

A Legal Perspective on Performance-Based Pay for Teachers

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Paying teachers based on their performance is an idea that is at once both old and new. Performance-based pay, also known as merit pay, appeared as early as 1908 in Newton, Massachusetts, not too long after public schools began to flourish. In Newton and elsewhere, salaries were in theory pegged to the knowledge, skills, and abilities of various teachers. In many places, however, teachers were not paid according to their merit but instead based on their race, gender, or political connections.

These abuses led to an early demise for merit pay. By the 1920s, most legislatures had adopted single salary schedules, which rewarded teachers according to more objective criteria, usually degrees earned and years of experience. Paying teachers according to a single salary schedule proved a much more durable policy. Indeed, today, the overwhelming majority of teachers are paid not based on the results they achieve, but instead on the number of degrees they have earned and years they have taught.

The idea of merit pay, however, has not gone away. Attempts to revive merit pay began in the 1980s, prompted by concerns that public schools were performing poorly as compared to their counterparts in other nations. Most of these early experiments failed after just a few short years. Teachers' unions were never on board, and individual teachers tended to oppose the plans. They complained that the evaluations were too subjective and that merit pay encouraged unhealthy competition.¹

Advocates of merit pay have redoubled their efforts recently, hoping to correct past mistakes. They have been encouraged by new models of merit-pay systems, some of which, for example, offer a bonus to an entire school rather than individual teachers in order to avoid the tension and competition that doomed earlier plans. They have also been buoyed by more precise ways of measuring teacher performance, which promise to isolate the value a particular teacher has added to his or her students' education. These advocates also recognize that teachers remain the single most important resource in public education, that many new ones need to be recruited, and that many good, existing teachers, need to be retained. Rewarding excellence is one obvious way to recruit and retain good teachers.

As a result of these renewed efforts, merit pay is now in the midst of a renaissance. Hundreds of school districts are experimenting with some type of performance-based pay system. At least six states have statewide or pilot programs. And the federal government has spent close to a \$100 million on a program, the Teacher Incentive Fund, designed to encourage performance-based pay in high-needs districts.² Teachers unions remain largely opposed to most plans, although the union position is not monolithic and there have been some important breakthroughs, including a recent agreement about a performance-pay plan between the Bloomberg administration and the New York City teachers union.³

Whether such programs will last, encourage the start of others, or fold like their predecessors remains to be seen. In the meantime, there are a number of important policy

and empirical questions to ask about these programs and performance-based pay more generally. Which programs are most likely to boost student achievement, and why? How important is teacher support for merit pay? Which sort of plans might teachers' unions support? Which level of government – local, state, or federal – is best suited to develop and implement performance-based pay? Social scientists are paying increasing attention to these and other questions, as demonstrated by the other contributions to this conference.

My task is to address the legal questions and to ask, essentially, whether there are legal obstacles to the creation and implementation of performance-based pay programs. The short answer is that there are very few legal obstacles, which should come as good news to those who favor experimentation in teacher compensation. In fact, the only serious, open legal question is whether performance-based pay must be the subject of bargaining among teachers' unions and states or districts. Even if – or where – performance-based pay is the subject of mandatory bargaining requirements, this does not necessarily preclude such programs. Indeed, law and policy might move in the same direction here, insofar as the legal requirement of mandatory bargaining might further the policy goal of creating performance-based pay systems that teachers themselves support.

Before delving into the particular issue of mandatory bargaining, this chapter sets out a framework for analyzing the legal issues raised by performance-based pay. Those issues can usefully be divided into two categories: (1) governmental authority; and (2) individual rights. Under the first category, the basic question to ask is whether the

government – whether federal, state, or local – has the authority to develop a performance-based pay system and, if so, whether there are any limitations on that authority. Under the second category, one can assume that governments have the authority to adopt performance-based pay programs. The essential question to ask is whether individual teachers possess any rights that must be protected in the implementation of performance-based pay programs. This chapter takes up these issues in turn.

I. Governmental Authority

Three levels of government play a role in shaping education law and policy: federal, state, and local. Each level of government, in turn, is subject to different rules about the reach of its power. The federal government is, famously, a government of enumerated powers. In order for the federal government to enact any kind of program, it must point to a provision in the federal constitution that grants the government the authority to act in that particular area. State governments, by contrast, possess inherent police powers, meaning that they can act to further the general welfare of their citizens. Local governments, finally, possess only those powers granted to them by state governments. Each level of government is also limited by the requirements in both state and federal constitutions that certain individual rights be respected. These rights act as cross-cutting checks on governmental power, as described more fully below.

A. The Federal Government

A federal program to encourage performance-based pay already exists, as mentioned above. Various proposals -- each one controversial -- have been offered to expand the federal government's role in this area, including proposals to incorporate performance-based pay into a revised version of the No Child Left Behind Act. At first blush, one might think that the federal government has no authority in the area of teacher pay. After all, the federal government is one of limited and enumerated powers, and the United States Constitution says nothing about teachers or education. The 10th Amendment to the Constitution, moreover, provides that "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." Given the silence of the Constitution and the command of the 10th Amendment, one might conclude that states, and only states, can govern regarding the issue of performance-based pay.

But federal power is not so easily cabined. The key feature of existing and proposed federal programs in this area, as in the field of education generally, is that they involve money. The federal government offers states money in exchange for states agreeing to follow certain directions, such as: create a pay system based on teacher performance. The United States Constitution does not say anything about teachers or education, and the Supreme Court has in recent years become more serious about policing the ability of Congress *directly* to regulate certain issues. The Constitution does, however, give the federal government the power to spend money and fairly broad

discretion as to how that money should be spent. The so-called “Spending Clause” explicitly gives Congress the power to tax and spend “to provide for the common defense and general welfare of the United States.”

Congress’ authority pursuant to the Spending Clause is vast, at least as interpreted by the Supreme Court. Through the magic of the Spending Clause, Congress can attach all sorts of conditions to spending bills and therefore attempt to accomplish indirectly what it might not be able to require directly. Thus, even if we accept for argument’s sake that Congress could not command states to institute performance-based pay, the Spending Clause gives Congress another route toward the same end: offer states money in exchange for their agreement to institute performance-based pay systems. To appreciate the importance of this power and the weakness of current limitations on it, a review of the relatively sparse law on the subject is in order.

Since the Spending Clause grants Congress the authority to tax and spend for the “general welfare,” the scope of authority granted by this clause turns on the definition of “general welfare.” Unfortunately, this term is not defined in the Constitution. Two different ways to interpret the scope of this term, and therefore the scope of the spending power, were apparent almost immediately after the Constitution was ratified. They were urged by two of the most influential founding fathers, James Madison and Alexander Hamilton.

First, as Madison argued, one could interpret the clause to require that spending for the general welfare be restricted to spending that carries out one of Congress' enumerated powers. This position, Madison urged, would essentially prevent Congress from using its spending powers to pursue objectives beyond those encompassed by Congress' enumerated powers; it would, in other words, preclude Congress from using the Spending Clause to accomplish indirectly what it could not accomplish directly. The alternative view, pressed by Hamilton, was that Congress could use its spending authority to pursue goals outside of those encompassed by its other enumerated powers, provided that the spending advanced the "general welfare" of the United States, an obviously capacious concept and thus a weak to nonexistent limitation.⁴

Hamilton's view won out in 1936. That year, in *United States v. Butler*, the court rejected Madison's view and held that the "power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."⁵ As a consequence, Congress can attach conditions to federal funds that require recipients to perform acts or administer regulations Congress could not directly command.

The intuitive notion underlying this approach is that federal spending programs operate like contracts. In return for federal funds, states or localities agree to comply with federally imposed conditions. As the court explained in a more recent decision, at least in theory "the residents of the state retain the ultimate decision as to whether or not the state will comply. If a state's citizens view federal policy as sufficiently contrary to

local interests, they may elect to decline a federal grant.”⁶ Thus, just as a homeowner can turn down someone’s offer to purchase her house, a state could turn down the federal government’s offer of money.

The problem with this view is that states, as a practical matter, may not always have much of an option to decline federal funds. The Supreme Court has recognized this potential problem, but it has yet to do much about it. The court has acknowledged that Congress’ power under the Spending Clause must be somewhat limited, given the vast financial resources of the federal government. Otherwise, Congress could “render academic the Constitution’s other grants and limits of federal authority.”⁷ The court also has established five limitations on the exercise of the federal spending power.⁸ These limitations, however, are fairly anemic, either singly or in combination.

The most basic requirement is that the spending power must be in pursuit of the “general welfare.” This requirement stems directly from the language of the Spending Clause, language, but it does not offer much in the way of a restriction. As the court instructed in 1987 in *South Dakota v. Dole*, which remains the court’s most recent and thorough pronouncement on the scope of the Spending Clause, “courts should defer substantially to the judgment of Congress” when considering whether a particular expenditure is designed to advance the general welfare. Indeed, the court suggested that the level of deference is such that the “general welfare” requirement may not be “a judicially enforceable restriction at all.”⁹

A second requirement is equally vapid, though for different reasons. Congress cannot induce states, through conditional funding, to engage in otherwise unconstitutional behavior.¹⁰ Congress could not, for example, offer states funding provided they inflict cruel and unusual punishment on prisoners or provided they discriminate against racial minorities. This requirement, unlike the first, surely would be enforced by courts were Congress to contravene it. But Congress is not typically in the business of using its conditional spending power to induce states to violate the Constitution, so it is not a particularly difficult requirement to meet.

The third requirement is that any conditions placed on federal funds must be stated unambiguously, so states can decide whether to accept funds knowingly and fully aware of the consequences.¹¹ This clear-statement requirement has a bit more bite than the first two and has been used by the Supreme Court and lower courts to invalidate attempts to enforce ambiguous conditions by withdrawing federal funds.¹² Just recently, in January 2008, a divided three-judge panel for the United States Court of Appeals for the Sixth Circuit ruled that Congress violated this requirement in the No Child Left Behind Act, by not making it clear that states might have to provide some funding in order to carry out the extensive testing and accountability regime.¹³

The Sixth Circuit's ruling may prove to be quite significant for the NCLB, depending on how Congress – which could clarify the law – responds. Despite the potential importance of that decision for the NCLB, and despite occasional enforcement of the clear-statement requirement, performance-based pay should not be at much risk. A

clear statement rule in general does not impose much of a substantive limit on Congress' authority or prevent Congress from overreaching. It simply requires Congress to speak clearly when attaching conditions to funding, and it indirectly prevents federal agencies – here, the Department of Education – from adding conditions to the funding after the legislation is passed and the money distributed.

There is little reason to predict that Congress would fail to be fairly clear when articulating conditions for a performance-based pay program. It remains possible, of course, that the legislation might leave some details unclear, and that the Department of Education will attempt to dictate those details over a state's objection. As long as Congress clearly specifies how states must use the money, however, and provided that the Department of Education does not overreach, this requirement should be easily satisfied.

The final two requirements could potentially impose serious restrictions on Congress' authority to attach funding conditions, but they have not been enforced with much zeal. One demands that conditions on federal funding must be germane; in the court's words, the conditions must not be "unrelated to the federal interest in national projects or programs."¹⁴ At first blush, this seems like a serious requirement, one that would enable courts to strike down conditions on funds that are only tangentially related to the purpose of the federal program. The court, however, has indicated that the federal interest can be stated at a high level of generality and that the relationship between the conditions and the spending can be fairly tenuous and still survive constitutional review.

In *South Dakota v. Dole*, for example, the court upheld a federal program that conditioned money for highways on an agreement by recipient states to raise their minimum drinking age to 21. The court held that this condition was related to the federal interest in “safe interstate travel,” which the court concluded was one of the “main purposes for which highway funds are expended.”¹⁵ Notice that the court described the federal interest in highway spending at a fairly abstract and general level. This in turn made it much easier for the condition on that spending to be relevant to the interest, for the simple reason that the more broadly and abstractly the federal interest is described, the more conditions will relate to that interest.

In addition, notice that the relationship between raising a drinking age and safe interstate travel is plausible but not precise. Indeed, Justice Sandra Day O’Connor dissented from the majority’s decision in *Dole* because she thought the relationship should have to be tighter to uphold a condition on federal funds.¹⁶ The majority of the court has yet to agree with O’Connor’s dissent in *Dole*, however, as it reiterated in a recent opinion (authored, ironically, by O’Connor) that there need only be “*some* relationship” between the conditions and the purposes of the federal spending.¹⁷

Finally, the court has stated that the financial inducement offered by Congress must not be “so coercive as to pass the point at which pressure turns into compulsion.”¹⁸ Like the germaneness requirement, the coercion limitation seems at first glance to place a serious obstacle in Congress’ use of the spending power. After all, while states remain

free in theory to refuse federal funds, there will always be a great deal of pressure on them to accept the funding, since the alternatives will be either to use state funds (and perhaps increase state taxes) or to forgo the program.

At the same time, however, divining the line between pressure, which is permitted, and compulsion, which is forbidden, will never be an easy task. As the court observed as long ago as 1937, and repeated again in its 1987 *Dole* decision, motive or temptation should not be confused with coercion. “[T]o hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible.”¹⁹

Perhaps because of these difficulties, the court has never found a conditional spending program to be unconstitutionally coercive or offered much guidance as to how this determination should be made. Instead, it simply has hinted that this determination should turn on the amount of money at stake. The hint appears in *Dole*, where the court rejected the contention that the highway program at issue was coercive. The court concluded that this argument was “more rhetoric than fact” because states would lose only 5% of their federal highway funds if they did not raise the minimum drinking age to 21. This “relatively mild encouragement” meant that enactment of the minimum drinking age remained “the prerogative of the state not merely in theory but [also] in fact.”²⁰

Obviously, the court's statements raise more questions than they answer, leaving one to wonder just where the point of coercion is to be found. Does it turn on whether a state will lose a greater percentage of federal funds if it fails to meet the condition? The overall amount of money at stake? The percentage of funding for a state-federal program that comes from Washington? Such questions remain unanswered.

Lower courts, meanwhile, have been quite reluctant to find undue coercion in federal spending programs. Almost all courts addressing the coercion issue have ruled against the states. A number have recognized the difficulty of discerning the difference between an offer that states "cannot refuse and merely a hard choice," and some have questioned whether any "sovereign state which is always free to increase its tax revenues [could] ever be coerced by the withholding of federal funds."²¹ The only court to buck this trend has been the Court of Appeals for the Fourth Circuit.

In a 1997 decision regarding the Individual with Disabilities in Education Act (IDEA), the court found that the language of IDEA was ambiguous on the issue of discipline and thus could not prevent Virginia from expelling students for misbehavior unrelated to their disabilities. It also held that the condition was coercive, insofar as Virginia would lose *all* of its federal funding under the IDEA program if it refused to rescind its disciplinary policy. The court thus concluded that the federal government went too far in using its financial might to impose federal education policy on the states.²²

The problem with this analysis, and with the coercion inquiry in general, is apparent from the fact that the court chose to focus on the percentage of federal funds that Virginia would lose rather than the relative percentage of funding that Virginia received from the federal government to educate disabled students. Federal funding constituted only 5% of the funds necessary to educate disabled students in Virginia.²³ If this were the basis of analysis—and there is little reason in principle for it not to be the benchmark—it would be much harder to conclude that Virginia was unconstitutionally compelled to accept federal money and abandon its disciplinary policy.

Looking at the percentage of funding for a state-federal program that comes from Washington does not have to be *the* benchmark, of course, but that really is the point. The benchmark chosen—whether total dollars, percentage of federal funds at stake or percentage of funds for a state-federal program that come from Washington, to name three—will affect the coercion determination, but there is no principled way to select the benchmark.

In sum, given the general reluctance of courts to find unconstitutional coercion in conditional spending programs, notwithstanding the Fourth Circuit's aberrational decision, Washington has wide latitude to affect education policy by attaching conditions to its funding. So long as the conditions are stated clearly and relate in some way to the purpose of the spending program, states effectively have but two options: Walk away from the funding or comply with the conditions. What this means for performance-based pay programs is that Congress could, if it wished, require that states and localities

contribute their own money to the program, much in the same that the IDEA requires contributions from state and local governments to cover the costs of the Act.

At least at the moment, aside from the requirement that Congress speak clearly when legislating, the only real limits on federal power over education policy are political. The limits are either self-imposed by Washington or established by those state leaders who make a political decision to decline federal funding. Federal legislators have not imposed many restraints on themselves, as witnessed by the NCLB, and state leaders have had a difficult time in the past turning down money. As a result, federal power over education law and policy has mushroomed over the last quarter century. Whether that will carry over to the area of teacher compensation and lead to an expanded role by the federal government in encouraging performance-based pay remains to be seen.

B. State and Local Governments and Mandatory Bargaining Requirements

As mentioned earlier, state governments possess inherent authority, at least under the federal constitution, to legislate to promote the general welfare of their citizens. To pass muster under the federal constitution, state legislation must not be tied to a specific, enumerated power; states instead possess the general police power. State law, however, typically poses some constraints on state governments, either by statute or by state constitution. Local governments, in turn, must point to some grant of power from the state in order to regulate a particular area. Local governments, like state governments,

can also be constrained by state law from taking certain actions, even if a general grant of authority gives them authority over a particular area.

In this context, the only relevant limitations are contained in state labor laws that require mandatory bargaining with teachers' unions over certain issues related to their employment. These state labor laws pertain to both state and local governments. Thus, even if a local government -- a school district -- has been granted by the state the general authority to negotiate labor agreements with teachers, state labor laws establish the parameters of that authority.

Collective bargaining laws are intended to reduce the inequality of bargaining power between employees and employer by forcing employers to negotiate in good faith with the representatives of the employees.²⁴ Though there are extensive federal laws governing labor relations, states and state political subdivisions such as cities are exempt from the federal requirements.²⁵ States and cities are covered, however, by many of the state labor relations laws.

Not all states, however, have collective bargaining laws, which leads to a crucial point to recognize: the relevant law on this topic is quite diverse. State collective bargaining legislation covering public employees did not even exist until the 1950s, when a few states, most notably Wisconsin, granted public employees the right to bargain with municipal governments. Since that time, many more states have enacted collective bargaining laws, but these vary quite a bit. Some states, including North Carolina and

Virginia, actually prohibit collective bargaining among public employees and their government employers.

Other states, totaling about forty, authorize collective bargaining for public employees. These laws vary quite a bit on such subjects as which groups of employees are covered; the extent of any duty to bargain and the subjects covered by mandatory bargaining requirements; limitations regarding the ability of public employees to strike, and whether local governments – in addition to state governments – have the authority to bargain with their employees. In addition, some states have one collective bargaining law for all government employees. Other states leave local governments to come up with their own laws. And still others states have a series of collective bargaining laws that govern different types of government employees such as firefighters or teachers. Given this diversity, it is not surprising that some have called the legal framework surrounding public sector collective bargaining a “crazy patchwork quilt.”

That said, and notwithstanding the differences among state laws, there are some points of convergence among the states. Two are most important. First, in the forty or so states where collective bargaining is authorized by law, teachers tend to be among the employees covered by those laws and school districts have some duty to bargain with the teachers’ unions. Second, the basic legal question regarding performance-based pay tends to be the same in every state, and that question is fairly straightforward: is performance-based pay an issue over which state or local governments *must* bargain with teachers’ unions? This question is important because if performance-based pay is the

subject of mandatory bargaining, state and local governments cannot institute such programs without the consent of teachers' unions. Given the traditional opposition of teachers' unions to performance-based pay, a requirement that teachers' unions consent be obtained before going forward might be enough to doom the program.

To determine whether performance-based pay is the subject of mandatory bargaining, state law must be consulted. Here, again, there is a good deal of convergence among the states, as most state laws require the employers and employees bargain over wages, terms, and "other conditions" of employment. The obvious question, therefore, is whether performance-based pay should be considered a "wage," or another term or condition of employment. Unfortunately, the law is quite unclear, in large part because there have been very few cases on the subject.

At first blush, one might think the question is simple: performance-based pay must be considered a "wage," as it is a form of payment from an employer to an employee. There is some support for this general approach, both indirect and direct. As for the indirect support, there are some court decisions interpreting a similar provision in the National Labor Relations Act, which covers federal employees and requires mandatory bargaining with respect to "wages." Although there have not been a slew of cases on point, the general "trend" according to one review of the case law is that "where a union has been recognized as a bargaining agent of the employees the employer cannot grant merit increases in wages to individual employees independent of the consent or act of the union." Put differently, "merit increases in wages cannot be made by the unilateral

action of the employer, and for the employer to do so would amount to a refusal to bargain collectively and amount to an unfair labor practice.”²⁶

Interpretations of federal labor laws do not control interpretations of state labor laws, even when the language in the two laws is identical. That said, some state courts undoubtedly look to and rely upon federal court interpretations of similarly worded federal laws, whether statutes or constitutions. One could expect state courts to do the same here. In addition, looking to federal court interpretations of the NLRA simply helps one to predict how state courts might interpret similar language, even if they are not bound by federal court decisions.

More direct support for the notion that performance-based pay is a wage is found in some administrative court decisions. In most states that have collective bargaining laws, administrative hearings precede any court action. The collective bargaining laws create an administrative process through which disputes first must pass before courts become involved. So, for example, if a teachers’ union believes that a school district has violated either the relevant labor law or the collective bargaining agreement itself, the union will typically first have to exhaust any available administrative remedies before going to court. If unhappy with the results of the administrative process, the union can then – but only then – press their case in court.

As a result of this administrative apparatus, there is a body of decisions from administrative officials regarding their respective state collective bargaining laws. Some

of these decisions have to do with merit or performance-based pay, and some support the notion that performance-based pay is indeed a wage. The hearing examiner in a 1994 New Jersey dispute, for example, determined that Camden County violated its bargaining obligation by unilaterally instituting a merit pay program. Citing a string of similar decisions out of New Jersey, the hearing examiner wrote that “[c]ompensation, specifically the implementation of a merit pay program, is mandatorily negotiable.” A similar conclusion was reached by the Florida Public Employees Relations Commission in a 1992 decision. The Commission interpreted a Florida statute that required a public employee to bargain collectively with regard to “wages, hours, terms and conditions of employment.” The Commission concluded that “[s]tep or merit pay salary increases are considered ‘wages’” and are therefore subject to mandatory bargaining.

These administrative decisions, while telling, have little precedential value. Courts, for example, are not required to follow them, even within the same state. However, taken together with the federal cases involving the National Labor Relations Act, these administrative decisions lend credence to the notion that, properly understood, performance-based pay is a wage. Put differently, they support the prediction that, if and when faced with this question, at least some state courts would find that performance-based pay is indeed a subject of mandatory bargaining. Indeed, one commentator, writing in 1999, thought the issue obvious, saying in a footnote in an article regarding merit pay that “[i]t is clear that such plans are mandatorily negotiable.”²⁷

Not all of the evidence, however, points in the same direction. In fact, there are some cases that reach precisely the opposite conclusion. The most well-known is *United Teachers of Dade v. Dade County Sch. Bd.*,²⁸ a 1986 decision by the Supreme Court of Florida. In *Dade County*, the Court held that the award given to teachers by the Florida Master Teacher Program was not a “wage,” and was thus not subject to mandatory collective bargaining.²⁹

The Florida Master Teacher Program granted monetary awards to successful public school teachers. Participation in the program was completely voluntary.³⁰ The plaintiffs in the case argued that the monetary award was a “merit wage,” and was thus a direct payment to teachers in violation of the teachers’ state constitutional right to bargain over wages.³¹

At the outset, the court noted that “the wisdom of [The Master Teacher Program] is not for our review.”³² The court then acknowledged the right of public employees, like private employees, to bargain over wages and other terms and conditions of employment. The court then emphasized, however, that some issues, including the one at hand, “arise[] in the public employment arena [and] would not arise in the private sector.”³³ The court then looked to the precedents of other states to come up with a test for whether or not the merit bonus was subject to mandatory bargaining. The court stated that, “[m]ost courts... have tended to view the test of bargainability as the degree of impact on wages, hours or other conditions of employment.”³⁴

In order to determine the effect that the award had on the conditions of employment, the court looked to a similar case from Iowa. In *Fort Dodge Cmty. Sch. Dist. v. Pub. Employment Relations Bd.*,³⁵ the question facing the Supreme Court of Iowa was whether a cash incentive for early retirement was a wage, and therefore subject to mandatory collective bargaining. The Supreme Court of Iowa reasoned that the incentive payment was not a wage, as the term wage is not commonly understood to “include payment for services not rendered or labor not performed.”³⁶

The Florida Supreme Court was persuaded by this line of reasoning, and thus determined that the Florida Master Teacher Program award was not a “wage,” as “no additional teaching services are required to be performed by the teachers who voluntarily choose to compete for the payment.”³⁷ The court also found persuasive the fact that the merit payment did not replace any of the provisions of the existing teachers’ contracts with the school board, and the fact that the award would not be used as a basis for determining future salary increases or promotions.³⁸ Based on these facts, the Florida Supreme Court determined that the Master Teacher Program award did not count as a wage, and thus the implementation of the program did not violate the plaintiffs’ rights to bargain collectively.³⁹

Another case that is tangentially related to the adoption of merit pay plans comes from Connecticut. In *Weathersfield Bd. of Educ. v. State Bd. of Labor Relations*⁴⁰, the Supreme Court of Connecticut held that certain union proposals regarding teacher evaluations were not subject to mandatory collective bargaining. While the board of

education and the teachers' union were negotiating a new collective bargaining agreement, the federation of teachers came forward with ten proposals for procedures regarding teacher evaluation.⁴¹ The school board agreed to negotiate about the first of these proposals, but refused to negotiate about the remaining ones.⁴²

The question presented to the Connecticut Supreme Court was whether this refusal to negotiate on the part of the school board violated the Connecticut Teacher Evaluation Act.⁴³ That statute required that teacher evaluations would be conducted “in accordance with guidelines established by the state board of education for the development of evaluation programs and such other guidelines as may be established by mutual agreement between the local or regional board of education.”⁴⁴ The court noted that a previous version of the Connecticut Teacher Evaluation Act had contained the word “negotiation” as opposed to “mutual agreement.”⁴⁵ This change, according to the court, was evidence of a legislative intent to “remove teacher evaluations from the ambit of mandatory collective bargaining.”⁴⁶ Based on this interpretation of the statute, the Connecticut Supreme Court held that teacher evaluations were not subject to mandatory bargaining.⁴⁷ The importance of this decision is that the court’s ruling granted the Connecticut school board the latitude necessary to develop an evaluation based merit pay system.⁴⁸

These cases help illustrate several important concepts. To begin, they indicate that when given a chance, some state courts will interpret state labor relations laws in such a way as to not inhibit important state political goals. Neither of the interpretations

reached by the two courts was obvious or ineluctable. Each case could have just as easily come out the other way, as indeed other cases have. The courts appear to have gone to some length to interpret the laws in such a way as to promote important legislative objectives.

These decisions may be due to the personal inclinations of the particular judges, but they also expose the fault line in the collective bargaining context. On the one hand, employees deserve the protection offered by collective bargaining rules and public employers should not be able simply to ignore those protections when they find it convenient to do so. On the other hand, some employment related matters involve issues that transcend the employment context and raise broader issues of public interest. Where these sorts of public policy issues are raised, the notion that they must be decided by collective bargaining, rather than by duly elected officials, seems incongruous with basic principles of democratic decisionmaking. And, indeed, there is some language to this effect in collective bargaining cases, suggesting that issues of public policy should not be determined by collective bargaining. Performance-based pay straddles this line. It is obviously important to teachers and their careers, but it is equally important – or could be – to students if it succeeds in increasing the motivation of teachers and attracting additional highly motivated people to the field of teaching. Perhaps for precisely this reason, the question of whether performance-based pay must be subject to collective bargaining remains open, and probably will continue to be the subject of disagreement among state courts.

All of that said, *United Teachers of Dade* nonetheless provides a model for the type of merit pay plan that stands the biggest chance of surviving a legal challenge based on a failure to negotiate in good faith with the teachers' union. The court in *United Teachers of Dade* found certain aspects of the Master Teacher Program indicative of the fact that it was not a wage. Specifically, the court found persuasive the fact that participation in the program was optional, that no additional teaching services were required by the program, that the program did not interfere with the currently negotiated teachers contracts, and the fact that the award would not be used in determining future promotions or changes to salaries.⁴⁹ It thus appears, at least from *Dade*, that the more a merit pay plan is made to appear like a bonus, as opposed to a complete restructuring of the salary scale, the less likely it is that it will be subject to mandatory bargaining.

It should be remembered, however, that state law governs whether merit pay plans are subject to mandatory collective bargaining. Thus, a close examination of the relevant labor relations laws would be required before attempting to implement a merit pay plan. In addition to state law, current collective bargaining agreements themselves might have provisions regarding performance-based pay. Compliance with those provisions would obviously be necessary as long as the agreement is in force.

A final point to consider is the intersection of law and policy. The law may allow for the implementation of performance-based pay programs without recourse to collective bargaining. This would mean, in effect, that schools could adopt merit pay without the consent of the relevant teachers' union. Whether and when schools can unilaterally adopt

merit pay systems, however, is uncertain and likely to remain so. The safer legal bet, by far, is to obtain the consent of the teachers' union. In some instances, this might not be possible, and pursuing ways to implement performance-based pay without the union's consent may be the only plausible course.

Evidence suggests, however, that performance-based pay is much more likely to survive and thrive if teachers consent to the system. Teacher "buy in" is cited by a number of researchers as crucial to the success of performance-based pay programs. Teacher buy in does not always equate with union consent, of course, and one could imagine teachers at a particular school favoring performance-based pay while their union opposes it. But union consent is often likely to be at least an imperfect proxy for teacher consent. Where this is the case, law and policy point in the same direction: the safer bet is to bargain over the terms of performance-based pay.

II. Individual Rights

Individual rights generally act as cross-cutting checks on government authority. Even where the federal or state government has authority to act, this is only the first question with regard to whether the act itself is legal. The second question is whether the act violates a protected individual right. To use a simple example, the federal government has the authority to regulate interstate commerce, and thus it has the authority to ban certain items from being shipped across state lines. If it decided, however, to ban the shipment of *The New York Times* across state lines, it would violate

First Amendment right to a free press (and perhaps to free speech as well). (The *Times* is a corporation, obviously, and not an individual, but corporations are considered persons for purposes of the individual rights guaranteed by the Constitution.)

In the context of merit pay, the two rights that are most relevant are the right to due process and the right to be free from government discrimination. These rights would only come into play once a merit pay system has been adopted; they would form the basis of challenges to the *operation* of the merit pay system, not its creation. One would focus on whether the procedural safeguards were sufficient and the decisionmaking free from arbitrariness and caprice. The other would focus on whether the system is being used to discriminate on forbidden grounds such as race, sex, religion, or age. Neither due process nor anti-discrimination protections should be difficult to provide, so neither presents much of an obstacle or burden to a well-designed merit-pay program. Whether there will nonetheless be complaints and litigation is another matter. Each right or, to be perfectly accurate, set of rights, is discussed in turn.

A. Due Process

Both the 5th and 14th Amendments of the United States Constitution protect against the deprivation of “life, liberty, or property, without due process of law.” The 5th Amendment applies to the federal government, and the 14th applies to state governments. They both provide identical protection; the only difference is the entity against whom the individual is protected. State constitutions generally contain similar provisions securing

due process of law, but these are usually interpreted to provide the same protections as the federal constitution. Analysis can therefore safely be confined to the federal constitution, recognizing that some state courts might interpret their due process protections somewhat more broadly.

One might believe, in reading the text alone, that the Due Process Clause provides just a procedural guarantee but does not protect any substantive interests. On this reading, as long as either the state or federal government followed sufficient procedures, they could take whatever life, liberty, or property interest they desired. But these Clauses have also been read to have a substantive component, under which certain fundamental rights are protected. Most famous among these unenumerated rights is the right to privacy, which has been extended to protect the right to abortion.

In addition, the Clause protects against “fundamental unfairness” even in the absence of a constitutional right, and thus protects against arbitrary and capricious decisionmaking. The line between procedural and substantive due process obviously blurs at this point, as one way to avoid arbitrary decisionmaking is to follow correct procedures. Nonetheless, it may be easiest conceptually to keep them separate, although nothing at all in this context is either lost or gained by the label attached.

In order to invoke either the procedural or substantive protections afforded by the Due Process Clause, an individual must first have a protected life, liberty, or property interest. Often this is not an issue because the government is trying to deprive someone

of a clearly protected interest. In cases involving government benefits, however, the only potential interest at stake is a property interest in those benefits. Whether an individual has a protected property interest in government benefits is a recurring and often difficult question, and it is one that will arise in this context, as it is not entirely clear that someone denied merit pay has a “property” interest in receiving that pay.

The law, unfortunately, is easier to state than to understand. The Constitution does not define what counts as a property interest, so the Supreme Court has instructed that such interests must be established by an independent source, such as state law. The relevant question is whether state law – or federal statutory law – creates a legitimate entitlement to the benefit at issue. The individual, in other words, must have a legitimate expectation that he or she will continue to receive the benefit. A unilateral expectation or subjective hope is not sufficient to demonstrate a property interest.

The problem with this approach is not hard to detect. The procedures used to determine when to provide, modify, or rescind the benefit might themselves constitute the best evidence regarding whether an individual has a legitimate or unilateral expectation in continuing to receive the benefit. Yet taken to its logical conclusion, this approach would ultimately render the due process protection circular if not entirely hollow. If the government offers little in the way of procedural protections, retains wide discretion to deny or rescind the benefit, and never explains why it makes a decision one way or the other, it would be hard for anyone to establish a legitimate expectation that they could continue to receive the benefit. The *lack* of procedures, in other words, would be the

justification for not providing *any* procedural protection, which seems a little odd, to put it mildly. It seems precisely backward to say that the more arbitrary the procedures, the less chance there is to challenge them.

A lower court decision from 1982, involving a merit pay program, provides a good example of the problem. In *Kanter v. Community Consolidated School District 65*, a tenured teacher argued that her procedural and substantive due process rights were violated when she did not receive a merit pay increase. The school failed to establish written criteria for awarding merit pay, and it also failed to give her written reasons for denying her an award. The district court used the *absence* of procedural protections to conclude that the teacher was not *entitled* to any protections because she did not have a property interest in merit pay. In the case at bar, the court reasoned, merit pay was “based on subjective factors of teacher merit as judged by the teacher’s peers and the superintendent of the school district.” It followed that Kanter, the teacher, could not have a property interest because awards of merit pay were largely discretionary – if not downright mysterious. “Therefore,” the Court concluded in a wonderful illustration of specious reasoning, “Kanter has no constitutional right guaranteeing any particular procedural due process.”

The Supreme Court, in a case decided after *Kanter*, clarified that looking solely to procedures to determine the existence of a property interest was inappropriate. In *Cleveland Board of Education v. Loudermill*, a 1985 decision, the Court rejected what had become known as the “bitter with the sweet” doctrine, which essentially allowed

governments to decide for themselves whether to protect benefits from deprivation without due process. According to the bitter with the sweet doctrine, a legislature could inextricably intertwine the benefit at issue with the procedures protecting that benefit and therefore define the scope of the benefit by the procedures established for its deprivation. The weaker the protections, the weaker the claim to the benefit. Beneficiaries would thus have to take “the bitter with the sweet,” meaning the weak procedural protections attached to the benefit or interest at stake.

In *Loudermill*, the Court explicitly rejected this doctrine. In the Court’s words:

The point is straightforward: the Due Process Clause provides that certain substantive rights -- life, liberty, and property -- cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. “Property” cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.

Having entombed the bitter with the sweet doctrine, however, the Court still left open the question of how, exactly, to decide whether state law creates a property interest.

In this context, the question is somewhat difficult to answer. There is little doubt that teachers, especially teachers with tenure, have a property interest in continued

employment. They have an expectation, in other words, that their employment will continue absent a good justification for their dismissal. The same is presumably true for teachers before tenure, provided they have some protection against dismissal provided by a shorter-term contract.

The harder question, however, is whether that property interest in continued employment is sufficient to establish a property interest regarding *conditions* of that employment. Presumably, at some point, it must; if schools could make conditions so deplorable as to effectively push teachers out of their jobs, the property interest in employment would have to trigger due process protections or be rendered meaningless. On the other hand, it does not seem reasonable to expect that every decision regarding a condition of employment, no matter how minor, constitutes a potential deprivation of a property interest. Unfortunately, performance-based pay seems to fall somewhere in the middle: the denial of such pay to a particular teacher hardly rises to an effective ouster from employment, but neither is it a trivial condition of employment.

The question will thus likely boil down to whether teachers can ever claim to have a legitimate entitlement to receive merit pay. Here, it remains difficult, despite the internment of the “bitter with the sweet” doctrine, to avoid considering the criteria used to award performance-based pay increases. The more those criteria are objective and require payment if certain conditions are met, the easier it is to conclude that teachers who meet those criteria are entitled to the pay. The more the criteria are subjective and

awards are unpredictable, the harder it is to conclude that teachers will ever have a legitimate claim of entitlement. The circularity problem thus seems difficult to escape.

The trend with regard to performance-based pay seems clearly in the direction of establishing relatively objective standards to guide the award of such pay. To the extent this trend continues, and there seem to be sound policy reasons to support it, one could safely conclude that most courts will find a property interest at stake. The question is hardly free from uncertainty, however, and it remains entirely possible that some due process challenges will falter at the starting line, in which case the question of whether the procedures are sufficient would never be addressed.

Assuming, however, that teachers possess the requisite property interest, the next inquiry is what sorts of procedures satisfy the Due Process Clause. Here the law is fairly clear. The teacher must receive notice of any decision regarding merit pay, an explanation for the basis of that decision, and an opportunity to be heard, meaning an opportunity to contest a negative decision. If those procedural safeguards are provided, the procedural component of due process should be satisfied.

To satisfy the “substantive” component of due process, the decision itself must not be arbitrary or capricious, which essentially means that it cannot be wildly inconsistent with the evidence surrounding the decision. None of these requirements is especially difficult to meet, as already mentioned, and courts are generally quite deferential to government decisionmakers. If teachers receive notice, an explanation, and

an opportunity to be heard, and the decision does not seem impossible to understand based on the established facts, performance-based pay programs should rarely lose a due process challenge brought by disappointed teachers.

Whether schools will nonetheless be *subject* to challenges, even if they prevail, is another question. Here, common sense is as good a guide as any. The more that performance-based pay programs are based on objective criteria, clearly spelled out and understood, the less likely they will invite challenge and litigation. If teachers subject to the program accede to the criteria – if they “buy in” to the program, in other words – the likelihood of a due process challenge will diminish even further, assuming that the criteria are followed.

B. Anti-Discrimination Laws

Federal law contains a wide array of protections against discrimination based on certain characteristics, including race, sex, religion, disability, and age. These protections are grounded either in the Equal Protection Clause of the United States Constitution, federal statutes, or both. The laws differ in their details and the degree of protection offered. Policies or decisions based on race, for example, are more vulnerable to constitutional challenge than those based on sex or disability. Policies or decisions that have a disparate impact based on either race or sex, are much less vulnerable to constitutional challenge than decisions that are made intentionally on that basis, which in

turn are less vulnerable than decisions or policies intentionally designed to disadvantage a racial minority or women.

To add to the complications, some federal statutes provide for individual enforcement, such as Title VII of the 1964 Civil Rights Act, which prohibits discrimination on the basis of sex. Others generally or in some circumstances only allow for administrative enforcement, such as Title VI of the 1964 Civil Rights Act. In addition, the availability of damages for violations of the statutes varies from statute to statute.

For our purposes, a general outline of the key legal principles, as opposed to a recitation of the bewildering details, should suffice. The most important legal principle is also the most obvious: performance-based pay programs should not be used as a basis for discriminating among teachers except on the basis of performance. If the programs are used instead to discriminate on personal characteristics such as race, sex, religion, or disability, that use will likely – and should – be found illegal. This is especially true where there is clear evidence of intentional discrimination.

In most instances, such proof will not exist. The smoking gun is a rare find. Instead, there may be evidence suggestive of discrimination. If a disproportionate number of men have been given performance-based pay, for example, that at least suggests the possibility that sex discrimination is at play. In these instances, and again speaking generally, where there is evidence of a disproportionate impact in the

implementation of performance-based pay programs, the burden will shift to the school to justify its decisions. The school, in other words, will have to explain *why*, for example, more men have received salary increases than women, an explanation which will obviously have to pertain to performance rather than gender.

The law is slightly more complicated than this, in large part because not all groups receive the same amount of protection, given variations in federal law. Some groups realistically are protected only against intentional discrimination, meaning that proof of a disparate impact would not be enough to place the burden upon the school to justify its decisions. But schools that institute performance-based pay programs need only be aware that they might be vulnerable to charges of discrimination if a pattern of decisions favors one identifiable group – e.g., men – over another. Provided that they have a rational explanation for that pattern, they should have little trouble succeeding in any challenge to their programs.

Anti-discrimination challenges can be avoided or reduced in the first place the same way that due process challenges can be avoided or reduced. If schools or school districts create programs that rely on objective, easily understood criteria, they will necessarily generate less suspicion than some other, insidious factor guided the decision. To the extent teachers buy into the program, moreover, the level of suspicion will drop accordingly.

Conclusion

The crucial legal issue regarding performance-based pay boils down to the question of whether the consent of teachers' unions is needed before schools implement such programs. That question remains unanswered, and it will likely continue to be the subject of controversy and disagreement among state courts. Given the traditional hostility expressed by unions toward performance-based pay, requiring consent could derail some experiments with performance-based pay. On the other hand, obtaining consent, at least of the teachers if not their unions, seems to be a wise policy in any event, so the law here might ultimately push in the same direction as policy.

The remaining legal requirements, whether pertaining to the authority of the federal government or the rights to due process and to be free from insidious discrimination, should not be difficult to meet. The federal government has ample authority to encourage performance-based pay, and a well-structured and fairly implemented performance-based pay program should be immune from due process and discrimination claims. Again, law and policy push in the same direction. The clearer and fairer the standards used to award performance-based pay, the less likely the program will be the subject of litigation. The law does not always march in time with wise policy, but in this instance, the two at the very least seem headed in the same direction.

¹ Ed Week article.

² (Education Week – Oct. 3 article).

³ (NY Times Oct. 17).

⁴ For a discussion of Madison’s and Hamilton’s views of the proper scope of the Spending Clause, see, e.g., McConville, p. 168.

⁵ 297 U.S. 1 (1936): 65. Ironically, after stating this view of the Spending Clause, the court nonetheless struck down the act under the 10th Amendment, because it regulated agriculture, which the court held was beyond Congress’ power to reach. *Id.* at 68. The court thus endorsed Hamilton’s view but seemed to apply Madison’s view, making this “one of the few truly ridiculous opinions delivered in two centuries of Supreme Court jurisprudence.” David E. Engdahl, “The Spending Power,” 44 *Duke Law Journal* (1994): pp.1, 36. The endorsement of Hamilton’s view has been repeated in later opinions; the application of Madison’s view has not.

⁶ *New York v. United States*, p. 168.

⁷ *New York*, p. 167.

⁸ The court discusses all five of these limitations in *South Dakota v. Dole*, 483 U.S. 203, pp. 207-08 and note 2 (1987).

⁹ *Dole*, pp. 207-08 and note 2.

¹⁰ *Dole*, pp. 210-11.

¹¹ *Dole*, p. 207.

¹² See, e.g., *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981); *Virginia Department of Education v. Riley*, 106 F.3d (1997), p. 559; *Arlington Central School District Board of Education v. Murphy*, 126 S.Ct. 2455 (2006).

¹³ *School District of the City of Pontiac v. Spellings*, xxx F.3d xxx (2008).

¹⁴ *Dole*, p. 207 (internal quotation omitted).

¹⁵ *Dole*, p. 208.

¹⁶ See *Dole*, pp. 212-18 (O’Connor dissenting).

¹⁷ *New York*, p. 167 (emphasis added).

¹⁸ *Dole*, p. 211.

¹⁹ *Dole*, p. 211 [quoting *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937): 589-90]. *Dole*, at 211-12.

²⁰ *Dole*, p. 211-12. See McConville, at 180-81 and note 4 (discussing and quoting decisions).

²¹ See McConville, pp. 180-81 and note 4 (discussing and quoting decisions). *Riley*, pp. 569-72.

²² *Riley*, pp. 569-72.

²³ *Riley*, p. 570.

²⁴ 29 U.S.C. § 151 (2007).

²⁵ 29 U.S.C. § 152(2) (2007).

²⁶ [ALR]

²⁷ [Farmelo]

²⁸ 500 So.2d 508 (Fla. 1986).

²⁹ *Id.* at 514.

³⁰ *Id.* at 509.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 512.

³⁴ *Id.* at 513 (citations omitted).

³⁵ 319 N.W.2d 181 (Iowa 1982).

³⁶ *Id.* at 184.

³⁷ *United Teachers of Dade*, 500 So.2d at 514.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ 201 Conn. 685 (Conn. 1986).

⁴¹ *Id.* at 687.

⁴² *Id.*

⁴³ *Id.* at 690.

⁴⁴ C.G.S.A. § 10-151b(a) (2007).

⁴⁵ *Weathersfield Bd. of Educ.*, 201 Conn. at 693.

⁴⁶ *Id.*

⁴⁷ *Id.* at 700.

⁴⁸ Deander, *supra* note 7, at 312.

⁴⁹ *United Teachers of Dade*, 500 So.2d at 514.

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