

A Human Resources, Legal and Financial Examination of Expedited Teacher Dismissal  
in New York State as a Consequence of Race to the Top

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### Abstract

When the New York State Education Department accepted the federal Race to the Top (RttT) grant in 2010, they agreed to reforms that educators in New York State never experienced before. Education Law 3012-c details that beginning in the current school year, public school teachers will receive end-of-year evaluations based on student outcomes and other determinants of teacher effectiveness and performance. As a direct result of these end-of-year ratings, an expedited process for teacher dismissal focused solely on ineffective performance will be implemented. Results and data tied to the new process are not available due to its implementation timeline, however, our paper examines the new teacher dismissal process from an objective human resources, legal, and financial lens. Freeing all those involved from an overly time-consuming, convoluted, and expensive process, the new procedures promise to be more efficient and transparent. The new teacher dismissal process needs to be closely monitored to determine its effectiveness and impact on improving teaching.

*Keywords: Race to the Top, teacher dismissal, teacher effectiveness, teacher evaluation*

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Teacher quality and effectiveness are key components of the federal Race to the Top (RttT) educational reform legislation. Receipt of RttT funds is contingent upon state-wide teacher and principal evaluation reform. As President Obama stated in 2009,

America will not succeed in the 21st century unless we do a far better job of educating our sons and daughters... And the race starts today. I am issuing a challenge to our nation's governors and school boards, principals and teachers, businesses and non-profits, parents and students: if you set and enforce rigorous and challenging standards and assessments; if you put outstanding teachers at the front of the classroom; if you turn around failing schools – your state can win a Race to the Top grant that will not only help students outcompete workers around the world (Obama, 2009).

Under the initiative "great teachers", RttT seeks to expand professional development, improve teacher preparation, and reform teacher evaluation (Obama). Connected to the concepts of seniority, merit pay, tenure, collective bargaining, and overall educational competitiveness, teacher performance and evaluation has been a hot topic for critics of the current American public education system. Weisberg, Sexton, Mulhern, & Keeling (2009) showed that most existing teacher evaluation systems do not provide adequate discrimination between successful and unsuccessful teachers. Reformers look at the current structure of the public school system and see few incentives for teachers to improve. Veteran teachers, who are subject to existing performing systems, are contrasted in the media with young, enthusiastic teachers from the

Teach for America Program (Ripley, 2010). Critics take issue with the fact that unlike the private sector, teacher pay is largely based on longevity and educational attainment, and that the tenure system shields teachers from being disciplined over mediocre performance. Additionally, recent financial pressures on school districts are leading some states to question tenure and seniority systems (Cohen & Walsh, 2010, p. 19).

RttT provides education funding to states for meeting of federal reform criteria. This “top-down” process drives reform at the state level in order for the states to procure federal education funding. Critics see this legislative approach as threatening to reduce autonomy of state legislatures, “who scrambled to bring their codes into line with the Administration’s preferences in time . . .” for the RttT deadlines ( McGovern, 2011, p. 7). This legislative scramble is precisely what happened in New York as the legislature revised principal and teacher evaluation under Education Law §3012-c (Chapter 103 of the Laws of 2010) and Section 100.2(o) and Subpart 30-2 of the New York State Commissioner’s regulations to win RttT funding. A key component of this is the creation of the expedited process to remove ineffective teachers based on their evaluation. This reform can be examined from a human resources, legal, and financial perspective.

### **Human Resources Perspective**

Prior to the 2011-12 school year, teacher evaluation systems across most of New York State assessed teachers using very general criteria that allowed for the same end-of-year ratings for outstanding teachers and for those that barely met the qualifications of an average teacher. When the New York State Education Department (NYSED) applied for and received federal Race to the Top (RttT) funds, they agreed to build a teacher evaluation system that improved the process and tools for assessing teachers, specifically by making student performance a

considerable criterion among multiple measures of teacher effectiveness. This is the foundation of the new Annual Professional Performance Review (APPR).

The human resource implications of the new APPR teacher dismissal process present many challenges. A large part is due to the radical changes in theory and in practice of the new teacher evaluation system. Under the former Commissioner's Regulations (CR) 100.2 (o), former § 3020-a procedures were cumbersome, expensive, and extremely lengthy but tenured teachers and administrators were entitled to retain their positions as long as they were deemed competent, efficient, and exhibited appropriate behavior. The former § 3020-a process stipulates procedures that are intended to both protect tenured teachers from authoritative capriciousness and assess their capability in order to carry out their professional responsibilities (Worona, 2010). However, it was this infelicitous process that prevented more principals from preferring charges against teachers (Jacobs, 1999; Messer, 2011).

### **Differentiation of Teacher Ratings**

According to the policy brief, *How Federal Education Can Reverse the Widget Effect* (The New Teacher Project, 2010), teacher effectiveness is the key to improving education for all students, however, differentiating the level of performance for teachers is critical in developing a more effective teacher evaluation system. Differentiation will lead to individualized professional development plans for teachers in need, and within a reasonable amount of time—two years, if no improvement is made, using an expedited teacher dismissal process, those teachers will be terminated.

The historic legislation enacted in May, 2010, that went into effect in the 2011-12 school year, for teachers of grades four through eight who teach English Language arts and/or mathematics, mandates that public school teachers are held accountable for the performance of

their students based on state and local assessments. Based on a 100 point scale, 40 points will be based on students' performance on these assessments—20 points for each. The remaining 60 points that are structured within an approved framework/rubric have to be negotiated with local teachers bargaining units. Determining point values for other components of teacher effectiveness, for example, instructional practices, professional responsibilities, and classroom environment, to name a few, have proven to be contentious as school officials and teachers, to date, have received little guidance from state education officials as to how to proceed with this implementation.

One of the largest human resources implications of the teacher dismissal process is the training of administrators as to how to use the new evaluation instruments within the classroom observation process and how classroom observations impact a teachers' final rating under the new HEDI rating system. The HEDI ratings—Highly Effective, Effective, Developing, and Ineffective—will be comprised of subcomponent and composite scoring ranges (local and state or other comparable measures) set forth by the Commissioner of Education, in addition to the remaining 60 points, based on New York State teaching standards, which have to be locally negotiated. At the end of the school year, the point value of all components will be converted to a HEDI rating.

Originally the New York State Education Department (NYSED) determined that a teacher who scores “Ineffective” in both the Student Growth (state or other comparable assessment) and Locally Selected Measures (local assessment) cannot receive a rating higher than “Ineffective.” To date, this has been declared invalid by the NYSUT (New York State United Teachers) lawsuit but can be agreed to, as part of collective negotiations (NYSED, 2011). Therefore, the new observation process is vital to teachers overall rating because it will be

instrumental in determining, what can be presumed, a large percentage of the remaining 60 points. In the 2012-13 school year, all teachers, regardless of content area taught, will be evaluated by the new system.

### **Implications of Classroom Observations**

In the past, formal and informal classroom observations of teachers by administrators were focused on improving performance, and the purpose of end-of-year evaluations were to monitor overall teacher growth and to assist in making tenure decisions. Under the new legislation, it is thought that the intention of classroom observations has shifted from growth and learning to include the determination of a point value and cause for termination. Under § 3012-c, mid- or end-of-year evaluations are now a critical factor in employment decisions that include but are not limited to promotion, retention, tenure determination, termination, and supplemental compensation (Worona, 2010). The perception of constant scrutiny is pervasive; however, the process may now render itself more objective.

Included in the legislation, before conducting any mid- or end-of-year evaluation is the mandated requirement for training of anyone who formally observes a teacher. Because the evaluation process is becoming standardized, there is less room for biases, inconsistencies, and subjectivity, which will assist in the expedited teacher dismissal process (The New Teacher Project, 2010). In the past, it was very difficult for administrators to prove teacher incompetence and considered quite subjective.

### **The Expedited § 3020-a Process**

The expedited § 3020-a process can be used only if based exclusively on an alleged “pattern of ineffective teaching or performance” (Worona, 2010) and must conclude within 60 days after a pre-hearing conference. In the past, a § 3020-a hearing lasted anywhere from one to

three years. This process will go into effect only after a teacher has received two consecutive annual “Ineffective” ratings. However, after a teacher receives the first “Developing or Ineffective” rating, a Teacher Improvement Plan (TIP) must be put into place within 10 days of the start of the new school year. An Improvement Plan must minimally include the needed areas of improvement, a timeline for achieving improvement, the manner in which the improvement will be assessed, and differentiated activities to support improvement in the stated areas. In addition, a locally negotiated appeals process must be in place.

The creation of TIP’s will also have large human resource implications. The development and coordination of differentiated professional development opportunities will be challenging and costly. However, this part of the process is not yet imminent and guidance from the New York State Education Department is not yet available.

### **Legal Perspective**

The revised teacher dismissal process for teacher ineffectiveness in New York State will create a number of changes in the legalistic nature of the evaluation system, the hearing process itself, and in the nature of evidence and proof that will be used during the proceedings.

### **Appeals of Evaluation**

Because each annual evaluation that culminates in an “ineffective” rating carries with it the possibility of teacher dismissal, the appeals process for the annual evaluation carries tremendous significance for teachers and districts. Under the new procedures, the appeals process, like other aspects impacting teacher rating, is subject to local collective bargaining. Many districts on Long Island are in the process of bargaining this component. The most cost-effective and efficient way for the appeals process to work is if the appeal of a teacher evaluation completed by a principal ends with the local district superintendent. Alternative possibilities



involve the use of arbitrators, mutually agreed-upon panels, the school board, or the BOCES district superintendent. All of these complicate the process and can lead to additional costs.

### **The Hearing**

One of the major changes in the dismissal procedure under the expedited § 3020-a hearing, which is designed to both streamline the proceeding and be a cost savings, is the elimination of the three member panel to hear case related to ineffective teaching and performance. Previously, teachers brought on § 3020-a charges would have the option of having the hearing run by a single hearing officer, or a three-member panel (NYSSBA, 2010, p.253). The three-member panel would have a member selected by each side, along with a single hearing officer who would be in charge. This system created the necessity of finding three people who could serve simultaneously, often over an extended period of time. The two additional people created burdens in scheduling and added costs to the process. Since the district selected one of these panel members and the defense selected the other, the net effect was that they canceled each other out and the hearing officer's judgment was likely determinant of the outcome. The revised process removes this redundancy. Additionally, under the expedited § 3020-a procedures, hearings are required to start within seven days of the prehearing conference and must be completed 60 days after that. While this timeframe seems to be an improvement over the existing process where cases can extend longer than a year, technically hearings in the existing standard process that do not involve license revocation are expected to last no more than 60 days after the prehearing conference absent extraordinary circumstances.

### **Burden of Proof and Building a Case for Dismissal**

Proving teacher incompetence under the standard § 3020-a process is a complex legal process. Both sides may be represented by legal counsel, they have the right to subpoena

witnesses and to cross examine them. Those witnesses testify under oath and a record of the hearings are kept by a court reporter. Because the case is appealable through the court system, detailed attention to legal procedures and evidence occurs. The burden of proof required in this proceeding is a "preponderance of evidence" (NYSSBA, 2004, p. 67). While hearsay evidence is admissible in the hearing, its value can be undermined during cross-examination. The burden of proof the district has to develop is also difficult to construct. Very often there is variability in the observations made by multiple supervisors. Recommendations for improvement may be contradictory, and supervisors reviewing the lessons may reach different conclusions about the quality of instruction based on their own training and preferences. In cases involving a tenured teacher, the teacher's personnel file will contain positive evaluations, which would have been the basis for granting them tenure in the first place. New evidence would have to be clear and convincing, demonstrating that the teacher's professional behavior had changed significantly enough to warrant removal (Jacobs, pp. 74-75). In developing a case through the supervisory process, administrators are therefore required to "act much like prosecuting attorneys when they gather the evidence needed to meet the burden of proof requirements" (Jacobs, p. 75).

Bridges (1990) noted that despite the fact that incompetent teachers were considered by superintendents as among the biggest problems they faced, very few teachers were dismissed for incompetence. Citing a study done by Gross in New York, during a 10-year period from 1977 to 1987, only 20 tenured teachers were dismissed for incompetence. In looking at national trends, Bridges noted that most of the cases for incompetence dealt with the "technical aspects" of the teaching job, which primarily deal with failure to manage the classroom, or "bureaucratic failure", about failure to perform required responsibilities. However, citing his own research, Bridges found that approximately one-third of the cases for teacher incompetence that he

examined between 1939 and 1982 were overturned on appeal. Failure to win conviction, or having a conviction overturned, produces a burden on the administrators and the school system. In a small school, this could have social and emotional consequences that will color relationships for a long period of time. Therefore, under the existing § 3020-a process, tremendous care and attention has to be made in preparing the cases that will be brought to a hearing to produce the "preponderance of evidence" necessary to withstand cross-examination and further legal challenges. Included in the process of building a § 3020-a case, under the standard mechanism, is the need to show that the district provided interventions to ameliorate the performance problems that existed prior to moving to a disciplinary approach (Messer, 2010). This cumbersome process places a heavy burden on administrators in dealing with teachers who they believe to be incompetent. Jacobs found that administrators in New York State took into account the direct effects of the law (cost, time, burden of proof); the indirect effects of the law (vague definition of incompetence, conduct unbecoming a teacher); and the non-law related variables (stress, staff conflict, documentation, negative impact on children) when they made a decision about whether to begin the dismissal process for tenured teachers. Principals report having to make this effort while the same time holding the belief that they will be unsuccessful (Jacobs, p. 72).

### **Elimination of Vagueness and Concurrent New Evidentiary Requirements**

The changes in teacher dismissal law supplants the existing charges of teacher incompetence with the ability of the district to show "a pattern of ineffective teaching or performance" to bring about dismissal. Ineffectiveness is defined in § 3012-c of the New York Education as "two consecutive annual ineffective ratings received by a classroom teacher or

building principal pursuant to annual professional performance reviews conducted in accordance with the provisions” of the law.

The new law takes the vagueness out of definition of teacher incompetence. In 1984, only two states defined teacher incompetence by statute (Bridges, p. 13). New York was not one of them. Through the changes being made in the regulations in New York, a numeric composite score from the APPR teacher evaluation process is being substituted for the relatively amorphous concept of incompetence. On its face, this looks to make the burden of proof necessary to get a conviction at a § 3020-a hearing easier. Arguments at these hearings will no longer focus on subjective measures of teacher performance, and will rely on the use of more objective quantifiable measures. However, many of the same legal issues remain, albeit, in a different form.

Each of the components of the composite score will now be under legal scrutiny. The response of New York State has been to address this through training and detailed guidance on the steps schools have to take to get ready for the new APPR (NYSED, 2011). Administrators responsible for evaluation and supervision need to be certified by their superintendent to be competent to perform evaluations under the new system. Superintendents themselves have to be certified by their Boards of Educations to evaluate principals. The training will allow administrators to withstand legal challenges based on their ability to evaluate teachers utilizing the revised New York State Teaching Standards. One of the key elements in this process is the required training on inter-rater reliability. It is likely that lawyers for the defense will ask to see documentation showing that an administrator has received up-to-date teacher evaluation training, and will ask them to show evidence of their ability to accurately evaluate a lesson based on the criteria being used in the district. Thus, the burden to produce this information will also fall on

the district. To further protect potential administrator's testimony at a § 3020-a hearing, training and possibly some form of certification in the application of the specific rubrics selected by the district will also be necessary.

The performance based component and composite score involves state-wide and local testing. While there has been a great effort taken to develop reliable New York State exams in English and math for grades three through eight, to meet the requirements of the U.S. Department of Education's No Child Left Behind requirements in order to receive federal funding, some educators have questioned the consequential validity of these tests (Braun, Chudosky, & Koenig, 2010). As a result, NYSED has stopped publishing the tests to avoid the practice of teaching to the tests. This eliminates the practice of teaching to the tests, a practice limits the use of the tests as a valid measure of teacher performance. The unintended consequence of this change, is that school's can no longer the use student performance data on these assessments to help improve instruction. Student assessment measures introduced under recent federal educational reform efforts were designed to establish student accountability in meeting various standards. These are the same assessment measures used for teacher evaluation. Having been designed to measure student performance, from a psychometric view, it may be possible to question whether there is any diminution to their validity when used to evaluate teachers (Baker, et al., 2010). This in turn, raises the potential for a legal challenge to this component of the evaluation.

The use of student test results to evaluate the effectiveness of teachers leads to increased cheating (Bridges, p.34). To deal with the potential problem of cheating on State exams, NYSED issued strict guidelines about who can proctor and grade these exams (Otterman, 2011). Concern over cheating on the New York State Regents exams is leading to consideration of

moving the Regents tests a week earlier in June, to allow for off-site grading. Districts have been told to plan on teachers not grading their own exams, or the exams of anyone else that they may have a direct interest in seeing perform well on their end of the year evaluations. Under this proposal high school students will take these high-stake tests and then return to school for a week afterwards. Concern about test administration and security change the purpose of testing to teacher evaluation from measuring student performance.

Achieving legally tight teacher evaluations also depends on the selection of a local measure of performance (NYSESED, 2011). Despite shifts in recent years towards the use of authentic assessment, portfolio evaluation, performance tasks, project-based learning, the NYSED guidelines call for measures of student growth that will meet psychometric requirements of the American Psychological Association for validity and reliability on educational measurements (NYSESED, 2011, RFQ). Administration and grading of these assessments will have to be done by someone who does not have a direct interest in their outcome. NYSED is concerned about cheating, and in protecting the district from a potential legal challenge during a § 3020-a proceeding. Additionally, the selected local measures can only use student assessments as part of the teacher evaluation process if they meet that psychometric standard. This may lead districts to consider abandoning best practice in assessment and learning, in substituting low-level multiple choice measures for the purpose of meeting psychometric criteria that will avoid legal challenges. The validity of the value-added and growth model approach have also been questioned by researchers, and may be contested in a legal appeal (Corcoran, 2010; Papay, 2011).

The processes of teacher evaluation rubric selection, administrator training, local assessment selection, administration, and grading, all are informed by the potential legal

challenges during a dismissal case. All of the care and anxiety that surrounded the dismissal of an incompetent teacher during the standard § 3020-a process has now been transferred to the evaluation of all teachers on an on-going basis. Because of the inclusion of student performance data in the process, student assessment will take on a high-stakes dimension throughout the school year as well. While the expedited § 3020-a hearing, which many saw as a cost savings when it was instituted, has the impact of turning teacher evaluation, student assessment and teacher- administrator relationships upside down.

### **Financial Perspective**

Both engaging in a process to dismiss teachers because of incompetence or allowing teacher incompetence and poor performance to persist have costs. Lack of action on the part of school officials can lead to low student achievement, teacher morale issues, loss of confidence in the public schools, and possible litigation. “If you think this is an exaggeration, just ask school board members what people talk to them about in the grocery store or at a social event. The poor performing teacher gets all the community's attention. . .” (McGrath, 1995).

### **Cost Savings with the Expedited § 3020-a**

The expedited § 3020-a proceeding has been seen as a method of cost savings for districts. In his testimony to the education committee of the New York State Legislature on behalf of NYSSBA, Little (2011) anticipated that “by reforming teacher disciplinary proceedings. . . [d]istricts could redirect the resources currently used in this process to programs that directly benefit students and help them meet the high-performance standards that have been set for them” (p. 2). NYSUT, the state teacher’s union, has supported “measures designed to make these due process rights more expeditious and less costly” (Kinsella, p. 5). Chief among the reasons given as to why this will reduce costs is that the “expedited” hearing will reduce the

amount of time a hearing will take. According to Pallotta, an officer for NYSUT, much of the delay occurred because NYSED takes a long time in providing a list of potential hearing officers. He reports an average delay of seven weeks just to get a list (Pallotta, 2011). State budget issues may also play a factor in delaying payment to hearing officers. Costs will not be able to be reduced unless overall length of the process can be shortened. As former superintendent Ron Friedman (2010) , "There is no assurance that the new 3012-c, revisions in 3020a, and revisions In Regulation 100.2(o) will synergistically combined to speed things along, as opposed to creating get further delay the process".

While Jacobs' research shows that administrators will still go ahead with the hearing, they do experience concern over whether or not the evidence that they have accumulated will lead to dismissal. Two-thirds of those interviewed "indicate that cost, to varying extents, was an important factor in their decision to dismiss or discipline and incompetent tenured teacher" (p. 62). An administrator states that quote a conservative estimate of one case in which he was associated, cost the district close to \$300,000 which may be excessive for certain objects" (p. 64). He notes that some districts, understanding the cost, negotiated settlements of between \$80,000 \$100,000 to get teachers to write letters of resignation and accept a monetary settlement.

In 2008, the New York State School Boards Association found that a § 3020-a proceeding took an average of 520 days from the date charges were brought to the time a decision was rendered (NYSSBA, 2008). When the case involved "pedagogical incompetence", the average case spanned 830 days, and cost \$313,000. Salary and benefits to the suspended teacher accounted for approximately 47% of that amount, 21% went to provide a substitute teacher, and 32% went for legal and administrative costs (NYSSBA, 2008). The costs of the court reporter and hearing officer are paid for by New York State.



The costs associated with dismissal proceedings are often weighed against the cost of keeping a teacher. Teachers whose behavior is extremely unprofessional, such as locking students in closets, sexually harassing them, or otherwise physically harming students, invite lawsuits that would be far costlier than the removal process. In terms of teacher incompetence or ineffectiveness, the cost to the district can be the failure to have schools achieve Annual Yearly Progress, and be placed on the “School In Need of Improvement” list. This public admonishment can have the effect of eroding support for the school or even depressing home values.

### **Different Costs with the Expedited § 3020-a**

The standard § 3020-a requires significant time on the part of the school administration. In order to prepare the case the building administration has to put in place a paper trail that would stand cross-examination. Included in this process would be the need to have conducted interventions to ameliorate the problem. Principals report having to make this effort while the same time holding the belief that they will be unsuccessful (p. 72).

The shift in the revised dismissal process is that the care and detail that went into the construction of a removal case for incompetent teachers will have to go into the evaluation procedures for all teachers. While §3020-a procedures may be called “expedited,” the preparation for teacher removal will not be. In fact, the level of preparation will now span most of the daily work of administrators in the district. One Long Island school district, at the request of a local New York State Council of School Superintendents committee, calculated the mandated expenditures for the new APPR. Ten days of training to certify administrators as teacher evaluators was estimated to cost \$5000. Seven days training central office staff to certify them to evaluate principals was estimated to cost \$7500. Administrator training on the use of the selected teacher rubric was estimated at \$15,000. Continuous administrative training to ensure

inter-rater reliability on the teacher evaluation component was estimated at \$5000 annually. Training for the teachers on the selected teacher rubric and on the other measures for teacher evaluation, in order to ensure transparency and fairness in the evaluation process, was estimated to cost \$15,000 plus teacher time. Scoring the state assessments under the revised procedures was estimated at \$20,000 annually. And the cost of a local assessment, for math and English alone, that met the states rigorous psychometric requirements, was estimated at \$30,000 annually. Finally, data collection and submission to the New York State data warehouse was estimated at \$30,000 plus staff costs. That is a total of \$130,500 of direct costs, before including all of the non-state tested subjects and calculating salary and man-hours.

None of this estimate actually includes the additional time that will be spent on implementing the evaluation system. As the initiative unfolds, it will become easier to define both the direct and indirect that districts will incur as a result of increased attention to teacher evaluation. After all of the process is in place and working, after the appeals of the annual evaluations are heard, then the expedited § 3020-a will still have to take place.

The human resources, legal, and financial examination of the New York State expedited § 3020-a process, as developed in response to the Race to the Top initiative of the federal government, is leading to significant changes in resource allocation, school administration and decision-making. By analyzing these changes from multiple perspectives, it is possible to see that the legislation will have both planned and unintended consequences for public schooling in New York State.

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