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ABSTRACT

ILLINOIS' PERFORMANCE EVALUATION REFORM ACT (PERA) EXAMINED WITHIN THE CONTEXT OF THE FEDERAL GOVERNMENT'S EXPANDING ROLE IN PUBLIC EDUCATION

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This study examines the ever-expanding role of the federal government's involvement in the American public education system to put the 2010 Illinois *Performance Evaluation Act* (PERA) into context. Understanding the history of federal education policy and the federal government's involvement in public education (historically the domain of the states) helps illuminate the current situation in Illinois. The 2010 *Performance Evaluation Reform Act* (PERA) changed the method of evaluating the performance of public school teachers. This alteration incorporated student academic growth data into the evaluation calculation. This is the first time Illinois teacher performance evaluations will be based in part on how well students learn.

Illinois is one of many states that has, or is in the process of, changing the teacher evaluation system to include student academic growth data. This is primarily the result of the federal Race to the Top campaign that rewarded states with federal funds if they increased the rigor of their teacher evaluation process. This focus on the teacher evaluation process is but one piece of the current teacher accountability movement.

A second purpose of this study is to explain the changes to the Illinois teacher performance evaluation and tenured teacher dismissal process resulting from the *Performance Evaluation Reform Act*. The changes to Article 24A of the Illinois School Code, the section of the code dealing with teacher performance evaluation, will also be analyzed and discussed.

This study also attempts to analyze Illinois tenured teacher dismissal cases, both pre and post PERA, to ascertain what practical lessons Illinois school officials can learn, as they attempt to dismiss ineffective but tenured teachers. One main lesson is clear: adherence to the procedures outlined in Article 24A is crucial.

Illinois' 2010 *Performance Evaluation Reform Act* sought to increase student academic achievement by enhancing teacher effectiveness. This goal was to be accomplished by revamping the teacher evaluation process. By streamlining the process to cull ineffective, tenured teachers, PERA has the potential to affect many positive changes on Illinois' public education system.

NORTHERN ILLINOIS UNIVERSITY
DEKALB, ILLINOIS

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ILLINOIS' PERFORMANCE EVALUATION REFORM ACT (PERA) EXAMINED
WITHIN THE CONTEXT OF THE FEDERAL GOVERNMENT'S
EXPANDING ROLE IN PUBLIC EDUCATION

BY

HILLARY A. NASSO
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A DISSERTATION SUBMITTED TO THE GRADUATE SCHOOL
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
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DEPARTMENT OF LEADERSHIP, EDUCATIONAL PSYCHOLOGY, AND
FOUNDATIONS

Doctoral Director:

Jon G. Crawford

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Finally, I would like to thank my father, Arthur Nasso, who always supported me to reach my maximum potential, by helping me push the limits of my capabilities. He instilled in me a love of learning and a belief that it is always better to reach for the highest goals possible, rather than not try at all.

DEDICATION

To Yoram, with all my love

To Leah and Eli, get your doctorate while you are still young!

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CHAPTER 1

INTRODUCTION TO THE STUDY

Prior to the 1983 publication of *A Nation at Risk*,¹ teacher accountability for student learning was not an issue of great public concern. Today, teacher accountability has surpassed the “buzz word” stage and has become an expectation viewed by many as a parental and community right. Teacher accountability for student learning has become part of the public agenda for education.² Assessment mandates and sanctions at both the federal and state levels have made accountability for student achievement a reality for public school teachers; a reality with potentially career altering consequences. Hyperbole? Not in California.

In *Vegara v. the State of California*,³ nine public school students alleged “five statutes of the California Education Code ... violate[d] the equal protection clause of the California Constitution.”⁴ The challenged statutes included the “Permanent Employment Statute,” two

¹ The Nat'l Comm'n on Excellence in Educ., *A Nation at Risk: The Imperative for Educational*

² Cynthia Gerstl-Pepin explains how the public is informed by the media: “Rather than informing the public, the media serve to represent the issues as framed by the ... two main political parties. Their definitions of educational problems were designed to appeal to mainstream voters. ... the media provide a limited understanding of education issues.” Cynthia I. Gerstl-Pepin, *Media (Mis)representations of Education in the 2000 Presidential Election*, 16 *Educ. Pol'y* 37, 50 (2002).

³ *Vegara v. California*, No. BC484642 (Cal. Super. Ct. June 10, 2014) (tentative decision).

⁴ *Id.* at 3.

“Dismissal Statutes,” and the “Last-In, First Out (LIFO) Layoff Statute.”⁵ The Superior Court of the State of California, Los Angeles ruled in favor of the students, finding the statutes were unconstitutional because they did not pass muster under a strict scrutiny analysis.⁶ In reaching this conclusion, the court determined the policies underlying the statutes disproportionately “affect[ed] high-poverty and minority students.”⁷

In *Vegara* students sued the state of California because the employment of “grossly ineffective teachers ... violate[d] their fundamental rights to equality of education by adversely affecting the quality of the education they [were] afforded by the state.”⁸ The Superior Court of California ruled “all [five of the] challenged statutes are found unconstitutional.”⁹

The *Vegara*¹⁰ decision cited *Brown v. Board of Education (1954)*,¹¹ *Serrano v. Priest (1971)*,¹² *Serrano v. Priest (1976)*,¹³ and *Butt .v State of California (1992)*.¹⁴ The landmark

⁵ *Id.*

⁶ Strict scrutiny is one of the three tests used when dealing with the Equal Protection Clause of the 14th Amendment. It is defined as a form of judicial review that courts use to determine the constitutionality of certain laws. In order for strict scrutiny to exist, the law must further a compelling governmental interest and be narrowly tailored (crafted in the least restrictive manner to accomplish its objective and create the least amount of difficulty). Both of these conditions must be met in order for strict scrutiny to exist. Strict Scrutiny is usually applied in cases of fundamental rights or for protected classes of people.

⁷ *Vegara v. California*, No. BC484642 at 15.

⁸ *Id.* at 3.

⁹ *Id.* at 15.

¹⁰ *Id.*

¹¹ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

case, *Brown*, centered on racial discrimination in the public schools, *Serrano* focused on the inequity of California's school-funding formula,¹⁵ and *Butt* involved a school term length disparity.¹⁶ In all four of these cases, the courts used the concept of the "fundamental right to equality of the educational experience"¹⁷ as the basis for their decisions. While education was deemed not to be a fundamental right guaranteed by the United States Constitution, as determined in *San Antonio v. Rodriguez*,¹⁸ the California Supreme Court found equality in educational opportunity *was* a right protected by the California Constitution.

¹² *Serrano v. Priest*, 5 Cal. 3d 584 (1971).

¹³ *Serrano v. Priest*, 18 Cal. 3d 728 (1976).

¹⁴ *Butt v. California*, 4 Cal. 4th 668 (1992).

¹⁵ In *Serrano I*, the court concluded education was a fundamental interest and the state education finance system, based on local property taxes, was discriminatory on the basis of wealth -- in violation of the equal protection clause. In *Serrano II*, the court affirmed the judgment of the trial court, agreeing that the school finance plan violated state equal protection provisions.

¹⁶ In *Butt*, the California Supreme court ruled that closing some schools six weeks prematurely, due to lack of funding, deprived those students of their right to basic equality of public education.

¹⁷ In a legal bulletin published by Schulte Roth & Zabel, LLP, Mark Brossman, Scott Gold, and Donna Lazarus stated, "The court held that these statutes violate the equal protection clause of the California Constitution because they prevent students from accessing their fundamental rights to equal education by adversely affecting the quality of the education they are afforded." Mark E. Brossman, Scott A. Gold, and Donna Lazarus, *Court Determines California Teacher Tenure Laws Are Unconstitutional*, SCHULTE ROTH & ZABEL LEGAL BULLETIN (June 27, 2014), http://www.srz.com/Court_Determines_California_Teacher_Tenure_Laws_Are_Unconstitutional/.

¹⁸ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

Is *Vegara* a harbinger of what the future of education might hold? As other states enact performance evaluation laws to hold teachers accountable for student learning, will the scope of the existing teacher performance evaluation laws widen? In 2010, teacher performance evaluation significantly changed in Illinois with the passage of the *Performance Evaluation Review Act* (PERA).¹⁹ The law changed how teachers are evaluated by incorporating a specific definition of effective teaching and a student growth factor. The law also required all teachers receiving an unsatisfactory teaching performance rating to be placed on a remediation plan. Failure to successfully complete the remediation plan results in the teacher being dismissed.

Theoretical Framework

Public education has historically been a state responsibility.²⁰ In 1973, the Supreme Court clearly declared in *San Antonio v. Rodriguez* -- education was not a fundamental right guaranteed by the U. S. Constitution.²¹ The Court's conclusion was based in part on the fact education was not mentioned in the Constitution, and any power not expressly granted to the federal government by the Constitution was reserved for the states.²² Notwithstanding the

¹⁹ Illinois Performance Evaluation Reform Act of 2010, Pub. Act 096-0861(2010).

²⁰ Federal aid to education has existed since the beginnings of our country. The Northwest Ordinance of 1785 and 1987 allocated a portion of the new western territories to be reserved for the sole purpose of public schools. The expression "federal involvement in education," does not refer to federal aid; it refers to the federal government's direct role in shaping and/or controlling education policy.

²¹ *San Antonio v. Rodriguez*, 411 U.S. 1 (1973): The majority opinion stated that the appellees did not sufficiently prove education was a fundamental right, textually existing within the US Constitution.

²² U.S. Const. amend. X.

Supreme Court's declaration that education was a state, not federal responsibility, the federal government has taken a steadily increasing role in framing and influencing public educational issues. Two by-products of this growing federal influence are the national standards movement and teacher accountability.

The impetus for the current standards movement is generally agreed²³ to have been the report of The National Commission on Excellence in Education, *A Nation at Risk*.²⁴ *A Nation at Risk* incited a movement toward transforming educational accountability into a quantifiable product, capable of being measured and analyzed, similar to business profitability or manufacturing production statistics. The Report proposed American schools adopt more rigorous and measurable standards and have higher expectations for all students. As the standards movement grew, standardized assessments were created to measure student outcomes across the curriculum. While some education stakeholders were caught off guard by this new movement, many others were not surprised, due to the events which transpired throughout the previous decades. Diane Ravitch cites ten key reasons leading to the genesis of the current standards movement, dating from the 1960s.²⁵

²³ Some education stakeholders claim American education has a standards based-history that dates back to Horace Mann and the inception of the public schools. In addition to education the common person, the public schools of the mid 1800s had the additional task of integrating and providing equal opportunities for the waves of newly arrived European immigrants. In order to accomplish this, schools had to have a certain level of consistency and uniformity. DIANE RAVITCH, NATIONAL STANDARDS IN AMERICAN EDUCATION: A CITIZEN'S GUIDE 33-34 (1995).

²⁴ Nat'l Comm'n on Excellence in Educ., *supra* note 1.

²⁵ These events and reasons are 1) the lack of rigor and academic focus due to the changes made to the American public schools in the 1960s, 2) declines in student performance in the 1970s, 3) poor performance of American students on international mathematics and science tests in the 1980s, 4) the idea prevalent in the 1980s that schools should be judged by their results, i.e. student performance, 5) the continuance of large educational

The current trend in education policy is accountability. This is not a new topic, by any means, as its roots reach back to the Sputnik Era and were strengthened by the 1983 *Nation at Risk Report* released during the Reagan Administration. The newest accountability component, however, is the focus on holding teachers accountable for student learning. The attention on teachers dates back to the early days of public education during the 19th century when training and credentials were the important policy issues.²⁶ Later, during the mid Twentieth Century, the agenda shifted to “professional standards... to create a teaching ‘profession,’ modeled after law and medicine.”²⁷ The movement towards professionalizing the image of teaching suffered a set back in the 1960s and 1970s with the advent of teacher unions.²⁸ Teacher unions were modeled after trade unions, and instead of “building a genuine profession for teachers, in many ways cut against it.”²⁹ Consistency of teaching took precedence over professionalism and bred mediocrity.³⁰ Andrew J. Rotherham and Ashley LiBetti Mitchell described teachers during this

achievement gaps between different racial and ethnic groups, 6) the belief that low expectations for some groups of students were causing the weak performance of those students, 7) economic changes exacerbated by the inequality between those who were well educated and those who were not, 8) the worry that poorly educated Americans might adversely impact the nation’s productivity and global competitiveness, 9) the realization that no clear agreement existed for the definition of what students should learn and what constituted valid measures of their knowledge, and 10) the American public schools had been pulled in too many directions by too many interest groups and had therefore become unfocused and without priorities. Ravitch, *supra* note 23, at 33-34.

²⁶ Andre Rotherham & Ashley Mitchel, *Genuine Progress, Greater Challenges: A Decade of Teacher Effectiveness Reforms*, Bellwether Educ. Partners 6 (2014).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

era as being “trained and treated as interchangeable parts ...more like clerks than genuine professionals.”³¹ This perception was also suggested in *The Widget Effect*, a 2009 research report published by The New Teacher Project.³² *The Widget Effect* described “the tendency of school districts to assume classroom effectiveness is the same from teacher to teacher.”³³ *The Widget Effect* acknowledged how this perception had been in place for decades and as a result fostered “an environment in which teachers cease[d] to be understood as individual professionals, but rather as interchangeable parts.”³⁴

The national standards movement and teacher accountability are but two pieces of the larger federalization of education puzzle. Analyzing the changes in the federal government’s role and the public’s opinion of the American education system, starting with Sputnik I in 1957, places the federal government’s growing role in, what used to be local and state controlled public schools, into perspective. Unfortunately, the expanding role of the federal government in education is in large part due to negative perceptions.

It is easy for the public and the federal government to blame public schools for the country’s ills. Joel Spring, author of *The Politics of American Education*, states, “Blaming schools makes good politics because otherwise politicians might have to blame corporate managers, factory owners for moving their factories offshore, and leaders of financial

³¹ *Id.*

³² DANIEL WEISBERG, SUSAN SEXTON, JENNIFER MULHERN, & DAVID KEELING, *THE WIDGET EFFECT: OUR NATIONAL FAILURE TO ACKNOWLEDGE AND ACT ON DIFFERENCES IN TEACHER EFFECTIVENESS* 4 (2nd ed. 2009).

³³ *Id.*

³⁴ *Id.*

institutions for economic problems. . . . It is politically safe to just blame the schools.”³⁵ The federal government has been trying to “fix” the public schools since the Soviets launched Sputnik I in 1957. Perhaps it is the federal government’s growing interference combined with the negative publicity fomented by the media that has created public education’s role as a scapegoat for the ills of society. Regardless of the reason, it was this negative zeitgeist that set the stage for Illinois politicians to pass the Illinois *Performance Evaluation Reform Act* of 2010³⁶ and its counterpart Senate Bill 7.³⁷

Statement of the Problem

The Illinois *Performance Evaluation Reform Act* of 2010’s³⁸ main themes are accountability for improved student learning, consistency, a greater focus on teacher performance evaluation, and a diminished importance of teacher tenure and seniority. In response to growing state Congressional pressure, the Illinois School Code was modified to hold teachers more accountable for improving student academic performance, vis- á-vis the evaluation of teacher classroom performance. The determination of tenure status, remediation of teacher classroom performance, reductions in force,³⁹ and teacher dismissal are now

³⁵ JOEL SPRING, *THE POLITICS OF AMERICAN EDUCATION* 18 (2011).

³⁶ Illinois Performance Evaluation Reform Act of 2010, Pub. Act 096-0861 (2010).

³⁷ Illinois School Code Education Labor Relations Pension Act 2011, Pub. Act 097-0008 (2011).

³⁸ Illinois Performance Evaluation Reform Act of 2010, Pub. Act 096-0861 (2010).

³⁹ Reduction-in-Force is defined as the elimination of jobs or positions due to declined enrollment or changing programs; it is considered an honorable dismissal.

predicated on a combination of standardized and non-standardized student academic assessments and teacher performance evaluation results. This trend demonstrated a substantial departure from past practice when seniority, not student academic performance, was the primary determinant in formulating teacher employment decisions.

It is the belief of Illinois lawmakers that holding teachers accountable for student academic achievement, coupled with more a more consistent teacher classroom performance evaluation process, will increase the quality of education Illinois students are receiving.⁴⁰ Until sufficient research has been completed, it will not be known whether the data support this hypothesis.

Purpose of the Study

The purpose of this study is to examine the history of the federal government's involvement in American public education to determine whether a pattern exists to explain and understand the federal government's expanding role in public education, thereby placing into context Illinois' passage of the 2010 *Performance Evaluation Reform Act* (PERA). This legislation (coupled with the subsequent and companion legislation, Senate Bill 7) made significant changes to the teacher classroom performance evaluation process and the role teacher tenure status plays in employment decisions in Illinois. The second purpose of this study is to determine what factors are most important in determining the outcome of teacher dismissal cases involving unsatisfactory classroom performance. This will be done through

⁴⁰ Illinois Performance Evaluation Reform Act of 2010, Pub. Act 096-0861 (2010), §24A-5(1), §24A-5 (2), and §24A-5 (4) (2010).

analysis of Illinois court decisions involving teacher dismissals based upon unsatisfactory classroom performance, decided both prior to and after the implementation of PERA.

Research Questions

The research questions explored in this study are:

1. What is the relevant history of the federal government's role in public education and how has this role impacted the Illinois School Code, as it pertains to teacher performance evaluation?
2. In Illinois, what changes have occurred, relative to teacher performance evaluation and tenured teacher dismissal, as a result of the *Performance Evaluation Reform Act* (PERA) and Senate Bill 7 (SB7)?
3. Based upon a review of the legal literature and Illinois court decisions, what are the predicted future implications for Illinois' teacher performance evaluation and tenured teacher dismissal?

These questions involve an analysis of the impact of the federalization of public education and its implications for the future of public education and teacher performance evaluation and teacher dismissal.

Definitions

Accountability: a concept stating school districts, school leaders and teachers must face consequences if students do not demonstrate improved academic achievement as measured by standardized tests.

Goals 2000: an Act providing resources to states and communities to ensure all students reach their full academic potential. The Act was based on the premise students will reach higher levels of academic achievement when more is expected of them.

Nation at Risk: a report published by the National Commission on Excellence in Education in 1983, calling for core subject standards and mandating states to implement school improvement plans.

National Assessment of Educational Progress (NAEP): the largest national and continual assessment measure of what America's students know and achieve in various subject areas; results of the assessments are released as the Nation's Report Card.

No Child Left Behind (NCLB): a federal law first passed in 2002, reauthorizing the *Elementary and Secondary Education Act of 1965*; NCLB included requirements for student performance accountability and public reporting of educational results, with consequences for failing to meet the stated requirements.

Performance Evaluation Reform Act (PERA): a 2010 Illinois law requiring the use of a four tier teacher performance rating system, student academic growth data to be incorporated into the teacher performance evaluation process, and mandating a pre-qualification training program for all school leaders who evaluate classroom teaching performance.

Race to the Top: a 2009 competitive process used by the U. S. Department of Education to award federal funds to individual states. The program was designed to promote innovations and reforms in K-12 public education.

Reduction in Force: an honorable dismissal of a teacher due to economic hardships, declining enrollment, or program changes.

Remediable: an issue capable of being corrected [as used in measuring the classroom performance of Illinois public school teachers].

Senate Bill 7: an Illinois law stemming from and expanding the Illinois *Performance Evaluation Reform Act*; amending the Illinois School Code to focus more on teacher accountability and less on seniority.

Standards Movement: a movement starting in the 1980's after the publication of *A Nation at Risk*, advocating clear, measureable academic standards for what all students should know and be able to do; these standards are to guide all the other components education; three main areas for which standards have been created: academic, content, performance

Student Growth Data: the data used to measure the change in academic achievement for an individual student between two or more points in time.

Tenure: the status given to experienced teachers guaranteeing a contractual right not to have their employment terminated without just cause.

Delimitations of the Study

While this study's aim was to place the recent Illinois *Performance Evaluation Reform Act* into perspective and examine its future implications, the study focuses solely on teachers. PERA created new evaluation criteria for teachers, assistant principals, as well as principals, but this study only examines the ramifications of the new law as it pertains to Illinois public school classroom teachers.

Organization of the Study

Chapter Two of this dissertation provides a review of the relevant literature including the history of the federal government's role in education, the history of Illinois school reform and the evolution of the Illinois School Code, an explanation of the Illinois *Performance Evaluation Reform Act* and Senate Bill 7, and pertinent legal cases associated with these topics. The study's purpose was to examine the research in order to synthesize trends and project a new perspective for evaluating teacher dismissal cases involving unsatisfactory classroom teacher performance.

Chapter Three discusses, within the context of the history and purpose of the *Performance Evaluation Reform Act*, trends, themes, and relevant lessons learned. Analysis of the pertinent teacher dismissal cases for reason of unsatisfactory teaching performance will also be discussed. Chapter Four explains the current state of teacher evaluation, placing into context Illinois' teacher evaluation system. It interprets the lessons learned from the case law analysis and offers potential policy implications and compliance suggestions for Illinois school officials. Finally, future areas for study are presented.

CHAPTER 2

REVIEW OF LITERATURE

This chapter begins with an overview of the history of the federal government's involvement in education. This review chronicles the federal government's expanding role in public education and places the 2010 emergence of the Illinois *Performance Evaluation Reform Act*⁴¹ (PERA) into context. PERA mandated a reframing of the process for evaluating and dismissing Illinois public school teachers.

The historical overview begins with the attack on the American public education system prompted by the Soviet Union's 1957 launch of Sputnik I and continues through the passage of the *No Child Left Behind Act* of 2002⁴² (NCLB) and *Race to the Top* in 2009.⁴³ To better understand the changes PERA precipitated and to formulate a picture of PERA's future implications, one should have an understanding of the pertinent Illinois teacher dismissal cases, resulting as a consequence of unsatisfactory classroom teaching performance, and PERA's important changes to the Illinois School Code. This review also examines these topics.

⁴¹ Illinois Performance Reform Evaluation Act of 2010, Pub. Act 96-0861 (2010).

⁴² No Child Left Behind Act of 2001, Pub. L. No. 107-110, 20 U.S.C. § 6301 (2001).

⁴³ The American Recovery and Reinvestment Tax Act of 2009, Pub. L. No. 111 – 5, 26 U.S.C. § 1 established the Race to the Top Fund.

History of the Federal Government's Involvement in Public Education

Sputnik

On October 4, 1957, the Soviet Union became the first country to send a satellite into Earth's orbit. Sputnik I was approximately the size of a beach ball and orbited the Earth for ninety-eight minutes. The Soviet's inaugural space voyage led to the passage of the *National Aeronautics and Space Act (NASA)*⁴⁴ and to the subsequent formation of America's National Aeronautics and Space Administration (NASA). Sputnik also fomented revolutionary changes in the American education system and changes in public attitudes about education— changes with consequences felt for decades to come.⁴⁵

The public was outraged and distressed by the Soviet accomplishment and perceived the event as an American disgrace. Just four years prior, the National Manpower Council had written the *Policy for Scientific and Professional Manpower*, “warning that the Soviet Union's totalitarian methods were forcing large numbers of students to study science and engineering, which would make the Soviet Union superior in technology and military weaponry.”⁴⁶ Because it appeared the Soviets had a technological and scientific advantage over the United States, the perception that America and its schools had failed was exacerbated.

⁴⁴ National Aeronautics and Space Act of 1958, Pub. L. No. 85-568, 51 U.S.C § 20101 (1958).

⁴⁵ Alvin Powell, *How Sputnik Changed U. S. Education*, HARVARD GAZETTE ONLINE, Oct. 11, 2007, available at <http://news.harvard.edu/gazette/story/2007/10/how-sputnik-changed-u-s-education/>.

⁴⁶ Spring, *supra* note 35, at 51.

In contrast, President Eisenhower was nonplussed. In a memorandum written by Brigadier General A.J. Goodpaster, summarizing a conference with the President and several other high-ranking leaders, Goodpaster quoted Eisenhower as saying, “people are alarmed and thinking about science, and perhaps this alarm could be turned into a constructive result.”⁴⁷ In addition to creating NASA, the United States Congress used the Sputnik launch to pass the *National Defense Education Act*⁴⁸ (NDEA) in 1958. The NDEA called for an improvement in the American public education system by increasing the attention given to mathematics, science, foreign language, and vocational-technical training. In his 1961 State of the Union Address, President Eisenhower referred to the NDEA as “a milestone in the history of American education.”⁴⁹ Although the U.S. Constitution leaves public education to the state and local governmental bodies, the NDEA signaled the beginning of a trend of greater federal involvement in the public school system.⁵⁰

Americans, and specifically the media, blamed the public education system for not creating scientists who were intelligent enough to be the first to put a satellite into orbit.

⁴⁷ *Memorandum from the Conference with the President on American Science Education and Sputnik*, (October 15, 1957) available at http://www.eisenhower.archives.gov/research/online_documents/sputnik.html (last visited Aug. 14, 2012).

⁴⁸ National Defense Education Act of 1958, Pub. L. No. 85-864, 20 U.S.C. § 401 (1958).

⁴⁹ Dwight D. Eisenhower, President, *State of the Union Address, Jan. 12, 1961*, available at <http://www.infoplease.com/t/hist/state-of-the-union/173.html> (last visited Aug. 14, 2012).

⁵⁰ The NDEA “sent an unprecedented infusion of federal funds into the public schools” and the Eisenhower administration “expanded the federal role in education.” ADAM NELSON AND ELLIOT WEINBAUM, *FEDERAL EDUCATION POLICY AND THE STATES, 1945 – 2009: A BRIEF SYNOPSIS* 12 & 7 (2009).

Although a little known fact at the time, America could have launched its own satellite over a year sooner than the launch of Sputnik I. A declassified, confidential memorandum dated October 9, 1957 and written by Brigadier General Goodpaster stated as much.⁵¹ Secretary Quarles, when asked by Eisenhower if “Redstone [the Army’s satellite program] could have been used and could have placed a satellite in orbit many months ago,” answered “there was no doubt that the Redstone, had it been used, could have orbited a satellite a year or more ago.”⁵² Instead of focusing on the launch of the first satellite, Eisenhower was secretly developing spy satellites which he felt were much more important than launching a “beach ball” satellite into orbit.⁵³

In fact, Eisenhower was pleased the Soviets were the first into space. It established the notion of ‘freedom of space’ which would greatly benefit the United States. Eisenhower had worried if the United States sent a satellite into space prior to the Soviets, it would have been perceived as an aggressive move. Sputnik I turned space exploration into a neutral event.

After Sputnik I, perhaps because the American public was unaware of both the U.S. spy satellite development program and the fact the United States indeed had the capability to launch the first satellite, public opinion regarding the effectiveness of the Nation’s public schools declined precipitously. The media was filled with articles entitled “The Decline of America,” “How Far Behind are We and How Long Will it Take to Catch Up?” and “Are We Americans

⁵¹ *Memorandum from the Conference with the President on Oct. 8, 1957*, located in the Dwight D Eisenhower Library, ARC identifier 186623, available at http://www.archives.gov/research/online_documents/sputnik/10_9_57_Early_Memo.pdf (last visited Aug. 14, 2012).

⁵² *Id.*

⁵³ Gerald W. Bracey, *The First Time Everything Changed*, 89 THE PHI DELTA KAPPAN 119, 120-121 (2007).

Going Soft?”⁵⁴ Articles, such as “Crisis in Education,” the cover story of *Life* magazine in March 1958, reported Russian schools to be far superior to our American schools.⁵⁵ Arthur Bestor, a well respected academic historian and professor of history, believed the American education system in general, and specifically high schools, were becoming mass institutions catering to the lowest common denominator, instead of focusing on traditional education for the intellectually superior.⁵⁶ Bestor’s post Sputnik article in *US News and World Report*, “What Went Wrong with U. S. Schools”⁵⁷ was the anthem the media kept playing.⁵⁸ Gerald Bracey, in his 2007 report on the condition of public education, stated “Sputnik set a nasty precedent that has become a persistent tendency: when a social crisis – real, imagined, or manufactured – appears, schools are the scapegoat of choice; when the crisis is resolved, they receive no credit.”⁵⁹

⁵⁴ *The New Republic* published “The Decline,” the *Atlanta Constitution* published “How Far Behind,” and *The New York Times Magazine* published “Are We Soft?”

⁵⁵ Howard Sochurek and Stan Wayman, *Crisis in Education: Exclusive Pictures of a Russian Schoolboy vs. his U.S. Counterpart*, LIFE MAGAZINE (Mar. 24, 1958).

⁵⁶ Arthur Bestor is also a revered and outspoken opponent of the popular “progressive education” movement of the fifties. Arthur Bestor, *Future Directions of American Education*, 35 THE PHI DELTA KAPPAN 373 (1954).

⁵⁷ Arthur Bestor, *What Went Wrong With US Schools*, US NEWS AND WORLD REPORT 68-80 (1958).

⁵⁸ Wolfgang Saxon, *Arthur Bestor, a Leading Scholar On the Constitution, Dies at 86*, N. Y. TIMES, Dec. 17, 1994, available at <http://www.nytimes.com/1994/12/17/obituaries/arthur-bestor-a-leading-scholar-on-the-constitution-dies-at-86.html?module=Search&mabReward=relbias%3Arl> (last visited Aug. 14, 2012).; Bracey, *supra* note 53, at 120.

⁵⁹ Bracey, *supra* note 53, at 123.

Some pundits tried to refute the critics' claims, but to no avail. The Executive Secretary of the National Association of Secondary School Principals, Paul Elicker, offered data to disprove the claim that Americans were less educated in the mid fifties than they were in prior years.⁶⁰ Even though the data were compelling, the media controlled the mass message of U.S. education failure. Biased and incorrect data were highlighted and vague definitions of words such as "proficient" were debated, but all of the attempts to disprove the media's sweeping claims of American educational inferiority went largely unheard. In addition, American public schools received no accolades, or even the slightest amount of credit when the United States landed the first man on the moon.⁶¹ This was a feat no other country was able to accomplish, and America did so despite the perceived inferior education system. "No one suggested that improved schools might have had anything to do with the mission's success."⁶²

Even though the media's rhetoric resonated with the American public, Sputnik did not signal a breakdown in the American education system. During the 1950's, Americans were not lacking in scientific knowledge, technology, or in education. These skills were being utilized under top-secret conditions, so the public was unaware. Nonetheless, Sputnik changed America's priorities and began a pattern of increased federal involvement in education and the use of America's public schools as a convenient "'whipping boy ... assigning guilt to [those] with the least power."⁶³

⁶⁰ *Id.* at 122.

⁶¹ *Id.* at 123.

⁶² *Id.*

⁶³ *Id.*

The Civil Rights Act and The Coleman Report

On the heels of Sputnik came the *Civil Rights Act of 1964*.⁶⁴ This Act required a research study to be conducted within two years, to determine “where educational resources in public educational institutions were lacking.”⁶⁵ Due to the Act, the focus of educational program evaluation “shifted to program outputs as the mandate for tracking education program effectiveness” from the previous criteria of resource inputs.⁶⁶ The 1966 *Equality of Educational Opportunity* report, commonly referred to as the *Coleman Report*, was the result of the research required by the *Civil Rights Act*.⁶⁷

The *Coleman Report* highlighted how the quality of individual teachers impacted student success. While the *Coleman Report* found the strongest indicator of student achievement was the socio-economic level of students’ families, the *Coleman Report* also found of all the in-school factors, the quality of a student’s teacher mattered the most.⁶⁸ This conflict in findings has been generally ignored, as politicians and the public have focused

⁶⁴ The Civil Rights Act of 1964, Pub. L. No. 88 – 352, 42 U.S.C. § 2000a (1964).

⁶⁵ JIM HORN & DENISE WILBURN, *THE MISMEASURE OF EDUCATION* 37 (2013).

⁶⁶ *Id.*

⁶⁷ JAMES S. COLEMAN ET AL., *EQUALITY OF EDUCATIONAL OPPORTUNITY* 22 (1966). Although the results of the Coleman Report indicated many factors influenced student achievement, the strongest indicator of student achievement was the socio-economic level of the students’ families. Coleman et al state, “the composition of the student bodies [had] a strong relationship to the achievement of [African American] and other minority pupils.”

⁶⁸ Coleman, *supra* note 67, at 22.

solely on teacher quality, as evidenced by the plethora of articles on the topic.⁶⁹ The numerous factors affecting student academic success are beyond either teacher or school control and are both politically and financially difficult to surmount and, as such, have been disregarded. Joel Spring, author of *The Politics of American Education*, offered the following explanation for this phenomena, “Blaming schools makes good politics because otherwise politicians might have to blame powerful and wealthy interests that can use their influence to thwart political ambitions. It is politically safe to blame the schools.”⁷⁰

In a March of 1970 speech entitled “Special Message to the Congress on Education Reform,” President Richard Nixon stated, “American education is in urgent need of reform.”⁷¹ He called for a “re-examination of our entire approach to learning” and a “thoughtful redirection to improve our long-range provisions for financial support of schools, [and] for [the] more efficient use of the dollars spent on education.”⁷² Relying upon the *Civil Rights Act of 1964*⁷³ and the *Coleman Report*,⁷⁴ the speech “called for a new focus on school outputs rather

⁶⁹ *E.g.*, in 2014 *Time* published “Rotten Apples: It’s Nearly Impossible to Fire a Bad Teacher;” in 2013 the *Seton Hall Law Review* published “If Students Aren’t Learning, Are Teachers Teaching?;” in 2013 the New Teacher Center published “Cultivating Effective teachers;” in 2008 the *Phi Delta Kappan* published “Sorting out teacher Quality;” in 2004 Douglas Reeves published the book *Accountability for Learning*” and in 1998 “Policy Implications of Long-Term Teacher Effects on Student Achievement” was presented at the Annual Meeting of the American Educational Research Association.

⁷⁰ Spring, *supra* note 35, at 18.

⁷¹ The American Presidency Project, Richard Nixon, President, Special Message to the Congress on Education Reform, (Mar. 3, 1970), <http://www.presidency.ucsb.edu/ws/?pid=2895> (last visited Aug. 14, 2012).

⁷² *Id.*

⁷³ The Civil Rights Act of 1964, Pub. L. No. 88 – 352, 42 U.S.C. § 2000a (1964).

⁷⁴ Coleman, *supra* note 67, at 22.

than inputs.”⁷⁵ President Nixon stated, for “years the fear of ‘national standards’” has held the country back,⁷⁶ and he advocated for local school districts to obtain “dependable measures of just how well its school system is performing.”⁷⁷ In this speech, President Nixon formulated what he termed as a “new concept” and called for accountability on the part of both school administrators and teachers.⁷⁸ Due to this speech, Jim Horn and Denise Wilburn, authors of *The Mismeasure of Education*, refer to 1970 as “the beginning of the new era in which ‘accountability’ would bleed into almost every thread of the schooling fabric.”⁷⁹

Sputnik, combined with the growing diatribe against the public education system, set the stage for the Supreme Court to decide a landmark case that declared education was *not* a fundamental right guaranteed by the United States Constitution. *San Antonio Independent School District v. Rodriguez*⁸⁰ set a precedent and cemented the responsibility of educating the nation’s youth with state and local officials.

In 1968 the San Antonio Independent School District was sued by Demetrio P. Rodriguez. Rodriguez, the parent of a Texas public school student, claimed to represent a class of school children throughout Texas who were members of minority groups, and/or who were

⁷⁵ Horn & Willburn, *supra* note 65, at 43.

⁷⁶ The American Presidency Project, Richard Nixon, President, Special Message to the Congress on Education Reform, (Mar. 3, 1970), <http://www.presidency.ucsb.edu/ws/?pid=2895> (last visited Aug. 14, 2012).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Horn & Willburn, *supra* note 65, at 45.

⁸⁰ *San Antonio Indep. Sch. Dist. V. Rodriguez*, 411 U.S. 1 (1973).

poor and resided in school districts having a low property tax base. The class action lawsuit⁸¹ compared Edgewood, the Texas school district where the Rodriguez child attended school – one of the poorest in the state – to neighboring Alamo Heights – the most affluent school district in the San Antonio area. Edgewood parents were frustrated by the lack of supplies and qualified teachers in their school district. Prompted by this frustration, approximately 400 students walked out of school and held a demonstration at the district administrative office. The walkout was the impetus for parent mobilization and the filing of the lawsuit.⁸²

The parents filed their lawsuit in the United States District Court for the Western Division of Texas. The complaint asserted Edgewood's per pupil property value was \$5,429⁸³ (the lowest in the state) as compared to \$45,095 (the highest in the state) in Alamo Heights.⁸⁴ The parents further pointed out, Alamo Heights, a primarily Anglo community, "had 25% lower property tax rates, but were able to spend literally twice the per capita amount on their kids"⁸⁵ than Edgewood, which was a 96% Mexican and African American community. The lawsuit asserted the wealthier children's education was being subsidized by the less affluent families, instead of the other way around. The parents explained Edgewood's per-pupil spending was \$231 and represented the state's lowest combined revenue per child, while

⁸¹ A class action lawsuit is a lawsuit allowing a large number of people with a common interest in a matter to sue as a group.

⁸² Cynthia E. Orozco, *Rodriguez v. San Antonio ISD*, *Texas State Historical Association, Handbook of Texas Online* (June 18, 2013), available at <http://www.tshaonline.org/handbook/online/articles/jrrht> (last visited Sept. 5, 2012).

⁸³ Note: the dollar figures cited are in 1971 dollars, not current dollars.

⁸⁴ *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 282 (W.D. Tex. 1971).

⁸⁵ Michael Rebell, *Rodriguez Revisited: An Optimist's View*, *ANN. SURV. AM. L.* 289, 291 (1998).

Alamo Height's per pupil spending was \$543,⁸⁶ the state's highest combined revenue per child.⁸⁷

The parents argued two main points,⁸⁸ the Fourteenth Amendment to the Constitution made education a fundamental right and the poor Mexican and African American families of Edgewood were a "suspect class"⁸⁹ and deserved Fourteenth Amendment protection. The District Court found merit in both claims, and ruled in favor of the parents and their children.⁹⁰ The District Court concluded the Texas system of financing public education "discriminate[d] on the basis of wealth by permitting citizens of affluent districts to provide a higher quality education for their children ... [and] that the plaintiffs ha[d] been denied equal protection of the laws under the Fourteenth Amendment [Equal Protection Clause]⁹¹ to the United States

⁸⁶ Note: the dollar figures cited are in 1971 dollars, not current dollars.

⁸⁷ *Rodriguez*, 337 F. Supp. at 282.

⁸⁸ *Orozco*, *supra* note 82.

⁸⁹ Suspect or protected class is defined as a class of individuals who have been historically subject to discrimination and constitute a minority. The most common suspect classes are based on race and national origin. Those that qualify for suspect class designation will be afforded strict scrutiny (extra legal protection, *see* note 157). The Court ruled being poor did not qualify for the protected distinction of suspect class. "The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

⁹⁰ *Rodriguez*, 337 F. Supp. at 281.

⁹¹ U.S. Const. amend. XIV, § 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

Constitution.”⁹² School officials appealed and because the Supreme Court “noted probable jurisdiction to consider the far-reaching Constitutional questions presented”⁹³ by the case, it elected to “pull up” the case directly;⁹⁴ thereby bypassing the Fifth Circuit.

Before the High Court, the parents argued three main points: 1) they represented a class of definably poor people who were unable to pay for, and therefore denied, a quality education for their children; 2) the lack of a quality education constituted interference with a fundamental right; and 3) due to the disparities in property tax income, children in less affluent districts were being discriminated against.⁹⁵ This meant the children of Edgewood represented a specific group of people who were denied a quality public school education solely on the basis that they were too poor to pay for it. The parents argued this lack of quality education amounted to denial of a fundamental right, which constituted discrimination. These three points formed the essential question of the case. Did the Texas public school finance system violate the

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

⁹² *Rodriguez*, 337 F. Supp. at 280.

⁹³ *Rodriguez*, 411 U.S. at 4.

⁹⁴ *Id.*; *See also*, Supreme Court Rule 18: “A direct appeal from a decision of a United States district court [can be] authorized by law” – rules of the Supreme Court accessed from the Supreme Court website, <http://www.supremecourt.gov/ctrules/2010RulesoftheCourt.pdf>.

⁹⁵ *Rodriguez*, 411 U.S. at 23, 29, 47.

Fourteenth Amendment's Equal Protection Clause by failing to distribute funding equally among its school districts?⁹⁶ The District Court had found it did.

By a 5-4 margin, the Supreme Court reversed the District Court's decision. The High Court held the school-financing system based on local property taxes was not a constitutional violation.⁹⁷ As rationale for this decision, the Supreme Court found the Texas school financing system was not unlike the financing systems used by many other states.⁹⁸ The Court further observed the funding system was not "so irrational as to be invidiously discriminatory."⁹⁹ The majority opinion, written by Justice Powell, stated absolute equity in education funding was not required. The Court noted the Constitution was not intended to provide judicial cures for every ill that plagued society.¹⁰⁰ The majority also ruled education was *not* a fundamental right, protected by the United States Constitution.¹⁰¹ Justice Powell explained, "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we

⁹⁶ The Oyez Project at IIT Chicago-Kent College of Law, *San Antonio Independent School District v. Rodriguez*, U. S. Supreme Court Media Oyez (June 9, 2013) available at http://www.oyez.org/cases/1970-1979/1972/1972_71_1332 (last visited Sept. 5, 2012).

⁹⁷ *Rodriguez*, 411 U.S. at 4. The Court decided the financing of public education is a state, not federal issue.

⁹⁸ The High Court cited *Griffin v. Illinois*, *Douglas v. California*, *Williams v. Illinois*, and *Bullock v. Carter* to "conclude that the Texas system does not operate to peculiar disadvantage of any suspect class." *Rodriguez*, 411 U.S. at 28. *Griffin v. Illinois*, 351 U.S. 12 (1956), *Douglas v. California*, 372 U.S. 353 (1963), *Williams v. Illinois*, 399 U.S. 235 (1970), and *Bullock v. Carter*, 405 U.S. 134 (1972).

⁹⁹ *Rodriguez*, 411 U.S. at 55.

¹⁰⁰ *Id.* at 32.

¹⁰¹ *Id.* at 35.

find any basis for saying it is implicitly so protected.”¹⁰² After concluding there was both no fundamental right to education in the U. S. Constitution, and the state’s funding system did not systematically discriminate against all poor people in Texas,¹⁰³ “the Court refused to apply strict scrutiny¹⁰⁴ to the parental claim.

Justice Brennan’s dissent argued education was a fundamental right because it was the route by which people gained an opportunity to participate in the electoral process. He further declared education was “inextricably linked” to many of the rights given to citizens. He therefore asserted, “the Texas school-financing scheme [wa]s constitutionally invalid.”¹⁰⁵ Justice White, in his dissent joined by Douglas and Brennan, stated, “In my view, the parents and children in Edgewood, and in like districts, suffer from an invidious discrimination violative of the Equal Protection Clause”¹⁰⁶ Justice Marshall’s dissent referenced *Brown v Board of Education*¹⁰⁷ and was joined by Justice Douglas. Justice Marshall stated,

¹⁰² *Id.*

¹⁰³ The Oyez Project at IIT Chicago-Kent College of Law, *San Antonio Independent School District v. Rodriguez*, U. S. Supreme Court Media Oyez (June 9, 2013) available at http://www.oyez.org/cases/1970-1979/1972/1972_71_1332 (last visited Sept. 5, 2012).

¹⁰⁴ Strict scrutiny is one of the three tests used when dealing with the Equal Protection Clause of the 14th Amendment. It is defined as a form of judicial review that courts use to determine the constitutionality of certain laws. In order for strict scrutiny to exist, the law must further a compelling governmental interest and be narrowly tailored (crafted in the least restrictive manner to accomplish its objective and create the least amount of difficulty). Both of these conditions must be met in order for strict scrutiny to exist. Strict scrutiny is usually applied in cases of fundamental rights or for protected.

¹⁰⁵ *Rodriguez*, 411 U.S. at 63.

¹⁰⁶ *Id.*

¹⁰⁷ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

the majority's holding can only be seen as ... an unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens... In my judgment, the right of every American to an equal start in life, so far as the provision of a state service as important as education is concerned, is far too vital to permit state discrimination on grounds as tenuous as those presented by this record.¹⁰⁸

San Antonio v. Rodriguez was a landmark decision with far reaching implications on both the financing of public education system and upon equality issues between the poor and the affluent. Michael Rebell, author of *Rodriguez Revisited: An Optimist's View*, stated, the Court "had to do something about making the possibilities that were raised by *Brown* [*Brown v Board of Education*] meaningful."¹⁰⁹ Rebell continued by suggesting *Rodriguez* represented the opportunity to do so.¹¹⁰ In addition, school finance reform had not been addressed in Texas since 1949¹¹¹ and it appeared as if the Court had its opportunity to correct past injustices and set the American public education system on a new path of equality, but this was not the case. Justice Thurgood Marshall, one of the dissenting justices in *San Antonio v. Rodriguez*, expressed his feelings about the decision: It was "a retreat from our historic commitment to equality of educational opportunity."¹¹² Later, the parents were denied a rehearing¹¹³ and the matter was closed.

Though *San Antonio* signaled the judiciary's retreat from the educational policy arena, both the executive and legislative branches of the federal government opted to pursue a different path.

¹⁰⁸ *Rodriguez*, 411 U.S. at 70-71.

¹⁰⁹ Rebell, *supra* note 85, at 291.

¹¹⁰ *Id.*

¹¹¹ Orozco, *supra* note 82.

¹¹² *Rodriguez*, 411 U.S. at 71.

¹¹³ *Id.* at 959.

A Nation at Risk

In August of 1981, due to concerns over “the widespread public perception that something [was] seriously remiss in the American educational system,”¹¹⁴ Secretary of Education, T.H. Bell, created the National Commission on Excellence in Education. Interestingly, the Commission was formed as a response to *perceptions* about the education system rather than the *reality* of the situation.¹¹⁵ Nonetheless, the Commission was directed “to examine the quality of education in the United States and to make a report to the Nation.”¹¹⁶ The report, commonly known as *A Nation at Risk*, addressed seven main areas: 1) the quality of learning and teaching in the Nation’s schools; 2) the quality of curricula, standards, and expectations of American schools as compared to those of several other advanced countries; 3) the relationship between university and college admission standards and the quality of high school standards; 4) the college preparation programs which consistently produce students who excel at the college level; 5) the major changes occurring in American society and education (from 1956 to 1981) which have had a major impact on educational achievement; 6) the information garnered from testimony and hearings to elucidate the issue of increasing the academic excellence of the Nation’s schools; and 7) the undertaking of any and all actions necessary to understand the issues at hand.¹¹⁷

¹¹⁴ Nat’l Comm’n on Excellence in Educ., *supra* note 1, at 1.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 39 - 40.

At risk, according to the 1983 Report, were America's "international standing," her preeminent place in the "markets," and her "position in the world."¹¹⁸ The report specifically mentioned Japan, South Korea, and Germany as America's key competition for economic superiority. Although roughly three decades had passed since Sputnik I, the messages of concern remained constant: the existence of American society was in peril, and the schools were to blame. The "Soviet threat used in the postwar [and Sputnik] era was not invoked by the National Commission, but the fear of successful foreign competition in the 'global village'"¹¹⁹ became the new impending danger, according to *A Nation at Risk*.

A Nation at Risk listed several "indicators of the risk" of America's educational inferiority. With two exceptions, the only source cited for the data set forth in the Report was "testimony received by the Commission."¹²⁰ The Commission listed numerous deficiencies with the American school system, and wanted the public to believe these were new problems needing immediate attention.¹²¹ However, the Report offered no support or citations to prove the inadequacies were indeed real, instead of merely *perceived* weaknesses. For example, the Report stated "secondary school curricula have been homogenized, diluted, and diffused to the point that they no longer have a central purpose. In effect, we have a cafeteria style curriculum

¹¹⁸ *Id.* at 6.

¹¹⁹ Erwin Johanningmeier, *A Nation at Risk and Sputnik: Compared and Reconsidered*, 37 AM. EDUC. HIST. J. 347, 354 (2010).

¹²⁰ Nat'l Comm'n on Excellence in Educ., *supra* note 1, at 8.

¹²¹ For example, the Report lamented "secondary school curricula have been homogenized [and] diluted," "the amount of homework for high school seniors has decreased," and "the average school provided about 22" hours of academic instruction per week. Nat'l Comm'n on Excellence in Educ., *supra* note 1, at 18, 19, 22.

in which the appetizers and desserts can easily be mistaken for the main courses.”¹²² The Commission wanted the public to believe the deteriorating condition of America’s public schools, was a *new* development.¹²³

In fact, educational critics had been using this line of thought for decades. In 1954, Arthur Bestor wrote, “the standard high-school diploma should be awarded only to the ones who have earned it through conscientious effort in the basic intellectual disciplines of science, mathematics, history, English, and foreign languages.”¹²⁴ He continued with, “a school whose curriculum puts the trivia of [non-academic] education on par with rigorous training in the intellectual disciplines is not vindicating democracy”¹²⁵ and is not doing justice to either students or their future employers.

The perceptions the Report relied upon, and wanted the public to believe, were in fact created by the media. Since its inception, the media has influenced the way the American public has thought about education. The media, “for the previous forty years, created in the public mind a reservoir of tacit [negative] knowledge that easily came to the fore when *A Nation at Risk* presented those familiar arguments and claims.”¹²⁶ The public accepted the negative mantra of American schools not being good enough. For decades the Phi Delta Kappa/Gallup Poll has collected data regarding attitudes towards public schools, and for years

¹²² Nat’l Comm’n on Excellence in Educ., *supra* note 1, at 18.

¹²³ *E.g.*, Johanninger, *supra* note 119, at 354.

¹²⁴ Bestor, *supra* note 56, at 377.

¹²⁵ *Id.* at 378.

¹²⁶ Johanninger, *supra* note 119, at 348.

the results have shown a growing disparity between the public's view of its own local schools and its views of the state of national education.¹²⁷

In 1983, the year *A Nation at Risk* was published, the percentage of citizens who “graded” their *local* public schools as an “A” or a “B” was 31%, compared to 19% of the same group who “graded” the Nation’s schools as an “A” or a “B.” This variance grew to the point, where in 2011, 51% of the public “graded” the *local* schools with an “A” or a “B,” as compared to 17% awarding the Nation’s schools the same grades.¹²⁸ In 2011, for the first time, the Gallup Poll queried respondents on why they thought there was a difference in the two pieces of data. Forty-three percent of those polled answered they had a “greater knowledge of [their] immediate community and local schools” and seventeen percent reported the reason for the difference was pride in their local community and/or no one wanted to “look bad.” “Better community and parental involvement at the local level” and “other schools deal with high poverty and insufficient funds” accounted for an additional ten percent of those responding to the question.¹²⁹ (The poll did not explain the reasoning behind the remaining thirty percent of respondents.) Almost half of those polled believed their first hand knowledge of local schools was the main factor in the grading difference. Joel Spring, author of *The Politics of American Education*, postulated “the source of information about the nation’s schools was probably the

¹²⁷ George H. Gallup, *The 16th Annual Gallup Poll of the Public's Attitudes Toward the Public School*, 66 THE PHI DELTA KAPPAN 23, 24-26 (1984).

¹²⁸ George H. Gallup and Stanley Elam, *The 15th Annual Gallup Poll of the Public's Attitudes Toward the Public Schools*, 65 THE PHI DELTA KAPPAN 33, 35 (1983) & William J. Bushaw & Shane J. Lopez, *The 43rd Annual Phi Delta Kappa/Gallup Poll of the Public's Attitudes Toward the Public Schools*, 93 THE PHI DELTA KAPPAN 9, 17 (2011).

¹²⁹ Bushaw, *supra* note 128, at 19.

media.”¹³⁰ “Rather than informing the public, the media tend to represent the issues as framed by the candidates of the two main political parties.”¹³¹

In *A Nation at Risk* the Commission reported findings and recommendations for four central features of the educational process -- content, expectations, time, and teaching. With regard to the curriculum or the content of what is being taught, the Commission “examined patterns of courses high school students took from 1964 to 1969 compared with course patterns from 1976 to 1981”¹³² to create three main conclusions regarding high schools. (Elementary schools were not examined and/or discussed.) In addition to assertions of watering down the curriculum, the Report stated from 1964 to 1979 there was a 30% increase in the number of students taking general coursework, as opposed to vocational or college preparatory coursework.¹³³ The second finding about content addressed the classes students were taking. The Report bemoaned the fact that not enough students enrolled in, and completed, courses such as French, Algebra II, geography, and calculus. Lastly, the Report stated twenty-five percent of the courses in which general-track students enrolled were non-academic (e.g., physical education, health, remedial English and remedial mathematics, and life training).

The recommendations for the content areas concentrated on high school graduation requirements. Without support or elaboration, the Report referred to the “New Basics” as the required foundation needed by all high school students. Specifically, the Report suggested all

¹³⁰ Spring, *supra* note 35, at 21.

¹³¹ Gerstl-Pepin, *supra* note 2, at 50.

¹³² Nat’l Comm’n on Excellence in Educ., *supra* note 1, at 18.

¹³³ *Id.*

high school graduates take four years of English, three years of mathematics, three years of science, three years of social studies, and one-half year of computer science. In addition, for those students who were college bound, the Report suggested two years of foreign language.¹³⁴

With regard to expectations (defined by the Report as “the level of knowledge, abilities, and skills” all students should possess and “time, hard work, behavior, self-discipline, and motivation that are essential for high student achievement”¹³⁵), the Report noted a plethora of deficiencies in the current education system. Close examination of these deficiencies revealed several of the items related more to the area of content, than to performance expectations. The overall theme of these inadequacies was a lack of rigor. The decreasing amount of time spent on homework, the dwindling time spent on mathematics and science courses, the diminishing of high entrance requirements to colleges and universities, and the decline in textbook quality were all areas noted as areas in need of improvement.¹³⁶ To correct these problems, the Report recommended the adoption of more rigorous (and measurable) standards and expectations for high school students. It also proposed colleges and universities raise their admission requirements. In addition, the Report proposed all high school students take a standardized test of achievement – one piece of a nationwide system of state and local standardized tests.¹³⁷

¹³⁴ *Id.* at 24.

¹³⁵ *Id.* at 19.

¹³⁶ *Id.* at 19–21.

¹³⁷ *Id.* at 28.

There were three “disturbing facts”¹³⁸ regarding the usage of time noted by the Report: “1) compared to other nations, American students spent much less time on school work; 2) time spent in the classroom and on homework was often used ineffectively; and 3) schools were not doing enough to help students develop either the study skills required to use time well or the willingness to spend more time on school work.”¹³⁹ The average American school day was six hours long, as compared to European schools with an eight-hour day. Similarly, the number of days American students attended school was also fewer than the days European students spent in school: 180 days as compared to 220 days.¹⁴⁰ The Report suggested three alternatives to alleviate these problems: a longer school day, better use of the existing school day, and a longer school year. All of these options included more homework, instruction in study skills, and better classroom management.

The last area addressed by the Report was teaching. Overall, the Report “found that not enough of the academically able students are being attracted to teaching; that teacher preparation programs need[ed] substantial improvement; that the professional working life of teacher [wa]s on the whole unacceptable; and that a serious shortage of teachers exist[ed] in key fields.”¹⁴¹ In addition to the preponderance of academically weak students entering the teaching profession, the Report stated the training teachers received was too heavily focused on methodologies and not enough attention was given to acquiring subject area content

¹³⁸ Nat’l Comm’n on Excellence in Educ., *supra* note 1, at 21.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 22.

knowledge. The Report also noted a shortage of teachers, especially in math and science, and the inadequate salaries teachers received. The Report's recommendations for teaching consisted of seven parts, all of which focused on improving teacher preparation and making the profession of teaching more rewarding and respected.

While the Report did not address "leadership and fiscal support" in the "Findings" section, it did make a recommendation on the topic. Simply put, the Report stated the public should hold educators and politicians responsible for achieving all of the listed recommendations, and the American citizens should provide the financial support to achieve the required recommendations.¹⁴² Furthermore, the Report declared "the Federal Government has *the primary responsibility* to identify the national interest in education," but "principals and superintendents must play a crucial leadership role in ... support for the reforms [it] propose[d]."¹⁴³

The Report professed the desire to establish a "Learning Society [to create] educational opportunities extending far beyond the traditional institutions of learning, our school, and colleges ... [to] life-long learning."¹⁴⁴ This small section focused on life-long learning was outweighed by the numerous references and inferences to the need for "skilled workers," "well-trained men and women," "strong economy," and "trained capability."¹⁴⁵ The Report asserted what was truly at risk was America's ability "to keep and improve on the slim competitive edge

¹⁴² *Id.* at 32.

¹⁴³ *Id.*

¹⁴⁴ Nat'l Comm'n on Excellence in Educ., *supra* note 1, at 14.

¹⁴⁵ *Id.* at 6, 7, 10, 17.

it still retained in world markets.”¹⁴⁶ Although this concept of human capital dates back to the Colonial era and Thomas Jefferson,¹⁴⁷ it was not until the National Manpower Council revamped the concept in the 1950s that the idea of a human capital paradigm became politically popular.¹⁴⁸

The notion of the human capital paradigm gained public popularity in the late forties when “‘major industrial and professional groups’ were already beginning to ‘feel the manpower pinch, particularly with respect to highly educated persons.’”¹⁴⁹ After Sputnik, the focus on human capital needs increased. “Public schools were to produce the knowledgeable human capital the nation needed to maintain parity with, if not superiority over the Soviet Union in the arms race and then to win the race to the moon.”¹⁵⁰ Sputnik opened the door for a widespread belief in, and the use of, this paradigm. “After the successful launch of Sputnik I ... national leaders then had a receptive audience for their argument that the nation needed,”¹⁵¹ as Jefferson

¹⁴⁶ *Id.* at 7.

¹⁴⁷ In “A Bill for the More General Diffusion of Knowledge,” one of three proposals Thomas Jefferson wrote in 1779 on the topic of education, Jefferson argued for the creation of free public education for the benefit of humankind. “Those persons, whom nature hath endowed with genius and virtue, should be rendered by liberal [arts] education ... to guard the sacred deposit of the rights and liberties of their fellow citizens ... to become useful instruments for the public.” THOMAS JEFFERSON, *CRUSADE AGAINST IGNORANCE: THOMAS JEFFERSON ON EDUCATION* 83-84 (Gordon C. Lee ed., 1961).

¹⁴⁸ Spring, *supra* note 35, at 51.

¹⁴⁹ Johanningmeier, *supra* note 119, at 349.

¹⁵⁰ *Id.* at 351.

¹⁵¹ *Id.*

stated, “instruments useful for the public.”¹⁵² *A Nation at Risk* informed us it was “essential ... for government at all levels to affirm its responsibility for nurturing the Nation’s intellectual capital.”¹⁵³

Another central theme of *A Nation at Risk* was equity. After a brief introduction, the Report stated, “All, regardless of race or class or economic status, are entitled to a fair chance and to the tools for developing their individual powers of mind and spirit to the utmost.”¹⁵⁴ This statement seems to suggest the National Commission and the Secretary of Education believed a right to an education existed in our country. However, in 1973 as noted earlier, the U.S. Supreme Court had previously rejected the existence of this “fundamental right” under the U.S. Constitution.¹⁵⁵ Although the *Nation at Risk* report claimed the issue of equity was at the heart of the matter, the specifics of the Report did not address any equity issues. No distinctions were made between gender, races, or socio-economic classes. All students were aggregated together, so the issue of equity was only superficially addressed.

The focus on excellence was also a central theme of the Report. However, the lack of specific definitions rendered this theme somewhat impotent. Terminology such as

¹⁵² Jefferson, *supra* note 147, at 84.

¹⁵³ Nat’l Comm’n on Excellence in Educ., *supra* note 1, at 17.

¹⁵⁴ *Id.* at 8.

¹⁵⁵ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973): The Supreme Court held that a school-financing system based on local property taxes was not an unconstitutional violation of the Fourteenth Amendment’s equal protection clause. The majority opinion stated that the appellees did not sufficiently prove that education is a fundamental right, that textually existed within the US Constitution, and could thereby (through the 14th Amendment to the Constitution), be applied to the several States.

“mediocrity,” “higher order intellectual skills,” “achievement,” “rigorous,” and “difficulty”¹⁵⁶ were used without any explanation of what these words meant in the context of the Report. The Report defined “excellence” as “performing on the boundary of individual ability in ways that test and push back personal limits ... [and] high expectations and goals for all learners.”¹⁵⁷ This definition appeared to be solid, but when critically analyzed, the meanings of “pushing back personal limits,” “boundaries of individual ability” and having “high expectations” were nebulous.¹⁵⁸ Without a stated, specific definition of “excellence” and the other key terms, it was difficult – if not impossible – to have intelligent discourse regarding the state of public education.¹⁵⁹

The pattern of blaming the public schools for society’s ills and decrying their subpar performance, began with Sputnik in the fifties and continued with *A Nation at Risk* into the eighties. Public schools remained the “scapegoat of choice.”¹⁶⁰ Joel Spring explained, “Blaming schools makes good politics because otherwise politicians might have to blame corporate managers, factory owners, ... and leaders of financial institutions for economic

¹⁵⁶ Nat’l Comm’n on Excellence in Educ., *supra* note 1, at 5, 9, 14, 19.

¹⁵⁷ *Id.* at 12.

¹⁵⁸ Bill Tierney, *The Nation is “Really, Really, Really,” At-Risk: U. S. Education Reform and National Security*, 21ST CENTURY SCHOLAR, Sept. 10, 2012, available at <http://21stcenturyscholar.org/2012/09/10/the-nation-is-really-really-really-at-risk-u-s-education-reform-and-national-security/>.

¹⁵⁹ Bracey, *supra* note 53, at 125.

¹⁶⁰ *Id.* at 123.

problems. These are powerful and wealthy interests that can use their influence to thwart political ambitions. It is politically safe to just blame the schools.”¹⁶¹

The Report to the Nation on the Imperative for Educational Reform, commonly referred to as *A Nation at Risk*, used overly general statements to reiterate the sentiments educational critics have been using for over four decades, in order to capitalize on the emotions of the public and its erroneous *perceptions* regarding the state of American public education. *A Nation at Risk* contained alarmist language full of “unproven and often repeated claim[s] ... dramatically claiming that the quality of our schools threatened the future of the nation.”¹⁶² It was this political force that set the stage for Goals 2000 which further increased the federal government’s role in public education.¹⁶³

Also in response to *A Nation at Risk*, the Illinois legislature decided to make significant changes to the public education system, and created the *Illinois Education Reform Act of 1985*.¹⁶⁴ The Illinois Education Reform Package was a seminal event on the road to the *Illinois Performance Evaluation Reform Act of 2010*¹⁶⁵ (PERA) and a direct consequence of the new national focus on education due to *A Nation at Risk*. It is discussed in detail in the *Illinois School History* section.

¹⁶¹ Spring, *supra* note 35, at 18.

¹⁶² JOEL SPRING, *POLITICAL AGENDAS FOR EDUCATION: FROM THE CHRISTIAN COALITION TO THE GREEN PARTY* 51 (1997).

¹⁶³ Michael M. Heise, *Goals 2000: Educate America Act: The Federalization and Legalization of Educational Policy*, 63 *FORDHAM L. REV.* 345, 347 (1994).

¹⁶⁴ Illinois Education Reform Act of 1985, Pub. Act 084-126 (1985).

¹⁶⁵ Illinois Performance Evaluation Reform Act of 2010, Pub. Act 096-0861 (2010).

Goals 2000

Educational reform during the 1960s and the 1970s primarily focused on the concept of inclusion, emphasizing civil rights, disability awareness and opportunity, and equity programs.¹⁶⁶ Important developments included the *Civil Rights Act of 1964*¹⁶⁷ (providing equal opportunities in education regardless of race and especially for economically disadvantaged children), the *Elementary and Secondary Education Act of 1965*¹⁶⁸ (providing funding to low income students and students at-risk), the *Education Amendments of 1972*¹⁶⁹ (safeguarding gender equality), and the *Education of All Handicapped Children Act of 1975*¹⁷⁰ (ensuring access to education for children challenged by disabilities). *A Nation at Risk* reframed both the conversation and the focus of the 1980s and 1990s from inclusion and equity back to fixing the broken education system. During these two decades, numerous state and federal initiatives were created and reports were issued focusing on this new topic. For example, South Carolina's 1984 *Education Improvement Act*,¹⁷¹ the 1983 *Action for Excellence: A Comprehensive Plan to Improve Our Nation's Schools* from the Task Force on Education for

¹⁶⁶ Heise, *supra* note 163, at 353.

¹⁶⁷ Civil Rights Act of 1964, Pub. L. No. 88-352, 42 U.S.C. § 2000a (1964).

¹⁶⁸ Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 20 U.S.C. § 2701 (1965).

¹⁶⁹ Education Amendments of 1972, Pub. L. No. 92-318, 20 U.S.C. § 1001 (1972).

¹⁷⁰ Education of the Handicapped Act of 1975, Pub. L. No. 94-142, (1975) now codified as Individuals with Disabilities Education Act of 1990, Pub. L. 113-234 20 U.S.C. § 1400a (1990).

¹⁷¹ South Carolina's Education Improvement Act of 1984, Pub. Act No. 512 (1984).

Economic Growth;¹⁷² the Carnegie Forum on Education and the Economy's *A Nation Prepared: Teachers for the 21st Century*, 1986;¹⁷³ the 1989 Education Summit at the University of Virginia;¹⁷⁴ the 1989 National Education Goals Panel (NEGP);¹⁷⁵ the National Education Goals: A Report to the Nation's Governors in 1990; the 1991 Education Council Act: National Council on Education Standards and Testing (NCEST);¹⁷⁶ the 1994 *Minority-Focused Civics*

¹⁷² In 1983 the Task Force on Education for Economic Growth, a subset of the Education Commission of the States, comprised of primarily of governors, legislatures, and corporate executives -- with some involvement from school board members and other community members -- found "the problem [with the American public school system was] educational deficits and blurred goals" which it saw as a deficit of quality teachers, a weakened curriculum, poor management of schools, low standards for college entrance, and not enough homework. The solution the task force proposed was an eight part action plan which included: a state plan for improving k-12 education, partnerships with businesses, better use of financial resources, a higher regard for teachers, more intense and productive academic experiences, quality assurance (measuring the effectiveness of teachers and rewarding outstanding teachers and tightening tenure and dismissal procedures), improving leadership and management of schools, and better serving the underserved and un-served populations. Task Force on Education for Economic Growth, *Action for Excellence: A Comprehensive Plan to Improve Our Nation's Schools*, 10-11 (1983).

¹⁷³ In 1986, in response to *A Nation at Risk*, the Carnegie Forum on Education and the Economy published *A Nation Prepared: Teachers for the 21st Century*. This report stated that education was the answer to the problems of eroding markets, decreased world competition, and lackluster productivity. Unlike the other reports, *A Nation Prepared* focused on teachers and desired to create "a profession of well-educated teachers prepared to assume new powers and responsibilities" and called for eight "sweeping changes in education policy." Task Force on Teaching as a Profession, *A Nation Prepared: Teachers for the 21st Century*, 2-3 (1986).

¹⁷⁴ MARIS A. VINOVSILIS, THE ROAD TO CHARLOTTESVILLE, THE 1989 EDUCATION SUMMIT (1999).

¹⁷⁵ National Education Goals announced by the President and adopted by the state governors in 1990.

¹⁷⁶ The Education Council Act of 1991, Pub. L. No. 102-62, 20 U.S.C. § 1221-1 (1991).

Education Act,¹⁷⁷ and New Jersey's 1996 *Comprehensive Education Improvement and Financing Act* (CEIF).¹⁷⁸ Of these initiatives, the 1989 Education Summit had the greatest impact and led to the creation of the *Educate America Act of 1994*,¹⁷⁹ commonly known as Goals 2000.

Prior to the 1989 Education Summit, the Nation's governors met in 1986 for their annual National Governors' Association (NGA) meeting. This meeting, combined with the prevailing notion that "blamed [the United States] economic conditions on the low quality of American teachers who were preparing workers for the new global economy"¹⁸⁰ forged "the impetus for the creation of national goals."¹⁸¹

At the two-day meeting, the governors and invited guests discussed seven areas of education reform that various taskforces had been investigating for the past year. These areas included: school leadership and management, teaching, school choice, school readiness, technology, school facilities, and college quality. The governors undertook this endeavor due to their belief that "better schools mean better jobs, and that the future of the people who elect

¹⁷⁷ Minority Focused Civics Education Act of 1994, Pub. L. 103-227, 42 U.S.C. § 201 (1994).

¹⁷⁸ N.J. STAT. ANN. § 18A:7F47 (1996).

¹⁷⁹ Goals 2000: Educate America Act of 1994, Pub. L. 103-227, 20 U.S.C. § 5801 (1994).

¹⁸⁰ Spring, *supra* note 162, at 52.

¹⁸¹ Robert B. Schwartz & Marian A. Robinson, *Goals 2000 and the Standards Movement*, BROOKINGS PAPERS ON EDUC. POL'Y 173, 175 (2000).

[them] depend upon having better jobs.”¹⁸² Governor Lamar Alexander of Tennessee expressed his belief in the ability of the governors to save the American public education system when he told the NGA, “If you look over the horizon and see a big cloud of dust, ... it’s likely to be the Governors coming to save the schools.”¹⁸³ Governor Alexander continued, “It is my judgment and hope that this report, and the issues upon which it focuses, will help to set the agenda for American public education for the next decade.”¹⁸⁴ Then Secretary of Education, William Bennett, told the NGA, “I think your reports [on the findings of the taskforces] may be the most important, constitute the most important event in American education in the last five years.”¹⁸⁵

At the 1986 meeting, each of the seven task forces presented their findings, put forth their recommendations, and created a governors’ action agenda entitled *Time for Results*. This report summarized the 1986 NGA meeting. The school leadership and management task force determined “in order to raise student performance, the selection, training, and support and evaluation of school leaders would have to be improved.”¹⁸⁶ The teaching task force desired to

¹⁸² Lamar Alexander, Governor of Tennessee, *First Plenary Session at the National Governors Association, Transcript of Proceedings* 8 (Aug 24, 1986) available at <http://www.nga.org/files/live/sites/NGA/files/pdf/1986NGAAnnualMeeting.pdf>.

¹⁸³ *Id.* at 7.

¹⁸⁴ *Id.* at 10.

¹⁸⁵ William Bennett, Secretary of Education, *First Plenary Session at the National Governors Association, Transcript of Proceedings* 22-23 (Aug 24, 1986) <http://www.nga.org/files/live/sites/NGA/files/pdf/1986NGAAnnualMeeting.pdf>. An interesting statement considering *A Nation at Risk* was published two years prior.

¹⁸⁶ National Governors Association, *1986 NGA Annual Meeting*, <http://www.nga.org/cms/home/about/nga-annual--winter-meetings/page-nga-annual-meetings/col2-content/main-content-list/1986-nga-annual-meeting.html> (last visited Oct. 6, 2012).

“rebuild the teacher education system, ... [wanted] greater cooperation among school boards, principals, and teachers, ... and more attention [devoted] to teacher recruitment and retention.”¹⁸⁷ The school choice task force discussed the question of why choice should not be an option in education when the public had a plethora of choices in all other aspects of life; and the school readiness group focused its attention on at-risk children and the role of parental involvement.¹⁸⁸ The task force dealing with facilities suggested “better use of school property for community activities ... [the restoration of] buildings to safety and good repair ... and alternative school use and design.”¹⁸⁹ The technology group investigated “the role of technology as a teaching tool” and the task force on college quality raised “the question of whether colleges and universities were succeeding in preparing students for the labor force.”¹⁹⁰

In actuality, half of the issues the governors explored were ones previously addressed in *A Nation at Risk*. The new issues the NGA grappled with were school readiness, technology, school facilities, and school choice. While the issues were important, what was more noteworthy was “the ability of the governors to work together across party lines on educational issues and to speak with a unified public voice. This was, in a sense, a trial run”¹⁹¹ for the 1989 Education Summit.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Schwartz, *supra* note 181, at 176.

In 1989, the Nation's governors and several top business leaders convened due to "a commitment to restructure and to make those fundamental changes that are needed if we're going to improve educational performance."¹⁹² President George H. W. Bush told the group, "doing more of the same is unlikely to accomplish what we need,"¹⁹³ and thus an entirely new direction in educational reform – significantly increased federal involvement -- had begun. At the end of the two day Education Summit, President Bush congratulated those involved noting, "We've reached agreement on the need for national performance goals, on the need for more flexibility and accountability, the need for restructuring and choice, and I agree with Governor Clinton that this is a major step forward in education."¹⁹⁴ The Education Summit created six educational goals, which were expanded to include two more in 1994, when President Clinton signed Goals 2000 into law with the passage of the *Educate America Act*¹⁹⁵

¹⁹² George Bush, President, *Remarks on the Education Summit and a Question-and-Answer Session with Reporters* (Sept. 27, 1989) available at the George Bush Presidential Library and Museum website, http://bushlibrary.tamu.edu/research/public_papers.php?id=959&year=1989&month=9 (last visited Oct. 6, 2012).

¹⁹³ *Id.*

¹⁹⁴ George Bush, President, *Remarks at the Education Summit Farewell Ceremony at the University of Virginia in Charlottesville* (Sept. 28, 1989) available at the George Bush Presidential Library and Museum website, http://bushlibrary.tamu.edu/research/public_papers.php?id=970&year=1989&month=9 (last visited Oct. 6, 2012).

¹⁹⁵ Goals 2000: Educate America Act of 1994, Pub. L. 103-227, 20 U.S.C. § 5801 (1994).

The primary purpose of Goals 2000, was to promote “coherent, nationwide, systematic education reform.”¹⁹⁶ Specifically, the Act sought to improve the quality of learning and teaching, define local and federal responsibilities, stimulate the development of a voluntary national system of skill standards to enhance the skills of future workers, and most of all, to “provide equal educational opportunity for all students.”¹⁹⁷ Congress declared, by the year 2000 1) all children will start school ready to learn; 2) the high school completion rate will increase to 90%; 3) all students in grades four, eight, and twelve will demonstrate achievement in the core subjects of English, mathematics, science, foreign language, social studies, and the arts; 4) all teachers will have access to continuing education programs and the opportunity for professional development; 5) American students will rank top in the world in mathematics and science; 6) every adult will be literate and possess the skills to compete in a global economy; 7) every school will be drug, alcohol, violence, and firearm free and be a place for disciplined learning; and 8) every school will promote partnerships with families that will increase parent participation.¹⁹⁸

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

Education had been perceived as a state and local concern, as it was not an area granted federal jurisdiction by the U.S. Constitution.¹⁹⁹ Notwithstanding an absence of federal Constitutional jurisdiction, there is a long history of federal involvement in education. The history, however, is one of ensuring opportunity and equal access, not of direct regulation and micromanagement. This history changed with Goals 2000, as it set a new precedent for the American education system – for the first time since the federal Constitution was signed, the federal government became intimately involved with local public schools.²⁰⁰ This was the intent of the Education Summit, which was the impetus for Goals 2000. Governor Branstad of Iowa, a member of the Education Summit, recapitulated the beliefs of the participants when he remarked, “we [the fifty governors, business leaders, and President Bush] unanimously agree that there is a need for the first time in this nation's history to have specific results-oriented goals.”²⁰¹ Yet, this belief was not held by all. Benjamin Superfine, a lawyer and a professor at the University of Illinois, wrote, “Goals 2000 represented one of the greatest intrusions of the federal government into education policy, an area traditionally reserved to the states.”²⁰² Dr.

¹⁹⁹ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

²⁰⁰ Benjamin M. Superfine, *The Politics of Accountability: The Rise and Fall of Goals 2000*, 112 AM. J. OF EDUC. 10 (2005); Heise, *supra* note 163.

²⁰¹ Terry Branstad, Governor of Iowa, *Remarks at the Education Summit Farewell Ceremony at the University of Virginia in Charlottesville* (Sept. 28, 1989) available at the George Bush Presidential Library and Museum website, http://bushlibrary.tamu.edu/research/public_papers.php?id=970&year=1989&month=9 (last visited Oct. 6, 2012).

²⁰² Superfine, *supra* note 200, at 10.

Michael Heise, a lawyer and a professor at Cornell University, concurred. Heise stated Goals 2000 “dramatically increase[d] the federal government’s educational policymaking role.”²⁰³

“Goals 2000 ... increase[d] the federalization – shift in control from state and local governments to the federal government – of American educational policy.”²⁰⁴ By doing this, Goals 2000 also laid the foundation for a standardized, national curriculum. President Bush and the Nation’s governors were taking advantage of the era’s negative zeitgeist and using it to move educational policy to the federal agenda, away from state and local control. Peter B. Dow, author of *Schoolhouse Politics: Lessons from the Sputnik Era*, asserted, “decisions about educational reform are driven far more by political considerations, such as the prevailing public mood, than they are by any systematic effort to improve instruction.”²⁰⁵

²⁰³ Heise, *supra* note 163, at 347.

²⁰⁴ *Id.* at 348.

²⁰⁵ PETER B. DOW, *SCHOOLHOUSE POLITICS: LESSONS FROM THE SPUTNIK ERA* 5 (1991).

There were three major themes in Goals 2000, creating an “opportunity” and/or “access” to high standards, the concept of 100% compliance, and the degree to which Congress had the ability to enforce the provisions set forth in the Act. The first theme, creating the opportunity for all to learn and achieve at the highest levels, used vacuous language. For example, Goals 2000 used wording such as, “provide equal educational opportunity” and “provide all students with an opportunity to learn.”²⁰⁶ These phrases made good sound bites for the media and public, but this language, in actuality, constituted hollow promises.²⁰⁷ Opportunity does not equate to accomplishment. It was, therefore, not sufficient to solely provide an opportunity for learning. Goals 2000 offered no specific plan to attain its goals.²⁰⁸ For example, merely providing teachers with access to professional development did not mean the teachers took advantage of the new learning experiences, incorporated this learning into their teaching, and/or improved in any way. The same problem was true for the 100% compliance wording.

²⁰⁶ Goals 2000: Educate America Act of 1994, Pub. L. 103-227, 20 U.S.C. § 5801 (1994).

²⁰⁷ “Goals 2000 focuses on shifting the allocation of educational policymaking authority rather than on any particular substantive reform.” Heise, *supra* note 163, at 360.

²⁰⁸ Michael M. Heise states, Goals 2000, through “NESIC [the National Education Standards and Improvement Council] and its activities will not adequately address the array of educational problems facing the nation.” Heise, *supra* note 163, at 370. Benjamin M. Superfine states, Goals 2000 “began with a great deal of promise ... [but] had very little bite.” Superfine, *supra* note 200, at 32-33.

Seven of the eight goals contained language indicating 100% compliance, i.e., “all students will leave grades 4, 8, and 12 having demonstrated competency over challenging subject matter.”²⁰⁹ It was statistically and realistically impossible to garner 100% compliance with these goals.²¹⁰ The only goal that did not use language such as “every” or “all” was the goal to decrease the high school drop out rate, which was set at 10%.

²⁰⁹ Goals 2000: Educate America Act of 1994, Pub. L. 103-227, 20 U.S.C. § 5801 (1994).

²¹⁰ Robert H. Seidman stated, “No matter how well intentioned the Goals 2000: Educate America Act may be, it is doomed to failure.” Robert H. Seidman, *Goals 2000: Some Unintended Disastrous Consequences*, paper presented at the Am. Educ. Research Assoc. Annual Meeting 3 (Apr. 19, 1995).

The law stated by the year 2000, the “high school graduation rate will ... [be] at least 90%.”²¹¹ Dr. Robert Seidman, professor at New Hampshire College observed, the high school graduation rates had been stabilized “at about 75% where it has been since 1965.”²¹² This suggested the 90% goal was unrealistic. Yet, the National Center for Education Statistics reported that as of October 2000, the national high school completion rate was 86.5%. This was an average of the completion rates of 91.8% for white students, 83.7% for Black students, 84.1% for Hispanic students, and 94.6% for Asian students.²¹³ (As of 2009, the completion rates were even higher, with a national average of 89.75%.²¹⁴) Although Goals 2000 offered no plan for achieving the higher high school graduation rate, this goal was accomplished.

²¹¹ Goals 2000: Educate America Act of 1994, Pub. L. 103-227, 20 U.S.C. § 5801 (1994).

²¹² Seidman, *supra* note 210.

²¹³ U. S. Department of Education, Office of Educational Research and Improvement, National Center for Education Statistics, *Dropout Rates in the United States: 2000*, 20 (2002) available at <http://nces.ed.gov/pubs2002/2002114.pdf>.

²¹⁴ U. S. Department of Education, *Trends in High School Dropout and Completion Rates in the US: 1972 - 2009*, (2011) available at <http://nces.ed.gov/pubs2012/2012006.pdf>.

Since 100% compliance was embedded in the other seven goals, it is not surprising those goals were not met, yet the Department of Education and other governmental agencies touted success in most of the seven areas.²¹⁵ The National Education Goals Panel (NEGP), an independent, executive agency in charge of monitoring state and national progress towards the National Education Goals set by Goals 2000, collected data to ascertain progress toward meeting the goals.²¹⁶ According to the NEGP, four indicators were used to determine if Goal One, school readiness, was met.²¹⁷ While the NEGP did not explicitly state whether the goal was met (it was not), it produced four sets of data showing progress towards the goal²¹⁸: in 1999 fewer babies were born with diseases, more children were immunized, more families were reading to their children, and more at-risk children were attending pre-school. Based on the data presented by the NEGP, the goal was not met, but there were small movements in the right direction.²¹⁹

²¹⁵ The National Education Goals Panel Interactive Data Center, http://govinfo.library.unt.edu/negp/cgi-bin/broker.exe-_program=goalsprg.pg150.sas&_service=goals&_debug=0.htm (last visited Nov. 6, 2012).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ The data used to show progress towards the goal has a nebulous connection to the stated goal, but it is the data the DEGP used.

²¹⁹ The National Education Goals Panel Interactive Data Center, http://govinfo.library.unt.edu/negp/cgi-bin/broker.exe-_program=goalsprg.pg150.sas&_service=goals&_debug=0.htm (last visited Nov. 6, 2012).

The data from the NEGP for Goal Three, (student achievement in core academic subjects) were inadequate as there was insufficient information to draw meaningful conclusions.²²⁰ Reading, writing, mathematics, science, civics, history, and geography were used as the core subjects, and grades four, eight, and twelve were used as benchmark years. Unfortunately, the data were incomplete: at times public school data were aggregated with private school data and at times they were not; only ten percent of the categories had baseline data for the year 1990; only ten percent of the categories had benchmark data for the year 2000; and almost one third of the categories had only one piece of datum for the entire ten year span. Although the NEGP claimed improvement in fourth grade reading (public and private combined), eighth grade reading (public and private combined), fourth grade math (public and private combined), eighth grade math (public and private combined), and twelfth grade math (public and private combined), the conclusions were based on only three or four pieces of data and most were not 1990 to 2000 comparisons.²²¹

²²⁰ *Id.*

²²¹ *Id.*

Further clouding the waters of goal achievement are the data from the NAEP. The National Assessment of Education Process (NAEP), a division of the Department of Education, reported average reading scores for fourth graders rose three points, scores for eighth graders rose two points and scores for twelfth graders *fell* two points during the years from 1990 to 1999.²²² During the same time frame, average mathematics scores rose two points for fourth graders, six points for eighth graders, and three points for twelfth graders.²²³ Since reporting to the NAEP is voluntary, discrepancies in reporting may exist, as not all the same districts submit scores during each reporting year and there is also a varied mix of public and private schools reporting data.

The Fourth Goal, access to continuing education and professional development opportunities for all teachers, was (and is) difficult to measure. The NEGP tried to use the percentage of teachers who participated in professional development and the percentage of “teacher preparation” (defined by the NEGP as the percentage of secondary public school teachers who are certified and have a major or minor in the subject areas they teach), but no data were reported and or used.²²⁴

²²² *Id.*

²²³ NAEP 2008 Trends in Academic Progress in Reading and Mathematics for Public and Private Schools, *available at*, <http://nces.ed.gov/nationsreportcard/pubs/main2008/2009479.asp> (last visited Nov. 6, 2012).

²²⁴ The National Education Goals Panel, *All Indicators for the Nation*, <http://govinfo.library.unt.edu/negp/cgi-bin/broker.exe-program=goalsprg.pg150.sas&service=goals&debug=0.htm> (last visited Nov. 6, 2012).

Unfortunately, American students were nowhere near the top ranks in success in mathematics and science (or even in reading), as compared to other industrialized nations, as measured by the Organization for Economic Cooperation and Development (OECD) and the Program for International Student Assessment (PISA).²²⁵ Although the NEGP reported “improvement” and used the number of mathematics and science degrees awarded to college graduates as the support for its conclusions – an increase from 28% in 1990 to 31% in 1997²²⁶ – the OECD reported much different data. In 2009, the United States ranked 17th out of 34 industrialized countries for performance in science and was tied for 25th (with Spain and the Czech Republic) for performance in mathematics. America was tied (with Poland and Iceland) for 12th place for reading scores.²²⁷

²²⁵ Organisation for Economic Co-operation and Development, *Pisa 2009 Database*, <http://www.oecd.org/pisa/46643496.pdf> (last visited Nov. 6, 2012).

²²⁶ The National Education Goals Panel, *All Indicators for the Nation*, http://govinfo.library.unt.edu/negp/cgi-bin/broker.exe-_program=goalsprg.pg150.sas&_service=goals&_debug=0.htm (last visited Nov. 6, 2012).

²²⁷ Organisation for Economic Co-operation and Development, *Pisa 2009 Database*, <http://www.oecd.org/pisa/46643496.pdf> (last visited Nov. 6, 2012).

The NAEP reported no change in the adult literacy rate and used participation in adult education and higher education as its sources of information.²²⁸ Goal Six, every adult will be literate and possess skills to compete in a global economy, led to the 1991 *National Literacy Act*,²²⁹ but did not eradicate adult illiteracy. The 1993 National Adult Literacy Survey gathered data and determined approximately 50% of the American population was in the lowest two levels of reading and writing comprehension.²³⁰ Forty four million adults were at the lowest levels and had such “limited skills that they were unable to respond to much of the survey,” even though the participants did not perceive they had a problem.²³¹ Only 20% of the U.S. population had literacy skills considered to be at the highest levels.²³² The National Adult Literacy Survey stated, “Although Americans today are, on the whole, better educated and more literate than any who preceded them, many employers say they are unable to find enough workers with the reading, writing, mathematics, and other competencies required in the workplace.”²³³

²²⁸ The National Education Goals Panel, *All Indicators for the Nation*, <http://govinfo.library.unt.edu/negp/cgi-bin/broker.exe-program=goalsprg.pg150.sas& service=goals& debug=0.htm> (last visited Nov. 6, 2012).

²²⁹ The National Literacy Act of 1991, Pub. L. No. 102-73, 20 U.S.C § 1201 (1991).

²³⁰ Irwin Kirsch, Ann Jungeblut, Lynn Jenkins, & Andrew Kolstad, *Adult Literacy in America – A First Look at the Findings of the National Adult Literacy Survey*, U. S. Department of Education, National Center for Education Statistics, xvi (2002). The NALS comprehension data is an aggregate of three literary scales encompassing prose, document, and quantitative reading materials.

²³¹ *Id.*

²³² *Id.* at xvii.

²³³ *Id.* at x.

As for Goal Seven, the NAEP reported improvement in student victimization, and no change in student alcohol use and class disruptions by students (as reported by students).²³⁴ The NAEP reported an increase of overall student drug use, teacher victimization, and class disruptions by students (as reported by teachers). Due to the inconsistencies in reporting and the differing definitions, it was (and still is) difficult to obtain comparable data from year to year, regarding school safety issues. Since 1992 there have been 270 violent deaths in schools, of which 207 were due to guns.²³⁵ The Center for Disease Control and Prevention (CDC) stated “there is not a consistent definition [of what constitutes school violence] over the years and throughout the Nation, therefore it is difficult to monitor, examine trends, and determine the magnitude of the problem.”²³⁶ However difficult to measure, it is clear our schools are not drug, alcohol, and weapon free.

The information on school-parent relationships was inconclusive, as the NAEP did not have enough data.²³⁷ During the ten-year period from 1990 to 2000, there was only one piece of data regarding parent-teacher conference attendance and one piece of data for percentage of parent involvement.²³⁸

²³⁴ The National Education Goals Panel, *All Indicators for the Nation*, http://govinfo.library.unt.edu/negp/cgi-bin/broker.exe-_program=goalsprg.pg150.sas&_service=goals&_debug=0.htm (last visited Nov. 6, 2012).

²³⁵ National School Safety Center, <http://www.schoolsafety.us/> (last visited Nov. 6, 2012).

²³⁶ The Center for Disease Control and Prevention, <http://www.cdc.gov/datastatistics/>.

²³⁷ The National Education Goals Panel, *All Indicators for the Nation*, http://govinfo.library.unt.edu/negp/cgi-bin/broker.exe-_program=goalsprg.pg150.sas&_service=goals&_debug=0.htm (last visited Nov. 6, 2012).

²³⁸ *Id.*

Goals 2000 was a significant step on the path toward the federalization of America's public education system.²³⁹ It was in direct response to *A Nation at Risk* and was in part a political move by the Nation's governors. Legitimate concerns about the state of public education were raised and some progress was made in the ten years that followed Goals 2000, however, due to the 100% compliance language used, it was doomed to failure from the start.²⁴⁰

No Child Left Behind

In 2001, the Bush Administration passed legislation to further increase the role of the federal government in American education. The *No Child Left Behind Act of 2001*²⁴¹ (NCLB) was signed into law and became effective in January 2002. It was the latest reauthorization of the *Elementary and Secondary Education Act of 1965*²⁴² (ESEA), but the public considered it a new law due to the major changes the legislation made.²⁴³ In April 1965, Congress passed the *Elementary and Secondary Education Act*,²⁴⁴ just a few months after it was originally

²³⁹ Heise, *supra* note 163, at 347.

²⁴⁰ *Id.* at 374.

²⁴¹ No Child Left Behind Act of 2001, Pub. L. No. 107-110, 20 U.S.C. § 6301 (2001).

²⁴² Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 20 U.S.C. § 2701 (1988 & Supp. V 1993).

²⁴³ MARGARET A. JORGENSEN & JENNY HOFFMANN, HISTORY OF THE NO CHILD LEFT BEHIND ACT OF 2001 (NCLB) 6 (2003).

²⁴⁴ Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 20 U.S.C. § 2701 (1988 & Supp. V 1993).

introduced, as a part of the Great Society reforms of the sixties.²⁴⁵ This Act was a cornerstone of President Lyndon B. Johnson's "War on Poverty."²⁴⁶ The law was enacted less than one year after the 1964 *Civil Rights Act*²⁴⁷ and was designed to ensure states were following the new desegregation laws; the *Civil Rights Act* was the stick and the ESEA was the carrot.²⁴⁸ It was the "federal government's first formalized foray into public K-12 education"²⁴⁹ and provided "legal authority for the U.S. government's financial support of K-12 education."²⁵⁰ At the time, it was "the most sweeping educational bill ever to come before Congress. It represent[ed] a major new commitment of the Federal Government to quality and equality in the schooling that we offer our young people."²⁵¹ It also represented an "unprecedented

²⁴⁵ U.S. History, *Lyndon Johnson's "Great Society,"* <http://www.ushistory.org/us/56e.asp> (last visited Nov. 8, 2012).

²⁴⁶ President Lyndon B. Johnson, *Special Message to Congress, **Proposal for A Nationwide War On The Sources of Poverty (Mar. 16, 1964)***

<http://www.fordham.edu/halsall/mod/1964johnson-warpoverty.html>

²⁴⁷ The Civil Rights Act of 1964, Pub. L. No. 88 – 352, 42 U.S.C. § 2000a (1964).

²⁴⁸ Under ESEA, segregated schools were not allowed to receive any federal funds. Julia Hanna, *The Elementary and Secondary Education Act 40 Years Later* Harvard Grad. Sch. Of Educ., Aug 18, 2005, available at <http://www.gse.harvard.edu/news/05/08/elementary-and-secondary-education-act>.

²⁴⁹ *Id.*

²⁵⁰ James Crawford, *Frequently Asked Questions about Reauthorization of the Elementary and Secondary Education Act (ESEA) and the Policy Issues at Stake*, available at www.diversitylearningk12.com.

²⁵¹ Lyndon B Johnson, President, *Transcript of Remarks Prior to Signing the ESEA on 4/11/1965*, available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650411.asp>

watershed event in education evaluation. ... Because of the ESEA, educational evaluation became a growth industry.”²⁵²

The central goal of the ESEA was to “strengthen and improve educational opportunities in the Nation’s elementary and secondary schools,”²⁵³ and more specifically, to fulfill the “special educational needs of educationally deprived children.”²⁵⁴ To fulfill this goal, Title I, the main provision of the ESEA, gave federal funding to schools (both public and parochial) to help meet the needs of educationally and economically deprived children. The rationale for this provision was as President Johnson asserted, “education is the only valid passport from poverty.”²⁵⁵

Title II of the *Elementary and Secondary Education Act*²⁵⁶ provided federal funds to improve library resources, textbooks, and other instructional materials, while Title III funded “supplementary educational services,”²⁵⁷ such as continuing adult education, the arts, mathematics and science. Title IV established funds for educational research and training, Title

²⁵² FRANCES C. FOWLER, *POLICY STUDIES FOR EDUCATIONAL LEADERS: AN INTRODUCTION* 280 (4th ed. 2013).

²⁵³ Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 20 U.S.C. § 6301 (1965).

²⁵⁴ *Id.* at § 205(a)(1).

²⁵⁵ Lyndon B Johnson, President, *Transcript of Remarks Prior to Signing the ESEA on 4/11/1965*, available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650411.asp>

²⁵⁶ Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 20 U.S.C § 205(a)(1) (1965).

²⁵⁷ *Id.* at § 303(b).

V strengthened and expanded state departments of education, and Title VI outlined the general provisions of the law.

There were three significant changes to education policy resulting from the passage of the ESEA in 1965. First, “it signaled the switch from general federal aid to education towards categorical aid [and tied] aid to national policy concerns.”²⁵⁸ Second, it “resulted in an expansion of state bureaucracies and larger involvement of state governments in educational decision-making.”²⁵⁹ And third, it allowed federal aid to be allocated to parochial schools, by earmarking the funds directly to the students.²⁶⁰

The *Elementary and Secondary Education Act*²⁶¹ was amended and reauthorized numerous times, five times in the first five years after it was passed and six more times from 1977 to 2001. In 1967, to accommodate the “rising number of non-English-speaking immigrant students,”²⁶² Title VII – the *Bilingual Education Act* --was added to the ESEA. This was the first major amendment. Its purpose was to support students who, because of their

²⁵⁸ The Social Welfare History Project, *Elementary and Secondary Education Act of 1965*, <http://www.socialwelfarehistory.com/events/elementary-and-secondary-education-act-of-1965/> and Nelson & Weinbaum, *supra* note 50, at 13.

²⁵⁹ The Social Welfare History Project, *Elementary and Secondary Education Act of 1965*, <http://www.socialwelfarehistory.com/events/elementary-and-secondary-education-act-of-1965/> and Nelson & Weinbaum, *supra* note 50, at 13.

²⁶⁰ The Social Welfare History Project, *Elementary and Secondary Education Act of 1965*, <http://www.socialwelfarehistory.com/events/elementary-and-secondary-education-act-of-1965/> and Nelson & Weinbaum, *supra* note 50, at 13.

²⁶¹ Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 20 U.S.C § 205(a)(1) (1965).

²⁶² Nelson & Weinbaum, *supra* note 50, at 21.

inability to speak English and their family's low income (annual earnings less than \$3,000²⁶³) were considered economically disadvantaged.²⁶⁴ The 1968 and 1969 Amendments broadened the Act to include funding for disabled children, technology for rural schools, and established the National Commission on School Finance. In 1972, Title IX was added to the ESEA. Title IX prohibits discrimination, based on gender, in educational programs and/or activities receiving federal funds.

The National Center for Education Statistics (NCES),²⁶⁵ the Education of the Handicapped Amendments, and the *Family Education Rights and Privacy Act* (FERPA)²⁶⁶ were created as a result of the amendments to the ESEA in 1974. One year later, the *Education for all Handicapped Children Act*²⁶⁷ -- ensuring that all children with disabilities receive a free education designed to meet their particular needs -- was passed. The Amendments of 1977²⁶⁸ introduced a comprehensive basic skills program intended to increase student achievement. In

²⁶³ 1967 dollars, not adjusted into the present value.

²⁶⁴ Nelson & Weinbaum, *supra* note 50, at 22.

²⁶⁵ The National Center for Education Statistics (NCES) is the primary federal entity for collecting and analyzing data related to education.

²⁶⁶ Family Education Rights and Privacy Act of 1974, Pub. L. No. 93-380, 20 U.S.C. § 1232g (1974).

²⁶⁷ Education for all Handicapped Children Act, Pub. L. No. 94-142, 20 U.S.C. § 1400 (1975) now codified as Individuals with Disabilities Education Act of 1990, Pub. L. 113-234, 20 U.S.C. §1400a (1990).

²⁶⁸ Education of the Handicapped Amendments of 1977, Pub. L. 95-49, 20 U.S.C. § 1400 (1977).

1989, Head Start²⁶⁹ programs were expanded, the Act was reauthorized in 1994 as the *Improving America's Schools Act* of 1994 (IASA),²⁷⁰ and included Title IX which broadened the law to include Indian Education.²⁷¹

The 1994 *Improving America's Schools Act* (IASA)²⁷² was passed eight months after Goals 2000 and was an important part of the Clinton Administration's education reform policy. President Clinton did not want the two laws merged, as he feared "any additional money that might be garnered for Goals 2000 would be used to support Title I and not the broader systemic reforms he envisioned."²⁷³ The IASA required academic standards be the same for *all* students – regardless if they were Title I or non-Title I students. The IASA also created the Eisenhower Professional Development Program to assist schools in meeting these new standards.²⁷⁴ The law did, however, provide greater flexibility for states in the form of waivers for some of the federally mandated requirements. The IASA was intended to work in tandem with Goals 2000, requiring states "to work to develop content and performance standards along the same lines as Goals 2000, with assessments aligned to those standards."²⁷⁵

²⁶⁹ Expansion and Quality Improvement Act of 1990, Pub. L. No. 101-501, 42 U.S.C. § 9801 (1990).

²⁷⁰ *Improving America's Schools Act* of 1994, Pub. L. No. 103-382, 20 U.S.C § 6301 (1994).

²⁷¹ Title IX of the *Improving America's Schools Act* of 1994, Pub. L. No. 103-382, 20 U.S.C § 6301 (1994).

²⁷² *Improving America's Schools Act* of 1994, Pub. L. No. 103-382, 20 U.S.C § 6301 (1994).

²⁷³ Nelson & Weinbaum, *supra* note 50, at 67.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 68.

In 2002, NCLB's high expectations came at the end of a long and winding history of education policy in the United States. In the 1800s Horace Mann championed the notion that an education be free and available to everyone, regardless of social class.²⁷⁶ In spite of Mann's philosophy, prior to the Civil War, education was primarily viewed as an endeavor reserved for the elite, upper class. After the war, however, the view changed when newly freed slaves eagerly filled classrooms.²⁷⁷ In 1892, a curriculum which included "English, mathematics (including geometry and algebra), physics, chemistry, Latin, history, and geography" was advocated.²⁷⁸ From 1918 until 1945, the idea of high standards gradually declined, until the concept of "life adjustment education" became in vogue.²⁷⁹ Charles Prosser believed "most students -- 60 percent -- should expect a future without higher education or employment in desirable skilled occupations."²⁸⁰ The U.S. Office of Education embraced this theory²⁸¹ which was the antithesis of Horace Mann's views.

²⁷⁶ University of Massachusetts, *Education Reform in Massachusetts*, available at <http://www.edbenchmarks.org/schoolimprovement/edreform.htm> (last visited on July 29, 2013).

²⁷⁷ U.S. Department of Education, *Great Expectations: Holding Ourselves and Our Schools Accountable for Results*, 7 (2008).

²⁷⁸ *Id.* at 5.

²⁷⁹ Arthur Bestor and James Conant wrote in the 1950s and 1960s to decry "life adjustment education" and instead called for more rigorous academic standards in the high schools.

²⁸⁰ U.S. Department of Education, *supra* note 277, at 6.

²⁸¹ *Id.*

NCLB was President George W. Bush's first piece of legislation. Many believed this was the most significant educational policy in a generation.²⁸² The overall purpose of the law was to ensure every child in America was able to meet rigorous learning standards, a theory taken from Goals 2000."²⁸³

NCLB federally funded programs to improve the performance of schools by increasing the accountability of states, districts, and schools and by providing flexibility for parents in choosing schools for their children.²⁸⁴

The law laid out detailed goals with a time line for accomplishment, and then imposed heavy sanctions on schools that did not meet those goals.²⁸⁵ The specific goals were 1) by the 2005-2006 school year, all students will be taught by highly qualified teachers; 2) by the 2013-2014 school year, all students will reach high standards, at a minimum attaining proficiency or better in reading and mathematics; 3) by the 2013-2014 school year, all students will be proficient in reading by the end of the third grade; 4) all limited English proficient students will become proficient in English;²⁸⁶ 5) all students will be educated in learning environments that are safe, drug free and conducive to learning; and 6) all students will graduate from high

²⁸² *One of several*: Thomas S. Dee and Brian A. Jacob, *The Impact of No Child Left Behind on Students, Teachers, and Schools*, BROOKINGS PAPERS ON ECON. ACTIVITY, 149, 149 (2010).

²⁸³ Nelson & Weinbaum, *supra* note 50, at 73.

²⁸⁴ *Letter from the United States Secretary of Education, dated Sep. 2002*, printed in *No Child Left Behind: A Desktop Reference*, 3 (2002) available at <http://www2.ed.gov/admins/lead/account/nclbreference/reference.pdf>.

²⁸⁵ Dee, *supra* note 282, at 154.

²⁸⁶ No Child Left Behind Act of 2001, Pub. L. No. 107-110, 20 U.S.C. § 6301 (2001), Executive Summary available at <http://www.asha.org/advocacy/federal/nclb/exec-summary.htm> (last visited July 26, 2012).

school.²⁸⁷ The law provided a combination of requirements, resources, and incentives to help schools meet the goals.²⁸⁸ The idea was to close the achievement gap and raise all students to a high level. Just as with *A Nation at Risk*, there was an urgency to correct the perceived dire condition of education. “The United States’ economic superiority, once unchallenged, was now under siege from a host of developing nations rapidly producing their own bumper crops of scientists, engineers, and innovators.”²⁸⁹

No Child Left Behind’s requirements placed an onerous burden on states to comply with the regulations and find the funds to pay for it. Because the federal government legislated a policy and required the states to pay for its compliance, many believed NCLB constituted an unfunded mandate.²⁹⁰ Michigan and Connecticut both brought suits against the Secretary of Education, asking that they not be required to comply with the new law on the basis that it was an unfunded mandate. Both Michigan and Connecticut lost their cases, as the Supreme Court decided the law did not constitute an unfunded mandate.²⁹¹ While *Connecticut* and *Pontiac*

²⁸⁷ New America Foundation, *Federal Education Budget Project*, <http://febp.newamerica.net/background-analysis/no-child-left-behind-overview> (last visited Mar. 8, 2015).

²⁸⁸ Illinois State Board of Education, <http://www.isbe.state.il.us> (last visited Mar 8, 2015).

²⁸⁹ DEBORAH YAFFE, *ADVANCING ≠ EQUITY: REMOVING ROADBLOCKS TO ACHIEVING HIGH ACADEMIC STANDARDS* 1, 3 (2012).

²⁹⁰ Many critics contend NCLB is an unfunded mandate, but on May 26, 2004, the non-partisan General Accounting Office confirmed NCLB was not a mandate, as defined by the Unfunded Mandates Reform Act of 1995. U.S. Department of Education, *Online Newsletter*, May 26, 2004; *available at* <http://www2.ed.gov/news/newsletters/extracredit/2004/05/0526.html> (last visited July 29, 2013).

²⁹¹ Please see Appendix A and Appendix B for a more detailed case summary.

cases were underway, the Department of Education was taking stock of the general state of education in America.

A Nation Accountable

A quarter of a century after the U. S. Department of Education published *A Nation at Risk*, the Department of Education compiled data to ascertain what advances the Nation amassed, vis-à-vis the problems enumerated in the 1983 report. In *A Nation Accountable: Twenty-five Years After A Nation at Risk*,²⁹² the U.S. Department of Education countermanded itself by proclaiming in the introduction to the report, “if we were ‘at risk’ in 1983, we are at even greater risk now”²⁹³ and then by stating a page and a half later, “we have made progress since 1983.”²⁹⁴ Under the auspices of then Secretary of the U.S. Department of Education, Margaret Spelling, the report relied on *estimates* and not actual data. This important fact was but briefly mentioned in an endnote of the report.²⁹⁵

Spelling highlighted the progress the Nation made in the five areas *A Nation at Risk* indicated needed improvement: curriculum, expectations for students, time allocation, teacher quality, and educational leadership/financial support.²⁹⁶ In 1983, the Commission suggested all

²⁹² U.S. Dep’t of Educ., *A Nation Accountable: Twenty-five Years After A Nation at Risk*, (2008), available at <https://www2.ed.gov/rschstat/research/pubs/accountable/accountable.pdf>.

²⁹³ *Id.* at 1.

²⁹⁴ *Id.* at 3.

²⁹⁵ *Id.* at 16.

²⁹⁶ The original Report included leadership/financial support in the “Recommendations” section, not in the “Findings” section.

high school students needed to receive a “heavy dose of English, math, science, social studies, (and for the college bound, foreign language)”²⁹⁷ and an introduction to computer science. *A Nation Accountable* reported as of 2005, “almost 65 percent of high school graduates were taking the recommended course work – four times the rate that students took the recommended course work in 1983.”²⁹⁸ This gain was overshadowed by the negative comments about “easy courses, the curricular smorgasbord available to high school students,”²⁹⁹ and the lack of academic growth made by high school students. These disparaging statements were not supported by data, but were used by educational critics for decades.³⁰⁰ The report continued by informing the public the educational achievement of the average 17 year old “ha[d] stagnated” since 1983,³⁰¹ and offered *The Nation’s Report Card*,³⁰² published in 2008 using 2004 data, as support. When evaluating the data given, it seemed the average 17-year-old student made some gains in math, but lost ground in reading.³⁰³

²⁹⁷ US. Dep’t of Educ., *supra* note 292, at 3.

²⁹⁸ *Id.* at 3.

²⁹⁹ *Id.* at 4.

³⁰⁰ Arthur Bestor used this line of thinking in the mid-fifties. *See* Bestor, *supra* note 56.

³⁰¹ US. Dep’t of Educ., *supra* note 292, at 4.

³⁰² The Nation’s Report Card informs the public about the academic achievement of elementary and secondary students in the United States. The Report Card is published by the National Assessment of Educational Progress (NAEP) which has been conducting and interpreting student assessment information since 1969.

³⁰³ US. Dep’t of Educ., *supra* note 292, at 4.

The 1983 Report advised, “schools ... [should] adopt more rigorous and measurable standards, and higher expectations, for academic performance.”³⁰⁴ The states responded by adopting individual state standards and then created curricula and tests and found textbooks, which aligned to those standards.³⁰⁵ By 1989, when the Nation’s governors met for their annual meeting, the momentum at the state level led to the adoption of national K-12 performance goals.

The Report uncovered “three disturbing facts about the use ... of time [in American public schools]: 1) compared to other nations, American students spend much less time on school work; 2) time spent in the classroom and on homework is often used ineffectively; and 3) schools are not doing enough to help students develop ... study skills ... or the willingness to spend more time on school work.”³⁰⁶ In *A Nation Accountable*, the public was told as of 2008, “our children do not spend more time in school than they did in 1983.”³⁰⁷ Furthermore, American students “are spending fewer hours per week on academic subjects and have a shorter school year than many other industrialized countries.”³⁰⁸ No suggestions for a methodical strategy to correct this situation were offered.

The last area *A Nation at Risk* tackled was that of teaching. Specifically, the Commission noted “academically able students are [not] being attracted to teaching; teacher

³⁰⁴ *Id.* at 5.

³⁰⁵ *Id.*

³⁰⁶ Nat’l Comm’n on Excellence in Educ., *supra* note 1, at 21.

³⁰⁷ US. Dep’t of Educ., *supra* note 292, at 6.

³⁰⁸ *Id.* at 6; using 2003 data.

preparation programs need substantial improvement; the professional working life of teachers is on the whole unacceptable; and a serious shortage of teachers exists in key fields.”³⁰⁹

Twenty-five years later we were told nothing of changes that may have occurred. *A Nation Accountable* lamented the situation, but used no data and gave no specifics. The public was only told “there is little evidence to conclude that this provision [*No Child Left Behind’s* Highly Qualified Teacher provision] has led to notable increases in the requisite subject-matter knowledge of teachers or to increases in measures of individual teacher effectiveness.”³¹⁰

Some states moved toward performance pay,³¹¹ others made changes in the state laws regarding teacher performance and evaluation, and still others created programs to attract “high-achieving professionals” and to create non-traditional paths into teaching,³¹² but no data were given about the impact of these changes.

While not addressed in the “Findings” section, *A Nation at Risk* did tackle the topic of leadership and financial support. *A Nation Accountable* began its summary of the status of the country as of 2008 with this statement, “Excellence costs. But in the long run mediocrity costs far more.”³¹³ One of the biggest changes since 1983 was the change in the job description for building principals and district superintendents and the amount of money spent on public

³⁰⁹ Nat’l Comm’n on Excellence in Educ., *supra* note 1, at 22.

³¹⁰ US. Dep’t of Educ., *supra* note 292, at 6.

³¹¹ *A Nation Accountable* cites school districts in Colorado and New York as moving towards performance pay and the Report references the 2006 federal grant program, which supported and encouraged states and school districts to adopt performance pay systems. US. Dep’t of Educ., *supra* note 292, at 6.

³¹² US. Dep’t of Educ., *supra* note 292, at 7.

³¹³ Nat’l Comm’n on Excellence in Educ., *supra* note 1, at 33.

education.³¹⁴ As of 2008 (and currently) school principals and district superintendents have taken on the role of instructional leaders, as well as managers.³¹⁵ Educational leaders were (and are) required to do more than in the past; this translated into increased financing for training and continuing education.³¹⁶ The second area of change was the amount of money spent on education on a per pupil basis. “Total spending and per-pupil spending – local, state, and federal – have gone up dramatically,” even after adjusting for inflation.³¹⁷ This would not be problematic if America was receiving a return on her investment.³¹⁸ Money does not equal quality. According to the data in *A Nation Accountable*, the per-student spending increased 54.6% from 1984 to 2004, but reading comprehension, as measured by the Long-Term NAEP Achievement Scores, held constant during the same time period.³¹⁹

Education was still “at risk” according to *A Nation Accountable*. “Twenty-five years later we know we face greater challenges.”³²⁰ The report informed the Nation, while a new transparency in education exists and although we are better at articulating the problems, the solution is far from us. In part because “not everyone is willing to accept and make the

³¹⁴ US. Dep’t of Educ., *supra* note 292, at 7.

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.* at 8.

³²⁰ US. Dep’t of Educ., *supra* note 292, at 15.

changes that are necessary”³²¹ and in part because not all of the correct solutions have been identified. The realization that America did not heed the “wake-up call” of *A Nation at Risk* led to increased education standards and assessment as a method of correcting the perceived problems of the education system. While the public was still digesting the information of *A Nation Accountable*, the federal government was working to create a new generation of education reform. Race to the Top, characterized as a “historic moment in education”³²² created “significant change in [the American] education system, particularly in raising standards and aligning policies and structures to the goal of college and career readiness.”³²³

Race to the Top

On February 17, 2009, President Barack Obama signed the *American Recovery and Reinvestment Act of 2009* (ARRA).³²⁴ The ARRA invested in public education by providing a foundation for educational reform.³²⁵ The ARRA established the Race to the Top Fund to encourage and reward states for improving student achievement, ensuring student success in

³²¹ *Id.* at 14.

³²² The White House, *Race to the Top*, <http://www.whitehouse.gov/issues/education/k-12/race-to-the-top> (last visited Mar 8, 2015).

³²³ *Id.*

³²⁴ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 26 U.S.C. § 1 (2009).

³²⁵ U.S. Department of Education, *Race to the Top Executive Summary (2009)*, available at <https://www2.ed.gov/programs/racetothetop/executive-summary.pdf>.

college and careers, and implementing education reform in four specified areas.³²⁶ The states successful in achieving these goals were to serve as models for other states.

Race to the Top was a competitive grant program. Illinois was awarded a \$42.8 million Phase Three Race to the Top grant in December of 2011, following unsuccessful attempts in the competition's first two rounds.³²⁷ There were thirty-five participating Illinois school districts involved in sixteen state projects.³²⁸ Among these projects was the focus on educator effectiveness.³²⁹ Illinois's involvement in Race to the Top was one of the primary precursors to the adoption of the *Performance Evaluation Reform Act (PERA)*³³⁰ and Senate Bill 7³³¹ in 2010.

³²⁶ *Id.*

³²⁷ Illinois School Board of Education, *Illinois Race to the Top*, <http://www.isbe.net/racetothetop/default.htm> (last visited July 30, 2013).

³²⁸ *Id.*

³²⁹ Illinois School Board of Education, *Illinois Race to the Top*, http://www.isbe.net/racetothetop/htmls/state_projects.htm#teachers (last visited July 30, 2013).

³³⁰ Illinois Performance Evaluation Reform Act of 2010, Pub. Act 096-0861, § 24A-7 (2010).

³³¹ Illinois School Code Education Labor Relations Pension Act 2011, Pub. Act 097-0008 (2011).

Illinois School History

Illinois Education

In 1818, Illinois became the twenty-first state, with an approximate population of 35,000.³³² Almost forty years later, in 1854, the Office of the Superintendent of Public Instruction was established.³³³ A year after the creation of this new office, the Illinois legislature approved a law to provide a free public school system to the state's children, and in 1856 the Illinois public school system was created.³³⁴ It was not until the ratification of the third Illinois State Constitution in 1870 that the state officially supported the concept of a free public school system.³³⁵ The 1870 Constitution expressly referenced, "The general assembly shall provide a thorough and efficient system of free schools whereby all children of this State may receive a good common school education."³³⁶ The 1870 Constitution also provided for the creation of local school boards and designated the state superintendent a constitutional officer.³³⁷

³³² History.com, *This Day in History*, <http://www.history.com/this-day-in-history/illinois-becomes-the-21st-state> (last visited July 30, 2013).

³³³ Peoriacountyoneroomschools.com, Illinois School History, www.peoriacountyoneroomschools.com/Illinoisschoolhistory.html (last visited July 30, 2013).

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ Ill. Const. of 1870, art. VIII, §1.

³³⁷ *Id.* at §5. The legal definition of a constitutional officer is a government official whose office is created by a constitution, rather than by a statute. The term of office of such officers are fixed and defined by the constitution.

One hundred years later, in 1970, the Illinois Constitution was amended and Article X created the State Board of Education.³³⁸ In addition, a nine member State Board of Education replaced the previously elected position of Superintendent of Public Instruction. In 1984, Illinois created the “Statements of Student Learning Outcomes” which eventually led to the Illinois Learning Standards. A year later the Illinois General Assembly passed the Education Reform Package,³³⁹ which created thirty-four State Goals for Learning³⁴⁰ and led to numerous educational changes.³⁴¹

One of the 1985 *Education Reform Act*³⁴² changes was the addition of Article 24A to the School Code i.e., “Removal or Dismissal of Teachers in Contractual Service.”³⁴³ Article 24A of the 1985 Illinois School Code included sections delineating the development of a teacher evaluation plan (for teachers in contractual continued service and for probationary teachers), the contents and components of the evaluation plan, training for teacher evaluators, and pertinent definitions and rules.³⁴⁴

³³⁸ Ill. Const., art. X, §2(a).

³³⁹ Education Reform Package Act, Pub. Act 84-126 (1985).

³⁴⁰ Illinois State Board of Education, *Introduction to the Learning Standards 1 (1985)*, available at http://www.isbe.state.il.us/ils/pdf/ils_introduction.pdf

³⁴¹ Some of the changes included the creation of Illinois Learning Standards, the creation and widespread use of the Illinois Standards Achievement Test (ISAT), and the creation of performance standards and descriptors.

³⁴² Illinois Education Reform Act of 1985, Pub. Act 084-126 (1985).

³⁴³ 105 ILL. COMP. STAT. 5/24-12 (West 1992); Ill. Rev. Stat. ch. 122, para. 24-12.

³⁴⁴ A more detailed explanation of the 1985 Article 24A can be found later in the literature review.

The 1985 Reform Package also incorporated, for the first time, a specific “purpose of schooling” into the Illinois School Code.³⁴⁵ In conjunction with the new purpose, each school district was required to create learning objectives in the six main subject areas (i.e., language arts, mathematics, social science, biological and physical science, fine arts and physical development and health) and establish an accountability system designed to measure each school district’s attainment of state and local objectives. Although required, each school district had autonomy to create its own learning objectives and measurement system. In 1986, in order to inform stakeholders of the progress schools were making toward the learning objectives, Illinois School Report Cards were distributed to parents and citizens. The Illinois Goal Assessment Program (IGAP)³⁴⁶ was used to measure student achievement starting in 1988.

The Reform Package also mandated, as of 1988, all persons seeking initial certification for teaching, administration, and other certified positions must pass a basic skills test and demonstrate proficiency in relevant content areas. In addition, a criminal background check was initiated and the principal’s job description changed, emphasizing the role as an instructional leader.³⁴⁷ The Reform Package also required regular personnel evaluations be

³⁴⁵ Norman C. Bettis, *Illinois School Reform and the Social Science: 1985 to the Present*, Nov/Dec THE SOCIAL STUDIES 239, 240 (2004).

³⁴⁶ The Illinois Goal Assessment Program (IGAP) developed competency-based tests and carried out the state-level assessment of the goals in all of the selected learning areas, each year in the designated grades. The goal of the assessments was to measure how schools compared to each other. The results were distributed annually via a school "report card."

³⁴⁷ This was a legal change, as the amended job description was detailed in the Illinois School Code.

conducted by evaluators who had received specific training. Lastly, the Reform Package “called for the dismissal of teachers who, as a result of evaluation, have unsatisfactory work performance and who [did] not demonstrate improvement in response to a remediation program.”³⁴⁸

The next major wave of changes to the Illinois School Code came in 1997 with the adoption of the Illinois Learning Standards and Benchmarks. The Illinois Learning Standards (ILS) were published on the heels of the creation of national content standards in many of the subject areas for elementary and secondary students.³⁴⁹ These standards were intended to “enhance, amplify, and clarify the 1985 goals”³⁵⁰ and were based on “what Illinois citizens generally agree[d] upon as constituting a core of student learning.”³⁵¹ The 1997 ILS were more specific than the 1985 learning goals and included detailed benchmark statements designed to assist school districts in creating curriculum and assessments. This represented a move towards a standards-based state education system. The formal, yearly, standardized tests administered to all Illinois students were also changed to reflect this new standards approach. In an effort to align the state assessment with the new learning goals, the Illinois Standards Achievement Test (ISAT) replaced the Illinois Goal Assessment Program (IGAP). With the new ISAT, students in grades three through eight were tested in reading and mathematics and students in grades four and seven were also tested in science. In addition to the ISAT, Illinois administered the

³⁴⁸ James Gordon Ward, *Consensus Politics and Local Control: The 1985 Illinois Educational Reform Package* 11 J. OF EDUC. FIN. 377, 381 (Winter 1986).

³⁴⁹ Bettis, *supra* note 345, at 240.

³⁵⁰ Illinois State Board of Education, *Appendix B “Crosswalk”*
http://www.isbe.state.il.us/ils/pdf/appendixB_crosswalk.pdf.

³⁵¹ *Id.*

Prairie State Achievement Exam (PSAE), correlated to the American College Test (ACT) during high school as an exit exam. Every eleventh grade student was required to complete the PSAE as a culminating assessment of elementary and secondary learning.

With a federal push for performance standards and the establishment of assessment frameworks, two major changes were introduced to Illinois public schools during the 2000-2001 school year. The Illinois State Board of Education (ISBE) created performance standards for each main curricular content area. These performance standards “specif[ied] how well students should perform at various points throughout their educational experience” in relation to meeting state standards.³⁵² These were developed as an optional resource for classroom teachers and appended the learning standards.

The Illinois Assessment Framework (IAF)³⁵³ was created in response to the vast number of inquiries ISBE received about the ISAT and PSAE test questions. It was anticipated IAF’s focus on the five content areas of reading, writing, math, science, and social studies, would yield higher student scores on the state assessments. Prior to 1985, Illinois provided little direction to public schools regarding the purpose of education, educational objectives, and learning targets. Less than two decades later, through legislation and numerous changes to the School Code, Illinois had evolved in these areas.

³⁵² Bettis, *supra* note 345, at 241.

³⁵³ The Illinois Assessment Frameworks (IAF) were designed to assist educators, test developers, policy makers, and the public by clearly defining those elements of the Illinois Learning Standards that were suitable for state testing. They were not designed to replace local or state curricula. They defined the content that was to be assessed on state standardized tests.

However, no more major changes to the Illinois education system occurred until 2010, when in January, Governor Pat Quinn signed the Illinois *Performance Evaluation Reform Act* (PERA)³⁵⁴ into law. This new law changed the teacher evaluation system and connected teacher job security to teacher performance evaluation, which was connected to student performance. This new law was an effort to increase teacher accountability and reduce the power of tenure.³⁵⁵

Illinois School Reform and Illinois School Code

Illinois school improvement legislation progressed in stages, beginning with the creation of learning goals in 1985. The learning goals were a major component of the 1985 Educational Reform Package.³⁵⁶ The changes created by the Reform Package necessitated numerous changes to the Illinois School Code. In response to the 1983 report, *A Nation at Risk*, the Illinois General Assembly created the Illinois Commission on the Improvement of Elementary and Secondary Education.³⁵⁷ This Commission was created to respond to the “wide and serious concerns ... generated from the “gap between public expectations and school

³⁵⁴ Illinois Performance Evaluation Reform Act of 2010, Pub. Act 096-0861, § 24A-7 (2010).

³⁵⁵ Sean Cavanagh, *Illinois' New Teacher Law: Model for Other States, or Outlier?* EDUCATION WEEK, June 13, 2011 available at http://blogs.edweek.org/edweek/state_edwatch/2011/06/illinois_governor_signs_teacher_law_a_model_for_other_states.html.

³⁵⁶ The Illinois Educational Reform Act of 1985, Pub. L. No. 084-126 (1985). This piece of legislation had over 160 legislative changes covering a plethora of educational topics.

³⁵⁷ Illinois State Board of Education, *The Education Package: An Overview* (1985) available at <http://files.eric.ed.gov/fulltext/ED260519.pdf>.

performance”³⁵⁸ and a perception Illinois did not have a “clear picture of what the state viewed as important in education.”³⁵⁹

The Commission recommended 1) the primary purposes of education be identified, 2) school districts make it a priority to achieve those purposes, 3) reasonable student achievement expectations be created, and 4) local assessments of student learning be conducted and reported, to inform the public of the extent to which students met the achievement expectations.³⁶⁰ This increased accountability vis-à-vis student assessment and public reporting was not a surprise.³⁶¹ The decades of negative attitudes toward public education beginning with Sputnik and continuing with *A Nation at Risk* made “the increased accountability measures [of the Commission’s report and the resulting 1985 Educational Reform Package, a] virtually forgone conclusion.”³⁶² The decision to statutorily formalize the learning objectives, student assessment, and public reporting of data placed “an expectation for continuous improvement in local education” on the public agenda.³⁶³

³⁵⁸ Ted Sanders, *Illinois Educational Reform: A Thoughtful Response to Crisis*, ILL. PERIODICALS ONLINE, May 1986, at 17 available at <http://www.lib.niu.edu/1986/ii860517.html>.

³⁵⁹ *Id.* at 18.

³⁶⁰ *Id.*

³⁶¹ Donald Sevener, *Revisiting the 1985 Education Reforms: Is the 'Old School Bus' Running Better?* ILL. PERIODICALS ONLINE, May 1991, at 15 available at <http://www.lib.niu.edu/1991/ii910514.html>.

³⁶² Sanders, *supra* note 358, at 18.

³⁶³ *Id.* at 19.

The 1985 Educational Reform Package created a protocol allowing tenured teachers to be terminated for ‘cause’ after the required procedures were followed.³⁶⁴ The Illinois School Code defined cause as “some substantial shortcoming which renders continuance in employment detrimental to discipline and effectiveness of service, or something which the laws and sound public opinion recognized as a good reason for the teacher to no longer occupy his position.”³⁶⁵ The five major reasons for dismissal were unethical behavior, physical abuse of students, personal misconduct, insubordination, and teacher incompetence. Of these, only teacher incompetence relates to PERA and, therefore, will be the only reason addressed by this study.

Teacher incompetence is generally defined as the inability or failure of a teacher to provide adequate instruction to students.³⁶⁶ The Illinois statute does not define incompetence.³⁶⁷ As a result, each legal case informs the judiciary’s working definition of the term.³⁶⁸ Standard K of the Illinois Professional Teaching Standards³⁶⁹ “require[d] ‘the

³⁶⁴ Prior to 1975, school boards had authority to make final decisions on teacher dismissals. (Paul W. Thurston, *Dismissal of Tenured Teachers in Illinois: Evolution of a Viable System*, U. ILL. L. REV. 1, 1 (1990).) However, in 1975 the Illinois legislature added an administrative hearing requirement to the process for dismissing tenured teachers.

³⁶⁵ 105 ILL. COMP. STAT. 5/10-22.4 (West 1983).

³⁶⁶ Regina Umpstead, Kevin Brady, Elizabeth Lugg, Joann Klinker & David Thompson, *Educator Ethics: A Comparison of Teacher Professional Responsibility Laws in Four States*, 42 J.L. & EDUC. 183, 224 (2013).

³⁶⁷ In 2011, SB 7 defined “incompetence” as two “unsatisfactory” evaluations within a seven-year period. Illinois School Code Education Labor Relations Pension Act 2011, Pub. Act 097-0008, § 21-23(a) (2011).

³⁶⁸ Thurston, *supra* note 364, at 32.

³⁶⁹ ILL. ADMIN. CODE tit. 23(A)(I)(6) § 24.100(k) (2012).

competent teacher understand education as a profession, maintain standards of professional conduct, and provide leadership to improve students' learning and well being."³⁷⁰ Standard K elaborated by stating, "the competent teacher 'follows codes of professional conduct and exhibits knowledge and expectations of current legal directives.'"³⁷¹

Paul W. Thurston,³⁷² author of *Dismissal of Tenured Teachers in Illinois: Evolution of a Viable System*, believed Article 24A of the Illinois School Code could "significantly alter the meaning of incompetence" due to mandatory evaluations and the changes to how remediability was handled.³⁷³ He postulated Article 24A's addition decreased the number of incompetency dismissals, citing thirty dismissal cases between 1976 and 1985, while there were only four cases in 1986 and 1987, and none in 1988 and 1989.³⁷⁴

Regina Umstead, Kevin Brady, Elizabeth Lugg, Joann Klinker and David Thompson also discovered through their research (conducted prior to PERA's enactment) student performance "remains an elusive legal criterion for disciplinary actions."³⁷⁵ Their research indicated the majority of teacher dismissals based upon incompetence focused on poor classroom management and lack of understanding of content matter. Illinois required teachers to improve student learning and well-being and to maintain standards of professional conduct

³⁷⁰ Umstead, *supra* note 366, at 191.

³⁷¹ *Id.* at 192.

³⁷² Paul W. Thurston received his J.D. and his Ph.D. in Education Administration from the University of Iowa. He is Professor Emeritus in Education Policy, Organization and Leadership at the University of Illinois at Urbana – Champaign. Thurston, *supra* note 364, at 5.

³⁷⁴ *Id.* at 31.

³⁷⁵ Umstead, *supra* note 366, at 224.

as defined by the Illinois School Code.³⁷⁶ With PERA's changes to Article 24A of the School Code, it has become easier to hold teachers accountable for student performance. Currently, Article 24A-5 requires student growth data to be used as a significant factor in rating overall teacher performance.³⁷⁷

Article 24A of the 1985 School Code, Prior to PERA

In 1985, Article 24A of the Illinois School Code focused on the process of evaluating teachers' classroom performance. Article 24A contained the details of the evaluation plan, rules for implementation, as well as the pertinent definitions, scheduling requirements, and the corresponding rules for teacher evaluation.³⁷⁸ Article 24A of the 1985 School Code, while more specific than any previous Code, was simultaneously silent and/or vague in many areas. These areas will be addressed by the changes required by PERA and will be discussed in a later portion of this study.³⁷⁹

In 1985, the School Code included the requirement for school districts to create and submit a teacher evaluation plan for their teachers because "school districts ... must ensure that performance evaluation systems are valid and reputable and contribute to the development of staff and improve student achievement outcomes."³⁸⁰

³⁷⁶ *Id.* at 219.

³⁷⁷ 105 ILL. COMP. STAT. 5/24A-4 (West 2010).

³⁷⁸ The subject of principal evaluations has not been addressed, as the focus of this study is teacher evaluation.

³⁷⁹ See Appendix D for tables highlighting the significant changes to Article 24A.

³⁸⁰ 105 ILL. COMP. STAT. 5/4 (West 1985).

Article 24A-4 of the School Code required the “development and submission of [an] evaluation plan . . . for all teachers.”³⁸¹ This plan was required to be “submitted to the State Board of Education for review and comment.”³⁸² The evaluation plan needed to “include a description of each teacher’s duties and responsibilities and of the standards to which the teacher is expected to conform.”³⁸³

Article 24A-5 dealt with the content of the evaluation plan and the frequency of evaluation for tenured teachers. This section specified tenured teachers were to be evaluated at least once every two years. In 1985, the School Code allowed the teacher evaluations to be completed by persons “not employed by or affiliated with the school district” or by someone deemed a “qualified district administrator” or an assistant principal under the supervision of a “qualified administrator.”³⁸⁴ The teacher’s attendance, planning, instructional methods, classroom management, and competency in subject matter were all to be taken into account in determining the teacher’s overall performance rating. At the end of the evaluation, the teacher’s strengths and weaknesses were to be documented along with any support needed for the teacher to improve. The statute mandated teachers would receive one of three overall ratings: excellent, satisfactory, or unsatisfactory.³⁸⁵ A copy of the evaluation was to be placed in the teacher’s personnel file.

³⁸¹ *Id.* at 5/24A-4.

³⁸² *Id.*

³⁸³ *Id.* at 5/24A-5.

³⁸⁴ *Id.* at 5/24A-5(a).

³⁸⁵ *Id.* at 5/24-5(d).

Article 24A-5 also provided the procedures triggered when a teacher received an overall “unsatisfactory” performance rating. The 1985 statute stated, within thirty days of the “unsatisfactory” evaluation rating a remediation plan designed to correct the teacher’s deficiencies was to be developed and implemented.³⁸⁶ A consulting teacher,³⁸⁷ selected by the district, was to assist with the facilitation of the remediation plan and to provide advice to the remediating teacher.³⁸⁸ Written performance evaluations were required every thirty school days during the ninety school day remediation period.³⁸⁹ These evaluations and the final evaluation at the conclusion of the remediation plan were to be “separate and distinct from the required annual evaluations.”³⁹⁰ Following the remediation plan, the 1985 law required further evaluations for the six months following the successful completion of the remediation plan.³⁹¹ After the six-month period, the teacher was reinstated to the “schedule of biennial evaluation[s].”³⁹²

³⁸⁶ 105 ILL. COMP. STAT. 5/24-5(f) (West 1985).

³⁸⁷ A consulting teacher is defined by Article 24A-5(j) as an educational employee with at least five years teaching experience, a reasonable familiarity with the assignment of the teacher being evaluated, and who received an “excellent” rating on his/her most recent evaluation.

³⁸⁸ 105 ILL. COMP. STAT. 5/24A-5(h) (West 1985).

³⁸⁹ *Id.*

³⁹⁰ *Id.*

³⁹¹ *Id.*

³⁹² *Id.* at (i).

If the teacher did not complete the remediation plan with a rating of “satisfactory,” the teacher was to be dismissed.³⁹³ The consulting teacher could not be compelled to testify at the teacher’s dismissal hearings.³⁹⁴ Immediate dismissal for “deficiencies which are deemed irreparable”³⁹⁵ were also specified in this section of the 1985 School Code.

Article 24A-7, stated, “the State Board of Education is authorized to adopt such rules as are deemed necessary to implement and accomplish the purposes and provisions of the Article.”³⁹⁶ Article 24A-8 specified the evaluations of non-tenured teacher performance be conducted once every school year.³⁹⁷ The remaining sections primarily dealt with principal evaluations, the powers and duties of the Superintendent, and a variety of administrative details.³⁹⁸

Pertinent Article 24A Teacher Dismissal Cases Prior to PERA (1985 - 2010)

Between the 1985 promulgation of the *Illinois Educational Reform Act*³⁹⁹ and the addition of Article 24A to the Illinois School Code, and prior to the changes emerging from the

³⁹³ *Id.* at (j).

³⁹⁴ 105 ILL. COMP. STAT. 5/24A-5(m) (West 1985).

³⁹⁵ *Id.* at (i).

³⁹⁶ *Id.* at 5/24A-7.

³⁹⁷ *Id.* at 5/24A-8.

³⁹⁸ These subjects have not been addressed, as the focus of this study is teacher evaluation.

³⁹⁹ The Illinois Educational Reform Act of 1985, Pub. L. No. 84-126 (1985), had 169 legislative changes which ranged broadly across a number of educational topics. Article 24A was one of those changes.

*Performance Evaluation Reform Act*⁴⁰⁰ and Senate Bill 7,⁴⁰¹ several teacher dismissals resulting from “unsatisfactory” classroom performance ratings were litigated. These cases and their import are discussed below, beginning with *Powell v. Board of Education*. *Powell* was the first teacher dismissal case for unsatisfactory teaching performance after the 1985 changes to the School Code. It is cited by numerous subsequent teacher dismissal cases, and set precedent; therefore it is discussed first.⁴⁰²

*Powell v. Board of Education*⁴⁰³

Kenneth Powell was a tenured teacher with twenty-two years of experience with Peoria School District 150. Powell’s March 1987 summative performance evaluation rated his teaching performance as “unsatisfactory – needs improvement.” Powell was placed on a remediation plan developed pursuant to Article 24A-5.⁴⁰⁴ According to school officials, Powell’s classroom performance needed improvement in four areas; discipline, classroom management, enthusiasm, and organization.⁴⁰⁵ The remediation plan was implemented during the 1987-1988 school year, and Powell was notified if he did not successfully complete the

⁴⁰⁰ Illinois Performance Evaluation Reform Act of 2010, Pub. Act 096-0861 §24A-7 (2010).

⁴⁰¹ Illinois School Code Education Labor Relations Pension Act 2011, Pub. Act 097-0008 (2011).

⁴⁰² The cases are organized chronologically, based on the decision dates.

⁴⁰³ *Powell v. Bd. of Educ. of the City of Peoria*, 189 Ill. App. 3d 802 (Ill. App. 1989).

⁴⁰⁴ *Id.* at 805.

⁴⁰⁵ *Id.* See also 105 ILL. COMP. STAT. § 24A-5 (West 1992).

remediation plan, he would be dismissed.⁴⁰⁶ At the culmination of the remediation plan, Powell had failed to improve and his teaching performance was rated as “unsatisfactory” in each of his quarterly reviews.⁴⁰⁷ The local board of education dismissed Powell and thereafter he demanded a hearing.⁴⁰⁸ The hearing officer affirmed the local school board’s dismissal decision.

Powell appealed the hearing officer’s ruling.⁴⁰⁹ The circuit court of Peoria County reversed the hearing officer’s decision, finding the School Board had not met the statutory requirements for initiating Powell’s remediation plan.⁴¹⁰ The Board of Education appealed.

The Third District appellate court had two issues to decide: “whether Article 24A require[d] school boards to ‘initiate’ or develop a remediation program as stated in the trial court order,”⁴¹¹ and “whether there [could] be a discharge of a teacher who ha[d] undergone remediation with the Board acting in only a ministerial capacity.”⁴¹²

To resolve the first issue, the appellate court analyzed the trial court’s interpretation of Article 24A vis-à-vis the “legislative scheme of Article 24A.”⁴¹³ The court noted Article 24A

⁴⁰⁶ *Powell v. Peoria*, 189 Ill. App. 3d at 805.

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² *Powell v. Peoria*, 189 Ill. App. 3d at 806.

⁴¹³ *Id.* at 805.

was added to the School Code to “improve educational services by requiring that all certified school district employees be evaluated ... [placing] the majority of the responsibility for evaluating teachers with school administrators.”⁴¹⁴ The court noted an administrator was responsible for the observation, the determination of the teacher’s strengths and weaknesses, and the determination of the overall performance rating. More importantly, the court noted it was an administrator who concluded whether the teacher had successfully completed the remediation plan.⁴¹⁵ “Given [the] legislative scheme and the unspecific language of the statute,”⁴¹⁶ the appellate court found “district administrators [were] ... to develop the individual teacher’s remediation plan under the overall supervision of the school board.”⁴¹⁷

On the second issue, determining the extent of the school board’s involvement in dismissing a teacher who failed to successfully complete a remediation plan, the court relied on the language of Article 24-12. Article 24-12 stated, “a Board must give the teacher reasonable warning in writing, stating specifically the causes which, if not removed, may result in charges [Notice to Remedy]; however no such written warning shall be required if the causes have been the subject of a remediation plan pursuant to Article 24A.”⁴¹⁸ The appellate court agreed with the School Board, citing the “clear statutory mandate set forth in the amended version of

⁴¹⁴ *Id.* at 806.

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ *Id.*

⁴¹⁸ *Powell v. Peoria*, 189 Ill. App. 3d at 806.

[Article] 24-12.”⁴¹⁹ The appellate court reversed the trial court, thereby resulting in an affirmation of the School Board’s decision to terminate Powell’s employment.

Dudley v. Board of Education⁴²⁰

There were no other Article 24A teacher dismissal cases in Illinois for five years. Then, during the 1990-1991 school year, a tenured teacher was dismissed for not successfully completing a remediation plan. Deborah Dudley, a tenured teacher in the Bellwood School District, received an “unsatisfactory” evaluation for the 1990-1991 school year, and was placed on a remediation plan. At the conclusion of the remediation plan, the School Board noted Dudley failed to successfully complete the remediation plan and terminated her employment. Dudley filed suit in the Circuit Court of Cook County, alleging her “evaluation and remediation program for the 1990-91 and 1991-92 school years were conducted in a manner contrary to Article 24A of the School Code.”⁴²¹ During the time of the dismissal hearings, Dudley was suspended without pay.⁴²²

The trial court dismissed Dudley’s first Count because it “failed to state a cause of action and was not properly before the court because [Dudley] had failed to exhaust her administrative remedies.”⁴²³ The second count dealt with Dudley’s claim that her suspension

⁴¹⁹ *Id.* at 807.

⁴²⁰ *Dudley v. Bellwood Sch. Dist.*, 260 Ill. App. 3d 1100 (Ill. App. 1994).

⁴²¹ *Id.* at 1101.

⁴²² *Id.*

⁴²³ *Id.*

without pay violated her due process rights.⁴²⁴ The Board of Education filed a motion to dismiss on the grounds that Dudley “failed to exhaust her administrative remedies.”⁴²⁵ The trial court dismissed the case and Dudley appealed.

When the First District, Sixth Division appellate court heard the case, it had to decide the issues of private right of action⁴²⁶ for enforcement of the School Code⁴²⁷ and whether the evaluation plan was administered in compliance with Article 24A.⁴²⁸ Article 24-12 of the School Code stated “the decision of the hearing officer is final unless the plaintiff pursues administrative review under section 24-16.”⁴²⁹ Since “one may not seek judicial relief from an administrative action unless he has exhausted all administrative remedies available” and since the only exception to this rule is in the circumstance “when a party challenges the constitutionality of a statute on its face,”⁴³⁰ the appellate court affirmed the trial court’s dismissal decision.

“Because [Dudley had] challenged the provisions of Article 24A only as they applied to her,”⁴³¹ and her challenge was not based on “the claim that Article 24A was invalid on its

⁴²⁴ *Id.*

⁴²⁵ *Id.* at 1102.

⁴²⁶ A right of action is defined as the privilege of instituting a lawsuit arising from a particular transaction or state of facts.

⁴²⁷ *Dudley*, 260 Ill. App. 3d at 1103.

⁴²⁸ *Id.* at 1104.

⁴²⁹ *Id.* at 1105.

⁴³⁰ *Id.* at 1106.

⁴³¹ *Id.* at 1107.

face,”⁴³² she was required to exhaust all administrative remedies prior to seeking the court’s assistance in the resolution of the matter.⁴³³ The appellate court found Dudley had not exhausted all administrative remedies and therefore affirmed the trial court’s dismissal of her complaint.

Davis v. Board of Education⁴³⁴

At approximately the same time as the Dudley case, another teacher dismissal case was making its way through the legal system. George Davis had been employed by the Chicago Board of Education since 1963 and began teaching automotive mechanics in the fall of 1989. Davis’ principal, Dr. Charles Lutzow, observed Davis’s classroom teaching performance on many occasions and noted several deficiencies. In an effort to correct the deficiencies, Lutzow met with Davis numerous times to discuss areas of weakness and offered suggestions for improvement. Unsatisfied with Davis’ response, Lutzow rated Davis’ teaching performance as “unsatisfactory” and thereafter developed a remediation plan.⁴³⁵ The forty-five school day remediation plan⁴³⁶ specified ten areas of weakness, including inadequate knowledge of content

⁴³² *Id.* at 1106.

⁴³³ *Dudley*, 260 Ill. App. 3d at 1107.

⁴³⁴ *Davis v. Bd. of Educ. of the City of Chicago*, 276 Ill. App. 3d 693 (Ill. App. 1995).

⁴³⁵ *Id.* 694-95.

⁴³⁶ *Id.* at 696; Article 24A of the school Code provides for a 45 school day remediation plan for a tenured teacher, following an unsatisfactory teacher performance rating. The Code also provides for additional remediation, up to one year, when at the conclusion of the 45 school day period the principal and the consulting teacher determine the teacher’s performance may be remediable. 105 ILL. COMP. STAT. 5/24A-5(f) (West 2010).

area, inadequate preparation, failure to motivate students, failure to implement suggestions for improvement, and failure to use class time effectively.⁴³⁷

Davis indicated he understood the terms of the remediation plan and worked with his department head, who also served as the consulting teacher.⁴³⁸ During implementation of the remediation plan, Davis was observed at least ten times. At the conclusion of the remediation plan, the principal determined Davis had not made adequate progress and his teaching performance remained “unsatisfactory.”⁴³⁹ The cited reasons for the unsatisfactory performance rating were inability to explain the material to students, lack of organization, failure to assign and check homework, and failure to implement suggestions for improvement.⁴⁴⁰ As a tenured Chicago teacher, Davis could have received an additional remediation plan, if the principal and consulting teacher determined the issues at hand were remediable.⁴⁴¹ As a result, Davis was dismissed, and he subsequently requested an administrative hearing.

Based on the evidence, the hearing officer concluded school officials made the correct decision as the evidence substantiated “nine of [the] ten charges of unsatisfactory performance against Davis.”⁴⁴² The hearing officer concluded Davis’ failure to improve and failure to

⁴³⁷ *Davis*, 276 Ill. App. 3d at 695.

⁴³⁸ *Id.*

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.* at 696.

⁴⁴² *Id.* at 695.

satisfactorily complete the remediation plan constituted sufficient cause for dismissal. Davis then filed suit in the Circuit Court of Cook County.

The trial court upheld the hearing officer's decision and Davis appealed to the Illinois Appellate Court. Davis contended the hearing officer, not the Board of Education, should have made the decision whether or not to extend his remediation period, since "the statute clearly vest[ed] the principal and the consulting teacher with the power to make this determination."⁴⁴³ The appellate court did not agree with Davis. Davis also argued the forty-five day remediation period was inappropriate because "he exhibited some improvement."⁴⁴⁴ Article 24A prescribed a forty-five day remediation period for Chicago Public School teachers, and the administrator and consulting teacher had the authority to determine both whether the remediation time period should be extended and whether the teacher's performance was "satisfactory" or not.⁴⁴⁵

The appellate court also rejected Davis' claim that a determination of remediability with respect to his behavior had to be made, in order to ascertain if he should be dismissed. Article 24A-5(j) stated, "any teacher who fail[ed] to complete any applicable remediation plan with a 'satisfactory' or better rating" shall be dismissed in accordance with the School Code.⁴⁴⁶ In addition, *Powell v. Board of Education*,⁴⁴⁷ previously established failure to complete a remediation plan under Article 24A with a "satisfactory," or better, rating constituted sufficient

⁴⁴³ *Davis*, 276 Ill. App. 3d at 696.

⁴⁴⁴ *Id.*

⁴⁴⁵ 105 ILL. COMP. STAT. 5/24A-5(f) (West 1992).

⁴⁴⁶ *Id.* at 5/24A-5(j).

⁴⁴⁷ *Powell v. Bd. of Educ. of the City of Peoria*, 189 Ill. App. 3d 802 (Ill. App. 1989).

grounds for dismissal.⁴⁴⁸ The court further observed Article 24A “provide[d] an alternative avenue for dismissal of incompetent teachers and drastically curtail[ed] the application of remediation.”⁴⁴⁹

Therefore, the appellate court affirmed Davis’ dismissal. The appellate court concluded, “despite minor improvements in certain deficient areas, the record supports the ... conclusion that Davis’ performance was unacceptable [and his] ... deficiencies correlated directly with his inability to do his job.”⁴⁵⁰

*Board of Education v. Smith*⁴⁵¹

Similar to George Davis, Vashti Smith was also a thirty-year veteran teacher, and her case was decided just one year after the *Davis* decision. Vashti Smith had been employed by the Chicago Public Schools since 1969 and was dismissed near the end of the 1990-1991 school year for not successfully completing a remediation plan.⁴⁵² In March 1991, Smith’s “unsatisfactory” performance rating stemmed in part from her failure to record grades, maintain bulletin boards, follow the math curriculum, and prepare appropriate lesson plans.⁴⁵³ After a conference with her principal, Robert Kellberg, Smith was placed on a remediation plan

⁴⁴⁸ *Davis* 276 Ill. App. 3d at 697.

⁴⁴⁹ Thurston, *supra* note 364, at 77.

⁴⁵⁰ *Davis*, 276 Ill. App. 3d at 697.

⁴⁵¹ *Chicago Bd. of Educ. v. Smith*; 279 Ill. App. 3d 26 (Ill. App. 1996).

⁴⁵² *Id.* at 28.

⁴⁵³ *Id.*

starting March 12, 1991.⁴⁵⁴ During the period of remediation, Kellberg conducted at least four observations and held post observation conferences with Smith.

The remediation period ended on May 21, 1991 and on May 23 Kellberg notified Smith “her performance was still unsatisfactory, that the remediation period would not be extended, and that he was going to recommend that she be dismissed.”⁴⁵⁵ On May 24, Kellberg sent a letter to the Deputy Superintendent of Schools recommending Smith’s dismissal.⁴⁵⁶ Smith was dismissed and subsequently protested the Board’s decision. An administrative hearing was held.

Smith requested to be reinstated on the grounds the proper classroom observation forms were not used ... and because Smith had not received an evaluation at the conclusion of the remediation period, as required by the Teacher Evaluation Plan and the district’s Handbook of Procedures and the School Code.⁴⁵⁷ The hearing officer found Smith’s dismissal “void because, after Smith was placed on remediation, the Board failed to utilize the ‘Classroom Teacher Visitation Form’ and failed to provide an evaluation at the end of her remediation period.”⁴⁵⁸ The hearing officer also held Smith had not waived her right to object, because Smith had communicated to the Board her assertions concerning the various violations of

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.*

⁴⁵⁷ *Chicago v. Smith*, 279 Ill. App. 3d 29.

⁴⁵⁸ *Id.*

School Code, the Teacher Evaluation Plan, and the Handbook.⁴⁵⁹ For these reasons, the hearing officer ordered Smith reinstated subject to the successful completion of another forty-five day remediation plan.⁴⁶⁰ The Board sought judicial review.

The Circuit Court reversed the hearing officer's decision after deciding Smith had waived her right to object to not receiving an evaluation. The judge remanded the case back to the hearing officer on the issue of whether Smith's teaching was satisfactory or not.⁴⁶¹ "Upon remand, the hearing officer determined Smith had been dismissed for cause under the School Code. Whether Smith's teaching was satisfactory or unsatisfactory was not under discussion, as the hearing officer found Smith's dismissal void because the district failed to follow the proper procedures."⁴⁶² Upon review, the circuit court affirmed and the Board appealed.

The First District, Second Division appellate court reviewed the facts and reversed the circuit court's decision, thereby affirming the decision of the hearing officer. The appellate court concluded Smith had not received a proper evaluation at the culmination of the remediation period and school officials had failed to use the proper forms. As for the trial court's interpretation of the Administrative Code concerning waiving the right of objection, the appellate court found "no binding authority which interpret[ed]" this section of the Code, and therefore favored the narrow scope used by the hearing officer.⁴⁶³ The appellate court

⁴⁵⁹ *Id.* at 30.

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.* at 31.

⁴⁶² *Id.* at 29.

⁴⁶³ *Chicago v. Smith*, 279 Ill. App. 3d at 33-34.

concluded even if the proper forms had not been used, had the substance of the forms been a true evaluation, it would have sufficed. But, the court determined the “evaluation” Smith received at the end of the remediation period, was not a true evaluation in accordance with the School Code and the Handbook. Therefore, the dismissal was void.⁴⁶⁴ The circuit court’s decision was reversed and the hearing officer’s decision overturning Davis’ dismissal was affirmed.

*Board of Education v. Spangler*⁴⁶⁵

The last tenured teacher dismissal case to be decided in the 1990s was the *Spangler* case. Raymond Spangler was a tenured teacher in the Elk Grove School District and had received satisfactory reviews prior to the 1996-1997 school year. During September 1996, Spangler’s principal, Bruce Brown, observed Spangler five times and sent Spangler a letter detailing his concerns “that needed immediate attention.”⁴⁶⁶ Brown advised Spangler if he did not improve, “it might result in an unsatisfactory rating.”⁴⁶⁷ At the summative evaluation meeting in April of the school year, Spangler received an unsatisfactory rating on his teaching performance. Five areas of deficiency were cited, among them, “instructional methods, lesson

⁴⁶⁴ *Id.* at 35.

⁴⁶⁵ *Bd. of Educ. of Cmty. Consol. Sch. Dist. No. 54 v. Spangler*, 328 Ill App. 3d 747 (Ill. App. 2002).

⁴⁶⁶ *Id.* at 748.

⁴⁶⁷ *Id.*

planning and organization, concept of lesson directions, and pacing.”⁴⁶⁸ A remediation plan was implemented at the end of the school year.

During the first quarter of the remediation period, Spangler was observed multiple times and received an “unsatisfactory rating on his ... progress.”⁴⁶⁹ The first quarter evaluation also noted, “concerns [detailed] in the remediation plan remained largely unaddressed by Spangler.”⁴⁷⁰ Numerous observations occurred during each of the three subsequent remediation quarters, and Spangler was given an “unsatisfactory” rating each quarter.⁴⁷¹ At the conclusion of the remediation period, Spangler received an overall unsatisfactory rating and the Board of Education passed a resolution to dismiss him.⁴⁷²

At the request of Spangler, a hearing was held and the hearing officer reversed the Board’s decision. The hearing officer concluded while Spangler’s teaching had deficiencies, they “hardly appear[ed] to be so serious as to warrant an unsatisfactory rating.”⁴⁷³ Of the school board’s seventeen charges against Spangler, there were only six charges the hearing officer found to constitute “a legitimate complaint” or “sustained” or “serious enough.”⁴⁷⁴ The hearing officer concluded, “the Board failed to show by a preponderance of evidence that

⁴⁶⁸ *Id.* at 749.

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.*

⁴⁷¹ *Spangler*, 328 Ill App. 3d at 749.

⁴⁷² *Id.*

⁴⁷³ *Id.* at 750.

⁴⁷⁴ *Id.* at 750-51.

Spangler deserved an unsatisfactory rating during the remediation year, nor should he have been dismissed.”⁴⁷⁵

The Board appealed and the circuit court affirmed the hearing officer’s decision.⁴⁷⁶ Upon appeal, the Illinois Appellate Court focused on two issues: the scope of a hearing officer’s authority, and if the charges proven warranted dismissal.

With respect to the issue of the scope of the hearing officer’s authority, the Board argued the hearing officer had “no authority to evaluate the seriousness or gravity of the charges when ascertaining whether the Board had met its burden of proving that an unsatisfactory rating was justified.”⁴⁷⁷ The Board further argued the hearing officer could “only determine whether the Board had proven, by a preponderance of the evidence, the charges alleged.”⁴⁷⁸

Instead, the board argued the hearing officer substituted “his judgment for that of the board.”⁴⁷⁹ The appellate court disagreed with the Board’s interpretation of Article 24-12 of the School Code. The court stated, “it was the legislature’s intent to give full and total authority to the hearing officer to make the ultimate decision and determination as to dismissal.”⁴⁸⁰

⁴⁷⁵ *Id.* at 751.

⁴⁷⁶ *Id.*

⁴⁷⁷ *Spangler*, 328 Ill App. 3d at 753.

⁴⁷⁸ *Id.*

⁴⁷⁹ *Id.*

⁴⁸⁰ *Id.* at 754.

The Board also argued the hearing officer's decision to reverse the dismissal of Spangler was erroneous. The Board asserted since it proved six of the charges against Spangler, the hearing officer "was required as a matter of law to dismiss Spangler."⁴⁸¹ The hearing officer, however, believed only two of the charges were fully supported.⁴⁸² The appellate court grappled with the question of whether the hearing officer was required to find Spangler's teaching performance properly rated "unsatisfactory" because he found two of the charges to be proven.⁴⁸³ After consideration, the appellate court found the Board failed to provide "any authority in support of its argument"⁴⁸⁴ and the court "reject[ed] the Board's argument that the hearing officer erred as a matter of law in failing to uphold the dismissal based on the fact that a certain number of charges were proven."⁴⁸⁵ For these reasons, the appellate court affirmed the reversal of Spangler's dismissal.

*Buchna v. Board of Education*⁴⁸⁶

Similar to the Smith case, where strict adherence to procedures was of the utmost importance, the Buchna case also exemplifies the consequences of not following the School Code. Lauri Buchna, a third grade teacher at Illinois Valley Central Unit School District No.

⁴⁸¹ *Id.* at 759.

⁴⁸² *Id.* at 760.

⁴⁸³ *Spangler*, 328 Ill App. 3d at 760.

⁴⁸⁴ *Id.*

⁴⁸⁵ *Id.*

⁴⁸⁶ *Buchna v. Ill. State Bd. of Educ.*, 342 Ill. App. 3d 934 (Ill. App. 2003).

321, was placed on a one-year remediation plan, after receiving a rating of “Does not Meet District Expectations” during the 1997-1998 school year.⁴⁸⁷ The remediation plan encompassed ten areas in which Buchna was found to be deficient, including instructional planning, instructional methods, classroom management, subject matter competence, and professional responsibilities.⁴⁸⁸ She was subsequently terminated for failing to successfully complete the remediation plan. At the end of the fourth quarterly evaluation during the year-long remediation period, Buchna received an overall rating of “Does not Meet District Expectations” and was dismissed.⁴⁸⁹

After her employment was terminated, Buchna appealed to the Illinois State Board of Education, asking for a directed verdict arguing “her termination was improper because the District failed to comply with Article 24A’s mandatory language” and procedures.⁴⁹⁰ In particular, Buchna argued since she did not receive an evaluation using the three ratings specified in Article 24A, the termination was invalid.⁴⁹¹ The hearing officer denied the motion, stating the District had “substantially complied with Article 24A.”⁴⁹² The circuit court affirmed

⁴⁸⁷ *Id.* at 935.

⁴⁸⁸ *Id.*

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.* at 936.

⁴⁹¹ *Id.*

⁴⁹² *Buchna*, 342 Ill. App. 3d at 936.

the hearing officer's decision, finding "the decision was neither against the manifest weight of the evidence, nor contrary to law."⁴⁹³

Buchna appealed on the grounds school officials had "ignored the requirements" of Article 24A's statutory language requiring the use of three specific performance ratings and instead "rated [her] under a scheme using only two ratings – neither of which employed the statutory language."⁴⁹⁴ The court ruled "aside from the simple issue of compliance, such disregard threatens the legislature's intended application of Article 24A-5."⁴⁹⁵ Accordingly, the court held the school district's noncompliance with Article 24A's statutory procedure invalidated the Board of Education's authority to remediate Buchna's teaching performance.⁴⁹⁶ Therefore, it reversed Buchna's dismissal. The *Buchna* decision affirmed the requirement for school officials to strictly adhere to the language and procedures detailed in Article 24A.

*Raitzik v. Board of Education*⁴⁹⁷

The Buchna case highlighted the need to follow procedures, and following procedures is the reason cited in the Raitzik case for upholding the district's decision to dismiss a tenured teacher. Prior to the 2000-2001 school year, Charlene Raitzik, a tenured teacher with twenty-

⁴⁹³ *Id.*

⁴⁹⁴ *Id.* at 937.

⁴⁹⁵ *Id.* at 938.

⁴⁹⁶ *Id.* at 939.

⁴⁹⁷ *Raitzik v. Bd. of Educ. of the City of Chicago*; 356 Ill. App. 3d 813 (Ill. App. 2005).

five years of experience, had received a majority of positive year-end performance ratings.⁴⁹⁸

Raitzik originally taught eighth grade, but was moved to the sixth, and then to the second grade, due to her inability to “control”⁴⁹⁹ the students. The change in grade levels did not improve Raitzik’s classroom management skills, and she was moved back to the sixth grade.⁵⁰⁰ From 1993 to 1995, Raitzik earned satisfactory and excellent ratings,⁵⁰¹ however, in 1995 Raitzik “received an unsatisfactory rating”⁵⁰² and was cited for “not maintaining a task-oriented or orderly classroom, ... not carrying out discipline procedures and ... not motivating the students.”⁵⁰³

Raitzik was put on a 90-day remediation plan following her second unsatisfactory rating in 1996.⁵⁰⁴ The remediation plan was “extended twice before [Raitzik] successfully completed the plan and raised her rating to satisfactory.”⁵⁰⁵ In the three years following successful completion of the remediation plan, Raitzik earned two excellent and one satisfactory

⁴⁹⁸ *Id.* at 814.

⁴⁹⁹ *Id.* at 815.

⁵⁰⁰ *Id.*

⁵⁰¹ *Id.*

⁵⁰² *Id.*

⁵⁰³ *Raitzik*, 356 Ill. App. 3d at 815.

⁵⁰⁴ *Id.*

⁵⁰⁵ *Id.*

performance ratings.⁵⁰⁶ With each rating, it was noted her relationships with the students and her classroom management skills still needed improvement.⁵⁰⁷

During the 2000-2001 school year Raitzik was observed two times and deficiencies were noted, including not eliciting the cooperation of her students, not displaying student work, lack of interpersonal skills, having a messy desk, having incomplete lesson plans and attendance records, not being able to control her students, and not enforcing an assertive discipline plan.⁵⁰⁸ In addition, students complained Raitzik had lost their homework and test papers and made students re-do the work.⁵⁰⁹ Raitzik also submitted a disproportionately large number of misconduct reports for her students.⁵¹⁰ The administration believed the majority of the student misconduct issues should have been handled by Raitzik via assertive discipline.⁵¹¹ Based on these observations, the principal gave Raitzik an unsatisfactory performance rating,⁵¹² and she was put on another 90-day remediation plan.⁵¹³ The remediation plan identified five main areas of deficiency; failure to “maintain reasonable student conduct, ... establish positive learning expectations for students, ... evaluate pupil progress and maintain up-to-date records

⁵⁰⁶ *Id.*

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.*

⁵⁰⁹ *Raitzik*, 356 Ill. App. 3d at 816.

⁵¹⁰ *Id.*

⁵¹¹ *Id.*

⁵¹² *Id.*

⁵¹³ *Id.*

of pupils' achievements, ... use sound professional judgment, [and] provide a safe, orderly, clean, and nicely decorated learning environment for the students.⁵¹⁴”

The new remediation plan began February 2, 2001 and ended in the following school year, on September 26, 2001.⁵¹⁵ The plan clearly stated an unsatisfactory rating at the conclusion of the remediation period could result in dismissal. During this remediation period, Raitzik was observed eight times by Robert Alexander, her principal. For each classroom observation a “Teacher Visitation form [was completed] and [a] post-observation conference was held.”⁵¹⁶ “On September 13, 2001, [the principal] noted that while [Raitzik] had improved in some respects such as more grades in the grade book and a complete lesson plan, she spent time arguing with one student and loading computers instead of teaching the class.”⁵¹⁷ The principal also stated Raitzik “was consistently using class time to grade homework rather than to teach.”⁵¹⁸ The consulting teacher also “noted that [Raitzik] did not implement any of the suggestions she had given.”⁵¹⁹

At the beginning of October 2001, Alexander sent Raitzik a letter notifying her she had failed to complete the remediation plan with a satisfactory or better rating. The letter also indicated Raitzik’s performance was deemed not remediable, due to her lack of sufficient

⁵¹⁴ *Id.* at 817.

⁵¹⁵ *Raitzik*, 356 Ill. App. 3d at 817.

⁵¹⁶ *Id.* at 818.

⁵¹⁷ *Id.* at 819.

⁵¹⁸ *Id.* at 820.

⁵¹⁹ *Id.*

progress,⁵²⁰ and therefore a recommendation for dismissal would to be submitted to the school board.⁵²¹ Alexander gave Raitzik a final performance rating of unsatisfactory, and the school board approved the dismissal recommendation.⁵²²

Raitzik appealed and a hearing to review the decision was held. The hearing officer ruled Raitzik should be reinstated.⁵²³ The decision was based upon the hearing officer's belief that issuing a Notice of Unsatisfactory Performance after "just two classroom visits" for a tenured teacher was "troubling, even though the law stipulated two visits were sufficient."⁵²⁴ In addition, the hearing officer believed it "significant" that since 1990 Raitzik had received only satisfactory and excellent performance ratings.⁵²⁵ He also noted Raitzik's students had scored above average (and the second highest in the grade level) on standardized tests.⁵²⁶ After considering this information, and reviewing the five primary deficiencies alleged against Raitzik in the remediation plan, the hearing officer found "some [deficiencies] were not proven, some were proven but only in part, and none were 'serious or grievous' enough to merit dismissal."⁵²⁷ The hearing officer concluded Raitzik should be reinstated.⁵²⁸

⁵²⁰ *Id.*

⁵²¹ *Raitzik*, 356 Ill. App. 3d at 820.

⁵²² *Id.* at 821.

⁵²³ *Id.*

⁵²⁴ *Id.*

⁵²⁵ *Id.*

⁵²⁶ *Id.* at 822.

⁵²⁷ *Raitzik*, 356 Ill. App. 3d at 822.

After considering the hearing officer's decision, the Board decided to reject it and confirmed the plaintiff's dismissal.⁵²⁹ The Board's primary reason for upholding the dismissal was the belief Raitzik's "failure to raise her rating constituted cause for her dismissal, which was otherwise warranted"⁵³⁰ because Raitzik "failed to satisfactorily complete a remediation plan."⁵³¹ Raitzik filed a complaint to the Circuit Court of Cook County for administrative review, to appeal the Board's decision.⁵³² The trial court reviewed the facts and found "the Board's findings of fact were not contrary to the manifest weight of the evidence."⁵³³ The dismissal was affirmed. Raitzik appealed the trial court's decision to the First District, Sixth Division appellate court.

The appellate court found no procedural violations in the dismissal and stated Raitzik had "indeed fail[ed] to raise her [teaching performance] rating as required under the remediation process, which [was] cause for dismissal."⁵³⁴ In addition, the court found "the Board's findings of fact provided a sufficient basis"⁵³⁵ for Raitzik's dismissal. The appellate court affirmed the lower court's decision and the complaint was dismissed.

⁵²⁸ *Id.* at 821.

⁵²⁹ *Id.* at 822.

⁵³⁰ *Id.*

⁵³¹ *Id.*

⁵³² *Id.*

⁵³³ *Raitzik*, 356 Ill. App. 3d at 822.

⁵³⁴ *Id.*

⁵³⁵ *Id.*

MacDonald v. Board of Education⁵³⁶

Although this case was decided in 2012, post PERA, the time frame pertains to the 2007-2008 school year, which follows the pre-PERA School Code. James Scott MacDonald, a tenured teacher with fourteen years of experience with the Pawnee Community School District, was dismissed after failing to successfully complete a remediation plan.⁵³⁷ After receiving satisfactory ratings as an art teacher over the previous fourteen years, MacDonald received an unsatisfactory performance rating at the conclusion of the 2007-2008 school year.⁵³⁸ The evaluation indicated four areas of deficiency: instructional management, student management, attendance, and promptness.⁵³⁹

On June 2, 2008 MacDonald's principal sent a letter to the president of the Pawnee Education Association informing him MacDonald "had been rated 'unsatisfactory,' a remediation plan would be written within 30 days [from the evaluation date], and the plan would commence at the beginning of the 2008-2009 school year."⁵⁴⁰ On October 22, 2008 MacDonald was sent a letter informing him of a meeting scheduled for October 27 to discuss the contents of his remediation plan.⁵⁴¹ MacDonald was unable to attend due to a previously

⁵³⁶ MacDonald v. State Bd. of Educ., 966 N.E.2d 322 (Ill. App. 4th Dist. 2012).

⁵³⁷ *Id.* at 324.

⁵³⁸ *Id.*

⁵³⁹ *Id.*

⁵⁴⁰ *Id.*

⁵⁴¹ *Id.*

scheduled medical appointment, and the meeting was held without him.⁵⁴² A second meeting took place on October 31, which MacDonald attended and received the remediation plan.⁵⁴³ Later, a revised copy of the remediation plan was given to Macdonald. Due to the timing issues and the changes to the remediation plan, MacDonald was under the impression his remediation plan did not begin until November 21, 2008.⁵⁴⁴

On November 10, 2008 MacDonald received the first of the required evaluations under the 90-day remediation plan. MacDonald was also evaluated three additional times between January and March of 2009. For each of the four evaluations, MacDonald's performance was rated as unsatisfactory.⁵⁴⁵ On April 14, 2009, a summative evaluation stated MacDonald had not successfully completed the remediation plan.⁵⁴⁶ Based on these finding, the Board voted to dismiss MacDonald.⁵⁴⁷

McDonald appealed and the hearing officer found "the school administrators complied with procedural requirements, ... cause existed to dismiss [MacDonald], and upheld the Board's decision to terminate [MacDonald's] employment."⁵⁴⁸ MacDonald requested an

⁵⁴² *MacDonald*, 966 N.E.2d 322 at 324.

⁵⁴³ *Id.*

⁵⁴⁴ *Id.*

⁵⁴⁵ *Id.* at 325.

⁵⁴⁶ *Id.*

⁵⁴⁷ *Id.*

⁵⁴⁸ *MacDonald*, 966 N.E.2d 322 at 325.

administrative review in the circuit court of Sangamon County, and at its conclusion the trial court upheld the hearing officer's decision.⁵⁴⁹

MacDonald appealed, arguing the Board violated Article 24A by failing to develop and implement the remediation plan within 30 days⁵⁵⁰ of the unsatisfactory rating.⁵⁵¹ The appellate court found "the Board violated the procedural requirements of Section 24A-5(f) of failing to create a remediation plan within a reasonable time"⁵⁵² and therefore reversed the lower court's decision. MacDonald was reinstated with back pay and benefits.⁵⁵³

Montgomery v. Board of Education⁵⁵⁴

Clarence Montgomery was a tenured chemistry teacher at Tilden High School in the city of Chicago. After many parent and teacher complaints about Montgomery's teaching, coupled with the high failure rate of his students, the Tilden principal, Phylis Hammond, contacted the district's administrator and supervisor for the remediation of teachers.⁵⁵⁵ She was

⁵⁴⁹ *Id.*

⁵⁵⁰ MacDonald's summative evaluation conference was June 26, 2008. The remediation plan was to be developed and implemented, according to the School Code, within 30 days. The plan actually began on October 31, 2008 – 97 days after the July 26 deadline.

⁵⁵¹ *MacDonald*, 966 N.E.2d at 325.

⁵⁵² *Id.*

⁵⁵³ *Id.* at 330.

⁵⁵⁴ *Montgomery v. Bd. Of Educ.*, No. 11-2324, 2012 Ill. App. Unpub. LEXIS 2135 (Ill. App., 2012)

⁵⁵⁵ *Id.* at *3.

informed Tilden did not have a consulting teacher⁵⁵⁶ on staff.⁵⁵⁷ The following school year, “Edward Talbot, chair of the science department at Tilden, became a consulting teacher.”⁵⁵⁸ During the 2007 – 2008 school year Montgomery was observed twice and each time several deficiencies in his teaching performance were noted. After each formal observation, the principal held a conference with Montgomery and shared “specific recommendations to improve his performance.”⁵⁵⁹ After each conference, Montgomery refused to sign the observation and conference notes.⁵⁶⁰ No overall performance rating was given at either of these observations.⁵⁶¹ On December 7, 2007, Hammond issued an unsatisfactory rating of Montgomery’s teaching performance based on his instructional performance, failure to foster school relations, and lack of good professional and personal work habits.⁵⁶²

Talbot was assigned as the consulting teacher and a meeting was held to discuss the remediation plan. At the meeting to revise the draft remediation plan, Montgomery refused to participate in the process and refused to sign the plan, stating, “do what you have to do.”⁵⁶³ A second meeting was held on December 12, 2007 and again Montgomery declined to participate

⁵⁵⁶ A consulting teacher is necessary to implement a remediation plan.

⁵⁵⁷ *Montgomery*, 2012 Ill. App. Unpub. LEXIS at *3.

⁵⁵⁸ *Id.* at *4.

⁵⁵⁹ *Id.* at *5.

⁵⁶⁰ *Id.*

⁵⁶¹ The case record does not include any explanation as to why an overall performance evaluation rating was not given.

⁵⁶² *Montgomery*, 2012 Ill. App. Unpub. LEXIS at *5-6.

⁵⁶³ *Id.* at *6.

and refused to sign the final remediation plan.⁵⁶⁴ The official 90-day remediation process began on December 18, 2007.⁵⁶⁵

During the remediation period, Montgomery was observed 38 times by the consulting teacher and at least four times by the principal. Many deficiencies were noted during all of the observations. Also during the remediation period, “one day in May [Montgomery] “did not show up for school and did not call to report his absence.”⁵⁶⁶ Accordingly, Montgomery was suspended. During his suspension, Montgomery failed to leave lesson plans for his substitute.⁵⁶⁷ Hammond observed Montgomery at the 30, 60, and 90-day marks during the remediation period and at each rated his teaching performance as unsatisfactory.⁵⁶⁸ At the end of the remediation period, Montgomery was notified he “failed to complete the remediation process with a satisfactory rating and ... a request for his dismissal [was to be made] to the Board.”⁵⁶⁹ The Board dismissed Montgomery.

An administrative hearing was held at which Montgomery stated he did not sign any documents during the remediation period “because he did not want the documents to be used against him.”⁵⁷⁰ He further stated he was not given any input into the creation of the

⁵⁶⁴ *Id.* at *7.

⁵⁶⁵ *Id.*

⁵⁶⁶ *Id.* at *10.

⁵⁶⁷ *Id.*

⁵⁶⁸ *Montgomery*, 2012 Ill. App. Unpub. LEXIS at *12-14.

⁵⁶⁹ *Id.* at *14.

⁵⁷⁰ *Id.* at *16.

remediation plan and never received the final plan document.⁵⁷¹ Montgomery also stated he never met with Talbot during the remediation process and only met with Hammond three, not four times.⁵⁷² In addition, Montgomery claimed the Board of Education did not meet the procedural requirements of Article 24A-5 of the School Code because 1) “Hammond had not provided an evaluation with supporting reasons prior to his unsatisfactory rating, which predicated the remediation process;”⁵⁷³ 2) “several procedural errors [were committed] during the administration of the remediation plan;”⁵⁷⁴ and 3) “the Board ... did not have the authority to discharge him because it failed to prove by a preponderance of evidence that he failed to successfully remediate his teaching performance.”⁵⁷⁵

The hearing officer concluded proper procedures had been followed with respect to Montgomery’s first claim, citing “Hammond’s written reports” and “ample supporting reasons for [the] eventual rating.”⁵⁷⁶ As for the second claim, the hearing officer “again found that proper procedure had been followed.”⁵⁷⁷ Montgomery’s final claim was also denied with the hearing officer finding “the Board ‘has proven by a preponderance of the evidence’ that

⁵⁷¹ *Id.*

⁵⁷² *Id.* at *17.

⁵⁷³ *Id.* at *18.

⁵⁷⁴ *Montgomery*, 2012 Ill. App. Unpub. LEXIS at *19.

⁵⁷⁵ *Id.* at *21.

⁵⁷⁶ *Id.* at *19.

⁵⁷⁷ *Id.*

[Montgomery] had ‘perform[ed] unsatisfactorily and fail[ed] to remediate pursuant to the required procedure.’⁵⁷⁸ Therefore, the hearing officer affirmed Montgomery’s dismissal.⁵⁷⁹

The decision was challenged in the Circuit Court of Cook County trial court. The court reviewed four matters. The first and second matters were whether the statute of limitations was violated when the remediation plan began, and why the consulting teacher was not allowed to testify at the hearing, participate in evaluations, or rate Montgomery’s performance. The third issue involved an “‘unfounded’” police report and “‘derogative materials’” placed in Montgomery’s personnel file, and the fourth issue dealt with why Talbot did not participate in the development of the remediation plan.⁵⁸⁰ Because Montgomery raised three of the four issues “for the first, and only, time before the trial court,”⁵⁸¹ the court held he “forfeited these issue[s]” and any evidence regarding these claims would not be considered. The only remaining issue was whether Talbot “participated in the development of [the] remediation plan, as required by the Code.”⁵⁸² As to this issue, the appellate court found Montgomery to have “mischaracterize[ed] the testimony presented at the hearing.”⁵⁸³ The court found “no error in the hearing officer’s determination”⁵⁸⁴ “that the provisions of section 24A-5(h) had been

⁵⁷⁸ *Id.* at *21.

⁵⁷⁹ *Id.*

⁵⁸⁰ *Montgomery*, 2012 Ill. App. Unpub. LEXIS at *22.

⁵⁸¹ *Id.* at *25.

⁵⁸² *Id.*

⁵⁸³ *Id.* at *27.

⁵⁸⁴ *Id.* at *30.

met.”⁵⁸⁵ Thus, the court affirmed Montgomery’s dismissal. Montgomery appealed to the Supreme Court of Illinois, but his petition was denied.⁵⁸⁶

These were the pertinent cases under the 1985 iteration of Article 24A of the Illinois School Code involving a teacher’s dismissal as a consequence of failing to successfully complete a remediation plan. In 1989, *Powell* set precedent and was cited by numerous subsequent teacher dismissal cases. *Powell* was the standard and the case courts relied upon to interpret the 1985 School Code. The situation changed with the passage of the 2010 *Performance Evaluation Reform Act*,⁵⁸⁷ as the School Code was significantly altered.

The Evolution of the Illinois Performance Evaluation Reform Act of 2010 and the 2011 Illinois Senate Bill 7

The Illinois Performance Evaluation Reform Act of 2010

For almost twenty-five years there were no significant changes made to Article 24A. However, in January 2010, Governor Pat Quinn signed the *Illinois Performance Evaluation Reform Act* (PERA).⁵⁸⁸ PERA represented the next phase of Illinois education reform, “in part

⁵⁸⁵ *Id.* at *29.

⁵⁸⁶ While these appellate proceedings were ongoing, Montgomery filed suit against Talbot alleging Talbot defamed Montgomery. Montgomery cited Talbot’s testimony at the dismissal hearing. The trial court dismissed the case on grounds that Montgomery did not file within the one-year statute of limitations requirement. The appellate court affirmed the lower court’s decision.

⁵⁸⁷ Illinois Performance Evaluation Reform Act of 2010, Pub. Act 861 (2010).

⁵⁸⁸ *Id.*

to establish the prerequisites necessary”⁵⁸⁹ for Illinois’ bid for federal funds under the Race to the Top grant program. In the fall of 2009, a group composed of representatives from various educational professional organizations began working to improve the principal evaluation system. This was the genesis of PERA.

Between late 2009 and early 2010, four bills were created and passed by the Illinois legislature primarily due to Illinois’ attempt to secure Race to the Top funds. The four bills were “a dramatic amount of policy change in a short period of time.”⁵⁹⁰ “Of the four big Race to the Top bills, PERA was considered by many in the state to be the most significant.”⁵⁹¹ “Although the state ultimately might have ended up with a bill like PERA even without Race to the Top, there is no question that Race to the Top played a critical role in its timing and structure,” asserted Elliot Regenstein.⁵⁹² Illinois had previously lost its first two bids for Race to the Top funds, and earnestly desired a successful outcome in its third and final attempt.⁵⁹³

⁵⁸⁹ John Dively Jr., *Growth Model Evaluations: Possibilities and Pitfalls*, Nov 10, 2012, http://thekeep.eiu.edu/edadmin_fac/1/ (last visited Mar. 8, 2015).

⁵⁹⁰ Elliot Regenstein, *Illinois: The New Leader in Education Reform?*, July 2011, at 6, available at http://cdn.americanprogress.org/wp-content/uploads/issues/2011/07/pdf/illinois_education.pdf (last visited Mar. 8, 2015).

⁵⁹¹ *Id.*

⁵⁹² *Id.* at 8; Elliot Regenstein is a Chicago-based partner of Education Counsel LLC who focuses on providing legal, policy, strategic planning, and advocacy services to governments, foundations, and nonprofit organizations. From 2004 to 2006, he served in the Illinois governor’s office as director of education reform.

⁵⁹³ Illinois State Board of Education, *Illinois Race to the Top*, http://www.isbe.net/racetothetop/PDF/RtT_infographic.pdf (last visited Dec. 22, 2014).

In addition to the changes in the teacher evaluation system, Illinois also adopted the Common Core Standards as part of a comprehensive effort to secure the Race to the Top funds.⁵⁹⁴

The stated purpose of the *Performance Evaluation Reform Act* (PERA),⁵⁹⁵ according to the Illinois State Board of Education (ISBE) is to change how the instructional performance of teachers is measured and evaluated.⁵⁹⁶ The law itself states, “effective teachers . . . are a critical factor contributing to student achievement”⁵⁹⁷ and “the State must ensure that performance evaluation systems are valid and reliable and contribute to the development of staff and improved student achievement outcomes.”⁵⁹⁸ PERA requires Illinois public school districts to design and implement performance evaluation systems to assess teacher classroom performance. Student growth data must be a “significant factor”⁵⁹⁹ in this determination. The new evaluation system must utilize objective standards and yield meaningful and timely feedback for teacher improvement.⁶⁰⁰ The primary goal of these changes is an increase in academic performance for all students.

⁵⁹⁴ The adoption of the Common Core State Standards was one of sixteen state projects and programs associated with Race to the Top. Illinois State Board of Education, *Illinois Race to the Top*, <http://www.isbe.net/racetothetop/> (last visited Dec. 22, 2014).

⁵⁹⁵ Illinois Performance Evaluation Reform Act of 2010, Pub. Act 861 (2010).

⁵⁹⁶ Illinois State Board of Education, *Performance Evaluation Advisory Council*, <http://www.isbe.net/peac/> (last visited Mar 8, 2015).

⁵⁹⁷ Illinois Performance Evaluation Reform Act of 2010, Pub. Act 096-0861, § 24A-5(1) (2010).

⁵⁹⁸ *Id.* at § 24A-5 (4).

⁵⁹⁹ *Id.* at § 24A-4(b).

⁶⁰⁰ *The Widget Effect*, published in 2009, described the failure of existing teacher evaluation systems to distinguish between subpar, mediocre, and excellent teacher performance. Weisburg, *supra* note 32.

Another purpose was to create a well-designed evaluation system to increase the number of opportunities educators have for reflection on their practice, the amount and quality of constructive feedback educators receive, and the alignment of professional development and educator support.⁶⁰¹ Yet another of the PERA's goals was to create a teacher evaluation system that provided "clear descriptions of professional excellence so everyone understands what great teaching means."⁶⁰² The new system of evaluation is to be "based on standards of effective practice ... [to] add objectivity to a practice that [was previously] almost universally subjective."⁶⁰³

With the passage of PERA, the Performance Evaluation Advisory Council (PEAC) was formed to lead Illinois' evaluation reform movement.⁶⁰⁴ Specifically, PEAC was charged with the development of a teacher and principal evaluation model and the task of advising the Illinois State Board of Education (ISBE) on the PERA implementation process.⁶⁰⁵ The appointed group was comprised of teachers, administrators, researchers, and representatives

⁶⁰¹ Melinda Selbee, *PERA Overview for School Board Members*, ILL. ASSOC. OF SCH. BDS BULL. Oct. 2013. Growth Through Learning, *Illinois Performance Evaluation Frequently Asked Questions, Mar 23, 2012, updated Apr. 2012, available at www.isbe.net/pera/pdf/pera-faqs.pdf*. Illinois State Board of Education, *Performance Evaluation Advisory Council, www.isbe.net/peac/* (last visited Mar. 8, 2015).

⁶⁰² Illinois State Board of Education, Performance Evaluation Reform Act (PERA) FAQ's, updated April 12, 2012, <http://www.isbe.net/PERA/default.htm> (last visited Dec. 22, 2014).

⁶⁰³ *Id.*

⁶⁰⁴ Illinois Performance Evaluation Reform Act of 2010, Pub. Act 096-0861 § 24A-7 (2010).

⁶⁰⁵ Growth Through Learning, *supra* note 601, at 2.

from higher education, ISBE, teacher unions, and other interested stakeholders.⁶⁰⁶

The five main changes to Article 24A required by PERA were: a system of four teacher performance ratings, a new timetable for the frequency and method of teacher evaluations, the requirement of trained evaluators, the use of student growth data as measured by the approved assessment types, and the use of instructional frameworks and rubrics to assess teacher performance. This new evaluation system was to be used with teachers as well as with principals and assistant principals.⁶⁰⁷ The new performance evaluation model was to be phased in, starting with the 2012-2013 school year, with full implementation being accomplished by the 2016-2017 school year.⁶⁰⁸ Additional changes included making personnel decisions (ie. tenure, reduction in force, and dismissals) based on PERA's new stipulations.

The first of the five main changes required all teacher evaluations (including non-tenured teachers) to utilize a four-category teacher performance ranking system ('excellent,' 'proficient,' 'needs improvement,' and 'unsatisfactory').⁶⁰⁹ In the past, school districts could request a waiver of this requirement in order to use a different ranking system, however, under PERA, *all* Illinois school districts must use the four-tiered system, without exception.

⁶⁰⁶ Growth Through Learning, *supra* note 601, at 4.

⁶⁰⁷ Since the focus of this research is the impact of PERA on teachers and teacher dismissals, only the details of the law and the changes it required for teachers will be discussed.

⁶⁰⁸ Illinois State Board of Education, *ISBE Non-Regulatory Guidance on PERA & SB 7*, Dec. 5, 2011, updated Jan 17, 2012, at 16, *available at* www.isbe.net/pera/pdf/pera_guidance.pdf (last visited Mar 8, 2015).

⁶⁰⁹ Illinois Performance Evaluation Reform Act of 2010, Pub. Act 096-0861 § 24A-5(e) (2010).

Prior to PERA's enactment many evaluation systems did not objectively or accurately measure teacher performance, identify teacher strengths and areas for growth, nor align areas of growth to professional development.⁶¹⁰ Most significantly, the evaluation systems used before PERA did not connect student performance to teacher quality.⁶¹¹ PERA's requirements "represent[ed] a significant cultural shift" for Illinois public schools.⁶¹² This shift grew from frustrations over the conclusions of earlier studies finding a disconnect between student achievement and teacher performance ratings. For example, one study found, "ninety-one percent of CPS [Chicago Public Schools] teachers received "superior" or "excellent" ratings in the 2007-2008 school year, [yet at the same time] 66% of CPS schools failed to meet state standards."⁶¹³

In an attempt to reform the public education system, PERA required teachers and school leaders to be accountable for student learning and achievement.⁶¹⁴ PERA's underlying premise was student performance can be improved by enhancing teacher effectiveness, which in turn was believed to be accomplished by revamping the teacher evaluation procedures.⁶¹⁵

⁶¹⁰ Illinois PTA, *The Performance Evaluation Reform Act (PERA)*, Sept. 2012, at 2, available at http://www.illinoispta.org/Education%20Issues/The%20Performance%20Evaluation%20Reform%20Act_PTA%20document%209-18-12.pdf (last visited Mar 8, 2015).

⁶¹¹ *Id.* at 2.

⁶¹² Growth Through Learning, *supra* note 601, at 1.

⁶¹³ LAUREN SARTAIN, SARA RAY STOELINGA, AND ERIC BROWN, RETHINKING TEACHER EVALUATION IN CHICAGO: LESSONS LEARNED FROM CLASSROOM OBSERVATIONS, PRINCIPAL-TEACHER CONFERENCES, AND DISTRICT IMPLEMENTATION 11 (2011).

⁶¹⁴ *Id.* at 1.

⁶¹⁵ Regenstein, *supra* note 590, at 5.

Therefore, PERA established requirements for evaluation frequency and transparency.

PERA's second major change addressed the frequency of evaluations. Amended Article 24A now required tenured teachers, to be evaluated "at least once in the course of every two school years ... [unless their performance was rated 'needs improvement' or 'unsatisfactory' and then they] must be evaluated at least once in the school year following the receipt of such a rating."⁶¹⁶ Thereafter, if the teacher received a rating equal to or better than 'proficient' in the school year following a rating of 'needs improvement' or 'unsatisfactory,' the regular evaluation schedule would be reinstated.⁶¹⁷

For tenured teachers rated as 'needs improvement,' the evaluator must, within 30 school days and in consultation with the teacher, create a "professional development plan" to address the areas needing improvement and specify any supports the school district will provide to address the areas identified.⁶¹⁸ For tenured teachers who are rated as 'unsatisfactory,' the evaluator must, within 30 school days and in consultation with the teacher, create a 90-day "remediation plan" designed to correct the noted deficiencies, provided the deficiencies are deemed remediable.⁶¹⁹ A mid-point and final evaluation by an evaluator must occur during the remediation period. A teacher failing to complete a remediation plan with a rating equal to, or

⁶¹⁶ Illinois Performance Evaluation Reform Act of 2010, Pub. Act 096-0861 § 24A-5(2) (2010).

⁶¹⁷ *Id.* at § 24A-5(2)(l).

⁶¹⁸ *Id.* at § 24A-5(h).

⁶¹⁹ *Id.*

better than, ‘satisfactory’ will be dismissed.⁶²⁰ One of PERA’s goals was to facilitate school officials’ ability to dismiss a tenured teacher who received an unsatisfactory performance evaluation and subsequently failed to show improvement during the remediation program.⁶²¹

PERA’s next modification addressed who would be allowed to conduct teacher evaluations and the training the evaluators must receive. PERA added Article 24A-2.5 to the School Code expressly defining the term ‘evaluator.’⁶²² In order to increase evaluator inter-rater reliability, all school district administrators conducting teacher evaluations were required to undergo evaluator training, prior to conducting any evaluations.⁶²³ These changes were implemented in September 2012.⁶²⁴

PERA also required all Illinois public schools to implement a standards-based evaluation system including “data and indicators of student growth as a ‘significant factor.’”⁶²⁵ PERA’s Administrative Rules outlined three types of assessments that are acceptable measures

⁶²⁰ *Id.* at § 24A-5(m).

⁶²¹ The other goals of PERA are to improve instructional leadership at the administrative level, to implement a systematized evaluation process with specific training, and to establish new requirements for student achievement testing.

⁶²² Illinois Performance Evaluation Reform Act of 2010, Pub. Act 096-0861 § 24A-2.5 (2010).

⁶²³ *Id.* at § 24A-3.

⁶²⁴ *Id.* at § 24A-5(e).

⁶²⁵ *Id.* at § 24A-4(b); “Significant factor” is defined by the PERA Administrative Rules as a minimum of 30% and a maximum of 50% in some cases, of the overall evaluation rating determination.

of student growth.⁶²⁶ Type I assessments,⁶²⁷ are statewide, standardized assessments. Type II assessments⁶²⁸ are district wide assessments for a given grade or subject area and Type III assessments⁶²⁹ are those assessments given in an individual classroom, created by the teacher and approved by the evaluator and the teacher.⁶³⁰ The overall year-end teacher performance rating must include at least one Type I or Type II assessment and one Type III assessment. If Type I and II assessments are not available, then two Type III assessments are to be used.⁶³¹

The Administrative Rules defined student growth as “demonstrable change in a student’s learning between two or more points in time”⁶³² using data from at least two assessments from Types I, II, and III described above. PERA left to the discretion of individual school districts decisions regarding metrics and targets, including establishing alternative standards for different student groups (i.e., English Language Learners).⁶³³ The Administrative Rules also determined four student growth performance levels; ‘no growth or negative growth,’

⁶²⁶ Illinois State Board of Education, *supra* note 608. 23 ILL. ADMIN. CODE tit. 50.310(b) (2012).

⁶²⁷ An example of a Type I Assessment is the Partnership for Assessment of Readiness for College and Careers (PARCC) exam.

⁶²⁸ An example of a Type II Assessment is any common assessment, approved by the district and given to all students in a particular grade.

⁶²⁹ An example of a Type III Assessment is an end of unit test created by a classroom teacher.

⁶³⁰ 23 ILL. ADMIN. CODE tit. 110(b) (2012)

⁶³¹ *Id.*

⁶³² Illinois State Board of Education and Illinois Performance Evaluation Advisory Council, *Transforming Educator Evaluations in Illinois*, available at www.isbe.net/peac/ppt/ISBE-PEAC_overview_pres_011812.pptx (last visited Jan 18, 2012).

⁶³³ *Id.*

‘minimal growth,’ ‘meets goal,’ and ‘exceeds goal.’⁶³⁴ ‘No growth or negative growth’ is defined as “does not meet any student growth targets [or] demonstrates negative growth on one or more measures.”⁶³⁵ ‘Minimal growth’ is characterized as “meets only 1 or 2 student growth targets; has no more than one measure with negative growth results.”⁶³⁶ ‘Meets goal’ occurs when the teacher “meets or exceeds the target for a majority of the student growth measures [and] does not have negative growth on any measures, and ‘exceeds goal’ is fulfilled when the teacher “exceeds the target for a majority of the student growth measures [and] meets all targets.”⁶³⁷

The term ‘student growth data’ has frequently been used interchangeably with ‘value added models,’ although they are not synonymous.⁶³⁸ Student growth data indicate student growth in a particular subject area, often measured with pre and post assessments. Value added models, on the other hand, “attempt to identify how much of a student’s achievement is due to the influence of a particular teacher while controlling for other variables.”⁶³⁹ Value added models are by definition more sophisticated and more complicated than student growth data.

⁶³⁴ *Id.*

⁶³⁵ *Id.*

⁶³⁶ *Id.*

⁶³⁷ *Id.*

⁶³⁸ Kimberly O’Malley, Katie McCarty, Tracey Magda & Kelly Burling, *Making Sense of the Metrics: Student Growth, Value-added Models, and Teacher Effectiveness*, PEARSON EDUC. BULL. Issue 19 (April 2011).

⁶³⁹ Dively, *supra* note 589.

The last significant change mandated by PERA related to the instructional framework and the corresponding rubrics used in the amended teacher performance evaluation system. Districts must utilize instructional frameworks aligned with the Illinois Professional Teaching Standards. The performance evaluation system Illinois identified as the exemplar and default system, if school districts did not choose another acceptable model, was the Charlotte Danielson Framework for Teaching. Charlotte Danielson⁶⁴⁰ “developed the framework [for teaching] as a means to promote clear and meaningful conversations about effective teaching practice.”⁶⁴¹ Charlotte Danielson has expressly stated she never intended the framework to be used as the sole tool for evaluating teacher classroom performance.⁶⁴² Notwithstanding this disclaimer, over twenty states have adopted Danielson’s four-quadrant framework as the main or sole tool for measuring teacher classroom performance. Illinois is one of these states. The adoption of the *Performance Evaluation Reform Act*⁶⁴³ in 2010, directed Illinois public school districts to chose a teacher classroom performance evaluation system conforming to PERA’s

⁶⁴⁰ Charlotte Danielson is a graduate of Cornell University (history), Oxford University (philosophy, politics, and economics) and Rutgers University (educational administration and supervision.) She has taught at all levels, kindergarten through university, has worked as a curriculum director and staff development director, and is the founder of The Danielson Group. Her *Framework for Teaching* has become the most widely used definition of teaching in the United States, and has been adopted as the single model, or one of several approved models, in over 20 states.

⁶⁴¹ The Danielson Group, *Charlotte Danielson*, <http://danielsongroup.org/charlotte-danielson/> (last visited Dec. 22, 2014).

⁶⁴² Knowledge Delivery Systems, *Charlotte Danielson’s A Framework for Teaching*, YouTube (Sept. 1, 2010) <http://www.youtube.com/watch?v=adaOmqipic> (last visited Dec. 22, 2014).

⁶⁴³ Illinois Performance Evaluation Reform Act of 2010, Pub. L. No. 096-0861 (2010).

mandates. As stated above, the Charlotte Danielson Framework became the default means for evaluating teacher classroom performance.⁶⁴⁴

The Danielson Framework is an extensive rubric encompassing the four domains of Planning and Preparation, Classroom Environment, Instruction, and Professional Responsibility. The four domains have a total of 22 components and 76 subcomponents or elements to be used to evaluate and rate teacher performance. The domains and corresponding components are aligned with PERA's four required teacher rating performance levels (i.e., 'excellent,' 'proficient,' 'needs improvement,' and 'unsatisfactory').⁶⁴⁵ Detailed rubrics for each domain are used in order to garner the accurate and objective evaluative data necessary for reliable evaluations. It is believed the use of these rubrics coupled with objective and thorough observations will accurately measure "whether effective teaching is taking place."⁶⁴⁶

Charlotte Danielson first developed the Framework for Teaching in 1996, using research from the Educational Testing Service (ETS) which PRAXIS (the organization in charge of creating entrance exams for the field of teaching) intended to use to assess new

⁶⁴⁴ Districts have two options for adopting a new system for evaluating teacher performance: develop its own system that meets the mandated standards, or use the state-designed model (the Charlotte Danielson Framework for Teaching) Growth Through Learning, *supra* note 601 and Liam Goldrick, Dalia Zabala, & Jennifer Burn, *Cultivating Effective Teachers Through Evaluation and Support: A Guide to Policymakers and Educational Leaders* (2013) available at <http://www.newteachercenter.org/sites/default/files/ntc/main/resources/Illinois-Guide-Policy-Makers-Educational-Leaders.pdf> (last visited Mar 8, 2015).

⁶⁴⁵ Illinois Performance Evaluation Reform Act of 2010, Pub. Act 096-0861, § 24A-5(e) (2010).

⁶⁴⁶ Sartain, *et. al*, *supra* note 613, at 2.

teacher licensing requirements.⁶⁴⁷ In 2007 the Framework was amended to incorporate additional research from the previous nine years and the state curriculum standards.⁶⁴⁸ In 2011, the four domains were created and incorporated data from the MET (Measures of Effective Teaching) Project.⁶⁴⁹ It was also in 2011 that Danielson developed the Framework for Teaching Evaluation Instrument to “facilitate evaluations.”⁶⁵⁰ In 2013 Danielson added “specific language around the instructional implications of the Common Core State Standards.”⁶⁵¹

Research has indicated the use of rubrics and other similar objective evaluation tools “can effectively measure teacher effectiveness and provide teachers with feedback on the factors that matter for improving student learning.”⁶⁵² For example, in 2008 the Chicago Public Schools (CPS) implemented a pilot program to improve how teachers are evaluated and how evaluators give feedback to improve teaching performance.⁶⁵³ The results of this two-year study found “classroom observation ratings [using the Danielson Framework] were valid

⁶⁴⁷ Charlotte Danielson, *Framework for Teaching Evaluation Instrument 2013 Edition*, 3 available at <http://usny.nysed.gov/rttt/teachers-leaders/practicerrubrics/Docs/danielson-teacher-rubric.pdf> (last visited Dec. 22, 2014).

⁶⁴⁸ *Id.*

⁶⁴⁹ *Id.* at 4.

⁶⁵⁰ *Id.*

⁶⁵¹ *Id.*

⁶⁵² Urban Education Institute, *National Implications of “Rethinking Teacher Evaluation*, available at http://www.joycefdn.org/assets/1/7/nat_implications_uoc.pdf (last visited Oct 18, 2014).

⁶⁵³ Sartain, *et. al*, *supra* note 613, at 1.

measures of teaching performance;” “classroom observation ratings [using the Danielson Framework] were reliable measures of teaching practice;” and post observation “conferences were more reflective and objective than in the past and were focused on instructional practice and improvement.”⁶⁵⁴ More specifically, the study found “in the classrooms of highly rated teachers, students showed the most growth [and] in the classrooms of teachers with low observation ratings, students showed the least growth.”⁶⁵⁵ This relationship was further substantiated by studies finding “teachers who receive[d] higher ratings on their evaluation [using the Framework as a teaching performance instrument] produce[d] greater gains in student test scores.”⁶⁵⁶

PERA has received much public support. The American Educational Research Association (AERA), a national research society⁶⁵⁷ supports PERA’s changes to Illinois’ teacher performance evaluation system. The AERA viewed the goals of teacher evaluation as accurately measuring good teaching, improving the skills of school leaders as well as teachers, providing information for improvement of practice through feedback and professional

⁶⁵⁴ *Id.* at 2.

⁶⁵⁵ *Id.* at 9.

⁶⁵⁶ Washington State Teacher/Principal Evaluation Project, *Charlotte Danielson’s Framework for Teaching*, , <http://tpep-wa.org/the-model/framework-and-rubrics/instructional-frameworks/danielson-framework/> (last visited Dec. 22, 2014).

⁶⁵⁷ AERA was founded in 1916. Its goal is “to advance knowledge about education ... and promote the use of research to improve education and serve the public good. American Educational Research Association, <http://www.aera.net/AboutAERA/tabid/10062/Default.aspx> (last visited Mar. 8, 2015).

development, and enabling effective personnel decisions.⁶⁵⁸ This interpretation of teacher evaluation is closely tied to the goals of PERA.

The Regional Office of Education (REO) 02 (the REO for the four most southern counties in Illinois) lauded the purpose of PERA's new evaluation system as providing "statewide consistency for what outstanding teaching and leadership should look like."⁶⁵⁹ The Illinois Parent Teacher Association (PTA) cited studies finding "some current evaluation systems don't accurately or objectively measure how teachers or principals are doing, or identify their strengths and areas for growth."⁶⁶⁰ For example, the evaluations consisted of only one observation by a minimally trained principal, the evaluations did not provide teachers with meaningful and timely information to improve their skills, and many evaluation tools were no more than a subject checklist with no guidance as to how to create a summative rating.⁶⁶¹ The Illinois PTA also referenced the fact that "most current evaluation systems do not formally connect student growth measures with educator performance."⁶⁶²

⁶⁵⁸ American Educational Research Association, *AERA-NAED Hold Successful Briefing on Teacher Evaluation*, Sept. 14, 2011, <http://www.aera.net/AboutAERA/KeyPrograms/EducationResearchandResearchPolicy/AERANAEDHoldSuccessfulBriefingonTeacherEval/tabid/10902/Default.aspx> (last visited Mar. 8, 2015).

⁶⁵⁹ Illinois Regional Office of Education 02, *Illinois Education Hot Topics*, <http://www.roe02.com/index.php/component/content/article/79-main/110-teacher-evaluations> (last visited Dec. 22, 2014).

⁶⁶⁰ Illinois PTA, *supra* note 610.

⁶⁶¹ Sartain, *et. al*, *supra* note 613, at 3-4.

⁶⁶² Illinois PTA, *supra* note 610.

There was support from many stakeholders and strong bipartisan endorsement for the new law. The bill's sponsors included the Senate chair, vice-chair of the Education Committee and House chair of the Elementary and Secondary Education Committee. Senator Lightford and the Senate Education Reform Committee spent three months discussing the proposed bill with the stakeholders before reaching agreement on "historic education reform legislation."⁶⁶³ The bill passed with resounding margins: 112-1 in the House and 59-0 in the Senate.⁶⁶⁴ Two of Illinois' teacher unions, the Illinois Education Association (IEA) and the Illinois Federation of Teachers (IFT) supported the new law.⁶⁶⁵ However, the Chicago Teachers Union withheld its support due to disagreements over a provision regarding the percentage of teacher votes needed to call a strike.⁶⁶⁶

Many school personnel decisions now must take into account PERA's requirements. For example, reductions in force, tenured teacher dismissals, incompetency declarations, tenure status, and remediation are all impacted by PERA.⁶⁶⁷ The most significant of these changes are tenured teacher dismissal decisions and the acquisition of tenure status. While in a few circumstances the tenure acquisition process may be accelerated, overall PERA makes it more rigorous to effectuate tenure. Some believe the unspoken agenda of PERA, along with its

⁶⁶³ Illinois Education Association, *Unions Stand Together to Forge Historic Education Reform*, <http://www.ieanea.org/media/2011/04/Sb7-fact-sheet-updated-4-161.pdf> (last visited Jan. 6, 2015).

⁶⁶⁴ Cavanagh, *supra* note 355.

⁶⁶⁵ *Id.*

⁶⁶⁶ Illinois Education Association, *supra* note 663.

⁶⁶⁷ Dively, *supra* note 589.

counterpart Senate Bill 7, was to chip away at the tenure armor and begin to rid the public schools of ineffective teachers.⁶⁶⁸

In addition, longevity is no longer a significant factor in reduction in force⁶⁶⁹ decisions. Under the new law, all teachers – tenured or not – having already received a performance evaluation, are placed into performance groups based upon their most recent evaluations. Teachers with the lowest evaluation ratings are the first to be dismissed, while teachers with the highest evaluation ratings are the last to be dismissed. Among teachers in each performance group, those with the shorter length of continuing service with the district shall be dismissed before teachers with more longevity with the district.⁶⁷⁰

The 2011 Illinois Senate Bill 7

After the *Performance Evaluation Reform Act* (PERA)⁶⁷¹ was signed into law, education stakeholders worked to create a reform bill that stemmed from and expanded PERA. This new bill, Senate Bill 7 (SB 7)⁶⁷² was signed into law on June 13, 2011. The *Digest of Bills Passed* for the 2011 Spring Session of the Illinois General Assembly stated the purpose of SB 7

⁶⁶⁸ Kelly Lester, *Testing Teachers*, ILL. ISSUES Jan. 2013, <http://illinoisissues.uis.edu/archives/2013/01/teachers.html>.

⁶⁶⁹ Reduction in Force is defined as an honorable dismissal of a teacher due to economic hardships, declining enrollment, or program changes.

⁶⁷⁰ Illinois Education Association, *Reduction in Force Resources*, <http://www.ieanea.org/resources/rif-resources/> (last visited Jan. 8, 2015).

⁶⁷¹ Illinois Performance Evaluation Reform Act of 2010, Pub. Act 096-0861 (2010).

⁶⁷² Illinois School Code Education Labor Relations Pension Act 2011, Pub. Act 097-0008 (2011).

was “to connect teacher hiring and dismissal to teacher performance.”⁶⁷³ Many of the SB 7 provisions elaborated on the language and scope of PERA. At the signing of Senate Bill 7, Governor Quinn stated, “These historic reforms [PERA and SB 7] will help us make sure that students across Illinois learn from the best teachers.”⁶⁷⁴

Similar to PERA, SB 7 was in large part due to the momentum created by the federal Race to the Top program. However, even prior to the 2009 Race to the Top competition, Illinois was already engaged in making policy changes that eventually culminated with the creation and passage of SB 7.⁶⁷⁵

Senate Bill 7 addressed several main issues. Among them was a system for collecting stakeholder feedback, providing for training of school board members, updated guidelines for contract negotiations, establishing a standard upon which the State Superintendent may revoke the certification/license of teachers, created requirements for the filling of new and vacant positions, as well as set ground rules for the acquisition of tenure, issues of reduction in force,

⁶⁷³ Illinois Association of School Boards, *The Digest of Bills Passed: 2011 Spring Session of the Illinois General Assembly*, 9 (July 2011).

⁶⁷⁴ Joy Resmovits and Will Guzzardi, *Illinois Education Reform: Gov. Pat Quinn Signs Bill Into Law*, HUFFINGTON POST (June 13, 2014), http://www.huffingtonpost.com/2011/06/13/pat-quinn-signs-ed-reform-bill_n_876048.html.

⁶⁷⁵ Starting in 2007, the State Board of Education gave more attention to college readiness policies and partnered with the Gates Foundation to create data collection and storage systems. Advance Illinois, an independent advocacy group supported by the Gates Foundation, was created to “facilitate more and better conversation about the policy elements that support college and career readiness.” The last policy effort prior to 2009 was the creation of the “Dialogue Group in 2007. This group drafted the “Burnham Plan for Education.” These three education policy reform efforts coalesced to form “Burnham 2.0,” but its release in 2009 was “overshadowed by the state’s efforts to apply for a Race to the Top grant. Regenstein, *supra* note 590, at 4-5.

and tenured teacher dismissals.⁶⁷⁶

As was the case prior to SB 7, the State Superintendent had the right to recommend suspension or revocation of a teacher's certificate/licensure. But under the new law, the State Superintendent may now also require a teacher to undergo professional development as a result of an unsatisfactory performance evaluation rating.⁶⁷⁷ While the State Superintendent has the ability to take action against a teacher's certificate in cases of 'incompetence,' the Illinois School Code did not previously define the term. Senate Bill 7 now defined "incompetence" as "two unsatisfactory evaluations within a seven year period."⁶⁷⁸

The requirements for filling new and vacant positions no longer relied upon seniority, but instead were determined by teacher performance.⁶⁷⁹ The process for the acquisition of tenure was also affected by SB 7. Rather than tenure decisions being within the sole discretion of the school administrator, Senate Bill 7 required a teacher to earn two "proficient" or "excellent" ratings in two of the first three years of service and a rating of "proficient" or "excellent" in the fourth year, in order to obtain tenure.⁶⁸⁰

SB 7 also established new reduction in force (RIF) procedures.⁶⁸¹ New "performance

⁶⁷⁶ Illinois State Board of Education, *Performance Evaluation Reform Act (PERA) and Senate Bill 7*, <http://www.isbe.state.il.us/%5C/PERA/default.htm> (last visited Mar. 8, 2015).

⁶⁷⁷ Illinois School Code Education Labor Relations Pension Act 2011, Pub. Act 097-0008, § 21-23 (2011).

⁶⁷⁸ *Id.* at § 21-23(a).

⁶⁷⁹ *Id.* at § 24-1.5.

⁶⁸⁰ *Id.* at § 24-11(d).

⁶⁸¹ *Id.* at § 24-12(b).

tiers”⁶⁸² were established and those teachers in the lowest performance tier must be released prior to teachers (in job alike categories) in the higher tiers. This was a dramatic change from the old system that used seniority as the sole basis for determining RIFs, to one using performance evaluations. The last change effectuated by SB 7 involved the dismissal of tenured teachers. While there was no change to teacher due process rights, the time line for dismissals was shortened and streamlined.⁶⁸³

As stated earlier, SB 7 was written to expand the language and scope of PERA. This expanded scope included four mandated performance rating categories, detailed evaluation plan content requirements, increased inter-rater reliability, and the inclusion of student growth data to hold teachers accountable and increase teaching quality. These enhancements coupled with SB 7’s time line changes created the potential for school districts to ensure only effective teachers are retained, and provided for expedited (as compared with the past) dismissals of ineffective teachers.

Changes in Article 24A of the Illinois School Code Subsequent to PERA⁶⁸⁴

PERA prescribed the establishment of a Joint Committee, comprised of equal representation of school district teachers and administrators, to oversee changes made to the

⁶⁸² The law requires districts to establish four performance tiers based on teacher performance evaluations. Teachers rated “excellent” are in the highest tier, and teachers rated “unsatisfactory” are in the lowest tier. The teachers rated “proficient” and “needs improvement” are in the middle two tiers.

⁶⁸³ Illinois School Code Education Labor Relations Pension Act 2011, Pub. Act 097-0008, § 24A-5(n) (2011).

⁶⁸⁴ See Tables 1-4

school district's evaluation plan prior to and during the implementation period. In addition, Article 24A-4 mandated (for all teachers) the use of "data and indicators on student growth as a significant factor in rating teacher performance."⁶⁸⁵

Article 24A-5 dealt with the content of the evaluation plan, its components, and the frequency of evaluations. This section specified non-tenured teachers would be evaluated at least once every year, and tenured teachers would be evaluated at least once every two years.⁶⁸⁶ If a tenured teacher received a rating of either 'needs improvement' or 'unsatisfactory,' the new changes mandated the teacher be evaluated again in the year following the negative rating. If the teacher succeeded in earning a 'satisfactory' or better rating on the subsequent evaluation, the normal evaluation cycle would be resumed.⁶⁸⁷ Article 24A was also modified to stipulate only pre-trained 'evaluators' could conduct teacher observations. The amended law allowed first year principals, after completing Illinois' evaluator training program, to perform teacher evaluations.⁶⁸⁸ There were no significant changes to the use of teacher's attendance, planning, instructional methods, classroom management,⁶⁸⁹ and competency in subject matter in determining the overall performance evaluation rating.⁶⁹⁰

⁶⁸⁵ 105 ILL. COMP. STAT. 5/24A-4 (West 2010).

⁶⁸⁶ *Id.* at 5/24-5.

⁶⁸⁷ *Id.*

⁶⁸⁸ *Id.* at 5/24-5(a).

⁶⁸⁹ The areas of planning, instructional methods, and classroom management are three of the four domains addressed by the Danielson Framework Model.

⁶⁹⁰ 105 ILL. COMP. STAT. 5/24-5(b) (West 2010).

Article 24A-5(c) was added in 2010 and mandated, for the first time, teacher performance ratings must use “student growth data as a significant factor in the rating of the teacher’s [overall] performance.”⁶⁹¹ In addition, the section changed the performance rating categories. After September 1, 2012, teachers received one of following four performance ratings; “excellent,” “proficient,” “needs improvement,” or “unsatisfactory.”⁶⁹² No change was made to the requirement of having a copy of the evaluation placed in the teacher’s personnel file, or including details about the teacher’s strengths and weaknesses in the written evaluation report.

Another new section was added, Article 24A-5(h). This provision specified the procedures to be followed when a teacher received a ‘needs improvement’ performance rating. Previously, there were only procedures established if a teacher received an ‘unsatisfactory’ performance rating. Under amended Article 24A when a teacher is rated as ‘needs improvement,’ school officials must create a “professional development plan” within thirty days.⁶⁹³ The plan must address the areas needing improvement and identify the supports needed to assist the teacher.⁶⁹⁴

The previous procedures responding to an “unsatisfactory” performance rating set forth in Article 24A-5 also underwent minor modifications. For example, the 90-day remediation

⁶⁹¹ *Id.* at 5/24-5(c). The effective date for the usage of student growth data was phased in over several years, starting with 300 Chicago public schools in the 2012-2013 school year. By the 2016-2017 school year, all Illinois schools must incorporate student growth data into the teacher evaluation system.

⁶⁹² 105 ILL. COMP. STAT. 5/24-5(d) (West 2010).

⁶⁹³ *Id.* at 5/24-5(h).

⁶⁹⁴ *Id.*

plan was amended to mandate the inclusion of both midpoint and final evaluations by an evaluator.⁶⁹⁵ The results of both of these evaluations must also be discussed with the teacher within ten school days from the observation date.⁶⁹⁶ Under the amended statute, teachers undergoing remediation plans must continue to undergo annual evaluations, but these annual evaluations are kept separate from the remediation plan evaluations.⁶⁹⁷ Reinstatement to the regular evaluation cycle occurred when the tenured teacher earned a “satisfactory” or “proficient” rating in the year following the “needs improvement” or “unsatisfactory” rating.⁶⁹⁸ There were no significant changes to the language regarding consulting teachers and the remediation process.

Amended Article 24A retained the language “deficiencies which are deemed irreparable”⁶⁹⁹ but expressly added language for non-tenured teachers. The new language stated, “nothing in this section is to prevent the dismissal or non-renewal of teachers not in contractual continued service for any reason not prohibited by applicable employment, labor, and civil rights laws.”⁷⁰⁰

⁶⁹⁵ *Id.* at 5/24-5(k).

⁶⁹⁶ *Id.*

⁶⁹⁷ *Id.* at 5/24-5(n).

⁶⁹⁸ 105 ILL. COMP. STAT. 5/24-5(l) (West 2010).

⁶⁹⁹ *Id.* at 5/24-5.

⁷⁰⁰ *Id.*

Article 24A-7 contained rules to implement and accomplish the purposes of the Article,⁷⁰¹ and is almost entirely new. The 1985 version of Article 24A stated, “the state Board of Education is authorized to adopt such rules as deemed necessary to implement and accomplish the purposes and provisions of this Article.”⁷⁰² Amended Article 24A added, “including but not limited to methods for measuring student growth; limitations on the age of useable data; the amount of data needed to reliably and validly measure growth [for teacher and principal evaluations]; [and] whether annual State assessments may be used as one of the measures of student growth.”⁷⁰³ The section also added school official’s ability to control “for factors as student characteristics, student attendance, and student mobility so as to best measure the impact [those factors have] on students’ academic achievement.”⁷⁰⁴ The section also described the circumstances under which some districts may use the annual state student achievement assessments as the sole measure of student growth for teacher and principal evaluations.⁷⁰⁵ A new, and significant sentence was added as Article 24A-7.1. This new sentence stated, “Except as otherwise provided under this Act, disclosure of public school teacher, principal, and superintendent performance evaluations is prohibited.”⁷⁰⁶ While the legislature believed it important to report performance results to education stakeholders, it also

⁷⁰¹ *Id.* at 5/24A-7.

⁷⁰² *Id.*

⁷⁰³ *Id.*

⁷⁰⁴ 105 ILL. COMP. STAT. 5/24A-7 (West 2010).

⁷⁰⁵ *Id.*

⁷⁰⁶ *Id.* at 5/24A-7.1.

believed in the necessity to protect the privacy of individual teachers and administrators. This is significant, as no one teacher/administrator can be singled out.

There were no changes to Article 24A-8 and the remaining sections, primarily addressing principal evaluations, the powers and duties of the Superintendent, and a variety of administrative details.⁷⁰⁷

Article 24A-20, “Data Collection and Evaluation Assessments and Support Systems,” was also added in 2010. As a result, school districts must annually collect and publish, at both the district and school level, teacher and principal performance evaluations results. This information is to be presented in the aggregate, so no one person may be personally identified.⁷⁰⁸ The section specified a teacher and principal evaluation template to be used with all evaluations. Although it is required by law to be used, the template is flexible enough to be customized by each school district.⁷⁰⁹ It was in this section that programs for the evaluator pre-qualification, the evaluator training, and the superintendent training were also specified.⁷¹⁰ Article 24A-20 required at least one tool to be used to provide instructional environment feedback to principals and a State Board approved evaluation support system for teacher and principal performance evaluations.⁷¹¹ Schools were allowed to use web-based tools to support

⁷⁰⁷ These subjects have not been addressed, as the focus of this study is teacher evaluation.

⁷⁰⁸ 105 ILL. COMP. STAT. 5/24A-20(a)(1) (West 2010).

⁷⁰⁹ *Id.* at 5/24A-20(a)(2).

⁷¹⁰ *Id.* at 5/24A-20(a)(3-5).

⁷¹¹ *Id.* at 5/24A-20(a)(6-7).

the use of model templates, the evaluator pre-qualification program, and the evaluator training program.⁷¹²

The last provisions added to Article 24A-20 included a way to measure and report the relationship between principal and teacher evaluation and 1) student growth and 2) retention rates of teachers.⁷¹³ Both teacher and principal performance evaluation data must be sent to the State Board of Education. These data must include performance ratings for tenured teachers, renewal ratios for non-tenured teachers, and principal performance ratings.⁷¹⁴ PERA also required a method to assess if Article 24A's new requirements have created valid and reliable methods to measure teacher and principal evaluations, if the requirements have positively contributed to staff development, and if the desired increase in student outcomes was accomplished.⁷¹⁵

Pertinent Article 24A Teacher Dismissal Cases Subsequent to PERA

*Board of Education v. Orbach*⁷¹⁶

At this point in time there are only two post-PERA dismissal cases tried in the courts. The first involved Shelley Orbach, a tenured high school science teacher in the Waukegan

⁷¹² *Id.* at 5/24A-20(a)(8).

⁷¹³ *Id.* at 5/24A-20(a)(9).

⁷¹⁴ 105 ILL. COMP. STAT. 5/24A-20(a)(10)(c) (West 2010).

⁷¹⁵ *Id.* at 5/24A-20(a)(10).

⁷¹⁶ *Bd. of Educ. of Waukegan Cmty. Unit Sch. Dist. No. 60 v. Orbach*, 991 N.E.2d 851 (Ill. App. 2013).

Community unit School District.⁷¹⁷ On April 27, 2010 Orbach was evaluated and received a summative evaluation, based on the mathematical average of his performance scores in six areas of teaching (organization, management, content, methodology, personal interaction, and professional responsibilities).⁷¹⁸ In addition to the summative performance rating, each of the six areas was also evaluated and given a performance rating.⁷¹⁹ Orbach received two unsatisfactory ratings and four satisfactory ratings. Using the mathematical averaging formula, Orbach received an overall performance rating of satisfactory.⁷²⁰ Nonetheless, on May 28, 2010, the district developed a remediation plan for Orbach's two unsatisfactory areas.⁷²¹ The plan was in effect during the first semester of the 2010-2011 school year.⁷²²

Orbach was evaluated three times during the remediation period.⁷²³ As a result of each of these evaluations, Orbach was rated unsatisfactory in some performance areas but received an overall evaluation rating of satisfactory. At the conclusion of the remediation period, Orbach was dismissed, even though he received an overall performance rating of "satisfactory."⁷²⁴ The Board's rationale for the dismissal was "any teacher receiving an

⁷¹⁷ *Id.*

⁷¹⁸ *Id.* at 853.

⁷¹⁹ *Id.*

⁷²⁰ *Id.*

⁷²¹ *Id.*

⁷²² *Orbach*, 991 N.E.2d at 853.

⁷²³ *Id.* at 854.

⁷²⁴ *Id.*

unsatisfactory rating at the end of the Remediation Plan shall be dismissed in accordance with the law.”⁷²⁵

The union requested a hearing on behalf of Orbach. Based on the collective bargaining language, which stated, “successful completion of a remediation plan depend[ed] on the teacher’s overall rating at the end of the plan,”⁷²⁶ the hearing officer reinstated Orbach.⁷²⁷ The school board appealed, arguing the language of the School Code took precedent over the language of the collective bargaining agreement.⁷²⁸ The Circuit Court of Lake County trial court reversed the hearing officer’s decision, citing both the collective bargaining agreement and the School Code, in tandem, for the reversal.⁷²⁹

Orbach appealed, arguing while an unsatisfactory rating in one category can result in a remediation plan, “only an *overall* unsatisfactory rating can lead to a dismissal.”⁷³⁰ The appellate court found “ample support [for Orbach’s argument] in the plain language of the [collective bargaining agreement].”⁷³¹ The school board asserted the collective bargaining

⁷²⁵ *Id.*

⁷²⁶ *Id.*

⁷²⁷ *Id.*

⁷²⁸ *Orbach*, 991 N.E.2d at 854.

⁷²⁹ *Id.*

⁷³⁰ *Id.* at 855 and “If the teacher on remediation status subsequently is evaluated with an overall rating of satisfactory or better, the teacher shall be re-evaluated the following year. Conversely, if the teacher on remediation status is still evaluated with an overall rating of unsatisfactory at the end of the remediation plan, the Board shall automatically institute dismissal procedures against the teacher.” *Id.*

⁷³¹ *Id.*

agreement did not control⁷³² and the School Code “mandate[d] [the] dismissal of a teacher who fail[ed] to remediate the particulars identified in the remediation plan.”⁷³³ The appellate court agreed with the school board and stated, “the Code prevails over the CBA,”⁷³⁴ but the determining factor was in the language of the School Code.⁷³⁵

The Second District Appellate Court elaborated by explaining, “the legislature could have very easily stated that the dismissal requirement applies to any teacher who fails to complete any application *portion of or component of* any applicable remediation plan.”⁷³⁶ However, it did not do so.”⁷³⁷ The court also stated, “It is quite another thing to say that an otherwise sound teacher should be dismissed where that teacher is unable to successfully remediate even a single deficiency. Indeed, the [Board’s] position, taken to its logical bounds, would mandate the dismissal of all but perfect teachers.”⁷³⁸ The court concluded Orbach was performing satisfactorily overall, even though there were a few areas still requiring improvement, and since “dismissal [is] contingent upon a teacher’s overall rating”⁷³⁹ the “CBA

⁷³² *Id.*

⁷³³ *Id. at 856.*

⁷³⁴ *Orbach*, 991 N.E.2d at 856.

⁷³⁵ *Id.*

⁷³⁶ Emphasis in original.

⁷³⁷ *Orbach*, 991 N.E.2d at 856.

⁷³⁸ *Id. at 857.*

⁷³⁹ *Id.*

did not mandate his dismissal.”⁷⁴⁰ Accordingly, the court found the “statute does not override the CBA,”⁷⁴¹ contrary to the school board’s opinion, and the court found “no conflict exist[ed] between the CBA and [the School Code].”⁷⁴² The appellate court reversed the lower court’s decision and affirmed the decision of the hearing officer. Orbach was reinstated.

Valley View v. Reid⁷⁴³

Although this case was ultimately decided in 2013, after the enactment of PERA, it followed the pre-PERA School Code language because the remediation plan began prior to PERA’s effective date. Lynn Reid was employed by the Valley View Community School District as a psychologist since 2002 and was a tenured employee.⁷⁴⁴ During the first three years Reid worked at Valley View, she “consistently received excellent evaluations in all categories.”⁷⁴⁵ At the beginning of the 2005-2006 school year, Reid was moved to a different school, where Donna Nylander was the principal. In 2006 Reid received her first evaluation, completed by Nylander, at the new school. She received “excellent ratings in all categories.”⁷⁴⁶

⁷⁴⁰ *Id.*

⁷⁴¹ *Id.* at 858.

⁷⁴² *Id.*

⁷⁴³ Bd. of Educ. of Valley View Cmty. Unit Sch. Dist. No. 354-U v. Ill. State Bd. of Educ., No. 3-12-0373, 2013 IL App (3d) 120373 (Ill. App. Oct. 25, 2013).

⁷⁴⁴ *Id.* at ¶6.

⁷⁴⁵ *Id.* at ¶14.

⁷⁴⁶ *Id.* at ¶15.

Nylander specifically mentioned Reid’s superior abilities in planning, assessment, and knowledge of subject mater.⁷⁴⁷

Three years later, in March 2009, Reid received her next evaluation.⁷⁴⁸ “Nylander rated Reid as ‘unsatisfactory’ in almost all categories and recommended Reid should ‘undergo a Remediation at this time.’”⁷⁴⁹ Reid disagreed with the evaluation and Nylander revised her conclusions to recommend “‘Reemployment with a Professional Growth Program’” instead of placement on a remediation plan.⁷⁵⁰ In May 2009, Nylander gave Reid a letter of recommendation, which “‘favorably discussed, in detail, Reid’s qualifications, assigned duties, and abilities to successfully perform her duties as a school psychologist.’”⁷⁵¹

In December 2009 Reid was again evaluated by Nylander.⁷⁵² Reid was rated “‘unsatisfactory.’” Nylander’s evaluation noted deficiencies in the areas of “‘preparation and planning, instruction and assessment, and classroom management or learning environment.’”⁷⁵³ A “‘Final Remediation Plan’” was established for Reid and was effective beginning January 11, 2010.⁷⁵⁴ During the time of the remediation plan, Reid was observed 29 times, 24 of which

⁷⁴⁷ *Id.*

⁷⁴⁸ *Id.* at ¶16.

⁷⁴⁹ *Valley View*, 2013 IL App (3d) 120373 at ¶16.

⁷⁵⁰ *Id.* at ¶17.

⁷⁵¹ *Id.* at ¶19.

⁷⁵² *Id.* at ¶21.

⁷⁵³ *Id.*

⁷⁵⁴ *Valley View*, 2013 IL App (3d) 120373 at ¶22.

were conducted by Nylander.⁷⁵⁵ At the end of the remediation plan, Reid was dismissed due to her lack of successfully completing the remediation plan.⁷⁵⁶ Reid appealed and sought an administrative review of the District's decision.⁷⁵⁷

The "administrative hearing officer determined the District terminated Reid base[d] on a less than fair remediation process initiated and managed by Nylander."⁷⁵⁸ The decision of the district was reversed and the District was ordered to reinstate Reid with back pay.⁷⁵⁹ The district challenged the administrative decision in circuit court. The circuit court "found the hearing officer's decision was not against the manifest weight of the evidence" and the decision was affirmed.⁷⁶⁰ The district appealed the circuit court decision to the appellate court.

In its appeal, the district claimed the "reversal of the hearing officer's decision [wa]s required due to various procedural errors ... [because] the hearing officer's findings were against the manifest weight of the evidence."⁷⁶¹ The district argued the hearing officer had committed six procedural errors. The appellate court agreed "various procedural errors" existed,⁷⁶² but in the end the court concluded the "cumulative effect of the undisputed

⁷⁵⁵ *Id.*

⁷⁵⁶ *Id.* at ¶1.

⁷⁵⁷ *Id.* at ¶2.

⁷⁵⁸ *Id.* at ¶3.

⁷⁵⁹ *Id.*

⁷⁶⁰ *Valley View*, 2013 IL App (3d) 120373 at ¶31.

⁷⁶¹ *Id.* at ¶34.

⁷⁶² *Id.* at ¶69.

procedural errors” ... did not result in a substantial injustice to the District.”⁷⁶³ The appellate court concluded “the District received a fair and impartial hearing in this case and was not denied due process.”⁷⁶⁴ As for the district’s claim the hearing officer’s decision was against the manifest weight of the evidence, the appellate court evaluated all the evidence and determined the hearing officer was “faced with conflicting evidence” and therefore “as the finder of fact [had] to assess the credibility of the documentary information and the testimony of the witnesses to determine the appropriate weight to be given the evidence.”⁷⁶⁵ After carefully reviewing the record, the appellate court determined “the hearing officer’s finding and ultimate decision were not against the manifest weight of the evidence.”⁷⁶⁶ For these reasons, the appellate court confirmed the circuit court’s decision to reverse the district’s dismissal of Reid. The district was ordered to “reinstate Reid with full back pay.”⁷⁶⁷

Public education has historically been a state issue. Since 1957, when the Soviets launched Sputnik, the federal government has taken a steadily increasing role in framing and influencing public educational issues. The public and governmental agenda has shifted to focus on teacher accountability. In Illinois, with the 2010 passage of the *Performance*

⁷⁶³ *Id.* at ¶72.

⁷⁶⁴ *Id.*

⁷⁶⁵ *Valley View*, 2013 IL App (3d) 120373 at ¶76.

⁷⁶⁶ *Id.*

⁷⁶⁷ *Id.* at ¶78.

Evaluation Reform Act,⁷⁶⁸ the focal point is now more rigorous and objective evaluations that take into account student growth.

⁷⁶⁸ Illinois Performance Evaluation Reform Act of 2010, Pub. Act 096-0861 (2010).

CHAPTER 3

ANALYSIS AND FINDINGS

This chapter discusses the trends emerging from the 1985 version of Article 24A of the Illinois School Code mandating classroom performance evaluation for all public school teachers. Pertinent Article 24A provisions and relevant Illinois teacher dismissal decisions will be analyzed and discussed to predict the *Performance Evaluation Reform Act's*⁷⁶⁹ (PERA) future implications.

In 2010 when PERA was signed into law, then Illinois Governor Quinn stated the statute's purpose was to send a "strong signal to Washington that a top-notch education for all Illinois students is our foremost priority," noting "rigorous teacher ... evaluations will make our education system the best it can be."⁷⁷⁰ Quinn also stated PERA was designed to ensure "Illinois [was] at the head of the class when it comes to winning those important federal 'Race to the Top' funds."⁷⁷¹ PERA's clear and streamlined procedures were intended to make the

⁷⁶⁹ *Id.*

⁷⁷⁰ Illinois Government News Network, *Press Release: Governor Quinn Signs Legislation to Improve Teacher, Principal Evaluations and Training; Boosts Illinois' Application for "Race to the Top" Funds*, Jan. 15, 2010, available at <http://www3.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=8176> (last visited Dec. 22, 2014).

⁷⁷¹ *Id.*

process of terminating the employment of tenured public school teachers less cumbersome.⁷⁷²

Education Week described PERA as “a sweeping measure that has the potential to significantly reshape the teaching profession in [Illinois] by linking educators’ tenure, hiring, and job security to performance, rather than seniority.”⁷⁷³ One reason for this change was a public perception the 1985 system of teacher evaluation and retention was ineffective. In 2005, Scott Reeder, a capital bureau chief for the Small Newspaper Group, conducted a six-month study into the costs and statistics for Illinois tenured teacher dismissals.⁷⁷⁴ Reeder’s study suggested a school district generally spent over \$220,000⁷⁷⁵ to dismiss a tenured teacher. Reeder posited the lengthy process and the high price tag deterred many school districts from initiating the tenured teacher dismissal process.⁷⁷⁶ Thus, substandard teachers were retained. PERA sought to correct this situation by streamlining the dismissal process. While this was PERA’s intent, it is too soon to determine if these changes have had the full desired impact (i.e., PERA has not yet been fully implemented and the Illinois courts have not yet issued a substantial body of tenured teacher dismissal decisions based upon PERA’s changes).

⁷⁷² Illinois Performance Evaluation Reform Act of 2010, Pub. Act 096-0861, § 24A-5(m) (2010).

⁷⁷³ Cavanagh, *supra* note 355.

⁷⁷⁴ Scott Reeder, *Cost to Fire a Tenured Teacher? More than \$219,000, The Hidden Costs of Tenure* (2005), available at <http://thehiddencostsoftenure.com/stories/?prcss=display&id=295712> (last visited Mar. 8, 2015).

⁷⁷⁵ This figure is in 2005 dollars. The approximate 2015 value is \$275,000.

⁷⁷⁶ Reeder, *supra* note 774.

Lessons Learned

PERA's overarching goal was increased academic outcomes for all students. To achieve this goal, PERA required Illinois public school teachers to prove (via the 30% minimum student growth data component⁷⁷⁷) their classroom teaching practices were producing academic excellence.⁷⁷⁸ PERA established consequences for teachers whose classroom teaching performance was not rated as either 'proficient' or 'excellent.'⁷⁷⁹ Post-PERA, tenured teachers receiving a summative performance rating of 'unsatisfactory' are placed on a remediation plan.⁷⁸⁰ If teachers do not complete the remediation plan with a final performance rating equal to or better than 'proficient,' their employment will be terminated.⁷⁸¹ By analyzing Article 24A tenured teacher dismissal decisions issued by the Illinois courts prior to PERA's partial implementation, patterns clarifying what school officials can do in order to successfully remove a low performing tenured teacher emerged.

Based upon an examination of Illinois teacher dismissal cases resulting from a teacher's failure to successfully complete a remediation plan, both before and after PERA's partial implementation, one lesson is clear: procedural compliance with Article 24A is crucial. Even when the quality of the classroom teaching was flagrantly substandard, if school officials did

⁷⁷⁷ 30% is the percentage for non-CPS schools; CPS must use 50%. See Chapter 2 for a more detailed explanation of student growth.

⁷⁷⁸ Illinois Performance Evaluation Reform Act of 2010, Pub. Act 096-0861, § 24A-5(1) (2010).

⁷⁷⁹ *Id.* at § 24A-5(2).

⁷⁸⁰ *Id.* at § 24A-5(i).

⁷⁸¹ *Id.* at § 24A-5(m).

not comply with Article 24A's procedural requirements, the school district's dismissal of the teacher did not garner judicial support. This trend is likely to continue in the post-PERA era. For the purpose of this study, the terms 'procedures' and 'procedural compliance' are defined as complying with the rules specified in Article 24A of the Illinois School Code. Specifically, the proper development and implementation of remediation plans, utilizing the stated performance rating categories, and adhering to the dismissal process requirements. Observing the time line provisions and satisfying the clerical requirements are also considered to be procedural compliance for the purpose of this study. Procedural adherence was the determining factor for school districts in nine of the eleven teacher dismissal cases in this study. One case turned on procedural compliance on the part of the teacher who challenged her dismissal.⁷⁸² The remaining case did not involve procedural issues and appeared to be an anomaly.⁷⁸³

In some instances, the courts have deemed the lack of procedural compliance was so egregious as to be labeled a *significant breach* of the procedures. The courts decided whether the Article 24A infractions were a *significant breach*, an *unauthorized* departure or still evidenced *substantial compliance* with 24A's procedural mandates. It is this determination that can overturn a school district's dismissal decision. After an analysis of school officials' procedural violations, resulting in dismissal decisions being overturned, five categories of error emerged:

⁷⁸² Because *Dudley v. Board of Education* involved procedural errors on the part of the teacher and not the district, it is not included here. Analysis of *Dudley* may be found in Appendix C.

⁷⁸³ *Bd. of Educ. v. Ill. State Bd. of Educ.* appears to be an anomaly motivated by something other than professional standards. The principal's actions regarding the tenured teacher were quite contradictory and unexplainable. As such, the case will not be discussed.

1. Failure to properly develop and implement the remediation plan;
2. Failure to apply Article 24A's expressly stated performance rating categories;
3. Failure to adhere to Article 24A's dismissal process;
4. Failure to comply with Article 24A's time line stipulations; and
5. Failure to comply with the Act's clerical requirements.

These five error types will be discussed vis-à-vis the case law within the context of the pre- and post- PERA tenured teacher dismissals resulting from the teacher's failure to successfully complete the remediation plan. The analysis discusses school officials' procedural transgressions resulting in the courts overturning school board dismissal decisions. The analysis also discusses how procedural compliance may bolster school officials in cases seeking judicial affirmation of tenured teacher dismissals.

Procedural Non-Compliance in Pre-PERA Case Law: Dismissals Overturned Based on Remediation Plan Errors

Analysis of the case law revealed nine instances wherein the proper development and implementation of the remediation plan was the deciding issue of the case. Of these, six cases involved errors resulting in the school board's dismissal decision being overturned.

In *Chicago Board of Education v. Smith*,⁷⁸⁴ the appellate court expressly stated, "the issue in this case centers on whether the proper procedures were observed" in dismissing the teacher.⁷⁸⁵ At the end of the remediation plan, the teacher did not receive a formal final

⁷⁸⁴ *Chicago Bd. of Educ. v. Smith*, 279 Ill. App. 3d 26 (Ill. App. Ct. 1st Dist. 1996).

⁷⁸⁵ *Id.* at 28.

evaluation as required by the School Code.⁷⁸⁶ Instead, the building principal verbally informed the teacher her performance during the remediation period was “still unsatisfactory”⁷⁸⁷ and her dismissal was being recommended to the Board of Education.⁷⁸⁸ The hearing officer based his decision to overturn the teacher’s dismissal on this procedural violation. On appeal, the appellate court concluded the verbal communication of the teacher’s remediation plan performance, coupled with another procedural error (discussed later), constituted a *significant breach of the procedures* (emphasis added) outlined in Article 24A-5 of the School Code.⁷⁸⁹ The appellate court observed school officials “did not comply with the requirements of the School Code... regarding evaluations and ratings.”⁷⁹⁰ As a result the teacher was reinstated.

The next instance of improper implementation of a remediation plan resulting in the overturning of a dismissal decision was *MacDonald v. Board of Education*.⁷⁹¹ Article 24A-5 required the remediation plan to be developed and implemented within thirty days of a tenured teacher receiving an unsatisfactory performance rating.⁷⁹² The teacher received his summative performance rating of unsatisfactory on the last day of the 2007 – 2008 school year. It was not until 158 days after the summative conference that the remediation plan had been developed

⁷⁸⁶ 105 ILL. COMP. STAT. 5/24A-5 (West 1992).

⁷⁸⁷ *Smith*, 279 Ill. App. 3d at 28.

⁷⁸⁸ *Id.*

⁷⁸⁹ *Id.* at 35.

⁷⁹⁰ *Id.*

⁷⁹¹ *MacDonald v. State Bd. Of Educ.*, 966 N.E. 2d 322 (Ill. App. 4th Dist. 2012).

⁷⁹² 105 ILL. COMP. STAT. 5/24A-5 (West 1992).

and implemented.⁷⁹³ The court concluded school officials should not have waited as long as they did to institute the remediation plan.⁷⁹⁴ Therefore, the court ruled the school district's lack of compliance with the remediation plan procedures was "an invalidation of the plan" and accordingly reversed the teacher's dismissal.⁷⁹⁵

Procedural Non-Compliance in Pre-PERA Case Law: Dismissals Overturned Based on
Performance Rating Errors

Pre-PERA Article 24A-5 explicitly stated school districts must use one of three rating categories (i.e., excellent, satisfactory, or unsatisfactory) to rate a teacher's performance.⁷⁹⁶ Consistency was important for cross-district comparisons, thus the need for all school districts to comply with this School Code provision. In *Buchna v. Illinois State Board of Education*,⁷⁹⁷ the teacher asserted her dismissal should be overturned due to the school district's non-compliance with Article 24A -5.⁷⁹⁸ Instead of utilizing the three statutorily prescribed ratings, the teacher's school district's practice was to use only two summative rating categories: "Meets or Exceeds District Expectations" or "Does Not Meet District Expectations."⁷⁹⁹

⁷⁹³ *MacDonald*, 966 N.E. 2d at 326.

⁷⁹⁴ *Id.*

⁷⁹⁵ *Id.* at 330.

⁷⁹⁶ 105 ILL. COMP. STAT. 5/24A-5(c) (West 1992).

⁷⁹⁷ *Buchna v. Ill. State Bd. of Educ.*, 342 Ill. App. 3d 934 (Ill. App. Ct. 3d Dist. 2003).

⁷⁹⁸ *Id.* at 935-36.

⁷⁹⁹ *Id.* at 936.

The teacher argued since “the ratings did not follow the statutory terminology, ... her termination was improper.”⁸⁰⁰ The hearing officer and the trial court decided the district “had *substantially complied* (emphasis added) with subsection 24A-5(c).”⁸⁰¹ However, the appellate court disagreed and concluded, “Section 5 [of Article 24A] authorize[d] remediation if certain requirements [were] followed. The Board lost its remedial authority when it failed to comply with one of those requirements.”⁸⁰²

The appellate court relied heavily on the statute’s language as, “the most reliable indicator of the law’s intent,”⁸⁰³ and determined the “language clearly state[d] that use of the three-tiered rating system ... was mandatory.”⁸⁰⁴ At the crux of the decision were the meanings of the words ‘may’ and ‘shall.’ School officials argued, “‘shall’ really only meant ‘may.’”⁸⁰⁵ The appellate court, after thoroughly evaluating the statute’s language, determined the legislature’s intent and the statute’s language were “clear and unambiguous.”⁸⁰⁶ The court declared ‘shall’ actually meant ‘required’ and all three ratings must be used.

Since “the remediation and dismissal provisions of Section 24A-5 only apply to teachers who have received an ‘unsatisfactory’ rating,” and the teacher never received such a

⁸⁰⁰ *Id.*

⁸⁰¹ *Id.*

⁸⁰² *Id.* at 939.

⁸⁰³ *Buchna*, 342 Ill. App. 3d at 936.

⁸⁰⁴ *Id.* at 937.

⁸⁰⁵ *Id.*

⁸⁰⁶ *Id.*

rating, the court held there was no legal support justifying the initiation of a remediation plan. Without the authority to place the teacher on a remediation plan, the unsatisfactory teaching performance rating at the conclusion of the plan (the reason for her dismissal) was invalid and the school district had no grounds to terminate the teacher's employment. The appellate court reversed the dismissal decision by reason of the school district's "*unauthorized departure*"⁸⁰⁷ (emphasis added) from Article 24A-5's express procedural requirements.

Procedural Non-Compliance in Pre-PERA Case Law: Dismissals Overturned Based on
Dismissal Process Errors

The dismissal process has many aspects, the role of the hearing officer being an important one. In *Board of Education v. Spangler*⁸⁰⁸ the issue was the hearing officer's scope of authority. While school officials complied with all procedures in relation to the year-end evaluation, developing the remediation plan within the time requirements, and following proper procedures during the remediation plan, they did not follow Article 24A-12's guidance on the hearing officer's role. At the conclusion of the remediation plan, the teacher's teaching performance was rated as unsatisfactory and a dismissal recommendation was submitted to the board of education. The board of education voted to dismiss the teacher and an administrative hearing followed.

The hearing officer concluded the board of education "failed to show by a preponderance of evidence that the teacher deserved an unsatisfactory rating during the

⁸⁰⁷ *Id.* at 939.

⁸⁰⁸ *Bd. of Educ. v. Spangler*, 328 Ill. App. 3d 747 (Ill. App. Ct. 1st Dist. 2002).

remediation year, nor should he have been dismissed.”⁸⁰⁹ The trial court concurred. On appeal, the board of education argued the hearing officer exceeded the scope of his authority.⁸¹⁰ The appellate court disagreed and found the hearing officer’s decision was not against the manifest weight of the evidence and he had not exceeded his authority, nor did he substitute his judgment for that of the board of education.⁸¹¹ The appellate court noted the board of education misinterpreted Article 24-12⁸¹² that granted “full and total authority to the hearing officer to make the ultimate decision and determination as to dismissal.”⁸¹³ Due to this procedural error, the appellate court upheld the hearing officer’s decision to overturn the board of education’s dismissal of the teacher.⁸¹⁴ The teacher was reinstated.

Procedural Non-Compliance in Pre-PERA Case Law: Dismissals Overturned Based on Time

Line Errors

Observing the time line requirements specified in the School Code is critical to successful removal of tenured teachers whose performance is rated as unsatisfactory. This

⁸⁰⁹ *Id.* at 751.

⁸¹⁰ *Id.* at 752.

⁸¹¹ *Id.* at 760.

⁸¹² At the end of 1975, Article 24-12 was amended to give the board of education “only an investigatory/charging function” and to give the “hearing function [to] an impartial hearing officer.” *Spangler*, 328 Ill App. 3d at 753.

⁸¹³ *Spangler*, 328 Ill App. 3d at 753-54.

⁸¹⁴ *Id.* at 748.

lesson was demonstrated in *MacDonald v. Board of Education*.⁸¹⁵ Article 24A-5 required a remediation plan be developed and implemented within 30 days after a tenured teacher's receipt of an unsatisfactory performance rating. The teacher received his summative performance rating of unsatisfactory on the last day of the 2007-2008 school year.⁸¹⁶ The 30-day time period required in pre-PERA Article 24-5 was not an exact time period, as hearing officers had the ability to give school districts a reasonable time allowance.⁸¹⁷ In making this determination, hearing officers and the courts have taken into account the discussions at legislative hearings. In this particular case, the hearing officer relied on the testimony of senators during legislative hearings⁸¹⁸ to determine "the 30-day time period [was] not mandatory."⁸¹⁹ Hence, the hearing officer upheld the dismissal.

The court, while allowing for some flexibility in the 30-day time period, was not as lenient as the hearing officer and reversed his decision. The court deemed the extensive time period prior to the beginning of the remediation plan (i.e., 158 days) to be a *substantial breach of the procedures* (emphasis added). The court held since the final performance rating was given to the teacher on the last day of school, the remediation plan should have started on the

⁸¹⁵ *MacDonald v. State Bd. Of Educ.*, 966 N.E. 2d 322 (Ill. App. 4th Dist. 2012).

⁸¹⁶ *Id.* at 324.

⁸¹⁷ Failure to strictly comply with the time requirements contained in Article 24A-5 shall not invalidate the results of the remediation plan. 105 ILL. COMP. STAT. 5/24A-5 (West 1992).

⁸¹⁸ *MacDonald*, 966 N.E. 2d at 326.

⁸¹⁹ *Id.*

first day of the next school year.⁸²⁰ This would have exceeded the thirty-day period, but not in an egregious manner. In making this decision, the court noted school officials determined the evaluation date and were aware of the statutory requirements.⁸²¹ In addition, the court further observed if school officials were dissatisfied with the teacher's teaching and believed it needed improvement, they should never have allowed the teacher to begin a new school year without a remediation plan commencing and a consulting teacher being identified.⁸²² Therefore, the court concluded school officials should not have waited 158 days after the teacher's summative evaluation meeting to institute the remediation plan.⁸²³ The court found school officials' failure to comply with procedural requirements was "an invalidation of the [remediation] plan"⁸²⁴ and, therefore, reversed the teacher's dismissal.

Procedural Non-Compliance in Pre-PERA Case Law: Dismissals Overturned Based on Clerical Errors

Even clerical issues matter when they pertain to the procedures outlined in Article 24A of the Illinois School Code. This was evidenced in *Chicago Board of Education v. Smith*.⁸²⁵

⁸²⁰ *Id.* at 330.

⁸²¹ *Id.*

⁸²² *Id.*

⁸²³ *Id.* at 326.

⁸²⁴ *MacDonald*, 966 N.E. 2d at 330.

⁸²⁵ *Chicago Bd. of Educ. v. Smith*, 279 Ill. App. 3d 26 (Ill. App. Ct. 1st Dist. 1996).

The school officials did not use the “proper visitation [observation] forms”⁸²⁶ when conducting the teacher’s remediation evaluation observations, nor did they use the proper end of remediation evaluation form.

At the end of the remediation period the teacher received neither the “Teacher Evaluation Review’ form” nor a summative rating on her teaching performance during the remediation plan.⁸²⁷ Two days after the culmination of the plan, the teacher was told a recommendation for her dismissal would be submitted to the Board because “she was not successful at remediation.”⁸²⁸ At this time the teacher was handed a document entitled “YOU HAVE NOT COMPLIED WITH THE FOLLOWING ITEMS.”⁸²⁹ The document listed areas of deficiency that closely approximated the information in the remediation plan.⁸³⁰ The hearing officer and the appellate court concluded the lack of the appropriate evaluation review form, coupled with another error in the implementation of the remediation process (discussed above) constituted a *significant breach of the procedures* (emphasis added) outlined in Article 24A-5 of the School Code.⁸³¹ The court noted school officials had failed to identify the teacher’s specific strengths and weakness, the supporting reasons, and an overall performance rating.⁸³²

⁸²⁶ *Id.* at 29.

⁸²⁷ *Id.* at 35.

⁸²⁸ *Id.*

⁸²⁹ *Id.*

⁸³⁰ *Id.*

⁸³¹ *Smith*, 279 Ill. App. 3d at 35.

⁸³² *Id.*

The hearing officer based his decision to overturn the teacher's dismissal on these procedural violations. The appellate court agreed, observing school officials "did not comply with the requirements of the School Code... regarding evaluations and ratings."⁸³³ Due to the clerical error, the teacher was reinstated.

All of these cases were overturned and the teachers were reinstated – with back pay and benefits – due to school officials' non-compliance with the procedures outlined in the pre-PERA Article 24A of the Illinois School Code.

Procedural Compliance in Pre-PERA Case Law: Dismissal Affirmed Based on Remediation

Plan Compliance

Meticulously following the procedures with respect to the remediation plan process aided the following school districts in successfully terminating the employment of unsatisfactory tenured teachers. In the first example involving school district remediation plan procedural compliance, *Powell v. Board of Education*,⁸³⁴ the appellate court upheld the dismissal decision.

The teacher claimed since the board of education's role was solely to ratify the principal's dismissal recommendation, the board violated Article 24A-5(f). The trial court reversed the dismissal, reasoning, "the statutory requirements to initiate a remediation program

⁸³³ *Id.*

⁸³⁴ *Powell v. Bd. of Educ.*, 189 Ill. App. 3d 802 (Ill. App. Ct. 3d Dist. 1989).

... were not met by the School Board.”⁸³⁵ The trial court interpreted the word ‘district’ to mean “only school boards had the authority to develop and initiate the remediation programs.”⁸³⁶

On appeal, the appellate court also focused on the issue of “whether Article 24A require[d] school boards to ‘initiate’ or develop a remediation program.”⁸³⁷ The appellate court determined the trial court applied an erroneous interpretation to the word ‘district.’⁸³⁸ The trial court interpreted ‘district’ to be the ‘school board,’ but the broader definition of ‘school officials’ was the true intention of Article 24A.⁸³⁹ Relying on Article 24A’s legislative scheme and a 1989 amendment to Article 4A-5(f),⁸⁴⁰ specifically permitting school officials to develop and commence remediation plans,⁸⁴¹ the court determined it was the responsibility of school officials, not the school board, to develop and implement the remediation plan.⁸⁴²

Subsequently, the appellate court found, “the trial court erred in reversing the decision of the

⁸³⁵ *Id.* at 805.

⁸³⁶ *Id.*

⁸³⁷ *Id.*

⁸³⁸ *Id.* at 805-06.

⁸³⁹ *Id.* at 806.

⁸⁴⁰ In 1989 an amendment was added to Article 24A-5 of the School Code which included the following language: “development and commencement by the district, or by an administrator” Pub. Act 090-0548 (1988) available at <http://www.ilga.gov/legislation/publicacts/pubact90/acts/90-0548.html> (last visited Mar. 8, 2015).

⁸⁴¹ *Powell*, 189 Ill. App. 3d at 806.

⁸⁴² *Id.*

hearing officer ... based on its erroneous conclusion the [board of education] had to initiate and develop the remediation program.”⁸⁴³ The teacher was dismissed.

In *Davis v. Board of Education*,⁸⁴⁴ the hearing officer, the trial court, and the appellate court all agreed the school district followed the necessary remediation procedures and made the appropriate decision to dismiss the teacher.

On appeal the teacher argued school officials failed to comply with Article 24A and the procedural errors necessitated a reversal of his dismissal. During the 1989-1990 school year the teacher’s classroom performance was rated unsatisfactory and a remediation plan was developed and implemented within the specified time period. A consulting teacher was selected and the plan was discussed with the teacher who stated he understood its terms.⁸⁴⁵ At the culmination of the remediation plan the teacher received an unsatisfactory rating. Pursuant to Articles 24A-5, the teacher’s employment was terminated.⁸⁴⁶ Upon review, the hearing officer found sufficient cause existed for the dismissal and found no procedural violations by school officials.⁸⁴⁷ The trial court concurred but on appeal, the teacher argued procedural violations with respect to who decides whether the teaching performance during the

⁸⁴³ *Id.* at 807.

⁸⁴⁴ *Davis v. Bd. of Educ., of the City of Chicago*, 276 Ill. App. 3d 693 (Ill. App. Ct. 1st Dist. 1995).

⁸⁴⁵ *Id.* at 695.

⁸⁴⁶ *Id.* at 697.

⁸⁴⁷ *Id.* at 695.

remediation plan is satisfactory or unsatisfactory.⁸⁴⁸ The teacher contended the determination was to be made by the hearing officer – not the school district.⁸⁴⁹

The appellate court disagreed, finding the school officials had followed Article 24A’s applicable procedures.⁸⁵⁰ The court cited Article 24A-5(f) finding, “the statute clearly vest[ed] the principal and the consulting teacher with the power to make this determination.”⁸⁵¹ Accordingly, the appellate court upheld the board of education’s dismissal decision. The teacher’s employment was terminated.

Proper procedures with respect to the development and implementation of the remediation plan were also the primary reason the teacher’s dismissal was upheld in *Montgomery v. Board of Education*.⁸⁵² At the heart of the case were two procedural matters. The teacher alleged school officials had not met Article 24A’s procedural requirements. Specifically, the teacher argued he had not been properly placed on a remediation plan because he never received a written evaluation with reasons supporting his unsatisfactory performance rating. The hearing officer “found that proper procedures had been followed” with respect to Article 24A-5 and with respect to the teacher’s placement on a remediation plan.⁸⁵³ The hearing officer concluded the “repeated written comments and suggestions ... [regarding the

⁸⁴⁸ *Id.* at 696.

⁸⁴⁹ *Id.*

⁸⁵⁰ *Id.* at 696–98.

⁸⁵¹ *Id.* at 696.

⁸⁵² *Montgomery v. Bd. Of Educ.*, No. 11-2324, 2012 Ill. App. Unpub. LEXIS 2135 (Ill. App., 2012).

⁸⁵³ *Id.* *18.

teacher's teaching performance] amounted to ample supporting reasons"⁸⁵⁴ for the unsatisfactory rating.

The teacher also alleged school officials committed several errors during the administration of the remediation plan.⁸⁵⁵ At the end of the hearing, the hearing officer determined school officials did not commit any procedural errors during the implementation and administration of the remediation plan.⁸⁵⁶ Based upon these findings the hearing officer affirmed the teacher's dismissal.⁸⁵⁷ At trial, the only issue the court considered was whether the consulting teacher "participated in the development of [the] remediation plan, as required by the Code."⁸⁵⁸ The court found "no error in the hearing officer's determination"⁸⁵⁹ "that the provisions of section 24A-5(h) had been met."⁸⁶⁰ Thus, the court affirmed the teacher's dismissal. The teacher appealed. The appellate court denied the petition and the case was dismissed.⁸⁶¹ The board of education's dismissal of the tenured teacher was upheld.

⁸⁵⁴ *Id.* at *19.

⁸⁵⁵ *Id.*

⁸⁵⁶ *Id.* at *19-20.

⁸⁵⁷ *Id.* at *21.

⁸⁵⁸ *Montgomery*, 2012 Ill. App. Unpub. LEXIS 2135 at *25.

⁸⁵⁹ *Id.* at *30.

⁸⁶⁰ *Id.* at *29.

⁸⁶¹ *Id.* at *32.

Procedural Compliance in Pre-PERA Case Law: Dismissal Affirmed Based on Dismissal

Process Compliance

Similar to the importance of complying with the proper remediation plan procedures, conformance with the details of the overall dismissal process is also crucial in strengthening school district's decisions to dismiss tenured teachers.

In *Davis v. Board of Education*,⁸⁶² the question of who was allowed to rate the teacher's performance during the remediation plan, a key aspect of the dismissal process, was the issue.

The teacher contended the decision lay with the hearing officer.⁸⁶³ The appellate court did not find merit in this argument, citing Article 24A-5(f), declaring, "the statute clearly vest[ed] the principal and the consulting teacher with the power to make this determination."⁸⁶⁴ The appellate court, therefore, upheld the board of education's dismissal decision and the teacher was dismissed.

The next example of the importance of adhering to the dismissal process procedures is *Raitzik v. Board of Education*.⁸⁶⁵ In this case, adherence to Article 24A's procedures buttressed the board of education's successful termination of the teacher's employment. During the 2000-2001 school year the teacher's classroom teaching was observed the requisite number of times, and after each observation the building principal met with the teacher to discuss her identified

⁸⁶² *Davis v. Bd. of Educ., of the City of Chicago*, 276 Ill. App. 3d 693 (Ill. App. Ct. 1st Dist. 1995).

⁸⁶³ *Id.* at 696.

⁸⁶⁴ *Id.*

⁸⁶⁵ *Raitzik v. Bd of Educ.*, 356 Ill. App. 3d 813 (Ill. App. Ct. 1st Dist. 2005).

strengths and weaknesses, and the reasons for both.⁸⁶⁶ After receiving a summative evaluation rating of unsatisfactory, the teacher was placed on a remediation plan, pursuant to Article 24A-5(f). The plan was developed, implemented, and communicated to the teacher in accordance with Article 24A.⁸⁶⁷ At the conclusion of the remediation plan the teacher received another unsatisfactory rating and the Board voted to dismiss her in accordance with Article 24A-5.⁸⁶⁸

The hearing officer concluded, although school officials complied with the School Code, he found it “troubling” for a tenured teacher to be dismissed after just two observations.⁸⁶⁹ Based upon this concern, the hearing officer overturned the Board’s termination decision.⁸⁷⁰ The school district sought relief in the trial court where the teacher argued school officials had not followed proper dismissal procedures.⁸⁷¹ At trial, the court found “no procedural violations in [the teacher’s] dismissal,”⁸⁷² and substantial evidence showing the teacher failed to improve her teaching performance during the remediation period. The appellate court reached the same conclusion⁸⁷³ and affirmed the board of education’s dismissal decision.

⁸⁶⁶ *Id.* at 815.

⁸⁶⁷ *Id.* at 817-20.

⁸⁶⁸ *Id.* at 821.

⁸⁶⁹ *Id.*

⁸⁷⁰ *Id.*

⁸⁷¹ *Raitzik*, 356 Ill. App. 3d at 822.

⁸⁷² *Id.*

⁸⁷³ *Id.* at 824.

In all of these dismissal cases, school officials conscientiously followed Article 24A's procedures and all of the cases ended with an affirmation of the tenured teacher's dismissal decisions. The recommendation for school officials looking to cull ineffective teachers is clear: adhere to the procedures outlined in Article 24A of the School Code.

The preceding cases regarding procedural errors all occurred prior to PERA's passage. The anticipated trend for the future is the courts will continue to give deference to school districts in tenured teacher dismissal cases if school officials follow Article 24A's procedural directives. A tenured teacher with many years of experience may successfully be dismissed if there is proper adherence to Article 24A's procedures. This anticipated trend is reflected in the only post-PERA Article 24A tenured teacher dismissal case decided to date. In this case, the dismissal decision was overturned due to school officials' failure to comply with the post-PERA Article 24A procedures.⁸⁷⁴

Procedural Compliance Post-PERA: Dismissal Overturned Based on Remediation Plan Errors

At the time of this study, only one post-PERA teacher termination case pertaining to Article 24A had been decided.⁸⁷⁵ PERA's recent enactment explains the dearth of cases. In

⁸⁷⁴ Procedural compliance cuts both ways – the courts are just as strict with following Article 24A's procedures with teachers as they are with districts. This is clearly evidenced in *Dudley v. Board of Education*. As this case does not deal with the actions of the school district and therefore has no bearing on the lessons learned for districts, extrapolated from the case law, it is discussed in Appendix D.

⁸⁷⁵ *Bd. of Educ. v. Ill. State Bd. of Educ.* appears to be an anomaly motivated by something other than professional standards. The principal's actions regarding the tenured teacher were quite contradictory and unexplainable. As such, the case will not be discussed.

*Board of Education v. Shelley Orbach*⁸⁷⁶ school officials did not follow the remediation plan procedures.

The board of education failed to follow Article 24A-5(m),⁸⁷⁷ thereby resulting in the board of education's dismissal decision being overturned. Post-PERA Article 24A-5(m) specifies the overall rating at the culmination of the remediation period determines the dismissal decision.⁸⁷⁸ Notwithstanding the overall "satisfactory" rating, at the conclusion of the remediation period, the board of education dismissed the teacher.⁸⁷⁹ The district used the individual component ratings to make its dismissal decision, but Article 24A made it clear those ratings were not relevant in the decision. Since the board of education did not base its dismissal decision on the teacher's overall performance rating, it failed to comply with Article 24A-5. Accordingly, the court reversed the dismissal decision.

Future Implications

As was the trend with the pre-PERA Article 24A tenured teacher dismissal cases, *Orbach*⁸⁸⁰ portends a continuation of a judicial expectation for strict procedural fidelity will

⁸⁷⁶ *Bd. of Educ. of Waukegan Cmty. Unit Sch. Dist. No. 60 v. Orbach*, 991 N.E.2d 851 (Ill. App. 2013).

⁸⁷⁷ *Id.* at 855. Article 24A-5(m) states the completion of a remediation plan for a teacher who receives less than an overall rating of satisfactory will result in dismissal. Illinois Performance Evaluation Reform Act of 2010, Pub. Act 096-0861, § 24A-5(m) (2010).

⁸⁷⁸ Illinois Performance Evaluation Reform Act of 2010, Pub. Act 096-0861, § 24A-5(m) (2010).

⁸⁷⁹ *Orbach*, 991 N.E.2d at 854.

⁸⁸⁰ *Id.*

continue. Based on the cases, the courts apply a tight definition of the concept of procedural compliance. The definition is narrow, but not totally inflexible. The case history exemplifies the courts have required “a significant breach of procedures”⁸⁸¹ and “an unauthorized departure” from procedures⁸⁸² before finding an Article 24A procedural violation. Thus, the courts have extended deferential treatment to school district dismissal decisions. Even with this historical deference, school officials should nonetheless scrupulously follow Article 24A’s procedural directives. The terms ‘significant breach’ and ‘unauthorized departure’ are nebulous. It is difficult to know exactly where the line between an acceptable bending of Article 24A’s procedures and a significant breach or an unauthorized departure lies. The lesson for school officials is to err on the conservative side and follow all the procedures outlined in Article 24A.

The proper development and implementation of remediation plans, utilizing the stated performance rating categories, adhering to the dismissal process requirements, observing time line stipulations, and satisfying the clerical requirements are all crucial categories for procedural compliance that should not be overlooked or glossed over if school officials desire to successfully dismiss tenured teachers in the post-PERA era. The pattern established by case law, coupled with the intent of the *Performance Evaluation Reform Act*,⁸⁸³ yields a clear lesson: if school districts want the courts to uphold their Article 24A tenured teacher dismissal decisions they must precisely adhere to the new law’s procedural directives. This is an

⁸⁸¹ *Chicago Bd. of Educ. v. Smith*; 279 Ill. App. 3d 26, 35 (Ill. App. 1996) and *MacDonald v. State Bd. of Educ.*, 966 N.E.2d 322, 330 (Ill. App. 4th Dist. 2012).

⁸⁸² *Buchna v. Ill. State Bd. of Educ.*, 342 Ill. App. 3d 934, 939 (Ill. App. 2003).

⁸⁸³ Illinois Performance Evaluation Reform Act of 2010, Pub. Act 096-0861 (2010).

important lesson for school officials seeking future dismissal of tenured teachers whose classroom teaching performance is determined to be unsatisfactory.

Conclusion

The *Performance Evaluation Reform Act*⁸⁸⁴ seeks to increase student academic performance by improving teacher instructional performance, vis-à-vis strengthening the teacher performance evaluation process. Most would agree PERA's impetus and the alacrity of its passage were designed to secure Race to the Top federal funding. Notwithstanding this motivation, PERA seeks to make many positive changes to strengthen the perception of public school teachers and the public school system. One way PERA seeks to accomplish this goal is by establishing clear guidelines addressing ineffective classroom teaching performance.

The next chapter explains the current state of teacher evaluation, thereby placing Illinois' PERA into context. The chapter offers potential policy implications of PERA and compliance suggestions for school officials. Future areas of study are also be discussed.

⁸⁸⁴ *Id.*

CHAPTER 4

CONCLUSION

This final chapter examines the history of the federal government's involvement in American public education to determine whether a pattern exists to understand the federal government's expanding role in public education, thereby placing into context Illinois' passage of the 2010 *Performance Evaluation Reform Act*⁸⁸⁵ (PERA). PERA, coupled with the subsequent and companion legislation, Senate Bill 7, made significant changes to Illinois' teacher performance evaluation process and the role tenure status plays in employment decisions. The second purpose of this study was to determine what factors were most important in determining the outcome of tenured teacher dismissal cases involving unsatisfactory teaching performance. This determination was made by analyzing Illinois court decisions regarding tenured teacher dismissal, both prior to and after the implementation of PERA. These dismissals stemmed from the teacher's failure to successfully complete a remediation plan resulting from an unsatisfactory teaching performance rating.

The federal government's role in public education has historically been one of financial and theoretical support. It was not until the post World War II era, and specifically the Soviet launch of Sputnik I that the federal government's involvement turned toward policy formation – despite the United States Constitution's establishing public education as a state responsibility.

⁸⁸⁵ *Id.*

Throughout the decades following Sputnik I, the federal government has taken an ever-increasing role in public education policy. A by-product of this growing federal influence has been teacher accountability, thus the recent attention on the teacher evaluation process.

In 2009 President Obama established the Race to the Top campaign. In 2009 President Obama established the Race to the Top campaign (RTTP).⁸⁸⁶ RTTP was a competitive federal program that provided qualifying states with federal funds in exchange for the adoption of newly recommended federal education policies. This program was intended to change education policy one state at a time. RTTP was a different approach to the federal government's involvement, and one that yielded some success as a new strategy for effectuating federal education policy changes. RTTP's stated goal was to create "achievable plans for implementing coherent, compelling, and comprehensive education reform."⁸⁸⁷ A large piece of this reform focused on teacher evaluation with an accompanying emphasis on teacher accountability.

While Congress could not enact a federal teacher evaluation law, the federal government used RTTP as a monetary incentive for states to adopt more rigorous teacher evaluation systems, incorporating student academic growth into the equation. In order to

⁸⁸⁶ U.S. Dept. of Ed., *Race to the Top Executive Summary* (Nov. 2009) available at <https://www2.ed.gov/programs/racetothetop/executive-summary.pdf> (last visited Mar. 8, 2015).

⁸⁸⁷ U.S. Department of Ed., *Race to The Top Fund*, <http://www2.ed.gov/programs/racetothetop/index.html> (last visited Mar. 8, 2015).

garner RTTP funds, many states with a teacher evaluation system not incorporating student academic growth, began amending their evaluation systems to align with RTTP guidelines.⁸⁸⁸

In the quest for RTTP funds, a number of states placed teacher evaluation at the top of their education policy agendas. As of 2013, all but ten states had already amended or were in the process of revamping their teacher evaluation systems.⁸⁸⁹

This chapter overviews the current state of teacher evaluation and places the Illinois' teacher evaluation system into context. This chapter also identifies lessons learned from the case law analysis and offers potential policy implications and compliance suggestions for Illinois public school districts. Finally, future areas for study are presented.

Current State of Teacher Evaluation

Based on the history of education policy and the current move toward greater federalization, the issue of teacher evaluation has been placed on the national policy agenda. However, the National Council of Teacher Quality (NCTQ) suggested “state governments are arguably the single most powerful authority over the teaching profession. State policies have an impact on who decides to enter teaching, who stays—and everything in between.”⁸⁹⁰

However, others whole-heartedly disagree with the NCTQ's viewpoint and argue the trend

⁸⁸⁸ All 41 states that applied to receive Race to the Top funds included in their applications some mention of teacher evaluation. Sartain, *et. al, supra* note 613, at 2.

⁸⁸⁹ National Council of Teacher Quality, *State of the States 2013: Teacher Effectiveness Policies*, 5 (2013) available at http://www.nctq.org/dmsView/State_of_the_States_2013_Using_Teacher_Evaluations_NC_TQ_Report (last accessed Mar. 8, 2015).

⁸⁹⁰ National Council on Teacher Quality, <http://www.nctq.org/p/statePolicy/> (last visited Mar. 8, 2015).

toward educational federalization as weakening the state role in determining educational policy.⁸⁹¹ For example, Douglas E. Mitchell, Robert Crowson, & Dorothy Shipps posited, the focus of quality education has shifted to “education as national security and economic necessity.”⁸⁹² The authors point out in the 1950s local school districts were responsible for educational policy decisions, but now “the policy making power has shifted sharply toward ... federal policymakers.”⁸⁹³

Many state teacher evaluation systems have been redefined in the past five years to include student achievement and/or academic growth metrics. The public demanded to know why the majority of teachers classroom performance was ranked as either ‘superior’ or ‘excellent’ while the majority of students did not meet state academic performance expectations. The general perception was one of teacher performance rating inflation occurring in the public schools. A 2009 study conducted by The New Teacher Project found 91% of Chicago Public School (CPS) teachers received a ‘superior’ or ‘excellent’ performance evaluation ranking for the 2007-2008 school year. During this same time period only 34% of CPS students met Illinois’ student achievement expectations.⁸⁹⁴ Arne Duncan, the current United States Secretary of Education and CEO of the Chicago Public Schools, acknowledged this problem when he asserted, “ninety-nine percent of teachers are rated satisfactory and most

⁸⁹¹ Douglas E. Mitchell, Robert Crowson, & Dorothy Shipps, *Shaping the Education Policy Dialogue*, PEABODY J. OF EDUC., 86, 367-72 (2011).

⁸⁹² *Id.*

⁸⁹³ *Id.*

⁸⁹⁴ Sartain, *et. al*, *supra* note 613, at 3.

evaluations ignore the most important measure of a teacher's success - which is how much their students have learned.”⁸⁹⁵

In 2013, thirty-five states and the District of Columbia were using student achievement data as a component of their teacher performance evaluation systems. This represented a twenty state increase from 2009.⁸⁹⁶ Although in 2013 the majority of states included student achievement data as one element in their teacher evaluation systems, each state differed on the weight this variable played in determining overall teacher performance ratings. Some states used student achievement data as the “preponderant” factor, others used it as a “significant” factor, and still others included it as a general factor in determining teacher effectiveness.⁸⁹⁷ All but ten states required some evidence of student learning as a component of their teacher performance evaluation system.⁸⁹⁸ With the passage of the *Performance Evaluation Reform Act*,⁸⁹⁹ by September 1, 2016 all Illinois public school districts will be required to weight student growth data as at least 30% of the calculus for determining a teacher’s overall

⁸⁹⁵ The New Teacher Project, *Teacher Evaluation 2.0*, <http://tntp.org/ideas-and-innovations/view/teacher-evaluation-2.0> (last viewed Mar. 8, 2015).

⁸⁹⁶ National Council of Teacher Quality, *State of the States 2012: Teacher Effectiveness Policies*, i and 1 (2012), available at http://www.nctq.org/dmsView/State_of_the_States_2012_Teacher_Effectiveness_Policies_NCTQ_Report (last visited Mar. 8, 2015) and National Council of Teacher Quality, *supra* note 889, at i.

⁸⁹⁷ National Council of Teacher Quality, *supra* note 889, at 91-92.

⁸⁹⁸ *Id.* at 5.

⁸⁹⁹ Illinois Performance Evaluation Reform Act of 2010, Pub. Act 96-0861 (2010).

performance evaluation rating.⁹⁰⁰ This is the first time in Illinois history student growth data must be taken into account when determining a teacher's overall teaching performance rating.

Interpretations of Lessons Learned

As Illinois public school leaders evaluate tenured teacher classroom performance under Article 24A, as amended by PERA, how should the “lessons learned” be applied? First and foremost, districts must pay close attention to the procedures outlined in Article 24A. Analysis of the tenured teacher dismissal cases, both pre and post PERA highlights this important lesson if school districts seek to remove unsatisfactory tenured teachers from the classrooms.

School leaders must properly develop and implement the remediation plan. This involves creating and beginning the plan within the thirty-day window, proper use of a consulting teacher, the appropriate number of observations and post-observation conferences, and a final written evaluation, stating the teacher's strengths and weaknesses, at the completion of the remediation plan.

School officials are required to use Article 24A's expressly stated performance rating categories. After PERA's implementation, all teachers must be given one of four performance ratings: excellent, proficient, needs improvement, or unsatisfactory.⁹⁰¹ In the past, individual districts were able to apply for and receive a waiver in order to use a different set of ratings. However, under PERA this option no longer exists. Therefore, school districts must either

⁹⁰⁰ *Id.* at § 24A-2.5 and § 24A-(c).

⁹⁰¹ 105 ILL. COMP. STAT. 5/24-5(d) (West 2010).

comply with the statutorily mandated performance rating system or risk losing in court when a teacher dismissal is challenged.

Article 24A's tenured teacher dismissal process, as set forth in the School Code, is yet another step public school leaders are obligated to follow if they desire to successfully terminate the contracts of unsatisfactory tenured teachers. School districts may not take shortcuts or alter the process.

Failure to comply with Article 24A's time line stipulations will likely result in a school board's dismissal decision being overturned. With respect to this issue, it appears school districts have a little leeway. The courts are willing to be flexible with the thirty-day deadline for commencing remediation plans. For example, in the case of *MacDonald v. Board of Education*⁹⁰² it appears clear that 158 days was too many days in excess of the thirty-day allotment in the law. It is safe to believe that 35 days would be an acceptable extension (five days) of the time period. However, school officials must ask themselves would 100 days be too excessive? 75 days? 45 days? There exists a continuum of a clearly acceptable bending of the rules and a significant breach of the procedures. Where the line is drawn is left to individual courts to decide. As such, school officials would be wise to err on the conservative side and keep as close as possible to the thirty-day period.

Lastly, school districts are charged with satisfying Article 24A's clerical requirements. While any one specific form may not seem important, and substituting a different form seems harmless, this is not the case. School district personnel are directed to utilize all the forms the law specifies. Continual monitoring to ensure procedural compliance will be essential. School

⁹⁰² *MacDonald v. State Bd. Of Educ.*, 966 N.E. 2d 322 (Ill. App. 4th Dist. 2012).

officials must also monitor and evaluate what other issues/infractions may cause the courts to overturn their dismissal decisions.

Potential Policy Implications

PERA implementation is underway. Frances Fowler, author of *Policy Studies for Educational Leaders* stated, “the success of implementation depends upon motivating educators to implement the new policy and providing them with the necessary resources to do so.”⁹⁰³ RTTP and the Illinois legislature’s enactment of PERA, not educator motivation, are driving compliance with the new law -- educators do not have a choice in this matter. By the 2016-2017 school year, Illinois public school districts must fully implement all aspects of PERA. The biggest compliance issues for school officials are time and money.⁹⁰⁴

There are several different time requirements associated with the multiple steps leading to full PERA policy implementation. Illinois intended to create manageable pieces, phased in over time, but the way the law is written, there is no room for flexibility on compliance dates.⁹⁰⁵ The other main resource issue is local school districts having sufficient funds to

⁹⁰³ Fowler, *supra* note 252, at 2.

⁹⁰⁴ Joseph J. Matula, *Implementing PERA? Get Started Now!*, Ill. Sch. Bd. J. Sept./Oct. 2013, http://www.iasb.com/journal/j091013_02.cfm (last visited Mar. 8, 2015) and Goldrick, *et. al.*, *supra* note 644, at iii.

⁹⁰⁵ PERA clearly defines the term implementation date in § 24A-2.5 and uses specific dates throughout the law. For example, September 1, 2012 was the cutoff date for the completion of the pre-qualification program for evaluators. Illinois Performance Evaluation Reform Act of 2010, Pub. Act 096-0861, § 24A-5(d), § 24A-3(b) (2010).

implement PERA's mandated changes.⁹⁰⁶ No funds have been allocated to school districts to help defray the costs of PERA compliance and implementation.

School districts not previously using Danielson's four performance categories for teacher performance evaluations were required to change their rating systems by September 1, 2012.⁹⁰⁷ The change required the formation of a Joint Committee. As dictated by PERA, the Joint Committee was required to be composed of equal representation of teachers and school board members/administrators.⁹⁰⁸ The Joint Committee was charged with aligning the school district's teacher evaluation system with PERA's expectations.⁹⁰⁹ Often times this alignment process involved many detailed discussions and decisions, thereby necessitating an allocation of both time and money.⁹¹⁰ School districts previously unfamiliar with Charlotte Danielson's *Framework for Professional Practice* (Framework) needed to fund several training sessions to familiarize staff with the new teacher evaluation model, as the Framework is the default model used in the state designed evaluation system.⁹¹¹ The Danielson model is detailed and

⁹⁰⁶ *E.g.*, in the Altamont Education Association Proposal written for contract negotiations, Article VII Teacher Evaluation outlines the committees and all the steps needed to prepare for full PERA implementation, <http://www.illinois.gov/elrb/Documents/FinalOffers/Altamont-IEA-NEA-offer.pdf> (last visited Mar. 8, 2015) and Mark A. Smylie, *Teacher Evaluation and the Problem of Professional Development*, 26 MID-WESTERN EDUC. RESEARCHER, issue 2, 97, 105 (2014).

⁹⁰⁷ Illinois Performance Evaluation Reform Act of 2010, Pub. Act 096-0861, § 24A-5(d) (2010).

⁹⁰⁸ *Id.* at § 24A-4(b).

⁹⁰⁹ *Id.*

⁹¹⁰ Matula, *supra* note 904 and Smylie, *supra* note 906, at 105.

⁹¹¹ Valerie Strauss, *Researchers Blast Chicago Teacher Evaluation Reform*, THE ANSWER SHEET BLOG, THE WASH. POST, Mar. 28, 2012,

comprehensive. Thus, the time and money needed to ensure all school district evaluators and teachers were comfortable with the new system was significant.⁹¹²

The next step in PERA implementation was deciding the student growth data sources to use for teacher evaluation. This decision must be made by the fall of 2016. Many school districts will need to adopt new assessments and more detailed data tracking systems.⁹¹³ This is a costly and time consuming undertaking.⁹¹⁴ For school districts currently having a difficult time balancing their budgets, these added financial constraints will likely create a significant burden.

The final stage of the policy implementation process is policy evaluation.⁹¹⁵ There are two main types of evaluation: formative and summative. Formative assessment is ongoing, driving mid-implementation changes, and summative assessment “assess[es] the quality of a policy that has been in force for some time.”⁹¹⁶ At this point, summative evaluation is not possible, as PERA has not even reached the full implementation date. It will be several years until a summative evaluation can begin. PERA included language mandating a “process for

http://www.washingtonpost.com/blogs/answer-sheet/post/researchers-blast-chicago-teacher-evaluation-reform/2012/03/28/gIQApdOfgS_blog.html; Illinois Association of School Administrators, *IASA Blast on PERA Training*, <http://www.iasaedu.org/cms/lib07/IL01923163/Centricity/Domain/72/PERA%20Training%20-%20Guidance.pdf> (last visited Mar. 8, 2015); and Goldrick, *et. al.*, *supra* note 644, at iii.

⁹¹² Matula, *supra* note 904 and Smylie, *supra* note 906, at 105.

⁹¹³ Matula, *supra* note 904.

⁹¹⁴ *Id.* and Smylie, *supra* note 906, at 105.

⁹¹⁵ Fowler, *supra* note 252, at 18.

⁹¹⁶ *Id.* at 285.

measuring and reporting correlations between local ... teacher evaluations and ... student growth.”⁹¹⁷ The State Board of Education is responsible for developing and implementing this data collection.⁹¹⁸ In addition, the State Board of Education will develop and implement systems to determine if the new teacher evaluation systems, pursuant to PERA, are “valid and reliable, contribute to the development of staff, and improve student achievement outcomes.”⁹¹⁹ The law further requires, “by no later than September 1, 2014, a research based study shall be issued ... [and] based on the results of this study, changes, if any, [will be required] ... for [the] remaining school districts ... to implement.”⁹²⁰

At this point there have been no changes made to the law and there has been no communication from the Illinois State Board of Education (ISBE) as to any mid-implementation changes.⁹²¹ Nor have any results of the research-based study, referenced above, been communicated.⁹²² Thus, there has been no true formative assessment of the law. There have, however, been several updates announced via the ISBE website with new implementation documents, guidelines, answers to frequently asked questions, and other

⁹¹⁷ Illinois Performance Evaluation Reform Act of 2010, Pub. Act 096-0861, § 24A-20(a)(9) (2010).

⁹¹⁸ *Id.* at § 24A-20(a).

⁹¹⁹ *Id.* at § 24A-20(a)(10).

⁹²⁰ *Id.*

⁹²¹ There has been no communication via the ISBE website and Illinois districts have not received any information regarding this issues from ISBE.

⁹²² There has been no communication via the ISBE website and Illinois districts have not received any information regarding this issues from ISBE.

pertinent information.⁹²³ While this is not a true formative assessment, it is the only version of assessment the state has provided to date. Other, more formal evaluations are not public at this time.

Will PERA Make a Difference?

Ideally, PERA will make a difference in culling the burnt-out, disheartened, tenured teachers who have emotionally and intellectually checked out because they no longer have the passion for teaching and know they have the safety net of tenure. Unfortunately, it is not clear if PERA, as currently written, will accomplish this. It will take at least two years, the time until full implementation, and several more teacher dismissal cases to determine if PERA will accomplish its goal.

In addition, it will be difficult to ascertain if PERA accomplished its goal of increased student academic performance since the student growth component will be buried within the overall teacher performance rating. It will be difficult to tease out the specific results for each teacher. Using the new Common Core standardized test, the Partnership for Assessment of Readiness for College and Careers (PARCC) will also be difficult as it is a brand new assessment and reliable data will not be available for years.

Based on the precedent of previous dismissal cases, the hearing officer will take into account the long term and successful teaching experience as a basis to overturn the district's decision.⁹²⁴ Hence, consistency over time will be a key issue. School officials will need to

⁹²³ Illinois State Board of Education, <http://www.isbe.net/> (last visited Mar. 8, 2015).

⁹²⁴ *Raitzik v. Bd of Educ.*, 356 Ill. App. 3d 813 (Ill. App. Ct. 1st Dist. 2005).

show a consistent pattern of unsatisfactory teaching. School officials will most likely need to show a gradual decline in the teacher's performance. They will have to decide whether to pursue an expensive appeal or to simply keep the ineffective teacher.⁹²⁵ If school districts are to dismiss a tenured teacher with significant years of service (i.e., twenty or more years), they must show a pattern of unsatisfactory teaching. It will be difficult to dismiss a tenured teacher who has received satisfactory (or better) performance evaluations for multiple years and then suddenly fails to successfully complete a remediation plan after earning an unsatisfactory performance rating. It is too soon to know if PERA is making it easier for school leaders to dismiss ineffective tenured teachers.

A formal process evaluating PERA's impact needs to be created and implemented. While the State Board of Education is continuously creating documents to elaborate and explain the law, there is no group or method to determine if the law will accomplish its goals. Both formative and summative assessments are needed. The formative assessments could entail surveys being sent to all or a randomly chosen set of school districts, soliciting anonymous information. Keeping the responses anonymous will increase the likelihood of honest feedback, to help the state address aspects of the implementation in need of change. While it is difficult to implement a true summative evaluation, several long-term assessments should be made. It would make sense to gather data to determine if PERA is meeting its stated goals five and ten years after the enactment of the law. Without this information, it will be difficult to determine if PERA accomplished what it set out to do.

⁹²⁵ Reeder, *supra* note 774.

Areas for Future Study

This study is finite and therefore there are areas requiring further study. The issue of assessing PERA's effectiveness will be an ongoing concern. Since PERA is relatively new, there was only one judicial decision involving tenured teacher dismissals under Article 24A of the updated School Code. PERA's future implications, both in terms of judicial rulings and educational policy, will be determined at a future date.

One question that needs to be answered is, given PERA's current language – without any amendments to make it more stringent – will school districts make growth goals that are relatively easy to obtain in order to avoid litigation? This is an area that needs further exploration. In addition, calculating and analyzing student growth data also need further exploration. At the present, each individual teacher may define student growth and determine how it is to be measured. If this situation continues, how will it impact school district dismissal decisions and judicial rulings? These are some of the many questions that need further clarification.

While all Illinois public school districts are required to use the Charlotte Danielson Framework, PERA does not specifically state if school officials must accord each of the four domains equal weighting. It is possible some school districts may elect to weight certain domains more than others. This would potentially skew the results of the teacher performance evaluation process. If this occurs, tenured teachers who are dismissed in school districts that either did, or did not, change the weighting calculus could arguably have grounds to seek reversal of the dismissal decision. This subject needs further study as well.

Conclusion

The quality of education and teacher accountability have been perennial themes of the federal government's focus. As of the 2009 Race to the Top -- the federal government's latest foray into education policy implementation -- teacher performance evaluation has been added to the federal and state policy agendas. The Race to the Top was the impetus for Illinois' *Performance Evaluation Reform Act of 2010*⁹²⁶ (PERA). PERA's goal was to increase the rigors of teacher performance evaluation, thereby holding teachers accountable for growth in student learning. PERAs potential is great, and with a few changes it could be an effective tool to increase the quality of teaching, increase student learning, and cull the teaching ranks of ineffective teachers.

⁹²⁶ Illinois Performance Evaluation Reform Act of 2010, Pub. Act 096-0861 (2010).

APPENDICES

APPENDIX A

SCHOOL DISTRICT OF THE CITY OF PONTIAC
V.
ARNE DUNCAN, SECRETARY OF EDUCATION

In 2005, the Pontiac School District in Michigan and the teachers' union sued the Secretary of the United States Department of Education, in the District Court for the Eastern District of Michigan, in the *School District of the City of Pontiac v. Arne Duncan, Secretary of Education*.⁹²⁷

The Pontiac school district alleged the *No Child Left Behind Act* (NCLB)⁹²⁸ violated the Spending Clause of the United States Constitution⁹²⁹ and a section of the Act itself,⁹³⁰ as NCLB was alleged to be an unfunded mandate.⁹³¹ School officials alleged “by enforcing various provisions of the ... NCLB Act, [Spellings was] imposing unfunded mandates on the States, although unfunded mandates [were] prohibited by the statute [the Unfunded Mandates Provision of the Spending Clause].”⁹³² The school district believed the unfunded mandate stemmed from “the shortfall between the costs of compliance and the federal funds appropriated.”⁹³³ The Secretary of Education moved to dismiss the case on two grounds; lack of subject matter jurisdiction due to the lack of standing, and plaintiff’s failure to provide a basis for their requested relief.⁹³⁴

⁹²⁷ *Pontiac v. Duncan*, 560 U.S. 952 (2010). At the time the case originated, the Secretary of Education was Margaret Spellings, but at the time of the final decision, the Secretary was Arne Duncan.

⁹²⁸ No Child Left Behind Act of 2002, Pub. L. No. 107-110, 115 Stat. 1425 (2002).

⁹²⁹ U.S. CONST. art. I, § 8, cl. 1: The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.

⁹³⁰ 20 U.S.C. § 7907(a) of the NCLB, Prohibitions on federal government and use of Federal funds: (a) General prohibition. Nothing in this Act [20 U.S.C. §§ 6301 *et seq.*] shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or

The United States District Court for the Eastern District of Michigan disagreed with the Secretary on the first issue and ruled each group of plaintiffs had sufficiently alleged an injury, and therefore had standing.⁹³⁵ However, the court did grant the motion to dismiss because the plaintiffs had not provided a basis for the relief requested.⁹³⁶ The court explained, while federal officers and employees could not impose unfunded mandates, the United States Congress was not prohibited from doing so.⁹³⁷ “Congress intended NCLB to impose numerous requirements on states that accepted particular federal funding, even if the states had to contribute some of their own resources to fulfill those requirements.”⁹³⁸ The District Court granted the Secretary of Education’s motion to dismiss.⁹³⁹

allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act [20 U.S.C. §§ 6301 *et seq.*].

⁹³¹ *Unfunded mandate* is defined as any mandatory order or requirement under statute, regulation, or by a public agency that requires the entity required to comply, to pay for the cost of compliance.

⁹³² Sch. Dist. of the City of Pontiac v. Spellings, No. 05-CV-71535-DT, 2005 U.S. Dist. LEXIS 29253, at *2 (E.D. Mich., 2005).

⁹³³ *Id.* at *5.

⁹³⁴ *Id.* at *7.

⁹³⁵ *Id.* at *10.

⁹³⁶ *Id.* at *12.

⁹³⁷ *Id.* at *11.

⁹³⁸ *Pontiac*, 2005 U.S. Dist. LEXIS 29253 at *11.

⁹³⁹ *Id.* at *13.

The decision was appealed to the United States Court of Appeals for the Sixth Circuit. The appellate court focused on the underlying issue of federal versus state funding under NCLB.⁹⁴⁰ Pontiac School District officials asked the court to rule they did not need to comply with the Act's requirements when federal funding was not adequate to cover the increased costs of compliance.⁹⁴¹ In 2008, the Sixth Circuit Court of Appeals reversed the district court's decision. The appellate court based its decision on the fact "that NCLB fail[ed] to provide clear notice as to who bears the additional costs of compliance"⁹⁴² and "statutes enacted under the Spending Clause of the United States Constitution must provide clear notice to the States of their liabilities should they ... accept federal funding under those statutes."⁹⁴³ The case was remanded for further proceedings.⁹⁴⁴

⁹⁴⁰ Schl. Dist. of Pontiac v. Spellings, 512 F.3d 252, 254 (6th Cir. 2008).

⁹⁴¹ *Id.*

⁹⁴² *Id.*

⁹⁴³ *Id.*

⁹⁴⁴ *Id.*

Later in the year, an *en banc* hearing⁹⁴⁵ resulted in a split decision: eight judges voted to affirm the district court's judgment and eight judges voted to reverse the judgment.⁹⁴⁶ Since there was not a majority vote,⁹⁴⁷ the judgment of the district court was affirmed and the case was restored to the appellate court docket.⁹⁴⁸

⁹⁴⁵ An "en banc" hearing is when all 16 judges will hear and decide a case. It is often used for unusually complex cases or cases considered of unusual significance or where the case concerns a matter of exceptional public importance.

⁹⁴⁶ *Pontiac v. Spellings*, 584 F. 3d 253 (6th Cir. 2009) (en banc).

⁹⁴⁷ In an en banc hearing, a majority vote of the sixteen judges is needed to overturn a decision. A split decision results in an affirmation of the original trial court decision.

⁹⁴⁸ *Pontiac v. Spellings*, 2008 U.S. App. LEXIS 12121 (6th Cir. 2008).

In 2009, the Sixth Circuit Court of Appeals again heard the case. This time the panel focused on the interpretation of obligations set forth in NCLB and whether the Act's language was "unambiguous such that a state official would clearly understand her responsibilities under the Act."⁹⁴⁹ School officials were seeking a judgment stating they did not need to comply with the requirements of NCLB because doing so would create costs not covered by federal funds. Reversing the District Court, the appellate court ruled NCLB did not comply with the clear-notice requirements of the Spending Clause.⁹⁵⁰ The court did not decide which of the three interpretations of NCLB's "Unfunded Mandates Provision" was correct, as the court stated "the only thing clear about §7907(a) is that it is unclear."⁹⁵¹ The Court of Appeals reversed the District Court's dismissal of the complaint and remanded the case for further proceedings.⁹⁵²

In June of 2010, the United States Supreme Court was petitioned to hear the case. The justices denied the *writ of certiorari*⁹⁵³ and the case was officially dismissed.⁹⁵⁴ The import of this case was the issue of unfunded mandates. The Pontiac School District claimed NCLB compliance was unnecessary due to "the shortfall between the costs of compliance and the

⁹⁴⁹ *Pontiac*, 512 F.3d at 256.

⁹⁵⁰ [U.S. CONST. art. I, § 8, cl. 1](#). "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States."

⁹⁵¹ *Pontiac v. Spellings*, 2009 U.S. App. LEXIS 22967 at *65 (6th Cir. 2009).

⁹⁵² *Pontiac*, 512 F.3d at 278.

⁹⁵³ Writ of Certiorari is defined as a written order issued by a court, by which a superior court can call up for review the record of a proceeding in an inferior court.

⁹⁵⁴ *Pontiac v. Duncan*, 130 S. Ct. 3385 (2010).

federal funds appropriated.”⁹⁵⁵ Since the case was dismissed, the result was NCLB was judicially declared not to be an unfunded mandate.

⁹⁵⁵ Sch. Dist. of the City of Pontiac v. Spellings, No. 05-CV-71535-DT, 2005 U.S. Dist. LEXIS 29253, at *5 (E.D. Mich., 2005).

APPENDIX B

STATE OF CONNECTICUT ET AL.
V.
ARNE DUNCAN, SECRETARY OF EDUCATION

In 2006, concurrent with *Pontiac v. Duncan*,⁹⁵⁶ the state of Connecticut in the *Connecticut v. Secretary of Education*⁹⁵⁷ alleged the Secretary of Education's interpretation of NCLB's Unfunded Mandates Provision⁹⁵⁸ was contrary to the Act itself and, therefore, unconstitutional. Furthermore, the state of Connecticut alleged the Secretary's denial of its waiver requests and plan amendments were a violation of the Administrative Procedures Act⁹⁵⁹ (APA).⁹⁶⁰ The Secretary of Education filed a motion to dismiss all four counts on the grounds of lack of jurisdiction, lack of standing, and lack of ripeness of the claims.⁹⁶¹

⁹⁵⁶ *Pontiac v. Duncan*, 560 U.S. 952 (2010). At the time the case originated, the Secretary of Education was Margaret Spellings, but at the time of the final decision, the Secretary was Arne Duncan.

⁹⁵⁷ *Connecticut v. Spellings*, 453 F. Supp. 2d 459 (D. Conn. 2006).

⁹⁵⁸ 20 U.S.C. §§ 6301-7941: The purpose of section 6301 is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic standards and state academic assessments.

⁹⁵⁹ The Administrative Procedures Act was a law to create the rules and regulations necessary to implement and enforce major legislative acts affecting federal regulatory agencies. Sections 701-706 dealt with applications and definitions, right of review, form and venue of proceedings, actions reviewable, relief pending review, and scope of review.

⁹⁶⁰ *Connecticut v. Spellings*, 453 F. Supp. 2d at 464.

⁹⁶¹ The legal definition of the adjective *ripe* is when a controversy exists and the matter of law needs to be settled on one or more issues raised; in order for a case to be litigated in court, the challenged law or governmental action must have produced a direct threat; a ripe issue of law must already have all of the correct findings of fact.

Similar to *Pontiac v. Spellings*,⁹⁶² the state of Connecticut alleged the Secretary of Education “violated the [NCLB’s] Unfunded Mandates Provision by requiring the State to expend funds in order to comply with the Secretary’s interpretation of the Act.”⁹⁶³ The State “assert[ed] that the Secretary’s interpretation and implementation of the Act violate[d] both the Spending Clause and the Tenth Amendment⁹⁶⁴ of the U.S. Constitution.”⁹⁶⁵ The State also challenged the Secretary’s denial for Connecticut’s request for waivers and amendments.⁹⁶⁶ The Secretary filed a Motion to Dismiss.

⁹⁶² *Pontiac v. Duncan*, 560 U.S. 952 (2010). At the time the case originated, the Secretary of Education was Margaret Spellings, but at the time of the final decision, the Secretary was Arne Duncan.

⁹⁶³ *Connecticut v. Spellings*, 453 F. Supp. 2d at 480.

⁹⁶⁴ The Tenth Amendment states: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. U.S. CONST. amend. X.

⁹⁶⁵ *Connecticut v. Spellings*, 453 F. Supp. 2d at 491.

⁹⁶⁶ *Id.* at 494 and 501.

The District Court granted the Secretary's Motion to Dismiss Count I, the Unfunded Mandates Provision, "for lack of subject matter jurisdiction."⁹⁶⁷ In Count II, the State asserted "the Secretary's interpretation and implementation of the Act violate[d] both the Spending Clause and the Tenth Amendment to the U.S. Constitution."⁹⁶⁸ The court disagreed with the reasoning but granted the "Motion to Dismiss as to Count II for lack of subject matter jurisdiction."⁹⁶⁹ As for the denial of waivers, the "State allege[d] that the Secretary's denial of the waivers was arbitrary and capricious." The state of Connecticut also alleged "the Secretary abdicated her statutory responsibilities."⁹⁷⁰ However, the court granted the Secretary's Motion to Dismiss.⁹⁷¹

The fourth Count dealt with the State's proposed plan amendments, which the Secretary had denied. The State alleged "the Secretary acted arbitrarily and capriciously in denying the State's request for plan amendments and that she violated [NCLB] when she failed to provide an adequate hearing prior to rejecting the State's proffered plan amendments."⁹⁷² The court dismissed this section of Count IV based on mootness. The court denied the remaining claims of Count IV. The District Court found NCLB was *not* unconstitutional.

⁹⁶⁷ *Id.* at 491.

⁹⁶⁸ *Id.*

⁹⁶⁹ *Id.* at 494.

⁹⁷⁰ *Id.* at 495.

⁹⁷¹ *Connecticut v. Spellings*, 453 F. Supp. 2d at 501.

⁹⁷² *Id.*

The District Court entered a judgment that allowed the State to amend and re-file the complaint. Connecticut re-filed and the District Court once again ruled in favor of the Secretary. In late 2009, the case was re-argued before the Second Circuit Court of Appeals. The State alleged “the Secretary of Education ha[d] misinterpreted the meaning of the No Child Left Behind Act ... and had violated the Administrative Procedures Act.”⁹⁷³ The essence of the State's lawsuit focused upon one core allegation: the Unfunded Mandates Provision of the NCLB Act required the State to be funded the full amount of any costs required to comply with the Act, but the State was nevertheless currently paying more to comply than it was receiving in Title I educational grants. In the State's view, the “Unfunded Mandates Provision” unambiguously prohibited the Secretary from requiring a state to spend its own money to comply with an accountability plan.”⁹⁷⁴ The court concluded,

While the State ha[d] a strong argument that it was entitled to a hearing on its plan amendments, and while the District Court was not entirely correct in finding that claim moot in *Spellings I*,⁹⁷⁵ the State now maintained that nothing could be gained by remanding the case prior to a ruling on the legal merits of its unfunded mandates claim. Because we find that claim unripe, there is no reason to order a hearing on the plan amendments before the agency addresses the State's amendment and waiver requests in the context of the Unfunded Mandates Provision.⁹⁷⁶

⁹⁷³ Connecticut v. Duncan, 612 F.3d 107, 109 (2d Cir. 2010).

⁹⁷⁴ *Id.* at 111.

⁹⁷⁵ Connecticut v. Spellings, 453 F. supp. 2d 459.

⁹⁷⁶ Connecticut v. Spellings, 612 F. 3d at 117.

In 2010 the Second Circuit Court of Appeals ruled,

the State retains the right to re-propose the same plan amendments, or any other ones, based on its claims about the Unfunded Mandates Provision, and also to continue pursuing its claim that it is entitled to a hearing on its plan amendments, we affirm the District Court's dismissal of the State's hearing claim and its grant of the Secretary's motion for judgment on the record with the modification that they are without prejudice. We also affirm, but without modification, the balance of the District Court's decision in Spellings I.⁹⁷⁷

In 2011, the state of Connecticut's *writ of certiorari*⁹⁷⁸ petition was denied, thereby resulting in the lower court's determination NCLB was constitutional and was to remain unaltered.

⁹⁷⁷ *Id.* at 118.

⁹⁷⁸ Writ of Certiorari is defined as a written order issued by a court, by which a superior court can call up for review the record of a proceeding in an inferior court.

APPENDIX C

DUDLEY V. BOARD OF EDUCATION

*Dudley v. Board of Education*⁹⁷⁹ also involved procedural inaccuracies, but this time the teacher, not school officials, was at fault. The teacher alleged the board of education made many procedural mistakes in terminating her employment, but ultimately the court's decision was based upon the teacher's errors in challenging her dismissal rather than the school officials' Article 24A procedural errors. The teacher contended her "evaluation and remediation program for the 1990-91 and 1991-92 school years were conducted in a manner contrary to Article 24A of the School Code,"⁹⁸⁰ and thus she should not have been dismissed.

Specifically, the teacher alleged her employer violated five different subsections of Article 24A. The teacher claimed school officials violated Article 24A-5(d) because her evaluation did not contain any mention of her strengths,⁹⁸¹ it violated Article 24A-1 because the evaluation was performed in a manner inconsistent with and not for the purpose of improving educational purposes,⁹⁸² and the remediation plan violated Article 24A-5(f) because it was not initiated within 30 days of the final evaluation.⁹⁸³ Furthermore, the teacher alleged Article 24A-1 was violated because the remediation plan was not for the purpose of "improving

⁹⁷⁹ *Dudley v. Bd. of Educ.*, 260 Ill. App. 3d 1100 (Ill. App. Ct. 1st Dist. 1994).

⁹⁸⁰ *Id.* at 1101.

⁹⁸¹ *Id.* at 1102.

⁹⁸² *Id.* Article 24A, the section of the School Code outlining the details for the Evaluation of Certified Employees, states in subsection 24A-1, the purpose of 24A is to "improve the educational services of... public schools." 105 ILL. COMP. STAT. 5/24A-1 (West 2010). According to the case, the defendant school district created a teacher evaluation plan with the stated focus as the improvement of instruction. *Dudley*, 260 Ill. App. 3d at 1104.

⁹⁸³ *Dudley*, 260 Ill. App. 3d at 1102.

educational services”⁹⁸⁴ and Article 24A-5(h) was violated because neither she nor the consulting teacher played a role in the development of the remediation plan.⁹⁸⁵

However, instead of first seeking administrative review by a hearing officer as specified by the School Code, the teacher filed suit directly in the circuit court. This was the procedural error that ultimately caused the teacher to lose her appeal seeking reinstatement. As a consequence of the teacher’s failure to initiate her dismissal challenge by seeking administrative review, the court refused to address her assertions of procedural errors by school officials. The court noted the teacher “was not properly before the court because she had failed to exhaust her administrative remedies.”⁹⁸⁶ As a result neither the trial court nor the appellate court investigated the teacher’s claims due to her procedural transgression. The board of education’s decision to dismiss the teacher at the end of the remediation period was upheld. The teacher’s non-compliance with Article 24A’s procedures barred any possibility of her reinstatement.

⁹⁸⁴ *Id.*

⁹⁸⁵ *Id.*

⁹⁸⁶ *Id.* at 1101.

APPENDIX D

TABLES: ARTICLE 24A

The tables below highlight the significant and relevant changes from the 1985 iteration of the Illinois School Code, Article 24A that occurred due to the passage of Illinois' *Performance Evaluation Reform Act* (PERA) in 2010. The section numbers refer to the 2010 version of the School Code. The information in italics represents PERA/2010 additions to the School Code. If there is no information in the 1985 column, it indicates there was no corresponding section or no corresponding information in the 1985 version of the Code.

Table 1: Article 24A-4, Development of the Evaluation Plan

1985	2010, PERA
Districts must develop and submit an evaluation plan	Districts need only develop an evaluation plan By the implementation date, districts must “incorporate data and indicators on student growth as a significant factor in rating teacher performance” for all teachers A Joint Committee, consisting of equal representation of staff and administration, created to assist with the incorporation of student growth indicators as a significant factor in teacher performance evaluations

Table 2: Article 24A-5, Content of the Evaluation Plan

1985	2010, PERA
Tenured teachers are required to be evaluated at least once every two years	Non tenured teachers must be evaluated at least once a year If a tenured teacher receives a rating of “needs improvement” or “unsatisfactory,” there must be at least one evaluation in the year following the rating First year principals may evaluate teachers
Evaluations may be done by persons “not employed by or affiliated with the school district”	

Table 3: Article 24A-5 Components of Evaluation Plan

	1985	2010, PERA
a	Evaluations may be done by a “qualified district administrator” or an assistant principal under the supervision of a qualified administrator	Personal observation of the teacher in the classroom must be done by an “evaluator” (“evaluator” is defined by Article 24A-2.5 as an administrator qualified in Article 24A-3)
b	Teacher’s attendance, planning, instructional methods, classroom management, and competency in subject matter are all taken into account in determining the overall performance rating	No significant change
c		By the implementation date, student growth data “as a significant factor in the rating of the teacher’s performance” must be incorporated
d	Performance Ratings- prior to 9/1/2012: excellent, satisfactory, or unsatisfactory	
e		Performance Ratings- After 9/1/2012: excellent, proficient, needs improvement, or unsatisfactory
f	Specifications as to documenting the teacher’s strength and weaknesses with support for the opinions	No significant change
g	A copy of the evaluation must be put in the teacher’s personnel file	No significant change
h		If a teacher is rated “needs improvement,” the evaluator has 30 days to create a “professional development plan” directed to the areas needing improvement and identifying any district support needed

(Continued on following page)

Table 3 (Continued)

	1985	2010, PERA
i	If a teacher is rated “unsatisfactory” and the deficiencies are deemed remediable, a 90 day remediation plan must be created	The language “in contractual continued service” was added to indicate this provision applied to tenured teachers
j	“Qualified district administrator”	Replaced “qualified district administrator” with “evaluator; added “in contractual continued service” to indicate tenured teachers
k	Evaluations once every 30 days during the 90-day remediation plan; further evaluations during the 6 months after completing the remediation plan; “teachers in remediation process are not subject to annual evaluations”	During a remediation period, an “evaluator” must complete midpoint and final evaluations; The results of the evaluations must be discussed with the teacher within 10 school days upon the evaluation’s completion; Teachers in the remediation process are now subject to annual evaluations; Remediation process evaluations are kept separate from the annual evaluation process
l	Completion of the 90 school day remediation plan with “satisfactory” or better rating will result in a reinstatement to a schedule of biennial evaluations	Reinstatement to the regular evaluation plan schedule after teacher achieves a rating of “proficient” or better, following a rating of “needs improvement” or “unsatisfactory”
m	Dismissal of any teacher who fails to complete any applicable remediation plan with a “satisfactory” or better rating; Can not compel a consulting teacher to testify at a dismissal hearing	Dismissal of any teacher who fails to complete any applicable remediation plan with a rating equal to or better than a “satisfactory” or “proficient” rating; No significant change
conc	“Nothing in this section shall prevent the immediate dismissal of a teacher for deficiencies which are deemed irreparable”	“or preventing the dismissal or non-renewal of teachers not in contractual continued service for any reason not prohibited by applicable employment, labor, and civil rights laws”

Article 24A-20, Data Collection & Evaluation Assessments & Support Systems, is entirely new. This section explains the detailed requirements for the collection and use of data PERA mandates. The highlights are in Table 4.

Table 4: Article 24A-20, Data Collection & Evaluation Assessment & Support Systems

1985	2010, PERA
	Annually collect and publish district data and school data for teacher and principal performance evaluation results; no one person can be personally identified
	Teacher and principal evaluation template must include the requirements of the law, but remain flexible enough to be customized for individual district needs
	Evaluators must participate in a pre-qualifying program
	Evaluators must participate in a training program
	Superintendents must participate in a training program
	At least one tool must be used to provide instructional environment feedback to principals
	Districts must use a State Board of Education approved evaluation support system for teacher and principal evaluations
	Web based tools to support the use of model templates, evaluator pre-qualifying programs, and evaluator training programs are allowed
	Districts must have a method to measure and report the relationship between principal and teacher evaluations and student growth and the relationship between principal and teacher evaluations and retention rates of teachers
	Research based study to begin no later than 9/1/14 to recommend changes needed to comply with the new law
	Teacher and principal performance evaluation data sent to the State Board of Education; data to include 1) teacher performance ratings for tenured teachers, 2) renewal ratios for non tenured teachers, and 3) principal performance ratings

(Continued on following page)

Table 4 (Continued)

1985	2010, PERA
A method to assess whether PERA's new requirements create 1) valid and reliable methods to measure teacher and principal evaluation, 2) contribute to staff development, and 3) an increase in student outcomes	