

TEACHER WORKING CONDITIONS WITH AND WITHOUT COLLECTIVE BARGAINING

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Public primary and secondary education systems in the United States have been subjected to many criticisms in recent years, and teacher unions and collective bargaining have been a focus of particular criticism. Many of these attacks come from what has been called the “education reform movement.”¹ In simplified form, these criticisms involve the notion that teacher collective bargaining results in excessive wages and benefits, and in human resource systems that are inflexible and that don’t reward quality or punish incompetence, but that do reward seniority. Overall the criticism is that the results of teacher collective bargaining generally sacrifice the educational needs of students to the desires of teacher unions to protect their members.²

The underlying assumption of this critique is that, in the absence of teacher unions and collective bargaining, the school systems and the administrators who manage those systems would behave very differently, and that students would benefit. In particular, school managers would engage in human resource practices that would be better aligned with the goal of providing students with the best possible education.³ In this paper, we attempt to examine

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¹ StudentsFirst, an organization founded by former Washington D.C. schools chancellor, is one example of a group working to promote the educational reform movement’s agenda. See Laurel Rosenhall, *Michelle Rhee Just Getting Started on Shaping California Education Policy*, SACRAMENTO BEE, Jan. 27, 2013, at 1A, available at <http://www.sacbee.com/2013/01/27/5143422/michelle-rhee-just-getting-started.html>.

² For evidence supporting these conclusions, see Terry M. Moe, *Collective Bargaining and the Performance of the Public Schools*, 53 AM. J. POL. SCI. 156, 172–73 (2009), and for a skeptical view, see Lala Carr Steelman et al., *Do Teacher Unions Hinder Educational Performance? Lessons Learned from State SAT and ACT Scores*, 70 HARV. EDUC. REV. 437, 437 (2000). Also, see *Improving Teachers: Lessons Learned*, ECONOMIST, Jan. 8, 2011, at 51, available at <http://www.economist.com/node/17851511>, for a summary of the views and positions of the education reform movement.

³ See Paul T. Hill, *The Costs of Collective Bargaining Agreements and Related District Policies*, in COLLECTIVE BARGAINING IN EDUCATION: NEGOTIATING CHANGE IN TODAY’S SCHOOLS 89, 91–104 (Jane Hannaway & Andrew J. Rotherham eds., 2006) [hereinafter COLLECTIVE BARGAINING].

the assumption that school districts would behave very differently without teacher collective bargaining. We do so by examining human resource practices, in particular those with regard to teacher deployment and pay systems, in states with and without teacher collective bargaining.

We find that, while there are important differences between the human resource practices of school systems with and without teacher collective bargaining, there are also significant similarities. These similarities are often in areas about which critics of teacher collective bargaining are most concerned. Overall, we find evidence that school systems with and without teacher collective bargaining often do not operate human resource policies that are very different from one another in a number of crucial respects.

First, we take a brief look at the critique of public education and the efforts it has helped engender to weaken teacher unions and collective bargaining. Then, we look at some of the research on teacher collective bargaining agreements to see what they actually contain, and the extent to which their characterization by the education reform movement is accurate. This is followed by an examination of human resource practices in several school districts in states without teacher collective bargaining. Finally, we analyze the differences in school human resource practices in the collective bargaining and non-bargaining states, and reach some conclusions about the impact of teacher unionism and bargaining on public school systems.

THE ATTACK ON TEACHER COLLECTIVE BARGAINING

Public school teachers and the unions that represent them have found themselves under attack by a variety of forces in recent years. These attacks have come from various elements in the “education reform movement” and, more recently, have also come from political figures who came to power primarily during the 2010 election cycle.⁴ In some cases this has produced dramatic changes in collective bargaining rights for teachers and sometimes other public employees as well. The best documented cases have been in Wisconsin, Ohio, and Indiana. In Wisconsin and Ohio, these efforts produced major political controversy, widespread demonstrations, and referenda on the law or recall efforts for state legislators and the governor.⁵

Much of the recent critique of teacher unions has been politically motivated in attempting to reduce the resources and influence of public sector unions—one of the major remaining institutional supporters of the Democratic Party. The longer standing attack has been focused on the belief that teacher unionism and collective bargaining are a major cause, perhaps THE major cause, of the failure of public schools to educate students adequately. Part of this argument is that unions lead to unduly generous wages and benefits for public school teachers. The issue of whether public employees generally have

⁴ For a detailed discussion of this more recent attack, see Clifford B. Donn, *The Attack on Public Sector Bargaining Rights and Unions in the United States: The Case of Public School Teachers*, Presentation Before the 11th World Congress of the International Federation of Scholarly Associations of Management, University of Limerick, Ireland (June 26, 2012) (on file with author).

⁵ *Id.*

been overpaid or underpaid compared to the private sector has been a source of considerable controversy, but the most comprehensive analyses seem to support the notion that public employees are not overpaid, especially public employees who are professionals.⁶

Of course the basis of this critique begins with the notion that public schools are not educating students adequately. The evidence for this failure of public schools is mixed at best.⁷ Much of the debate simply takes the failure of public schools as a given or relies on anecdotal evidence or assertion. Joel Best discusses the analysis that leads many to conclude that public schools are failing in the face of considerable evidence to the contrary.⁸ However, the attack on public education presumes that the failure of public education is an unarguable fact and tends to skip the step of demonstrating it, moving instead directly to the step of analyzing the reasons for this failure. That analysis usually starts (and often ends) with the issue of teacher unionization and collective bargaining. Given this analysis, it is not surprising that educational reformers often propose steps to limit or even eliminate collective bargaining in public education.

ATTEMPTS TO LIMIT BARGAINING

Attempts have been made in a number of states with widespread teacher collective bargaining to modify that process, to legislate certain aspects of the bargaining process, or to require certain specific substantive changes in the way teachers are evaluated, deployed or paid. Some of those attempts were successful (i.e. the legislation passed) while others were not.

In Tennessee for example, dramatic changes were made in the bargaining process. There, the very nature of bargaining was changed to something much more like a “meet and confer” system. Indeed the new legislation no longer refers to collective bargaining—which existed only in a fairly limited form for teachers in Tennessee in any case—but rather attempts to create a system of “collaborative conferencing.”⁹ This system still requires school managers to meet with unions that represent their teachers to discuss pay and working conditions. Such meetings can result in memoranda of understanding, but not in collective bargaining agreements, and the school district is free to refuse to sign a memorandum of understanding. Finally, any issues not explicitly covered by a memorandum of understanding can be determined unilaterally by the school district. Therefore, school managers can maintain unilateral control over any

⁶ See generally David Lewin et al., *The New Great Debate About Unionism and Collective Bargaining in U.S. State and Local Governments*, 65 *INDUS. & LAB. REL. REV.* 749 (2012). See also Andrew J. Coulson, *The Effects of Teachers Unions on American Education*, 30 *CATO J.* 155, 157–63 (2010) (generally supports the argument that teachers are compensated too highly but he attributes this to union lobbying rather than to collective bargaining).

⁷ MARTIN CARNOY & RICHARD ROTHSTEIN, *ECON. POLICY INST., WHAT DO INTERNATIONAL TESTS REALLY SHOW ABOUT U.S. STUDENT PERFORMANCE?* 2–3, 82 (2013) (discussing international comparisons of student test results).

⁸ JOEL BEST, *THE STUPIDITY EPIDEMIC: WORRYING ABOUT STUDENTS, SCHOOLS, AND AMERICA’S FUTURE* 9–40 (2011).

⁹ Professional Educators Collaborative Conferencing Act of 2011, *TENN. CODE ANN.* § 49-5-601 (2013).

issue in its dealings with teachers simply by refusing to sign a memorandum of understanding covering that issue.

In other states, very drastic changes were made in bargaining rights for teachers as part of a more general set of limitations imposed on public employees. Wisconsin, Michigan, and Indiana are among these states (as was Ohio, but legislative changes there were reversed by referendum).¹⁰ These restrictions covered a variety of areas, including employee contributions toward fringe benefits, allowing local governments to reduce wages or benefits when faced with fiscal problems and requiring that unions regularly demonstrate majority status in order to bargain.¹¹ For example, in Wisconsin, the new law required public sector unions to be re-certified by their members annually, prohibited them from dues check off the automatic deduction of union dues from employee paychecks limited them from bargaining pay increases at rates higher than the increase in the consumer price index unless approved by a referendum, required mandatory contributions to pension plans by employees, and limited collective bargaining agreements to one year in duration.¹²

In New York, less drastic changes were made—perhaps because the governorship and one of the houses of the legislature remained in the hands of the Democratic Party. There, unions and school districts were essentially ordered by legislation passed in 2010, to negotiate new teacher evaluation processes—called Annual Professional Performance Reviews—that rely in significant measure on student learning outcomes. While districts and their local teacher unions have considerable freedom to negotiate systems that suit their needs, the result has to be a single composite index of teacher effectiveness that consists of at least 40 percent of measures of student learning. Districts that failed to negotiate such processes would be punished with smaller amounts of state aid.¹³

The motivation for these changes in New York, and in some other states where Democrats maintained some measure of political power, was largely financial rather than ideological. The Federal Government provided the financial incentives. The “Race to the Top” program, announced in July 2009 by Arne Duncan, the U.S. Secretary of Education, made billions of dollars in grants available to states undertaking educational reforms.¹⁴ In order for school districts to be eligible for such grants, they have to use teacher evaluation systems that take student achievement explicitly into account and they have to

¹⁰ MICH. COMP. LAWS ANN. § 423.210 (West 2013); MICH. COMP. LAWS ANN. § 423.201 (West 2013); S.B. 575, 117th Gen. Assemb., Reg. Sess. (Ind. 2011); S.B. 5, 129th Gen. Assemb., 2011 Reg. Sess. (Ohio 2011); Assemb. B. 11, 2011 Leg., 2011 Spec. Sess. (Wis. 2011).

¹¹ See Donn, *supra* note 4.

¹² Wis. Assemb. B. 11. See also, e.g., MICH. COMP. LAWS ANN. § 423.210; MICH. COMP. LAWS ANN. § 423.201 (West 2013); Ind. S.B. 575; Ohio S.B. 5.

¹³ See *Collective Bargaining: The Taylor Law/Civil Service Law*, N.Y. STATE UNITED TEACHERS, <http://www.nysut.org/members/member-guide/collective-bargaining> (last visited Feb. 12, 2014). See also N.Y. EDUC. LAW § 3012-c (McKinney 2013).

¹⁴ Press Release, U.S. Dep’t of Educ., President Obama, U.S. Secretary of Education Duncan Announce National Competition to Advance School Reform (July 24, 2009), *available at* <http://www2.ed.gov/news/pressreleases/2009/07/07242009.html>.

have plans that enable them to remove ineffective teachers.¹⁵ Such federal largesse often succeeds in getting states to change policies in a variety of areas, and during the current difficult fiscal times, few states can resist such offers.

In Nevada, initial attempts to legislate change did not succeed. There, three separate bills were among those introduced that would have modified the bargaining process in public education. None would have eliminated collective bargaining, but all three would have placed very significant limits on bargaining. These would have included a prohibition on negotiations over how teachers are hired, assigned, transferred, or directed. They would have also changed some non-mandatory bargaining topics into prohibited topics, would have allowed local governments to suspend pay increases if certain budget parameters were met, and if at any time the state passed legislation increasing the cost of local government employees, would have automatically reopened collective bargaining agreements for the purpose of finding ways to offset those increased costs.¹⁶

However, legislative changes were eventually made in Nevada that reflected the incentives created by the “Race to the Top” program and the arguments of the education reform movement. Thus, Nevada state law now specifically prohibits teacher (or administrator) layoffs based entirely on seniority.¹⁷ The law does not specify how much seniority may count—as long as it does not count for 100%—and while the statute suggests other items that may be considered (e.g. the employee’s performance evaluations, whether the position is difficult to fill, the type of licensure the employee holds and the criminal record of the employee are among those enumerated), it does not require that any or all of them be considered as long as seniority is not the only consideration.¹⁸

Additional legislation in Nevada makes it much easier to fire teachers who are deemed unsatisfactory. This legislation increases teacher probationary periods and it essentially returns any tenured teacher who receives two consecutive unsatisfactory evaluations to probationary status.¹⁹ Also, legislation that became effective July 1, 2013, requires that school districts revise teacher and administrator evaluation systems to designate personnel as “highly effective,” “effective,” “minimally effective,” or “ineffective,” using student data for at least 50 percent of the measure. It also requires the establishment of a “pay-for-performance” program that must be implemented for the 2014–15 school year.²⁰

It is clear that the federal “Race to the Top” program, in several ways, has been significantly influenced by the critique of the education reform movement. Therefore, a growing number of states are mandating aspects of the education reform agenda because federal dollars are only available in states that

¹⁵ *Should Teachers Get Tenure?*, PROCON.ORG, <http://teachertenure.procon.org> (last visited Feb. 12, 2014).

¹⁶ See S.B. 78, 2011 Leg., 76th Sess. (Nev. 2011); S.B. 162, 2011 Leg., 76th Sess. (Nev. 2011); S.B. 342, 2011 Leg., 76th Sess. (Nev. 2011).

¹⁷ NEV. REV. STAT. § 288.151 (2013).

¹⁸ *Id.*

¹⁹ NEV. REV. STAT. § 391.3129 (2013).

²⁰ NEV. REV. STAT. § 391.168 (2013).

do. This leaves open the question of whether teacher collective bargaining agreements are as inflexible as has been claimed.

CONTENT OF TEACHER COLLECTIVE BARGAINING AGREEMENTS

The narrative of the education reform movement asserts that teacher collective bargaining agreements have several features that work to the detriment of the education of students. These tend to revolve around three related issues. The first is salary increases based on seniority. The second is that the deployment and layoff of teachers are inflexibly based on seniority. The third is that incompetent teachers are almost impossible to terminate.²¹

By far the most common system of teacher pay in the United States bases the pay of the individual teacher on seniority and educational attainment. Teacher pay is often based on a table that includes years of seniority, often up to some limit, on the vertical axis, and educational degrees and credits beyond the bachelor's degree along the horizontal axis. Based on the educational attainment and the year of seniority for a given teacher, the appropriate box in the table will indicate that teacher's annual salary. Since, under such a system, pay increases do not depend on teacher success in educating students, the assumption of the educational reformers is that such teachers have little incentive to work hard at teaching their students or at developing the skills that will enable them to teach their students effectively.²² The question of whether or not such teachers do work hard to help their students succeed is rarely examined, nor is the underlying assumption that experience and additional education are not significant factors in teacher effectiveness.

The education reform narrative also asserts that able and enthusiastic junior teachers find such salary scales discouraging. It is asserted that such junior teachers are demoralized by the fact that they see senior teachers who make little effort and get paid much larger amounts due to their seniority. Such junior teachers often allegedly leave the profession because they are discouraged, and because they understand that young people like them with ability and enthusiasm can find much greater rewards in the private sector or by going into school administration.²³ While such claims are often made, little hard evidence is adduced to support them. However, the education reform critics are certainly correct that most negotiated teacher salary systems base pay increases primarily on seniority and educational attainment.²⁴ It is the impact of this system that is in dispute.

²¹ See Azmat Khan, *The Battle Over Education Reform*, FRONTLINE (Jan. 8, 2013, 9:45 PM), <http://www.pbs.org/wgbh/pages/frontline/education/education-of-michelle-rhee/the-battle-over-education-reform/>.

²² See *New York City Teacher Salary*, N.Y.C. DEP'T OF EDUC., <http://schools.nyc.gov/nr/rdonlyres/eddb658c-be7f-4314-85c0-03f5a00b8a0b/0/salary.pdf> (last visited Feb. 12, 2014).

²³ See Susan Moore Johnson & Morgaen L. Donaldson, *The Effects of Collective Bargaining on Teacher Quality*, in COLLECTIVE BARGAINING, *supra* note 3, at 111, 114–15; see also Richard D. Kahlenberg, *The History of Collective Bargaining among Teachers*, in COLLECTIVE BARGAINING, *supra* note 3, at 7, 10–11 (discussing these issues).

²⁴ See, e.g., Anthony Cody, *Is Seniority for Teachers Bad for Students?*, EDUC. WK. TCHR. (Nov. 3, 2012, 11:23 AM), http://blogs.edweek.org/teachers/living-in-dialogue/2012/11/is_seniority_for_teachers_bad_.html.

School districts have several different contexts by which they deploy their teachers. They need to assign the teachers they initially hire. They need to reassign or transfer teachers (voluntarily or involuntarily) when there are openings that are not filled with new teachers. They need to lay teachers off when they have too many and to redeploy the teachers that remain after a layoff.

The educational reform narrative is that, under teacher collective bargaining systems, such decisions are made entirely on the basis of seniority. Thus school districts have no flexibility in their ability to deploy their teachers in ways that would provide the maximum benefit to students. Senior teachers use their seniority to transfer into schools and classes that have the best students and are the easiest to teach. This leaves the neediest students and schools with the most junior teachers who may or may not be those best suited to teach them.

Similarly, the narrative is that layoffs (reductions in force) are based entirely on seniority. This means that able junior teachers are laid off while less able senior teachers are kept on when school systems are forced to retrench. Since senior teachers are paid more than junior teachers, this approach requires more teachers to be laid off in order to save any given amount of money.

In fact, there is considerable evidence that teacher collective bargaining agreements don't hamstring school managers in their teacher deployment decisions nearly as much as the education reform narrative asserts. Cohen-Vogel and Osborne-Lampkin examined teacher collective bargaining agreements in Florida and found that seniority does not dominate teacher deployment decisions.²⁵ Similarly, Donn, Karper, and Kirby examined collective bargaining agreements in the ten largest cities in New York State. Since these are the largest districts in the state, they are the ones that are most bureaucratic and thus most likely to have inflexible teacher deployment policies. Yet, once again, the authors found that seniority was usually not the dominant consideration in teacher deployment decisions.²⁶ Hess and Kelly similarly report that teacher collective bargaining agreements are often not as inflexible as they are portrayed.²⁷

The final part of the narrative is that teacher tenure systems make it almost impossible to terminate incompetent teachers. The concept of tenure is widely misunderstood, often presented in the media as a guarantee of a "job for life."²⁸ In truth, what tenure actually means is that the employee can't be terminated without some kind of "just cause" and that the employee has certain due process protections when the school district does try to discipline or terminate her

²⁵ See generally Lora Cohen-Vogel & La'Tara Osborne-Lampkin, *Allocating Quality: Collective Bargaining Agreements and Administrative Discretion Over Teacher Assignment*, 43 EDUC. ADMIN. Q. 433 (2007).

²⁶ See generally Clifford B. Donn et al., *Teacher Collective Bargaining: Evidence on Flexible Deployment of Teaching Resources*, in Labor and Employment Relations Association Series: Proceedings of the 63rd Annual Meeting, 63 (Francoise Carré & Christian Weller, eds., 2011), available at <http://leraweb.org/sites/leraweb.org/files/publications/Proceedings/Proceed2011.pdf>.

²⁷ See generally Frederick M. Hess & Andrew P. Kelly, *Scapegoat, Albatross, or What? The Status Quo in Teacher Collective Bargaining*, in COLLECTIVE BARGAINING, *supra* note 3, at 53.

²⁸ Khan, *supra* note 21.

or him. This may mean that an impartial hearing officer or arbitrator must determine whether a teacher should be terminated. However, it clearly does not mean that unsatisfactory teachers cannot be removed.

Sometimes these due process protections can be quite elaborate. This can make the termination process rather expensive and possibly rather lengthy although there is nothing inherent in the concept of tenure that requires that termination procedures be unduly expensive or lengthy. However, in many cases these due process protections are contained in law rather than in collective bargaining agreements. New York State is an example where the process of disciplining a tenured teacher is embodied in Section 3020-a of state education law. Teacher unions often play a major role in lobbying for such legislation, but clearly the problem does not lie in the system of collective bargaining.²⁹

Sometimes, the impartial hearing officer may not agree with the termination decision of the school district. This is usually portrayed in public as the story of a teacher who deserves termination but can't be fired. However, the public is unlikely to read the hearing officer's analysis that may find evidence of discrimination, over-reaction, or inequity on the part of the school administration.

It must also be noted that tenure is not just a feature of teacher employment systems in states with collective bargaining. Non-bargaining states generally provide teachers (after a probationary period) with tenure as well. Some states, such as Colorado, Georgia, and Idaho, have legislated to limit tenure or reduce tenure rights.³⁰ Still most states, with or without teacher collective bargaining, continue to provide teachers with a system of tenure that requires some "just cause" basis for discharge and allows for some impartial hearing mechanism where the teacher disputes the basis of the termination. The fact that such "tenure rights" are prevalent in non-bargaining states demonstrates that such systems are not the result of collective bargaining.

TEACHERS IN NON-COLLECTIVE BARGAINING STATES

Critics of teacher collective bargaining often compare what they see as the inflexible and seniority-based personnel systems in unionized school districts with what they presume would exist if teachers were not unionized, or if unions behaved differently. However, it is unnecessary to speculate on how non-union school districts would behave since, in a significant number of states, they are the rule rather than the exception. Looking at school districts in states without teacher collective bargaining, such as Arizona and Georgia, should provide direct evidence of how school districts behave in that environment. While there are certainly differences between districts that bargain with their teachers and those that do not, it is interesting, given the assertions of the education reform movement, how many similarities there are between unionized school districts, and those that are not unionized. This provides evidence that some district poli-

²⁹ N.Y. EDUC. LAW § 3020-a (McKinney 2013).

³⁰ *Should Teachers Get Tenure?*, *supra* note 15.

cies that critics blame on teacher unions are not actually the result of teacher unions at all.

We have interviewed school district personnel in several districts in the states of Arizona and Georgia. All were fairly large metropolitan or suburban districts with multiple school buildings and large numbers of teachers. None had collective bargaining agreements with unions (although some consulted with unions). We inquired about policies addressing pay scales, teacher deployment and layoffs. We also inquired as to the nature and extent of consultation with teachers and teacher unions. We were able to reach several conclusions.

First, most of these districts traditionally gave a significant role to seniority in the deployment of teachers. In most cases, layoffs were based largely on seniority, at least until recently. Several of these districts had relied entirely on seniority in the case of teacher layoffs, but they are no longer doing so. This is because both Arizona and Georgia have passed legislation forbidding the use of reductions-in-force based on seniority.³¹ This has caused some consternation among administrators in some districts who are having trouble determining an equitable and effective basis for such layoffs.

Some of the districts that we surveyed indicated that seniority played some role in transfers of teachers. This was particularly the case of involuntary transfers. The process, like that in many collective bargaining environments, involves requesting volunteers to fill openings and, if no suitable volunteers come forward, relying at least in part on seniority in deciding which teacher(s) to move.

Second, salaries are often largely based on seniority, with salary scales primarily based on seniority and educational attainment, much as in unionized environments. In some cases, these scales are essentially imposed by law—as in Georgia where there is a statewide salary scale. The Georgia scale has some room for local adjustment, but it is based on seniority and education. In other cases, the scales are the result of discussions or consultation with teachers or teacher unions. In Arizona, many districts have not moved teachers up the salary scale during the last several years (e.g., raised pay based on seniority) because additional funds necessary to pay such raises have not been available.³²

We do not share the view that the policies on which the education reform movement focuses (e.g., salaries based significantly on seniority, and teacher assignment based significantly on seniority) necessarily result in poorer education for children. However, as this section has indicated, in practice many of those policies are quite similar in school districts both with and without teacher collective bargaining. The fact that some states without teacher collective bargaining (e.g., Arizona, Georgia) have found it necessary to create law which restricts teacher reductions-in-force from being based entirely, or partially, on seniority suggests that perhaps such reduction-in-force rules do not come primarily from collective bargaining.³³ This evidence indicates that there are orga-

³¹ ARIZ. REV. STAT. ANN. § 15-502(H) (2013); GA. CODE ANN. § 20-2-948(a) (2013).

³² See Cathryn Creno, *Mesa Teachers Will See Hard-Fought Pay Raises*, AZCENTRAL.COM (Aug. 2, 2013, 10:28 AM), <http://www.azcentral.com/community/mesa/articles/20130729-mesa-teachers-will-see-hard-fought-pay-raises.html>.

³³ ARIZ. REV. STAT. ANN. § 15-502(H); GA. CODE ANN. § 20-2-948(a).

nizational factors at work in addition to unions and collective bargaining that lead districts to prefer seniority-based layoffs.

ANALYSIS AND CONCLUSIONS

It is clear from the evidence adduced above that there are more similarities in the human resource practices of school districts, both with and without teacher collective bargaining, than many of the critics of teacher collective bargaining have admitted. These critics have tended to focus on large urban school districts and thus have often confused the naturally bureaucratic and rule-based systems in those districts for the product of collective bargaining. However, in practice, these systems are often just the natural product of large organizations.

One of the factors that makes seniority an important criterion in the determination of salaries and in the deployment of employees in collective bargaining agreements is that seniority is easy to measure and relatively objective. There is also a certain element of perceived justice in rewarding those who have served the employer the longest. This means that systems based on seniority produce fewer disputes about the accuracy of the measure than other systems, and they can be easily justified to employees and to other constituencies. These features are attractive to managers.

On the other hand, ability is much harder to measure, especially in a profession with complex and multi-faceted tasks and outputs, such as teaching. How do we compare the ability of a kindergarten teacher with that of a high school mathematics teacher? How do we compare the ability of a music teacher to an art teacher? How do we compare the ability of a teacher in a school in one neighborhood with strong parent involvement with the ability of a teacher in another neighborhood where parents tend to be less involved? There have been major struggles over attempts to rate teacher quality. In fact, that issue was one of the principal issues in dispute in the Chicago teachers' strike in the Fall of 2012.³⁴

It is certainly possible to create such measures of ability, but they are not obvious, they are not natural, and they seem to lend themselves to considerably more debate than do such measures as academic credentials and seniority. To teachers, and even to administrators, they can seem arbitrary. Even in the absence of collective bargaining grievance procedures, reliance on these measures can give rise to disputes and to morale problems.

Attempts to create measures of teacher ability and effectiveness are ongoing. Most rely in large measure on scores on standardized tests. This gives rise to another set of controversies about the ability of tests to measure student learning accurately, about cultural bias in tests, and about the problems

³⁴ Sevil Omer, *Question at Heart of Chicago Strike: How Do You Measure Teacher Performance?*, NBCNEWS.COM (Dec. 23, 2013, 1:50 PM), http://usnews.nbcnews.com/_news/2012/09/11/13808109-question-at-heart-of-chicago-strike-how-do-you-measure-teacher-performance?lite. The summary of contract provisions produced by the Chicago Teachers' Union indicated the issues in dispute had included *inter alia* how much teaching evaluations would depend on standardized tests and on student surveys. *Id.*

involved when “high stakes” testing creates incentives for teachers to “teach to the test.”³⁵

A number of the trends that distress critics about public education (e.g., growth of staff/student ratios and the use of seniority in layoffs) are real, although their impact on student learning outcomes is not clear. However, the fact that these trends are often similar in school systems both with and without teacher collective bargaining suggests strongly that their origin and persistence lie outside of collective bargaining.

Few aspects of teacher collective bargaining agreements cause education reformers more concern than the way in which they limit the ability of school districts to deploy teachers as needed. The assertion is that school districts are hamstrung by restrictions on assignments, reassignments, and transfers that mandate that such moves be made by seniority (or that give senior teachers choices about such moves). However, the evidence is clear that teacher collective bargaining agreements are not as restrictive as they have been portrayed on these issues. The evidence is also clear that school systems without teacher collective bargaining often use teacher deployment methods that have much in common with those in collective bargaining systems. Again, this suggests that the origin and persistence of such practices is not to be found in teacher collective bargaining.

Similarly, tenure systems are largely the product of state legislation. We do not accept that it is appropriate for employers—school districts or others—to be able to terminate their employees without cause, and without those employees having due process rights. We have yet to see convincing evidence that such systems are detrimental to the education of children; indeed, there is some evidence that senior teachers may be more effective on average.³⁶ There is also evidence that school administrators who decide to terminate teachers often act in an arbitrary manner. This is true even in cases when the administrators know that their decisions may be appealed to impartial hearing officers.³⁷ However, in any case, the systems were not created by collective bargaining. The formalities and expenses that are so often the object of criticism are likewise primarily the result of state law and regulations, rather than the result of teacher collective bargaining.

The fact that some states (without teacher collective bargaining) have found it necessary to forbid reliance on seniority for some teacher-deployment decisions, again, suggests that the forces that favor seniority often arise outside of collective bargaining relationships. Unions often argue in favor of using seniority in such decisions because it seems equitable, and because it is easy to

³⁵ ELAINE WEISS & DON LONG, *BROADER, BOLDER APPROACH TO EDUC., MARKET-ORIENTED EDUCATION REFORMS’ RHETORIC TRUMPS REALITY* 11, 47, 55 (2013); David Denby, *Public Defender*, *NEW YORKER*, Nov. 19, 2012, at 66, 66–71; C. Kirabo Jackson, *Non-Cognitive Ability, Test Scores, and Teacher Quality: Evidence from 9th Grade Teachers in North Carolina* 1, 26 (Nat’l Bureau of Econ. Research, Working Paper No. 18624, 2012). See also BEST, *supra* note 8, at 9–10, 16–20.

³⁶ Carrie R. Leana, *The Missing Link in School Reform*, 9 *STAN SOC. INNOVATION REV.* 30, 34 (2011), available at http://www.ssireview.org/articles/entry/the_missing_link_in_school_reform.

³⁷ JAMES A. GROSS, *TEACHERS ON TRIAL: VALUES, STANDARDS, & EQUITY IN JUDGING CONDUCT & COMPETENCE* 11–12 (1988).

measure, therefore giving rise to fewer disputes. Managers in school districts that do not engage in collective bargaining with their teachers often find seniority attractive for exactly the same reasons.

Teacher quality and effectiveness are very complex concepts to measure. It can be difficult to separate these measures from the personal preferences of the administrators. Where teachers (or other employees) believe that assignments, transfers, and layoffs are subject to arbitrary or capricious decisions, morale and performance may suffer. The fact that many school managers in non-unionized districts have preferred to rely on seniority is evidence that they understand the advantages of seniority-based systems.

Educational reformers seem to assume that the alternative to collective bargaining is to pay teachers by their performance and to assign them, transfer them, and lay them off based entirely on quality measures. However, those measures are complex to develop and our evidence indicates that school managers, when left to their own choices, often prefer to rely, at least in substantial part, on seniority. With regard to pay systems, levels of education are, like seniority, easy to measure and they also carry an implication of equity. In addition, basing pay on educational credentials has appealed to school managers because it (arguably) creates incentives for teachers to develop their skills.

It is clear that the criticisms of educational collective bargaining by education reform advocates are overstated at best. Many of the features of collective bargaining that they criticize (which they have yet to demonstrate harm the education of children) do not arise because of collective bargaining. Turning teacher unions into demons that cause the alleged failure of our public school system does little to help us improve our schools. Indeed, more may be gained by working with teacher unions to improve public education instead of vilifying them.³⁸

It is not clear that educational outcomes are worse in school systems where teachers exercise collective bargaining rights than in school systems where they do not. While that assertion is made frequently, the evidence is weak at best. However, it is clear that there is less work-place democracy in school systems without collective bargaining for teachers.

There is one other piece of evidence that should not be overlooked. Often, school districts that are not required to engage in collective bargaining with teacher unions (and which may even be legally precluded from signing collective bargaining agreements with such unions) choose to consult extensively with teacher unions or associations about a variety of topics. Sometimes those consultations are memorialized as school district policies. Clearly, school managers sometimes see unions as creating a mechanism for consultation with the professional teaching staff that can be useful and productive.³⁹ This is not sur-

³⁸ Pat Wingert, *Give Peace A Chance*, NEWSWEEK, Dec. 13, 2010, at 42, 42–43. See also George H. Cohen, Dir., U.S. Fed. Mediation and Conciliation Serv., *Advancing Student Achievement in the United States Public Schools Through Labor-Management Collaboration: The FMCS's Evolving Role in Education Reform*, Presentation at the Worlds of Work: Employment Dispute Resolution Systems Across the Globe, St. John's Center for Labor & Employment Law (July 20, 2011).

³⁹ Julia E. Koppich, *The As-Yet-Unfulfilled Promise of Reform Bargaining: Forging a Better Match Between the Labor Relations System We have and the Education System We Want*,

prising to those who study various forms of industrial democracy. School districts that work at making their teachers and teacher unions allies in improving the education they provide are more likely to succeed than those that demonize them.

in COLLECTIVE BARGAINING, *supra* note 3, at 203, 212–13, 224. *See also* Wingert, *supra* note 38.