Holding Teachers Accountable and Rewarding Those Who Perform: Evaluating a Performance-Based Pay System for West Virginia

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I. INTRODUCTION

Almost fifty million students headed back to public schools this fall, and $525 billion will be spent on their education this school year. With over

2 Id. at 55 tbl.18.
98,000 public schools across the nation, everyone from politicians to concerned parents has an opinion on reforming the current education system. Presidents have attempted to improve our public school systems through their own innovative programs such as former President George W. Bush's "No Child Left Behind" and President Barack H. Obama's "Race to the Top." All of these programs seek to improve the educational performance of our nation's youth.

It is no surprise that education has become an issue of primary concern. Education is one of the most important and beneficial investments our federal and state governments can make, and it is extremely valuable to both individuals and society as a whole. The more schooling an individual has, the higher his earning advantage; in fact, over the past two decades, "the earnings advantages associated with more schooling have soared." There are also many non-

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President George W. Bush signed the No Child Left Behind Act into law on January 8, 2002, and it amended the Elementary and Secondary Education Act of 1965. Id. The purpose of the No Child Left Behind Act was to "close the achievement gap with accountability, flexibility, and choice, so that no child is left behind." Pub. L. No. 107-110, 115 Stat. 1425 (2002). The No Child Left Behind Act implemented statewide accountability systems that encompassed all public schools and students, and it included annual testing for all students from third to eighth grade. 20 U.S.C. §§ 6301–7941. Further, the Act also provides for reporting to both parents and the public on school performance and teacher quality. Id. As a result of the No Child Left Behind Act, West Virginia administers yearly testing to students and evaluates student, school, and school system performance and progress. W. VA. CODE R. § 126-14-3 (2011).

5 President Barack H. Obama's Race to the Top program received $5 billion in funding through the American Recovery and Reinvestment Act of 2009. Pub. L. No. 111-5, 123 Stat. 115 (to be codified at 26 U.S.C. § 1). The first round of federal funding through the Race to the Top program began on April 14, 2010, and notice was published in the Federal Register so states could begin applying for the funds. Notice Inviting Applications, 75 Fed. Reg. 19496 (Apr. 14, 2010). The purpose of the Race to the Top funding was to "encourage and reward States that are creating the conditions for education innovation and reform [and] achieving significant improvement in student outcomes, including making substantial gains in student achievement, closing achievement gaps, improving high school graduation rates, and ensuring student preparation for college and careers." Id. at 19497. Specifically, preference will be given to states that propose performance-based compensation for both teachers and principals and that provide monetary incentives for teachers in hard-to-staff subject areas, such as mathematics, science, and special education. Id. at 19504.


7 Id. ("In 1973, high-school grads earned about 15.7 percent more per hour than dropouts, 15.9 percent in 1989, 16.1 percent in 2000, and 15.5 percent [in 2006].") See also U.S. CONGRESS JOINT ECON. COMM., INVESTMENT IN EDUCATION: PRIVATE AND PUBLIC RETURNS 2 (2000), available at http://www.raikhingonline.org/articles/intro/investment_in_education.pdf ("[I]n terms of annual median income, the average baccalaureate tends to earn nearly $20,000 more than the average high school graduate."); Jared Bernstein, Is Education the Cure for Poverty?, AM. PROSPECT, Apr. 22, 2007, at A17.
monetary benefits associated with higher education. For instance, citizens who have more education are more likely to be informed and “participate in government, are less likely to be involved in crime, and are less likely to be dependent on public support.”

In contrast, the lack of schooling can have detrimental effects on society as a whole, including our nation’s economy and labor market. It is estimated that over one-third of our nation’s elementary and secondary school students are “at-risk.” At-risk students are two years behind their grade level by sixth grade. Also, if and when an at-risk student graduates high school, the at-risk student will only be performing at an eighth-grade level. The lack of education directly affects the economy because our schools are not producing citizens who have the skills needed to function and support the United States economy and labor market.

A lack of education has a negative societal impact as well. A 2003 study found that the amount of schooling a person had related to their probability of incarceration. The more schooling a citizen had, the less likely the citizen was to be incarcerated. Conversely, the lack of schooling significantly increased the probability of incarceration. Therefore, considering the economic and societal impacts of education, investing in education is perhaps one of the best investments our state and federal governments could make. In fact, if the high school graduation rate for men was increased by only five percent, the nation would see an annual savings of $4.9 billion in crime-related costs.

Not only is education reform being discussed at the national level, but it is also a concern to West Virginia citizens at the state level. Recent studies

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8 Hanushek, supra note 6, at 31.
9 Henry M. Levin, Economics of School Reform for At-Risk Students, in IMPROVING AMERICA’S SCHOOLS: THE ROLE OF INCENTIVES, supra note 6, at 225.
10 Id.
11 Id.
12 Id.
14 Id. Also, other researchers who have analyzed recidivism rates of criminals have found that the lower a criminal’s education level, the higher the criminal’s probability of recidivism than compared to convicts with higher levels of education. ALLEN J. BECK & BERNARD E. SHIPLEY, U.S. DEP’T OF JUSTICE, NCJ 116261, RECIDIVISM OF PRISONERS RELEASED IN 1983, at 1 (1989), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr83.pdf.
15 Hanushek, supra note 6, at 31.
17 Former Governor Joe Manchin discussed the need for educational reform in West Virginia in his 2010 State of the State Address. He commented on West Virginia’s need for federal grant money through President Obama’s Race to the Top program in order to use the money to “pro-
indicate that West Virginia needs to implement significant education reforms in order to remedy the deficiencies of our current education system. In a study by the American Legislative Exchange Council that ranked the education performance of the fifty states and the District of Columbia, West Virginia ranked fifty-one out of fifty-one. Further, on the 2005 National Assessment of Education Progress, West Virginia ranked in the bottom ten in fourth grade math and reading scores and eighth grade reading scores. Additionally, out of eight educational testing categories, West Virginia ranked below the national average in six categories. Because West Virginia has been racing to the bottom in education, perhaps it is time the state concentrates on education reform with West Virginia children being the center of the discussion.

This Note focuses on reforming the education system; specifically, this Note highlights West Virginia's dire need to reform its broken and failing education system and argues for a new payment structure that incorporates performance-based pay. In Part II, this Note describes the traditional pay scale by focusing on the history of the traditional compensation system and its inadequacies. Furthermore, Part II explains West Virginia's traditional pay scale and why it is not a system designed to benefit the students.

In Part III, this Note discusses performance-based pay systems. First, Part III examines what constitutes performance-based pay, including the factors used to evaluate teachers and the evaluations that are used to calculate teachers' salaries and bonuses. Second, Part III takes a closer look at how performance-based pay systems have been implemented in other states. Specifically, this Note examines Denver, Colorado's performance-based pay system, the Teacher Advancement Program, and Minnesota's Quality Compensation for Teachers Program. Each program has unique characteristics; however, the main goal in implementing these programs has been to cultivate successful students in the classroom. Third, Part III discusses how performance-based pay remedies the inadequacies of the traditional pay system, such as the lack of career advancement and opportunities in teaching, the absence of any motivation to achieve results in the classroom."


State Profiles, NAT'L CTR. FOR EDUC. STATISTICS, http://nces.ed.gov/nationsreportcard/states/ (last visited Mar. 17, 2012). West Virginia scored below the national average in fourth grade math, eighth grade math, fourth grade reading, eighth grade reading, fourth grade writing, and eighth grade writing. Id. West Virginia surpassed the national average in fourth grade science by two points. Id. West Virginia tied the national average in eighth grade science. Id.
PERFORMANCE-BASED PAY SYSTEM

greater success in the classroom, and the problem of not holding teachers accountable for the performance of their students.

In Part IV, this Note argues for the implementation of a performance-based pay system in West Virginia’s public schools. Part IV examines the legal mechanisms other states used in implementing their performance-based pay programs. Further, this Note briefly discusses the performance-based compensation system already in place at West Virginia University that is used to determine faculty members’ bonuses. After examining the legal mechanisms other states used to implement their compensation systems and West Virginia University’s own policies, this Note recommends a performance-based compensation system for West Virginia’s public schools, suggests possible sources of funding, and proposes key elements that should be included in West Virginia’s performance-based pay system that will put the success of our students first.

II. BACKGROUND—THE TRADITIONAL PAY SCALE

This Part explores the traditional pay scale, including the history of the traditional compensation system. Next, this Part explains West Virginia’s traditional pay scale, which increases compensation primarily based on one’s level of education and one’s years of teaching experience. Then, this Part highlights the inadequacies of the traditional compensation system and argues that it is not a system designed to benefit the students.

A. Overview of the Single Salary Pay Schedule

The single salary pay schedule emerged in the 1920s in an effort to end the discrimination between elementary and secondary school teachers, as well as the inequities of pay between males and females. In the 1930s and 1940s, the single salary pay schedule gained a foothold, and it became the pay scale for the majority of states.

Single salary pay schedules are designed to have incremental points that apply to all teachers. There is no flexibility of pay beyond that which is explicitly set by the scale. The single salary pay schedule determines a teacher’s salary based on accumulated years of teaching experience, degrees earned, and

22 Id.
24 See sources cited supra note 23.
the number of graduate credits completed.\textsuperscript{25} Salary increases are very limited, and the small incremental raises are almost exclusively based upon annual cost of living increases or amending the statute to provide for a raise based on years of teaching experience and degrees earned.\textsuperscript{26}

**B. The Single Salary Pay Schedule in West Virginia**

West Virginia has adopted a traditional pay scale that incorporates the previously described elements.\textsuperscript{27} The West Virginia State Legislature has implemented a State Minimum Salary Schedule, which prescribes the minimum salary amount for teachers in West Virginia.\textsuperscript{28} West Virginia’s statutory minimum salary bases a teacher’s compensation upon three categories: (1) the years of teaching experience, (2) the type of degree (bachelors, masters, or doctorate), and (3) the amount of graduate credits earned.\textsuperscript{29} Additionally, teachers with twenty years of teaching experience are awarded a $600 annual salary supplement.\textsuperscript{30} Although these provisions are aimed at financially rewarding academic degrees and experience, no provisions exist in West Virginia to reward teachers for their actual performance in the classroom. This is surprising considering the alleged purpose for passing the state minimum salary schedule was to “provide inducement for the teacher to increase his or her competency and thereby earn and deserve the increase in salary.”\textsuperscript{31} However, the only monetarily recognized ways to increase a teacher’s competence is through years of teaching experience and the level of formal education.\textsuperscript{32} As suggested infra in this Note, both years of teaching experience and the level of formal education have minimum impacts on the classroom performance and effectiveness of a teacher. Therefore, these two options prescribed by the legislature are inadequate to actually serve the purpose of the Act, which is to provide financial incentives for teachers to increase their competency.\textsuperscript{33}

The county boards of education must use the state’s minimum salary schedule to fix the salaries of teachers.\textsuperscript{34} Although the county boards of educa-

\textsuperscript{25} See sources cited supra note 23.
\textsuperscript{26} See W. Va. CODE ANN. § 18A-4-2; H.R. 2099, 80th Leg., 1st Sess. (W. Va. 2011) (proposed bill to the education committee then to the finance committee).
\textsuperscript{27} W. Va. CODE ANN. § 18A-4-2.
\textsuperscript{28} Id.
\textsuperscript{29} Id.
\textsuperscript{30} Id.
\textsuperscript{32} W. Va. CODE ANN. § 18A-4-2; see also Lockett v. Fayette Cnty. Bd. of Educ., 591 S.E.2d 112 (W. Va. 2003).
\textsuperscript{33} See sources cited supra note 31.
\textsuperscript{34} W. Va. CODE ANN. § 18A-4-5a (LexisNexis 2012).
performance-based pay system can pay salaries in excess of the state’s minimum salary schedule, which is usually funded through a special tax levy, the higher salaries may only be paid for teachers placed in special instructional assignments, for those assigned to or employed for duties other than regular instructional duties... and they may provide additional compensation for any teacher assigned duties in addition to the teacher’s regular instructional duties wherein such noninstructional duties are not a part of the scheduled hours of the regular school day.

This section allows a salary supplement for teachers who complete assigned duties such as supervising student lunch hours and serving on bus duty. However, the statute expressly precludes rewarding teachers with a salary supplement for regular instructional duties.

Under West Virginia’s current salary structure, the county boards of education are restricted to the uniform salary structure, and the county boards of education have no mechanism in place to reward effective teachers or teachers going above and beyond the required duties. The county boards of education must pay the same amount of additional compensation to other teachers performing “like assignments and duties.” Therefore, the only option a school board has to reward effective teachers is to give an across-the-board bonus to all teachers. This is hardly a fair solution because, instead of county school boards having the ability to reward effective teachers for their outstanding performance, all teachers must be rewarded equally—even ineffective teachers will get the bonus.

Further, West Virginia allows teachers to achieve a tenure status after only three years of teaching. In West Virginia, a teacher’s contract is either a probationary contract or a continuing contract. A probationary contract is for a term of “not less than one nor more than three years.” After three years of

35 See id.; Summers Cnty. Educ. Ass’n v. Summers Cnty. Bd. of Educ., 376 S.E.2d 387 (W. Va. 1987) (“Section 18A-4-5 governs the authority of county school boards in fixing the salaries of teachers. It requires county boards of education to use the minimum salaries established in § 18A-4-2, and allows the county boards to establish higher local salary schedules as long as they are uniform” however the school board can reduce local salary schedules if “forced to do so by failure of a special levy, or a loss in assessed values, or state aid, or events over which it has no control.”).


37 Id.


40 Id.

41 Id.
teaching employment, a teacher enters into a continuing contract as long as the teacher "holds a professional certificate, based on at least a bachelor’s degree, has met the qualifications for a bachelor’s degree and the county board enters into a new contract of employment." Practically, a continuing contract is very similar to a teacher achieving tenure. A continuing contract may not be terminated except (1) by a majority vote of the full membership of the county board of education, after certain due process requirements have been met, such as serving written notice upon the teacher of the stated causes for termination and a pre-termination hearing before the county board of education, or (2) by written resignation of the teacher. National studies have been conducted to evaluate the effect of such de facto tenure provisions at the secondary school levels. In a study of urban school districts across the nation, approximately one percent of all school teachers were either dismissed or did not have their contracts renewed each year. This is an extremely low percentage, which reinforces the fact that once teachers are hired and achieve tenure in a short period of years, it is extremely difficult to replace poorly performing tenured teachers with more efficient and higher performing teachers.

West Virginia’s legislature prescribes the entire pay scale for teachers, which dictates the employer-employee relationship. Furthermore, there are no collective bargaining agreements between public employers and public employees. In the absence of express legislation or statutory provisions that provide for collective bargaining, mediation, and arbitration, public school teachers also have no right to strike to protest wages and benefit packages. This is a significant difference in the West Virginia education system compared to others; in a majority of states, the employer-employee relationship between teachers and the county school boards are governed by collective bargaining agreements. The absence of collective bargaining agreements in West Virginia’s education system would allow West Virginia to effectuate educational reform at a faster pace than other states; states that have collective bargaining agreements in the educa-

42 Id.
43 Id.
44 Matthew G. Springer, Rethinking Teacher Compensation Policies: Why Now, Why Again?, in PERFORMANCE INCENTIVES: THEIR GROWING IMPACT ON AMERICAN K-12 EDUCATION 1, 8 (Matthew G. Springer ed., 2009). Once a secondary school teacher achieves tenure, “contract nonrenewal can be triggered only by severe malfeasance on the part of the employee and, even then, termination is an arduous, controversial, and costly process.” Id.
45 Id.
tional sphere will have to invest significant time and resources in order to hurdle this additional legal obstacle.

In addition to statutory and administrative requirements, case law has also contributed to the traditional pay system in West Virginia. First, all statutes and school personnel regulations are to be strictly construed in favor of the employee. This creates a distinctly pro-teacher environment that provides an extra safeguard for poorly performing teachers. Second, under the single salary pay schedule, county boards of education are prohibited from giving bonuses or salary increases to teachers who are performing above and beyond their required duties. Once a county board of education pays any additional compensation to an employee, all employees with like assignments and duties must be paid the additional compensation, regardless if the bonus was to reward an employee for exceptional performance that goes above and beyond his or her job duties. Ultimately, it places the students at a disadvantage because inadequate teachers have an extra layer of legal protection created by a combination of case law and statutes.

C. The Inadequacies of the Traditional Pay System

The current pay system’s three factors—experience, degrees, and hours of graduate credit—are “not accurate predictors of successful teachers.” First, there is no scientific data that connects more advanced degrees (such as masters and doctorate degrees) to effective teaching methods and strategies. A teacher with a bachelor’s degree can elicit the same high-quality performance as a teacher with a master’s degree or a doctorate, with the exception of masters degrees in math and science for math and science teachers. Therefore, the pay system financially rewards higher degrees, but the students are not necessarily reaping educational benefits by having a teacher with a higher degree.

Second, teaching experience is usually effective only for the first few years in a teacher’s career. During those crucial first years of teaching, a teacher

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51 Id.
54 Goldhaber, supra note 53; Hanushek, supra note 6, at 36.
makes significant improvements. However, after those first few years of experience are gained, the benefits of more experience tend to subside. There is simply not enough evidence or data to support a link between many years of teaching experience to increased student performance. Therefore, to include years of teaching experience as one of only three factors in determining a teacher’s salary is inadequate. Rather, years of teaching experience could be included in a determination of salary, but it should be coupled with performance-based factors as well to insure the highest quality of teachers in the classrooms.

Furthermore, experience is rewarded only if it is gained by teaching in a school system. Professional experience is not factored into the pay scale. In Lockett v. Fayette County Board of Education, a vocational instructor who was teaching business education was not entitled to credit for salary purposes for her years of work experience outside the classroom. The instructor’s professional experience was not teaching experience; therefore, it could not be monetarily rewarded. However, this is a shortfall in the traditional pay system because valuable experience in one’s field is not monetarily rewarded, even though the professional experience could contribute significantly to one’s teaching success in the classroom. The traditional pay scale does not ensure an increase in student performance because of the increased expenditures given to teachers for years of teaching experience and higher degrees earned.

In addition to the inadequacy of the pay system’s factors for predicting successful teachers, the pay scale does not take advantage of market incentives that are present in other professions. There is a nation-wide teacher shortage in specific subject areas and certain locations. In the 2011–2012 school year, out

55 Charles T. Clotfelter et al., Teacher Credentials and Student Achievement in High School: A Cross-Subject Analysis with Student Fixed Effects 19 (Urban Inst., Working Paper No. 11, 2007). See also Hanushek, supra note 53, at 20–21; Douglas N. Harris & Tim R. Sass, Teacher Training, Teacher Quality and Student Achievement 19 (Nat’l Ctr. For Analysis of Longitudinal Data in Educ. Research, Nov. 2010) (“Experience enhances the productivity of both elementary and middle school teachers, but not high school teachers . . . [h]ere, we find that the bulk of the experience effects are indeed in the early years” but also noting there may be “marginal effects” in the later years.); Douglas N. Harris & Tim R. Sass, Teacher Training, Teacher Quality and Student Achievement 19 (Nat’l Ctr. For Analysis of Longitudinal Data in Educ. Research, Mar. 2008) (“The bulk of the experience effects occur in the first year, with subsequent experience yielding diminishing increases in teacher productivity.”).

56 Clotfelter et al., supra note 55. See also Hanushek, supra note 53, at 20–21; Harris & Sass, supra note 55.

57 Hanushek, supra note 6, at 38.


59 Id.

60 Id.

61 See Hanushek, supra note 6, at 39.

of the fifty states and the District of Columbia, forty-four states reported a
teacher shortage in mathematics, forty-four states reported a teacher shortage in
science, and forty-seven states reported a teacher shortage in special educa-
tion. The education system should “provide a premium to people who fill posi-
tions in high demand, possess skills in short supply, or perform exceptionally
well.” This element is clearly lacking from the traditional pay scale.

The pay-for-performance program, unlike the traditional pay scale, at-
tracts employees who are particularly good by providing more opportunities for
higher pay. The traditional pay system operates as a barrier because it offers
no incentives to attract the most capable of job candidates to the teaching pro-
fession. While other professions are offering incentives and higher earning op-
portunities for performance, the traditional pay scale pushes out motivated,
highly qualified candidates because it locks them into a pay system with no
compensation for their improvement, professional development, or perfor-
man ce.

III. REWARDING PERFORMANCE: EVALUATING PERFORMANCE-BASED PAY
SYSTEMS

This Part first examines the basic performance-based pay structure, in-
cluding the factors used to evaluate teachers and the evaluations used to calcu-
late teachers’ salaries and bonuses. After explaining the basic performance-
based pay system, this Part gives three examples of how performance-based pay
has been utilized to create new pay structures. Specifically, this Part examines
Denver, Colorado’s performance-based pay system, the Teacher Advancement
Program, and Minnesota’s Quality Compensation for Teachers Program. Final-
ly, this Part discusses how performance-based pay remedies the inadequacies of
the traditional pay system, such as the lack of career advancement and opportu-
nities in teaching, the absence of any motivation to achieve greater success in
the classroom, and the problem of not holding teachers accountable for the per-
formance of their students.

A. Performance-Based Pay: An Overview of the Concept

The concept of performance-based pay “embraces a fundamental Amer-
ican ethic: workers should be paid on the basis of their skills and perfor-
man ce.” It is not a new idea in the American education system: in the early
1900s it was considered “the norm for compensating teachers.”68 In the 1920s and 1930s, school systems began to adopt a single salary pay schedule to give “equal rewards to all teachers with similar experience and training” and to eliminate the discrimination of pay between male and female school teachers.69

However, the idea of performance-based pay has resurfaced to resolve the inefficiencies of the traditional pay system, mainly that the single salary pay schedule provides little or no incentives for teachers to excel in the classroom.70 Performance-based pay had a revival when it gained notable publicity in the early to mid-1980s.71 The increased attention coincided with President Ronald W. Reagan’s 1983 release of the A Nation at Risk report, which stated that our nation was undergoing an “educational disarmament.”72 In the report, the National Commission on Excellence in Education emphasized that “teachers should be paid and promoted on the basis of their merit and competence. Hard-earned tax dollars should encourage the best. They have no business rewarding incompetence and mediocrity.”73 A performance-based compensation system, which was endorsed by the A Nation at Risk report, uses financial incentives as a “viable tool for motivating teachers to higher levels of performance, enticing more effective teachers to join or remain in the teaching profession, and aligning teachers’ behaviors and interests with institutional goals.”74 Therefore, discussions centering on education reform looked to performance-based pay as a viable solution to rescue our nation’s floundering education system.

Teacher quality has been at the forefront of educational discussions in recent decades. A survey by the Teaching Commission75 revealed that “90 percent of teachers and 91 percent of adults believe that ensuring quality teachers in every classroom is very important.”76 Not only is it perceptually important to teachers and adults alike, but teachers’ performance also has become increasing-

68 Id. at 2.
69 Id. at 3.
70 Springer, supra note 44, at 1.
71 Id. at 2.
73 Id.
74 Springer, supra note 44, at 1.
75 Press Release, The Teaching Commission, Teaching Commission Praises New Report on Teacher Quality (Apr. 19, 2005), available at http://andrewleigh.org/pdf/LiftingTeacherPerformance_TC.pdf. The Teaching Commission was founded in 2003 by former IBM chairman and Chief Executive Officer, Louis V. Gerstner, Jr. The Commission is a bipartisan organization that is dedicated to reforming the teaching profession. Id.
ly more important as recent studies find that “the single most important school factor related to increased student achievement is having a high quality teacher in the classroom.” Research shows that students who are assigned to effective teachers have significantly higher achievement and gains in achievement than those who are assigned to ineffective teachers. In a study conducted by William Sanders and June Rivers, they found that a student that encountered three consecutive years of teachers at or above the eightieth percentile of performance ranked fifty percentile points higher than those students encountering teachers in the bottom twentieth percentile of performance for three consecutive years. Furthermore, in a separate study that used Texas’ student test score data, a student who had an above-average teacher for five consecutive years “could overcome the achievement gap in grade [seven] mathematics typically found between students on the free or reduced-price lunch program and those from higher-income backgrounds.”

With studies emphasizing the importance of a teacher’s effectiveness and competence on a student’s achievement, recent media attention has focused on the pitfalls of the traditional pay scale. These reports highlight that although teachers are paid more for experience, education, and training, none of those factors had much bearing on whether the teacher improved their students’ performance. Coinciding with recent studies and reports, public opinion also supports performance-based pay for teachers: seventy-two percent of public school parents want teachers’ salaries to be tied to the quality of their work and seventy-five percent want teachers’ salaries to be tied to their students’ performance. Further, both the federal government and some state governments are moving towards performance-based pay systems. In fact, the Department of Education established a Teacher Incentive Fund that assists states and school districts in developing and implementing a performance-based compensation system. Additionally, state governments have passed legislation to fund and

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77 Id.; Springer, supra note 44, at 9.
79 Id. at 2-3.
80 Springer, supra note 44, at 10 (citing Eric A. Hanushek & Steven G. Rivkin, How to Improve the Supply of High-Quality Teachers, in BROOKINGS PAPERS ON EDUCATION POLICY: 2004, at 7-25 (Diane Ravitch ed., 2004)).
regulate alternative compensation plans based on teacher performance, student performance, or both.  

B. A Closer Look at Implementing Performance-Based Pay Systems

School systems across the country have enacted performance-based pay systems, but each program is slightly different and tailored to the school system. First, this Part examines Denver, Colorado’s performance-based pay system (“ProComp”), which keeps a traditional pay structure that is supplemented with merit-based pay bonuses. Second, this Part highlights the Teacher Advancement Program (“TAP”), which is a payment structure based on four components: Multiple Career Paths, Ongoing Applied Professional Growth, Instructionally Focused Accountability, and Performance-Based Compensation. Third, this Part discusses Minnesota’s Quality Compensation for Teachers Program (“Q Comp”), which is a statutory framework incorporating elements of TAP.

1. Denver’s Professional Compensation System for Teachers

The Denver public school system initiated a program that kept the basic, traditional pay structure, but supplemented it with a merit-based pay system. The performance incentives supplement the base salary as a bonus, but can also add to the base salary over time. The program is designed to “reward teachers for their professional accomplishments while linking pay to student achievement.” There are four basic components: knowledge and skills, comprehensive professional evaluation, market incentives, and student growth.

The knowledge and skills component includes professional development, advanced degrees and licensing, and tuition and student loan reimbursement opportunities. This component also rewards teachers for attaining Na-
The second component, comprehensive professional evaluation, rewards teachers for satisfactory annual teacher evaluations. The third component, market incentives, has two possible incentives. The first incentive rewards teachers who work in hard-to-serve schools, which the school district defines as those schools with a high free and reduced lunch percentage. The second incentive is available for teachers who work in a hard-to-staff subject area, and it is designed to attract teachers to "roles with [a] high vacancy rate and [a] high turnover." The fourth and final component is student growth, which focuses on rewarding teachers for higher student performance on standardized tests, higher school performance, meeting student growth objectives in the classroom, and for schools that achieved academic improvement.

The ProComp pilot program launched in sixteen Denver schools. After a four-year pilot program, studies found a positive correlation between a teacher’s participation in the program and student achievement. As a result of the program’s success, it was implemented in all of Denver’s public schools. The program automatically enlists all teachers hired after 2006, but teachers hired before 2006 can select either the traditional pay scale or the performance-based compensation system. The new program has even received support from the teachers. Union leaders surveyed their membership in Denver in 2003, asking whether members favored performance pay incentives such as teaching in hard-to-staff schools and in hard-to-staff subject areas, and eighty-nine percent of teachers favored the incentive for teaching in hard-to-staff schools while eighty-two percent of teachers favored giving incentives to teachers who agree to work in hard-to-staff subject areas.

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90 National Board Certification is a voluntary certification that awards teachers who “excel on both an assessment of knowledge of their subject area and a performance-based assessment, which includes a portfolio of student work samples, assignments, videotaped lessons, and analysis of one’s teaching.” Brief of Amicus Curiae National School Boards Association in Support of Respondents at *21 n.14, Meacham v. Knolls Atomic Power Lab., 554 U.S. 84 (2008) (No. 06-1505), 2008 WL 1765762 at *21.


93 Id.


96 About ProComp, supra note 86.


98 Id.
in hard-to-staff subject areas. As of the 2009–2010 school year, over seventy percent of teachers in Denver’s public school system had enrolled in the program.

2. The Teacher Advancement Program

A second approach is the Teacher Advancement Program ("TAP"), which was developed by the Milken Family Foundation. TAP is a model program that legislatures have looked to when creating their own statutes, but TAP is not purely reflected in a statutory framework. The program is aimed at attracting, developing, motivating, and retaining high-quality teachers; the main goal is "to keep talented people in the teaching profession—and draw more of them there—by making it more attractive and rewarding to be a teacher."

There are four elements of TAP: Multiple Career Paths, Ongoing Applied Professional Growth, Instructionally Focused Accountability, and Performance-Based Compensation. First, the Multiple Career Paths element “allows teachers to pursue a variety of positions throughout their career—career, mentor, and master teacher—depending upon their interests, abilities, and accomplishments.” The purpose of this element is to allow teachers to move up the ranks and reward teachers with higher compensation as their “qualifications, roles, and responsibilities increase.” Traditionally, the only avenue for teachers to move up the ranks was to move into an administrator or principal position; however, the Multiple Career Paths element enables teachers to assume more leadership roles and responsibilities while remaining in the classroom.

Second, the Ongoing Applied Professional Growth element reorganizes the school schedule so that during the regular school day teachers may take part in professional development training and programming. Historically, traditional professional development for teachers was outside of the school setting in

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99 Id.
100 Encouraging Findings from ProComp Study, DENVER PUBLIC SCHOOLS (May 24, 2010), http://communications.dpsk12.org/newsroom/encouraging-findings-from-procomp-study/mydps-newsletters1/.
101 Teacher Advancement Program Foundation, supra note 76, at 7. For states that have statutorily implemented the TAP model, see S.C. CODE ANN. § 59-18-1500 (2011) and TEX. EDUC. CODE ANN. § 21.705 (West 2012).
102 See S.C. CODE ANN. § 59-18-1500 (authorizing the use of TAP as an alternative program for an at-risk or below average school).
103 Teacher Advancement Program Foundation, supra note 76, at 1.
104 Id. at 7.
105 Id.; see also S.C. CODE ANN. § 59-26-100 (2012) (creating financial incentives for a mentor teacher program).
106 Teacher Advancement Program Foundation, supra note 76, at 7.
workshops or conferences. However, under the second TAP element, time is set aside for teachers to "meet, learn, plan, mentor, and share with other teachers so they can constantly improve the quality of their instruction, and, hence, increase their students' academic achievement." This time period encourages teachers to collaborate with each other and learn new instructional strategies. TAP's professional development model encourages teachers to learn and collaborate with one another in the school environment. Further, large-scale studies document an increase in student achievement and teacher learning when professional development is teacher-led, ongoing, and collaborative.

Third, the Instructionally Focused Accountability element directly ties into the performance of teachers and how well they teach their students. Each teacher is evaluated four to six times during the school year by multiple trained and certified evaluators. Teachers are evaluated based on four categories: "designing and planning instruction, teacher-created learning environment, classroom instruction, and teacher responsibilities." Teachers received both announced and unannounced evaluation visits.

Finally, the Performance-Based Compensation element rewards teachers by compensating teachers in accordance with their roles and responsibilities, the teacher's performance in the classroom, and the students' performance in the classroom. All teachers are eligible to receive a financial award based upon "the average scores they earn on multiple evaluations of their classroom teaching, their students' classroom-level achievement growth as measured using a value-added model, and school-level achievement growth as measured using a value-added model."

The TAP model has been largely successful in the school systems. At Bell Street Middle School in Clinton, South Carolina, the school was scoring below the average on South Carolina's standardized testing, and it was only one step above the lowest level of performance. The TAP model was implement-

108 Teacher Advancement Program Foundation, supra note 76, at 7.
109 Id.
110 See Laura M. Desimone et al., Effects of Professional Development on Teacher's Instruction: Results from a Three-Year Longitudinal Study, 24 EDUC. EVALUATION & POL'Y ANALYSIS 81 (2002); Mark A. Smylie et al., Teacher Professional Development in Chicago: Supporting Effective Practice (2001).
111 Teacher Advancement Program Foundation, supra note 76, at 7; see also TEX. EDUC. CODE ANN. § 21.705 (statutorily implementing the Instructionally Focused Accountability element).
112 Id.
113 Id.
114 Id. at 15.
115 Id. at 7.
116 Id. at 16. Value-added "refers to the improvement gains in student achievement that are made each year based on pre- to post-test outcomes." Id.
117 Id. When a school receives a rating of below average or a school or school district receives an at-risk rating, the school or school district is required to create a renewal plan. The TAP model
ed in 2001, and the school had marked success in 2003–2004. That year, the school achieved the highest possible rating for school wide value-added student achievement, and “all teachers received a performance award based on the three award categories: skills, knowledge, and responsibilities; classroom-level student achievement; and school-level student achievement.”\(^{118}\) Another TAP school, Renaissance Elementary Charter School in Miami, Florida, actually assisted a first-year teacher in raising his student’s subject proficiency from sixty-two percent to ninety-two percent in just one year.\(^{119}\)

The TAP model integrates career advancement opportunities and holds teachers accountable for their performance in order to create a financial award program that motivates higher quality teaching, and this directly results in a better-educated student. The TAP model has already had success.\(^{120}\) In 2003, twenty-five TAP schools in two states were compared to control schools, and “TAP teachers outperformed comparison group teachers 63 percent of the time, while TAP schools outperformed comparison group schools 57 percent of the time in mathematics and 67 percent of the time in reading.”\(^{121}\) In 2005, a second round of evaluations were conducted for TAP schools. The results found that “the average TAP schools gained 10 percent to 21 percent more than control schools did each year on achievement tests.”\(^{122}\) Currently fifteen states and the District of Columbia are employing the TAP program to some extent.\(^{123}\)

3. Minnesota’s Quality Compensation for Teachers Program

Lastly, in Minnesota the former Governor, Timothy J. Pawlenty, argued that the “current teacher pay system is outdated, and it is not geared towards accountability for results. We need to treat teachers as professionals, not part of an assembly line from the 1940s.”\(^{124}\) Therefore, the Governor urged Minnesota to adopt a statewide education reform—which was based on the Milken Teacher

\(^{118}\) Teacher Advancement Program Foundation, supra note 76, at 17.

\(^{119}\) Id. at 13.


\(^{121}\) Id. at 5.

\(^{122}\) Id.

\(^{123}\) Id. at 1. See, e.g., MINN. STAT. ANN. §§ 122A.413–14 (West 2012); TEX. EDUC. CODE ANN. § 21.701 (West 2012).

\(^{124}\) Springer et al., supra note 120, at 22.
Advancement Program—the Quality Compensation for Quality Teachers ("Q Comp") legislation. The state legislature enacted the Q Comp program in 2005 and approved $76 million to fund the program in 2007. Q Comp is a voluntary program based on TAP, but individual school districts negotiate with local unions to develop the details of their own plans. In order to implement a performance-based compensation system in a Minnesota school district, the district must provide an educational improvement plan. The educational improvement plan must be approved by the school board and contain eight elements:

1. assessment and evaluation tools to measure student performance and progress;
2. performance goals and benchmarks for improvement;
3. measures of student attendance and completion rates;
4. a rigorous research and practice-based professional development system, based on national and state standards of effective teaching practice;
5. measures of student, family, and community involvement and satisfaction;
6. a data system about students and their academic progress that provides parents and the public with understandable information;
7. a teacher induction and mentoring program for probationary teachers that provides continuous learning and sustained teacher support; and,
8. substantial participation by the exclusive representative of the teachers in developing the plan.

The statute reflects the Minnesota Department of Education’s five goals for the Q Comp program: career ladder and advancement options enabling teachers to take on increased responsibilities and mentoring roles, job-embedded professional development, teacher evaluations performed by multiple people and aligned with state objectives, performance pay tied to student achievement, and alternative salary schedules.

States have chosen to implement merit-based pay programs in a variety of ways. In Colorado, individual school districts are creating performance-based

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125 Id.
126 2005 Minn. Sess. Law Serv. 141 (West).
127 Id.
128 Minn. Stat. Ann. § 122A.413. The educational improvement plan that is required to apply for Q Comp funds must be developed by the school board and the exclusive representative of the teachers. Id.
pay plans and financial incentives for teachers. Other states have opted to implement a performance-based compensation plan by the state legislature uniformly enacting the policy throughout the state. While the types of performance-based plans vary in their construction and implementation, the goal of all of the programs are the same: improving the educational system for the students.

C. Performance-Based Pay: Remedyng the Inadequacies of the Traditional Pay System

Merit-based pay has arguably become even more important in recent years as American students fall behind those of other countries. In a 2006 study that compared American fifteen-year-old students to fifteen-year-old students in fifty-seven other countries, the American students performed below international averages in science and mathematics. Furthermore, President Obama has acknowledged that “only a third of [thirteen] and [fourteen] year-olds read as well as they should and that this country’s curriculum for eighth graders is two full years behind other top-performing nations.”

Although a merit-based pay system will not automatically resolve all of the problems in America’s current educational system, it is a “step in the right direction.” One of the immediate improvements merit-pay would bring is to “let prospective teachers, and even those who are remotely contemplating careers in education, know that they will not be locked to a salary predicated solely on years of experience and numbers of graduate credits.” Under the traditional pay scale, the type of students being attracted to teaching positions “tend to score near the bottom of college and graduate school entrance examinations such as the [Scholastic Achievement Test] and GRE. Conversely, students with high [Scholastic Achievement Test] scores and grade point averages are the least likely to enroll in education courses or teacher training programs.”

137 Id.
138 Teacher Advancement Program Foundation, supra note 76, at 5. Looking at data gathered by Graduate Record Examination, “the overall mean score (based on verbal and quantitative sections) of prospective education majors is 984, versus 1051 for prospective social science majors,
For successful and highly-motivated potential candidates, the current single salary pay schedule does not reward teachers for innovation, effectiveness, and accomplishments. Only one in ten high school students expresses a strong desire to teach. According to the other nine students, “careers in K-12 education provide few opportunities for advancement, poor compensation, and a lack of respect from society.” Merit pay would attract “brighter and more adventurous college students to the field of education.”

Therefore, the school system “might be able to do without those teachers who constantly misspell words on the board and are really academically unfit to mold the minds of children in grades K–12.”

Another by-product of implementing performance-based compensation plans is that veteran teachers will have opportunities to collaborate with others and welcome new ideas into the classroom. Specifically, the performance-based pay programs push teachers to improve through yearly evaluations that are monetarily tied to either one’s salary or one’s bonuses. In several TAP schools, “teachers who have taught for more than 15 years—year in and year out, doing basically the same lessons with the same set of expectations—are now challenging their self-imposed status quo.”

Although the benefits of merit-based pay are well known, some educators and teachers’ unions still disagree with performance-based pay. In San Francisco, educators, teachers’ unions, and politicians have “clashed bitterly” over changes included in President Obama’s Race to the Top plan that includes provisions for performance-based pay. The San Francisco superintendent, Carlos Garcia, stated that “he objects to . . . Mr. Obama’s execution of Race to the Top, which aims to overhaul the nation’s public schools by awarding money based on several conditions, including tying teacher salaries to student performance, abolishing teacher tenure and expanding charter schools.”

Educators who do not support merit pay have three major concerns. First, some teachers are concerned that such a system would create divisive competition and jealousy among the teachers at the school. Additionally, a few teachers worry that parents would push for their children to be placed in the classes of teachers who received merit pay awards or recognition. Last, some educators are concerned

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1045 for life/natural science majors, 1110 for humanities and arts majors, 1187 for engineering majors and 1186 for physical sciences majors.” Id. at 5 n.1.

139 Id. at 4.

140 Id.

141 VAIRO, MARCUS & WEINER, supra note 136.

142 See Teacher Advancement Program Foundation, supra note 76, at 23–24.

143 Id. at 24.


145 Id.
that shared trust and accountability would diminish among the professional staff in the school.

Although the concerns seemingly have some “merit,” they have largely been unfounded. First, most private and some public universities have already implemented merit pay systems, and the fears of those opposing merit pay have not materialized at that level. At these levels, merit pay has acted as a motivator for teacher’s performance rather than a source of jealousy, divisive competition, or lack of collaboration. At the university level, merit pay systems are based on whether a teacher’s performance is “beyond simply being competent.” The amount of the merit pay award varies from an “average of $1,000 to $5,000 per year.” Then, the award is incorporated as a permanent part of the professor’s base salary. This merit pay system at the university level has become a “financial incentive for university personnel to strive for a[n] . . . award.”

Further, although teachers are concerned about parents placing their children in teachers’ classrooms who have qualified for merit pay rewards, teachers “would be ignoring reality if [they] did not acknowledge that, even without a merit pay system in place many parents descend on principal’s offices demanding specific teachers for their children.” Lastly, opposing merit-based pay and supporting a salary schedule “predicated solely on years of experience in the field and the number of graduate credits accumulated” lacks common sense. One of the most straightforward examples about the impracticality of opposing merit-based pay is to “think of Michael Jordan, after [five] years of playing for the Chicago Bulls in the National Basketball Association, being paid the same salary as every other NBA player with [five] years of experience.” The premise itself seems unfair because no matter how well one performs, the rate of pay stays the same. While this is perhaps an oversimplification, it is the illogical basis for the current traditional pay scale.

If teachers are involved in determining the components for merit pay plans and in deciding who should receive it, most likely a greater number of teachers would prefer a merit-based compensation plan rather than a single salary schedule. Teachers in

146 VAIRO, MARCUS & WEINER, supra note 136, at 50.
147 Id.
148 Id.
149 Id.
150 Id.
151 Id.
152 Id. at 51.
153 Id. at 48–49.
154 Id. at 48.
155 Id.
a given school know which of their colleagues are of the highest
caliber and which ones are of the lowest caliber. The universal
litmus test for this phenomenon would be to simply ask any
teacher in a school whom they would want to teach their own
child. Even student interns or newly appointed teachers to a
school know within a matter of a few weeks what all the other
teachers in the school already know—who are the best teachers.
This litmus test is unerringly accurate. Teachers also know who
are the worst teachers among them—those they would never al-
low to teach their very own children.¹

Therefore, merit-based pay compensation plans should include some teacher
evaluation of their colleagues. The plans should include student performance on
standardized test scores, a principal or other administrator’s assessment of
teacher performance in the classroom during unannounced visits, additional
professional development, teacher attendance, willingness to teach difficult
and/or larger classes, and the quality of the teacher’s interaction with the stu-
dents.¹¹

While some oppose performance-based compensation systems, the real
fear is not that of creating competition or jealousy among faculty members.
Rather, it is the fear of change. In life, individuals are held accountable for their
actions. In other professions, employees and employers are held accountable for
the quality of their work and performance. Teachers, as professionals in an oc-
cupation that is invaluable to society, should be held accountable for their ac-
tions, work, and performance as well. Holding teachers accountable would bring
America one step closer to creating a successful educational system that enables
American children to thrive.

IV. WEST VIRGINIA SHOULD ADOPT A PERFORMANCE-BASED PAY SYSTEM

West Virginia’s traditional pay scale is inadequate to meet the needs of
our students and to prepare them to enter a global workforce or to attend colleg-
es and universities. It is an injustice to West Virginia’s students because their
education is not put first. Fortunately, there are a variety of measures West Vir-
ginia can institute to adopt a performance-based pay system.

A. How Other States Have Adopted Performance-Based Pay

States have chosen to draft legislation and institute performance-based
pay programs using a variety of approaches.¹¹¹ For instance, Wyoming’s state

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¹¹ Id.
¹¹¹ Id. at 55.
(implementing performance-based pay by statute); Minn. Stat. Ann. § 122A.60 (West 2012)
legislature approved $400,000 to establish a pilot TAP. This program provides monetary incentives and support for: multiple career paths providing options to teachers for career advancement with corresponding increases in responsibility, compensation and leadership; teacher compensation based upon classroom performance and student progress; performance evaluation and promotion based upon knowledge and ability standards agreed to by teachers; frequent, regularly scheduled collaborative professional development opportunities for teachers; and expanded teacher certification progress and processes made available at alternative entry points.159

Florida has also had similar legislative enactments, including a requirement that all school districts implement a professional development system that focuses on student achievement and teacher effectiveness.160 Both Wyoming and Florida utilized their state legislatures to provide funding to schools in order to pilot performance-based pay initiatives, such as TAP. While Wyoming and Florida implemented funding to start a pilot program, South Carolina’s state legislature modified its state laws to allow for performance-based compensation systems for schools rated below average or at-risk.161 Schools can choose between a program offered by the South Carolina Department of Education or an alternative program, such as TAP.162 The statute makes clear, though, that the program must “reasonably be expected to improve student performance.”163

Texas enacted a performance-based compensation system by passing education reform statutes, which outlined an Educator Excellence Awards Program.164 Texas implemented almost a quasi-pilot program for the performance-based compensation system that provides for performance-based pay bonuses.165

(implementing the Q Comp program); MISS. CODE ANN. § 37-19-7 (West 2012) (keeping the original single salary schedule, but beginning the process of implementing performance-based pay by allowing monetary incentives for school districts with improved test scores and monetary incentives for teachers to become mentor teachers); S.C. CODE ANN. § 59-18-1500 (2012) (implementing performance-based pay by statute); TEX. EDUC. CODE ANN. § 21.701 (West 2012) (creating performance-based pay system); OHIO ADMIN. CODE 2201-58-03 (2012) (incorporating the value-added formula for evaluating teacher performance).

160 FLA. STAT. ANN. § 1012.98.
162 Id.
163 Id.
165 Id. § 21.705.
Essentially, instead of Texas implementing a broad sweeping reform that applies to all schools immediately, Texas has allowed an exception to its former traditional pay scale: school districts may create a local awards plan and apply for a performance-based pay grant through the state to implement such a program.\textsuperscript{166} The local awards plan is created by the school district, but in order for the plan to be approved, there must be “evidence of significant teacher involvement in the development of the plan.”\textsuperscript{167} Further, a majority of classroom teachers in the school district that wishes to implement such a plan must approve participation in the plan prior to submitting a local awards plan.\textsuperscript{168} By statutorily requiring teacher involvement in the creation of a performance-based plan, the State of Texas ensures that teachers are able to voice their apprehensions about a performance-based plan and make suggestions on its implementation and evaluation criteria in order for the plan to be both fair and functional in the classroom.

Under Texas’ program, if the school district receives a grant for its local award plan, it must allocate sixty percent of all total grant money received from the state to performance-based pay bonuses.\textsuperscript{169} The school district—not the state—evaluates teacher performance by considering how the teacher improved student performance, but the school district must use “meaningful, objective measures” when conducting the evaluation.\textsuperscript{170} The remaining forty percent of the grant funds may be used for similar educational reforms such as implementing the components of TAP, providing stipends to “recruit and retain” highly-effective classroom teachers and principals, providing mentoring support for teachers, and rewarding teachers who teach in a subject that experiences a critical shortage of teachers.\textsuperscript{171}

Other states have found a unique opportunity in implementing performance-based pay systems through voter initiatives. In Arizona, voters raised the state sales tax six-tenths of one percent in order to fund the Classroom Site Fund.\textsuperscript{172} Forty percent of the fund is set aside to finance performance-based pay programs in all of Arizona’s school districts.\textsuperscript{173} In Eagle County, Colorado, voters in November 2001 approved a ballot initiative to raise the salaries of Eagle

\textsuperscript{166} Id. § 21.704.
\textsuperscript{167} Id.
\textsuperscript{168} Id.
\textsuperscript{169} Id. § 21.705.
\textsuperscript{170} Id.
\textsuperscript{171} Id.
\textsuperscript{173} ARIZ. REV. STAT. ANN. § 15-977.
County teachers. However, this salary increase was not merely to increase salaries across the board; rather, it was to combine a performance-based compensation plan that held teachers directly accountable for the success of their students. The initiative passed with a sixty percent margin and provided $3 million in funding for the school district.

In 2002, the Eagle County School District implemented TAP in five out of its fifteen schools. By fall 2004, the program had gradually been phased into all of the district’s fifteen schools. The Eagle County School District’s performance-based compensation system incorporates the performance awards as both bonuses and increases in annual base salary.

B. West Virginia University’s Performance-Based Pay Model

West Virginia University, West Virginia’s land grant research university, has already adopted a performance-based compensation plan for its faculty. The policy rewards faculty members based on their meritorious performance, which is defined as “the quality of a faculty member’s performance as it relates to assigned responsibilities.” Each year, faculty members are to be evaluated for their annual performance, and the evaluations contain input from the dean, the chair, and the department committee. There are four rankings for each category: excellent, good, satisfactory, or unsatisfactory. There are three main areas for which each faculty member will be evaluated: teaching, research, and service. The “excellent” rating receives the highest performance-based reward. The “good” rating will receive a smaller reward than the excellent rating, and the “satisfactory” rating will receive yet a smaller reward than the good rating. The “unsatisfactory” rating results in no performance-based compensation reward for that portion of the teacher’s responsibilities.

174 Teacher Advancement Program Foundation, supra note 76, at 21.
175 Id.
176 Id.
177 Id.
178 Id.
179 W. VA. CODE ANN. § 18-10-1 (LexisNexis 2011).
181 Id.
182 Id.
183 Id.
184 Id.
185 Id.
186 Id.
187 Id.
Although higher education and secondary education are markedly different in many areas, West Virginia University’s performance-based compensation plan could be a starting point for the West Virginia Legislature. It allows for assessments from administrators and faculty members, and it creates an incentive for faculty members to excel. Further, the overall themes of professional development and performance can be extended into the secondary education sphere. Both West Virginia University and Marshall University could be instrumental in the professional development educational reforms because an employee from each university is a member of the Center for Professional Development Board. The Center for Professional Development Board was created by the legislature in order to advance the quality of teaching and ensure the professional development of teachers in West Virginia’s public schools. Therefore, the Center for Professional Development Board could play a key role in implementing pilot programs that create an incentivized, professional pay structure in the secondary education environment.

C. A Program Tailored To Fit West Virginia

West Virginia is in a better position to initiate change and adopt a performance-based compensation system than other states because there are fewer legal obstacles. First, in West Virginia’s Constitution, the State legislature has the duty to provide for a “thorough and efficient system of free schools.” Education has essentially become a fundamental right in West Virginia. Further, if the West Virginia Legislature is not providing for a high quality statewide educational system, then the State has not fulfilled its constitutional obligation to the citizens of this state. Our statewide educational system is consistently ranked in the bottom tier, and reforms must be enacted to improve our educational system and provide for a “thorough and efficient system” of public schools. In West Virginia, the State grants powers to local authorities—the county school boards—to provide and carry out the educational system.

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189 Id.
190 W. VA. CONST. art. 12, § 1.
192 Syl. pt. 5, Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979) (“The Thorough and Efficient Clause contained in Article XII, Section 1 of the West Virginia Constitution requires the Legislature to develop a high quality State-wide education system.”).
193 W. VA. CONST. art. 12, § 1.
However, in the absence of any legislative enactments, the county school boards lack the authority to implement any performance-based salary or salary supplement.\(^{195}\)

The West Virginia Legislature would have to enact a statute or amend the current State Minimum Salary Schedule for any substantive educational reforms to be implemented by county school boards. While this is an arduous task, West Virginia is in a better position than other states to effectuate educational reforms because there are no collective bargaining agreements in West Virginia between the public school districts and public school employees.\(^{196}\) Therefore, the solution to enacting a performance-based compensation system seems relatively straightforward—the State Legislature can simply enact a statute to implement such a program and amend or repeal the State Minimum Salary Schedule. However, tailoring a performance-based compensation program to West Virginia is easier said than done. Perhaps the most practical course to initiate reform is to implement gradual changes by starting a performance-based compensation system in the form of salary supplements or bonuses.\(^{197}\) Further, like Texas’ program that allows school districts to “opt-in” to this arrangement,\(^{198}\) West Virginia could create a pilot program for performance-based pay, and it would allow West Virginia to tailor an alternative compensation system that works for the State and its students.\(^{199}\)

There are key elements that West Virginia’s performance-based compensation system should include. First, West Virginia should incorporate a value-added analysis in evaluating teachers’ performance. Value-added is a statistical model that gauges “how much students gain or improve in academic achievement in a given year from pre- to post-testing. Because value-added calculates improvement in achievement each year, students starting academic attainment levels do not affect value-added estimates.”\(^{200}\) Value-added analysis has been incorporated as a pillar of the TAP under the Performance-Based Compensation element.\(^{201}\) Under this pillar, teachers receive financial awards

\(\text{\footnotesize{195 See Herald, 65 S.E. at 103.}}\)
\(\text{\footnotesize{196 City of Fairmont v. Retail, Wholesale & Dep’t Store Union, 283 S.E.2d 589, 593 (W. Va. 1983). In the absence of a statutory requirement, public employers are not “required to recognize or bargain with a public employee association or union.” Id.}}\)
\(\text{\footnotesize{197 See ARIZ. REV. STAT. ANN. § 15-977 (2012) (using salary supplements to compensate for teacher performance); FLA. STAT. ANN. § 1008.36 (West 2012) (recognizing the “need for a performance incentive program for outstanding faculty and staff in highly productive schools” and authorizing a performance-incentive program); FLA. STAT. ANN. § 1012.22 (West 2012) (“By July 1, 2014, the district school board shall adopt a performance salary schedule that provides annual salary adjustments for instructional personnel and school administrators based upon performance. . . .”).}}\)
\(\text{\footnotesize{198 TEX. EDUC. CODE ANN. § 21.704 (West 2011). See supra text accompanying notes 164–171.}}\)
\(\text{\footnotesize{199 For example, a low performing school could pilot the TAP as part of its improvement plan. See W. VA. CODE R. § 126-13-13 (2012) (defining a low performing school).}}\)
\(\text{\footnotesize{200 Teacher Advancement Program Foundation, supra note 76, at 42.}}\)
\(\text{\footnotesize{201 Id. at 16.}}\)
based upon "the average scores they earn on multiple evaluations of their classroom teaching, their students' classroom-level achievement growth as measured using a value-added model, and school-level achievement growth as measured using a value-added model."202 Further, many state legislatures have utilized the value-added analysis when evaluating teachers based on their student performance.203 In Florida, a district school board evaluates a teacher based upon not only the students' academic proficiency, but also the students' gains in learning for that year "as measured by statewide standardized tests, or, for subjects and grades that are not measured by the statewide assessment program, by national, state, or district-determined testing instruments."204 This assessment constitutes sixty percent of the overall evaluation for the performance-based bonus.205

The California State Board of Education is brainstorming ways to create more effective evaluation tools for teachers, and the key method being considered is incorporating a value-added analysis.206 Specifically, one state board member commented that "[i]ncluding value-added as a component is just common sense, if we take seriously the notion that education is about kids and not grown-ups."207 California has been set back in introducing a value-added analysis into teachers' evaluations because it falls under teachers' collective bargaining agreements;208 however, West Virginia does not have this legal obstacle because there are no collective bargaining agreements in the education sphere in West Virginia.209 Therefore, West Virginia is in an inherently better position to adopt a value-added analysis into teachers' evaluations.

West Virginia already has statewide standardized tests that measure the achievement of its students.210 The West Virginia Educational Standards Test 2 ("WESTEST2") is a statewide assessment tool that measures a student's level of

202 Id. Value-added "refers to the improvement gains in student achievement that are made each year based on pre- to post-test outcomes." Id.
204 Fla. Stat. Ann. § 1012.34.
205 Id.
207 Id.
208 Id.
209 See City of Fairmont v. Retail, Wholesale, & Dep't Store Union, 283 S.E.2d 589, 593 (W. Va. 1983) ("Thus, while some constitutional protection is extended under the First Amendment to public employees to organize, speak freely and petition, it is clear that a public employer is not required to recognize or bargain with a public employee association or union in the absence of a statutory requirement.").
achievement in mathematics, reading and language arts, social studies, and science in third through eleventh grades. The ACT EXPLORE test measures the proficiency of eighth grade students in English, mathematics, reading, and science. The ACT PLAN tests the same subject areas as ACT EXPLORE, but this test is only given to tenth graders. In subject areas or grade levels that do not have statewide or national standardized tests, local school districts can continue to employ and adapt benchmark assessments. Benchmark assessments are optional tests that monitor students’ progress within the instructional period; therefore, when statewide or national standardized tests would not provide a score to measure a student’s achievement, benchmark assessments could be utilized to fill the gap. A multitude of testing data from various standardized tests is readily available for the state to utilize, and a value-added analysis would simply partially link a teacher’s salary supplement to his or her students’ achievement.

Student test scores, though, should not be the only criteria used to compensate teachers. Like TAP, West Virginia should include four to six evaluations during the school year by different trained evaluators. Currently, teachers in their first, second, or third year of teaching must be evaluated at a minimum of two times per year. Teachers in their fourth or fifth year are evaluated at least once per year, but teachers with five or more years of experience who have not received an unsatisfactory rating, may choose to have a professional growth and development plan rather than an evaluation. Further, unannounced classroom visits are not required. The evaluators must have one scheduled evaluation with the teacher, but whether the second evaluation is scheduled or unannounced is at the discretion of the evaluators.

The West Virginia House of Delegates has begun to take gradual steps to improve the evaluation of West Virginia’s public school teachers by passing a bill that would have a teacher’s performance reviewed at least five times during the first three years in the classroom. The Bill also calls for a new evaluation process by July 2012, which includes providing annual reviews for classroom

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211 Id. § 126-14-3.
212 Id.
213 Id.
214 Id.
215 Id.
217 Id.
218 Id.
219 Id.
220 H.R. 2757, 80th Leg., 1st Sess. (W. Va. 2011). Teachers in their first or second year of teaching would be evaluated at least twice a year using at least two observations of thirty minutes each for each evaluation. Id. Teachers in their third year would be evaluated at least once a year with two, thirty-minute observations each. Id.
teachers—even the classroom teachers who have five years of experience would be subject to annual reviews under the Bill. Specifically, the Bill provides that teachers in their fourth year or beyond who have not received an unsatisfactory evaluation within the last five years would receive an informal evaluation, unless a principal or assistant principal decides a formal evaluation is needed. Instead of teachers in their fifth year opting out of receiving any type of evaluations, teachers in their fourth year or beyond will be subject to an informal evaluation. This at least provides a yearly assessment of a teacher’s performance and effectiveness, especially in the later years when the benefits of teaching experience tend to wane. This Bill provides for an incremental change that has the potential to usher in additional education reforms.

While the Bill passed recently by the House of Delegates is a step in the right direction to reforming the teacher evaluation systems in place, additional elements are needed to make the system more effective. A performance-based component could be incorporated by also evaluating teachers based on student performance and using a value-added analysis. Additionally, by incorporating unannounced classroom visits, trained evaluators can gain insight into what the regular school day instruction is really like rather than a rehearsed, edited version that may be portrayed during announced classroom evaluation visits.

Second, a professional development component should be implemented under the performance-based pay compensation system. Therefore, various components that reward professional development and additional training would be incorporated under this element. An example of this is rewarding teachers for attaining National Board Certification, which has already been discussed supra in Part III of this Note. West Virginia has an existing statute that monetarily rewards teachers “who [hold] a valid certificate issued by the National Board of Professional Teaching Standards.” Teachers are paid $3500 annually for holding a National Board Certification. Therefore, West Virginia has already incorporated elements into the West Virginia Code that reward teachers for professional development, and the legislature can merge this pre-existing statute into an overarching statutory scheme similar to Minnesota’s Q Comp legislation. In Minnesota, the professional development program specifically provides for staff development activities that “focus on the school classroom and research based strategies that improve student learning,” “enhance teacher knowledge

221 Id.
222 W. VA. CODE R. § 126-142-9. Currently, teachers with five years of experience may opt for a professional growth and development plan rather than undergoing any evaluation process. Id.
223 H.R. 2757.
224 Clotfelter et al., supra note 55, at 19.
226 See Teacher Advancement Program Foundation, supra note 76, at 15.
227 W. VA. CODE ANN. § 18A-4-2a (LexisNexis 2012).
228 Id.
and instructional skills,” and “provide opportunities for teachers to practice and improve their instructional skills over time.”

Like Minnesota’s Q Comp legislation, the West Virginia Legislature should also expressly state what does not qualify as professional development to set clear boundaries of what would and would not qualify under the new compensation system. West Virginia has already recognized the importance of rewarding professional development by monetarily rewarding teachers with National Board Certification. Therefore, this purpose could be extended to monetarily reward teachers for improving the quality of their instruction through other techniques, such as by learning new instructional strategies. This ensures that the teacher’s professional development is benefiting the students and their classroom instruction. A statute similar to Minnesota’s legislation would not provide for performance-based awards for more administrative tasks, like preparing report cards, because those tasks—although a necessary duty in the classroom—do not directly impact student learning.

Under a performance-based compensation system, a third category could be integrated that rewards teachers for taking on additional responsibilities. Florida’s performance-based compensation program evaluates and rewards teachers based on instructional leadership and professional job responsibilities. Minnesota financially rewards teachers who take advantage of additional opportunities, such as the teacher-to-teacher mentoring component. The goal of this component is to provide opportunities for teachers to build professional relationships in the secondary school environment and monetarily reward those teachers who take advantage of such opportunities.

Additionally, West Virginia should take advantage of market incentives and incorporate financial incentives for hard-to-staff subjects and hard-to-staff schools. Incentives for hard-to-staff subjects are monetary rewards targeted to

229 Minn. Stat. Ann. § 122A.60 (West 2012). The statute makes clear the distinction between professional development and other job responsibilities, expressly stating that time provided for teachers to “supervise students on field trips and school activities, or independent tasks not associated with enhancing the teacher’s knowledge and instructional skills, such as preparing report cards, calculating grades, or organizing classroom materials” is not professional development time that can be calculated for performance-based compensation bonuses. Id.

230 The Teacher Advancement Program has already incorporated this element into its model performance-based pay compensation scheme. Teacher Advancement Program Foundation, supra note 76, at 7.


232 Minn. Stat. Ann. § 122A.60 (outlining effective staff development activities, including “focus[ing] on the school classroom and research-based strategies that improve student learning” and “provide[ing] opportunities for teachers to use student data as part of their daily work to increase student achievement”); Minn. Stat. Ann. § 122A.414 (West 2012) (outlining that a school district that seeks to participate in a performance-based pay program must “agree to use up to two percent of basic revenue for staff development purposes, consistent with sections 11A.60 and 122A.61, to develop the alternative teacher professional pay system agreement under this section”).

teachers who work in "subject areas where there are shortages, which are based on need at the school, district, or state level." Currently, there is proposed legislation in the West Virginia House of Delegates that would allow for incentives for hard-to-staff subjects. The Bill would provide a $5000 annual supplement to teachers certified in math, science, or reading, and who are teaching in those subject areas. As mentioned earlier in this Note, there is a nationwide shortage of math, science, and special education teachers. In West Virginia for the 2011–2012 school year, there were thirty-five subject areas that had a teacher shortage. Therefore, the proposed legislation would target West Virginia’s top three hard-to-staff subject areas of math, science, and reading, and the Bill should increase the number of certified teachers in those subject areas.

Not only is there a shortage of teachers in specific subject areas, but there is also a shortage of teachers across the state. Therefore, West Virginia should also incorporate monetary incentives for hard-to-staff schools. This is a monetary reward offered "for teaching in high-needs schools or districts, typically either high-poverty, low-performing, or geographically remote schools. Like hard-to-staff subject incentives, these incentives are designed specifically to address market factors influences." This is essential in West Virginia because all counties have reported a teacher shortage either due to a hard-to-staff location or a hard-to-staff subject area. Therefore, all counties would be in a position to benefit from these incentives.

West Virginia’s teacher shortage has become a state-wide epidemic. Performance-based pay needs to be implemented to attract more college students to pursue careers in teaching. Also, financial incentives need to be implemented to encourage students to pursue hard-to-staff subject areas and to teach in hard-to-staff schools. With a teacher shortage in every single county, measures need to be taken to reform education if the West Virginia education system is really about putting the students and their educations first.

Although performance-based pay systems require funding, there is most likely enough money to fund a new program in West Virginia if the state would reallocate funds from inefficient programs and take advantage of federal funding opportunities. First, the State Superintendent of Schools and the West Virginia Legislature can work together to cut ineffective programs that are draining the schools’ budgets without increasing student performance. This is a restructuring of funds that are already allocated to school systems, but using them in an efficient manner that produces results. For example, the West Virginia Legisl-
lature currently prescribes an annual bonus to teachers with twenty years of teaching experience.\textsuperscript{241} However, this type of bonus rewards simply the amount of time spent teaching.\textsuperscript{242} It does not guarantee that the time spent teaching was productive or effective. Further, because teaching experience is usually effective only for the first few years in a teacher’s career and after the first few years of teaching, the benefits of more experience tend to wane, this money already set aside as a bonus for teachers should be converted to performance-based bonuses. Also, a proposed bill in the legislature would grant a five percent per year pay increase to teachers for the next three years.\textsuperscript{243} The proposed legislation would be extremely expensive and reinforce the current, inefficient compensation system that rewards teachers based on experience and additional college hours, without linking their compensation to areas of need or performance. Instead of using tax dollars to fund a five percent across the board pay raise, that money could be used to fund a performance-based bonus system.

Second, President Obama’s Race to the Top program provides federal funding to institute performance-based compensation systems.\textsuperscript{244} West Virginia did not receive the first round of grant money because the state legislature refused to look into the possibility of charter schools and performance-based pay.\textsuperscript{245} Furthermore, if West Virginia desires to compete with other states for federal funding for its educational system, performance-based compensation systems is something that it will have to enact.\textsuperscript{246} In order to apply for the feder-

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\item \textsuperscript{241} W. VA. CODE ANN. § 18A-4-2(b) (LexisNexis 2012).
\item \textsuperscript{242} W. VA. CODE ANN. § 18A-4-1, 2 (LexisNexis 2012). The West Virginia Code defines “years of experience” as “the number of years the teacher has been employed in the teaching profession.” W. VA. CODE ANN. § 18A-4-1.
\item \textsuperscript{243} H.R. 2099, 80th Leg., 1st Sess. (W. Va. 2011) (proposed bill to the education committee then to the finance committee).
\item \textsuperscript{244} Not only has Race to the Top provided funding, but the Teacher Incentive Fund annually provides funding for school districts and states to develop and implement financial incentives for teachers and principals who raise student achievement and close the achievement gap. In April 2011, the Full-Year Continuing Resolution Act was passed allocating $400 million to the Teacher Incentive Fund for the fiscal year. H.R. 1473-126, § 1829(a) 112th Cong. (1st Sess. 2011). Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, Pub. L. No. 109-49, 119 Stat. 2833, 2864–65 (2005) (authorizing the Teacher Incentive Fund by providing for performance-based compensation systems).
\item \textsuperscript{245} Walt Williams, State School Board To Debate Charter Schools, Performance Pay, WEST VIRGINIA MEDIA, Apr. 16, 2010, available at http://66.118.80.206/story.cfm?func=viewstory&storyid=78398&catid=45. See also U.S. Dep’t of Ed., Race to the Top Technical Review Form – Tier 1, West Virginia Application #6840WV (Feb. 19, 2010), http://www2.ed.gov/programs/racetothetop/phase1-applications/comments/west-virginia.pdf (“Applicant articulates a comprehensive reform agenda, but its strategy to turn around failing scores is rather narrowly focused. For example, applicant does not have a charter school law. Further, applicant’s commitment to aggressive changes in the approach to teacher compensation, which will be focused on rewarding teachers who are effective at raising student achievement, is not clear.”).
\item \textsuperscript{246} See Williams, supra note 245.
\end{itemize}
al funding, at the time the state submits its application, the state must certify that
it "does not have any legal, statutory, or regulatory barriers at the State level to
linking data on student achievement or student growth to teachers and principals
for the purpose of teacher and principal evaluation." Therefore, West Virginia
would have to amend its current compensation statute because it does not allow
for a teacher’s salary to be differentiated based on performance.

The former State Superintendent of Schools of West Virginia, Steve
Paine, made it clear to the Legislature that West Virginia should implement
charter schools and performance-based pay in order to qualify for any funds
from the $5 billion in Race to the Top funds. West Virginia did not even apply
for the second round of funding because the Legislature refused to consider
seriously reforming education by allowing charter schools or performance-based
pay. Yet, West Virginia’s neighboring states received education funds
through the Race to the Top stimulus money. Ohio received $400 million, and
Maryland received $250 million. While West Virginia sits out each year, our
neighboring states are making strides to dramatically improve their education
systems. While West Virginia continues to resist educational reforms, the indi-
viduals who suffer are the students. When will West Virginia enact educational
reforms that help the students? When will the students become the focus of the
discussion?

V. CONCLUSION

Reforming the education system in West Virginia will be an arduous
task, but it is necessary for the Legislature to fulfill its duty of providing a high
quality education system. West Virginia’s students deserve an education that enables them to succeed not only in higher education, but also in a global mar-
ketplace. The quality of education that the state legislature is providing its citi-
zens is below average and an injustice to West Virginians. Furthermore, to
compete with other states for federal funding for its educational system, West
Virginia must enact a performance-based compensation system and apply it to
public school teachers.

249 Walt Williams, supra note 245.
250 Walt Williams, West Virginia Sits Out "Race to the Top," STATE JOURNAL, Sept. 2, 2010,
252 Id.
codified in 26 U.S.C. § 1) ("Innovation and Improvement Section").
West Virginia has consistently ranked nationally in the lowest tiers of education; yet, our state continues to resist innovation to improve our educational system. In a state that almost consistently ranks below average in every subject and is accordingly “racing to the bottom” in education performance, teachers need to be rewarded for their students’ performance. The traditional pay scale is broken in West Virginia, and it lacks any incentive for teachers to improve and perform in the classroom. Further, it does not attract new teachers, which shows a direct correlation to West Virginia having thirty-five subjects with teacher shortages and every county reporting a teacher shortage in 2011-2012.

A performance-based pay system like the one suggested for West Virginia would provide monetary incentives for professional development, increased student performance, additional leadership roles, and teaching in hard-to-staff subjects and areas. By making performance-based compensation reforms, eleven states and the District of Columbia have received Race to the Top grants. Additionally, numerous states have adopted performance-based systems incorporating elements from the ProComp and TAP models. Such performance-based compensation systems have reported marked success and displayed a positive correlation between the enactment of the programs and higher student achievement. Using models from other states and from our own premier higher education institution, West Virginia University, performance-based pay can be tailored to fit West Virginia and the needs of its citizens. Instead of shying away from reforming our education system, leaders in the state and the legal community should urge West Virginia legislators to put West Virginia’s students at the forefront of this discussion and enact a compensation system that serves students’ needs as well as the teachers’ needs.

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Press Release, supra note 251.


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