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Navigating the Transition

A Legal Primer on Using
New State Student Assessments in Educator Evaluation

NOVEMBER 2015

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*This resource has been developed to provide guidance to states and school districts as they determine how the transition to new state assessments for students will impact their educator evaluation systems. After a brief overview of the current state policy landscape, including a discussion of the opportunities and challenges associated with new evaluation systems, this primer provides a deeper analysis of the legal principles that states should consider in the incorporation of student growth into educator evaluation systems related to new, more rigorous assessments based on college and career ready learning standards.**

Introduction

The last several years have seen significant changes in the national education landscape, with states leading the way on efforts to prepare K-12 students for college and careers through new state standards; new, higher quality statewide assessments; and revamped accountability systems. At the same time, nearly all states are designing and implementing new systems of educator evaluation based on multiple measures, including student growth on state assessments, to ensure that educators have the information they need to advance their practice and improve student outcomes. Managing these interrelated, overlapping transitions is challenging. Over time, many states and the U.S. Department of Education have extended the timelines for these transitions and rethought the sequence of what happens when, particularly with regard to how new assessment data will be used in educator evaluation decisions. These developments provide both the need and opportunity to make sure that every educator effectiveness system is meaningful and legally sustainable.

This primer identifies legal issues that may arise during implementation of new systems of educator evaluation. Understanding and addressing these issues not only can help states and districts manage prospective legal vulnerabilities but also can illuminate and reinforce sound education policy principles for creating effective systems for teachers and students. This focus also can inform and strengthen related efforts on standards and assessments so that the entire education system is oriented around student outcomes and student learning.

Because evaluation systems may impact educators' employment interests and legal rights, states should carefully consider a number of legal rules that generally break down into three categories:

- **Property rights** are established in state law and may include (but are not limited to) continued employment, tenure, compensation, and licensure and recertification.

* This primer focuses on the incorporation of student growth based on statewide assessments in educator evaluation systems. It does not directly address other measures that may be included in educator evaluations, such as observations, student learning objectives based on content other than the statewide assessments, and student surveys, nor does it examine the use of statewide assessments for other purposes, such as school/district accountability and high-stakes student decisions like graduation, although these issues are often interrelated and may inform each other.

In addition, although this resource provides a general overview of legal principles, it should not be construed as state- or district-specific legal advice. Local counsel should be consulted with respect to determinations of legal risk and compliance as states and districts make decisions with respect to the design, implementation, and use of their educator evaluation systems.

- **Substantive protections** are established in state and federal law and refer to the need for the evaluation system and its components to be sufficiently specific, valid, reliable, and relevant to professional responsibilities.
- **Procedural protections** are established in state and federal law and refer to the need to provide educators with a fair process, including clear notice about the evaluation system and its components, the opportunity to learn and teach curriculum aligned to new learning and performance standards, and the opportunity to contest evaluation results with employment consequences.

Courts will interpret these legal requirements in light of sound educational principles that are supported by practitioners' experience and evidence. Courts tend to uphold state and local education policies if they are thoughtfully and appropriately designed, as long as relevant substantive and procedural legal protections have been provided.¹ For example, the legal requirements that state assessments be used in ways that are valid and reliable looks directly to the education-related, psychometric meaning of those terms.² Courts would likely ask questions such as: Does the test actually measure what it is supposed to measure so that it can make meaningful inferences in the given use?³ Are results consistent regardless of how or in what context the test was administered?⁴

Legal challenges to educator evaluation systems are a reality. New educator evaluation systems already have been the subject of litigation challenging their design, implementation, and early use, with cases often focused on the incorporation of student test results in educator evaluation. The transition to new, more rigorous student assessments raises the prospect for additional scrutiny as a relatively new evaluation practice—including measures of student growth—faces a foundational change with the move to new statewide tests. Given their unique contexts, states may select different approaches to incorporating student growth based on statewide assessments in their educator evaluations during the assessment transition. But any state policy must work to create validity and reliability in the evaluation system's design and provide educators with appropriate supports to prepare them for the assessment transition. After all, the federal Title I statute explicitly requires that statewide assessments be valid and reliable for their intended purpose and be consistent with relevant, nationally recognized technical and professional standards.⁵ As federal guidance instructs, “If educators and policymakers consider using the same test for school or district accountability purposes and for individual student high-stakes purposes, they need to ensure that the test score inferences are valid and reliable for each particular use for which the test is being considered.”⁶

More specifically, states should commit to the following best practices to support an effective evaluation system:

- Provide an opportunity for meaningful input on the evaluation system from relevant stakeholders, especially teachers and principals.

- Embed technical expertise in decision making (e.g., adherence to psychometric standards, expert review of measures, and rules about test use).
- Clearly communicate the policy decision to all relevant stakeholders.
- Monitor and support districts in the implementation and use of the educator evaluation system, including the collection of data to inform revisions to the system.

Throughout these efforts, it can be helpful for the state to remain grounded in a central theory of action: The intent of the evaluation system is to provide more effective feedback and support to educators and thus improve student outcomes.

RESOURCES



Supporting Principals Using Teacher Effectiveness Data

Teacher effectiveness data can help school and district leaders make informed and evidence-based talent management decisions, but too many leaders lack the skills to use these data. Building on research from Vanderbilt University, we created this module to help district and school leaders make better use of teacher effectiveness data.

Background and Context

Nearly all states are implementing new evaluation systems for teachers and principals with some basis in measures of student growth, including—for educators in tested grades and subjects—results from statewide assessments. State policy decisions, supported by changes to state laws and regulations, have served as the foundation for these systems. In some cases, the U.S. Department of Education has offered incentives that have spurred state action through Race to the Top grants or Elementary and Secondary Education Act (ESEA) Flexibility requests.

States have taken different approaches to state and local control over educator evaluation systems. Some have adopted a statewide system, mandatory for all school districts. Others have developed a state model but provided districts with the ability to design their own systems as long as they meet certain criteria. And others have developed criteria for districts but have no state model.

EVALUATION POLICY DATABASES



Databases on State Teacher and Principal Evaluation Policies

State-level teacher and principal evaluation policy is undergoing a dramatic shift in both form and focus. Performance-based evaluation systems, often with measures of student growth and learning, are taking shape in many states across the country. To promote information sharing and collaboration as states and districts engage in this work, these databases house information on state-level evaluation policies across nearly all 50 states.

States also are working to incorporate measures of student growth based on state assessments into evaluation systems in different ways, including through “student growth” or “value-added” models. Student growth models measure how well a student has progressed over the course of a year, including whether he or she is “on track.”⁷ Value-added models estimate educators’ impact on student growth, including whether the level of growth is more or less than expected.⁸

Some states have mandated a particular weight for student growth based on state tests. Among these states, some require that student growth based on the state tests be the sole measure of student achievement for relevant teachers of record and school principals, while others call for a combination of student growth data on state assessments and locally selected measures of student achievement. Another group of states does not mandate a weight for the measure of student growth based on state assessments but requires that it be included in evaluations. In addition, in certain states, all teachers are evaluated in part on a schoolwide measure of student growth based on state assessments, while other states require that only teachers of record in grades and courses associated with a statewide test receive a student growth or value-added score. (A recent study concluded that, nationally, about 20 percent of educators are in tested grades and subjects.⁹)

At the same time that states are developing and implementing new educator evaluation systems, they also have made sweeping changes to state standards and assessments, including the transition to new, more rigorous K–12 standards and aligned assessments, including those associated with the Partnership for Assessment of Readiness for College and Careers (PARCC) and the Smarter Balanced Assessment Consortium. Formal assessment transitions occurred in many states during the 2014–15 school year, although a few states began the transition earlier.

The convergence of these considerable changes in the 2014–15 school year has received the heightened attention of policymakers and practitioners, requiring each state to think critically about how it sequences these efforts and navigates these shifts to serve a legitimate education purpose. Among these decisions, states are paying attention to how new assessments will be used among multiple measures of teacher and leader effectiveness and when evaluations will be used to inform employment decisions, issues that may be governed by state law and/or federal accountability requirements established by ESEA Flexibility.

ESEA Flexibility and Educator Evaluation

Under ESEA Flexibility, states that received waivers from the U.S. Department of Education were expected to implement new educator evaluation systems based on multiple measures, including student growth as a significant factor, by 2014–15. This timeline coincided with the first year that states have been expected to begin using new student assessments aligned to higher standards. Although states were required to use new systems to inform professional development and to identify excellent educators, the Department has extended the implementation timeline in two important areas for states that requested it: (1) a one-year delay on the use of evaluation results to inform employment (moving from 2015–16 to 2016–17)¹⁰ and (2) no incorporation of student growth scores into ratings for educators in tested grades in 2014–15.¹¹ This additional time provides states with an opportunity to ensure that these decisions are made thoughtfully and with attention to legal principles. For example, teachers and students alike will have more time to prepare for and learn about the new standards and assessments before the new assessments are used for employment decisions.

Opportunities and Challenges

As states address the use of measures of student growth based on state assessments in educator evaluation systems at the same time they transition to new assessments, they are presented with opportunities and challenges.

Some of the opportunities include:

- Harnessing interrelated efforts on standards, assessments, and educator evaluation to orient the entire education system around student outcomes and student learning
- Leveraging the change in state standards to provide enhanced supports to educators that improve their instructional practices and drive better student outcomes
- Creating a coherent and predictable system of expectations across educator preparation, in-service, and evaluation
- Providing teachers and principals with personalized, actionable feedback that can improve their practice and the outcomes of their students

At the same time, states face many challenges as they work to develop and implement these changes, including:

- Communicating new expectations to educators, including both temporary changes that may ease pressures during the transition (e.g., “pausing” the use of student growth or value-added scores in evaluation results) and the long-term changes that will come into effect after the transition is complete



- Training educators on new standards for teaching and learning
- Supporting teachers as they make shifts in instruction to align with new college and career readiness standards

Preparing Teachers for the Common Core: Aligning Preparation Program Curricula

To help share information and resources across states, the Center on Great Teachers and Leaders' (GTL Center's) partner, the Council of Chief State School Officers (CCSSO), asked the team leads of its 30-member State Consortium on Educator Effectiveness to share how they are helping teacher preparation programs in their states align preparation program curricula to the Common Core State Standards. In addition, expert staff working with the new student assessment consortia provided examples of leading practices for the *Ask the Team Brief, Preparing Teachers for the Common Core: Aligning Preparation Program Curricula.*

Creating Coherence: Common Core State Standards, Teacher Evaluation, and Professional Learning

In our recently released Special Issues Brief, *Creating Coherence: Common Core State Standards, Teacher Evaluation, and Professional Learning*, we introduced a practical way for states and districts to begin to ensure coherent supports for teaching to the Common Core. To bring these ideas into practice, this new professional learning module provides of a set of “grab, customize, and go” materials that state and regional technical assistance providers can use to facilitate work sessions that lead district teams through a collaborative, coherence-building process.

- Determining meaningful differences in performance
- Identifying valid, reliable, and comparable standards and measures of performance for all subjects and grades
- Ensuring that educators’ growth scores are calculated in a reasonable, balanced way (e.g., not based on an overly small number of students, based on a direct student-teacher instructional relationship)
- Balancing state policy and local control on issues
- Ensuring that technical aspects of the evaluation process are managed effectively (e.g., students are appropriately linked with teachers, scores are calculated according to state or local policy parameters)

Relevant legal principles can help states as they navigate these challenges and determine the best policy for their educator workforce.

Key Questions Raised in Recent Lawsuits Related to Educator Evaluation Systems:

- Is the state-mandated inclusion in the evaluation system of schoolwide value-added measures for all teachers constitutional? (The reviewing court said yes, based on Florida's "rational basis" for the evaluation system.¹²)
- Is a district permitted to release value-added aggregate student achievement scores for individual teachers to the press? (The reviewing court said yes.¹³)
- Does a low evaluation rating with no other consequences trigger an educator's rights related to his or her liberty interest in protecting his or her reputation? (The reviewing court has not yet made a decision, although it is worth noting that at least one court in the past has ruled that liberty interests in protecting reputation do not apply to educator evaluations.¹⁴)
- Did the district faithfully implement state substantive and procedural requirements for the evaluation system (compensation decisions and grievance procedures in particular)? (The reviewing court has not yet decided.¹⁵)
- Is an exam for teacher certification unconstitutionally biased if it produces starkly different results for teachers of different races? (The reviewing court said yes, although its decision was related to a test that is currently out of use.¹⁶)

The Legal Foundation: Educator Evaluation, Student Assessments, and Educators' Rights

The design, implementation, and use of new evaluation systems may trigger legally recognized rights of teachers and principals. A state or local school district is more likely to face a legal challenge if an evaluation system is tied to employment decisions. When evaluations are tied to employment decisions, it is more likely that they could impact an educator's "property rights," such as continued employment, tenure, compensation, and licensure and recertification. When these property rights are affected, educators are granted both substantive and procedural protections.

The law can also be used to inform policy design in proactive and positive ways, particularly because legal principles are interpreted in light of sound education policy and decision making. States are likely to receive significant deference from reviewing courts as long as their decisions comply with relevant legal parameters and they provide educators with substantive and procedural protections in cases where educator evaluation systems will be

used to affect employment rights. Increased efforts to ensure the validity of the evaluation system—its indicators and the system as a whole—and providing educators with appropriate procedural protections will help states and school districts avoid or defend against legal challenges.

Core Legal Sources and Doctrines

Federal law, state law, and—potentially—local collective bargaining agreements can affect evaluations of public employees. These issues should be considered—to the degree practicable—proactively throughout the development of a new educator evaluation system. Each state’s laws establish and define legally protected rights of public educators. Questions of law will turn on these rights, so states should consult their laws to determine the “property rights” conferred on educators (the concept of a “property right” is discussed below).

In turn, there are federal and state legal requirements (and potentially local board rules and/or collective bargaining agreements) regarding substantive and procedural protections for these “property rights.” These protections include federal (and usually corresponding state) requirements for due process and nondiscrimination. Due process protections involve both (1) substantive considerations, such as validity and reliability of the use of student assessment results in making educator employment decisions and (2) procedural considerations, including notice and opportunities to demonstrate satisfactory performance and challenge negative employment actions. Nondiscrimination protections ensure that similarly situated educators are treated similarly. (The box below outlines federal due process and nondiscrimination doctrines.) These protections are required in all states such that states cannot avoid or mitigate them through legislation or regulations, but states may establish *additional* due process and nondiscrimination requirements beyond those mandated in federal law. It is therefore important to consult state laws of relevance and court decisions as well.

Thus, there is no single, comprehensive body of law that resolves all issues that may arise with respect to educator evaluation systems. This is particularly true given the relatively new and recent nature of changes in these education policy areas. Ultimately, the specifics

SOURCES OF LAW

FEDERAL

- **U.S. Constitution**
- **Federal statutes and regulations (e.g., on nondiscrimination)**

STATE

- **State constitution**
- **State statutes and regulations (e.g., on employment rights of public employees, on public educator evaluation systems)**

LOCAL

- **Local ordinances**
- **Contracts and collective bargaining agreements**

of any evaluation policy depend on the specific state and local context, although common legal principles derived from the U.S. Constitution and federal law will apply to all evaluation systems. The discussion below follows the three core questions in the federal due process analysis:

- 1. *Property rights:*** Does use of the evaluation system negatively impact an educator's property interests?
- 2. *Substantive protections:*** Was the challenged employment action related to a legitimate government interest and based on a sufficiently valid and reliable judgment?
- 3. *Procedural protections:*** Did the state provide the educator with sufficient notice and an opportunity to learn new expectations and to contest any evaluation results?

1. Property Rights: Does Use of the Evaluation System Negatively Impact an Educator's Property Interests?

Evaluation systems for educators may activate due process rights if a potential use of the system could negatively impact educators' property rights established in state law.¹⁷ Legally recognized property rights may include (but are not limited to) continued employment, tenure, compensation, and licensure and recertification. These rights vary across states but are grounded in what educators' reasonable expectations should be to attain these property interests. These expectations may depend on the amount of time an educator has been in his or her position, his or her prior experiences, and experiences of similarly situated educators. For example, even if a state does not grant tenure to qualified educators, it likely does allow for renewable contracts from year to year. In this case, the educator's property interests would relate to his or her reasonable expectation that the contract would be renewed and/or salary would be maintained. States should consult their constitution, statutes, regulations, and relevant court decisions to determine what property rights are bestowed on educators. In some jurisdictions, state law may permit some specifics of these rights to be determined locally (e.g., through collective bargaining agreements). If the evaluation system affects a property right established in state law, the educator is entitled to substantive and procedural protections before adverse action affecting that interest can be taken.¹⁸

A state's assessment transition may heighten the legal scrutiny placed on its educator evaluation system and its prospective use because the transition will impact a core design element (e.g., the measure of student growth based on state assessments). Any policy regarding the incorporation of measures of student growth based on the new state tests

should adhere to a number of substantive and procedural rules, including those regarding validity and reliability, notice, and opportunity to learn and remediate any deficiencies.

Federal Legal Doctrines: Due Process and Nondiscrimination

There are two core federal legal doctrines that may be most relevant to educator evaluation systems and that will apply to cases in all states and districts: (1) due process and (2) nondiscrimination.

Due Process: Under the U.S. Constitution, states and districts must provide educators with due process before limiting or denying property or liberty interests.¹⁹ Applying this standard to the educator evaluation context raises questions related to property rights (was the educator denied a property [or liberty] interest sufficient to trigger federal due process protections?), substantive protections (if so, is the challenged employment action reasonably related to a legitimate government interest, and is the action based on a sufficiently valid judgment?), and procedural protections (if so, have educators been provided with sufficient notice of how they will be judged, an opportunity to learn and meet new professional expectations, and a fair opportunity to contest evaluation results?).

For educator evaluation systems, states and districts need to ensure that where the system affects an educator's recognized legal rights, the employment action is sufficiently related to the legitimate purpose of the system; that the system and its decisions are sufficiently valid; and that educators receive adequate procedural protections.

Nondiscrimination: Certain federal statutes prohibit recipients of federal funds (including states and school districts) from discriminating against individuals on certain bases. Title VII of the Civil Rights Act of 1964, for example, prohibits discrimination on the basis of race, color, religion, sex, or national origin in employment.²⁰ (Claims of discrimination under federal law that do not involve a recognized protected characteristic [race, religion, sex, etc.] are reviewed using a less rigorous standard, requiring only a rational basis for different treatment.)

Federal laws prohibit two types of discrimination on the basis of a particular characteristic: (1) disparate treatment, which refers to intentional discrimination, and (2) disparate impact, which refers to policies neutral on their face that nonetheless disproportionately and unjustifiably harm individuals because of a particular characteristic.²¹ Disparate treatment involves intentional discrimination by an employer against the employee (e.g., treating the employee differently than similarly situated employees because of the employee's race or sex). Disparate impact in and of itself is not discriminatory; statistical disparities are not

necessarily discrimination. Instead, courts evaluate disparate impact claims using a three-part, burden-shifting test²² designed to distinguish impermissible discrimination from disparity alone:

1. Does the policy result in a significant disparity in the distribution of benefits/harms based on a certain characteristic (e.g., race, national origin, or sex)?
2. If so, is the policy reasonably job-related for the position in question and consistent with a legitimate business purpose?
3. If so, is there an alternative policy that would equally serve the state's goals with less disparity?

For educator evaluation systems, states and districts should analyze existing data to predict and identify (to the degree possible) whether results have a disproportionately negative impact on certain classes of educators. If disparity is predicted or identified, states should adjust evaluation systems to avoid this disparate impact or otherwise determine that no alternative evaluation system design would equally serve their goals without the same level of disparity. For example, Hispanic or Latino teachers may be more likely to teach English language learners who disproportionately may struggle on English language statewide assessments. Particularly for those cases, the evaluation system should be designed in a way that accounts for any such student differences and special student populations so as not to inappropriately disadvantage these teachers and discourage their work with these students.

2. Substantive Protections: Was the Challenged Employment Action Related to a Legitimate Government Interest and Based on a Sufficiently Valid and Reliable Judgment?

Substantive legal principles establish the need for the evaluation system (and its components) to be sufficiently valid, reliable, and accurate to justify its use in making employment decisions about individual educators. In assessing whether an evaluation system is valid and reliable, courts will look for the articulation of a legitimate state interest in the evaluation system and a demonstration of how the evaluation system was rationally designed and implemented.²³

Perfection is not the expectation. Courts will set realistic, if demanding, standards for validity and reliability. Federal courts have acknowledged that validation studies for employment-related assessments “are by their nature difficult, expensive, time consuming and rarely, if ever, free of error.”²⁴ And they have allowed a district to elect a cutoff score different from the recommendation in studies and/or advice as long as the decision is not arbitrary.²⁵

Strategies for ensuring validity, reliability, and accuracy—and minimizing errors—include:

- a. States should be able to articulate a valid state purpose for the evaluation system.** As described in the box below, many states have successfully justified their evaluation systems based on their interest in improving teaching and learning in the state.
- b. States should incorporate multiple measures into summative evaluations.** Student growth measures should represent one factor among several, such as observation or assessment of professional practice and student surveys. The Measures of Effective Teaching (MET) project, for example, showed that multiple measures increase reliability of educator evaluations by reducing volatility of scores from year to year while preserving a sound link to student achievement.²⁶ And using multiple measures allows for a holistic review of educator effectiveness that provides educators with multiple avenues of demonstrating effectiveness.
- c. States should set levels for summative ratings that are reasonable and consistent with expectations of acceptable educator effectiveness.** Summative ratings should make meaningful distinctions in educators' performance rather than arbitrary categories. During the assessment transition, states should take a close look at any use of student cut scores used for measures of student growth and student proficiency for educators in tested grades and subjects (as appropriate) to determine whether they account for the difficulty of the new assessment (particularly any impact on student proficiency levels).²⁷
- d. States should be attuned to technical data requirements.** Specific considerations likely include the number of data points and years of data needed for growth or value-added scores. The degree to which student growth data based on the previous assessments can or cannot be linked to data based on the new, more rigorous tests is also likely relevant. Strategies for ensuring that technical data requirements are met include establishing business rules for the use of data and not basing results on a single year of data.²⁸

States and districts should strive to ensure that each component of the evaluation system is valid and reliable so that the evaluation system as a whole reflects validity and reliability. As an expert in educational measurement has explained, “[t]he crucial question is whether or not the [evaluation] data improve the decision making over and above the decisions that would be made without [them].”²⁹ Where used and balanced appropriately, measures of student growth based on tests aligned to standards and curriculum can have a legitimate education purpose and be legally defensible as a source of information about educator effectiveness.

Several courts reviewing the use of measures of student achievement in educator evaluation systems have upheld the practice (although not yet using the new state assessments), finding it rationally related to legitimate state interests in better teaching and improved student achievement. For example:

- A California court held that a legitimate, nondiscriminatory reason for a teacher's transfer existed when her test scores dropped in her first year and failed to rise in her second year (a fact not disputed by the teacher).³⁰
- A Tennessee court found that the use of student test results for evaluation of teacher performance and effectiveness "clearly serves a legitimate education purpose."³¹
- A New York court found that a lack of data demonstrating "quantifiable student achievement" was a rational, nondiscriminatory reason for denying a teacher tenure.³²

Two recent suits were dismissed because the state could demonstrate that the new evaluation system was rationally designed and implemented:

- In dismissing a challenge against the state and a few districts on the design and early implementation of the new evaluation system, a Florida court found that the state's evaluation system, including its use of value-added measures based on student performance on the state assessments, was "rational within the meaning of the law."³³
- In dismissing a challenge to a district's implementation of the evaluation system and use of the system to inform teacher placement, a Colorado court similarly found that the state had a valid purpose in creating the system.³⁴

3. Procedural Protections: Did the State Provide the Educator With Sufficient Notice and an Opportunity to Learn New Expectations and to Contest Any Evaluation Results?

In addition to substantive protections, procedural protections for educators must be provided before an evaluation system can be used to make high-stakes employment decisions that impact property rights. The transition to new assessments underscores the importance of ensuring that educators receive notice and opportunity to learn the new material and to contest evaluation results, including through appeal.

- a. **Educators need to receive advance notice of the procedures, components, and criteria that will be used in the evaluation system.** This notification includes information about how the evaluation system is designed (including specific measures and summative rating categories), how the evaluation system will be applied to differentiate educator performance, and how the evaluation results may



Preparing Educators for Evaluation and Feedback: Planning for Professional Learning

Educators need more than “evaluation training” to successfully participate in performance evaluation; they need integrated, ongoing professional learning opportunities. In this module, regional centers and states will find information and activities on high-quality professional learning approaches that prepare evaluators, educators, and district leaders for implementing evaluation systems.

- b. The actual process of conducting individual evaluations needs to align to the system design under state and local rules.³⁵** Educators should be evaluated using the measures of educator practice and student growth that are established in state and local law and policy. For example, the school and district should ensure that any incorporation of student growth on a statewide assessment in a specific teacher’s evaluation is properly weighted, pursuant to established requirements for his or her grade and subject.

The state also should consider how to support fidelity in implementation, for example, by training and/or assessing evaluators and by providing technical assistance to districts. These procedural standards make it important for evaluators to be provided with evidence-based training to ensure accurate and consistent determinations of educator effectiveness. The state also should be prepared to monitor and, when appropriate, take action when state requirements do not promote a valid, accurate, and reliable system (either in design or in practice).
- c. Educators should receive meaningful opportunities to correct deficiencies identified in the evaluation before high-stakes employment action is taken.** This opportunity is particularly true during the transition to new standards and assessments. States and districts should provide educators with training and resources regarding the instructional shifts necessitated by the new standards and assessments as well as time to incorporate new curricular content and new instructional techniques.
- d. At least for those educators with a property interest, the evaluation system should establish an opportunity to contest evaluation results and subsequent employment-related decisions.** This process can be structured in different ways (e.g., through an appeal or grievance procedure), depending on local context.



Evaluating Specialized Instructional Support Personnel: Supplement to the Practical Guide to Designing Comprehensive Teacher Evaluation Systems

This supplemental guide, *Evaluating Specialized Instructional Support Personnel: Supplement to the Practical Guide to Designing Comprehensive Teacher Evaluation Systems*, contains guidance on designing teacher evaluation systems for specialized instructional support personnel to adequately reflect their roles and responsibilities.

Inclusive Design: Building Evaluation Systems That Support Students With Disabilities

This GTL Center Special Issues Brief, *Inclusive Design: Building Evaluation Systems That Support Students With Disabilities*, provides key considerations, action steps, and practical examples for designing educator evaluation systems that are inclusive for teachers of students with disabilities.

A few courts have directly addressed the procedural rights related to evaluation systems:

- The U.S. Supreme Court has noted that educators' property rights in their employment entitle them to "some kind of a hearing" before termination.³⁶
- A Washington, D.C., court found that a plaintiff had received advance notice of all bases for the possible nonrenewal of his contract and, therefore, the nonrenewal was valid.³⁷
- The West Virginia Supreme Court noted that state and local policies that specified performance indicators was "not a definitive list" and held that a district's decision to place a teacher on notice of termination because of his skewed distribution of grades—not an indicator specifically listed in state and local policies—was permissible.³⁸
- A federal appeals court noted with approval that a Missouri statute provided teachers "an opportunity to correct" incompetency.³⁹

In addition to the substantive and procedural protections described in this primer, other legal issues may be relevant to educator evaluation systems. For example, federal and state laws often provide special protections for certain student populations. Students with disabilities and English language learners, for example, have unique education needs that may necessitate accommodations and modifications in the general curriculum to ensure equitable access to educational opportunity. Educator evaluation systems as designed and implemented need to account for challenging issues in assessing student growth of special populations and ensure that the system does not disadvantage educators who spend significant time providing instruction to these students.⁴⁰

Conclusion

As states manage transitions to new learning standards, assessments, and educator evaluation systems, it is critical that any policy regarding the incorporation of measures of student growth based on the new assessments takes into consideration the legal issues described in this primer. States should review applicable state, federal, and local laws and policies, with a close eye on:

Property rights:

- Identify the property rights that state law grants educators (e.g., continued employment, tenure, compensation, and licensure and recertification).
- Examine how (if at all) these rights may be affected by the use of evaluation results.

Substantive protections:

- Articulate a rational purpose for the evaluation system.
- Verify the validity and reliability of the evaluation system before tying results to employment decisions, including through incorporating multiple measures, setting reasonable and appropriate summative rating levels, and being attuned to technical data requirements.

Procedural protections:

- Notify educators of the procedures, components, and criteria within the new evaluation system.
- Monitor for appropriate implementation of the system.
- Provide educators with time to learn new content and adapt instructional techniques to new teaching and learning standards.
- Ensure that educators have access to sufficient due process when evaluation results are used to inform employment decisions, particularly for any decisions that will affect educators' tenure status, continued employment, salary, or other "property interests."

New systems should be valid and reliable and should protect educators' procedural rights to notice and due process. The extended implementation timelines that most states have recently adopted should allow for thoughtful consideration in light of policy, pedagogical, and legal perspectives.

Current efforts of states and school districts to adopt and implement new standards and assessments and enhance educator evaluation systems hold tremendous promise for improving our systems of public education and the educational outcomes of our students. The confluence of these significant shifts requires that states and districts think carefully

about the appropriate sequencing of these efforts, including whether and how to incorporate measures of student growth based on state tests into educator evaluation systems during the assessment transition. The legal requirements and policy considerations discussed in this resource may serve as useful guideposts for developing an educationally appropriate, legally sustainable policy.

Legal requirements should support, not hinder or conflict with, the underlying educational goals for educator evaluation systems. All evaluations should provide educators with information that is of sufficient quality to help advance their practice in order to improve student outcomes. After all, legal requirements may not apply to every use of the evaluation system, but informing professional growth and learning should be a common goal. Systems should provide educators with sufficient timely, actionable, and relevant information and adequate opportunities to improve their practice, to drive system improvements, and to work toward better outcomes for all students.

Endnotes

1. See, e.g., *Cook v. Stewart*, 2014 WL 2959248 (N.D. Fla. May 6, 2014), http://www.meyerbrookslaw.com/documents/Cook%20vs%20Bennett/_Cook_Summary_Judgment_Order.pdf.
2. See *GI Forum v. Texas Education Agency*, 87 F. Supp. 2d 667, 674, 683 (W.D. Tex. 2000); S. E. Phillips, *GI Forum v. Texas Education Agency: Psychometric evidence*, 13(4) *Applied Measurement in Education* 343, 351 (2000), available at: <http://www.marces.org/mdarch/pdf/1000024.pdf>.
3. U.S. Department of Education, Office for Civil Rights, *The use of tests as part of high-stakes decision-making for students: A resource guide for educators and policy-makers* 22 (2000) (hereinafter “OCR, High Stakes”), <https://www2.ed.gov/offices/OCR/archives/pdf/TestingResource.pdf>.
4. OCR, High Stakes, *supra* note 3, at 28–29; American Educational Research Association, American Psychological Association, & National Council on Measurement in Education, *Standards for Educational and Psychological Testing* 25–36 (1999).
5. 20 U.S.C. § 6311(b)(3)(C).
6. OCR, High Stakes, *supra* note 3, at 3.
7. O’Malley, K., McClarty, K., Magda, T., & Burling, K., *Making sense of the metrics: Student growth, value-added models, and teacher effectiveness* 1–2 (Pearson 2011), <http://researchnetwork.pearson.com/wp-content/uploads/F143689371.pdf>.
8. *Id.* at 2.
9. Whitehurst, G., Chingos, M., & Lindquist, K., *Evaluating teachers with classroom observations: Lessons learned in four districts* (Washington, DC: Brookings Institution, May 2014), <http://www.brookings.edu/~/media/research/files/reports/2014/05/13%20teacher%20evaluation/evaluating%20teachers%20with%20classroom%20observations.pdf>. For further examination of the technical considerations that may arise, see Betebenner, D., Diaz-Bilello, E., Marion, S., & Domaleski, C., *Using student growth percentiles during the assessment transition: Technical, practical, and political implications* (Washington, DC: Council of Chief State School Officers, Oct. 27, 2014), http://www.nciea.org/publication_PDFs/Using%20Student%20Growth%20Percentiles%20During%20the%20Assessment%20Transition%20SM14.pdf.
10. Delisle, D., *Letter to chief state school officers* (Washington, DC: U.S. Department of Education, Aug. 2, 2013), <http://www2.ed.gov/policy/elsec/guid/secletter/080713.html>.
11. U.S. Department of Education, *ESEA flexibility: Guidance for renewal process* (Washington, DC: Author, Nov. 13, 2014), <http://www2.ed.gov/policy/elsec/guid/esea-flexibility/flex-renewal/flexguidrenewal2014.doc>.
12. *Cook v. Stewart*, *supra* note 1.
13. *Mulgrew v. Board of Education*, 978 N.Y.S.2d 701 (N.Y.A.D. 2011).
14. *Lederman v. King*, Plaintiff’s Affidavit (N.Y. Sup. Ct, County of Albany, Oct. 24, 2014) (claiming “ineffective” rating poses serious risk to reputational rights); *St. Louis Teachers Union v. St. Louis Board of Education*, 652 F. Supp 425, 432 (E.D. Mo. 1987) (rejected the teachers’ argument that unsatisfactory evaluation ratings on the basis of student test scores affected a protected liberty interest cases and cited other cases).
15. Amended Compl., *Trout v. Knox County Board of Education*, 3:14-cv-00049-HSM-CCS (E.D. Tenn., March 5, 2014), http://www.gpo.gov/fdsys/pkg/USCOURTS-tned-3_14-cv-00049/pdf-USCOURTS-tned-3_14-cv-00049-1.pdf.
16. *Gulino v. Board of Education of the City School District of New York*, No. 96-CV-8414 (S.D.N.Y. June 5, 2015).

- ¹⁷ It is important to note that even though property rights may exist under state law, states likely can qualify or change these rights—for both new and existing educators—as long as they do not invalidate other legal rights established through federal law (e.g., due process rights) or current collective bargaining agreements.
- ¹⁸ E.g., *Board of Regents v. Roth*, 408 U. S. 564 (1972); *Stone v. Federal Deposit Insurance Corporation*, 179 F. 3d 1368, 1374 (Fed. Cir. 1999).
- ¹⁹ The 14th Amendment to the U.S. Constitution provides that “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.
- ²⁰ Id.; 42 U.S.C. § 2000e et seq. Title IX of the Education Amendments Act of 1972 prohibits discrimination on the basis of sex in education, while Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of handicap or disability in a variety of contexts. See 20 U.S.C. § 1681 (sex); 29 U.S.C. § 701 (disability).
- ²¹ The Supreme Court has held that individuals cannot bring claims under the federal regulations that prohibit disparate impact on the basis of race, and its logic has been extended by other courts to prohibit individuals from bringing challenges under federal regulations that prohibit disparate impact on the basis of sex. See *Alexander v. Sandoval*, 532 U.S. 275 (2001) (Title VI regulations do not create a private right of action to allow private lawsuits based on evidence of disparate impact); *Barrett v. West Chester Univ.*, 2003 U.S. Dist. LEXIS 21095 (E.D. Pa. 2003) (no private right of action for Title IX disparate impact regulations). However, federal agencies like the U.S. Department of Education can investigate and take enforcement action (which may include the withholding of federal funds) where the agency determines that a recipient’s policy results in impermissible disparate impact.
- ²² A burden-shifting test means that the responsibilities for proving (or refuting) certain components of a legal claim shift between the plaintiff and the defendant in a particular dispute.
- ²³ Courts use various standards of review depending on the private interest affected by the state action. See, e.g., Chemerinsky, E., Procedural due process claims, 16 *Touro Law Review* 871 (2000). Courts employ the most rigorous standard, strict scrutiny, where individuals claim that a state action or law denies them a fundamental right such as the right to marry and procreate, to speak freely, to vote, or to practice their religion. E.g., *Griswold v. Connecticut*, 381 U.S. 497 (1965) (with majority, concurring, and dissenting opinions discussing fundamental rights). For all other rights (such as a property right) that may be affected, courts use more deferential review of the state action or law, reviewing the action to determine whether it is rationally related to a legitimate government interest and, in the case of actions that impact employment rights, ensuring that procedures provided to individuals afford notice and an opportunity to be heard. Id. See also *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, (1985) (requiring, in the case of a challenge to a specific employee dismissal, only that “there are reasonable grounds to believe the charges against the employee are true and support the proposed action”); *Cook v. Stewart*, *supra* note 1 (stating, “[t]he analysis requires this Court to identify ‘a legitimate government purpose—a goal—that the enacting government body *could* have been pursuing’”, then ask whether “‘a rational basis exists for the enacting government body to believe that the legislation would further a hypothesized purpose’”) (*quoting Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1214 (11th Cir. 1995)).
- ²⁴ *Association of Mexican-American Educators v. California*, 231 F.3d 572, 587 (9th Cir. 2000) (internal citations omitted).
- ²⁵ *Association of Mexican-American Educators v. California*, 937 F. Supp. 1397, 1422 (N.D. Cali. 1996).
- ²⁶ Bill & Melinda Gates Foundation, *Ensuring fair and reliable measures of effective teaching: Cumulative findings from the MET Project’s three-year study* (Seattle, WA: Author 2013), http://metproject.org/downloads/MET_Ensuring_Fair_and_Reliable_Measures_Practitioner_Brief.pdf.

27. See Gewertz, C., Cutoff scores set for common-core tests, *Education Week*, Nov. 17, 2014 (projecting that more than half of students will fall short of grade-level proficiency on Smarter Balanced Assessment Consortium tests), <http://www.edweek.org/ew/articles/2014/11/17/13sbac.h34.html?cmp=ENL-EU-NEWS1>; Ujifusa, A., Scores drop on Ky.'s Common Core-aligned tests, *Education Week*, Nov. 2, 2012, <http://www.edweek.org/ew/articles/2012/11/02/11standards.h32.html>.
28. See, e.g., 29 C.F.R. § 1607.5(H) (discussing validation for employment tests, explaining, "Where cutoff scores are used, they should normally be set so as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force. Where applicants are ranked on the basis of properly validated selection procedures and those applicants scoring below a higher cutoff score than appropriate in light of such expectations have little or no chance of being selected for employment, the higher cutoff score may be appropriate, but the degree of adverse impact should be considered.").
29. Mehrens, W., Validity issues in teacher licensure tests, 1 *Journal of Personnel Evaluation in Education* 195, 221 (1987).
30. Harris v. Lynwood Unified School District, 2009 WL 2900313 (C.D. Cal. 2009).
31. Guster v. Hamilton County Department of Education, 2004 WL 1854181 (E.D. Tenn. 2004).
32. St. Louis v. Board of Education, 705 F. Supp. 751 (E.D.N.Y. 1989).
33. Cook v. Stewart, *supra* note 1.
34. Masters v. School District No. 1, 2014 CV 30371 (Denver Dist. Ct. June 6, 2014), <http://s3.documentcloud.org/documents/1184332/sb191lawsuitdismissed.pdf>.
35. Note that "[b]eyond the basic constitutional requirements of appropriate notice and an opportunity to be heard, state laws and school board policies often contain detailed procedures that must be followed. Failure to provide these additional procedures...results in a violation of state law, rather than constitutional law." See Cambron-McCabe, N. B., McCarthy, M. M., & Thomas, S. B, *Public school law: Teachers' and students' rights* 394 (5th ed. 2004).
36. Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).
37. Pearson v. District of Columbia, 644 F. Supp.2d 23 (D.D.C. 2009).
38. Brown v. Wood County Board of Education, 184 W.Va. 205, 216 (1990).
39. Derrickson v. Board of Education, 703 F.2d 309 (8th Cir. 1983).
40. See, e.g., Massachusetts Department of Elementary and Secondary Education, Inclusive practice: Reviewing common assessments, in *Educator effectiveness guidebook for inclusive practice*, <http://www.doe.mass.edu/edeval/guidebook/> (Malden, MA: Author last updated Sept. 2, 2015).

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