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Do Teacher Pay for Performance Schemes Advance American Education? What Education and Business Can Learn from Each Other in the Education Reform Movement

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DO TEACHER PAY FOR PERFORMANCE
SCHEMES ADVANCE AMERICAN EDUCATION?
WHAT EDUCATION AND BUSINESS CAN LEARN
FROM EACH OTHER IN THE EDUCATION
REFORM MOVEMENT

DEVIN R. BATES*

ABSTRACT

States are quickly moving away from the uniform salary schedule used to compensate teachers and are instead implementing various forms of Pay for Performance. While Pay for Performance compensation schemes have proved effective in some areas of business, they are not uniformly applicable and are ill-suited to education reform. By outlining recent developments in this area of the law and by reviewing the justifications for Pay for Performance schemes, this Note shows what education can learn from business and what business can learn from education. Ultimately, it is in the self-interest of businesses to oppose the implementation of Pay for Performance schemes when used to compensate teachers.

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TABLE OF CONTENTS

INTRODUCTION..... 549

I. THE TRADITIONAL UNIFORM SALARY SCHEDULE..... 551

II. THE MOVEMENT AWAY FROM THE UNIFORM SALARY SCHEDULE:
STATES ADOPT PAY FOR PERFORMANCE SCHEMES AND OTHER
CHANGES TO TEACHER COMPENSATION..... 554

A. The State’s Role in Setting the Uniform Salary Schedule.... 554

*B. State Statutory Regulations on Teacher Performance Pay ..*555

III. TEACHER PAY FOR PERFORMANCE SCHEMES: WHERE THEY
CAME FROM, WHERE THEY GO WRONG, AND HOW THEY ARE
ILL-SUITED FOR EDUCATION..... 557

A. The Origins and Development of Incentive Pay 557

*B. Pay for Performance Systems Can Create Adverse Incentives
to Cheat, Game the System, and Ultimately Compromise the
Long-Term Performance of an Organization.....* 560

*C. Incentive-Based Pay Systems Can Open Schools to
Legal Challenges.....* 562

*D. Pay for Performance Systems Refocus Teachers, and Are
Entirely Counterproductive to the Education Process.....* 565

 1. *Daniel Pink and the Surprising Truth About What
Motivates Us.....* 566

 2. *Daniel Pink’s Lessons on Motivation Applied to
Business and Education* 569

IV. ALTERNATIVE APPROACHES TO REFORMING EDUCATION AND
WHAT BUSINESS CAN LEARN FROM EDUCATION REFORM 574

CONCLUSION..... 577

INTRODUCTION

President Barack Obama has called teachers “nation builders.”¹ He charged young people: “If you want to make a difference in the life of our nation; if you want to make a difference in the life of a child—become a teacher. Your country needs you.”² While strong political rhetoric supports the idea that teachers build our nation, genuine reform has proved elusive and the education system is failing.³ A person’s outcome can be determined based upon the zip code in which they are born.⁴ United States school systems trail their international counterparts.⁵ This situation is problematic for the United States economy⁶ because education is a well-recognized pathway to economic development.⁷

Recognizing the need to improve educational outcomes, federal initiatives such as No Child Left Behind (NCLB)⁸ and Race to the

¹ President Barack Obama, Remarks by the President in the State of Union Address (Jan. 25, 2011), transcript available at <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address> [<https://perma.cc/8QLL-HBKB>].

² *Id.*

³ See DANA KELLY ET AL., NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., PERFORMANCE OF U.S. 15-YEAR-OLD STUDENTS IN MATHEMATICS, SCIENCE, AND READING LITERACY IN AN INTERNATIONAL CONTEXT 14–19 (2002), <https://nces.ed.gov/pubs2014/2014024rev.pdf> [<https://perma.cc/MXJ5-XLGE>].

⁴ See Arne Duncan, Sec’y of Educ., U.S. Dep’t of Educ., Remarks: The New Spotlight on America’s Opportunity Gaps (Mar. 21, 2014), <http://www.ed.gov/news/speeches/new-spotlight-americas-opportunity-gaps> [<https://perma.cc/BU L4-97GH>] (“the everyday educational experience for far too many students of color, students with disabilities, and English [Language] Learners falls short of meeting the American promise that if you work hard and study hard, you will have a fair shot to succeed.”).

⁵ *See id.*

⁶ *See* discussion *infra* Part IV.

⁷ *See* Jonathan C. Augustine, *The Interest Convergence of Education Reform and Economic Development: A Response to “The State of our Unions,”* 51 U. LOUISVILLE L. REV. 407, 409–10 (2013) (“[T]he United States’ two major political parties embrace education reform as a pathway to economic development.”).

⁸ No Child Left Behind Act, 20 U.S.C. §§ 6301–7941 (2006).

Top (RTT)⁹ have pursued reform. At the state and local levels, state legislatures and school districts have changed many policies, most notably their systems for teacher evaluation and compensation. An emerging trend has been compensating teachers according to “Pay for Performance” plans—a form of merit pay—whereby teacher compensation is tied to student outcomes.¹⁰ Pay for Performance schemes are spreading,¹¹ and the method of teacher compensation has become a rapidly changing area of state education law.¹²

While educators and policy makers are adopting Pay for Performance schemes in the classroom, similar systems are already well established in the business community.¹³ This Note seeks to bridge the gap between educators and business people by applying lessons learned in the business world to the area of education and suggesting what the business community can learn from education’s relatively recent foray into innovative pay structures. Learning in this context is critical, as costly failures abound.¹⁴

⁹ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

¹⁰ See Lara K. Ompps, Note, *Holding Teachers Accountable and Rewarding Those Who Perform: Evaluating A Performance-Based Pay System for West Virginia*, 114 W. VA. L. REV. 1053, 1065 (2012) (pointing out that “both the federal government and some state governments are moving towards performance-based pay systems”).

¹¹ See NAT’L COUNCIL ON TEACHER QUALITY, POLICY ISSUE: COMPENSATION—PAY SCALES AND PERFORMANCE PAY [hereinafter NCTQ PERFORMANCE PAY], <http://www.nctq.org/statePolicy/2015/statePolicyIssues.do#2> [<https://perma.cc/H7VU-JCFS>] (identifying sixteen states that support some sort of performance pay).

¹² See Preston C. Green III et al., *The Legal and Policy Implications of Value-Added Teacher Assessment Policies*, 2012 B.Y.U. EDUC. & L.J. 1, 2 (2012) (“At the time of submission of this article, only a handful of states had taken such bold steps. But, by the time of our final edits, 18 states had overhauled teacher evaluation requirements with 14 requiring that at least 40% of teacher evaluation consist of student performance measures.”).

¹³ See *Sales Commissions*, REFERENCE FOR BUSINESS, <http://www.referenceforbusiness.com/small/Qu-Sm/Sales-Commissions.html> [<https://perma.cc/YLM8-EXZQ>].

¹⁴ See, e.g., Lynn Stout, *‘Pay for Performance’ pitfalls: a cheating scandal in Atlanta reveals the dark side of offering incentives*, L.A. TIMES (Apr. 12, 2013), <http://articles.latimes.com/2013/apr/12/opinion/la-oe-stout-atlanta-teachers-in>

This Note argues that Pay for Performance systems based on student test scores are ill-suited for education. Instead, this Note highlights how teacher compensation can be adjusted to better meet educational needs. Part I will briefly outline how teachers are traditionally compensated and how that system is now outdated. Part II will examine the different state statutory approaches to compensating teachers. Part III will examine the assumptions upon which Pay for Performance schemes rely, and will argue that Pay for Performance systems are not the proper way to improve educational outcomes. Finally, Part IV will highlight viable alternatives and show what business can learn from education.

I. THE TRADITIONAL UNIFORM SALARY SCHEDULE

For most of the past century, teachers have been compensated according to rigid and intensely uniform salary schedules.¹⁵ These salary schedules are often dictated by state governments, thus limiting local school district control.¹⁶ The schedule determines a teacher's salary based on the number of years teaching, providing enhancements for additional certifications, additional duties, and additional degrees earned.¹⁷ These single salary pay schedules only allow for salaries to be set by prescribed amounts set by factors listed in the statute.¹⁸ The salary increases are minimal and do not take teacher performance or student outcomes into account.¹⁹

centives-20130412 [<https://perma.cc/R3AX-R27P>] (“[The] Atlanta cheating scandal illustrates the dangers of the modern infatuation with incentives and what’s called ‘Pay for Performance.’”).

¹⁵ See Omps, *supra* note 10, at 1057.

¹⁶ See discussion *infra* Part II.

¹⁷ *E.g.*, TEX. EDUC. CODE ANN. § 21.402 (West 2015) (“Except as provided by [the grandfather clause], a school district must pay each classroom teacher, full-time librarian, full-time school counselor ... not less than the minimum monthly salary, based on the employee’s level of experience in addition to other factors, as determined by commissioner rule, determined by the following formula.”).

¹⁸ *Id.*

¹⁹ See OHIO REV. CODE ANN. § 3317.13 (West 2015):

(C) Minimum salaries exclusive of retirement and sick leave for teachers shall be as follows:

The factors upon which each state bases the salary schedule vary slightly, but the general rigidity to the system is relatively uniform.²⁰ At times these single salary pay schedules have been challenged, but courts strictly interpret the schedules to preserve uniformity.²¹

YEARS OF SERVICE	TEACHERS WITH LESS THAN BACHELOR'S DEGREE		TEACHERS WITH A BACHELOR'S DEGREE		TEACHERS WITH FIVE YEARS OF TRAINING, BUT NO MASTER'S DEGREE		TEACHERS WITH A MASTER'S DEGREE OR HIGHER	
	Per Cent	Dollar Amount	Per Cent	Dollar Amount	Per Cent	Dollar Amount	Per Cent	Dollar Amount
0	86.5	17,300	100.0	20,000	103.8	20,760	109.5	21,900
1	90.0	18,000	103.8	20,760	108.1	21,620	114.3	22,860
2	93.5	18,700	107.6	21,520	112.4	22,480	119.1	23,820
3	97.0	19,400	111.4	22,280	116.7	23,340	123.9	24,780
4	100.5	20,100	115.2	23,040	121.0	24,200	128.7	25,740
5	104.0	20,800	119.0	23,800	125.3	25,060	133.5	26,700
6	104.0	20,800	122.8	24,560	129.6	25,920	138.3	27,660
7	104.0	20,800	126.6	25,320	133.9	26,780	143.1	28,620
8	104.0	20,800	130.4	26,080	138.2	27,640	147.9	29,580
9	104.0	20,800	134.2	26,840	142.5	28,500	152.7	30,540
10	104.0	20,800	138.0	27,600	146.8	29,360	157.5	31,500
11	104.0	20,800	141.8	28,360	151.1	30,200	162.3	32,460

²⁰ Compare GA. CODE ANN. § 20-2-212 (West 2015) (requiring additional compensation for teachers who obtain advanced degrees), *with* LA. REV. STAT. ANN. § 17:418 (West 2015) (leaving the issue of additional compensation for teachers who obtain advanced degrees up to local discretion), *and* FLA. STAT. ANN. § 1012.22 (West 2015) (requiring that advanced degrees cannot be used in setting the salary schedule unless the advanced degree is in the area that the teacher is certified to teach), *and* Stephanie Banchero & Meredith Rutland, *North Carolina Ends Pay Boosts for Teacher Master's Degrees*, WALL ST. J. (July 26, 2013, 8:38 PM), <http://online.wsj.com/articles/SB10001424127887323971204578630312785220612> [<https://perma.cc/8TBB-E5FE>] (highlighting that North Carolina was the first state to prohibit schools from compensating teachers more for obtaining advanced degrees).

²¹ See, e.g., Bd. of Educ. Tyler v. White, 605 S.E.2d 814, 819 (W. Va. 2004) (“Once a county board of education pays additional compensation to certain

Uniform salary schedules are subject to criticism, namely that the systems' main considerations—experience, graduate coursework, and degrees—are “not accurate predictors of successful teachers.”²² Research by the National Bureau of Economic Research does not connect advanced degrees with effective teaching, and many excellent teachers obtained only a bachelor's degree.²³ But a recent quantitative study on the long-term effect of teachers conducted by three researchers—two from Harvard and one from Columbia—proves that teacher quality has a substantial impact on student outcomes.²⁴ This research has sparked debate, however, and detractors maintain that measuring the effect of any one teacher is an impossible task.²⁵ Regardless of whether the precise impact of one teacher can accurately be measured, the overarching concern is that teachers should not be paid more where no value is added for students.²⁶

teachers, it must pay the same amount of additional compensation to other teachers performing ‘like assignments and duties.’”).

²² Omps, *supra* note 10, at 1061 (citing Brief for National School Boards Association as Amici Curiae Supporting Respondents, *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 (No. 069-1505), 2008 WL 176572, at *18).

²³ See Omps, *supra* note 10, at 1061 (citing Dan Goldhaber, *The Mystery of Good Teaching*, EDUC. NEXT, Spring 2002, at 50, 53; Eric A. Hanushek et al., *The Market for Teacher Quality*, 15–18 (Nat'l Bureau of Econ. Research, Working Paper No. 11154, Feb. 2005), <http://www.nber.org/papers/w11154.pdf> [<https://perma.cc/W87S-CXTX>]).

²⁴ See Anne Lowrey, *Big Study Links Good Teachers to Lasting Gains*, N.Y. TIMES (Jan. 6, 2012), http://www.nytimes.com/2012/01/06/education/big-study-links-good-teachers-to-lasting-gain.html?pagewanted=all&_r=0 [<https://perma.cc/9V4V-WCSE>] (quoting author Professor Friedman as saying that “[i]f you leave a low value-added teacher in your school for 10 years, rather than replacing him with an average teacher, you are hypothetically talking about \$2.5 million in lost income”); Raj Chetty et al., *The Long-Term Impacts of Teachers: Teacher Value-Added and Student Outcomes in Adulthood*, 104 AM. ECON. REV. 2633, 2661–63 (2014).

²⁵ See Lowrey, *supra* note 24 (“Supporters argue that such metrics hold teachers accountable and can help improve the educational outcomes of millions of children. Detractors, most notably a number of teachers unions, say that isolating the effect of a given teacher is harder than it seems, and might unfairly penalize some instructors.”).

²⁶ See Omps, *supra* note 10, at 1061–62.

II. THE MOVEMENT AWAY FROM THE UNIFORM SALARY SCHEDULE: STATES ADOPT PAY FOR PERFORMANCE SCHEMES AND OTHER CHANGES TO TEACHER COMPENSATION

Some states have been quickly moving away from the traditional uniform salary schedule.²⁷ With the spread of NCLB, Common Core, RTT, and much greater tracking of data, current mechanisms are in place for teacher accountability.²⁸ Even with those additional levels of control, states are very interested in adopting various forms of Pay for Performance schemes. States have also been modifying their laws governing teacher compensation in other ways. Against the backdrop of the default rule of a uniform salary schedule,²⁹ this Part analyzes the different approaches that states have taken in recent years. As noted above, this area of the law has been rapidly evolving.³⁰

A. The State's Role in Setting the Uniform Salary Schedule

Many uniform salary schedules have remained intact, but states treat them differently and allow for varying levels of local versus state control. The slight majority of states take the approach adopted by New York, and do not take a role in setting the uniform salary schedule.³¹ The decision of setting the salary schedule is left up to the individual school districts.³² A minority of states, including Illinois, set a minimum teacher salary that allows individual school districts to create their own policies and salary

²⁷ See Green et al., *supra* note 12, at 2.

²⁸ See Natalie Gomez-Velez, *Urban Public Education Reform: Governance, Accountability, Outsourcing*, 45 URB. LAW. 51, 59 (2013) (“As these myriad changes [NCLB and RTT] unfolded, proponents of each presented them as earnest efforts to improve education by increasing accountability, fostering equity, and funding innovation.”).

²⁹ See *supra* notes 22–25 and accompanying text.

³⁰ See Green et al., *supra* note 12.

³¹ See, e.g., N.Y. EDUC. LAW § 16.63 (McKinney 2015). Article 63 contains the laws governing retirement and sick leave, when salaries must be paid, reduction of salaries for purchase of annuities, etc., but does not set a salary schedule. *Id.*; see also NCTQ PERFORMANCE PAY, *supra* note 11.

³² See, e.g., N.Y. EDUC. LAW § 16.63; see also NCTQ PERFORMANCE PAY, *supra* note 11.

schedules as long as they are in excess of the state minimum.³³ Another minority group of states, including Ohio, sets the minimum uniform salary schedule at the state level.³⁴ The minimum salary is prescribed for each employee based on the number of years of teaching experience and the highest education level obtained.³⁵

B. State Statutory Regulations on Teacher Performance Pay

In a break from the traditional, militant adherence to the uniform salary schedule, six states now require that a Pay for Performance system be part of the salary scheme for all teachers.³⁶ Eight states permit Pay for Performance as a part of teacher salaries,³⁷

³³ See 105 ILL. COMP. STAT. ANN. 5/24-8 (West 2015):

In fixing the salaries of teachers, school boards shall pay those who serve on a full-time basis not less than a rate for the school year that is based upon training completed in a recognized institution of higher learning, as follows: for the school year beginning July 1, 1980 and thereafter, less than a bachelor's degree, \$9,000; 120 semester hours or more and a bachelor's degree, \$10,000; 150 semester hours or more and a master's degree, \$11,000.

See also NCTQ PERFORMANCE PAY, *supra* note 11.

³⁴ See OHIO REV. CODE ANN. § 3317.13 (West 2015) (“(B) No teacher shall be paid a salary less than that provided in the schedule set forth in division (C) of this section ... (C) Minimum salaries exclusive of retirement and sick leave for teachers shall be as follows.”); see also NCTQ PERFORMANCE PAY, *supra* note 11.

³⁵ See OHIO REV. CODE ANN. § 3317.13; see also NCTQ PERFORMANCE PAY, *supra* note 11.

³⁶ Six states—Florida, Hawaii, Indiana, Louisiana, Michigan, and Utah—now require that performance pay be a part of teacher compensation. *E.g.*, FLA. STAT. ANN. § 1012.22 (West 2015) (“Performance salary schedule.—By July 1, 2014, the district school board *shall adopt* a performance salary schedule that provides annual salary adjustments for instructional personnel and school administrators based upon performance.”) (emphasis added); see also NCTQ PERFORMANCE PAY, *supra* note 11.

³⁷ Eight states—Arkansas, Arizona, Kentucky, Minnesota, Mississippi, Nevada, Oklahoma, and Tennessee—allow school districts to opt into Pay for Performance systems. *E.g.*, MINN. STAT. ANN. § 122A.414 (West 2015) (“Alternative teacher professional pay system. (a) To participate in this program, a school district, intermediate school district, school site, or charter school must have an educational improvement plan ... and an alternative teacher professional pay system agreement.”). See also NCTQ PERFORMANCE PAY, *supra* note 11.

but these permissive states often impose hurdles for a school to implement a Pay for Performance scheme.³⁸

In a modified form of the above laws, two states provide for a performance bonus that is available to all teachers.³⁹ One of these systems, the South Carolina School Incentive Reward Program (SIRP), has become the “longest running state-sponsored, group-based performance plan in the nation,” doling out performance bonuses to approximately a quarter of South Carolina schools.⁴⁰

Several states have offered Pay for Performance compensation, available through Department of Education grants, as an initiative in select districts.⁴¹ In strict adherence to the traditional idea of uniformity as outlined in Part I, a large group of states do not allow for teacher Pay for Performance policies.⁴² There are many other factors upon which states condition teacher pay, but those considerations are beyond the scope of this Note.⁴³

³⁸ See, e.g., MINN. STAT. ANN. § 122A.414; see also NCTQ PERFORMANCE PAY, *supra* note 11.

³⁹ Nebraska and South Carolina provide schoolwide performance bonuses to teachers. See, e.g., S.C. CODE ANN. § 59-21-1220 (West 2015) (outlining the requirements to be paid for performance in South Carolina, namely that “exceptional improvement in or the maintenance of superior student performance, with consideration given to rewarding schools which demonstrate exceptional improvement or maintenance of superior performance by all the groups of students at various levels of performance.”); see also NCTQ PERFORMANCE PAY, *supra* note 11.

⁴⁰ See CAROLINE KELLEY & ALLAN ODDEN, CONSORTIUM FOR POLICY RESEARCH IN EDUC., CPRE FINANCIAL BRIEFS: REINVENTING TEACHER COMPENSATION SYSTEMS 3 (Sept. 1995), <http://www2.ed.gov/pubs/CPRE/fb6/fb6c.html#south> [<https://perma.cc/6E49-QHRY>]; see also NCTQ PERFORMANCE PAY, *supra* note 11.

⁴¹ See FISCAL YEAR 2012 NEW AWARDS (2012), <http://www2.ed.gov/programs/teacherincentive/2012awards.html> [<https://perma.cc/ZAC2-9UC5>] (highlighting federal grants awarded to select school districts in Arizona, California, Colorado, Connecticut, the District of Columbia, Florida, Indiana, Maine, Massachusetts, Michigan, New Jersey, New York, Ohio, South Carolina, Tennessee, and Texas to implement Pay for Performance initiatives).

⁴² E.g., ALA. CODE § 16-13-231.1 (West 2015) (requiring that “each county and city board of education shall adopt a local salary schedule which is at least 100 percent of the State Minimum Salary Schedule” and that no teacher “shall have his or her pay diminished or reduced in any manner”).

⁴³ Various state practices allow for differential teacher pay based on the localized supply and demand realities of various markets for teachers. For example, some states support differential teacher pay—that is, pay departing from the uniform salary schedule—only in schools that are deemed to be high-need

III. TEACHER PAY FOR PERFORMANCE SCHEMES: WHERE THEY
CAME FROM, WHERE THEY GO WRONG, AND HOW THEY
ARE ILL-SUITED FOR EDUCATION

This Part will introduce Pay for Performance systems, highlighting their use in both businesses and schools. It will then reveal some of the more notable failings of Pay for Performance systems and the legal challenges to these systems. This Part will review the social science research behind human motivation and reconcile it with payment schemes. Finally, this Part will show that Pay for Performance systems refocus teachers, and are entirely counterproductive to education.

A. The Origins and Development of Incentive Pay

Altering employees' salaries based on the quality of work is not a novel concept. The idea of incentivized pay is widely used in sales and in business.⁴⁴ It is common that upper-level management and many people working in sales are compensated based on their job performance.⁴⁵ The theory behind this type of Pay for Performance compensation in the realm of business is that people respond to incentives, and are motivated to increase their productivity when they are rewarded.⁴⁶

Before 1900, teachers in the United States were traditionally only compensated with room and board.⁴⁷ In the early 1900s, the development of a cash-based industrial economy and the advent of more standardized teacher preparation programs led to a

schools. See NCTQ PERFORMANCE PAY, *supra* note 11 (highlighting that Colorado, Delaware, Hawaii, Maryland, North Carolina, Texas, Washington, Wisconsin, and Wyoming have such practices). Other state statutes support differential teacher pay for teachers that teach subjects where there is a shortage of teachers teaching that subject. See *id.* (summarizing that this practice exists in Pennsylvania and Utah).

⁴⁴ See REFERENCE FOR BUSINESS, *supra* note 13.

⁴⁵ See Dan Ariely et al., *Large Stakes and Big Mistakes* (Fed. Reserve Bank of Bos., Working Paper No. 05-11, 2005) <http://www.bostonfed.org/economic/wp/wp2005/wp0511.pdf> [<https://perma.cc/CH7V-UZX2>] ("Most upper-management and sales force personnel, as well as workers in many other jobs, are paid based on performance, which is widely perceived as motivating effort and enhancing productivity relative to non-contingent pay schemes.")

⁴⁶ See *id.*

⁴⁷ See KELLEY & ODDEN, *supra* note 40.

replacement of the barter system.⁴⁸ Before the single salary pay schedule became popular in schools in the first half of the twentieth century, paying teachers in the same school variable rates was common.⁴⁹ In 1918, 48 percent of United States schools used some form of Pay for Performance system.⁵⁰

The uniform salary schedule was developed in the 1920s to end discriminatory salary differentials.⁵¹ The early Pay for Performance systems were not objective and were often discriminatory, as elementary, female, and minority teachers received lower compensation than males and those teaching secondary education.⁵² The uniform salary schedule spread in the 1930s and 1940s, and quickly became the law regarding teacher compensation in many states.⁵³ By the end of the 1950s, schools had largely moved to the uniform salary schedule.⁵⁴ By the mid-1980s, 99 percent of teachers worked in districts using uniform salary schedules.⁵⁵

The uniform salary schedule was developed to address a problem in the 1920s⁵⁶ that has since become heavily regulated by the law. In 1963, Congress enacted the Equal Pay Act, prohibiting sex-based wage discrimination between workers performing the same job in the same location.⁵⁷ The following year, Congress enacted the Civil Rights Act, prohibiting employment

⁴⁸ *See id.*

⁴⁹ *See* RICHARD J. MURNANE & DAVID K. COHEN, "MERIT PAY" AND THE NATURE OF THE EMPLOYMENT RELATIONSHIP: LESSONS FROM PUBLIC SCHOOL SYSTEMS 3–4 (1985), <http://files.eric.ed.gov/fulltext/ED270841.pdf> [<https://perma.cc/WU93-SYQS>].

⁵⁰ *See id.* at 3.

⁵¹ *See* Omps, *supra* note 10, at 1057 (citing FREDERICK S. CALHOUN & NANCY J. PROTHEROE, MERIT PAY PLANS FOR TEACHERS: STATUS & DESCRIPTIONS 3 (Educ. Research Serv. Inc. 1983)).

⁵² KELLEY & ODDEN, *supra* note 40, at 2; Omps, *supra* note 10, at 1057 (citing FREDERICK S. CALHOUN & NANCY J. PROTHEROE, MERIT PAY PLANS FOR TEACHERS: STATUS & DESCRIPTIONS 3 (Educ. Research Serv., Inc. 1983)).

⁵³ *See* KELLEY & ODDEN, *supra* note 40, at 2; Omps, *supra* note 10, at 1057 (citing FREDERICK S. CALHOUN & NANCY J. PROTHEROE, MERIT PAY PLANS FOR TEACHERS: STATUS & DESCRIPTIONS 3 (Educ. Research Serv., Inc. 1983)).

⁵⁴ *See* MURNANE & COHEN, *supra* note 49, at 4.

⁵⁵ *See id.* at 2.

⁵⁶ *See* Omps, *supra* note 10, at 1057.

⁵⁷ Equal Pay Act of 1963, Pub. L. No 88-38 (codified at 29 U.S.C.A. § 206(d)(1) (West 2015)).

discrimination based on race, color, religion, or national origin.⁵⁸ Additionally, many states implemented laws to specifically ban discrimination in schools.⁵⁹ In 1965, the Equal Employment Opportunity Commission (EEOC) opened its doors to hearing complaints of discrimination.⁶⁰ As these other protections have developed since the 1920s, the uniform salary schedule is no longer needed to address concerns about discrimination.

In 1983, President Ronald Reagan released his “A Nation at Risk” report, which endorsed performance-based pay for teachers.⁶¹ In 1984, South Carolina established the South Carolina School Incentive Reward Program (SIRP), a group-based performance plan that rewarded funds to top performing schools for instructional uses.⁶² A flurry of other states followed suit in the early 1990s.⁶³ Schools in Denver, Colorado, became the first to consider a teacher compensation system that completely overhauled the traditional method of paying teachers by basing earnings on student outcomes.⁶⁴ Union members in Denver approved the

⁵⁸ Civil Rights Act of 1964, Pub. L. 88-352 (codified at 42 U.S.C.A. § 2000e-2 (West 2015)).

⁵⁹ *E.g.*, N.Y. EDUC. LAW § 3026 (McKinney 2015) (“There shall be no discrimination in the determination of the amount to be paid or the payments to be made to persons employed as teachers in the public schools in any city, union free or common school district in this state, based on sex.”); N.Y. EDUC. LAW § 3027 (McKinney 2015) (“[N]o board of education in any city, union free, common or central school district in this state shall hereafter ... discriminate against any person ... by reason of his or her age.”).

⁶⁰ *See* EQUAL EMPLOYMENT OPPORTUNITIES COMM’N, 1965–1971: A “TOOTHLESS TIGER” HELPS SHAPE THE LAW AND EDUCATE THE PUBLIC, <http://eeoc.gov/eeoc/history/35th/1965-71/index.html> [<https://perma.cc/GS5X-FRH2>].

⁶¹ *See* U.S. DEP’T OF EDUC., U.S. NAT’L COMM’N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM: A REPORT TO THE NATION AND THE SECRETARY OF EDUCATION (1983), http://datacenter.spps.org/uploads/sotw_a_nation_at_risk_1983.pdf [<https://perma.cc/YL6T-KM98>]; Ronald Reagan, Address at Commencement Exercises at Seton Hall University in South Orange, NJ (May 21, 1983) (“One of the best ways to [make good schools] is by rewarding excellence. Teachers should be paid and promoted on the basis of their merit and competence. Hard-earned tax dollars should encourage the best. They have no business rewarding incompetence and mediocrity.”).

⁶² *See* KELLEY & ODDEN, *supra* note 40, at 3.

⁶³ *See id.* at 2, 4–5 (summarizing incentive payment schemes in the Commonwealth of Kentucky, Douglass County, Colorado, and Dallas, Texas).

⁶⁴ *See* Michael Janofsky, *For Denver Teachers, a Pay-For-Performance Plan*, N.Y. TIMES (Sept. 10, 1999), <http://www.nytimes.com/1999/09/10/us/for-denver>

widespread implementation of a similar plan in 2004, making Denver a high-profile and continually evolving example of alternative teacher compensation systems.⁶⁵

School systems and entire states have been rapidly reforming their policies and laws, respectively, over the past decade to change their teacher compensation and evaluation systems.⁶⁶ Changes to teacher compensation are often pursued because of the failures of uniform salary schedules. Uniform salary schedules are not based on factors that influence student outcomes, do not account for past professional experience, and do not provide the market incentives for good performance present in other professions.⁶⁷ Ultimately, the goal of changing teacher compensation systems is to change the outcome for students.⁶⁸

B. Pay for Performance Systems Can Create Adverse Incentives to Cheat, Game the System, and Ultimately Compromise the Long-Term Performance of an Organization

The record on Pay for Performance systems in education, business, and government is riddled with failures and wrongdoing. In 2011, news broke that as many as 180 educators in 44 Atlanta schools had given students answers or changed student responses

-teachers-a-pay-for-performance-plan.html [https://perma.cc/ZT5S-D32S] (introducing the Denver plan “that for the first time anywhere in the country would link teachers’ raises to the performance of the students in their individual classrooms”).

⁶⁵ See Dan Goldhaber & Joe Walch, *Strategic Pay Reform: A Student Outcomes-Based Evaluation of Denver’s ProComp Teacher Pay Initiative* (CEDR Working Paper 2011-3, 2011), [http://www.cedr.us/papers/working/WP%202011-3%20Procomp%20Strategic%20Compensation%20\(9-28\).pdf](http://www.cedr.us/papers/working/WP%202011-3%20Procomp%20Strategic%20Compensation%20(9-28).pdf) [https://perma.cc/6EMM-BAWD] (“Denver’s Professional Compensation System for Teachers (ProComp) represents what is arguably the nation’s most high-profile example of strategic pay reform.”).

⁶⁶ See Green et al., *supra* note 12, at 2.

⁶⁷ See Omps, *supra* note 10, at 1061–62.

⁶⁸ See MATTHEW G. SPRINGER ET AL., NATIONAL CENTER ON PERFORMANCE INCENTIVES AT VANDERBILT UNIVERSITY, http://www.rand.org/content/dam/rand/pubs/reprints/2010/RAND_RP1416.pdf [https://perma.cc/6KN2-BMDA] (“The ultimate purpose of changing teacher compensation is to improve outcomes for students in our nation’s schools.”).

on state tests.⁶⁹ Atlanta teachers were given bonuses in response to the artificially high scores,⁷⁰ and these bonuses, which were tied to student achievement, are what caused this scandal in the first place.⁷¹ A year later, in Washington, D.C., a similar cheating scandal was uncovered.⁷² Despite this disturbing reality, many school administrators are reluctant to investigate wrongdoing because of the embarrassment that an investigation could cause.⁷³

Beyond the realm of education, there are many examples of Pay for Performance systems that create adverse incentives. Performance pay was partly responsible for the 2008 Mortgage Crisis by incentivizing mortgage brokers to approve loans to borrowers who were entirely unqualified, and by luring finance executives into creating risky derivatives.⁷⁴ The Enron and WorldCom scandals have been linked to incentive pay structures.⁷⁵ The Savings and Loan Crisis of the 1980s can also be partly attributed to incentive pay.⁷⁶ The 2014 Veterans Administration scandal was

⁶⁹ *Atlanta Schools Cheating Suspects to Surrender*, CBS NEWS (Apr. 1, 2013), <http://www.cbsnews.com/news/atlanta-schools-cheating-suspects-to-surrender/> [<https://perma.cc/2A4C-WHC2>].

⁷⁰ *Id.* (“Prosecutors say some pay bonuses [that the accused teacher] received were tied to falsified scores on standardized tests ... Schools with good test scores received extra federal dollars, to spend in the classroom or on bonuses.”).

⁷¹ *See* Stout, *supra* note 14 (“Were these teachers and principals all ‘bad apples,’ intrinsically unethical individuals who somehow ended up in the same school district? Not likely. They were ordinary people who allegedly did unethical and dishonest things to achieve the student performance targets needed to keep their jobs and earn their bonuses.”).

⁷² *See* Emma Brown, *Report: Teachers in 18 D.C. classrooms cheated on 2012 tests*, WASH. POST (Apr. 12, 2013), http://www.washingtonpost.com/local/education/memo-could-revive-allegations-of-cheating-in-dc-public-schools/2013/04/12/9ddb2bb6-a35e-11e2-9c03-6952ff305f35_story.html [<https://perma.cc/BC97-NRL4>].

⁷³ *See* Jack Gillum & Marisol Bello, *When standardized test scores soared in D.C., were the gains real?*, USA TODAY (Mar. 30, 2011), http://usatoday30.usatoday.com/news/education/2011-03-28-1Aschooltesting28_CV_N.htm [<https://perma.cc/AX6C-FQG6>] (“After [the DC Chancellor] gave bonuses to educators in some schools that posted big gains in test scores in 2007 and 2008, there was little incentive to examine those scores, [a state board member] says, ‘You’ve handed out these big bonuses. What are you going to do? Take them back?’ she says. ‘It’s a bombshell. It’s embarrassing.’”).

⁷⁴ *See* Stout, *supra* note 14.

⁷⁵ *See id.*

⁷⁶ *See id.*

partially due to incentive pay for administrators that covered up problems in the system.⁷⁷ As a point of clarity, this Note is not suggesting that Pay for Performance systems are per se improper. Rather, it is important to highlight these failures to examine contexts in which such systems have failed, because Pay for Performance must be implemented in a way that is designed to avoid this all too common pitfall.

C. Incentive-Based Pay Systems Can Open Schools to Legal Challenges

This Section will examine whether adopting a Pay for Performance compensation scheme may open schools up to legal challenges. The legal challenges examined here include claims of discrimination, technical challenges for discrepancies with measurement, challenges given the disparate impact on teacher supply, and challenges under Title VII of the Civil Rights Act. While private employers are generally free to pay different wages to different employees, public schools are subject to greater regulations.⁷⁸

First, incentive-based pay systems run the significant risk of opening schools up to discrimination lawsuits. Because all students are unique, judging the performance of a teacher by the outcome of their students presents inherent challenges. This is worth noting from a legal standpoint because many differences in school populations are drawn along the lines of race and class.⁷⁹ Divisions

⁷⁷ See Wyatt Andrews, *VA bonuses were incentive to hide wait times, whistleblowers say*, CBS NEWS (May 13, 2014), <http://www.cbsnews.com/news/va-bonuses-tied-to-secret-waiting-lists-whistleblower-says/> [<https://perma.cc/P5AJ-VSQS>] (“The VA grants bonuses to executives and doctors, partly based on short wait times. Whistleblowers—including Dr. Sam Foote, who revealed the scandal in Phoenix, where up to 40 veterans may have died—believe bonuses give an incentive to conceal delays in care.”).

⁷⁸ 1 Guide to Employment Law and Regulation § 10:1 (2015).

⁷⁹ See GARY ORFIELD, NAT’L EDUC. ASSOC., *RACE AND SCHOOLS: THE NEED FOR ACTION*, <http://www.nea.org/home/13054.htm> [<https://perma.cc/K5GN-XYH9>] (“Double and triple segregation has become far worse since the U.S. Supreme Court began dissolving desegregation plans 16 years ago—a dissolution that continues to deepen and intensify segregation. Across 21st-century America, segregation has reached levels for millions of students once found only in the Old South.”).

along the lines of race and class can be problematic.⁸⁰ Students are often not randomly distributed among districts and among classrooms. The divisions often fall along lines defined by race, class, and ability.⁸¹ This can be problematic when basing teacher compensation on student outcomes because these demographic factors are beyond a teacher's control.⁸² Some teachers could challenge such an allotment of their compensation, arguing that they are being evaluated for compensation, even if inadvertently, according to demographic factors outside of their control.

Teachers may challenge these systems based on a theory of lack of control over student outcomes. Music, art, and early childhood education teachers who are not teaching state-tested subjects may challenge Pay for Performance teacher compensation systems if their salaries are determined using student data that they did not directly impact. In *Cook v. Stewart*, a federal district court rejected a challenge based on this theory, holding that mandating teacher evaluations to rely on student test scores in subjects not

⁸⁰ See *id.* (“We are currently in the midst of a vast migration of the Black and Latino middle class to suburban school districts, districts that have very little diversity in their staffs and little or no preparation to avoid the polarization, inequality, and resegregation so many urban neighborhoods and schools experienced in years past.”).

⁸¹ See Green et al., *supra* note 12, at 11–12 (“Students are not sorted randomly across schools, districts, or teachers within schools. Nor are teachers randomly assigned across school settings with equal resources.”).

⁸² See AM. PSYCHOLOGICAL ASSOC., ETHNIC AND RACIAL DISPARITIES IN EDUCATION: PSYCHOLOGY'S CONTRIBUTIONS TO UNDERSTANDING AND REDUCING DISPARITIES (Aug. 3, 2012), <http://www.apa.org/ed/resources/racial-disparities.pdf> [<https://perma.cc/6AX4-QYA2>]:

Pervasive ethnic and racial disparities in education follow a pattern in which African American, American Indian, Latinos, and Southeast Asian groups underperform academically, relative to Whites and other Asian Americans. These educational disparities (1) mirror ethnic and racial disparities in socioeconomic status as well as health outcomes and healthcare, (2) are evident early in childhood and persist through the K–12 education, and (3) are reflected in test scores assessing academic achievement, such as reading and mathematics, percentages of repeating one or more grades, drop-out and graduation rates, proportions of students involved in gifted and talented programs, enrollment in higher education, as well as in behavioral markers of adjustment, including rates of being disciplined, suspended, and expelled from schools.

associated with the teacher's subject did not violate substantive due process.⁸³ Since many Pay for Performance systems have only emerged within the past few years, there is not a vast body of law illustrating challenges based on this theory and *Cook* does not represent a majority approach.

Other states may reach a different conclusion in a similar challenge. In California, for example, a larger body of case law exists regarding the arbitrariness of teacher compensation systems.⁸⁴ In general, teacher compensation systems are "permissible as long as they were not arbitrary, discriminatory or unreasonable."⁸⁵

If Pay for Performance teacher compensation systems incentivize teachers to move to higher-performing schools or districts where they may perceive that it is easier to receive higher compensation, the students at the lower-performing schools may receive lower-quality teachers, or incur a shortage of teachers.⁸⁶ This would have a disparate racial impact if teachers followed the money, and could subject the Pay for Performance compensation scheme to legal challenges. Although no such lawsuit has emerged, a similar 2014 lawsuit in California certainly provides a colorable outline for such a case.⁸⁷ In *Vergara v. State of California*, a state superior court invalidated a state statute as unconstitutional because the statute kept ineffective teachers in the classroom, and the plaintiffs were able to show that this had a statistically detrimental effect on the future of minority students.⁸⁸ Although Pay for Performance policies would be one step of causation removed from *Vergara*, this argument may carry weight in California or other liberal jurisdictions.

Minority teachers may be able to challenge Pay for Performance laws under Title VII of the Civil Rights Act of 1991, which

⁸³ 28 F. Supp. 3d 1207 (N.D. Fla. 2014).

⁸⁴ See *Adair v. Stockton Unified Sch. Dist.*, 77 Cal. Rptr. 3d 62, 67 (2008) (citing *Rible v. Hughes*, 24 Cal.2d 437 (1944)).

⁸⁵ *Id.*

⁸⁶ See ORFIELD, *supra* note 79 ("As a nation, we expect our schools to create equal outcomes for students who leave their homes severely disadvantaged by family and community poverty, who arrive at their schools to find sometimes unqualified or inexperienced teachers, and who leave those schools as soon as they can.").

⁸⁷ See *Vergara v. California*, No. BC484642, 2014 WL 2598719, at *5, *7 (Cal. Super. Ct. June 10, 2014).

⁸⁸ *Id.*

prevents employers from discriminating “against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race.”⁸⁹ A study of students in Los Angeles, California, showed that black students perform lower on standardized tests than white students, and black teachers are more likely to work in schools with black students.⁹⁰ Again, even though no such lawsuit has emerged, this represents another possible legal challenge.

D. Pay for Performance Systems Refocus Teachers, and Are Entirely Counterproductive to the Education Process

Proponents of Pay for Performance systems champion their applicability to school systems.⁹¹ However, the research on Pay for Performance systems in the educational context reaches divergent conclusions, and there is not a consensus.⁹² A study of New York

⁸⁹ Green et al., *supra* note 12, at 23 (citing 42 U.S.C. § 2000e-2(a)(1) (2010)).

⁹⁰ *Id.* at 12 (citing Richard Buddin, *How Effective Are Los Angeles Elementary Teachers and Schools?* (MPRA Paper No. 27366, Aug. 31, 2010), http://mpra.ub.uni-muenchen.de/27366/1/MPRA_paper_27366.pdf [<https://perma.cc/B4VH-F9QG>]).

⁹¹ See Nick Morrison, *Merit Pay for Teachers is Only Fair*, FORBES (Nov. 26, 2013), <http://www.forbes.com/sites/nickmorrison/2013/11/26/merit-pay-for-teachers-is-only-fair/> (arguing that even though “[e]vidence that performance-related pay raises standards is hard to come by ... this doesn’t mean it should be abandoned”); James Sherk, *The Federal Pay System: Inflated Compensation, Ignored Performance, Testimony before the Committee on Oversight and Government Reform*, HERITAGE FOUND. (Apr. 28, 2011), <http://www.heritage.org/research/testimony/2011/04/the-federal-pay-system-inflated-compensation-ignored-performance> [<https://perma.cc/T2XS-PRS2>] (summarizing why incentive-based pay is well suited for government workers).

⁹² See Goldhaber & Walch, *supra* note 65, at 21–22 (This article statistically evaluates the Denver teacher compensation scheme and concludes that their “findings document significant student learning gains in DPS across grades and subjects. The source of those gains, however, are not altogether clear as there is not a consistent pattern across grade level and subject: in some cases the gains appear primarily amongst students with [incentive paid] teachers, while in other cases non-[incentive paid] teachers are found to be more effective.”); DAVID N. FIGLIO & LAWRENCE KENNY, NAT’L BUREAU OF ECON. RESEARCH, INDIVIDUAL TEACHER INCENTIVES AND STUDENT PERFORMANCE 17–18 (Oct. 2006), <http://www.nber.org/papers/w12627.pdf> [<https://perma.cc/CAX2-2TVF>] (concluding that “students learn more in schools in which individual teachers are given financial incentives to do a better job, though we cannot discern whether this relationship is due to the incentives themselves or to better schools also choosing

City schools even documented that increasing teacher performance pay could decrease student achievement in larger schools.⁹³

The belief that Pay for Performance compensation will increase educational outcomes rests on two assumptions: (1) performance-based pay will increase teacher motivation, and (2) increased motivation will result in better results for students.⁹⁴ This Section will examine those assumptions. First, this Section will outline Daniel Pink's research on human motivation. Second, this Section will show where Pink's research applies successfully to businesses, and define the boundaries of where it does not apply, namely in education. Finally, this Section will conclude by drawing comparisons between Pay for Performance schemes in business and education showing what each can learn.

1. Daniel Pink and the Surprising Truth About What Motivates Us

In his book *Drive*, Daniel Pink summarizes existing research on human motivation.⁹⁵ Motivation to complete a task depends on the type of task that is being attempted.⁹⁶ Pink distinguishes

to implement merit pay programs," and that "[t]he evidence of a positive association between merit pay and student performance should be interpreted with caution."); STEVEN GLAZERMAN & ALLISON SEIFULLAH, MATHEMATICA POLICY RESEARCH, INC., AN EVALUATION OF THE TEACHER ADVANCEMENT PROGRAM (TAP) IN CHICAGO: YEAR TWO IMPACT REPORT (2010), http://www.mathematica-mpr.com/~media/publications/PDFs/education/tap_year4_impacts.pdf [<https://perma.cc/XK2C-SBGC>]; SPRINGER ET AL., *supra* note 68.

⁹³ See ROLAND G. FREYER, NAT'L BUREAU OF ECON. RESEARCH, TEACHER INCENTIVES AND STUDENT ACHIEVEMENT: EVIDENCE FROM NEW YORK CITY PUBLIC SCHOOLS (2011), <http://www.nber.org/papers/w16850> [<https://perma.cc/62DH-N5J9>] (describing "a school-based randomized trial in over two-hundred New York City public schools designed to better understand the impact of teacher incentives on student achievement," and finding "no evidence that incentives change student or teacher behavior," and further suggesting that "teacher incentives may decrease student achievement, especially in larger schools.").

⁹⁴ See Arieley et al., *supra* note 45, at 1 ("The expectation that people will improve their performance [under a Pay for Performance compensation system] rests on two subsidiary assumptions: (1) that increasing performance contingent incentives will increase motivation and effort, and (2) that this increase in motivation and effort will result in improved performance.").

⁹⁵ See generally DANIEL H. PINK, *DRIVE: THE SURPRISING TRUTH ABOUT WHAT MOTIVATES US* (2009).

⁹⁶ See *id.* at 27.

between algorithmic and heuristic tasks performed by employees in the workplace.⁹⁷ In an algorithmic task, the workers follow “a set of established instructions down a single pathway to one conclusion.”⁹⁸ The idea is that there is an equation for defining success in an algorithmic task.⁹⁹ In a heuristic task, by contrast, there is no algorithm.¹⁰⁰ Because creativity and thinking are involved, no equation exists for what success looks like for heuristic tasks, and success requires experimenting with possibilities to devise a solution.¹⁰¹

In the twentieth century, most of the tasks to be performed in the economy were algorithmic.¹⁰² But this type of work is largely disappearing because it can be outsourced or automated, and 70 percent of job growth in the United States comes from heuristic work.¹⁰³

When external rewards—such as bonuses—are used, the results vary greatly depending on the type of activity to which they are applied.¹⁰⁴ When applied to algorithmic tasks, external rewards work effectively, but they can be devastating when applied to heuristic tasks.¹⁰⁵ The problem is that extrinsic rewards narrow a worker’s focus.¹⁰⁶ Where there is a clear path to a solution—as in an algorithmic task—narrowing the focus is helpful and leads to increased productivity.¹⁰⁷ But where creativity is important—as with heuristic tasks—rewards squelch creativity and “blinker[] the wide view that might have allowed [workers] to see new uses for old objects.”¹⁰⁸

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* (explaining that “[w]orking as a grocery checkout clerk is mostly algorithmic”).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* (explaining that creating an advertising campaign, for example, is a heuristic task because “you have to come up with something new”).

¹⁰² *Id.* at 28 (“Even when we traded blue collars for white, the tasks we carried out were often routine. That is, we could reduce much of what we did—in accounting, law, computer programming, and other fields—to a script, a spec sheet, a formula, or a series of steps that produced a right answer.”).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 28–29.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 42.

¹⁰⁷ *Id.* (recognizing that rewards “help us stare ahead and race faster”).

¹⁰⁸ *Id.*

Pink summarizes studies that examine human motivation, and arrives at the conclusion that an important distinction exists between extrinsic and intrinsic motivation.¹⁰⁹ With extrinsic motivation, an individual needs to receive some sort of reward in addition to doing a task, while with intrinsic motivation, the performance of the task itself is the reward.¹¹⁰ He concludes that “[i]ntrinsic motivation is conducive to creativity,” whereas “controlling extrinsic motivation is detrimental to creativity.”¹¹¹ When extrinsic motivation is employed to control employee behavior in the short-term, there are detrimental long-term effects.¹¹² Extrinsic rewards, especially conditional “if-then” rewards, snuff out human creativity.¹¹³

When performance of the task itself gives people intrinsic motivation, people are much more dedicated to the task, spend more time working on it, and generally seem more interested in completing the task successfully.¹¹⁴ This realization about what motivates people leads to some strange and counterintuitive results.¹¹⁵ Pink describes two competing encyclopedias. First, Pink introduces Microsoft’s MSN Encarta—developed by professional writers, editors, and well-compensated managers.¹¹⁶ Second, Pink introduces Wikipedia—created by tens of thousands of volunteers that write for nothing other than personal enjoyment.¹¹⁷ Fifteen

¹⁰⁹ *Id.* at 36 (citing Mark Lepper et al., *Undermining Children’s Intrinsic Interest with Extrinsic Rewards: A Test of the “Overjustification” Hypothesis*, 28 J. PERSONALITY & SOC. PSYCHOLOGY 129, 129–37, n.1 (1973)).

¹¹⁰ *Id.* at 18.

¹¹¹ *Id.* at 28–29 (citing TERESA M. AMABILE, CREATIVITY IN CONTEXT 119 (1996)) (noting that if “used properly and carefully, extrinsic motivators can be conducive to creativity”).

¹¹² *Id.* at 37 (“Careful consideration of reward effects reported in 128 experiments lead to the conclusion that tangible rewards tend to have a substantially negative effect on intrinsic motivation” and that “[w]hen institutions—families, schools, businesses, and athletic teams, for example—focus on the short-term and opt for controlling people’s behavior, they do considerable long-term damage” (citing Edward L. Deci et al., *A Meta-Analytic Review of Experiments Examining the Effects of Extrinsic Rewards on Intrinsic Motivation*, 125 PSYCHOLOGICAL BULLETIN 627, 658–59 (1999)).

¹¹³ *Id.* at 37.

¹¹⁴ *Id.* at 3–8.

¹¹⁵ *Id.* at 13–15.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

years ago, it would have seemed impossible that the latter would achieve tremendous success and be a respected source, and the former would have been abandoned.¹¹⁸

Pink posits that true motivation that leads to excellent creative performance comes from mastery, autonomy, and purpose, and spends the remainder of his book outlining these concepts.¹¹⁹ Businesses have achieved success when they pay their workers higher than the market rate rather than using conditional “if-then” rewards.¹²⁰ This takes the issue of money off of the table and “does more to boost performance and organizational commitment than an attractive bonus structure.”¹²¹

2. Daniel Pink’s Lessons on Motivation Applied to Business and Education

Teaching is a heuristic task that involves creativity, and is more than just students acquiring a set amount of knowledge.¹²² Educators should be compensated like successful businesspeople who also perform creative, heuristic tasks. Economist and Nobel laureate George Akerlof revealed that, when companies slightly overpay their workers, companies are better at attracting and retaining talent.¹²³ This slight overpayment also serves to boost company morale and productivity.¹²⁴ In the words of Pink, this “take[s] the issue of money off the table” and allows workers to

¹¹⁸ *Id.* at 14.

¹¹⁹ *Id.* at 10.

¹²⁰ *Id.* at 180:

Instead of paying employees the wages that supply and demand would have predicted, [some companies] gave their workers a little more. It wasn’t because the companies were selfless and it wasn’t because they were stupid. It was because they were savvy. Paying great people a little more than the market demands, [the Economists] found, could attract better talent, reduce turnover, and boost productivity and morale.

¹²¹ *Id.*

¹²² *Id.* at 191.

¹²³ George A. Akerlof & Janet L. Yellen, *A Near-Rational Model of the Business Cycle, with Wage and Price Inertia*, 100 Q. J. ECON. 823, 828 (1985), https://notendur.hi.is/ajonsson/kennsla2003/Akerlof_Yellen1.pdf [<https://perma.cc/8LRZ-MN43>].

¹²⁴ *Id.*

focus on their work instead of their pay.¹²⁵ However, to capture the gains from taking the issue of money off of the table, employees must be compensated fairly in relation to their peers at a given company.¹²⁶

Applying Pink's research to teacher compensation should be done with the ideals of promoting creativity and instilling intrinsic motivation in teachers. Teachers should be paid more than they are today. Pay for Performance schemes, however, constantly keep the issue of pay on the table, decrease creativity, and kill the intrinsic motivation that teachers need to be able to excel in the classroom.

Additionally, there is a measurement problem inherent in assessing educational quality, and education is different than a company that is attempting to maximize profits. Education is a complex good with many inputs,¹²⁷ and teaching is a complex profession that seeks long-term success.¹²⁸ Therefore, it is difficult

¹²⁵ PINK, *supra* note 95, at 180.

¹²⁶ *See id.* at 179; Akerlof & Yelle, *supra* note 123.

¹²⁷ *See* CTR. FOR INT'L DEV. AT HARVARD UNIV., GLOSSARY, THE ATLAS OF ECONOMIC COMPLEXITY, <http://atlas.cid.harvard.edu/about/glossary/> [<https://perma.cc/L2JY-3MPS>] (describing an index that measures the complexity of goods by ranking them:

[They are ranked] by the amount of capabilities or know-how necessary to manufacture them. Products such as chemicals and machinery are said to be highly complex, because they require a sophisticated level of productive knowledge and typically emerge from large organizations where a number of highly skilled individuals interact. Whereas products, such as raw materials or simple agricultural products, require only a basic level of know-how and can be produced by an individual or family-run business.);

S. Claudina Vargas et al., An educational production system complexity: implications for model completeness and performance improvement 1 (Feb. 14, 2002) (unpublished manuscript), <http://www.researchgate.net/publication/238527489> [<https://perma.cc/5ZKR-7UY5>] ("A modern K-12 [Educational Production System], in general terms, is a socio-political structure, open-looped that embodies multi-tiered hierarchies with multiple interrelated purposes. This system is inherently dynamic and complex due to the nature of its core function is the development of [human learning].").

¹²⁸ *See* Arnaud Costinot, *On the origins of comparative advantage*, 77 J. INT'L ECON. 255, 263 (2009), <http://economics.mit.edu/files/3925> [<https://perma.cc/4RQB-Q3R8>] (describing that to measure the complexity of a job, they use the questions "[s]uppose someone had the experience and education needed to

to say that a student's long-term educational outcome changes even if they have an exceptional teacher for one year as measured by a year-end test.¹²⁹ Because schools hope to promote graduation rates, an appropriate measurement here might be tying kindergarten teachers' salaries to students' high school or college graduation rates. Given the impracticality of this suggestion, however, concerns about measurement strongly suggest that Pay for Performance schemes should be avoided.

The introduction to this Section outlined two assumptions upon which Pay for Performance teacher compensation systems rely. The first assumption is that performance-based pay will increase teacher motivation.¹³⁰ The second assumption is that, with increased teacher motivation, student outcomes will be improved. As this Note has shown, this first assumption is flawed because teaching is a heuristic task and motivation to complete heuristic tasks cannot be bolstered with external rewards.¹³¹ To the contrary, harm can result.¹³² The second assumption is also flawed because the type of motivation that teachers receive from increased pay will likely not lead to changes in their teaching.¹³³

start working at a job like yours. From that point, how long would it take them to become fully trained and qualified [to do a job like yours]?" and noting that "[t]he answer is expressed in number of months," finally concluding that the "proxy for complexity is equal to the average number of months necessary to be fully trained and qualified in a given industry").

¹²⁹ See Vargas et al., *supra* note 127, at 2 (Education is a "dynamic process that involves many imprecise factors. [Human learning] development is multi-stage, sequential, interdependent, and imprecise.").

¹³⁰ See Arieley et al., *supra* note 45, at 1.

¹³¹ See *supra* notes 109–11, 121 and accompanying text.

¹³² See *id.*

¹³³ Many teachers enter the teaching profession as a calling and not out of motivation to receive financial gains. See *What It's Really Like to Be an Elementary School Teacher*, MONSTER.COM, <http://teaching.monster.com/careers/articles/9638-what-its-really-like-to-be-an-elementary-school-teacher> [<https://perma.cc/VX2J-28CR>] (acknowledging that many teachers "seemed to see [teaching] as a calling—a way of 'making a difference.' 'It's not a job to do for the money,' said one teacher bluntly. You have to 'have a passion for what you teach.' 'I stopped teaching for several years but missed the interactions with students,' wrote another, who took a better paying day job in the interim. 'I don't make more money and I have less time for myself, but I wouldn't trade any of that. I love meeting new students every year and I thrive in an atmosphere of change and flexibility.'").

Another justification offered in support of Pay for Performance schemes is that the increased pay will attract people to education who might otherwise enter alternative careers.¹³⁴ While there is a high rate of teachers leaving the teaching profession each year,¹³⁵ only a small percentage leave due to the compensation.¹³⁶

By focusing on Pink's approach of fostering intrinsic motivation and by following the examples of successful businesses, education can best improve school results. What really makes teachers happier is being included in school decisionmaking and having greater opportunities to collaborate with other teachers.¹³⁷ Pink highlights that intrinsic motivation spawns from autonomy,

¹³⁴ Omps, *supra* note 10, at 1073 (“[F]or successful and highly-motivated potential candidates, the current single salary pay schedule does not reward teachers for innovation, effectiveness, and accomplishments. Only one in ten high school students expresses a strong desire to teach.”).

¹³⁵ See NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., TEACHER TRENDS, <http://nces.ed.gov/fastfacts/display.asp?id=28> [<https://perma.cc/JBG9-4U8J>] (reporting that 8 percent of teachers leave the profession each year).

¹³⁶ See THE NEW TEACHER PROJECT, GREENHOUSE SCHOOLS: HOW SCHOOLS CAN BUILD CULTURES WHERE TEACHERS AND STUDENTS THRIVE 2 (2012), http://tntp.org/assets/documents/TNTP_Greenhouse_Schools_2012.pdf [<https://perma.cc/TJ5Z-7SPX>] (reporting that of the teachers who leave the teaching profession, between 8 and 12 percent report that financial compensation is the reason for their departure). A far greater reason for teachers leaving has to do with the working and learning environment in the school. *Id.* (reporting that in low-end schools, 42 percent of teachers report that they leave because they are dissatisfied with school leadership, there are insufficient development opportunities, and the student conduct and learning environment are poor, whereas in high functioning schools, 47 percent of teachers leave for personal reasons that have nothing to do with the aforementioned reasons).

¹³⁷ Jill Barshay, *What makes for happier teachers, according to international survey*, EDUCATION BY THE NUMBERS (June 30, 2014), http://educationbythenumbers.org/content/teachers-top-performing-countries-teach-less_1404/ [<https://perma.cc/QY3C-J4HX>]:

Teachers who say they get included in school decision-making and collaborate often with other teachers are more likely to say that teaching is a valued profession in their society. In turn, these same teachers report higher levels of job satisfaction and confidence in their ability to teach and to motivate students, according to a 2013 survey of middle-school teachers in 34 countries and regions around the world conducted by the Organization for Economic Co-operation and Development (OECD) and published on June 25, 2014.

mastery, and purpose, and that teachers get dissatisfied and leave the profession when they are not intrinsically motivated.¹³⁸ This lack of intrinsic motivation has more to do with the work environment than it does with the rate of pay.¹³⁹ Focusing on autonomy, mastery, and purpose releases workers to do quality work.

The teacher motivation justification for implementing Pay for Performance policies seems to mischaracterize teaching as an algorithmic task that can be boosted by extrinsic rewards, and assumes that teachers just need to put in more effort. Applying extrinsic rewards to problems that require intrinsic motivation limits the breadth and reduces the depth of human thinking.¹⁴⁰ Misapplying extrinsic rewards can be shortsighted.¹⁴¹

The second justification for Pay for Performance policies—that they would send the right signal to people considering the teaching profession—is generally meritorious,¹⁴² but that justification is just as applicable to alternatives that are more supported by social science.¹⁴³

Upon examining the justifications for implementing Pay for Performance compensation systems and looking at the social science that would purport to lend support to this policy, a serious lack of evidence that this policy will achieve the desired result is revealed.

¹³⁸ PINK, *supra* note 95, at 191.

¹³⁹ See Barshay, *supra* note 137.

¹⁴⁰ See PINK, *supra* note 95, at 54 (In the findings of a study where one group was incentivized and the other group was not, and both were asked to complete a heuristic task:

The incentivized participants performed worse than their counterparts because they were so focused on the prize that they failed to glimpse a novel solution on the periphery. Rewards, we've seen, can limit the *breadth* of our thinking. But extrinsic motivators—especially tangible, “if-then” ones—can also reduce the *depth* of our thinking.)

¹⁴¹ See *id.* (warning that misapplied extrinsic rewards “can focus our sights on only what’s immediately before us rather than what’s off in the distance”).

¹⁴² *What are some types of incentives for business units?*, CCH HUMAN RESOURCES COMPLIANCE LIBRARY, CCH-HRCL ¶ 22,930 (C.C.H.), 2012 WL 5468633, ¶ 22,930 (2015) (noting that a general reason for implementing a Pay for Performance system is that “business unit incentives are to attract qualified individuals”).

¹⁴³ See PINK, *supra* note 95, at 191 (“[T]oo many talented people opt out of [teaching] because they’re concerned about supporting their families.”).

IV. ALTERNATIVE APPROACHES TO REFORMING EDUCATION AND
WHAT BUSINESS CAN LEARN FROM EDUCATION REFORM

There is an incredible disconnect between how states are compensating teachers¹⁴⁴ and what is effective.¹⁴⁵ What the states should be doing is setting up environments that promote autonomy, mastery, and purpose to build the intrinsic motivation that will allow teachers to truly address the challenges of teaching.¹⁴⁶ While there are certainly many factors that go into creating that type of environment,¹⁴⁷ this Note will hereinafter focus on providing solutions for the role that teacher compensation plays in the equation.

Pink recommends that an employer pay its employees above average for their industry to get the issue of money off of the table and allow teachers to focus on teaching.¹⁴⁸ One school, The Equity Project Charter School (TEP), has taken that advice to new levels by paying their middle school teachers a salary of \$125,000.¹⁴⁹ The school strategically allocates its resources by asking teachers to take on additional roles, thereby allowing it to operate off of the same income as a traditional public school.¹⁵⁰ This structure,

¹⁴⁴ See discussion *supra* Part II.

¹⁴⁵ See discussion *supra* Part III. Furthermore, if states would still like to pursue rewards in the form of teacher bonuses, the bonuses should at least be presented in a way that is shown to be effective by research. For example, changing the reward to the loss aversion context. ROLAND G. FRYER, JR., STEVEN D. LEVITT, JOHN LIST & SALLY SADOFF, ENHANCING THE EFFICACY OF TEACHER INCENTIVES THROUGH LOSS AVERSION: A FIELD EXPERIMENT 18 (2012), http://scholar.harvard.edu/files/fryer/files/meritpaychihgtsall_1.pdf [<https://perma.cc/X5D2-67ZW>] (“[F]raming a teacher incentive program in terms of losses rather than gains leads to improved student outcomes.”).

¹⁴⁶ See PINK, *supra* note 95, at 10.

¹⁴⁷ See generally THE NEW TEACHER PROJECT, *supra* note 136.

¹⁴⁸ PINK, *supra* note 95, at 191.

¹⁴⁹ *Philosophy*, THE EQUITY PROJECT CHARTER SCHOOL, <http://www.tepcharter.org/philosophy.php> [<https://perma.cc/Z234-E7JQ>].

¹⁵⁰ Meredith Galante, *Why A Middle School In New York Is Paying Teachers \$125,000 A Year*, BUS. INSIDER (Apr. 18, 2012, 3:32 PM), <http://www.businessinsider.com/the-equity-project-charter-school-pays-teachers-125000-a-year-2012-4> [<https://perma.cc/G52S-BVV8>] (“TEP operates on the same allocated money as other public schools in New York City. The only fundraising it does is for the new building that it hopes to start construction on soon.”).

while initially surprising, makes complete sense upon reflection. Economist and Nobel laureate George Akerlof's aforementioned findings reveal that paying an above average salary decreases employee turnover and boosts productivity.¹⁵¹ Replacing employees when they leave is an expensive burden on schools, businesses, and the economy as a whole.¹⁵² While an extensive empirical study about the viability of this compensation system on a broader scale is beyond the scope of this Note, TEP certainly provides a starting point for this inquiry.

If businesses ever had any doubt about whether there were some tasks to which Pay for Performance schemes should not extend, the application to teacher pay should make this lesson clear. Businesses should be making clear determinations between heuristic and algorithmic tasks.¹⁵³ Policymakers should be doing the same, and ignoring this critical distinction when mandating Pay for Performance compensation schemes will have detrimental long-term consequences.¹⁵⁴

Businesses should care about teacher compensation for four strategic reasons. First, the business community should be skeptical of any effort by legislatures to codify an ineffective system of compensation. This can lead to inefficiency and possibly even legislative expansion into areas that could have a more direct effect on business. Second, businesses should be concerned with education reform, because it is partly paid for by the business community.¹⁵⁵

¹⁵¹ Akerlof & Yelle, *supra* note 123.

¹⁵² See Suzanne Lucas, *How much does it cost companies to lose employees?*, CBS NEWS (November 21, 2012, 11:24 AM), <http://www.cbsnews.com/news/how-much-does-it-cost-companies-to-lose-employees/> [<https://perma.cc/SR6Y-WL4K>]:

Turnover costs include productivity losses during training, recruiting and lost work while a position is vacant. For all jobs earning less than \$50,000 per year, or more than 40 percent of U.S. jobs, the average cost of replacing an employee amounts to fully 20 percent of the person's annual salary.

¹⁵³ See *supra* notes 109–11.

¹⁵⁴ See *supra* note 111.

¹⁵⁵ See THE WHITE HOUSE, OFFICE OF MGMT. AND BUDGET, BUDGET TABLE 2.2 (2015) <https://www.whitehouse.gov/omb/budget/Historicals> [<https://perma.cc/K2HZ-HU3Q>] (summarizing that jointly paid payroll taxes account for 34 percent and corporate taxes account for 11 percent of the total federal tax revenue).

Third, increasing educational attainment increases economic activity.¹⁵⁶ Similarly, an uneducated populace is costly to society.¹⁵⁷ Education reduces crime, leading to both savings on incarceration costs and net gains in economic activity due to increased wages.¹⁵⁸ Education leads to a healthier population and saves money on healthcare spending.¹⁵⁹ Furthermore, an increase in educational attainment is correlated with a reduction in government spending on social assistance programs.¹⁶⁰ A correlation exists between education and earnings,¹⁶¹ and higher individual earnings lead to greater tax revenues for the government.¹⁶² All of these

¹⁵⁶ See Erin McDonald, Note, *Trading Diplomas for Dollars: How Michigan Lawmakers Could Use Education as an Economic Development Model*, 55 WAYNE L. REV. 1131, 1137 (2009).

¹⁵⁷ See *id.* at 1139.

¹⁵⁸ See *id.* (citing ALLIANCE FOR EXCELLENT EDUCATION, SAVING FUTURES, SAVING DOLLARS: THE IMPACT OF EDUCATION ON CRIME REDUCTION AND EARNINGS, at 9 (Sept. 12, 2013), <http://all4ed.org/reports-factsheets/saving-futures-saving-dollars-the-impact-of-education-on-crime-reduction-and-earnings-2/> [<https://perma.cc/T3XR-7TL3>] (reporting that a 5 percent increase in male high school graduation rate would result in \$18.5 billion in crime-related savings and \$1.2 billion in additional earnings, for a total economic gain of \$19.7 billion nationwide); Lance Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self Reports*, 94(1) AM. ECON. REV. 155, 155–56 (2004) (articulating several theories for the connection between the economy and a reduction in crime)).

¹⁵⁹ See McDonald, *supra* note 156, at 1137 (citing ALLIANCE FOR EXCELLENT EDUC., HEALTHIER AND WEALTHIER: DECREASING HEALTH CARE COSTS BY INCREASING EDUCATIONAL ATTAINMENT (Nov. 2006), <http://citeseerx.ist.psu.edu/viewdoc/download?rep=rep1&type=pdf&doi=10.1.1.173.4598> [<https://perma.cc/YV5Q-499H>]).

¹⁶⁰ See *id.* (citing Jane Waldfogel et al., *Welfare and the Costs of Public Assistance*, in THE PRICE WE PAY: THE ECONOMIC AND POLITICAL CONSEQUENCES OF INADEQUATE EDUCATION 160 (Clive R. Belfield & Henry M. Levin eds., 2007)).

¹⁶¹ See JIM SAXTON, JOINT ECON. COMM., U.S. CONGRESS, INVESTMENT IN EDUCATION: PRIVATE AND PUBLIC RETURNS 2 (Jan. 2000), <http://down.cenet.org.cn/upfile/41/200593011828169.pdf> [<https://perma.cc/39GC-CUGM>].

¹⁶² See McDonald, *supra* note 156, at 1139 (citing CECILIA ELENA ROUSE, PRINCETON UNIV. & NAT'L BUREAU OF ECON. RESEARCH, THE LABOR MARKET CONSEQUENCES OF AN INADEQUATE EDUCATION (Sept. 2005), <http://www.literacycooperative.org/documents/TheLaborMarketConsequencesofanInadequateEd.pdf> [<https://perma.cc/896B-DVYR>] (“Because those who do not complete high school are less likely to be employed and have significantly lower annual earnings than those with at least a high school degree, they also contribute significantly less to tax revenues.”)).

considerations lead to an increase in aggregate demand—a boon to business. Finally, the educational attainment of workers matters to businesses, and businesses should be concerned with making sure that educational reforms are effective to best serve their future interests.¹⁶³

CONCLUSION

Pay for Performance compensation schemes based on student test scores are ill-suited for education. Teacher compensation can be adjusted to better meet educational needs, as the uniform salary schedule is outdated. Although states have been quick to move to Pay for Performance compensation schemes, this will have a long-term detrimental effect on educational outcomes. Teaching is a task that requires creativity, and Pay for Performance schemes squelch creativity. This lesson is one that business has used to its advantage for years, and this is where education can learn from business. Business can solidify what it knows to be true from education's recent foray into Pay for Performance schemes, mainly that incentive pay works in some contexts and is detrimental in others. Finally, the business community should act out of its own self-interest to oppose Pay for Performance compensation schemes in education.

¹⁶³ Businesses consider the educational system of an area when planning where to locate new facilities. *See, e.g.*, Paul Krugman, *Toyota Moving Northward*, N.Y. TIMES (July 25, 2005) (reporting that low educational attainment was one reason why Toyota chose to locate a new automobile manufacturing facility in Canada instead of in Alabama); SAXTON, *supra* note 161, at 2.

