



## A Legal Perspective on Differential Pay for Teachers

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In “A Legal Perspective on Differential Pay for Teachers”—a paper presented at the National Center on Performance Incentives research to policy conference in February — James E. Ryan, Distinguished Professor of Law at the University of Virginia, assesses whether there are legal obstacles associated with creating differential pay programs for teachers. He concludes that although the legal landscape is open to differential pay programs, several considerations related to governmental authority and individual rights should guide the establishment and implementation of such programs.

### Establishing a Differential Pay Program

According to Ryan, it is important to consider the role of federal, state, and local governmental authority when establishing a differential pay program for teachers.

#### *Federal Authority*

The federal government has little direct power to regulate education, but it has nearly unlimited power to regulate education indirectly. The federal government can use its spending power to require states to comply with federal regulations if they wish to receive education funding. States can, in theory, walk away from the funding, but often this is practically or politically difficult. As a result, the federal government is free to require states to establish differential

pay programs for teachers or face the loss of at least some federal funding for education.

#### *State Authority*

The issue of state governmental authority, particularly state requirements for mandatory bargaining with teacher unions, is more complex. State governments possess general authority under the federal constitution to enact legislation that promotes the welfare of their citizens. Additionally, state labor laws have significant implications for the establishment of a differential pay program. These labor laws govern whether differential pay plans are subject to collective bargaining, and compliance with these state laws is required as long as such an agreement is in force. It is also important to note that states possess the authority to modify statutes that restrict either their own power or the power of local governments over schools.

#### *Local Government Authority and Mandatory Bargaining Requirements*

Where differential pay is subject to mandatory bargaining, state and local governments effectively cannot institute such programs without the consent of teachers’ unions. The main unresolved legal question is whether differential pay—be it merit pay, a recruitment bonus, or an incentive to teach math or science—should be considered a “wage” or another

term or condition of employment. There have been few legal cases on this matter and related policy decisions have not yet established a strong precedent. Ryan suggests that the more a differential pay plan acts as a bonus system—as opposed to a complete restructuring of the salary scale—the less likely it will be subject to mandatory bargaining.

### Implementing a Differential Pay Program

Another critical legal matter is whether implementation of differential pay violates individual rights. In the context of differential pay, individual rights pertaining to due process and government discrimination are most relevant. These legal rights come into play once a differential pay system has been adopted and also raise questions as to whether appropriate procedural safeguards are in place and if protection against discrimination is ensured.

#### *Individual Due Process Rights*

Before someone can invoke the protections of the federal Due Process Clause, it must be shown that a life, liberty, or property interest is at stake. There is little doubt that teachers with tenure have a property interest in continued employment. The harder question is whether that property interest requires the enactment of due process procedures regarding the conditions of differential pay. Ryan argues that there is good reason to believe that courts would conclude that teachers are entitled to due process protections with regard to differential pay, though the issue is hardly free from uncertainty.

Assuming the Due Process Clause applies, teachers must receive notice of any decision about differential pay, an explanation of the basis for that decision, and an opportunity to be heard, meaning an opportunity to contest a negative decision. Moreover, the ultimate decision must not be arbitrary or capricious. With these safeguards, the procedural component of due process should be satisfied.

#### *Individual Anti-Discrimination Rights*

Federal and state laws provide many protections against discrimination based on race/ethnicity, sex,

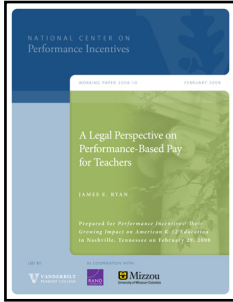
religion, or disability. Accordingly, differential pay policies or decisions should distinguish teacher awardees solely on the basis of objective performance criteria or other staffing needs. If programs are used to discriminate against individuals based on certain personal characteristics, they will likely be ruled as an obstruction of anti-discrimination rights. This is especially true where there is clear evidence of intentional discrimination.

Ryan notes that schools instituting differential pay programs should be sensitive to potential charges of discrimination when a pattern of pay decisions favors one identifiable group over another—e.g., men over women. If a rational explanation for the pattern exists (i.e., evidence that decisions were determined by objective, established criteria), however, such legal challenges should have little footing.

One final source of potential discrimination charges emanates from teacher tenure laws, which in some states hold that all teachers must be paid according to a single salary schedule. Most courts, however, grant districts discretion to create the criteria that define various salary grades, which could include consideration of student performance or the teaching of hard-to-staff subjects—the only stipulation being that similarly situated teachers be treated equally.

### Conclusion

According to Ryan, there are few legal obstacles to establishing a differential pay program for teachers, though he notes several legal requirements which must be considered in design and implementation of such a program. Crucial considerations include compliance with federal guidelines for programs that are federally funded, and consent of teachers' unions where required by state law. The remaining legal requirements pertain to the individual rights of due process and protection against discrimination. The clearer and more objective the differential pay criteria, the less likely a program is to be subjected to legal challenges.



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