INDEPENDENCE
INSTITUTE.ORG

Eternal LIFO:
Unlawful Layoff Procedures in Unionized Colorado School Districts

by Ross Izard

IP-9-2016 | November 2016

727 East 16th Avenue | Denver, Colorado 80203

www.IndependenceInstitute.org | 303-279-6536 | 303-279-4176 fax

Introduction

Passed in 2010, Senate Bill 191 was a landmark piece of education reform legislation that garnered significant bipartisan support, including unanimous support from Republican legislators. The bill amended Colorado's Licensed Personnel Performance Evaluation Act[1] and the Teacher Employment, Compensation, and Dismissal Act (TECDA)[2] to align state statute more closely with the goal of ensuring that every student is taught by an effective teacher.

The importance of this endeavor is difficult to overstate. Research has so consistently shown that teachers are the single most important school-related factor in students' academic performance that the finding is nearly undisputed—a rarity in social science research.[3]

There is also substantial evidence that the benefits of effective teaching extend far beyond a student's school years. One rigorous empirical study of 2.5 million students found that replacing an ineffective teacher with even an average teacher would increase the lifetime earnings of a single classroom of students by $267,000.[4] The same study found that the students of high-performing teachers were "more likely to attend college, attend higher-ranked colleges, earn higher salaries, live in higher [socioeconomic status] neighborhoods, and save more for retirement."[5] Another study estimated that an average teacher would increase the total lifetime earnings of a classroom of 20 students by $400,000 compared to a very low-performing teacher.[6] Similarly, a teacher at the 84th percentile of effectiveness would increase the same classroom's lifetime earnings by another $400,000 compared to an average teacher.[7]

Despite the proven power of effective teaching, many school districts historically have not adopted policies or agreements designed to promote effectiveness through performance-based personnel decisions. In particular, collective bargaining agreements between school districts and local teachers unions have consciously avoided including provisions that prioritize effectiveness rather than longevity in the classroom. Senate Bill 191 seeks to correct this problem by requiring negotiated policies or agreements between school districts and employees to include performance as a significant factor in decisions related to which teacher contracts to cancel in the event of a reduction of teaching positions. Further, the law requires measured performance to be considered before seniority or nonprobationary status. Properly applied, this statutory requirement curtails "last-in-first-out" (LIFO) layoff policies, under which the least senior teachers automatically lose their jobs in cases where reductions are necessary irrespective of their performance in the classroom.

Sixteen school districts that maintain formal relationships with their local teachers unions—approximate 42 percent of the 38 districts known to be unionized in Colorado—are currently operating under negotiated contracts or policies that contain unlawful reduction-in-force (RIF) provisions. These districts employ a combined 15,600 teachers, or more than a quarter of all public school teachers in Colorado. A further seven school districts employing a combined 7,800 teachers have ratified RIF provisions that meet the letter of the law while circumventing its spirit.[8]

For context, this paper begins by outlining SB 191's primary provisions before exploring the law's anti-LIFO requirements and the ways in which many current negotiated agreements and policies ignore or skirt those requirements.

Despite the proven power of effective teaching, many school districts historically have not adopted policies or agreements designed to promote effectiveness through performance-based personnel decisions.

Senate Bill 191 — Primary Provisions

To accomplish the goal of promoting the effectiveness of all Colorado teachers, Senate Bill 191 sought to weave teacher performance into Colorado's existing legal framework. The law's centerpiece reform is a major shift in the way teachers gain or lose "nonprobationary status," but it also includes a number of other important provisions. These provisions are summarized below.

Educator Evaluations

Teacher evaluation systems have historically been plagued by an inability to meaningfully distinguish teacher performance. Generally reliant on observations and subjective judgments, these evaluation systems tended to rate nearly every teacher effective each year. Dubbed the "Widget Effect," this phenomenon was documented in a variety of school districts in the United States.[9] Senate Bill 191 sought to more meaningfully differentiate performance by requiring 50 percent of teacher and principal evaluations to be comprised of district-determined objective measures of student academic growth.[10] The other 50 percent of evaluations continues to be based on professional practice observations.

To accomplish the goal of promoting the effectiveness of all Colorado teachers, Senate Bill 191 sought to weave teacher performance into Colorado's existing legal framework.

Although the inclusion of student academic growth data in evaluations has been controversial, it has not led to widespread increases in the number of teachers identified as partially effective or ineffective. Data from 23 Colorado school districts participating in the Colorado Department of Education's State Model Evaluation System pilot program indicate that only two percent of participating teachers were identified as partially effective. Zero teachers were identified as ineffective.[11]

The continuing lack of meaningful differentiation is partially explained by a system of weak cut points under the widely adopted State Model Evaluation System. Under that system, teachers may be assigned one of four ratings: ineffective, partially effective, effective, or highly effective. Teachers must receive 458 points or fewer out of a possible 1,080—42 percent—in order to be rated "partially effective." To be rated "ineffective," teachers must receive 188 or fewer points, or about 17 percent of the points available.[12]

It is little wonder that few teachers are ever rated below effective under such low expectations. Even so, the continued lack of real performance differentiation is likely rooted in problems deeper than can be explained by any single evaluation system. Recent research indicates that despite some positive movement, evaluation reform in other states has also failed to produce true differentiation of classroom performance. These failures may be due to cultural issues within schools or an unwillingness on the part of school leaders to implement the systems with full fidelity.[13]

Teacher Tenure Reform

Traditional public school teachers in Colorado are broadly divided into two employment status categories: probationary and nonprobationary. School districts can, at their discretion, choose not to renew the contracts of probationary teachers from year to year. Nonprobationary teachers, on the other hand, are entitled to continued employment and may only be terminated in very specific situations. These situations are explicitly outlined in state statute.[14]

Nonprobationary status replaced tenure in 1990 when the Colorado General

Assembly passed the Teacher Employment, Compensation, and Dismissal Act (TECDA). Although nonprobationary status is statutorily distinct from the concept of teacher tenure as it existed in former iterations of Colorado's teacher employment law,[15] it provides similarly robust protections to teachers. Districts wishing to end the employment of a nonprobationary teacher—even a nonprobationary teacher who is ineffective in the classroom—must navigate an extensive system of statutory "due process" that begins with district-level hearings and may continue all the way to the steps of the Colorado Supreme Court. This arduous process can take many months and cost tens of thousands of dollars. As a result, districts rarely initiate efforts to remove a nonprobationary teachers. One 2009 study found that there had been zero formal dismissals for performance in Denver Public Schools during a three-year period.[16]

Under previous Colorado law, teachers were granted nonprobationary status after three consecutive years of teaching, regardless of effectiveness. Senate Bill 191 modified the law to grant nonprobationary status after three consecutive years of demonstrated *effective* teaching. Critically, the law and its associated rules also allow for the loss of nonprobationary status. Teachers rated ineffective or partially effective in a single year must be notified of their deficiencies and given professional development opportunities designed to help them achieve an effective rating on the following evaluation.[17] Those who receive a second consecutive rating of partially effective or ineffective lose their nonprobationary status.[18]

Evaluations first began counting toward the earning or loss of nonprobationary status in 2014-15.[19] A 2016 Chalkbeat Colorado survey of large Colorado school districts found that after two years of evaluations under the new system, 47 teachers in Denver Public Schools, 24 teachers in Douglas County School District, and 12 teachers in Aurora Public Schools were slated to lose their nonprobationary status under Senate Bill 191.[20]

Despite frequent implications to the contrary, Senate Bill 191 does not require school districts to terminate the employment of teachers who lose their nonprobationary status. Rather, it increases local control by providing them with the option of doing so if they determine such an action to be in the best interests of students.

Mutual Consent

A lesser-known component of Senate Bill 191 ended the era of forced placement, under which a teacher displaced from a school could be forcibly placed into a different school in the same district irrespective of the wishes of the new school's principal or teachers. Displacement involves a teacher losing his or her position within a school. This situation is noticeably distinct from termination or cancellation because the teacher is not losing his or her job with the school district. Rather, the displaced teacher is still a paid district employee and may be placed in a different school within the same district.

Forced placement ignored the importance of allowing school leaders to select teachers who fit well within their schools. It also gave rise to a phenomenon known as the "Dance of the Lemons," under which ineffective nonprobationary teachers were shuffled between schools to avoid the herculean efforts required to terminate their contracts. According to a 2009 *Denver Post* analysis, 427 out of 592 teachers—72 percent—forcibly placed into schools during the preceding four years were placed in low-income schools. The analysis

Senate Bill 191 does not require school districts to terminate the employment of teachers who lose their nonprobationary status. Rather, it increases local control by providing them with the option of doing so if they determine such an action to be in the best interests of students.

also found that 117 teachers were forcibly placed into schools twice in two years.[21] While these findings are partially explained by Denver's relatively high proportion of low-income schools and the fact that such schools tend to have more open teaching positions than others, they indicate a distressing pattern.

Senate Bill 191 replaced forced placement with a system called "mutual consent." Under this system, teachers displaced from a school must win the approval of a new school's principal and two representative teachers before being placed in that school. Displaced nonprobationary teachers rated effective in the previous school year enter a "priority hiring pool," which grants them the first opportunity to interview for open positions. While searching for a position, these teachers continue to draw pay for one year or two hiring cycles, whichever is longer. If teachers are still unable to secure a consensual placement after that time, they are placed on unpaid leave.[22]

Senate Bill 191 replaced forced placement with a system called "mutual consent." Under this system, teachers displaced from a school must win the approval of a new school's principal and two representative teachers before being placed in that school.

Senate Bill 191's mutual consent provision has been strongly opposed by teachers unions in Colorado. The Denver Classroom Teachers Association and a group of nonprobationary teachers launched a suit against Denver Public Schools' use of the provision in 2014. Through the suit, *Masters v. School District No. 1*, the union seeks to eliminate Senate Bill 191's mutual consent provision and to enshrine statutory nonprobationary status protections in perpetuity. Plaintiffs' arguments can be distilled to three main points:

- Placing teachers who can't secure a mutual consent placement within a defined period of time on unpaid leave without a hearing amounts to discharge without cause.
- The Teacher Employment, Compensation, and Dismissal Act (TECDA) creates vested contractual rights to employment protections between nonprobationary teachers and their school districts under the Colorado Constitution's Contract Clause.[23] The Colorado General Assembly lacks the authority to impair these contract rights through revocation or revision.
- Nonprobationary teachers have a constitutionally protected property interest in continued employment that demands due process under the Colorado Constitution's Due Process Clause.[24] Placing teachers on unpaid leave in the absence of a hearing deprives them of these property interests.

The union's suit was dismissed by a Denver District Court judge. That decision was overturned by the Colorado Court of Appeals. The appellate court rejected the argument that being placed on unpaid leave amounted to discharge without cause, though that rejection did not substantively alter the court's conclusion. In its decision, the appellate court ruled that:

Although not dismissed (or effectively dismissed) for cause, nonprobationary teachers who are placed on unpaid leave have nevertheless had their expectation of continued employment disappointed because they are not working and do not collect their salaries during the indefinite period of leave.[25]

The case was subsequently appealed to the Colorado Supreme Court, which granted certiorari in March, 2016. Though Denver Public Schools is the primary defendant, the district has been joined by a broad coalition of organizations, including the Independence Institute, in defending Senate Bill 191's mutual consent provision.

The Other Provision: The End of LIFO

The reforms described in previous sections of this paper steal much of the limelight when it comes to Senate Bill 191. Media outlets, education activists, unions, educators, and policymakers tend to focus on sweeping changes to evaluations, nonprobationary status, and mutual consent when discussing the bill's reforms. However, Senate Bill 191 contains another important reform that often escapes public notice: curtailing LIFO provisions in the realm of layoffs or reductions in force. LIFO provisions utilize seniority as the ultimate arbiter of which teachers keep their jobs in the event of a reduction in the number of teaching positions available in a school district. Such reductions could occur because of:

- Decreased enrollment
- Decreased numbers of students participating in a certain program
- Elimination of or changes to instructional programs
- Budgetary considerations and fiscal exigencies
- Shifts in school district building usage, or the opening or closing of new schools
- Attendance boundary changes

To illustrate how LIFO provisions function, imagine two nonprobationary teachers in a single high school. While both teachers have gained nonprobationary status, one has been teaching in the district for six years while the other has been teaching in the district for seven. Suppose that the six-year veteran teacher is rated highly effective and that the seven-year veteran teacher is rated partially effective. The district experiences a drop in enrollment one year that necessitates the elimination of one of the two teaching jobs, and must decide which teacher to let go. Under a LIFO system, the six-year teacher would lose her job automatically in this situation despite the fact that she is more effective than the seven-year veteran teacher.

Such provisions defy the most basic tenet of education: that the goal of any education system should be to produce the best possible results for students. LIFO makes little sense in light of extensive research illustrating the powerful effect of teachers on student outcomes. Even so, such provisions have often found their way into collective bargaining agreements in Colorado—sometimes with distressingly illogical results. A previous collective bargaining agreement between the 5,000-teacher Jefferson County School District and the Jefferson County Education Association famously stated that in the event of a tie between two equally senior teachers during reductions in force, the decision of which teacher kept his or her job would be determined not by effectiveness in the classroom, but by "a flip of a coin between the teachers involved by a disinterested third party."[26]

In keeping with the goal of shifting focus to teacher performance rather than seniority, Senate Bill 191 sought to eliminate provisions like the one in Jefferson County. The bill amended the section of Colorado statute governing employment contracts to read (emphasis added):

> A teacher may be suspended temporarily during the contractual period until the date of dismissal as ordered by the board pursuant to section 22-63-302 or may have his or her employment contract cancelled during the contractual period when there

LIFO provisions utilize seniority as the ultimate arbiter of which teachers keep their jobs in the event of a reduction in the number of teaching positions available in a school district.

is a justifiable decrease in the number of teaching positions. **The manner in which employment contracts will be cancelled when there is a justifiable decrease in the number of teaching positions shall be included in any contract between the board of education of the school district and school district employees or in an established policy of the board, which contract or policy shall include the criteria described in section 22-9-106 as significant factors in determining which employment contracts to cancel as a result of the decrease in teaching positions. Effective February 15, 2012, the contract or policy shall include consideration of probationary and nonprobationary status and the number of years a teacher has been teaching in the school district; except that these criteria may be considered only after the consideration of the criteria described in section 22-9-106 and only if the contract or policy is in the best interest of the students enrolled in the school district.**[27]

... 16 Colorado school districts—approximately 42 percent of the known unionized districts in the state—have unlawfully negotiated and ratified contracts that do not place performance ahead of seniority or that rely solely upon seniority when conducting RIFs.

The referenced statutory section, C.R.S. 22-9-106, is the portion of the law covering local school boards' obligation to adopt performance evaluation systems. In non-statutory terms, the law requires two things:

- That performance be a significant factor in any teacher contract cancellations made as a result of any justifiable decrease in the number of teaching positions in a school district; and
- That seniority and nonprobationary status be considered only after performance, and only if doing so is in the best interests of a district's students.

By the plain language of the statute, these requirements apply to "any contract between the board of education of the school district and school district employees" and to any "established policy of the board." Thus, negotiated agreements and policies in each of Colorado's unionized school districts fall under this statute. The requirements also apply more broadly to the policies of non-unionized districts. While some individual schools have applied for and been granted waivers from this section of statute by the Colorado State Board of Education,[28] no unionized school district in the state holds a districtwide waiver that would exempt it from these legal requirements.[29]

Fifteen of the 38 school districts in Colorado known to maintain formal relationships with their local teachers unions have implemented the required changes by adopting policies or entering into contracts that explicitly require performance to be considered before seniority and nonprobationary status. But despite the broad applicability of the law and information provided by well-known school district support organizations like the Colorado Association of School Boards (CASB),[30] 16 Colorado school districts—approximately 42 percent of the known unionized districts in the state—have unlawfully negotiated and ratified contracts or policies that do not place performance ahead of seniority or that rely solely upon seniority when conducting RIFs.

For instance, the current collective bargaining agreement between Denver Public Schools—the state's largest school

district with more than 90,000 PK-12 students[31] and nearly 6,000 teachers[32]—and the Denver Classroom Teachers Association (DCTA) relies solely upon hiring dates to determine which contracts to cancel.[33] In cases where hiring dates are identical, decisions are made on the basis of experience in the subject area affected by the reduction or the highest degree held.[34] Similarly, Cherry Creek School District, which employs more than 3,000 teachers[35] and negotiates teacher-related policy with the Cherry Creek Education Association, determines reductions in force by placing teachers into groups based on seniority.[36]

Similar patterns can be observed outside the Denver Metro Area. Steamboat Springs School District, which has a less formal meet-and-confer relationship with its local teachers association (and is therefore not included in the number of formally unionized districts) but still negotiates certain aspects of district policy, has a negotiated policy requiring probationary teachers to be laid off first, followed by nonprobationary teachers on the basis on seniority.[37] Trinidad School District, a small district with about 50 teachers[38] nearly 200 miles south of Denver, has a contract requiring probationary teachers to be dismissed by seniority. If nonprobationary teachers must also be reduced, these reductions must be made on the basis of eight separate factors. Only one of these factors is related to teacher performance, and there is no stipulation that it be considered first or as a significant factor.[39]

Some local negotiating processes have produced complex systems that further cloud the issue. For instance, Pueblo County School District 70 allows nonprobationary teachers whose contracts are scheduled to be canceled and who hold endorsements in more than one area to displace less senior teachers in other endorsement areas instead of being laid off.[40] This provision raises the possibility that an effective teacher in an endorsement area not affected by a reduction in teaching positions could lose his or her job simply to preserve the employment of a more senior teacher in an entirely different area. If RIF decisions must be made between equally senior nonprobationary teachers in a single endorsement area, a "lottery" is used to determine which contract to cancel.[41] Such a provision is not easily distinguishable from the "coin-flip" provision discussed above.

Boulder Valley School District's collective bargaining agreement with the Boulder Valley Education Association creates an even more complex domino-like RIF system. The contract's RIF provision relies upon seniority to make reduction-in-force decisions among teachers and other employees.[42] However, the contract sows further complication and potential disruption by allowing removed employees to displace other, less senior employees elsewhere in the district. Those employees can then do the same to yet more employees. The contract reads:

> **D-20.3 The following procedure will apply for the reduction of employees:**
>
> a. Employees with the least seniority in the classification affected will be the first to be removed
> b. An employee removed under (a) will displace the employee with the least seniority in a similar job classification within the District
> c. An employee who cannot displace another employee in a similar job classification because he/she does not have sufficient seniority will displace the employee with the least seniority within the District whose

... Cherry Creek School District, which employs more than 3,000 teachers and negotiates teacher-related policy with the Cherry Creek Education Association, determines reductions in force by placing teachers into groups based upon seniority.

assignment he/she is qualified to perform, and

d. An employee displaced by another employee under this procedure shall follow the same procedure in displacing another employee
e. An employee displaced under (d) will not be considered to be subject to the mutual consent provisions of this Agreement.[43]

School districts should acknowledge and reward effective teaching regardless of how long a teacher has been in the classroom.

Other school districts have entered into contracts with the teachers union that appear designed to loosely meet the letter of law without remaining true to its spirit. For example, Thompson School District's memorandum of understanding with the Thompson Education Association requires unavoidable reductions in force to be made on the basis of "years of effective service" in addition to basic seniority. It defines "effective service" as applying to teachers rated "effective" or "highly effective."[44]

While this provision initially sounds promising, further investigation reveals it to be little more than a thinly veiled continuation of seniority-based RIF policies. The "Widget Effect" discussed is a previous section is alive and well in Colorado; Thompson School District has rated more than 99 percent of its teachers "effective" or "highly effective" since it began using those ratings in 2014-15. Fewer than one percent of teachers in the district were rated below proficient under the rating system employed in 2013-14.[45] The memorandum of understanding's RIF provision makes no effort to distinguish more granular performance differences such as those between effective and highly effective teachers, so the system operates functionally identically to seniority-based RIF in practice.

Thompson is not the only school district to exploit weak evaluation systems to circumvent the spirit of SB 191's LIFO provision. Neighboring Poudre School District's contract with the Poudre Education Association also relies upon years of "effective service," which it defines in the same manner as Thompson's contract, to determine layoffs among teachers.[46] However, the school district rated only 27 of its 1,527 evaluated teachers (1.7 percent) "partially effective" in 2013-14, and just 14 of its 1,957 evaluated teachers (.7 percent) in 2014-15. It rated zero teachers "ineffective" in those years. In 2015-16, the first year in which two consecutive "partially effective" or "ineffective" evaluation ratings would result in the loss of nonprobationary status under Senate Bill 191, the district placed exactly zero teachers into these evaluation categories.[47] Once again, this system operates nearly identically to seniority-based RIF procedures in practice.

Sheridan School District has gone one step further. The district has negotiated a contract stipulating that only teachers rated "ineffective" will be laid off before the district resorts to conducting RIFs through a seniority-based system.[48] The district has rated zero teachers ineffective in the last three school years.[49]

In addition to violating or circumventing state law, the continuation of LIFO policies puts students' educations at risk by making it more difficult to ensure that every student has an effective teacher. It also compromises the secondary purpose of performance-based personnel decisions: fairness for teachers. School districts should acknowledge and reward effective teaching regardless of how long a teacher has been in the classroom. They should avoid penalizing talented, motivated new teachers in order to preserve the employment of more experienced but potentially less effective teachers on the basis of seniority. The reverse is also true: A veteran teacher who has successfully translated his or her experience into

effective or highly effective instruction should be secure in the knowledge that his or her hard work and dedication will not be discounted in the case of reductions in force.

Working Around the Issue: Contract Cancellation Versus Non-Renewal

Although SB 191's requirement that districts consider performance before seniority and nonprobationary status was an important step in the right direction, Colorado's legal structure still leaves districts significant latitude to target probationary teachers rather than nonprobationary teachers when reductions in force become necessary. This latitude stems from the difference between the cancellation of a teacher contract during its term and the non-renewal of a teacher contract at the end of its term.

SB 191's anti-LIFO provision applies only to the cancellation of teacher contracts while those contracts are in effect. The law does not apply to the non-renewal of probationary teacher contracts from year to year. Thus, Colorado school districts can opt to non-renew the contracts of probationary teachers at the end of any given school year to avoid having to cancel the contracts of nonprobationary teachers the following year. Indeed, some collective bargaining agreements explicitly stipulate that non-renewal of probationary teacher contracts should be undertaken before the contracts of nonprobationary teachers are canceled, regardless of performance.[50] Other agreements state clearly that their RIF processes do not apply to the non-renewals of probationary contracts.[51] Still others explicitly state that reductions in force can only take place at the end of the year, making non-renewal an even easier option for districts struggling with difficult layoff decisions.[52]

Article IX, § 15 of the Colorado Constitution provides local school boards "control of instruction" in their school districts, which has been held by the Colorado Supreme Court to include teacher employment decisions.[53] Any conversation about limiting school districts' ability to non-renew the contracts of probationary teachers must therefore be approached with great caution and respect for local control. However, it should be noted that the act of non-renewing probationary teacher contracts in order to spare nonprobationary contracts does not result outcomes significantly distinguishable from full LIFO provisions in some circumstances. School districts should pay particular attention to these provisions when negotiating contracts and ensure that contractual language does not promote or recommend the use of non-renewals to circumvent the promotion of effective teaching in the classroom.

SB 191's anti-LIFO provision applies only to the cancellation of teacher contracts while those contracts are in effect. The law does not apply to the non-renewal of probationary teacher contracts from year to year.

Conclusion and Recommendations

Failure to rectify the situation created by these instances of noncompliance is irresponsible. Unlawfully continuing LIFO practices has the potential to harm students by depriving them of the most effective teachers available, undermine the validity and legitimacy of collective bargaining agreements across the state, and expose school districts to possible litigation by teachers wrongfully laid off under RIF procedures that violate state statute.

Unlawfully continuing LIFO practices has the potential to harm students by depriving them of the most effective teachers available, undermine the validity and legitimacy of collective bargaining agreements across the state, and expose school districts to possible litigation by teachers wrongfully laid off under RIF procedures that violate state statute.

School districts with contracts or policies containing LIFO provisions should take immediate steps to ensure full compliance with state statute and support the best possible education for Colorado students. A model RIF provision is available in Appendix B. In cases where a contract states explicitly that provisions in violation of the law are null and void, bringing the district into compliance could be as simple as reverting to an existing district policy covering RIF procedures—provided such a policy is itself in compliance with the law. In cases where such a fallback does not exist or is otherwise infeasible, districts will need to revisit and possibly renegotiate the relevant sections of their union contracts or district policy in order to rectify the problem.

Furthermore, districts with questionable contractual provisions designed to meet the letter of the law while circumventing its spirit should pay close attention to the language adopted during future negotiations. The locally elected boards of education in these districts should ensure that they are drafting their collective bargaining agreements to best serve students rather than adults.

Correcting non-compliant collective bargaining agreements or policies may not be pleasant or easy. But Colorado's students—and its truly effective teachers—deserve no less.

The author of this publication is not an attorney, and nothing contained herein should be construed as legal advice. School districts and board of education members should seek legal counsel before modifying or adopting contractual provisions or policy.

Endnotes

[1] C.R.S. 22-9-101 et seq.

[2] C.R.S. 22-63-101 et seq.

[3] See, for instance, McCaffrey, J. R., Lockwood, D. F., Koretz, D. M., & Hamilton, L. S., "Evaluating Value Added Models for Teacher Accountability [Monograph]," RAND Corporation, 2003, http://www.rand.org/content/dam/rand/pubs/monographs/2004/RAND_MG158.pdf; Rivkin, S. G., Hanushek, E. A., & Kain, J. F., Teachers, Schools, and Academic Achievement, National Bureau of Economic Research Working Paper No. 6691, August 1998, http://www.nber.org/papers/w6691.pdf; Rowan, Brian; Correnti, Richard; and Miller, Robert J.. (2002). "What Large-Scale Survey Research Tells Us About Teacher Effects on Student Achievement: Insights From the Prospectus Study of Elementary Schools," Consortium for Policy Research in Education Research Report Series RR-051, http://www.cpre.org/sites/default/files/researchreport/791_rr51.pdf; Wright, S. P., Horn, S. P., & Sanders, W. L., "Teachers and Classroom Context Effects on Student Achievement: Implications for Teacher Evaluation," *Journal of Personnel Evaluation in Education*, April 1997, 11(1), 57-67, http://link.springer.com/article/10.1023%2FA%3A1007999204543; "Teachers Matter: Understanding Teachers' Impact on Student Achievement," RAND Corporation, 2012, http://www.rand.org/pubs/corporate_pubs/CP693z1-2012-09.html.

[4] Chetty, R., Friedman, J., and Rockoff, J. E., "The Long-Term Impacts of Teachers: Teacher Value-Added and Student Outcomes in Adulthood," National Bureau of Economic Research Working Paper No. 17699, Dec. 2011, 5, http://www.nber.org/papers/w17699.pdf. Analyses including smaller numbers of classrooms produced lower income estimates, though even the lowest estimate of earning gain was roughly $135,000.

[5] Ibid.

[6] Hanushek, E., "Valuing Teachers: How Much is a Good Teacher Worth?" *Education Next*, Summer 2011, 11(3), 40-45, http://hanushek.stanford.edu/publications/valuing-teachers-how-much-good-teacher-worth.

[7] Ibid., 42.

[8] Data drawn from Colorado Department of Education, "2015-16 Teachers by Ethnicity/Race and Gender," https://www.cde.state.co.us/cdereval/6-countofteachersbydistrictethnicityandgenderxls.

[9] Daniel Weisberg, Susan Sexton, Jennifer Mulhern, and David Keeling, "The Widget Effect: Our National Failure to Acknowledge and Act on Differences in Teacher Effectiveness," The New Teacher Project, 2009, http://tntp.org/assets/documents/TheWidgetEffect_2nd_ed.pdf.

[10] C.R.S. 22-9-106. Rules adopted by the Colorado State Board of Education require that the measures of student growth include summative assessment data, results from the Colorado Growth Model, at least one individually attributable measure of student growth, and at least one collectively attributable measure of student growth. However, the rules do not prescribe how heavily districts must weight these factors within the overall 50 percent of evaluations dedicated to measures of student academic growth. See 1 C.C.R. 301-87 5.01 (E)(7).

[11] Colorado Department of Education, "Colorado State Model Evaluation System: 2014-15 Pilot Findings," March 2016, http://www.cde.state.co.us/educatoreffectiveness/2014_15_teachersmesfactsheet. It should be noted that districts were given the option of weighting measures of student learning below 50 percent in 2014-15, so results in some pilot districts may not be indicative of a fully implemented evaluation system.

[12] Colorado Department of Education, "Determining Final Effectiveness Ratings Using the Colorado State Model Evaluation System for Teachers," July 2016, https://www.cde.state.co.us/educatoreffectiveness/determining-a-final-educator-effectiveness-rating.

[13] Matthew Kraft and Allison Gilmour, "Revisiting the Widget Effect: Teacher Evaluation Reforms and the Distribution of Teacher Effectiveness," Brown University Working Paper, February 2016, http://scholar.harvard.edu/files/mkraft/files/kraft_gilmour_2016_revisiting_the_widget_effect_wp.pdf?m=1456772152.

[14] C.R.S. 22-63-301.

[15] For more information on the legal nuances of tenure versus nonprobationary status, see Independence Institute's amicus brief on behalf of Denver Public Schools in *Masters v. School District No. 1*, 2015-SC-1062, https://www.i2i.org/wp-content/uploads/2016/06/Independence-Institute-Amicus-Masters-final-filing.pdf

[16] Supra, note 9.

[17] C.R.S. 22-9-106 (3.5)(a).

[18] C.R.S. 22-63-103 (7). See also, 1 C.C.R. 301-87 3.03.

[19] C.R.S. 22-9-105.5 (10)(a)(V)(A).

[20] Melanie Asmar, "Denver Public Schools Set to Strip Nearly 50 Teachers of Tenure Protections After Poor Evaluations," Chalkbeat Colorado, July 15, 2016, http://www.chalkbeat.org/posts/co/2016/07/14/denver-public-schools-set-to-strip-nearly-50-teachers-of-tenure-protections-after-poor-evaluations/#.V6JtorgrLIU.

[21] Jeremy Meyer, "Denver Teacher Placement Can Add to Disparities," *The Denver Post,* August 16, 2009. Available at https://web.archive.org/web/20100213101615/http://www.denverpost.com/news/ci_13132467.

[22] C.R.S. 22-63-202 (2).

[23] Colorado Constitution, art. II § 11.

[24] Ibid., art. II § 25.

[25] Colorado Court of Appeals 2015COA159, 20, https://assets.documentcloud.org/documents/2506046/appealsmastersruling110515.pdf.

[26] Ross Izard, "Strange Bedfellows: Teachers Unions, Conservatives, and Tenure Reform," Complete Colorado, March 17, 2015, http://completecolorado.com/pagetwo/2015/03/17/strange-bedfellows-teachers-unions-conservatives-and-tenure-reform/. The provision described was found in Article 32-4-5A of Jeffco Schools' Master Agreement. The agreement expired in August 2015 and is no longer available online.

[27] C.R.S. 22-63-202 (3).

[28] Colorado Department of Education, "Approved State Waivers-Innovation Schools," January 2016, https://www.cde.state.co.us/choice/statewaivers-innovationschools.

[29] This information was confirmed via email on Sept. 27, 2016, by the Colorado Department of Education.

[30] Colorado Association of School Boards, "Teacher Employment, Compensation and Dismissal Act of 1990," http://www.casb.org/Page/603.

[31] Colorado Department of Education, "2015-2016 District Ranking; Pupil Membership (High to Low)," https://www.cde.state.co.us/cdereval/2015-16-pupilmembership-district-rankings-excel.

[32] Supra, note 8.

[33] "Agreement and Partnership between School District No. 1 in the City and County of Denver, State of Colorado and Denver Classroom Teachers Association September 1, 2008 – August 31, 2011," Article 20-1-3, 54, http://hr.dpsk12.org/wp-content/uploads/2014/07/20082011DCTAAgreementwProCompAddendum.pdf. Note that while the agreement itself states that it expired in August 2011, a Denver Public Schools official confirmed via email that the district still operates under the terms of this agreement with DCTA.

[34] Ibid., Article 20-1-3-1, 54.

[35] Supra, note 8.

[36] Cherry Creek School District Policy 4160, http://www.cherrycreekschools.org/HumanResources/Employees/Policies/Teachers/4160%20Reduction%20in%20Force.pdf.

[37] Steamboat Springs School District Negotiated Policy NP-32, https://drive.google.com/file/d/0B_IAvoCN2sXdUjFTcUdoZWdLVHM/view?pref=2&pli=1.

[38] Supra, note 8.

[39] "Negotiated Agreement of the Trinidad Board of Education and Trinidad Federation of Teachers and Trinidad Education Association for the Period July 1, 2014 to June 30, 2017," Article 9, 35, http://tsd1.org/wp-content/uploads/2014/12/1417NegotiatedAgreement-Cert.pdf.

[40] "2014-2019 Agreement Between the Pueblo County School District 70 in the County of Pueblo, State of Colorado, and the Pueblo County Education Association," Article 13-5, 44, http://www.district70.org/pdf/2015_2019_Negotiated_Agreement.pdf.

[41] Ibid., Article 13-6, 44.

[42] "Agreement between the Board of Education and the Employees Represented by the Boulder Valley Education Association of the Boulder Valley School District RE2J," Section D 20, http://bvsd.org/HR/Documents/Negotiated%20Agreements%20and%20Salary%20Schedules/BVEA%20Agreement%2015-18.pdf.

[43] Ibid., D-20.3.

[44] "2016-2017 Memorandum of Understanding Between the Thompson Education Association and the Thompson School District R2-J Board of Education," Article 20-8-6 (a), 39, http://www.thompson.k12.co.us/page/12289.

[45] Information obtained from an August 16, 2016, response to a request filed with Thompson School District under the Colorado Open Records Act.

[46] "Employee Agreement Between the Association of Classified Employees, the Poudre Association of School Executives, the Poudre Education Association and the Board of Education Poudre School District 2016-17," Article 14.2, 106, https://www.psdschools.org/webfm/12486.

[47] Information obtained from an August 18, 2016, response to a request filed with Poudre School District under the Colorado Open Records Act.

[48] "Master Agreement August 1, 2016, through July 31, 2017, Between Board of Education, Sheridan School District No. Two, Sheridan, Colorado, and Sheridan Educators Association, Sheridan Public Schools, Sheridan, Colorado," Article X D, 22-23, http://filecabinet5.eschoolview.com/52FC275F-2398-4088-B57F-33576D21AE37/master%20agreement/Master%20Agreement%2016-17%20Final.pdf.

[49] Information obtained from an August 18, 2016, response to a request filed with Sheridan School District under the Colorado Open Records Act.

[50] "See, for instance, Westminster Education Association and Westminster Public Schools Board of Education Licensed Employees Agreement," July 1, 2016 – June 30, 2019, Article 13, 21, http://www.westminsterpublicschools.org/site/handlers/filedownload.ashx?moduleinstanceid=1184&dataid=891&FileName=Licensed%20Negotiated%20Agreement%20for%202016-2017%20FINAL.pdf; and "Agreement Betweenthe St. Vrain Education Association and the St. Vrain Valley School District NO. RE-1J, July 1, 2015 – June 30, 2017," Article 36, 40, http://www.svvsd.org/files/SVVEA-AGREEMENT-2015-FINAL.pdf.

[51] See, for instance, "Agreement between the Aurora Public Schools Board of Education and the Aurora Education Association," July 1, 2015 – June 30, 2020, Article 20 (4), 32, http://hr.aurorak12.org/wp-content/uploads/sites/64/2015/12/Master-Agreement-2015-20-with-Index-final-121615.pdf.

[52] See, for instance, "Master Agreement between Colorado Springs District 11 and the Colorado Springs Education Association," Article XVIII (C), http://www.d11.org/HR/CSEA%20Document%20Library/Master%20Agreement%202016_17%20FINAL.pdf.

[53] *Bd. of Educ. of Sch. Dist. No. 1 in City & County of Denver v. Booth*, 984 P.2d 639 (Colo. 1999), http://law.justia.com/cases/colorado/supreme-court/1999/97sc609-0.html.

JON CALDARA is President of the Independence Institute.

DAVID KOPEL is Research Director of the Independence Institute.

PAMELA BENIGNO is the Director of the Education Policy Center.

ROSS IZARD is a Senior Policy Analyst of the Education Policy Center at the Independence Institute.

ADDITIONAL RESOURCES on this subject can be found at: www.i2i.org/education.

Appendix A: School District Collective Bargaining Agreements by Compliance

District	RIF Provision Compliant
Adams County 14	Yes
Alamosa	Yes
Canon City RE-1	Yes
Colorado Springs 11	Yes
Eagle RE-50J	Yes
Fort Morgan RE-3	Yes
Fremont RE-2	Yes
Greeley-Evans 6	Yes
Huerfano RE-1	Yes
Jefferson County R-1	Yes
Johnstown-Milliken RE-5J	Yes
Littleton 6	Yes
Mesa County Valley 51	Yes
Montrose County RE-1J	Yes
Pueblo City 60	Yes
Boulder Valley RE-2	No
Brighton 27J	No
Centennial R-1	No
Center 26 JT	No
Cherry Creek 5	No
Denver County 1	No
Gunnison Watershed RE-1J	No
Lake County R-1	No
Mapleton 1	No
Pueblo County 70	No
Salida R-32J	No
St. Vrain Valley RE-1J	No
Summit RE-1	No
Telluride R-1	No
Trinidad 1	No
Westminster 50	No
Adams 12 Five Star Schools	Questionable. Reductions are conducted according to a weighted rubric in which the most recent evaluation is most heavily weighted. However, performance is not considered before other factors, and probationary teachers must be reduced (through non-renewal) before nonprobationary teachers
Adams-Arapahoe 28J (Aurora Public Schools)	Questionable. Performance is considered alongside length of service when creating a reduction "pool."
Durango 9-R	Questionable. Performance must be considered before seniority or nonprobationary status, but is weakly defined as teachers rated "effective or higher."

Englewood 1	Questionable. Requires that probationary teacher contracts be canceled first, then divides teachers into groups on the basis of binary evaluation results (unsatisfactory and satisfactory) and years of service.
Poudre R-1	Questionable. Relies upon "years of effective service," which is defined as being rated "effective" or "highly effective." Based on district evaluation distributions, this system is not easily distinguishable from seniority-based RIF policies in practice.
Sheridan 2	Questionable. Requires that teachers rated "ineffective" have their contracts canceled before proceeding on the basis of seniority. The district has rated zero teachers "ineffective" in the last three years, making this system functionally identical to seniority-based RIF procedures.
Thompson R2-J	Questionable. Uses "years of effective service," which is defined as being rated "effective" or "highly effective." Based on district evaluation distributions, this system is not easily distinguishable from seniority-based RIF policies in practice.

Appendix B: Model Contract Article

The following model article is based on a reduction-in-force policy in use in many school districts across the state. Though every attempt has been made to ensure that the model article is broadly applicable, legal counsel should be sought before modifying contractual provisions or district policy.

Instructional Staff Reduction in Force

A justifiable reduction in the number of teaching positions occurs when the Board determines that the cancellation of one or more teacher contracts is necessary. Causes of a justifiable reduction in the number of teaching positions include, but are not limited to, the following:

- Financial or other exigency so declared by the Board
- Budgetary limitations
- Decrease in student enrollment
- Elimination, curtailment of reorganization of a curriculum offering, program or school operation
- Consolidation of two or more individual schools not related to a financial exigency
- Decline in subject or grade level enrollment

In the event of a potential reduction in force, this article shall apply. Any cancellation of a teacher's employment contract shall be in accordance with this article. This article shall not apply to teacher dismissals, non-renewals, or other personnel actions that do not result in a reduction in the number of teaching positions in the district.

Definitions

For purposes of this article, the following definitions shall apply.

1. "Justifiable Reduction in the Number of Teaching Positions" means any time the Board of Education, in its sole discretion, finds that a decrease in the number of teaching positions is required.
2. "Cancellation of employment" means the cessation of employment of a teacher during the term of the teacher's contract when there is a justifiable reduction in the number of teaching positions in the school district.
3. "Teacher" means any person who is defined as a teacher under the Teacher Employment, Compensation, and Dismissal Act of 1990, C.R.S. 22-63-101 et seq.
4. "Day" means each calendar day; provided, however, that if the deadline for any action under this policy or accompanying regulation falls on a Saturday, Sunday or official school holiday, the next following day that is not a Saturday, Sunday or official school holiday shall be the deadline for such action.

Board of Education's Preliminary Determination and Statement

If the Board determines that a justifiable reduction in the number of teaching positions is required and such determination may require the cancellation of employment of one or more teachers, it shall adopt a statement that reasonably identifies the reasons therefore. This statement shall be transmitted to the superintendent and made

available to district faculty. The Board shall establish the actual number of teacher contracts to be canceled or the amount of teacher salaries and benefits to be reduced consistent with the Board's authority to establish educational programs within the district.

Superintendent's Action

Within 30 days after receiving the Board's statement, the superintendent shall submit to the Board recommendations for the cancellation of employment of particular teachers. In making these recommendations, the superintendent shall not be limited to considering only the teachers in the area(s) or program(s) designated by the Board in its adopted statement.

The superintendent shall consider the following as significant factors in recommending a teacher for cancellation of employment:

1. Merit, meaning teacher performance as determined by the teacher's performance rating over the previous three-year period as assigned pursuant to the school district's performance evaluation system. If the teacher does not have three years of performance ratings from the school district, then the superintendent shall consider only those available performance ratings. Nothing in this policy requires consideration of evaluations conducted in other school districts.
2. The needs of the district.

Only after considering the factors above, the superintendent may consider the following factors in recommending a teacher for cancellation of employment:

1. Professional experience including experience as an administrator.
2. Education, licensing endorsements and other professional qualifications.
3. Length of service in the school district.
4. Probationary and nonprobationary status.

In the event all factors are equal, cancellation of employment shall be accomplished in a manner that best supports the interests of the students in the school district.

Appendix C: Methodology and Categorization

Colorado Revised Statutes 22-63-202 (3) reads:

> A teacher may be suspended temporarily during the contractual period until the date of dismissal as ordered by the board pursuant to section 22-63-302 or may have his or her employment contract cancelled during the contractual period when there is a justifiable decrease in the number of teaching positions. The manner in which employment contracts will be cancelled when there is a justifiable decrease in the number of teaching positions shall be included in any contract between the board of education of the school district and school district employees or in an established policy of the board, which contract or policy shall include the criteria described in section 22-9-106 as significant factors in determining which employment contracts to cancel as a result of the decrease in teaching positions. Effective February 15, 2012, the contract or policy shall include consideration of probationary and nonprobationary status and the number of years a teacher has been teaching in the school district; except that these criteria may be considered only after the consideration of the criteria described in section 22-9-106 and only if the contract or policy is in the best interest of the students enrolled in the school district.

The referenced statutory section, C.R.S. 22-9-106, is the portion of law covering local school boards' obligation to adopt performance evaluation systems. In non-statutory terms, the law requires two things:

- That performance be a significant factor in any teacher contract cancellations made as a result of any justifiable decrease in the number of teaching positions in a school district; and
- That seniority and nonprobationary status be considered only after performance, and only if doing so is in the best interests of a district's students.

The author's review and subsequent categorization of each of the Colorado's 38 known collective bargaining agreements or bargained policies were guided by these two requirements. There is a great deal of variation in the language and procedures adopted by school districts related to reductions in force. As such, general criteria were developed that guided the author's determinations of which contracts were in compliance, which were not, and which left questions open regarding their commitment and adherence to the law's spirit.

The author made every effort to determine category placements in as objective a manner as possible. Even so, there is necessarily some subjective judgment involved in any review of widely varied policies or procedures. In cases where the appropriate category for a policy or agreement was not clear, the author exercised his best judgment.

The following are the criteria used to classify the reviewed policies or agreements:

Negotiated RIF procedures were classified as being non-compliant if they met any of the following criteria:

- The negotiated RIF procedure relies solely or primarily upon seniority or a similar measure of longevity to determine the order in which contracts will be canceled.
- The negotiated RIF procedure does not explicitly include performance as measured by evaluations as a significant factor in determining which contracts to cancel.
- The negotiated RIF procedure requires the consideration of seniority or a similar measure of longevity before the consideration of performance.
- The negotiated RIF procedure requires the cancellation of probationary teacher contracts before nonprobationary teacher contracts without consideration of performance.

Negotiated RIF procedures were classified as questionable if they met any of the following criteria:

- The author has access to evidence demonstrating that the implementation of the negotiated RIF procedure is not functionally or substantially different from seniority-based RIF procedures despite the nominal consideration of performance.
- The language of the negotiated RIF procedure is sufficiently unclear, nebulous, or contradictory to raise doubts about the fidelity of the procedure's implementation.
- The language of the negotiated RIF procedure adheres to a portion of the statutory requirements while not meeting another. For instance, a RIF procedure would be categorized as questionable due to weighting performance heavily in RIF decisions but failing to explicitly consider it before other factors.
- The negotiated RIF procedure includes a definition of performance that is sufficiently vague or broad to raise concerns about the ability for the system to operate with fidelity.

Districts with negotiated RIF procedures clearly stating that performance is a significant factor in RIF decisions *and* that performance must be considered before seniority or nonprobationary status—regardless of the composition or design of these procedures—were categorized as being in compliance with statutory requirements. This categorization does not mean that the relevant procedures are ideal, only that they meet the requirements of the law.

INDEPENDENCE
INSTITUTE.ORG

727 East 16th Avenue | Denver, Colorado 80203

www.IndependenceInstitute.org | 303-279-6536 | 303-279-4176 fax