teachers ranked in the top 20% the first year, only one-third were ranked in the top 20% the second year.<sup>134</sup>

Again, this study illustrates the importance of finding and implementing the right performance-based compensation system. A possible solution to this issue is to consider a larger sample of the teacher's students. For example, a teacher's compensation may be determined by the average student performance over multiple years. Instead of a teacher's compensation being determined by the performance of the 24 students he taught this year, it is determined by the aggregate performance of the 72 students he has taught over the past three years. This system minimizes year-to-year changes in compensation.

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<sup>132</sup> Herzberg, *supra* note 10, at 118. Herzberg illustrates this point: "If I get a bonus of \$1,000 one year and \$500 the next, I am getting extra rewards both years, but psychologically, I have taken a \$500 salary cut."

<sup>133</sup> Baker, *supra* note 124, at 11.

<sup>134</sup> *Id.* at 12.

Finally, performance-based compensation raises the issue of funding. In June 2011, the New Jersey legislature cut teachers' benefits resulting in decreased salaries for the 2011-2012 school year.<sup>135</sup> Given the current economic situation, it is arguable that the state does not have the funding to support a performance-based compensation program.<sup>136</sup> This argument, however, assumes that teachers' base pay would remain their current salary and would be supplemented by performance-based compensation. Instead, New Jersey could implement a performance-based compensation scheme that replaces the "steps and lanes" system altogether. The money that will be saved by placing all teachers on the same "step" can then be redistributed based on teacher effectiveness.<sup>137</sup>

While numerous performance-based compensation systems have failed and there are multiple arguments against such systems, those results and arguments are unique to specific compensation systems. Performance-based compensation has the potential to escalate student outcomes, through increased teacher effectiveness, if it is implemented the right way.

## **Conclusion:**

Time is of the essence. The President of the United States is calling for educational reform. Governors and legislatures are backing legislative measures that overhaul traditional

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<sup>135</sup> Statehouse Bureau Staff, *N.J. Assembly Passes Landmark Employee Benefits Overhaul* (June 24, 2011) [http://www.nj.com/politics/index.ssf/2011/06/assembly\\_passes\\_landmark\\_emplo.html](http://www.nj.com/politics/index.ssf/2011/06/assembly_passes_landmark_emplo.html).

<sup>136</sup> See Arizona Department of Education, *supra* note 51. Arizona's Career Ladder Program was cut last year because there was not adequate funding to support the performance-based compensation program.

<sup>137</sup> A simplified example is to examine the potential salary redistribution between a first-year teacher and a teacher with 15 years' experience. A first-year teacher in Newark Public Schools with a Bachelor's degree earns \$50,000 per year. Their counterpart with 15 years' experience earns \$89,241 per year. If, instead, both teachers earned a salary of \$50,000 per year, then the \$39,241 could be redistributed between the two teachers. If the two teachers are equally effective then each teacher would receive \$19,710.50, a larger bonus than any study discussed in Section I. Again, this is just one of many solutions. The purpose of this example is to illustrate that the issue of funding does not categorically preclude the success of a performance-based compensation system.

practices in education. States are changing their tenure laws, the methods they use to evaluate teacher and student performance, and are restructuring the way they compensate effective teachers. These broad, sweeping changes *will* change the landscape of public education in the United States. The question is, “Will it be for the better or for the worse?” As the United States continues to fall farther behind other countries in math, science and reading, and as the achievement gap persists in the United States, it is imperative that these changes be made “for the better.”

Performance-based compensation can increase the educational outcomes of New Jersey’s students. To do so, however, it must be carefully planned and implemented so that it not only increases student performance, but also narrows New Jersey’s achievement gap. By developing a plan that considers a teacher’s placement as a significant factor in compensation, New Jersey can motivate its best teachers to teach its most underprivileged students.