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Teacher Tenure Reform in Wyoming: Bad Teachers Left behind

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TEACHER TENURE REFORM IN WYOMING: BAD TEACHERS LEFT BEHIND

*Arah N. Shumway**

Teaching is one of the noblest of professions.
—Calvin Coolidge, 1924

*I believe that what's wrong with our schools in this nation is that they have become
unionized in the worst possible way.*
—Steve Jobs, 2007

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I. INTRODUCTION

In the midst of one of the worst job markets in United States history,¹ job security is an ever-looming concern. Those holding jobs work diligently to retain their positions while thousands of others are forced to dust off their old resumes and find new or replacement employment. One group is tenured teachers. Tenured teachers can rest assured that absent truly egregious conduct on their parts, their jobs are safe. Teacher tenure has been touted as a “job for life”² by some, yet nothing but a right to due process³ by others. Some view tenure as an outdated system which shields only the incompetent;⁴ others consider it crucial in providing protections from vindictive and malicious administrators.⁵

Views on the merits and limitations of teacher tenure vary across the board.⁶ The battle over the issue of teacher tenure has only intensified with the advent of the No Child Left Behind Act of 2001 (NCLB).⁷ Some of the main goals behind

¹ See Peter Ferrara, *The Worst Five Years Since the Great Depression*, FORBES (Feb. 7, 2013, 10:02 PM), <http://www.forbes.com/sites/peterferrara/2013/02/07/the-worst-five-years-since-the-great-depression/>.

² See Rudy Harper, *Pittsburg Educator spends weekend protesting in Topeka*, KOAMTV (Apr. 7, 2014 5:49 PM), <http://www.koamtv.com/story/25186396/pittsburg-educator-spends-weekend-protesting-in-topeka>.

³ *The Truth About Teacher Tenure in Higher Education*, NAT’L EDUC. ASS’N, <http://www.nea.org/home/33067.htm> (last visited May 6, 2014).

⁴ See John M. Rothgeb Jr., *When Tenure Protects the Incompetent: Results from a Survey of Department Chairs*, 47 PS: POL. SCI. & POL. 182 (2014).

⁵ See Randy Turner, *An Argument For Teacher Tenure*, HUFFINGTON POST THE BLOG, (Dec. 07, 2012, 6:06 PM), http://www.huffingtonpost.com/randy-turner/teacher-tenure-_b_2257120.html.

⁶ See *infra* notes 38–67 and accompanying text.

⁷ See generally No Child Left Behind (NCLB) Act of 2001, 107 Pub. L. No. 110, 115 Stat. 1425 (codified at 20 U.S.C. §§ 1041, 3427, 6052, 6053(e), 6054(b), 6055(h), 6056(a)); Jesse L. Bonner, *States weaken tenure rights for teachers*, USA TODAY (Jan 25 2012, 12:02 AM), <http://usatoday30.usatoday.com/news/education/story/2012-01-25/teacher-tenure-rights-firings/52772354/1>.

the NCLB are both simple and laudable,⁸ while achieving those goals are not easy affairs.⁹ Teacher tenure is just one of the many features of our educational system under the scrutinizing eye of the NCLB.¹⁰ However, the NCLB and other entities interested in promoting teacher tenure reform suffer from a common problem: a lack of specific guidelines.¹¹ While not expressly addressing teacher tenure, the NCLB has been the driving force behind legislatures and administrators revisiting teacher tenure laws. The NCLB aims to improve teacher effectiveness in an effort to boost the performance of students overall. Whether linking teacher evaluations to student performance measures will achieve the goals of the NCLB is less than clear. Many states currently view teacher tenure with a skeptical eye and seek reform to increase the accountability of tenured teachers.¹²

The State of Wyoming is not immune to the effects of this national debate. The federal overhaul of the public education system brought about by the NCLB has put similar pressures on Wyoming as it has on other states.¹³ The volley of legislation aimed at ensuring compliance with the NCLB includes amendments to the statutory scheme for teacher tenure in Wyoming.¹⁴ While these amendments are a move in the right direction, they suffer from a lack of specificity, clear

⁸ See MITCHELL L. YELL, *THE LAW AND SPECIAL EDUCATION* 181 (2006), *excerpt available at* <http://www.education.com/reference/article/goals-no-child-left-behind/> (noting that goals of NCLB include the following: “all students will achieve high academic standards by attaining proficiency or better in reading and mathematics by the 2013–2014 school year; highly qualified teachers will teach all students; all students will be educated in schools and classrooms that are safe, drug free, and conducive to learning; all limited English proficient students will become proficient in English; and all students will graduate from high school”).

⁹ See Valerie Strauss, *A decade of No Child Left Behind: Lessons from a policy failure*, WASH. POST (Jan. 7, 2012, 12:00 PM), http://www.washingtonpost.com/blogs/answer-sheet/post/a-decade-of-no-child-left-behind-lessons-from-a-policy-failure/2012/01/05/gIQAeb19gP_blog.html.

¹⁰ See George J. Peterson & Michelle D. Young, *The No Child Left Behind Act and its Influence on Current and Future District Leaders*, 33 J.L. & EDUC. 343, 356 (2004).

¹¹ *Id.*

¹² EDUCATION COMMISSION OF THE STATES, *Teacher Tenure / Continuing Contract*, http://www.ecs.org/html/educationIssues/teachingQuality/teacherdb_intro.asp (Sixteen states use teachers’ performance ratings in tenure decisions while Florida, North Carolina, Kansas and Idaho have repealed tenure entirely).

¹³ See Elysia Conner, *Wyoming to Submit No Child Left Behind Waiver Request*, CASPER STAR TRIB. (Feb. 27, 2013), http://trib.com/news/state-and-regional/wyoming-to-submit-no-child-left-behind-waiver-request/article_1a596fa6-23c9-5b17-bb86-5b34d3658b13.html; Elysia Conner, *Wyoming to Wait a Year on No Child Left Behind Waiver*, CASPER STAR TRIB. (Jul. 8, 2013), http://trib.com/news/local/education/wyoming-to-wait-a-year-on-no-child-left-behind/article_995806dac39d-520c-aa4f-5bb48eda7347.html. The full extent of the requirements brought about by the NCLB is outside the scope of this article. Only certain requirements relating to teacher tenure will be explored.

¹⁴ See 2011 Wyo. Sess. Laws, ch. 182, § 1.

guidelines, and any kind of enforcement provisions.¹⁵ The amendments provide little direction regarding how school districts should implement the new requirements.¹⁶ This seemingly intentional decision leaves ample room for district-specific interpretations.¹⁷ Such ambiguity will almost certainly lead to inconsistent implementation across the state. Given the varying needs of school districts across the state, such flexibility could be seen as a boon. However, without a certain amount of consistency in application, these amendments could suffer from poor implementation or from being ignored entirely.

This article provides possible solutions to problems stemming from the language of the amendments, and offers suggestions to school districts tasked with their implementation. The suggestions will facilitate compliance with the statute and ensure that the teacher tenure process in Wyoming functions to further the goal of placing the best teachers in front of Wyoming students. First, this article provides a brief history of teacher tenure in the United States.¹⁸ Second, this article discusses differing views of teacher tenure, including merits and drawbacks.¹⁹ Third, this article examines teacher tenure reform and details the effects the NCLB has had on teacher tenure reform.²⁰ Finally, this article outlines the progression of teacher tenure in Wyoming, provides an overview of the current transitional status of Wyoming's teacher tenure statute, addresses problems with the statutory scheme, and suggests possible solutions and methods for implementation.²¹

II. HISTORY OF TEACHER TENURE

Pinpointing the origins of teacher tenure is difficult. Accounts of unfair work conditions for teachers in the United States date back to the nineteenth century.²² Teachers at the time sought protection from interference from parents and administrators regarding classroom instruction.²³ In 1887, the National Education Association (NEA) held its first-ever conference in Illinois and brought the issue of teacher tenure to the forefront of the discussion.²⁴ “By the turn of the [Twentieth]

¹⁵ See *id.*

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ See *infra* notes 22–37 and accompanying text.

¹⁹ See *infra* notes 38–67 and accompanying text.

²⁰ See *infra* notes 68–96 and accompanying text.

²¹ See *infra* notes 97–144 and accompanying text.

²² See CARL E. VAN HORN & HERBERT A. SCHAFFNER, *WORK IN AMERICA: AN ENCYCLOPEDIA OF HISTORY, POLICY, AND SOCIETY* 549 (2003); M. J. Stephy, *A Brief History of Tenure*, TIME (Nov. 17, 2008), <http://content.time.com/time/nation/article/0,8599,1859505,00.html>.

²³ See VAN HORN & SCHAFFNER, *supra* note 22, at 549; Stephy, *supra* note 22.

²⁴ See Stephy, *supra* note 22.

century, tenure had become a hot-button issue that some politicians preferred to avoid.²⁵ Massachusetts passed the first pre-college tenure law in 1886,²⁶ and New Jersey followed suit in 1910, granting fair dismissal rights to college professors.²⁷ These rights were extended nationwide to K–12 teachers during the 1920s.²⁸ Teachers' unions began forming in response to the high teacher turnover rates associated with the Great Depression, and “by the mid 1950s, eighty percent of all K–12 teachers were tenured.”²⁹ In 2008, 2.3 million public school teachers in the United States had tenure.³⁰ The landscape of teacher tenure changed in the late Twentieth Century, and teacher tenure was viewed with a more skeptical eye.³¹ The advent of the NCLB intensified the hard look at teacher tenure.³²

While the exact time and place of the origins of teacher tenure are subject to dispute, the driving force behind the initial push for teacher tenure is clear. During the early campaigns for teacher tenure, teachers had little to no protections against arbitrary dismissal decisions.³³ Teachers—especially women—were dismissed for a wide array of reasons.³⁴ Teachers were fired for getting married, staying out too late, getting pregnant, wearing pants, and a wide variety of other arbitrary reasons.³⁵ Teachers presenting unpopular or controversial topics were also targeted.³⁶ As teachers' unions formed and state statutory schemes came into existence, the landscape of teacher tenure began unfolding and continues today. News sources from around the country describe advocacy groups debating the merits and shortfalls of the teacher tenure system and an outcry for system

²⁵ *Id.*

²⁶ See VAN HORN & SCHAFFNER, *supra* note 22, at 549.

²⁷ See Stephy, *supra* note 22.

²⁸ See VAN HORN & SCHAFFNER, *supra* note 22, at 549; Stephy, *supra* note 22.

²⁹ Stephan Maldonado, *The History of Teacher Tenure* (Feb. 22, 2012), <http://certificationmap.com/teacher-tenure-debate/>.

³⁰ See Stephy, *supra* note 22; see also NAT'L EDUC. ASSOC., RANKINGS OF THE STATES 2012 AND ESTIMATES OF SCHOOL STATISTICS 2013 ix (2012), available at [http://www.nea.org/assets/img/content/NEA_Rankings_And_Estimates-2013_\(2\).pdf](http://www.nea.org/assets/img/content/NEA_Rankings_And_Estimates-2013_(2).pdf) (the total number of schoolteachers in 2012 was approximately 3.1 million).

³¹ See VAN HORN & SCHAFFNER, *supra* note 22, at 549.

³² See generally No Child Left Behind (NCLB) Act of 2001, 107 Pub. L. 110, 115 Stat. 1425 (codified at 20 U.S.C. §§ 1041, 3427, 6052, 6053(e), 6054(b), 6055(h), 6056(a)); Bonner, *supra* note 7.

³³ See Stephy, *supra* note 22.

³⁴ *Id.*

³⁵ See Stephy, *supra* note 22; Sigrid Bathen, *Tracing the roots of teacher tenure*, CAL. J., May 1999, at 10, 17–18, available at <http://www.cde.ca.gov/nr/re/hd/documents/yr1999hd05.pdf>; Michael Rosenfield, *NH Teacher Fired for Refusing to 'Unfriend' Students on Facebook*, CBS (Apr. 7, 2014, 6:10PM), <http://boston.cbslocal.com/2014/04/07/nh-teacher-fired-for-refusing-to-unfriend-students-on-facebook/>.

³⁶ See VAN HORN & SCHAFFNER, *supra* note 22, at 549; Stephy, *supra* note 22.

reform.³⁷ The following section details some of the arguments raised by advocates and opponents of teacher tenure.

III. DIFFERING VIEWS ON TEACHER TENURE

At its inception, teacher tenure sought to remedy clearly unfair employment practices and provide teachers with needed due process protections. However, some argue that as time has progressed, teacher tenure laws have spawned a host of unwanted consequences in public education and allow poorly performing teachers to retain their jobs. Advocates on each side of the debate enumerate several arguments for and against teacher tenure. While far from a comprehensive list of pros and cons of teacher tenure, the following should provide context allowing a more focused look at tenure laws.

A. *Merits of Teacher Tenure*

The NEA, one of the major proponents of teacher tenure, has a mission statement that includes “advocat[ing] collectively” for education professionals.³⁸ The NEA and fellow advocates highlight the virtues of teacher tenure,³⁹ including (1) protection against firing and hiring decisions based on arbitrary, personal, or political reasons; (2) job security; (3) the promotion of innovation in the classroom; (4) assurance of due process protections; and (5) other benefits.⁴⁰

1. *Protection Against Arbitrary Firings*

As stated above, before the existence of teacher tenure laws, teachers could be fired for almost any conceivable reason.⁴¹ Teachers lacked any form of protection against hiring and firing decisions based on discrimination; political maneuverings; personal differences with administrators, students, or parents; and even acts as trivial as wearing pants or staying out “too late.”⁴² Teacher tenure

³⁷ See Turner, *supra* note 5 (arguing for teacher tenure); John Hanna, *Kansas Lawmakers Pass School Funding Bill that Would Eliminate Teacher Tenure*, KANSAS CITY STAR (April 6, 2014), <http://www.kansascity.com/2014/04/05/4940366/kansas-lawmakers-draw-closer-to.html>. Kansas lawmakers gave final approval for a bill eliminating teacher tenure for public school teachers.

³⁸ *NEA's Vision, Mission, and Values*, NAT'L EDUC. ASS'N, <http://www.nea.org/home/19583.htm> (last visited Jan. 19, 2015); *About NEA*, NAT'L EDUC. ASS'N, <http://www.nea.org/home/2580.htm> (last visited Jan. 19, 2015) (The National Education Association is the largest union in the United States and represents public school teachers and teachers in higher education. Each state has a state-level organization, which is directly affiliated with the NEA.).

³⁹ See, e.g., Turner, *supra* note 5.

⁴⁰ See *infra* notes 41–54 and accompanying text.

⁴¹ See *supra* notes 33–35 and accompanying text.

⁴² See VAN HORN & SCHAFFNER, *supra* note 22, at 549; Bertot v. Sch. Dist., 522 F.2d 1171 (10th Cir. 1975) (addressing issues including whether nonrenewal of two high school teachers' contracts amounted to retaliation for proper exercise of First Amendment rights).

provides protections against such arbitrary employment decisions by requiring administrators to show “good” or “just” cause prior to firing a tenured teacher.⁴³ Without such a requirement, administrators would have almost limitless power to hire and fire teachers.

2. *Job Security*

Proponents of teacher tenure maintain that such protection provides well-deserved and needed job security for teachers. As of 2006, teachers earned fifteen percent less weekly than persons working in comparable positions.⁴⁴ The trade-off for this wage disadvantage comes in the form of job security afforded by teacher tenure. Without such security, high-quality teachers might seek alternative career paths that would provide more competitive pay, which would in turn reduce the overall quality of education. However, opponents of tenure argue that merit-based pay is a viable alternative to tenure and would alleviate the concern of teachers earning less than those in comparable positions.⁴⁵

3. *Classroom Innovation*

Without tenure, the structure of the classroom, including what and how curriculum will be taught, can be severely limited.⁴⁶ Teachers likewise lose the ability to teach controversial topics and teach using outside-of-the-box methodology.⁴⁷ Creativity in the classroom promotes critical thinking and problem-solving skills in students:⁴⁸ skills vital to success in the Twenty-first Century job market.⁴⁹

⁴³ See, e.g., WYO. STAT. ANN. § 21-7-110(a)(ix) (2013).

⁴⁴ SYLVIA A. ALLEGRETTO, ET AL., *THE TEACHING PENALTY: TEACHER PAY LOSING GROUND 2* (2008), available at <http://teachertenure.procon.org/sourcefiles/the-teaching-penalty.pdf>. Sixteen professions comparable to teachers were identified in a study including accountants, reporters, registered nurses, computer programmers, clergy, and personnel officers. These professions were chosen for comparison based on occupational “skill level” data, including raw skill requirements and market valuation of those skills, from the Bureau of Labor Statistics National Compensation Survey (NCS). *Id.* at 29–30, 32.

⁴⁵ Ericha Parks, *Nation Pushes for Teacher Merit Pay - The Politics: Good Teachers vs. Bad Teachers*, EXAMINER (Jul. 13, 2009, 8:59 PM), <http://www.examiner.com/article/nation-pushes-for-teacher-merit-pay-the-politics-good-teachers-v-bad-teachers>.

⁴⁶ See Stephy, *supra* note 22; Laura Hibbard, *Naiya Galloway, Teacher's Aide, Allegedly Fired for Calling 'Huckleberry Finn' Racist*, HUFFINGTON POST (Jul. 19, 2012, 11:41 AM), http://www.huffingtonpost.com/2012/07/19/naiya-galloway-teacher-aide-fired-huckleberry-finn-racist_n_1686326.html.

⁴⁷ David McGrath, *Teacher-tenure Proposal Would Weaken Florida Education*, HERALD TRIB. (Apr. 15, 2010), <http://www.heraldtribune.com/article/20100415/COLUMNIST/4151031?p=1&tc=pg>.

⁴⁸ Donald J. Treffinger, *Preparing Creative and Critical Thinkers*, ASSOC. FOR SUPERVISION AND CURRICULUM DEV. (2008), <http://www.ascd.org/publications/educational-leadership/summer08/vol65/num09/Preparing-Creative-and-Critical-Thinkers.aspx>.

⁴⁹ *Id.*

Creativity in teaching promotes creativity in students.⁵⁰ Tenure provides teachers with assurance that they will not lose their jobs simply for choosing to teach unpopular topics, or in non-standardized ways. However, as will be discussed later, the NCLB restricts the manner in which teachers can teach, thus weakening tenure protections.⁵¹ While innovation can certainly enhance classroom learning, the NCLB greatly restricted the level of innovation teachers could engage in. Thus, innovation in the classroom may no longer be a benefit of tenure.

Before the NCLB, teachers could rest easy knowing they could not be fired for developing curricula that did not necessarily fit the district mold. Much of the credit for this educational freedom lies with the tenure system. The passage of the NCLB in 2001, and the imposition of associated requirements on school districts, significantly curtailed teachers' rights to choose their own teaching methods. Teachers were expected to manage classrooms in a manner ensuring students would perform to a federally mandated level in standardized testing. Such requirements choked out the freedom to innovate in the classroom eliminating one of the liberties tenured teachers enjoyed.

4. *Due Process Protections*

Tenured teachers have a property interest in continued employment,⁵² protected under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.⁵³ Tenured teachers cannot be stripped of their interest in continued employment without a hearing and the opportunity to respond.⁵⁴ Teacher tenure helps ensure that teachers enjoy the protections afforded under the Due Process Clause.

5. *Other Benefits*

Identifying additional benefits stemming from tenure sometimes requires revealing the disadvantages of abolishing tenure. Without tenure, teacher turnover would increase. Teachers could be dismissed in the middle of a school year, which would create problems not only for school faculty, but more importantly, for students in the classroom. Replacing a teacher midyear disrupts the learning process and sows confusion among students. Consistency in instruction is important to stability in the classroom.

⁵⁰ JAMI BILES JONES & LORI J. FLINT, *THE CREATIVE IMPERATIVE: SCHOOL LIBRARIANS AND TEACHERS CULTIVATING CURIOSITY TOGETHER* 139–41 (2013).

⁵¹ See *infra* notes 74–82 and accompanying text.

⁵² See *Bishop v. Wood*, 426 U.S. 341, 344 (1976); *Perry v. Sindermann*, 408 U.S. 593, 599 (1972); *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

⁵³ See *Bishop*, 426 U.S. at 344; *Perry*, 408 U.S. at 598; *Roth*, 408 U.S. at 576.

⁵⁴ See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *Metz v. Laramie Cnty. Sch. Dist. No. 1*, 173 P.3d 334, 343–44 (Wyo. 2007).

Because tenure provides a property interest in continued employment and powerful protections, administrators are more likely to carefully and thoughtfully select teachers. Further, administrators have an interest in granting tenure only to high-quality teachers, and thus tenure promotes meaningful review and evaluation of teachers currently on the tenure track. When coupled with such oversight, tenure provides administrators with the chance to weed out underachievers and retain high-quality teachers.

B. Arguments Against Teacher Tenure

While proponents of tenure highlight the virtues of the tenure system, an equally vocal group calls attention to the system's flaws and failings. This group includes school board officials whose hands are often tied by tenure; parents whose children are placed in the classroom with underperforming, apathetic, and at times even abusive teachers; principals who are forced to continue employing such teachers; and others. Opponents of tenure identify several drawbacks, including (1) encouragement of complacency; (2) difficulty and cost of removing underperforming teachers; and (3) inadequate probationary periods.

1. Encouragement of Complacency

Tenured teachers who fully understand their protected position may be tempted to perform at the minimum level necessary to continue drawing a paycheck. Teachers under the protection of tenure understand that absent *good or just* cause, they do not risk losing their jobs. While tenure certainly carries the risk of complacency in the classroom, the majority of teachers do not fall within this *minimal effort* category.⁵⁵ Most teachers perform their jobs well, regardless of the fact that they may be able to perform at a lower level without any repercussions.⁵⁶ Examples certainly exist of teachers pushing the limits of poor performance, but these seem to constitute a minority.⁵⁷

⁵⁵ Jennifer Medina, *Competing Views of Teacher Tenure are on Display in California Case*, N.Y. TIMES (Apr. 16, 2014), <http://www.nytimes.com/2014/04/17/education/competing-views-of-teacher-tenure-are-on-display-in-california-case.html>.

⁵⁶ Michelle Rhee, *Students Win when Great Teachers are Protected*, ORANGE CNTY. REG. (Apr. 21, 2014, 10:03 AM), <http://www.ocregister.com/articles/teacher-610441-teachers-students.html>.

⁵⁷ See, e.g., Michael Chen, *Attorney: Complaint Against Cellphone-loving Teacher may End Tenure of Lincoln High Principal*, ABC 10 NEWS (Apr. 23, 2014, 6:42 PM), <http://www.10news.com/news/investigations/attorney-complaint-against-cellphone-loving-teacher-may-end-tenure-of-lincoln-high-principal> (discussing a teacher who routinely talked on his cellphone during class time); Jason Song, *Firing Teachers can be a Costly and Tortuous Task*, LOS ANGELES TIMES (May 3, 2009), <http://articles.latimes.com/2009/may/03/local/me-teachers3> (providing several examples of misconduct of teachers including abusive comments, physical assault, sexually pervasive comments directed at students, and denial of meals to misbehaving students).

2. *Difficulty and Cost of Removing Underperforming Teachers*

Probably the most cited reasons for the abolishment of teacher tenure are the cost and burdensome procedural requirements surrounding the dismissal of a tenured teacher.⁵⁸ While numbers and figures vary across the country, dismissing a tenured teacher costs a school district time and money.⁵⁹ The procedural protections afforded tenured teachers may allow a teacher whom a school district is seeking to fire to retain her position for months or even years.⁶⁰ During this time, the tenured teacher is entitled to a hearing before an impartial hearing officer.⁶¹ Even after a successful dismissal, the teacher may appeal the decision in court, requiring the district to spend thousands of dollars on legal fees, and further delaying the dismissal process. Rather than enter this proverbial hornet's nest, school districts often resort to retaining the problem teacher, or seeking other means of severing the employment relationship.⁶²

3. *Inadequate Probationary Periods*

Tenure in the K–12 setting is notably different than tenure in higher educational institutions, which usually requires research and publication.⁶³ Tenure in the K–12 realm, on the other hand, requires only that a teacher teach in a school district for a certain number of years.⁶⁴ In most states, teachers are eligible for tenure after three consecutive years of teaching.⁶⁵ Opponents of tenure argue that three years (or less) is an inadequate probationary period that fails to sufficiently measure the quality (or ineptitude) of a teacher.⁶⁶ Further, the

⁵⁸ See, e.g., Frank Eltman, *Firing Tenure Teachers isn't Just Difficult, it Costs You*, USA TODAY (Jun. 30, 2008, 3:29 PM), http://usatoday30.usatoday.com/news/education/2008-06-30-teacher-tenure-costs_N.htm (explaining that the cost of firing one incompetent teacher in New York was approximately \$250,000).

⁵⁹ *Id.*

⁶⁰ See, e.g., WYO. STAT. ANN. § 21-7-110(a)(vii) (2013) (requiring two consecutive years of teacher evaluations indicating inadequate performance before dismissal can occur).

⁶¹ See, e.g., *id.* § 21-7-110(c)–(e), (g)–(h).

⁶² See Eltman, *supra* note 58 (noting that of the 55,000 teachers in New York, only ten were fired in the previous year).

⁶³ See Robert B. Townsend, *A Survey of Tenure Practices in History: Departments Indicate Books Are Key and Success Rates for Tenure High*, AM. HISTORICAL ASSOC. (Feb. 2004), <http://www.historians.org/publications-and-directories/perspectives-on-history/february-2004/a-survey-of-tenure-practices-in-history>.

⁶⁴ See Marcus Winters, *Challenging Tenure in D.C.*, WASH. TIMES (Nov. 5, 2008), <http://www.washingtontimes.com/news/2008/nov/05/challenging-tenure-in-dc/>.

⁶⁵ NAT'L COUNCIL ON TEACHER QUALITY, TEACHER QUALITY ROADMAP 40 (2013), available at http://www.nctq.org/dmsView/Final_Dayton.

⁶⁶ See Dan Goldhaber & Michael Hansen, *Is it Just a Bad Class? Assessing the Stability of Measured Teacher Performance* 27 (Ctr. on Reinventing Pub. Educ., Working Paper No. 2008_5, 2008), available at <http://teachertenure.procon.org/sourcefiles/is-it-just-a-bad-class.pdf>.

first two to three years of teaching does not effectively predict a teacher's level of performance post-tenure.⁶⁷ Without a meaningful and extensive probationary period, proper evaluation of teachers cannot take place, and the potential for granting tenure to poor-performing teachers increases.

Bearing in mind the preceding discussion of the advantages and limitations of teacher tenure, this article next focuses on the ever-evolving movement toward teacher tenure reform in the United States.

IV. TEACHER TENURE REFORM IN THE UNITED STATES

The current fate of teacher tenure around the country is tenuous at best.⁶⁸ Some states are in the process of instituting legislation to completely abolish teacher tenure,⁶⁹ while others seek to scale it back, or impose conditions or limitations on obtaining and retaining tenure.⁷⁰ Tenure reform received a substantial shot in the arm with the advent of the NCLB. While the NCLB never explicitly discusses teacher tenure, its focus on student achievement measures creates increased pressure on teachers and administrators.⁷¹ This pressure partially drives the call for teacher tenure reform. While many of the NCLB's several hundred pages of legislation fall outside the scope of this article, Title II of the act—preparing, training, and recruiting high-quality teachers and principals⁷²—parallels the primary focus of this article. Part A of this section gives a brief overview of the NCLB, focusing primarily on the portions relating to teachers. Part B discusses linking student performance measures to teacher evaluations and the resulting effect on teacher tenure.⁷³

⁶⁷ See *id.* at 31.

⁶⁸ *Teacher Tenure Rules are in State of Flux Across the Nation*, PBS NEWSHOUR (Mar. 29, 2014, 1:37 PM), <http://www.pbs.org/newshour/updates/teacher-tenure-rules-state-flux/>.

⁶⁹ See, e.g., *Kansas lawmakers approve school funding bill that eliminates teacher tenure*, WICHITA BUS. J. (Apr. 7, 2014, 7:27 AM), http://www.bizjournals.com/wichita/morning_call/2014/04/kansas-lawmakers-approve-school-funding-bill-that.html; Shannon O'Brien, *Teacher Tenure at Stake for November Ballot*, CBS ST. LOUIS (May 6, 2014, 12:25 PM), <http://stlouis.cbslocal.com/2014/05/06/teacher-tenure-at-stake-for-november-ballot/>; Lizette Alvarez, *Florida House Approves Ending Tenure for New Teachers*, N.Y. TIMES (Mar. 16, 2011), <http://www.nytimes.com/2011/03/17/us/17florida.html>.

⁷⁰ See, e.g., WYO. STAT. ANN. § 21-7-104 (2013); John Rogers, *Attorneys argue value of California teacher tenure laws*, LOS ANGELES DAILY NEWS, (Mar. 27, 2014, 9:50 PM), <http://www.dailynews.com/social-affairs/20140327/attorneys-argue-value-of-california-teacher-tenure-laws>; Bob Grotenhuis, *Colorado Lawmakers Take Aim at Teacher Tenure*, KOAA5 NBC, (Apr. 7, 2014), <http://www.koaa.com/news/colorado-lawmakers-take-aim-at-teacher-tenure/>; Goldhaber & Hansen, *supra* note 66, at 1. (listing Tennessee and Texas as states with accountability systems for teachers).

⁷¹ See No Child Left Behind (NCLB) Act of 2001, 107 Pub. L. 110 § 6161, 115 Stat. 1425 § 6161.

⁷² See *id.* § 2101.

⁷³ See *infra* notes 83–96 and accompanying text.

A. *No Child Left Behind Act of 2001*

The NCLB, promulgated in 2001, came about as a direct response to the deteriorating performance of K–12 students, especially those in economically disadvantaged and minority communities.⁷⁴ The NCLB requires federally funded schools to promulgate annual student achievement assessments that measure student performance.⁷⁵ Additionally, schools receiving federal funds must attain adequate yearly progress (AYP) in test scores.⁷⁶ Various penalties for failing to attain AYP include (1) public labeling of schools as “in need of improvement”; (2) imposition of requirements to offer free tutoring and other supplemental education programs; and (3) even closing of underperforming schools.⁷⁷

Pressures associated with the new requirements placed on school districts and the looming penalties have been serious concerns for school districts and administrators across the United States. Over the past several years, educators focused on improving student achievement and compliance with the NCLB. However, implementation of the NCLB system has been, for the most part, a failure.⁷⁸ A lack of meaningful improvement under the NCLB may have caused lawmakers and leaders in education to turn to other means of achieving AYP. Some teachers have responded to these new demands by structuring curriculum around achieving AYP rather than facilitating individual student learning.⁷⁹ While not inherently ill-advised,⁸⁰ such a structure can have negative results in the form of teachers who unduly focus on helping struggling students perform better on standardized tests and explaining the tricks and shortcuts of the standardized tests to promote better scores, rather than emphasizing learning and retaining the material.⁸¹

Another result of the NCLB is the push to link student achievement measures to teacher evaluations.⁸² Such a link has the potential to increase accountability for

⁷⁴ See 107 Pub. L. 110 § 1001, 115 Stat. 1425 § 1001. Section 1001 states that the purpose of NCLB is “to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.” *Id.*

⁷⁵ *Id.*

⁷⁶ See *id.* § 6161.

⁷⁷ See *id.* § 6163.

⁷⁸ See Strauss, *supra* note 9.

⁷⁹ *NCLB Boosts Temptation to Cheat*, FAIRTEST, <http://fairtest.org/nclb-boosts-temptation-cheat> (last visited Dec. 4, 2014).

⁸⁰ On the surface, AYP requirements would appear to further the goal of student academic progression, since students are required to show progress in several core subjects. However, AYP fails to account for the individual circumstances of students and districts, and opts rather for strict formulas to determine whether state school districts are meeting the AYP requirements.

⁸¹ See FAIRTEST, *supra* note 79.

⁸² See, e.g., WYO. STAT. ANN. §§ 21-7-104(a), 21-3-110(a)(xviii), 21-2-304(b)(xv) (2013).

teachers, but also creates the risk of evaluating teachers using criteria oftentimes outside their control.

B. Linking Student Performance Measures to Teacher Evaluations

Linking student performance measures to teacher evaluations seems like a logical step toward increased accountability for teachers. Teachers have control over the day-to-day activities in their classrooms, and thus should be held accountable for the performance of the students they teach. Further, it would seem logical to infer that high-quality teachers produce high-performing students. However, factors exist which may cast doubt on the logic of the above link. For example, a teacher who receives otherwise high marks on teacher evaluations could concurrently receive low marks in the areas of the evaluation linked to student performance.⁸³ The school district may have placed a proven and seasoned teacher with poor-performing students in an effort to improve their learning. Low marks in areas of the teacher evaluation linked to student performance, in this instance, would be a poor indicator of the overall effectiveness of the teacher.

Additionally, teachers have no control over the academic performance level of their students when they first enter the classroom. Student academic progress, despite efforts toward educational equity, varies according to several factors.⁸⁴ A teacher's window of influence for a student exists almost exclusively within the walls of her classroom during school hours. Efforts can certainly be made outside the classroom,⁸⁵ but for the most part, a teacher's responsibility to educate exists in the classroom.⁸⁶ A student's academic progress is affected by many factors including the student's family environment,⁸⁷ socioeconomic status,⁸⁸ whether English is the student's first language,⁸⁹ etc..⁹⁰ Because teachers have little to no

⁸³ See Valerie Strauss, *Don't Rush to Link Teacher Evaluation to Student Achievement*, WASH. POST (May 14, 2010, 10:30 AM), <http://voices.washingtonpost.com/answer-sheet/national-standards/lets-not-rush-to-link-teacher.html>.

⁸⁴ See *id.* Factors include prior experience in school, prior teachers, learning support outside of school, parental involvement, and other family and societal factors.

⁸⁵ See *id.*

⁸⁶ See *id.*

⁸⁷ See Christine Kim, *Academic Success Begins at Home: How Children Can Succeed in School*, THE HERITAGE FOUND. (Sept. 22, 2008), <http://www.heritage.org/research/reports/2008/09/academic-success-begins-at-home-how-children-can-succeed-in-school>.

⁸⁸ See Nikki L. Aikens & Oscar Barbarin, *Socioeconomic Differences in Reading Trajectories: The Contribution of Family, Neighborhood, and School Contexts*, 100 J. EDUC. PSYCHOLOGY 235, 235 (2008).

⁸⁹ See Christine Armario, *U.S. Bilingual Education Challenge: Students Learning English as Second Language at Risk*, HUFFINGTON POST (Apr. 14, 2013, 9:28 AM; updated Jun. 14, 2013, 5:12 AM), http://www.huffingtonpost.com/2013/04/14/us-bilingual-education-_n_3079950.html.

⁹⁰ Interview with Henry Bailey, Chairman of the Board of Trustees, Laramie County School District #1, in Cheyenne, Wyo. (Mar. 28, 2014) (explaining that several factors contribute to overall student success); see also Strauss, *supra* note 83.

influence in these factors, a teacher's ultimate influence on her students' academic progress is limited to what takes place in the classroom.⁹¹ Therefore, any correlation between teacher evaluations and student academic achievement measures should likewise be limited to teacher actions in the classroom. As this article discusses later, linking student performance to teacher evaluation could effectively increase accountability for teachers.⁹² The link must include factors properly reflecting a teacher's effectiveness, rather than factors outside their control.⁹³

Wyoming is currently reforming its teacher tenure laws, including the requirement linking student achievement measures to teacher evaluations.⁹⁴ Wyoming's teacher tenure statutes underwent an important amendment in 2011.⁹⁵ The 2011 amendments, which must be implemented by the 2016–2017 school year, have the potential to substantially affect a tenure-status teacher's rights and protections and will significantly change the tenure landscape in Wyoming.⁹⁶ The following section gives an overview of tenure law in Wyoming and provides suggestions for where it needs to go from here.

V. TEACHER TENURE IN WYOMING

As part of the teacher tenure reform happening around the country, teacher tenure law in Wyoming is evolving.⁹⁷ Amendments to the statutory scheme for teacher tenure created new teacher evaluation requirements requiring full implementation by the 2016–2017 school year.⁹⁸ These amendments suggest a compromise by the legislature, which failed to enact a bill for the complete abolishment of teacher tenure in 2011.⁹⁹ The new evaluation requirements appear to increase accountability for K–12 teachers statewide. Before examining the statutory amendments and their effects on teacher tenure, Part A provides a brief history of teacher tenure law in Wyoming to provide legal context for the amendments.

⁹¹ Bailey, *supra* note 90.

⁹² See *infra* notes 120–22, 129–33 and accompanying text.

⁹³ See *infra* notes 120–22, 129–33 and accompanying text.

⁹⁴ See Teacher Accountability Act, 2011 Wyo. Sess. Laws, ch. 182.

⁹⁵ See *id.*

⁹⁶ See *id.*

⁹⁷ See *id.*

⁹⁸ See *id.*

⁹⁹ S. File 52, 61st Leg., 2011 Gen. Sess. (Wyo. 2011).

A. *History of Teacher Tenure in Wyoming*

Prior to 1967, Wyoming law lacked any kind of tenure provision for teachers.¹⁰⁰ During this time, teachers did not have a property interest in continuing employment and had minimal protection against being fired.¹⁰¹ In 1967, Wyoming enacted a statute creating a distinction between an initial contract teacher and a continuing contract teacher.¹⁰² The statute defined a continuing contract teacher as:

- (A) Any initial contract teacher who has been employed by the same school district in the state of Wyoming for a period of three (3) consecutive school years, and has had his contract renewed for a fourth consecutive school year; or
- (B) A teacher who has achieved continuing contract status in one (1) district, and who without lapse of time has taught two (2) consecutive school years and has had his contract renewed for a third consecutive school year by the employing school district.¹⁰³

An initial contract teacher was defined as “[a]ny teacher who has not achieved continuing contract status.”¹⁰⁴ A continuing contract teacher was essentially a teacher who had been granted tenure status and “employed by each school district on a continuing basis from year to year without annual contract renewal.”¹⁰⁵

¹⁰⁰ See Standard School Employment Contract, 1957 Wyo. Sess. Laws, ch. 29, § 1. Section 1 reads as follows:

Section 1. The Attorney General of the State of Wyoming is authorized and directed to prepare, and revise from time to time, a standard form of employment contract for the use of school districts in Wyoming which desire to use the same. Said form of contract shall make provision, among other things:

- (1) That the employer-employee relationship between a school district and its employees shall continue until terminated by specified affirmative action of either the employee or the employer.
- (2) That the employer and the employee be protected by appropriate guarantees against untimely repudiation after execution.
- (3) *That no promise or guarantee of any right of tenure in employment or office shall be implied.*

Id. (emphasis added).

¹⁰¹ *Id.*

¹⁰² See Wyoming Teachers Employment Act, 1967 Wyo. Sess. Laws, ch. 182, § 4. Section 4 states that “[a] continuing contract teacher shall be employed by each school district on a continuing basis from year to year without annual contract renewal . . .” *Id.*

¹⁰³ See *id.* § 3.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* § 4.

Beyond granting automatic renewal of contracts for continuing contract teachers, the statute established additional protections. Continuing contract teachers could be fired only for “good cause.”¹⁰⁶ Further, to dismiss a continuing contract teacher, a school district had to follow certain procedural steps, including giving notice of termination by April 15th of the current school year,¹⁰⁷ and allowing for a hearing in front of a hearing officer.¹⁰⁸

The new statutory scheme provided teachers in Wyoming with the protections of tenure without any of the limitations posed by teacher tenure reform. Essentially, continuing contract teachers had strict teacher tenure. For nearly fifty years, teachers in Wyoming enjoyed these additional protections. However, over the last decade, the teacher tenure discussion in Wyoming has led to legislative action in the form of statutory amendments. The amendments to the Wyoming teacher tenure statute will potentially change how tenure operates in Wyoming. Part B addresses the statutory amendments to the Wyoming teacher tenure statutes and focuses primarily on the 2011 amendment.

B. Amendments to the Wyoming Teacher Tenure Statute

Over the course of nearly fifty years—from 1967 to now—the Wyoming teacher tenure statute has undergone only three amendments.¹⁰⁹ Of the three, only the 2011 amendment provides meaningful changes for continuing contract teachers. The 1997 amendment added a provision for salary credit to continuing contract teachers with prior years of service teaching in Wyoming.¹¹⁰ In 2001, an amendment added a provision granting the 1997 amendment credit to teachers in the regional developmental preschool program.¹¹¹ The 2011 amendment required continuing contract teachers to undergo annual satisfactory performance evaluations.¹¹² The Wyoming State Board of Education¹¹³ and Wyoming school district boards of trustees will promulgate the performance evaluation systems.¹¹⁴ The statutory language requires the State Board of education to:

¹⁰⁶ *Id.* § 9; *see also* O’Melia v. Sweetwater Cty. Sch. Dist., 497 P.2d 540, 542 (Wyo. 1972) (“absent good cause to the contrary a continuing contract teacher has a reasonable expectation of continued employment”).

¹⁰⁷ Wyoming Teachers Employment Act, 1967 Wyo. Sess. Laws, ch. 182, §§ 5, 9.

¹⁰⁸ *Id.* § 9; *see also* Simineo v. Sch. Dist., 594 F.2d 1353, 1356 (10th Cir. 1979) (“A discharge is lawful only if substantial evidence shows the existence of good cause, and the teacher is given a hearing by an impartial board as required by Wyoming’s Administrative Procedure Act.”).

¹⁰⁹ 1997 Wyo. Special Sess. Laws, ch. 3, § 506; 2001 Wyo. Sess. Laws, ch. 123, § 1; 2011 Wyo. Sess. Laws, ch. 182, § 1.

¹¹⁰ *See* 1997 Wyo. Special Sess. Laws, ch. 3, § 506.

¹¹¹ *See* 2001 Wyo. Sess. Laws, ch. 123, § 1.

¹¹² *See* 2011 Wyo. Sess. Laws, ch. 182, § 1.

¹¹³ *See* WYO. STAT. ANN. § 21-2-304(a)(xv) (2013).

¹¹⁴ *See id.* § 21-3-110(a)(xviii).

Not later than July 1, 2016, promulgate rules and regulations for the implementation and administration of a comprehensive school district teacher performance evaluation system *based in part upon defined student academic performance measures as prescribed by law, upon longitudinal data systems and upon measures of professional practice according to standards for professional practice prescribed by board rule and regulation. The evaluation system shall clearly prescribe standards for highly effective performance, effective performance, performance in need of improvement and ineffective performance.* Rules and regulations adopted under this paragraph shall to the extent the statewide accountability system is not compromised, allow districts the opportunity to refine the system to meet the individual needs of the district. The performance evaluation system shall also include reasonable opportunity for state and district provision of mentoring and other professional development activities made available to teachers performing unsatisfactorily, which are designed to improve instruction and student achievement.¹¹⁵

Wyoming school district boards of trustees likewise have new responsibilities under the amendments. Under the statute, the boards of trustees must:

Not later than school year 2016-2017 and each school year thereafter, establish a teacher performance evaluation system and require the performance of each continuing contract teacher to be evaluated summatively *based in part upon student achievement measures as prescribed by rule and regulation of the state board under W.S. 21-2-304(b)(xv).*¹¹⁶

Such requirements have the potential to significantly alter the rights of a tenured teacher in Wyoming. While the language of these amendments could increase accountability for teachers and thus ensure the best teachers are in front of Wyoming students, the amendments also suffer from flaws that threaten their effectiveness. Part C discusses some of these problems.

C. Problems with the 2011 Amendments

The 2011 amendments to the Wyoming teacher tenure statutes seem to focus on improving accountability among teachers and administrators across the State of Wyoming. Ideally the amendments will enhance the education of

¹¹⁵ *Id.* § 21-2-304(b)(xv) (emphasis added).

¹¹⁶ *Id.* § 21-3-110(a)(xviii) (emphasis added).

Wyoming students by identifying which teachers are performing effectively and which are underperforming. Further, the amendments allow for the dismissal of continuing contract teachers who receive poor evaluations for two straight years.¹¹⁷ On the surface, the amendments seem to progress toward alleviating some of the drawbacks of teacher tenure, including reducing the administrative burden and cost of firing poor-performing teachers. However, the statute as it currently stands allows school districts to structure evaluation systems that directly mirror evaluation systems already in place, or alternatively, completely ignore the statutory requirements altogether. Further, any actions seeking the removal of ineffective teachers are hamstrung by lengthy and overly protective remedial measures. Specifically, the 2011 amendment (1) lacks any enforcement mechanism, (2) lacks specificity regarding the structure and implementation of teacher evaluations, and (3) mandates overly protective remedial measures for underperforming teachers. Each of these problems will be addressed below.

1. Lack of Enforcement Provision

Any teeth the 2011 amendments have in shaping Wyoming teacher tenure law are blunted by the fact that the amendments lack any kind of enforcement provision.¹¹⁸ While the likelihood that Wyoming school districts will outright ignore the new requirements is low, the statute does not expressly include any negative consequences for doing so. Neither the Wyoming State Board of Education nor boards of trustees in the various school districts will face any penalty for failure to establish the new teacher evaluation systems under the amendment.¹¹⁹ Without enforcement provisions, those tasked with promulgating the new evaluation systems, specifically the Wyoming Board of Education and Wyoming school districts, can simply refuse to make such changes without any repercussions.

There may be a reason why the Wyoming legislature did not include an enforcement provision. Possibly, an enforcement provision seemed unnecessary because the legislature assumed that the Board of Education and school districts would follow statutory law. Notably, the 2011 amendments include elements of the NCLB,¹²⁰ which does contain enforcement provisions.¹²¹ Because the 2011 amendments draw elements of the NCLB that have explicit enforcement provisions, including provisions mandating the implementation of the new teacher evaluation systems under the 2011 amendments, it seems unnecessary to include enforcement provisions in the amendments.

¹¹⁷ 2011 Wyo. Sess. Laws, ch. 2, § 1.

¹¹⁸ *See id.*

¹¹⁹ *See id.*

¹²⁰ *See id.* Specifically, the 2011 amendments included the requirement that teacher evaluations be linked to student academic performance measures.

¹²¹ *See supra* note 74 and accompanying text.

2. *Lack of Specificity*

The 2011 amendments added to the teacher tenure statute important language requiring continuing contract teachers to undergo an annual teaching evaluation and making tenure contingent on satisfactory performance under those evaluations.¹²² However, the language mandating the new teacher evaluation system fails to provide detail regarding how the systems should look, operate, and be implemented.¹²³

The fact that the 2011 amendments fail to direct how teacher evaluation systems should look or operate is not necessarily a bad thing. Wyoming takes a conservative approach to education and seeks to solve problems on the local level. Thus, leaving the structuring of teacher evaluation systems in the hands of individual school districts and possibly individual schools themselves seems to comport with this view of local control. In addition, the needs of school districts around Wyoming vary. A one-size-fits-all model of teacher evaluation would most likely fail to address the eclectic needs of school districts around the state and would likely face public disapproval.

While leaving the shaping of the teacher evaluation systems to individual districts seems to have obvious benefits, it also has some major drawbacks. Tailoring programs to the diverse needs of school districts around the state completely eliminates any possibility of providing uniform evaluation results. Given the ambiguous language of the 2011 amendments regarding teacher evaluations, school districts are free to interpret the provisions of the amendments in almost any conceivable way. The meaning of the phrase “student academic performance measures”¹²⁴ in Laramie County might differ entirely from its meaning in Fremont County. The rubric for “highly effective performance, effective performance, performance in need of improvement, and ineffective performance”¹²⁵ may look one way in Albany County and another way in Goshen County.

Variation in the establishment and implementation of the teacher evaluation systems around Wyoming may also create chaos in the teacher employment process. Teachers seeking employment in Wyoming would have no concrete standard under which their jobs and ultimately their tenure status would be reviewed. The standard could vary drastically, depending on the district in which the teacher seeks employment. This could lead to higher turnover as teachers migrate toward districts interpreting the new teacher evaluation system requirements in a more teacher-friendly manner. Administrators may also feel pressured to relax the

¹²² See 2011 Wyo. Sess. Laws, ch. 182, § 1.

¹²³ See *id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

standards under which teachers are evaluated to avoid losing high-quality teachers to other districts with less demanding standards.

Along with the potential problem of varying implementation throughout Wyoming is the concern that little to no implementation will take place in response to the 2011 amendments. Without specific standards for the creation and implementation of teacher evaluations, school districts might implement few to no changes to their current evaluation systems and instead conduct “business as usual.” In speaking with members of the school district boards of trustees for Albany and Laramie counties, it became evident that teacher evaluation systems currently used by those two districts do not differ radically from the evaluation system proffered in the 2011 amendments.¹²⁶ Board members indicated that the amendments most likely will not have a noticeable impact on the evaluation systems currently in place.¹²⁷ If school boards have already established and are implementing effective teacher evaluation systems, “business as usual” may actually work. These school boards will have no trouble adhering to the new requirements for teacher evaluations because, for all intents and purposes, they have already been doing so. However, for school districts that have historically failed to provide meaningful teacher evaluations, or that do not currently have any formal teacher evaluation systems, “business as usual” poses a real and continuing threat to the overall goal of placing high-quality teachers in front of Wyoming students.

Finally, lack of specificity regarding how teacher evaluations should relate to student achievement measures also render the 2011 amendments problematic.¹²⁸ Nothing in the statute describes how to link the evaluations to the measures: it specifies only that the teacher evaluation system should be “based in part upon student achievement measures as prescribed by law.”¹²⁹ As discussed above, absent statutory delineation of the appropriate link between teacher evaluations and student achievement measures, teacher evaluations potentially assess performance based on factors often entirely outside the teachers’ control.¹³⁰ This kind of evaluation is not only unfair to the teacher, but utterly fails to provide meaningful data about teacher effectiveness.

3. *Overly Protective Remedial Measures*

The 2011 amendments also aimed to simplify the process of removing ineffective teachers. The mandated annual teacher evaluation system could help

¹²⁶ Bailey, *supra* note 90; Interview with Mike Hamel, Assistant Superintendent – Personnel & Quality Learning, Albany County School District #1, in Laramie, Wyo. (Apr. 2, 2014).

¹²⁷ Bailey, *supra* note 90; Hamel *supra* note 126.

¹²⁸ See 2011 Wyo. Sess. Laws, ch. 182, § 1.

¹²⁹ *Id.*

¹³⁰ See *supra* notes 84–93 and accompanying text.

achieve this result, but the statute also contains provisions that complicate the removal process. First, the 2011 amendments include a new reason for which a teacher may be suspended or dismissed.¹³¹ While providing an additional justification for removing underperforming teachers, this new reason for suspension or dismissal can only be exercised after a significant amount of time has passed¹³² and if underperformance persists for at least two consecutive years.¹³³ This means that an ineffective teacher will continue to teach for at least two years before a school can institute any kind of dismissal action under the statute. This poses a problem for two reasons: first, two years is far too long a time for an ineffective teacher to be teaching second, an ineffective teacher who receives an report of ineffective performance may merely shape up just enough to avoid a second ineffective performance evaluation. Upon receiving an evaluation rating higher than “ineffective performance,” the teacher may return to ineffective teaching methods, knowing her job is safe for at least another full year. This remedial requirement essentially ensures only that ineffective teachers will shape up long enough to reset their evaluation clock.

Further, the 2011 amendments require that the teacher evaluation system “also include reasonable opportunity for state and district provision of mentoring and other professional development activities made available to teachers performing unsatisfactorily”¹³⁴ While the statute fails to provide specific information about the kinds of opportunities districts must provide, such opportunities will inevitably impede the dismissal of ineffective teachers. Such mentoring and professional development of ineffective teachers can certainly provide opportunities for growth and improvement, but this improvement occurs at the expense of students who have already suffered from the ineptitude of the underperformer.

In order to effectuate the kind of improvement in accountability for teachers sought by the 2011 amendments, certain changes to the statute must be made. Part D offers some suggestions for the improvement of the 2011 amendment language, and gives direction to school boards for effective implementation of the amendment.

D. Solutions and Suggestions

The 2011 amendments to the Wyoming teacher tenure laws have the potential to reform teacher tenure in a way that will further the goal of placing the best

¹³¹ See 2011 Wyo. Sess. Laws, ch. 182, § 1 (allowing for the suspension or dismissal of teachers for inadequate performance under the new teacher evaluation system for two consecutive years).

¹³² See *id.*

¹³³ See *id.*

¹³⁴ *Id.*

possible teachers in front of Wyoming students. This section of the article provides possible solutions to the three problems from which the 2011 amendments suffer: (1) adding an enforcement provision to the statute, (2) clarifying ambiguous terms and provisions within the statute, and (3) limiting the protection provided by statutorily required remedial steps.

1. *Enforcement Provision*

As mentioned above, the 2011 amendment suffers a lack of any kind of enforcement provision.¹³⁵ Without an enforcement provision in place, the legislature runs the risk of the State Board of Education and school boards of trustees ignoring or curtailing changes to evaluation procedures mandated by the amendments. Amending the statute to include language detailing sanctions and penalties for failing to promulgate the teacher evaluation system would alleviate this possible problem. Such language would better inform the Wyoming Board of Education and Wyoming school districts of the importance of implementing the statutory requirements. While this article does not specifically identify potential sanctions or penalties, it merely notes that such penalties must be enforceable and severe enough to ensure compliance with the statutory requirements.

2. *Clarify Ambiguous Terms and Provisions*

To remedy the lack of specificity in the amendments, the Wyoming legislature should provide further details about the teacher evaluation system, including defining ambiguous terms such as “longitudinal data systems” and “standards for professional practice.”¹³⁶ As stated above, a one-size-fits-all approach to the teacher evaluation system is not the answer. Wyoming’s school districts have varied strengths and face different challenges. Some kind of balance must be struck between completely dictating the way teacher evaluations should be implemented and leaving the decision entirely to the school districts. The legislature could provide general guidelines regarding “standards for highly effective performance, effective performance, performance in need of improvement, and ineffective performance.”¹³⁷ Such guidance would assist school districts in crafting evaluation systems that are both flexible enough to meet a district’s individual needs, and uniform enough to ensure a certain level of statewide uniformity.

The statute must better define the link between teacher evaluations and student achievement measures. Requiring that teacher evaluations be “based in part upon student academic performance measures as prescribed by law” does

¹³⁵ See *supra* notes 118–21 and accompanying text.

¹³⁶ 2011 Wyo. Sess. Laws, ch. 182, § 1.

¹³⁷ *Id.*

little to explain the scope of such a basis.¹³⁸ As stated above, such a broad approach to the link between teacher evaluation and student performance places teachers under scrutiny for circumstances entirely outside their control.¹³⁹ Any link between teacher evaluations and student achievement measures must be based on interactions between the teacher and student, and exclude any factors outside that scope. A teacher's ability to influence the learning of his students occurs almost exclusively in the classroom setting. Therefore, any link between student achievement and an evaluation of that teacher's effectiveness should fall within the scope of what occurs in the classroom. Additionally, teachers have no control over a student's academic level when the student enters the classroom. Teachers struggle with the challenge of educating students with a wide spectrum of academic progress. Therefore, any link of student achievement to teacher evaluation must both reflect the individual progress of each student and cover the timeframe for which the teacher and student interact in order to properly correlate the teacher's efforts with the student's academic development.

Currently, Albany County School District #1 implements Measure of Academic Progress (MAP) testing,¹⁴⁰ which evaluates a student's progress at the beginning, middle, and end of a school year.¹⁴¹ MAP also tracks each student according to his or her initial test performance and projects the academic progression individual students should achieve.¹⁴² This method of testing could prove useful in linking teacher evaluations to student achievement measures. MAP testing is both individualized and narrow enough in scope to provide meaningful data for use in evaluating teacher performance. While certainly not the only proper form of student testing, MAP testing represents one form of testing that Wyoming school districts could use in linking student achievement measures to teacher evaluations.

3. *Limit Protection of Remedial Provisions*

Under the current statutory language of the Wyoming teacher tenure statute, a district may dismiss a teacher for "inadequate performance as determined through performance evaluation tied to student academic growth for at least two (2) consecutive years . . ." ¹⁴³ To avoid prolonged employment of an ineffective teacher, the statute should be amended to allow suspension or dismissal after only one evaluation indicating inadequate performance. While this may seem brash, it is important to note that the statute does not require suspension or dismissal

¹³⁸ *Id.*

¹³⁹ See *supra* notes 84–93 and accompanying text.

¹⁴⁰ Hamel, *supra* note 126.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ WYO. STAT. ANN. § 21-7-110(a)(vii) (2013).

of the teacher. Indeed, even as currently enacted, the statute merely enumerates reasons for the school board and superintendent making a suspension or dismissal decision.¹⁴⁴ The school board has and will continue to have freedom to use the remedial provisions articulated in the statute and seek improvement from an inadequately performing teacher for as long as it sees fit. Allowing suspension or dismissal after one inadequate performance review grants the school board more flexibility in its employment decisions.

VI. CONCLUSION

The employment arena for teachers in Wyoming is currently a buyer's market. Mike Hamel, Assistant Superintendent of Albany County School District #1, said that several of the current job openings available in the district have hundreds of applicants.¹⁴⁵ Some of the more difficult positions—including positions for paraprofessionals working with special-needs students—had fewer applicants, but still enough that the district had a wide pool of candidates from which to choose.¹⁴⁶ Mr. Hamel explained that we need not retain poorly performing teachers in Wyoming:¹⁴⁷ the state has an abundance of qualified and quality teachers seeking employment.¹⁴⁸ Placing these quality teachers in front of Wyoming students merely requires removing underperforming teachers as quickly as possible, and selecting the best replacement candidate from the extensive hiring pool.

Teacher tenure in Wyoming is on the verge of monumental changes. What those changes will look like will depend significantly on the efforts of the Wyoming State Board of Education and the boards of trustees of Wyoming school districts. Implementing a teacher evaluation system that effectively measures a teacher's performance in the classroom, coupled with a streamlined means of removing ineffective teachers, provides a pathway toward filling our classrooms with high-quality teachers and improving education for students across the State of Wyoming.

¹⁴⁴ *Id.*

¹⁴⁵ Hamel, *supra* note 126.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*