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## California Mayoral Empowerment Study

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## **CALIFORNIA MAYORAL EMPOWERMENT STUDY**

Center for Education Policy and Law • University of San Diego  
A non-partisan, university-based educational research center

**January 2012**

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This study was conducted by the Center for Education Policy and Law (CEPAL), a research entity operating under the auspices of the School of Leadership and Education Sciences and the School of Law at the University of San Diego. Established by a grant from the William D. Lynch Foundation in 2007, CEPAL's mission is to foster better linkage between educational research, policymaking, and practice. To this end, CEPAL undertakes empirical and legal research on educational policy issues, enhances communication between education leaders and state-level policymakers, and facilitates understanding among USD law students and education graduate students about the policymaking process through courses, internships, and research opportunities. Additional information about CEPAL is available at [www.sandiego.edu/cepal](http://www.sandiego.edu/cepal).

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## EXECUTIVE SUMMARY

### Overview

Mayoral control of urban school districts, which face many challenges and often fail to provide every K-12 student with a high quality public education, is a reform effort seeking to create a more integrated approach to school governance. In California, a state legislative effort (the Romero Act) to further mayoral control in the Los Angeles Unified School District was struck down by a state court of appeal in 2007. This study explores ways of amending the state constitution and changing statutory law to permit the option of mayoral control through appointment of school board members.

The study first examines existing California law on educational control. Then the study examines efforts in seven cities across the United States to expand mayoral influence over school district operation and the findings of credible research studies on the consequences of doing so. Mayoral influence is examined in four areas: governance, finance, collective bargaining, and reform of low-performing schools. The forms of mayoral control range from weak to control in the seven cities.

Based on these findings, the study then examines the implications for changing California law to expand mayoral influence over school districts. The final section sets forth drafts of possible constitutional initiatives to empower mayors to appoint school board members in this state; changes that would be necessary in provisions of the Education Code and related laws; and potential challenges that could arise.

### Existing California Law on Educational Control

#### *Governance*

At the state level, the ten members of the State Board of Education are appointed by the governor with the advice and consent of two-thirds of the senate, and the Superintendent of Public Instruction (SPI) is elected in each gubernatorial election by the statewide electorate. At the county level, county boards of education are elected and the county superintendent is either elected by voters or appointed by the county board. Local school districts are governed by three, five, or seven member boards of education and a district superintendent hired by the board of education. In general law cities, the boards of education must be elected, but charter cities may choose whether the boards will be elected or appointed.

#### *Finance*

Each school district superintendent prepares an annual budget to submit to the district board of education. The board of education must hold a public hearing before formally adopting the budget. The budget is then filed with the county superintendent, who will approve or disapprove it. The budgets from the county boards of education are ultimately submitted to the SPI for his or her approval.

### *Collective Bargaining*

School districts are permitted to designate who will represent the district in negotiations with employee representatives. Collective bargaining contracts may be entered into by the district superintendent, but must be approved by the district board of education. The mandatory and restricted topics of bargaining are set by statute. The Public Employment Relations Board has the authority to determine on a case-by-case basis which topics are negotiable, even if the topics are not specifically enumerated in the Educational Employment Relations Act.

### *Low-Performing Schools*

The control and oversight of low-performing schools are governed by the Public Schools Accountability Act. Schools are categorized as underperforming based on Academic Performance Index scores. The school district boards of education having jurisdiction over the underperforming schools must select an external evaluator or entity to develop an improvement plan for the school. Schools that do not meet improvement goals are subject to state takeover.

## **Weak Category: Oakland**

### *Mayoral Influence*

The City of Oakland, California, is a charter city. The city charter was amended in 2000 to expand the Oakland Unified School District (OUSD) Board of Education from seven to ten members and to allow the mayor to appoint three members. This school board structure was repealed in 2004. No changes to California law were made regarding finance, collective bargaining, or low-performing schools during the period of mayoral appointment. The district returned to local control in 2009 after period of state oversight due to a budget crisis.

### *Empirical Research*

The district currently is operating below capacity, having lost 30% of its students since 2000. The district has had severe financial difficulties since 2003 that have continued since the return to local control. Evidence suggests collective bargaining agreements may have lessened the potential impact of recent funding reforms by limiting teacher transfer and hiring decisions at school sites. There have been steady increases in student performance over time, though it is not clear whether these increases are unique to the district. The district remains among the lowest performing districts in the state.

## **Weak Category: Philadelphia**

### *Mayoral Influence*

The state of Pennsylvania took control over the School District of Philadelphia (SDP) due to fiscal distress, resulting in a “city-state partnership.” Under this partnership, the governor of Pennsylvania appoints three members of the district’s governing board and the mayor of Philadelphia appoints two. The SDP also currently employs an “Acting CEO & Superintendent.” Both the state and city are required to contribute to the SDP’s finances. The school board is in control of the district’s financial matters, possessing the power to adopt the annual budget and to levy taxes. The mayor has no direct role in the budgeting process. The school board has complete control over collective bargaining. Bargaining topics are set by statute, which supplies an additional list of restricted topics that applies

specifically and exclusively to the SDP. Public school employees are prohibited from striking. The school board is permitted to enter into contracts with outside individuals or entities to run individual schools within the district. The school board has utilized this authority with respect to the lowest-achieving schools.

#### *Empirical Research*

The leadership in the district was relatively consistent from 2002 through the beginning of the 2011 school year with a focus on structure, requirements, standards, and accountability; the use of diverse providers; and improving teacher quality. Per-pupil spending increased between 2002 and 2005, but the district has struggled financially since 2007. We identified no high-quality empirical studies relating to collective bargaining. Student achievement remains low.

### **Moderate Category: Cleveland**

#### *Mayoral Influence*

State law classifies the Cleveland Metropolitan School District (CMSD) as a “municipal school district,” a term which refers to any school district in the state that has ever been under court-ordered state supervision. The mayor of Cleveland appoints each of the nine school board members chosen from a list of candidates proposed by the nominating panel and the CEO with the board’s concurrence. The CMSD school board votes on and approves the annual budget. State law sets forth actions, outlined in greater detail in the following full report, which may be taken with respect to school districts experiencing extreme financial difficulties. The CMSD is authorized to choose its representative for purposes of collective bargaining negotiations. The CMSD currently delegates this power to the CEO with the assistance of a negotiating team. The CMSD must approve all collective bargaining contracts. Bargaining topics are determined by state law. The CEO is in control of low-performing schools in the district. State law also provides for a Pilot Project Scholarship Program, which provides vouchers to low-income families in the CMSD to aid with private school tuition or tutoring assistance. The mayor has no role in that program.

#### *Empirical Research*

Relatively high turnover in the positions of mayor and school district CEO has occurred since increased mayoral influence. There remain issues of leadership, safety, absenteeism and lack of capacity in this very high-poverty district. While there was an increase in funding initially under increased mayoral control, financial difficulty has been present since 2003. We identified no high-quality empirical studies relating to collective bargaining. An initial increase in student test scores under increased mayoral control did not outlast cuts in spending in 2004. CMSD remains among the lowest performing urban districts in the United States.

### **Moderate Category: Detroit**

#### *Mayoral Influence*

Mayoral control was in effect in the Detroit Public Schools (DPS) from 1999 to 2005. During those years, the mayor of Detroit appointed six out of the seven school board



members, the Superintendent of Public Instruction (SPI) chose the seventh. The school board selected the district CEO by a two-thirds vote; the SPI's appointee was required to be part of the voting majority. The CEO took over all powers of the former elected school board. The CEO was in charge of the district's finances and was responsible for submitting the annual budget to the school board for its approval. The school board would then file its budget with the county tax allocation board to approve tax rates. The CEO was viewed as the employer and thus in control of collective bargaining. During the period of mayoral control and currently, bargaining topics are set by statute, but state courts may determine on a case-by-case basis the precise scope of mandatory bargaining topics. State collective bargaining law includes provisions that apply only to public schools, for example, prohibitions against lockouts and additional mediation procedures. The CEO was required to draft school improvement plans with the approval of the school board, and submit these to the school district accountability board (comprised of state officials and appointees). The CEO was also required to draft several annual and monthly reports regarding academic performance to the governor, legislature, mayor, and the public.

#### *Empirical Research*

The district remains in crisis, with inadequate leadership and capacity. More than half of eligible students have left the district since 1998. The district has experienced severe budget deficits since 2002 and currently is operating under a state-appointed emergency financial manager. We identified no high quality empirical studies relating to collective bargaining. Students have very low academic achievement, performing worse than students in any large urban district.

### **Strong Category: Boston**

#### *Mayoral Influence*

The governing board of the Boston Public Schools (BPS) is comprised of seven members appointed by the mayor of Boston with use of a nominating panel. The mayor also selects the district superintendent. Each school within the district has a school council, comprised of the principal and a certain number of parents, teachers, and other local citizens. The City of Boston bears the primary responsibility to fund the BPS. The BPS superintendent initially drafts the annual budget for approval of the school board. The school board holds a public hearing and submits the budget to the mayor, who may approve or reduce the total budget. The mayor then seeks the appropriation of funds directly from city council. The City of Boston is considered the employer of school employees for collective bargaining purposes; however, the city is represented in negotiations by the BPS school board. The mayor is authorized to participate directly and vote as a member of the school board in the bargaining process. Bargaining topics are defined by statute, with courts determining the exact scope of bargaining on a case-by-case basis. Low-performing schools are overseen by state and local officials. The state Board of Elementary and Secondary Education establishes regulations that define when a school or district has failed to improve its educational program. District superintendents exercise control over underperforming schools and are responsible for creating and implementing a turnaround plan with the assistance of a local stakeholder group (of which the mayor is one member).

### *Empirical Research*

BPS has experienced very consistent leadership, free of conflict, and has maintained a long-term, consistent focus on instruction. While there was an increase in funding initially with the increase in mayoral control, financial difficulties have been evident since 2004. We identified no high-quality empirical studies relating to collective bargaining. Student performance has improved and is high compared to other urban districts, though still lower than desired, with disparities across district schools.

### **Strong Category: Chicago**

#### *Mayoral Influence*

The Chicago Public Schools (CPS) is governed by a seven-member board of education whose members are appointed by the mayor. The mayor also appoints the CEO, who makes recommendations to the school board. Local school councils similar to those in the Boston Public Schools are established at each school. The CPS school board is responsible for adopting the district's annual budget. The Chicago School Finance Authority, comprised of members appointed by the governor of Illinois and mayor of Chicago, must approve the budget. The CEO is responsible for negotiating collective bargaining contracts, but the contracts are subject to the approval of the school board. Principals at each school have the authority, with some limitations, to waive provisions of teachers' collective bargaining contracts as applied to that school. Bargaining topics are determined by statute and have varied greatly over time; the recent trend has been to restrict the scope of negotiable topics. Each school must draft a three-year school improvement plan. The CEO generally bears the responsibility to monitor school performance and identify non-performing schools. The CEO is authorized, and in some instances required, to take various corrective actions in regards to non-performing schools.

#### *Empirical Research*

There have been a large number of new programs and policies implemented since increased mayoral control, as well as a focus on accountability and, more recently, increased autonomy for schools. Funding for the district increased initially with increased mayoral control but expenses remained greater than revenues through this period. CPS has experienced severe budget deficits since 2009. We identified no high-quality empirical studies relating to collective bargaining. Reforms enacted since increased mayoral control do not appear to have changed teaching and learning in substantive ways. Students continue to perform poorly on national assessments and graduate from high school in low numbers.

### **Control Category: New York City**

#### *Mayoral Influence*

The governance structure in the New York City Department of Education (NYCDOE) consists of a governing board, chancellor, community district education councils, and community superintendents. The mayor of New York City appoints eight of thirteen members of the school board; the five borough presidents appoint the remaining five. The board is largely advisory to the chancellor, who is appointed by and employed at the will of the mayor. The finance and budgeting processes of the NYCDOE are tied directly to New York City, because the NYCDOE functions as a branch of city government. The chancellor

submits budget estimates to the mayor, who then shares control with the New York City Council over final budget decisions and appropriations. The NYCDOE governing board is considered the public employer of all school employees for collective bargaining purposes and as such, is responsible for negotiating with employee representatives. Bargaining topics are determined by statute and may be interpreted by the state Public Employment Relations Board. Control over low-performing schools is exercised both at the state and local levels. The state Commissioner of Education develops a school progress report card to assess the schools. In the NYCDOE, the chancellor must measure student achievement and develop local assistance plans to improve student results. The chancellor is authorized to intervene in underperforming schools and take drastic actions, after a public hearing and approval by the school board.

### *Empirical Research*

Leadership in the district was consistent between 2003 and 2010. Reforms have changed over time. The initial focus was on uniformity and control, with a more recent focus on capacity, autonomy, and accountability. Initially, dollars for education increased, though a lower percentage of the city budget was allocated to education. Since 2007 financial difficulties have escalated, resulting in budget cuts. We identified no high-quality empirical studies relating to collective bargaining. There is a lack of empirical evaluation of education reforms. Student performance on national assessments is mixed and has been relatively flat over time.

NOTE: To help the reader understand the various forms of mayoral influence over school district governance in these cities and the findings of reliable empirical research relating to each, a single-page matrix is presented at the end of this executive summary.

### **Implications for California Law**

The possibility of mayoral control over California school districts is limited by current constitutional, statutory, and case law. Article IX of the California Constitution pertains to education and includes sections that prohibit the transfer of control over the public school system to outside entities or individuals, authorizes the legislature to delegate decision-making power to school boards only, and grants charter cities the right to determine whether their school board will be elected or appointed. As interpreted by *Mendoza v. State*, an opinion from a California appellate court regarding attempted school governance reforms in the Los Angeles Unified School District, these constitutional provisions limit the possibility of several features of mayoral influence used in the cities studied, such as mayoral appointment of school board members and the CEO/superintendent. These sections would likely need to be repealed, revised, or amended to allow for various models of mayoral control in California. Furthermore, current statutory law found in the Education Code, Government Code, and elsewhere that currently conflicts with features of mayoral control would also need to be repealed, revised, or amended. Charter cities, however, have the option of amending their city charters to alter the school district governance structure, within constitutional limitations.

## **Changing California Law to Allow for Mayoral Control of Schools**

### *Constitutional and Statutory Changes through the Initiative Process*

Sections 6, 14, and 16 of Article IX of the California Constitution would have to be amended to give mayors the authority to appoint school board members. Statutory changes include various sections of the Education Code such as §§ 5200-5399 and 35000-35199 and Gov. Code §§ 3540-3549 (Educational Employment Relations Act).

### *Constitutional Drafting Considerations: Amendment versus Revision*

Amendments to the California Constitution are permitted through the initiative process. Revisions are not. A qualitative change to the Constitution can be determined to be a revision if there is a change to the basic governmental structure or if one branch of government is being given control that another previously had. The initiative process is easier to accomplish than the revision process.

### *Single Subject Rule*

Initiative provisions must all be reasonably germane to a common theme or purpose. Both constitutional and statutory amendments can be placed in a single initiative measure, as comprehensive changes to a single subject may be made through the initiative process.

### *Mechanics and Timing of the Initiative Process*

The required number of signatures for a constitutional amendment is presently 807,615. The time period allowed for obtaining this number of signatures is 150 days. The initiative must appear on the next regularly scheduled election that occurs 131 days after the petition signatures are verified. Recently, the governor signed into law a bill revising section 9016 of the Elections Code moving all statewide initiatives to the November election cycle. Thus, any resulting mayoral empowerment initiative may appear on a November ballot only.

### *Scope of Changes and Uniformity Rule*

The constitutional and statutory changes will be different depending on whether the plan is to apply such changes to all cities in California or only to charter cities, large cities, or those cities whose school district and city boundaries are contiguous. Article IV, Section 16 of the state constitution provides that laws of a general nature should have uniform application and disfavors local or special statutes where a general statute is possible. Because education is considered a topic of general statewide concern, any statutory changes that appear to apply to only specific jurisdictions will need to be justified on some rational basis (e.g., cities or school districts above a certain population level).

### *Potential Post-Passage Challenges*

#### **Timing of Judicial Review**

Initiative measures are not generally subject to pre-election review. As a result, challenges to the drafting or the constitutionality of a measure mainly occur after the election. Proponents of an initiative need to be ready to defend the initiative after the election. Recently, the California Supreme Court has reaffirmed that proponents of an initiative have standing to defend the initiative even if the State Attorney General and Governor refuse to do so.

### **Equal Protection Challenges**

A basic vote denial challenge could come as a result of changes that move the school board positions to appointed rather than elected. This is particularly true if the changes are made for some cities and not others. Some courts in other states looking at changes from elected to appointed school board positions have applied a rational basis test. Almost any change being proposed would pass this test under the federal Constitution. The California Constitution has a more stringent equal protection clause.

An equal protection challenge by non-city residents who are part of a school district that will be placed under the control of that city's mayor would be a more difficult challenge to overcome. Challengers could frame a vote denial challenge in a situation where some members of the school district have a say in the election of the person in charge of the schools and others do not. This problem could be remedied by changing the school district lines to parallel the city boundary lines. This, however, as set forth in the Education Code, is a very complex and time-consuming process.

### **Voting Rights Act - Section 5**

Because certain counties in California are considered "covered jurisdictions" under the Voting Rights Act, any change that moves school board positions that were once elected to appointed will have to be pre-cleared by the United States Department of Justice or the United States District Court for the District of Columbia. The process for preclearance is outlined in the full report.

### **Voting Rights Act – Section 2**

A number of cases have explored whether a change from school board elections to school board appointments can constitute a Section 2 challenge under the Voting Rights Act. While those claims have been allowed to proceed, they have generally not been successful. In fact, a number of cases have held that Section 2 does not apply to appointive systems at all.

**SUMMARY MATRIX – PAGE 9 OF 143**

GOVERNANCE		FINANCE		COLLECTIVE BARGAINING		LOW-PERFORMING SCHOOLS		
	Legal	Empirical	Legal	Empirical*	Legal	Empirical	Legal	Empirical
<b>OAKLAND</b>	2000-2004: school board increased from 7 to 10 members, mayor appointed 3of 10.	Returned to local control in 2009 after period of state oversight due to budget crisis. Currently operating below capacity; lost 30% of students since 2000.	No changes.	Severe financial difficulties since 2003. Massive cuts since return to local control.	No changes.	Evidence suggests CB agreements may have lessened the potential impact of recent funding reforms by limiting hiring decisions at school sites.	No changes.	Increases in student performance over time. Remains among lowest-performing districts in the state.
<b>PHILA</b>	Mayor appoints 2 of 5 members of the governing bd.; bd selects sup't by 2/3 vote.	Relatively consistent leadership at the district through beginning of 2011 school year. Focus on standards, accountability; use of diverse providers; improving teacher quality.	Funded by state and city. School bd. approves budget and has authority to levy taxes.	Per pupil spending increased between 2002-2005. Budget crisis revealed in 2007; district has struggled financially since that time.	School bd. may negotiate with employees and enter into new contracts.	No high-quality empirical studies identified.	School bd. contracts with outside entities to provide educational services in low-performing schools.	Student achievement levels remain low.
<b>CLEVE</b>	Mayor appoints entire bd. of education with use of nominating panel; and CEO with bd.'s approval.	Relatively high turnover in positions of mayor and school district CEO since increased mayoral influence. Issues of leadership and lack of capacity in this very high-poverty district.	School bd. formulates and approves budget.	Increased funding on education initially. Financial difficulties since 2003.	School district designates its rep. for negotiating purposes (now the CEO). School bd. approves the contract.	No high-quality empirical studies identified.	CEO measures academic performance and may take corrective action with bd.'s approval.	Initial increase in student test scores did not outlast cuts in spending in 2004. Among the lowest performing urban districts in the U.S.
<b>DETROIT</b>	1999-2005: Mayor appointed 6 of 7 school bd. members; bd. selected strong CEO by 2/3 vote.	District in crisis, lack of leadership and capacity. More than half of eligible students have left the district since 1998.	CEO had authority over expenditure of funds, but school bd. had to approve the budget.	Severe budget deficits since 2002. District currently serving under state-appointed emergency financial manager.	CEO was considered the employer and was in control of bargaining.	No high-quality empirical studies identified.	CEO + school bd. submitted improvement plans to accountability bd. CEO submitted annual + monthly reports to mayor/school bd.	Students have very low achievement, perform at lowest levels of any large urban district.
<b>BOSTON</b>	Mayor appoints entire school bd. with use of nominating panel. School bd. selects the sup't.	Very consistent leadership, free of conflict. Long-term consistent focus on instruction.	Funded mainly by city. Mayor must approve budget and seek appropriation from city council.	Increased funding on education initially. Financial difficulties since 2004.	The city is the employer, but school bd. handles negotiations. Mayor gets one vote in the bargaining process.	No high-quality empirical studies identified.	Detailed scheme for underperforming schools and districts. District sup't develops turnaround plan.	Student achievement has improved and is high compared to other urban districts.
<b>CHI</b>	Mayor appoints entire school bd. and the CEO.	Large number of new programs and policies over time. Focus on accountability and, more recently, increased autonomy for schools.	School bd. adops budget with School Finance Authority approval (mayor shares appointment authority with governor).	Increased funding for education initially, but expenses greater than revenues. Severe budget deficits since 2009.	CEO is in charge of negotiating but school bd. must approve contracts.	No high-quality empirical studies identified.	CEO monitors low-performing schools. CEO may place schools on remediation, probation, or take other corrective action.	Reforms do not appear to have changed teaching and learning in substantive ways. Students continue to perform poorly on national assessments and graduate in low numbers.
<b>N.Y.C.</b>	Mayor appoints 8 of 13 bd. members + chancellor. Bd. advises the chancellor. Also includes community district education councils and community sup'ts.	Consistent leadership in district between 2003-2010. Reforms have changed over time; initial focus on uniformity and control, more recent focus on capacity, autonomy, and accountability.	Funded as a department of the city (NYCDOE). Chancellor gives budget estimates to mayor; mayor seeks appropriation from city council.	Increased dollars for education initially, though lower percentage of city budget allocated to education. Financial difficulties and budget cuts since 2007.	School bd. is considered the employer and is responsible for negotiating.	No high-quality empirical studies identified.	State and city control. Chancellor develops improvement measures and local assistance plans. Chancellor may take corrective action after public hearing and school bd. approval.	Lack of empirical evaluation of education reforms. Students' performance on national assessments is mixed and has been relatively flat over time.

\*Cuts in state and federal education funding have likely contributed to financial difficulties across districts.

## **I. Introduction**

### **A. Purpose**

Many school districts are failing to provide every K-12 student with a high quality public education. This is particularly true for large urban districts with diversified student populations. School reformers at the national and state level believe this failure may be attributed in part to the isolated governance structure of public education which separates school systems from the larger city government. Mayoral control of urban school districts is a reform effort that seeks to create a more integrated approach to school governance so that districts are better managed and student achievement improves.

In California, a state legislative effort (the Romero Act) to further mayoral control in Los Angeles was struck down as unconstitutional in 2007 by a state court of appeal. An effort is now underway to consider the use of a California constitutional initiative to permit mayoral control in certain districts. The Center for Education Policy and Law (CEPAL) at the University of San Diego was selected to provide research in key areas related to such an effort.

This study encompasses both legal and social science research. Legal research focuses on existing California law dealing with school district governance, experience in changing the law in selected cities across the United States to empower mayors in school district operations, and how the law in California would need to be changed to do so. Social science research focuses on identifying credible research studies following mayoral empowerment in the selected cities to determine outcomes in cities with differing levels of mayoral empowerment. A vast number of studies were reviewed and compiled by researchers, and are available to review upon request.

The researchers who conducted this study include the CEPAL staff attorney, CEPAL Associate Director for Social Science Research, CEPAL Associate Director for Legal Research, both legal and education research assistants, and two experts on the initiative process from the University of the Pacific McGeorge Law School in Sacramento along with their legal research assistants. The study was begun in August 2011 and concluded six months later.

### **B. Overview**

The study begins with an examination of existing California law on school district governance. This section provides the necessary background to understand what would need to be changed to enable mayors to take over the management of school districts in various ways including appointing the school board.

Then the study examines efforts in seven cities across the United States to expand mayoral influence over school district operation and the findings of credible research studies on outcomes in these cities. Mayoral influence is examined in four areas: governance, finance, collective bargaining, and reform of low-performing schools. The forms of mayoral control range from weak to control in the seven cities.

Based on these findings, the study then examines the implications for changing California law to expand mayoral influence over school districts. The final section sets forth drafts of possible constitutional initiatives to empower mayors to have greater governing authority and therefore influence school district finance, school district collective bargaining, and turnaround measures for low-performing school.

## II. Existing California Law on Educational Control

Before delving into the legal changes made in other cities providing for some degree of mayoral influence over the school districts, it is first necessary to review the current laws regarding governance, finance, collective bargaining, and low-performing schools in California. The feasibility of implementing weak, moderate, strong, or control levels of mayoral influence in California school districts will be examined against this backdrop.

### A. Governance

Article IX of the California Constitution governs the state public school system. Section 1 of Article IX commands the state legislature to “encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.”<sup>1</sup> To that end, the legislature is directed to “provide for a system of common schools.”<sup>2</sup> The California Legislature has created a school system that is run and overseen by an interaction of government bodies and actors at the state, county, and local levels.

At the state level, organization of the school system stems from the State Department of Education (Department). The Department is administered by the State Board of Education (SBE), which is the “governing and policy determining body,” and a Superintendent of Public Instruction (SPI), “in whom all executive and administrative functions of the department are vested . . . .”<sup>3</sup> The SBE is comprised of ten members appointed by the governor with the advice and consent of two-thirds of the senate.<sup>4</sup> The SBE is empowered to determine “all questions of policy within its powers” and to adopt rules and regulations for the government of elementary, secondary, and technical and vocational schools.<sup>5</sup> The SPI is elected by the voters at each gubernatorial election.<sup>6</sup> The SPI acts under the direction of the SBE to execute its policies.<sup>7</sup> Generally, the SPI’s duty is to “superintend the schools of the state.”<sup>8</sup>

Section 1000 of the Education Code establishes county boards of education (CBE), consisting of five or seven elected members.<sup>9</sup> The duties of CBEs are largely financial in nature and include: approving the annual budget of the county superintendent of schools; approving the annual county school service fund budget of the superintendent of schools; and reviewing the report of the annual audit provided for by the superintendent of schools.<sup>10</sup> The constitution

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<sup>1</sup> CAL. CONST. art. IX, § 1.

<sup>2</sup> *Id.* § 5.

<sup>3</sup> CAL. EDUC. CODE §§ 33301, 33303 (West 2011).

<sup>4</sup> *Id.* § 33000.

<sup>5</sup> *See id.* § 33031.

<sup>6</sup> CAL. CONST. art. IX, § 2.

<sup>7</sup> EDUC. § 33111.

<sup>8</sup> For the full list of the SPI’s duties, see *id.* § 33112.

<sup>9</sup> *Id.* § 1000.

<sup>10</sup> *Id.* § 1040.



provides that a Superintendent of Schools for each county may be elected by the voters at each gubernatorial election, or may be appointed by the CBE.<sup>11</sup> The superintendent of schools in each county must: superintend the schools in the county, maintain responsibility for the fiscal oversight of each school district in the county, visit and examine each school in the county to observe and learn of any problems, identify and submit reports on low-ranking schools based on API scores, present reports to the school district governing boards regarding the fiscal solvency of districts with a disapproved budget, and enforce the course of study.<sup>12</sup>

As for the local level, the constitution delegates to the legislature the authority to incorporate and organize school districts, and in turn, to authorize the governing board of each school district to “act in any manner which is not in conflict with the laws and purposes for which school districts are established.”<sup>13</sup> Per the Education Code, “every school district shall be under the control of a board of school trustees or a board of education.” In general law cities, district boards of education are comprised of three, five, or seven members.<sup>14</sup> The members of the board of education are elected by the voters in the district.<sup>15</sup> In charter cities, there is an important difference: charter cities have a constitutional right to determine, independently of the Education Code, whether their boards of education will be elected or appointed, the number of board members, and the members’ qualifications, compensation, and terms for removal.<sup>16</sup> However, as discussed in Section VI of this study, the number of school board members a mayor in a charter city could appoint to the school board without violating another section of the California Constitution remains uncertain. The Education Code grants school district governing boards broad authority to “initiate and carry on any program, activity, or may otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with the purposes for which school districts are established,”<sup>17</sup> which is the constitutional extent of a local school board’s powers.<sup>18</sup>

Lastly, each school district with eight or more teachers may employ a district superintendent, chosen by the board of education.<sup>19</sup> District superintendents have the powers and duties to: enter into contracts on behalf of the district (if the governing board delegates such power), prepare and submit a budget to the governing board, assign certificated employees to positions (subject to board approval), transfer teachers from one school to another, determine that employees in positions requiring certification hold valid certificated documents, and to submit financial and budgetary reports to the governing board.<sup>20</sup>

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<sup>11</sup> CAL. CONST. art. IX, § 3.

<sup>12</sup> For the full description of the county superintendents’ responsibilities, see EDUC. §1240, which runs three pages.

<sup>13</sup> CAL. CONST. art. IX, § 14.

<sup>14</sup> EDUC. § 35012(a)-(c).

<sup>15</sup> *Id.*

<sup>16</sup> CAL. CONST. art. IX, § 16. The state constitution allows cities to adopt charters by majority vote of residents. CAL. CONST. art. XI, § 3. In general, the city charter provisions, rather than state law, govern the city with “respect to municipal affairs.” *Id.* § 5. Cities that do not have a charter are called general law cities, which are governed entirely by state law. There are currently 120 charter cities out of a total 478 cities in California. “Facts at a Glance (2011.)” *CACities.org*. League of California Cities, 1 July 2011. Web. 13 Dec. 2011. For the complete list of charter cities in California, see [http://www.cacities.org/resource\\_files/28410.Charter\\_Cities.doc](http://www.cacities.org/resource_files/28410.Charter_Cities.doc).

<sup>17</sup> EDUC. § 35160, *see also id.* § 3516(b).

<sup>18</sup> *See supra* note 13.

<sup>19</sup> EDUC. § 35026. The Education Code commands that the “superintendent of each school district shall . . . [b]e the chief executive officer of the governing board of the district.” *Id.* § 35035(a).

<sup>20</sup> *Id.* § 35035(b)-(g).

## B. Finance

Finance of the public school system in California begins at the state level and works its way down to the local school districts. The state constitution sets public school funding as a priority, providing that “[f]rom all state revenues there shall first be set apart the moneys to be applied by the state for the support of the public school system and public institutions of higher education.”<sup>21</sup> The Superintendent of Public Instruction must prepare an estimate each year of the amount of state money that will be apportioned to each county for the current school year.<sup>22</sup> The County Board of Education must then adopt an annual budget and file it with the SPI, who will either approve or disapprove the budget.<sup>23</sup>

In each school district, the superintendent (or other employee designated by the school board) initially prepares and submits a budget to the school district governing board.<sup>24</sup> The school board will then, on or before July 1 of each year, hold a public hearing on the budget and adopt a budget. The board then files the budget with the county superintendent of schools. The county superintendent must examine the budget to determine whether it complies with the standards and criteria adopted by the SBE, and whether the budget will allow the district to meet its financial obligations.<sup>25</sup> By August 15 of each year, the county superintendent must approve, conditionally approve, or disapprove the district’s adopted budget. Section 42127 of the Education Code further sets out a detailed process that ensues if a school district’s budget is conditionally approved or disapproved. In sum, the county superintendent must provide to the board written recommendations on how to revise the budget.<sup>26</sup> This commences a back-and-forth exchange between the county superintendent and the district board to revise the budget until it is approved.<sup>27</sup>

## C. Collective Bargaining

In California, collective bargaining between school districts and their employees is governed by the Education Code and the Educational Employment Relations Act (EERA).<sup>28</sup> With the passage of the EERA, the legislature declared its purpose “to promote the improvement of personnel management and employer-employee relations within the public school systems of the State of California . . . .”<sup>29</sup> The EERA gives public school employees the right to “form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.”<sup>30</sup> Once the employees in a unit have selected an exclusive representative recognized by the public school employer, the employees are required to join that organization or to pay a services fee.<sup>31</sup> In terms of

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<sup>21</sup> CAL. CONST. art. XVI, § 8.

<sup>22</sup> EDUC. § 33118.

<sup>23</sup> *Id.* § 1622(a)-(b).

<sup>24</sup> *Id.* § 35035(b).

<sup>25</sup> *Id.* § 42127.

<sup>26</sup> *Id.* § 42127(d).

<sup>27</sup> *Id.* § 42127.

<sup>28</sup> CAL. GOV. CODE. §§ 3540-3549.3.

<sup>29</sup> *Id.* § 3540.

<sup>30</sup> *Id.* § 3543(a).

<sup>31</sup> *Id.* § 3543(a), *see also id.* § 3544.1.

negotiating, the EERA allows a public school employer to designate who will meet and negotiate with the representative of the employee organization.<sup>32</sup> Generally, the authority to enter into a contract may be delegated to the district superintendent; however, the contract is not valid until the district board approves or ratifies it.<sup>33</sup>

Section 3543.2 of the Government Code sets forth the topics over which employees may bargain. The scope of representation is “limited to matters relating to wages, hours of employment, and other terms and conditions of employment.” The terms and conditions of employment include health and welfare benefits; leave, transfer, and reassignment policies; safety conditions of employment; class size; procedures to be used for evaluating employees; organizational security; procedures for processing grievances; layoff of probationary certificated employees; and alternative compensation or benefits for employees.<sup>34</sup> Certificated employees have the right to consult on educational objectives, content of courses and curriculum, and the selection of textbooks.<sup>35</sup> Mandatory topics of bargaining include: the causes and procedures for disciplinary action of certificated employees, other than dismissal; the layoff of certificated employees for lack of funds; the payment of additional compensation based on criteria other than years of training and experience; and salary schedules based on criteria other than a uniform standard for years of training and experience. If the bargaining unit and employer do not reach an agreement on these topics, the relevant sections of the Education Code prevail.<sup>36</sup>

Although the Government Code states that “[a]ll matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating,”<sup>37</sup> a 1983 California Supreme Court opinion shows that is not exactly the case. In *San Mateo City School District v. Public Employment Relations Board*, the Supreme Court upheld a determination by the Public Employment Relations Board (PERB)<sup>38</sup> that subjects not specifically listed in the EERA may still be negotiable.<sup>39</sup> As such, the PERB set forth a three-part test to determine which topics are negotiable although not enumerated in the EERA:

- (1) it is logically and reasonable related to hours, wages or an enumerated term and condition of employment,
- (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict, and
- (3) the employer’s obligation to negotiate would not significantly

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<sup>32</sup> *Id.* § 3543.3.

<sup>33</sup> CAL. EDUC. CODE § 17604 (West 2011).

<sup>34</sup> GOV. § 3543.2(a).

<sup>35</sup> *Id.* “Consult” means that the employer and employee may discuss the topics but are not required to bargain over them unless both parties agree. Kemerer, Frank and Peter Sansom. *California School Law*. 2d ed. Stanford, California: Stanford University Press, 2009. Print.

<sup>36</sup> GOV. § 3543.2(b)-(e); EDUC. §§ 44944, 44955, 45028.

<sup>37</sup> GOV. § 3543.2(a).

<sup>38</sup> The PERB is a part of state government that is “independent of any state agency” and consists of five members appointed by the governor. *Id.* §3541(a). The PERB’s powers include, but are not limited to, the power to: determine or approve bargaining units, determine whether a particular item is within the scope of representation, conduct studies relating to employer-employee relations and to report to the legislature, to adopt rules and regulations, hold hearings, and to conduct investigations alleged violations of the EERA. *Id.* § 3541.3.

<sup>39</sup> 663 P.2d 523, 534 (Cal. 1983).

abridge his freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the District’s mission.<sup>40</sup>

The California Supreme Court approved PERB’s use of this test, declaring that “we cannot agree . . . that EERA embodies a scope of negotiations that is strictly limited to the subjects specifically named in the statute,”<sup>41</sup> and that the legislature purposely left the task of determining the negotiability of specific topics to the PERB’s expertise.<sup>42</sup> As such, bargaining between school districts and their employees may include substantially more topics than are listed by statute.

#### **D. Low Performing Schools**

In 1999, the California Legislature enacted the Public Schools Accountability Act (PSAA), declaring that “many pupils in California are not now, generally, progressing at a satisfactory rate to achieve a high quality education.”<sup>43</sup> As such, the legislature set out to create a “statewide accountability system” that includes rewards to recognize high achieving schools, as well as interventions and sanctions for continuously low performing schools.<sup>44</sup> The PSAA consists of three components: the Academic Performance Index (API), the Immediate Intervention/Underperforming Schools Program, and the Governor’s High Achieving/Improving Schools Program.<sup>45</sup>

The PSAA sets forth lengthy and detailed provisions to govern its three components. In sum, the Superintendent of Public Instruction (SPI) and the State Board of Education (SBE) developed an API to “measure the performance of schools, especially the academic performance of pupils.”<sup>46</sup> A school’s API score is used to rank the schools to determine participation in the Immediate Intervention/Underperforming Schools Program (“Underperforming Schools Program”) and the High Achieving/Improving Schools Program. The SPI, with approval of the SBE, invites the schools that scored below the 50<sup>th</sup> percentile on the achievement tests to participate in the Underperforming Schools Program. The district boards of education having jurisdiction over the schools that participate in the program must select either an “external evaluator” from a list compiled by the SPI and SBE, or an entity with “proven, successful expertise specific to the challenges inherent in high-priority schools.” The entity or evaluator must develop an action plan to improve the academic performance of students at the school, providing percentage growth targets.<sup>47</sup> Eventually, if the school is not meeting its growth targets over time, the school is subject to state takeover. The SPI, in consultation with the SBE, must reassign the principal of the school and must also take at least one of the following actions: revise attendance options for students; allow parents to apply to the SBE for establishment of a charter school; assign management of the school to an “appropriate educational institution;”

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<sup>40</sup> *Id.* at 528.

<sup>41</sup> *Id.* at 531.

<sup>42</sup> *Id.* at 528.

<sup>43</sup> CAL. EDUC. CODE § 52050.5(c) (West 2011).

<sup>44</sup> *Id.* § 52050.5(i).

<sup>45</sup> *Id.* § 52051.

<sup>46</sup> *Id.* § 52052(a)(1).

<sup>47</sup> *Id.* § 52054(c).

reassign certificated employees; renegotiate a new collective bargaining agreement; reorganize the school; close the school; or place a trustee at the school for up to three years.<sup>48</sup>

### **III. Weak Category**

#### **A. Oakland, California**

The Oakland Unified School District (OUSD) is located in California and is therefore generally subject to all state laws regarding the public school system as described above. However, the City of Oakland is a charter city and, as such, is constitutionally entitled to determine whether the members of the OUSD board of education will be elected or appointed.<sup>49</sup> Although the OUSD is perhaps notorious for receiving the largest state emergency loan in history,<sup>50</sup> it has also recently been recognized as the most improved urban school district in California.<sup>51</sup>

##### **i. Mayoral Influence**

Local voters in Oakland approved the idea of mayoral influence over the OUSD in 2000 via ballot initiative. The initiative, known as Measure D, proposed to amend the Charter of the City of Oakland to provide for a temporary and weak form of mayoral control. These changes were in place during the tenure of former mayor Jerry Brown, who is now the Governor of California.

##### **a. Governance**

###### **1. Amending the City Charter: Measure D**

Before 2000, the governing board of the Oakland Unified School District was comprised of seven elected members, known as “District School Directors.”<sup>52</sup> However, former mayor Jerry Brown set out to change the school district governance structure when he was elected in 1998. Brown inherited a school system that, according to an independent study, “embodie[d] the failure of public education” in that previous reform efforts in the OUSD had only “produced ineptitude, mediocrity, and failure on a massive scale.”<sup>53</sup> In June 1999, with the aim of reforming the education system, Mayor Brown appointed a sixteen member Commission on Education, consisting of civil leaders, activists, parents and educators to address the issue of public school governance reform.<sup>54</sup> Mayor Brown requested that the Commission review the current state of OUSD and make recommendations as how to improve OUSD student performance.

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<sup>48</sup> *Id.* § 52055.5(b).

<sup>49</sup> CAL. CONST. art. IX, § 16(a).

<sup>50</sup> “State Senate OKs Oakland Schools Loan.” *SFGate.com*. San Francisco Chronicle, 25 Apr. 2003. Web. 14 Dec. 2011.

<sup>51</sup> “Oakland Unified School District.” Oakland Unified School District. Web. 21 Nov. 2011.

<sup>52</sup> OAKLAND, CAL., CHARTER § 404(a) (2011), *available at* [http://library.municode.com/Html/16308/level2/THCHOA\\_ARTIVCIOF.html](http://library.municode.com/Html/16308/level2/THCHOA_ARTIVCIOF.html).

<sup>53</sup> Wong, Kenneth and Francis Shen, “Big City Mayors and School Governance Reform: The Case of School District Takeover.” *Peabody Journal of Education*, 78.1 (2003): 5-32. Print.

<sup>54</sup> “Measure E: Endorsement of Mayor’s Education Commission Recommendation.” *SmartVoter.org*. Smart Voter, 7 Mar. 2000. Web. 14 Dec. 2011.

After conducting research on the status of OUSD, the Committee concluded that significant changes in governance needed to occur to effectively improve Oakland public school students' performance. Among other recommendations, the Commission encouraged the mayor to appoint the entire school board. Moreover, the Commission judged that the mayor had a better chance of bringing about new coherent policies with absolute control over school board appointment. However, concerns about undermining the democratic process by appointing all board members and lack of political support for full mayoral control<sup>55</sup> swayed Brown to propose a hybrid theory with both appointed and elected members.<sup>56</sup>

As a result, a ballot initiative known as Measure D was introduced to amend the current provisions in the Charter of the City of Oakland.<sup>57</sup> Measure D proposed to temporarily amend Section 404 of the charter by adding three additional district school directors to the seven-member board that had been in existence. The three additional members would be appointed by the mayor. The terms of Measure D provided that these changes would only remain in effect from May 2000 to May 2004, when the school board would return to its former status of seven elected members. The mayor's appointees would serve two-year terms each. The qualifications of the appointees were to be "determined by the Mayor and may include, but shall not be limited to: (i) a Director who is an educator; (ii) a Director who is skilled in financial matters; and (iii) a Director who is a student or a recent graduate of the Oakland Unified School District."<sup>58</sup> In support of the new governance structure, the ballot initiative stated that "the performance of the Oakland Public Schools has fallen dramatically below the level of excellence that the young people of our community deserve" and "without structural change, significant improvement in schools is unlikely . . ."<sup>59</sup> The official text of the initiative claimed that allowing the mayor to appoint three additional school board members for the four-year period "would increase the likelihood that the Oakland schools would measure . . . to their true potential . . ."<sup>60</sup>

On March 7, 2000, Oakland voters narrowly approved Measure D with 52.1% of votes cast in favor of the charter amendment.<sup>61</sup> In addition to appointing three new members to the school board, Brown endorsed four candidates for the remaining elected positions. Out of the candidates for school board that Brown endorsed, two won. Thus, five out of the ten members on the new board of education had either been appointed or endorsed by Brown. This gave him slightly more influence over the OUSD; however, the board was split evenly, five to five, of Brown endorsements/appointees versus the remaining elected members.<sup>62</sup>

## 2. Aftermath of Measure D

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<sup>55</sup> Mezzacappa, Dale, Annie E. Casey Foundation. "School Governance Changes in Selected Cities." 2001. PDF file.

<sup>56</sup> Gewertz, Catherine. "Oakland Voters Give Brown Broader Say Over Schools." *Edweek.org*. Education Week, 15 Mar. 2000. Web. 14 Dec. 2011.

<sup>57</sup> "Measure D: Addition of 3 Appointed Members to Oakland Board of Education." *SmartVoter.org*, Smart Voter, 7 Mar. 2000. Web. 22 Nov. 2011.

<sup>58</sup> *Id.*; see also OAKLAND, CAL., CHARTER § 404 (2011), available at [http://library.municode.com/Html/16308/level2/THCHOA\\_ARTIVCIOF.html](http://library.municode.com/Html/16308/level2/THCHOA_ARTIVCIOF.html).

<sup>59</sup> "Measure D," 2000.

<sup>60</sup> "Measure D," 2000.

<sup>61</sup> "Measure D," 2000.

<sup>62</sup> Fast, Austin. "Did Jerry Brown Damage the Oakland School District?" *CaliforniaWatch.org*. California Watch, 30 June 2010. Web. 14 Dec. 2011.

In *Hazzard v. Brown*, an individual plaintiff immediately challenged the charter amendment, seeking a declaratory judgment that Measure D violated both the California Constitution and the Education Code.<sup>63</sup> In a brief and unpublished opinion,<sup>64</sup> the California Court of Appeal determined that the charter amendment allowing the mayor to appoint three members to the board of education did not violate the state constitution, which specifically authorizes charter cities to determine whether the boards of education in their cities will be elected or appointed.<sup>65</sup> Nor was there any conflict between the Education Code and the charter amendment, because the Education Code “expressly recognizes that city charter provisions regarding the limited issues authorized by the state constitution prevail over state statutory provisions.”<sup>66</sup> Thus, the charter amendments made by the voters’ approval of Measure D were upheld in their entirety.

The school board partially-appointed by Mayor Brown technically remained in place until May 1, 2004; however, the state took over the OUSD in May 2003. Due to the OUSD’s severe financial problems, the state agreed to provide an emergency \$100 million loan. As a condition of the loan, the state Superintendent of Public Instruction took over the OUSD.<sup>67</sup> When the state completely released its control over the OUSD in 2009, the school district reverted back to its pre-2000 governance structure of a seven-member elected board of education.<sup>68</sup>

### **b. Finance**

Measure D changed only how many members would be on the governing board of the Oakland Unified School District and how they would be selected.<sup>69</sup> The charter amendment changed nothing in terms of the board’s powers or duties; thus, Measure D did not alter the finance structure or budgeting process for the OUSD. The relevant provisions of the Education Code applied to the OUSD during the period that the mayor appointed three members of the school board. This means that Mayor Brown had indirect, shared control over the budgeting process through his appointment powers, in that the board of education in every school district must vote to approve the budget before submitting it to the county superintendent.<sup>70</sup>

### **c. Collective Bargaining**

The terms of Measure D did not change anything in regards to collective bargaining laws between the OUSD and its employees. Thus, the general provisions of the Education Code and

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<sup>63</sup> 2002 WL 863186, at \*1-2 (Cal. Ct. App. May 7, 2002). The plaintiff originally sought an injunction to prevent the vote on Measure D from occurring. However, due to procedural errors on the plaintiff’s part, the voters approved Measure D before the court could hear the case. After the approval, the plaintiff instead sought the declaratory judgment. *Id.* at \*1.

<sup>64</sup> In California, unpublished court decisions may not be cited as authority in court in subsequent cases. CAL. R. CT. 8.1115(a)-(b).

<sup>65</sup> *Hazzard*, 2002 WL 863186 at \*2 (quoting CAL. CONST. art. IX, § 16(a)).

<sup>66</sup> *Id.* at \*2 (citing CAL. EDUC. CODE § 5222 (West 2011)).

<sup>67</sup> S.B. 39, 2003 Leg., Reg. Sess. (Cal. 2003), available at [http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb\\_0001-0050/sb\\_39\\_bill\\_20030602\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0001-0050/sb_39_bill_20030602_chaptered.pdf).

<sup>68</sup> Oakland Unified School District, *Oakland School Board Names Tony Smith New Superintendent*. Oakland, California: Oakland Unified School District, 22 May 2009. Web. 30 Nov. 2011.

<sup>69</sup> “Measure D,” 2000.

<sup>70</sup> See CAL. EDUC. CODE § 42127; *supra* section II.B.

the EERA applied to the OUSD even during the period that the mayor appointed three members of the school board.<sup>71</sup> As such, Mayor Brown’s influence over collective bargaining was indirect through his appointment powers over the three board members.

#### **d. Low-Performing Schools**

Although Measure D acknowledged the disappointing performance of the Oakland public schools and cited it as a reason for change in governance structure, the terms of Measure D did not change anything in regards to low-performing schools in the OUSD.<sup>72</sup> Thus, the terms of the Public Schools Accountability Act (PSAA), which apply to all school districts throughout California, applied to the OUSD even during the years that the mayor appointed three members of the school board. In sum, the PSAA provides for very little local school district governing board influence over low-achieving schools. Instead, control is given largely to the state.<sup>73</sup> The state took over the OUSD in 2003; although it was for financial reasons rather than academic performance.

#### **ii. Review of Empirical Research**

In order to identify effects, if any, associated with the relatively low level of mayoral influence in Oakland Unified School District (OUSD) in recent years, we reviewed high-quality, methodologically sound research reports; journal articles; books; and book chapters published within the last five years that focused on outcomes for students, teachers, and administrators in OUSD and across urban districts generally. While empirical data on outcomes in OUSD are limited, recent research provides evidence for the following general trends in the district.

##### **a. Governance**

OUSD was placed under state control in 2003 in the wake of a budget crisis. Three different state-appointed leaders managed the district until the return to local control in 2009.<sup>74</sup> Between 2000 and 2011, OUSD lost approximately 30% of its students, reducing from approximately 54,000 students in 2000 to 38,000 in 2011.<sup>75</sup> Thanks in part to the district’s historical focus on opening small schools to compete with local private and charter schools, OUSD is currently operating well below capacity, with fewer students per school, on average, than any other large district in California.<sup>76</sup>

##### **b. Finance**

We identified one study that systematically evaluated the effects of mayoral control on financial resources and spending in school districts across the United States. Using ten years

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<sup>71</sup> See *supra* section II.C.

<sup>72</sup> “Measure D,” 2000.

<sup>73</sup> See *supra* section II.D.

<sup>74</sup> Murphy, Katy. “Oakland School District: Is it Better off After the State Takeover?” *Oakland Tribune*. Oakland Tribune, 26 Mar. 2010. Web. 2 Nov. 2011.

<sup>75</sup> Beckles, Yirmevah. “OUSD School Closures Vote Wed Follows Years of Creating Small Schools, then Having to Pay for Them.” *Oakland North*. Oakland North, 25 Oct. 2011. Web. 1 Nov. 2011; Gammon, Robert. “School Closures Make Sense.” *East Bay Express*. East Bay Express, 28 Sept. 2011. Web. 1 Nov. 2011.

<sup>76</sup> Beckles, 2011; Gammon, 2011; “Restructuring OUSD to Expand Quality and Release Resources.” *thrivingstudents.org*. Oakland Unified School District, n.d. Web. 15 Nov. 2011.



(1993-2003) of financial data for 104 large school districts, researchers found slightly lower levels of relative spending on instruction and instructional support by mayors without the ability to appoint the majority of the school board, as in Oakland, as compared to districts with this form of mayoral control.<sup>77</sup>

In 2004, OUSD moved to a school-based funding (SBF) model, in which funds theoretically follow the student rather than the teacher, in an attempt to increase equity.<sup>78</sup> In a mixed-methods examination of this reform, researchers at the American Institutes for Research found high levels of acceptance for SBF in OUSD but did not find evidence of increases in student attendance or teacher experience levels; changes in staffing ratios or programmatic offerings; changes in the relationship between either student poverty or school size and per pupil expenditure; or changes in the proportion of funding allocated to schools as a result of the change.<sup>79</sup>

OUSD has struggled with severe budget shortfalls since 2003.<sup>80</sup> Despite the return to local control, the district has experienced massive cuts in the past two years and has laid off hundreds of employees.<sup>81</sup> OUSD teachers remain among the lowest paid in the state.<sup>82</sup>

### c. Collective Bargaining

We identified one recent, high quality study that explicitly examined the impact of collective bargaining agreements in the context of the analysis of school-based funding (SBF) reform in OUSD by the American Institutes for Research described earlier. More than half the principals and district administrators interviewed for the study reported that collective bargaining agreements had an impact on the implementation of SBF, working against principals' increased budgetary autonomy by restricting teacher hiring and transfer decisions. Several individuals at OUSD also indicated that collective bargaining agreements may have lessened the potential impact of the use of actual rather than average teacher salaries in school-level budgets. This aspect of the reform was intended to distribute teacher experience more evenly across schools over time by freeing up funds in schools with lower average levels of teacher experience. The additional funds not allocated for salaries could then be used for professional development and supports to help the new teachers increase their capacity and to make the site a more desirable

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<sup>77</sup> Wong, Kenneth, Francis Shen, Dorothea Anagnostopoulos, and Stacey Rutledge. *The Education Mayor: Improving America's Schools*. Washington, D.C.: Georgetown University Press, 2007. Print.

<sup>78</sup> Chambers, Jay, Larisa Shambaugh, Jesse Levin, Mari Muraki, and Lindsay Poland. "A Tale of Two Districts: A Comparative Study of Student-Based Funding and School-Based Decision Making in San Francisco and Oakland Unified School Districts." *American Institutes for Research*. Web; Honig, Meredith, and Michael Copland. "Reinventing District Central Offices to Expand Student Learning." *Center for Comprehensive School Reform and Improvement*. Web.

<sup>79</sup> Chambers et al., 2008.

<sup>80</sup> Craig, Elise. "California's Education Budget Crisis: The Story So Far." *Oakland North*. Oakland North, 3 Mar. 2010. Web. 1 Nov. 2011; Mongeau, Lillian. "OUSD Budget Balanced Now, but Funding Outlook Bleak". *Oakland North*. Oakland North, 16 Dec. 2010. Web. 1 Nov. 2011; Murphy, Dean. "Dream Ends for Oakland School Chief as State Takes Over". *New York Times*. New York Times, 8 June 2003. Web. 2 Nov. 2011; OUSD, 2011.

<sup>81</sup> Beckles, 2011; Gannon, 2011.

<sup>82</sup> Gannon, 2011.

place to work, attracting more experienced teachers. As of 2008, this redistribution had not occurred.<sup>83</sup>

#### **d. Performance**

We identified one study that systematically evaluated the effects of mayoral control on student test scores in reading and mathematics across the United States. Using five years of data (1999-2003), researchers found that the mayor's lack of ability to appoint a majority of the school board, as was the case in Oakland before, during, and after the state takeover in 2003, was associated with lower relative average student performance on state tests as compared with districts where the mayor had majority appointment power.<sup>84</sup>

Despite this finding, the percentage of students in OUSD achieving proficiency on the California Standards Test has increased steadily since 2002.<sup>85</sup> The pattern of increases in state test scores in English language arts over this time period is nearly identical to increases in six other urban school districts in California (San Diego, Los Angeles, Long Beach, Fresno, San Francisco, and Sacramento), however, suggesting that the increases may be unrelated to policies and practices specific to OUSD.<sup>86</sup> While OUSD had the highest improvement in API score of any large urban district in California between 2004 and 2009, OUSD remains among the lowest performing districts in the state.<sup>87</sup>

### **B. Philadelphia, Pennsylvania**

The School District of Philadelphia (SDP) is the eighth-largest district in the nation, with a student enrollment of approximately 146,000.<sup>88</sup> The SDP is known for its city-state partnership, in which the governor of Pennsylvania and the mayor of Philadelphia share appointment authority over the SDP governing board, and its "diverse provider model" in which the school district contracts with outside entities and individuals to run some of its schools. These systems came about as the result of new state laws and an agreement between the mayor and the governor.

#### **i. Mayoral Influence**

Pursuant to the Philadelphia Home Rule Charter, the mayor of Philadelphia had previously appointed all nine members of the governing board of the School District of Philadelphia.<sup>89</sup> The laws reforming the school governance system, first enacted in 1998, were designed to decrease the mayor's power over the SDP in exchange for greater state influence.

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<sup>83</sup> Chambers et al., 2008.

<sup>84</sup> Wong, et al., 2007.

<sup>85</sup> Chambers et al., 2008.

<sup>86</sup> Chambers et al., 2008

<sup>87</sup> Oakland Unified School District. "Oakland Unified School District Impact Assessment: OUSD Results." 2011. Web. 3 Nov. 2011; Chambers et al., 2008; OUSD, 2011.

<sup>88</sup> "About Us." *School District of Philadelphia*. The School District of Philadelphia, n.d. Web. 22 Nov. 2011; "Enrollment." *School District of Philadelphia*. The School District of Philadelphia, n.d. Web. 22 Nov. 2011.

<sup>89</sup> PHILA., PA., HOME RULE CHARTER § 12-201 (2011), available at [http://www.amlegal.com/nxt/gateway.dll/Pennsylvania/philadelphia\\_pa/thephiladelphiacode?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:philadelphia\\_pa](http://www.amlegal.com/nxt/gateway.dll/Pennsylvania/philadelphia_pa/thephiladelphiacode?f=templates$fn=default.htm$3.0$vid=amlegal:philadelphia_pa) [hereinafter PHILA. CHARTER].

Although the legislation allowing the state to take over the SDP was passed in 1998, the state did not exercise this power until late 2001.

## a. Governance

### 1. Legislative Changes Allowing for State Takeover

Like many other urban school districts, school reform in the School District of Philadelphia was motivated by its dire financial straits and subpar student performance. In February 1998, former SDP superintendent David Hornbeck threatened to adopt an unbalanced budget for the district, which could have caused the schools to shut down before the school year ended, if the state did not provide the SDP with the funds it required.<sup>90</sup> The Pennsylvania Legislature and Governor did not take kindly to Hornbeck's threat, responding immediately with the passage of Act 46 in April 1998.<sup>91</sup>

Act 46 set forth situations in which the state may take over a school district. Although Act 46 was phrased generally, it was enacted with the SDP specifically as a target. The state takeover provisions of the act apply only to school districts of the "first class," meaning school districts with a population of one million or more—only the School District of Philadelphia.<sup>92</sup> Act 46 allowed the state Secretary of Education to declare any school district to be in a state of "financial distress" if certain conditions occurred in the district, such as: teacher and employee salaries remaining unpaid for ninety days, default in payment of bonds, or accumulation of and operation with a deficit of two percent or more of the assessed valuation of the taxable real estate in the district for two successive years.<sup>93</sup> However, Act 46 allowed the state to take control of financially distressed school districts of the first class only. As originally enacted, Act 46 provided that within fifteen days of the declaration of distress, the Secretary of Education was required to appoint a Chief Executive Officer (CEO) of the district "to oversee and manage the school district."<sup>94</sup> The CEO would assume all powers and duties of the former district superintendent and governing board. In addition, a School Reform Commission (SRC) would "advise and assist the [CEO] regarding the operation, management and educational program of the school district."<sup>95</sup> The SRC was to be comprised of five members: the Secretary of Education (or his designee), three appointed by the governor, and one appointed by the mayor.<sup>96</sup> In addition to taking over the powers of the former superintendent, the CEO was given an expansive list of specific powers, notably including the ability to: approve the establishment of or conversion into charter schools, enter into contracts with for-profit and nonprofit entities to operate schools or provide educational services to the school district, to close or reconstitute a

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<sup>90</sup> Christman, Jolley Bruce and Amy Rhodes. "Civic Engagement and Urban School Improvement: Hard-to-Learn Lessons from Philadelphia." *Consortium for Policy Research in Education* (2002): 1-70. Web.

<sup>91</sup> Act of Apr. 27, 1998, no. 46, 1998 Pa. Laws 270.

<sup>92</sup> *Id.* at 272-76 (codified as amended at 24 PA. CONS. STAT. ANN. §6-696 (West 2011)); *see also* 24 PA. CONS. STAT. ANN. § 2-202. Note that in Pennsylvania, each city, incorporated town, township, and borough is automatically a separate school district; thus, the population in the school district in effect means the population in the corresponding city as a whole, e.g., the City of Philadelphia. *See* 24 PA. CONS. STAT. ANN. § 2-201.

<sup>93</sup> *Id.* § 6-691(a).

<sup>94</sup> § 3, 1998 Pa. Laws at 272 (codified as amended at 24 PA. CONS. STAT. ANN. § 6-696).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

school, and to negotiate new collective bargaining agreements.<sup>97</sup> Thus, Act 46 severely limited, but did not completely eliminate, the mayor's influence over a distressed school district of the first class.

As of 2000, the Secretary of Education still had not declared the SDP to be financially distressed; as such, the district remained under the control of the mayor-appointed school board. However, the Pennsylvania Legislature enacted an additional set of legislation, the Education Empowerment Act (EEA), which provided the state with yet another source of authority to take over a school district.<sup>98</sup> The EEA required the Pennsylvania Department of Education to place "a school district that has a history of low test performance on an education empowerment list." A school district on such list was required to develop a district improvement plan, with the assistance of an "academic advisory team" assembled by the Department of Education, and a "school district empowerment team," consisting of officials, employees, parents, and local citizens in the school district.<sup>99</sup> In sum, if a school district did not meet the goals of its improvement plan and maintained its history of low test performance for three years, a "board of control" would take over. The board of control would consist of the Secretary of Education and two of his appointees.<sup>100</sup> The board of control would be given all the powers and duties of the former school district governing board, much like the CEO under Act 46.<sup>101</sup> The SDP, along with ten other districts, was immediately placed on the education empowerment list, thereby providing the state with another potential avenue to take control.<sup>102</sup>

## 2. State Takeover and Current Governance System

Therefore, in 2001, the state had two sources of statutory authority to potentially take over the SDP. As such, former Governor of Pennsylvania Mark Schweiker and former Mayor of Philadelphia John Street began negotiating for a "friendly takeover" of the SDP.<sup>103</sup> As part of the deal, the state and city each agreed to provide additional funds to the SDP, with the state contributing \$75 million and the city giving \$45 million.<sup>104</sup> Mayor Street also agreed to suspend a pending federal lawsuit that he, the SDP, SDP superintendent, SDP board of education, and the City of Philadelphia had joined with several other plaintiffs in March 1998 against the state challenging the state's public school funding system as racially discriminatory.<sup>105</sup> In exchange, the mayor sought greater influence over the SDP than what he would have pursuant to Act 46. Therefore, In October 2001, the legislature made further changes to Act 46. The changes specified that two of the governor's initial appointments to the School Reform Commission

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<sup>97</sup> *Id.* at 274.

<sup>98</sup> Education Empowerment Act, no. 16, § 8.1, 2000 Pa. Laws 50 (2000).

<sup>99</sup> *Id.* at 51-52.

<sup>100</sup> *Id.* at 55.

<sup>101</sup> *Id.* at 56.

<sup>102</sup> Travers, Eva. "Philadelphia School Reform: Historical Roots and Reflections on the 2002-2003 School Year Under State Takeover." Penn GSE Perspectives on Urban Education 2.2 (2003): n. pag. Web. 14 Dec. 2011.

<sup>103</sup> Cucchiara, Maia. "The Evolution of Reform: Studying "Community Partnerships" in Philadelphia." Penn GSE Perspectives on Urban Education 2.2 (2003): n. pag. Web. 14 Dec. 2011.

<sup>104</sup> Clowes, George, "State Takes Over Philadelphia's Failing Schools." *Heartlander.org*, Heartlander 1 Feb. 2002. Web. 14 Dec. 2011.

<sup>105</sup> *Powell v. Ridge*, 247 F.3d 520, 521 (3d Cir. 2001). After years of litigation and procedural challenges, the case was ultimately dismissed in October 2005 without any decision regarding the merits of the plaintiffs' claims. "School District of Philadelphia Funding Litigation (1996-2005)." *Manninlaw.com*. The Mannino Law Firm, n.d. Web. 21 Nov. 2011.

would serve seven-year terms, one a five-year term, and one a three-year term.<sup>106</sup> The mayor would initially appoint one member to a three-year term. After the initial terms expired, all appointments would be for four years.<sup>107</sup> The legislature eliminated the requirement that the Secretary of Education appoint a CEO to oversee the district, instead providing that the SRC could “suspend or dismiss the superintendent or any person acting in an equivalent capacity.”<sup>108</sup> The SRC would take over all powers and duties of the former governing board and of the CEO that had previously been included in Act 46.<sup>109</sup>

In December 2001, the Secretary of Education declared the SDP to be a financially distressed school district, triggering the state takeover provisions of Act 46.<sup>110</sup> Thus, since the start of 2002, the SDP has been under the control of the SRC. The legislature made changes to Act 46 yet again in 2002, giving the mayor slightly more influence.<sup>111</sup> Under current law, the mayor of Philadelphia appoints two members to the SRC and the governor appoints three.<sup>112</sup> SRC members may not serve successive terms and may be removed during their terms by the governor, but only upon clear and convincing proof of malfeasance.<sup>113</sup> Generally, the SRC is “responsible for the operation, management and educational program” of the SDP and possesses all powers and duties of the former governing board.<sup>114</sup> Enumerated powers of the SDP include, but are not limited to, the authority to: enter into agreements with for-profit or nonprofit organizations to operate schools, reconstitute or close a school, suspend professional employees, supervise and direct principals and teachers, and delegate to any person any powers that it deems necessary to carry out the purposes of the law.<sup>115</sup>

Act 46 originally provided for the selection of a powerful CEO to run a distressed school district. However, all provisions of Act 46 relating to the CEO position were deleted before the Secretary of Education declared the SDP to be distressed. Other than the provision that the SRC may choose to suspend or dismiss a superintendent or similar official, the current law pertaining to distressed school districts contains no specific terms about hiring a CEO or superintendent or the powers and duties of such an official.<sup>116</sup> However, state law applying generally to all school districts provides that the governing board of a school district may select a superintendent by majority vote.<sup>117</sup> The Philadelphia Home Rule Charter provides that the superintendent is “the chief administrative officer and chief instructional officer” of the school district. The superintendent’s general duties are to execute all actions of the board, administer and operate the public school system subject to the board’s policies, and to supervise all matters pertaining to

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<sup>106</sup> Act of Oct. 30, 2001, no. 83, § 1, 2001 Pa. Laws 828, 828-29.

<sup>107</sup> *Id.* at 829.

<sup>108</sup> *Id.* at 828, 830.

<sup>109</sup> *Id.* at 830-34; *see also supra* notes 94-97 and accompanying text.

<sup>110</sup> Clowes, 2002.

<sup>111</sup> Act of June 29, 2002, no. 88, § 7, 2002 Pa. Laws 524, 526-28.

<sup>112</sup> 24 PA. CONS. STAT. ANN. § 6-696(a), (b)(1)(iii). These laws apply to the SDP despite the contradicting provisions in the Philadelphia Home Rule Charter that the mayor appoints the school board, because the SDP remains “subject to all laws relating to school matters which are of statewide application . . . .” PHILA. CHARTER, *supra* note 89, at § 12-500.

<sup>113</sup> 24 PA. CONS. STAT. ANN. § 6-696(a)(b)(2).

<sup>114</sup> *Id.* § 6-696(e)(1).

<sup>115</sup> *Id.* § 6-696(i)(1)-(14).

<sup>116</sup> *See supra* notes 108-109 and accompanying text.

<sup>117</sup> 24 PA. CONS. STAT. ANN. § 10-1071(a).

instruction under the direction of the board.<sup>118</sup> Currently, the SDP employs Leroy D. Nunery as its “Acting CEO & Superintendent.”<sup>119</sup>

The School District of Philadelphia will remain under the control of the SRC until the Secretary of Education issues a declaration to dissolve the SRC. This declaration may only be made after a recommendation by a majority of the SRC. The declaration must be issued at least 180 days before the end of the school year to be effective at the end of that school year. After the SRC is dissolved, the former governing board, known as the board of directors, will resume its powers and duties.<sup>120</sup> It should be noted that the Education Empowerment Act expired by its own terms on June 30, 2010; therefore, school districts in Pennsylvania are no longer subject to state takeover under its provisions.<sup>121</sup>

## **b. Finance**

In Pennsylvania generally, the constitution provides that the legislature must “provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth.”<sup>122</sup> The legislature has set up a system of public school finance comprised of mandatory state and local contributions. First, the state appropriates a set amount to each local school district, determined by a complicated statutory formula.<sup>123</sup> The city or county in which the school district is located must fund the remainder of what is necessary to operate the district.<sup>124</sup> As such, the governing boards of school districts throughout the state are given the power to levy taxes.<sup>125</sup>

As applied to the SDP specifically, Act 46 contains detailed provisions relating to the finance and budget of a distressed school district of the first class, which is not surprising given that the act was designed specifically for financially-troubled school districts. Act 46 directs the School Reform Commission to be responsible for “financial matters related to the distressed school district of the first class . . . .”<sup>126</sup> The SRC assumed all powers and duties of the former governing board, which means that the SRC adopts the annual budget and has the authority to levy taxes.<sup>127</sup> Furthermore, Act 46 provides a specific level of taxes that must be levied for the SDP. For every year that the SDP is declared to be distressed, the amount paid by the city to the SDP and the tax authorized to be levied must remain at their highest levels out of the prior three fiscal years.<sup>128</sup> The City of Philadelphia must also provide to the SDP “all other available local non-tax revenue, including grants, subsidies or payments made during the prior year.” If the city

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<sup>118</sup> PHILA. CHARTER, *supra* note 89, at § 12-400.

<sup>119</sup> “Our Leadership.” *School District of Philadelphia*. The School District of Philadelphia, n.d. Web. 17 Nov. 2011.

<sup>120</sup> 24 PA. CONS. STAT. ANN. § 6-696(n).

<sup>121</sup> *See id.* §§ 17-1701-B-1716-B (expired 2010); “Empowerment Act Expires.” *PSEA.org*. The Pennsylvania State Education Association, Sept. 2010. Web. 14 Dec. 2011; *supra notes* 98-102 and accompanying text.

<sup>122</sup> PA. CONST. art. III, § 14.

<sup>123</sup> *See* 24 PA. CONS. STAT. ANN. § 25-2502.50 (applying to the 2010-2011 school year only).

<sup>124</sup> *See, e.g., id.* §§ 5-507, 6-652.

<sup>125</sup> *Id.* §§ 5-507, 6-652.1 (applying specifically to school districts of the first class).

<sup>126</sup> *Id.* § 6-696(h).

<sup>127</sup> *Id.* §§ 6-696(e)(1), 6-696(h)(5).

<sup>128</sup> *See id.* § 6-696(h).

is unable to meet the financial obligations, the state may assist by providing any amounts that would otherwise be due from the state to the city.<sup>129</sup>

The Philadelphia Home Rule Charter authorizes the mayor to have a role in the budget and finance of some local agencies; however, as long as the SDP remains a distressed school district, these provisions do not apply. Pursuant to section 8-102 of the charter, the mayor is permitted to request any agency receiving a city appropriation to submit an estimate of the money it requires to function over a specified time period, for the mayor's approval or disapproval. If the mayor does not approve the estimate, he or she may order that it be revised and resubmitted.<sup>130</sup> However, as discussed above, Act 46 does not permit the amounts paid by the city to the SDP or the authorized tax levy to be reduced as long as the district is distressed.<sup>131</sup> The terms of Act 46 prevail over the charter.

### **c. Collective Bargaining**

Public employee collective bargaining in the SDP is governed by the statewide Public Employee Relations Act (PERA) and provisions of Act 46 pertaining to distressed school districts of the first class only. The PERA, passed in 1970, gives public employees the rights to organize, form, join, or assist in employee organizations and to engage in lawful activities for the purpose of collective bargaining.<sup>132</sup> Public employers, including school districts, are required to negotiate and bargain with employee organizations and to enter into written agreements evidencing the result of such bargaining.<sup>133</sup> The PERA defines collective bargaining as “the mutual obligation of the public employer and representative of the public employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment . . . .”<sup>134</sup>

Mandatory topics of bargaining under the PERA are wages, hours, and terms and conditions of employment. Restricted topics of bargaining are topics such as, but are not limited to: matters of inherent managerial policy, overall budget, organizational structure, and selection and direction of personnel.<sup>135</sup> Act 46 provides greater specificity regarding the topics of bargaining as applied to the SDP. The SDP is not required to negotiate regarding the following: contracts with third parties for the provision of goods or services, decisions related to reductions in force, staffing patterns and assignments, the use of pilot or experimental programs, the approval or designation of a school as a charter or magnet school, and the use of technology to provide instructional or other services.<sup>136</sup> The SRC has complete control over collective bargaining, possessing the authority to supervise and direct principals, teachers, and administrators; to negotiate any memoranda of understanding under an existing collective bargaining agreement; and to negotiate a new collective bargaining agreement.<sup>137</sup>

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<sup>129</sup> *See id.*

<sup>130</sup> PHILA. CHARTER, *supra* note 89, at § 8-102.

<sup>131</sup> *Supra* notes 128-129 and accompanying text.

<sup>132</sup> 43 PA. CONS. STAT. ANN. § 1101.401.

<sup>133</sup> *Id.* §§ 1101.101, 1101.301(1).

<sup>134</sup> *Id.* § 1101.701.

<sup>135</sup> *Id.* § 1101.702.

<sup>136</sup> *Id.* § 6-696(k)(2).

<sup>137</sup> *Id.* § 6-696(i)(10)-(12). Note that the SRC may delegate any “powers it deems necessary” to another person. *Id.* § 6-696(i)(13).

Any new collective bargaining contract entered into during the period that the SDP is in a state of financial distress is required to provide for a school day for professional employees that is at least equal to the state average and a number of instructional days that is at least equal to the state average. Furthermore, the SRC may not increase the compensation of any employee solely to fulfill the school day and instructional day requirements.<sup>138</sup> All school employees are prohibited from striking during the period that the district is in financial distress. The Secretary of Education may suspend the certificate of anyone who violates the striking prohibition.<sup>139</sup>

#### **d. Low-Performing Schools**

The 2001 amendments to Act 46, as related to academic performance in the SDP, generally directed the SRC to be responsible for the district's "educational program" and authorized the SRC to "develop achievement plans and implement testing or other evaluation procedures for educational purposes."<sup>140</sup> The SRC was also required to establish an "independent educational assessment and reporting center" to monitor the performance of the publicly-funded schools in the district.<sup>141</sup> As such, the SRC formed the Accountability Review Council, an independent entity comprised of seven individuals to monitor the district's reform efforts. The council's reports are available online.<sup>142</sup>

More specifically, the SRC is permitted to contract with outside individuals or entities to operate, manage, and provide educational services to schools within the district.<sup>143</sup> Beginning in late 2002, the SRC applied this statutory authorization to the lowest-achieving schools in the district, based on state test scores.<sup>144</sup> The SRC contracted with for-profit educational management organizations, local non-profit organizations, and universities to control selected schools. This became known as the "diverse provider" model.<sup>145</sup> Currently, contracts entered into by the SRC with outside entities to operate schools must include "appropriate fiscal and academic accountability measures." The academic accountability measures must include goals for improving academic performance, methods setting forth how the goals are to be achieved, and specific methodology for evaluating results.<sup>146</sup>

Additional legislation, the Education Empowerment Act, formerly included provisions for low-performing schools as well. As discussed above, the EEA applied to all school districts in Pennsylvania and in sum, allowed for eventual state takeover of a district that persistently earned low scores on the state test. The EEA was set to expire by its own terms in June 2010.<sup>147</sup>

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<sup>138</sup> *Id.* § 6-696(k)(3).

<sup>139</sup> *Id.* § 6-696(l).

<sup>140</sup> Act of Oct. 30, 2001, no. 83, § 1, 2001 Pa. Laws 828, 830, 832 (codified at 24 PA. CONS. STAT. ANN. §§ 6-696(e)(1), 6-696(i)(9)).

<sup>141</sup> 24 PA. CONS. STAT. ANN. § 6-697(a).

<sup>142</sup> "Accountability Review Council." *School District of Philadelphia*. The School District of Philadelphia, n.d. Web. 21 Nov. 2011.

<sup>143</sup> 24 PA. CONST. STAT. ANN. §§ 6-696(e)(2), 6-696(i)(2), (5), (8).

<sup>144</sup> Bulkley, Katrina, Leah Mundell, and Morgan Riffer, "Contracting Out Schools: The First Year of the Philadelphia Diverse Provider Model." *Research for Action* (2004):1-12. Web.

<sup>145</sup> Bulkley, Mundell, and Riffer, 2004.

<sup>146</sup> 24 PA. CONS. STAT. ANN. § 6-696(e)(2).

<sup>147</sup> Education Empowerment Act, no. 18, § 8.1, 2000 Pa. Laws 50 (2000); *supra* notes 98-102.



The Pennsylvania Legislature attempted to revise and re-enact the EEA, but the proposed legislation did not pass.<sup>148</sup>

## ii. Review of Empirical Research

In order to identify effects, if any, associated with the city-state partnership form of mayoral influence in the School District of Philadelphia (SDP) in recent years, we reviewed high-quality, methodologically sound research reports; journal articles; books; and book chapters published within the last five years that focused on outcomes for students, teachers, and administrators in SDP and across urban districts generally. While it is not methodologically possible to directly link the partnership that replaced mayoral control in Philadelphia in 2002 with changes in educational outcomes, recent research provides evidence for the following general trends in SDP.

### a. Governance

With the advent of the city-state partnership in 2002, the new SDP CEO Paul Vallas, with input from the state, instituted a number of substantial changes. These included a diverse provider system in which the school district turned over management of 45 of the lowest-performing elementary and middle schools, with additional funding and/or support, to seven different private and non-profit organizations. These included three for profit entities (Edison Schools, Inc., Victory Schools, Inc., and Chancellor Beacon Academies, Inc.); two non-profit organizations (Foundations, Inc. and Universal Companies, Inc.); and two universities (Temple University and the University of Pennsylvania).<sup>149</sup> At the same time, the district enacted additional requirements and standards across all schools in the district, in many cases including those schools managed by the diverse providers. These requirements and standards included a common core curriculum; a more structured school day; a longer school day and mandatory summer school for low-performing students; increased use of data on student performance; and a zero-tolerance discipline policy.<sup>150</sup> Changes also included a wider, more demanding set of course and program offerings at the high school level; the elimination of middle schools in favor of K-8 schools; and an increase in the number of small high schools and charter schools.<sup>151</sup> Additionally, the district placed an emphasis on identifying underperforming teachers and improving teacher quality.<sup>152</sup> Many of these reforms—including district-wide standards, accountability and use of data, supports for struggling students, and an emphasis on teacher professional development—were also emphasized by Arlene Ackerman, the superintendent and

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<sup>148</sup> See S.B. 1192, 2010 Gen. Assemb., Reg. Sess. (Pa. 2010); *supra* note 121.

<sup>149</sup> Bulkley, Katrina. "Bringing the Private into the Public: Changing the Rules of the Game and New Regime Politics in Philadelphia Public Education." *Educational Policy* 21.1 (2007): 155-184. Print.; Bulkley, Katrina, Jolley Christman, Margaret Goertz, and Nancy Lawrence. "Building with Benchmarks: The Role of the District in Philadelphia's Benchmark Assessment System." *Peabody Journal of Education* 85.2 (2010): 186-204. Print; Gill, Brian, Ron Zimmer, Jolley Christman, and Suzanne Blanc. "State Takeover, School Restructuring, Private Management, and Student Achievement in Philadelphia." *RAND Education* (2007): 1-43. Web; Useem, Elizabeth. "Big City Superintendent as Powerful CEO: Paul Vallas in Philadelphia." *Peabody Journal of Education* 84 (2009): 300-317. Print.; Wong, et al., 2007.

<sup>150</sup> Bulkley, 2007; Bulkley et al., 2010; Gill et al., 2007; Wong et al., 2007; Useem, 2009.

<sup>151</sup> Bulkley, 2007; Useem, 2009.

<sup>152</sup> Gill et al., 2007; Maxwell, Lesli. "Leader in Philadelphia Seeks Changes in Teacher Rules." *Education Week* 29.2 (2009): 1-13. Print; Useem, 2009.

CEO who replaced Vallas in 2008 and served until the beginning of the 2011-2012 school year.<sup>153</sup>

There is evidence that the level of district and school leadership and the level of resources available affected the degree to which policies enacted under reduced mayoral control in Philadelphia were associated with changes in school structure and classroom activities. Between 2003 and 2007, the district opened 25 small high schools, primarily by converting existing schools into smaller units. These schools were developed without a district-wide plan and without any external funding.<sup>154</sup> Based on a case study of these 25 schools in the early stages of implementation, conversion was incomplete and uneven. Researchers found different perceptions of aspects of the reform and different levels of instructional leadership at different sites, differences that mediated the effect of the reform on classroom practice.<sup>155</sup> In a district-wide study of teachers' use of benchmark data between 2005 and 2007, a reform for which resources were plentiful, researchers found evidence that the district mandated core curriculum was widely accepted and that information from benchmark exams was used to change instructional practice, including at low-performing schools. The degree to which instructional change occurred, however, was dependent on the presence and quality of school leadership teams and the guidance teachers received in translating information from the data into instructional strategies.<sup>156</sup> Because of budget difficulties, funding used at school sites to support these activities was cut or eliminated in 2007.<sup>157</sup>

## **b. Finance**

We identified one study that systematically evaluated the effects of mayoral control on financial resources and spending in school districts across the United States. Using ten years (1993-2003) of financial data for 104 large school districts, researchers found slightly lower levels of relative spending on instruction and instructional support by mayors without the ability to appoint the majority of the school board, as in Philadelphia, as compared to districts with this form of mayoral control.<sup>158</sup> Despite this finding, in SDP, district wide per pupil spending increased approximately \$1,900 between 2002-2005.<sup>159</sup> A budget crisis was revealed in 2007,

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<sup>153</sup> School District of Philadelphia. "Imagine 2014: Building a System of Great Schools." *Philadelphia, PA: School District of Philadelphia* (2011): 1-34. Print.

<sup>154</sup> Hartmann, Tracey, Rebecca Reumann-Moore, Shani Evans, Clarisse Haxton, Holly Maluk, and Ruth Neild. "Going Small: Progress & Challenges of Philadelphia's Small High Schools." *Research for Action* (2009): 1-89. Web.

<sup>155</sup> Hartmann et al., 2009.

<sup>156</sup> Blanc, Suzanne, Jolley Christman, Roseann Liu, Cecily Mitchell, and Eva Travers. "Learning to Learn from Data: Benchmarks and Instructional Communities." *Peabody Journal of Education* 85.2 (2010): 205-225. Print; Christman, Jolley, Ruth Neild, Katrina Bulkley, Suzanne Blanc, Roseann Liu, Cecily Mitchell, and Eva Travers. "Making the Most of Interim Assessment Data: Lessons from Philadelphia." *Research for Action* (2009): 1-82. Web; Olah, Leslie, Nancy Lawrence, and Matthew Riggan. "Learning to Learn from Benchmark Assessment Data: How Teachers Analyze Results." *Peabody Journal of Education* 85 (2010): 226-254. Print.

<sup>157</sup> Bulkley et al., 2010.

<sup>158</sup> Wong, et al., 2007.

<sup>159</sup> Gill et al., 2007.

and the district has struggled financially since that time.<sup>160</sup> The budget deficit for SDP for the 2011-2012 school year was \$650 million.<sup>161</sup>

### c. Collective Bargaining

We did not identify any recent, high-quality research studies that examined changes related to collective bargaining in SDP.

### d. Performance

We identified one study that systematically evaluated the effects of mayoral control on student test scores in reading and mathematics across the United States. Using five years of data (1999-2003), researchers found that being a “new-style” mayor (a mayor willing to be held accountable for the performance of the school district), as in Philadelphia, was associated with small increases in student achievement on state tests as compared with other districts in the same state at the elementary but not high school level, holding other factors constant.<sup>162</sup>

In the study of the effects of uses of benchmark test data on student achievement between 2005 and 2007 cited earlier, researchers found that schools with strong instructional leadership that valued and made use of data had higher average increases in student achievement relative to other students in the district than those with weaker instructional leadership. The researchers found that teachers needed guidance and the opportunity to make sense of benchmark data in order to use it to improve their teaching practice.<sup>163</sup>

Average scores of students in SDP on the state achievement test for Pennsylvania have increased continuously and substantially since the move away from mayoral control to the city-state partnership.<sup>164</sup> We identified no recent high-quality studies, however, that were able to identify whether this trend was different than the trend in other districts in the state or across the nation in response to the federal No Child Left Behind Act. Achievement levels in SDP remain low.<sup>165</sup> In the most recent rounds of testing for the National Assessment of Educational Progress (NAEP), 13% of SDP 4th graders and 16% of SDP 8th graders tested “proficient” in reading, 20% of SDP 4th graders and 18% of SDP 8th graders tested “proficient” in math, and 8% of SDP 4th graders and 6% of SDP 8th graders tested “proficient” in science.<sup>166</sup> All of these scores were lower than the average in other large cities.<sup>167</sup>

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<sup>160</sup> Hartmann et al., 2009.

<sup>161</sup> Gammage, Jeff, Kristen Graham, and Susan Snyder. “Ackerman’s Removal Seen as Imminent.” *Philadelphia Inquirer*. Philadelphia Inquirer, 21 Aug. 2011. Web. 21 Oct. 2011.

<sup>162</sup> Wong, Kenneth. “Does Mayoral Control Improve Performance in Urban Districts?” In Joseph Viteritti (Ed.), *When Mayors take Charge: School Governance in the City*. Washington, D.C.: The Brookings Institution, 2009. Print.; Wong, Kenneth and Francis Shen. “Mayoral Leadership Matters: Lessons Learned from Mayoral Control of Large Urban School Systems.” *Peabody Journal of Education* 82.4 (2007): 737-768. Print; Wong, et al., 2007.

<sup>163</sup> Blanc et al., 2010; Christman et al., 2009.

<sup>164</sup> Christman et al., 2009; Gill et al., 2007.

<sup>165</sup> Christman et al., 2009; Gill et al., 2007.

<sup>166</sup> The most recent NAEP scores available at the district level are from 2011 for reading and mathematics and 2009 for science.

<sup>167</sup> National Center for Education Statistics, *The Nation’s Report Card: Trial Urban District Assessment, (Mathematics, Reading, Science), 2009 and 2011*, <http://nationsreportcard.gov>.

## **C. Comparison of Oakland and Philadelphia**

### **i. Governance**

Although the forms of mayoral control formerly used in the Oakland Unified School District and the School District of Philadelphia are both categorized as weak, they came about in different ways. The changes providing for mayoral influence in the OUSD were the result of a temporary amendment, via voter initiative, of the city's charter. The changes allowing for mayoral influence in the SDP were implemented pursuant to the authority of state law applying only to school districts of a certain size and financial condition. In the former OUSD system and current SDP system, the respective mayors appoint a minority of the members of the school board. From 2000 to 2004, Mayor Brown appointed three out of ten school board members and the Mayor of Philadelphia currently appoints two out of five members of the School Reform Commission . Therefore, each mayor's effect on school district governance is direct but slight.

### **ii. Finance**

In regards to finance and budget, the mayor of Oakland from 2000 to 2004 had, and the mayor of Philadelphia currently has, only indirect influence as the result of their appointment powers. This is because in the OUSD, the budgeting process remained subject to general California law requiring the governing board of each school district to adopt the annual budget. Therefore, the mayor of Oakland had only indirect influence, by appointing three out of ten school board members, over the formulation of the budget.

This is also the situation in the SDP, where the school reform commission is in control of the district's finances, budget, and levying taxes. Because the mayor of Philadelphia appoints two out of the five members on the SRC, he exercises indirect authority over budgeting and tax decisions.

### **iii. Collective Bargaining**

Similar to finance and budgeting in the OUSD and SDP, Mayor Brown formerly exercised, while the mayor of Philadelphia currently holds only indirect influence over collective bargaining between the respective school districts and their educational employees. In the OUSD from 2000 to 2004, collective bargaining remained subject to the state Educational Employment Relations Act and related provisions of the Education Code. Thus, Mayor Brown's influence over negotiating was indirect through his power to appoint three school board members, because the school board had the authority to approve collective bargaining contracts. This is also the situation in the SDP currently—the School Reform Commission is in complete control of collective bargaining, possessing the powers to negotiate with employees and enter into new contracts. The mayor therefore holds an indirect role in collective bargaining through his authority to appoint two out of five SRC members.

### **iv. Low-Performing Schools**

In regards to low-performing schools, the Oakland Unified School District from 2000 to 2004 remained subject to California's Public Schools Accountability Act. The PSAA generally gives control of low-performing schools to state officials; however, if a school is placed in the Underperforming Schools Program, the school district governing board is permitted to select an

external evaluator or entity to come up with an action plan to improve the school. Thus, in the OUSD, Mayor Brown had only indirect and rather slight influence over low-performing schools, through his authority to appoint three school board members.

In the SDP, the School Reform Commission is also in control of low-performing schools, with the responsibility to develop achievement plans, testing, and evaluation procedures. Furthermore, the SRC is authorized to contract with outside individuals and entities to manage schools within the district, a tool that has generally been utilized for lower-performing schools. As such, the mayor of Philadelphia has an indirect influence and oversight of low-performing schools and decisions to contract with outside entities, through his or her ability to appoint two SRC members.

#### **IV. Moderate Category**

##### **A. Cleveland, Ohio**

In 1995, a federal court judge described the Cleveland public schools as a “rudderless ship mired in mismanagement, indecision and fiscal irresponsibility.”<sup>168</sup> The Cleveland public schools have experienced problems throughout history with racial segregation and political turmoil.<sup>169</sup> As such, the student population has dropped dramatically from 123,000 students in 1976 to 44,362 in 2011.<sup>170</sup> Furthermore, one hundred percent of the district’s students come from economically disadvantaged families.<sup>171</sup>

##### **i. Mayoral Influence**

What ultimately led to the implementation of mayoral control was the school district’s history of racial segregation, federal court supervision, and state takeover. Mayoral control over the Cleveland public schools took effect in 1998. Therefore, June 2011 marked a milestone for mayoral control in the district: the graduating class of 2011 was the first group of students to have experienced mayoral control from kindergarten all the way through to graduation.<sup>172</sup>

##### **a. Governance**

##### **1. Desegregation and State Takeover**

In 1976, certain students, their parents, and the NAACP brought a claim against the Cleveland public school system, Ohio State Board of Education, and other state officials, alleging that the public school system was purposefully segregated by race.<sup>173</sup> After finding that

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<sup>168</sup> Rich, Wilbur and Stephanie Chambers. “Cleveland: Takeovers and Mayors are not the Same.” In Jeffrey R. Henig and Wilbur C. Rich (Eds.), *Mayors in the Middle: Politics, Race, and Mayoral Control of Urban Schools*. Princeton, New Jersey: Princeton University Press, 2004. Print.

<sup>169</sup> See *Mixon v. Ohio*, 193 F.3d 389, 394 (6th Cir. 1999).

<sup>170</sup> “Cleveland, Ohio, Public Schools’ Near-Bankruptcy.” *OhioHistoryCentral.org*. Ohio History Central, 2005 July 1. Web. 9 Nov. 2011; “CMSD Facts.” *CMSDNet.net*. Cleveland Metropolitan School District, n.d. Web. 9 Nov. 2011.

<sup>171</sup> “CMSD Facts,” 2011.

<sup>172</sup> O’Donnell, Patrick. “Mayoral Control of the Cleveland City Schools has Brought Stability but Other Improvements Hard to Measure.” *Cleveland.com*. The Plain Dealer, 20 Aug. 2011. Web. 15 Dec. 2011.

<sup>173</sup> See *Reed v. Rhodes*, 422 F.Supp. 708, 712 (N.D. Ohio 1976), *aff’d in part*, 607 F.2d 714 (6th Cir. 1979).

“the significant involvement of the Cleveland Board of Education in the creation or maintenance of a segregated school system cannot be denied,” the federal district court held that the board violated the plaintiffs’ Fourteenth Amendment right to equal protection.<sup>174</sup> As a result, the court permanently enjoined any further racial discrimination in the Cleveland public schools and ordered the school board and State Board of Education to submit desegregation plans to the court.<sup>175</sup> This desegregation order marked the beginning of a more than twenty-year federal court supervision over the Cleveland school district.

After the desegregation order, things only got worse for the Cleveland public schools. Due to “escalating controversy,” internal dissention, resignation of key personnel, and a “financial crisis of magnitude” marked by the failure to procure support for a \$29.5 million emergency loan to cover day-to-day operational costs, the court concluded that the Cleveland school district was incapable of continued implementation of the desegregation plan.<sup>176</sup> Consequentially, on March 3, 1995, the court ordered state takeover of the district, directing the State Superintendent to “assume immediate supervision and operational, fiscal and personnel management of the District, including, but not limited to, administration of its educational policies and all other powers incident there to during the state of crisis” until further court order.<sup>177</sup>

## 2. House Bill 269: Creation of Municipal School Districts

The state takeover was an impetus for legislative change to the governance structure. At that time, state law provided for an elected board of education of five to seven members, and a superintendent selected by the board.<sup>178</sup> Instead, then-mayor Michael White sought control over the school board. In his 1996 State of the City Address, White asked for a law that would allow the mayor to appoint the school board.<sup>179</sup> The Ohio Legislature granted White’s wish in 1997, passing House Bill (H.B.) 269, which would apply only to newly-created “municipal school districts.”<sup>180</sup> A municipal school district is one that “is or has ever been under a federal court order requiring supervision and operational, fiscal, and personnel management of the district by the state superintendent of public instruction.”<sup>181</sup> Because the Cleveland school district was placed under the supervision of the state superintendent by federal court order in 1995, it is considered a municipal school district.<sup>182</sup> When the legislature passed House Bill 269, Cleveland public schools were still under court-ordered state supervision. Thus, the legislature provided that the new laws would not apply to any school district under state supervision until it was released from federal court order.<sup>183</sup> For Cleveland, this occurred in March 1998.<sup>184</sup>

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<sup>174</sup> *Id.* at 796.

<sup>175</sup> *Id.* at 797.

<sup>176</sup> *Reed v. Rhodes*, 934 F.Supp. 1533, 1558-59 (N.D. Ohio 1996).

<sup>177</sup> *Id.* at 1560.

<sup>178</sup> *See* OHIO REV. CODE ANN. §§ 3313.02, 3319.01 (West 2011).

<sup>179</sup> Rich and Chambers, 2004.

<sup>180</sup> Act of July 22, 1997, 1997 Ohio Laws 2388, 2395 (codified at OHIO REV. CODE ANN. § 3311.71(A)(1)).

<sup>181</sup> OHIO REV. CODE ANN. § 3311.71(A)(1). At the time House Bill 269 was passed, the Cleveland school district was the only one to qualify as a municipal school district. *Spivey v. Ohio*, 999 F.Supp. 987, 993 (N.D. Ohio 1998).

<sup>182</sup> *Supra* note 177 and accompanying text.

<sup>183</sup> OHIO REV. CODE ANN. § 3311.71(B).

<sup>184</sup> O’Donnell, 2011.

House Bill 269 provided that in a municipal school district, the mayor “of the municipal corporation containing the greatest portion of a municipal school district’s territory” would appoint all nine members of the board of education.<sup>185</sup> For the Cleveland public schools, this means the mayor of Cleveland. The new laws set up a governing system over what has since become known as the Cleveland Metropolitan School District (CMSD), initially consisting of a board of education, nominating panel, Chief Executive Officer (CEO), and a Community Oversight Committee.<sup>186</sup> House Bill 269 granted “management and control” of the CMSD to a new nine-member board of education appointed entirely by the mayor, who also designates which member will be the chairperson of the board.<sup>187</sup> However, the mayor’s selections for the board are limited by the nominating panel. The nominating panel consists of eleven members: three parents or guardians of children attending a school in the district appointed by the district parent-teacher association, three persons appointed by the mayor, one person appointed by the president of the legislative body of the municipal corporation containing the greatest portion of the school district’s territory, one teacher appointed by the collective bargaining representative of the district’s teachers, one principal appointed through a vote of all the principals in the district, one representative of the business community appointed by a business entity selected by the mayor, and one president of an institution of higher education located within the district appointed by the state Superintendent of Public Instruction (SPI).<sup>188</sup> Thus, although the mayor does not have complete discretion to select board members, his or her input is heard at the nominating stage as well. All members of the nominating panel serve at the pleasure of the official or entity who selected them.<sup>189</sup>

H.B. 269 provided that the initial nominating panel was to submit a list of at least eighteen candidates to the mayor to select the first new board.<sup>190</sup> The list was required to include at least three persons who resided outside of the municipal corporation containing the greatest portion of the district’s territory (e.g., outside the City of Cleveland).<sup>191</sup> The legislature provided that if voters approved an extension of the mayor-appointed school board after a required referendum,<sup>192</sup> the mayor would appoint a new board, with five members appointed for two-year terms, and four members appointed for four-year terms.<sup>193</sup> After that, board members would be appointed to four-year terms each. The nominating panel must submit to the mayor a list of candidates amounting to at least double the total number of vacant positions on the board of education. At least two of the candidates must reside outside of the city of Cleveland.<sup>194</sup> In addition to the nominating panel, the mayor is further limited in his or her selections for the board of education because four of the members must have, prior to being appointed to the board, “significant expertise” in the fields of education, finance, or business management, and there must be at least one member on the board at all times who resides outside of the city of

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<sup>185</sup> 1997 Ohio Laws at 2395 (codified at OHIO REV. CODE ANN. § 3311.71(B)).

<sup>186</sup> *See id.* at 2395-2408 (codified as amended at OHIO REV. CODE ANN. §§ 3311.71-3311.77).

<sup>187</sup> *Id.* at 2395 (codified at OHIO REV. CODE ANN. § 3311.71(B)).

<sup>188</sup> OHIO REV. CODE ANN. § 3311.71(C).

<sup>189</sup> *Id.*

<sup>190</sup> 1997 Ohio Laws at 2395 (codified at OHIO REV. CODE ANN. § 3311.71(C)).

<sup>191</sup> *Id.* At the time House Bill 269 was passed, the CMSD consisted of the City of Cleveland and the villages of Bratenahl, Linndale, Newburgh Heights, and a portion of Garfield Heights. *Spivey v. Ohio*, 999 F.Supp. 987, 992 (N.D. Ohio 1998).

<sup>192</sup> *See infra* notes 209-210 and accompanying text.

<sup>193</sup> 1997 Ohio Laws at 2397 (codified at OHIO REV. CODE ANN. § 3311.71(F)).

<sup>194</sup> *See* OHIO REV. CODE ANN. § 3311.71(F).

Cleveland.<sup>195</sup> However, the mayor is authorized to remove any board member for cause, with consent of the nominating panel.<sup>196</sup>

House Bill 269 changed only the selection process of the members of the board of education; it did little to change the powers and duties of the board of education in a municipal school district. Pursuant to H.B. 269, the board is generally directed to “set goals for the district’s educational, financial, and management progress and establish accountability standards with which to measure the district’s progress,” in consultation with the department of education.<sup>197</sup> The board of education in a municipal school district has “all of the rights, authority, and duties conferred upon a city school district and its board by law” that are not inconsistent with the other provisions of H.B. 269 (sections 3311.71 to 3311.76 of the Revised Code).<sup>198</sup>

The 1997 legislation also created the position of CEO, who takes the place of the former district superintendent.<sup>199</sup> For the thirty months following the date that the first mayor-appointed school board assumed control, the CEO was appointed solely by the mayor. Now, the CEO is appointed by the mayor with the concurrence of the board.<sup>200</sup> The CEO currently serves at the pleasure of the board of education, but the mayor’s approval is required before the board may remove the CEO.<sup>201</sup> The CEO is authorized to appoint a chief financial officer, chief academic officer, chief operating officer, and chief communications officer.<sup>202</sup> The CEO assumed the powers and duties of the district superintendent, thus, in addition to any other powers provided by H.B. 269, he or she is the executive officer of the board and may direct and assign district employees, assign pupils to schools and grades, and perform any other duties the board determines.<sup>203</sup>

The legislature originally provided two checks on mayoral appointment of the school board and CEO—the establishment of a Community Oversight Committee (COC) and a mandatory voter referendum.<sup>204</sup> The purpose of the COC was generally to “review and evaluate the mayoral appointment school governance plan for any municipal school district . . . .”<sup>205</sup> Members of the COC were appointed to four-year terms by the SPI and were subject to removal only for cause. The COC was directed to submit, after consulting with the board of education, annual written reports to the speaker and minority leader of the Ohio House of Representatives, the president and minority leader of the Ohio Senate, and the chairpersons and ranking minority members of the standing committee of each house of the Ohio General Assembly having primary jurisdiction over elementary and secondary education legislation.<sup>206</sup> The report was to address “the financial, operational, academic, community, and other issues involving the school district

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<sup>195</sup> See *id.* § 3311.71(D).

<sup>196</sup> *Id.* § 3311.71(E).

<sup>197</sup> 1997 Ohio Laws at 2401 (codified at OHIO REV. CODE ANN. § 3311.74(A)).

<sup>198</sup> *Id.* at 2403 (codified at OHIO REV. CODE ANN. § 3311.76(B)).

<sup>199</sup> *Id.* at 2399 (codified at OHIO REV. CODE ANN. § 3311.72(C)).

<sup>200</sup> OHIO REV. CODE ANN. § 3311.72(B)(1)-(2).

<sup>201</sup> *Id.* § 3311.72(B)(4)(b).

<sup>202</sup> *Id.* § 3311.72(C).

<sup>203</sup> *Id.* §§ 3311.72(C), 3319.01.

<sup>204</sup> *Id.* §§ 3311.73, 3311.77 (repealed 2011).

<sup>205</sup> 1997 Ohio Laws at 2403 (codified at OHIO REV. CODE ANN. § 3311.77 (repealed 2011)).

<sup>206</sup> *Id.* at 2403-04 (codified at OHIO REV. CODE ANN. § 3311.77 (repealed 2011)).



as a result of the implementation of the mayoral appointment school governance plan . . . .”<sup>207</sup> Effective June 30, 2011, the legislature abolished the COC, thereby eradicating one of the checks on the mayor’s control.<sup>208</sup> The other check on the mayor’s appointment powers was a mandatory referendum. H.B. 269 provided for the referendum to take place “at the general election held in the first even-numbered year occurring at least four years after the date the new board assumed control” to determine whether to return to an elected school board.<sup>209</sup> This occurred in 2002, and the voters voted in favor of the mayor-appointed school board, rather than returning to an elected board.<sup>210</sup>

### 3. *Mixon v. Ohio* and Current Mayoral Control

The NAACP, along with several taxpayers, registered voters with children attending school in the CMSD, and registered voters employed by the CMSD, immediately challenged H.B. 269 in federal district court.<sup>211</sup> The plaintiffs sued the State of Ohio and then-mayor Michael White, seeking a declaratory judgment to prevent implementation of the new laws on the grounds that H.B. 269 violated the United States and Ohio Constitutions, the federal Voting Rights Act, and Ohio common law.<sup>212</sup> The Court of Appeals for the Sixth Circuit ultimately affirmed the district court’s ruling, upholding H.B. 269.<sup>213</sup>

Plaintiffs first argued that House Bill 269 violated Article VI, section 3 of the Ohio Constitution, which provides city school districts with “the power by referendum vote to determine for itself the number of members and the organization of the district board of education . . . .”<sup>214</sup> The Sixth Circuit disagreed with the plaintiffs, finding no constitutional violation because the state legislature had discretion as to the timing of the referendum as long as it acted reasonably.<sup>215</sup> According to the Ohio Supreme Court, section 3 does not require voter approval of legislative changes to the organization of school boards *before* the legislature may implement such changes; rather, providing voters with an opportunity to vote on the changes at a later date is constitutionally sufficient.<sup>216</sup> The four-year period established in H.B. 269 was “reasonably related to the legitimate state purpose of improving the school board and providing the new appointees with some leeway to do their work.”<sup>217</sup>

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<sup>207</sup> *Id.* at 2404 (codified at OHIO REV. CODE ANN. § 3311.77 (repealed 2011)).

<sup>208</sup> *See* H.R. 264, 129th Gen. Assemb., Reg. Sess. (Ohio 2011).

<sup>209</sup> 1997 Ohio Laws at 2400-01(codified at OHIO REV. CODE ANN. § 3311.73(B)).

<sup>210</sup> O’Donnell, 2011.

<sup>211</sup> *Spivey v. Ohio*, 999 F.Supp. 987 (N.D. Ohio 1998), *aff’d in part sub nom* *Mixon v. Ohio*, 193 F.3d 389 (6th Cir. 1999). As originally filed in federal district court, *Spivey* was consolidated with a nearly-identical case known as *Mixon v. Ohio*. After the district court’s decision, the *Spivey* plaintiffs dropped their appeal; the case was then known as *Mixon v. Ohio* before the Sixth Circuit. *Mixon*, 193 F.3d at 393 n.1.

<sup>212</sup> *Id.* at 396.

<sup>213</sup> *Id.* at 410. However, the Sixth Circuit dismissed the Equal Protection claims against the State of Ohio on grounds of sovereign immunity. The Eleventh Amendment to the United States Constitution provides that a state may not be sued in federal court unless the state consents to the lawsuit or the case arises out of a statute passed pursuant to Section 5 of the Fourteenth Amendment. The court found that Ohio did not consent to being sued in federal court and therefore dismissed the federal Equal Protection Clause claims against the state. The court allowed all other claims against the state and all claims against the mayor to proceed. *Id.* at 397-99.

<sup>214</sup> OHIO CONST. art. VI, § 3.

<sup>215</sup> *Mixon*, 193 F.3d at 400.

<sup>216</sup> *Id.* at 401 (citing *State ex rel. Ach v. Evans*, 107 N.E. 537, 538 (Ohio 1914)).

<sup>217</sup> *Id.*

The court next addressed the plaintiffs' Equal Protection claims, brought under the United States and Ohio Constitutions. The plaintiffs claimed that H.B. 269 violated their rights to equal protection by denying residents of municipal school districts the opportunity to vote for school board members while residents of other school districts in the state retained such right.<sup>218</sup> The Sixth Circuit declared that there is no fundamental right to vote per se, and no fundamental right to elect "an administrative body such as a school board, even if other cities in the state may do so."<sup>219</sup> Because H.B. 269 did not involve a fundamental right, the court used the "rational basis" standard. Based on Cleveland's financial and operational problems, the possible benefits of an appointed school board, and the state legislature's need for "freedom to experiment with different techniques to advance public education," the Sixth Circuit upheld the district court's determination that the legislature had a rational basis for treating municipal school districts differently than others.<sup>220</sup>

Plaintiffs advanced a second Equal Protection Clause argument, based on the "one person, one vote" principle. The problem here, which has significant implications for the possibility of mayoral control in California school districts whose boundaries are not contiguous with the cities within which they are located, was that the Cleveland school district included territory that was outside the City of Cleveland. Thus, residents in areas outside of Cleveland but within the school district were unable to vote for the mayor of Cleveland, who would ultimately appoint the school board.<sup>221</sup> The court struck down plaintiffs' arguments, reviewing a United States Supreme Court opinion that established that "non-residents do not necessarily have the right to vote in a city election simply because the city has some limited authority over the non-residents."<sup>222</sup> The Sixth Circuit repeated the district court's observations that it was the *state legislature and governor* who enacted H.B. 269 and plaintiffs retained the right to vote for those officials.<sup>223</sup> Furthermore, the board of education is required to have at least one member from outside the City of Cleveland, guaranteeing representation of non-Cleveland residents, which might not have been the case with an elected school board.<sup>224</sup>

The change from an elected to appointed school board was also the basis for plaintiff's claim under the federal Voting Rights Act of 1965 (VRA).<sup>225</sup> In sum, the VRA prohibits states and political subdivisions from denying or abridging a citizen's right to vote on the basis of race

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<sup>218</sup> *Id.* at 402.

<sup>219</sup> *Id.* at 402, 403. The Sixth Circuit, citing Supreme Court precedent, found that the right to vote *itself* is not constitutionally protected, but that if a state has set up "an elective process for determining who will represent any segment of the state's population," a citizen's right to participate in that vote must be determined on an equal basis. *Id.* at 402. Furthermore, Supreme Court precedent implies that there is no fundamental right to elect government bodies of the "nonlegislative character," like school boards. *Id.* (citing *Sailors v. Bd. of Educ.*, 387 U.S. 105, 108 (1967)).

<sup>220</sup> *Id.* at 403-04. The court noted the following potential benefits of an appointed school board: (1) insulating board members from direct political pressures; (2) promotion of stable school board membership; (3) encouraging the service of those who would not ordinarily seek elective office; (4) promotion of diversity in viewpoints which might not occur on an elected school board; (5) concentrating fiscal authority in one body; (6) avoiding the fragmentation of local political authority; and (7) avoiding the problem of single issue campaigns that frequently occur with elected boards. *Id.* at 403 (citing *Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352, 1355 (4th Cir. 1989)).

<sup>221</sup> *Id.* at 404.

<sup>222</sup> *Id.* at 405 (citing *Holt v. City of Tuscaloosa*, 439 U.S. 474 (1968)).

<sup>223</sup> *Id.* at 406.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

or color. To show a violation of section 2 of the VRA, a plaintiff must establish that “the political processes leading to *nomination or election in the State or political subdivision* are not equally open to participation” by members of a certain protected class of citizens.<sup>226</sup> The Sixth Circuit rejected plaintiffs’ arguments that the change from an elected to appointed school board violated the VRA, first noting the consensus among federal courts that section 2 of the VRA does not apply to *appointive* systems.<sup>227</sup> Second, the court quoted dicta from a United States Supreme Court opinion, which suggested that a state could avoid application of the VRA to its judiciary by changing from an elective to appointive judicial system.<sup>228</sup> Thus, there was no violation of section 2 of the VRA.<sup>229</sup> However, the court noted that in certain jurisdictions in the United States, appointive systems are not completely immune from challenge and could be subject to attack under section 5 of the VRA.<sup>230</sup> It will be necessary to keep this in mind when making changes to school boards in California.

Lastly, the *Mixon* plaintiffs challenged H.B. 269 under the Uniformity Clause of the Ohio Constitution and under a principle of Ohio common law that prohibits conflicts of interest. The Uniformity Clause requires “laws of a general nature [to] have a uniform operation throughout the state . . . .”<sup>231</sup> The court rejected plaintiffs’ argument that H.B. 269 violated the clause in that it only applied to municipal school districts, finding that H.B. 269 was constitutionally permissible because it *could apply* uniformly to other school districts in the future.<sup>232</sup> It was irrelevant that, at the time, the Cleveland school district was the only one to be classified as a municipal school district.<sup>233</sup> The Sixth Circuit also concluded that it did not violate the common law prohibition against conflicts of interest to have the same individual serve as mayor and appoint the school board, because “the mayor merely assumes additional executive responsibilities and does not directly control the school board, let alone serve on the school board or act in any legislative capacity.”<sup>234</sup>

Despite plaintiffs’ several challenges to the legislation, House Bill 269 was upheld in its entirety.<sup>235</sup> Other than the abolishment of the Community Oversight Committees in 2011, there have been only minor, non-substantive changes to the statutes relating to mayoral control over the Cleveland school district since the enactment of H.B. 269 in 1997. Considering that mayoral control passed the required voter referendum in 2002, and the legislature has since increased mayoral influence by doing away with the COC, it appears that a mayor-appointed school board and CEO are now here to stay in Cleveland.

## **b. Finance**

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<sup>226</sup> Voting Rights Act of 1965, § 2, 42 U.S.C. § 1973(a)-(b) (2006) (emphasis added).

<sup>227</sup> *Mixon*, 193 F.3d at 407.

<sup>228</sup> *Id.* (citing *Chisom v. Roemer*, 501 U.S. 380, 401 (1991)).

<sup>229</sup> *Id.* at 408.

<sup>230</sup> *Id.* at 407.

<sup>231</sup> OHIO CONST. art. II, § 26.

<sup>232</sup> *Mixon*, 193 F.3d at 409.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 410.

<sup>235</sup> *Id.*

The mayor of Cleveland does not have unique power over Cleveland public school district finance and budgeting. The mayor's influence is exercised indirectly through the school board and through the CEO whom the mayor appoints with school board concurrence.

Article VI, section 2 of the Ohio Constitution directs the state legislature to "make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state . . . ." <sup>236</sup> The Ohio Supreme Court has interpreted Article II, section 2 as placing the responsibility for funding an adequate public school education on the state. <sup>237</sup> The finance structure and budgeting process for the CMSD are largely the same as for other public school districts in Ohio. However, House Bill 269 specified that budgets of municipal school districts must be estimated, planned, and financed separately from the budgets of the corresponding municipal corporation (e.g., the City of Cleveland). <sup>238</sup>

According to the Ohio Department of Education, 8.5 percent of the public school system is funded by the federal government, 48.8 percent by local sources, and 42.7 percent by the state. <sup>239</sup> The school finance and budgeting process is handled mainly at state level and works its way down to local districts, with the Ohio Board of Education responsible for administering and supervising the allocation and distribution of all state and federal funds for public school education. <sup>240</sup> The state aid for Ohio public schools is determined by the "school foundation program," which provides for a required local contribution and determines the amount of state funds that each school district will receive. <sup>241</sup> The Ohio Board of Education must first submit budget requests for its agencies and for the public schools to the state Director of Budget and Management. <sup>242</sup> The Ohio Legislature then determines the appropriations for the state board of education, and the State Superintendent of Public Instruction calculates the amounts payable to each school district. <sup>243</sup> At the municipal school district level, the board of education must "set goals for the district's . . . financial . . . progress and establish accountability standards with which to measure the district's progress." <sup>244</sup> As such, it is the board of education that votes on and approves the budget for the CMSD. <sup>245</sup> The state board requires the CMSD, along with every other school district, to make its financial information and annual budgets available to the public "in a format understandable by the average citizen." <sup>246</sup>

Apart from the annual budget and finance provisions, the Ohio Legislature has set forth procedures designed to "ensure the fiscal integrity of school districts." <sup>247</sup> As such, a school

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<sup>236</sup> OHIO CONST. art. VI, § 2.

<sup>237</sup> *DeRolph v. State*, 728 N.E.2d 993, 1014 (Ohio 2000).

<sup>238</sup> Act of July 22, 1997, 1997 Ohio Laws 2388, 2402 (codified at OHIO REV. CODE ANN. § 3311.75(A) (West 2011)).

<sup>239</sup> Ohio Department of Education. "Ohio's School Foundation Funding Program." Ohio Department of Education, 2009. Web. 15 Dec. 2011.

<sup>240</sup> OHIO REV. CODE ANN. § 3301.07(C).

<sup>241</sup> *See id.* § 3317.01.

<sup>242</sup> *Id.* §§ 126.08, 3301.07(G).

<sup>243</sup> *Id.* § 3317.01.

<sup>244</sup> *Id.* § 3311.74.

<sup>245</sup> "CMSD School Board." *CMSDNet.net*. Cleveland Metropolitan School District, n.d. Web. 8 Nov. 2011.

<sup>246</sup> OHIO REV. CODE ANN. § 3301.07(B)(2).

<sup>247</sup> *Id.* § 3316.02.

district may be placed on “fiscal caution,” “fiscal watch,” or “fiscal emergency.”<sup>248</sup> The first phase is fiscal caution. Generally, the board of education in every school district is required to submit to the Ohio Department of Education a five-year projection of operational revenues and expenditures.<sup>249</sup> The SPI, in consultation with the auditor of state, must develop guidelines for identifying fiscal practices and budgetary conditions that could result in a future declaration of fiscal watch or fiscal emergency.<sup>250</sup> If, based on the five-year forecast, the SPI determines that any of such practices or conditions exists, the SPI may place the school district on fiscal caution after consulting with the board of education. If the SPI places the district on fiscal caution, the school board must provide written proposals for discontinuing or correcting the practices and conditions that led to the declaration of fiscal caution.<sup>251</sup>

The next phase after fiscal caution is fiscal watch, which can occur in a variety of situations; however, only the auditor of state may declare the district to be on fiscal watch. The auditor of state may place a district on fiscal watch upon his or her own initiative or after a written request from the governor, SPI, or the district board of education.<sup>252</sup> After being placed on fiscal caution, if the SPI finds that the district has “not made reasonable proposals or otherwise taken action to discontinue or correct the fiscal practices or budgetary conditions that prompted the declaration of fiscal caution,” the SPI may determine that the district should be in a state of fiscal watch. If fiscal watch is necessary to prevent further decline and if the auditor of state finds the SPI’s determination to be reasonable, the auditor will place the district on fiscal watch.<sup>253</sup> The Revised Code lists other situations in which the auditor of state *must place* a district on fiscal watch and situations in which the auditor *may place* a district on fiscal watch. For example, the auditor *must declare* a district to be in a state of fiscal watch if the district has a certified operating deficit for the current fiscal year exceeding eight percent of the prior year’s general fund revenue, and the local voters have not approved a tax that would raise sufficient additional revenue to correct the deficiency for the next fiscal year.<sup>254</sup> A school district on fiscal watch must prepare and submit to the SPI a financial plan outlining the steps that it will take to eliminate the deficit and to avoid incurring any further deficits. The SPI has the authority to approve or disapprove the plan. A school district in fiscal watch must submit annual financial plans to the SPI for his or her approval.<sup>255</sup>

The last phase is fiscal emergency, which largely results in a takeover of the school district. As with fiscal watch, the Revised Code lists the situations in which the auditor of state may or must declare the district to be in a state of fiscal emergency. For one example, the auditor *must declare* a fiscal emergency if an operating deficit has been certified for the current fiscal year that exceeds fifteen percent of the general fund revenue for the preceding fiscal year and the voters have not approved a tax levy that would raise sufficient additional revenue.<sup>256</sup> A

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<sup>248</sup> *Id.* § 3316.03.

<sup>249</sup> *Id.* § 5705.391. The five-year forecasts are available online at <http://www.education.ohio.gov/GD/Templates/Pages/ODE/ODEPrimary.aspx?Page=2&TopicID=1009&TopicRelationID=101>.

<sup>250</sup> OHIO REV. CODE ANN. § 3316.031(A).

<sup>251</sup> *Id.* § 3316.031(B)-(C).

<sup>252</sup> *Id.* § 3316.03(A).

<sup>253</sup> *Id.* § 3316.031(E).

<sup>254</sup> *Id.* § 3316.03(A)(1).

<sup>255</sup> *Id.* § 3316.04(A)-(C).

<sup>256</sup> *Id.* § 3316.03(B)(1).

district that has been in fiscal watch may also be placed on fiscal emergency if the SPI determines that the district is not “materially complying” with its financial plan, a declaration of fiscal emergency is necessary to prevent further fiscal decline, and if the auditor finds the SPI’s determinations to be reasonable.<sup>257</sup>

For every school district in fiscal emergency status, there is a financial planning and supervision commission (FPSC). The FPSC is comprised of five members: the director of budget and management, the SPI, one member appointed by the governor, one member appointed by the SPI, and one member appointed by the mayor of the city with the largest number of residents living in the school district.<sup>258</sup> The FPSC must, after seeking “appropriate input” from the school district board and community, develop a financial recovery plan. The financial recovery plan is required to include certain elements, such as: the actions the school district will take to eliminate all fiscal emergency conditions, satisfy any past-due accounts payable, eliminate deficits, and balance the budget; the management structure that will enable the district to take the above actions; and the target dates for completion of such actions.<sup>259</sup> The SPI has the authority to approve the financial recovery plans.<sup>260</sup> The FPSCs are given extensive control and oversight over school districts in fiscal emergency—in addition to a list of specified powers, FPSCs are generally authorized to “*assume any of the powers and duties of the school board it deems necessary*, including all powers related to personnel, curriculum, and legal issues” in order to successfully implement the actions listed in the recovery plan.<sup>261</sup>

The FPSC and fiscal emergency status terminate when either the FPSC itself or the auditor of state determines that all of the following have occurred: an effective financial accounting and reporting system is being implemented, all of the fiscal emergency conditions identified have been corrected or eliminated, the objectives of the financial recovery plan are being met, and the auditor of state determines that the school district’s five-year financial forecast is “nonadverse.”<sup>262</sup> Currently, there are eight school districts in Ohio that are in a state of fiscal emergency. The Cleveland Metropolitan School District was in fiscal emergency status from October 1996 to September 1999, and remained on fiscal watch until March 2008.<sup>263</sup>

### **c. Collective Bargaining**

Collective bargaining between the CMSD and its employees is governed by the Public Employees’ Collective Bargaining Act (Act), which was enacted in 1983 and applies to public employers throughout Ohio.<sup>264</sup> With the passage of the Act, the legislature gave public employees the rights to: form, join, assist, participate in, or refrain from any such activities, an employee organization; to engage in concerted activities for the purpose of collective bargaining; to be represented by an employee organization; to bargain collectively with their public

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<sup>257</sup> *Id.* § 3316.03(B)(3).

<sup>258</sup> *Id.* § 3316.05.

<sup>259</sup> *Id.* § 3316.06(A).

<sup>260</sup> *Id.* § 3316.06(C).

<sup>261</sup> *Id.* § 3316.06(A)(2) (emphasis added).

<sup>262</sup> *Id.* § 3316.16(A).

<sup>263</sup> “Districts in Fiscal Caution, Watch and Emergency.” *Ohio.gov*. Ohio Department of Education, 7 Nov. 2011. Web. 8 Nov. 2011.

<sup>264</sup> Public Employees’ Collective Bargaining Act, 1983 Ohio Laws 336, 338-71 (1983) (codified as amended at OHIO REV. CODE ANN. §§ 4117.01-4117.27).

employees to determine wages, hours, terms and other conditions of employment; to enter into collective bargaining agreements; and to present grievances.<sup>265</sup>

The Act requires public employers to bargain collectively with the exclusive employee representative.<sup>266</sup> A school district falls under the definition of a “public employer.”<sup>267</sup> A designated representative of the public employer is responsible for negotiating with the employee representative.<sup>268</sup> Thus, a school district may choose who will conduct negotiations with employees on behalf of the district. Pursuant to a recent contract between the CMSD and the teachers’ union, it appears that negotiations are largely handled by the CEO with the help of a “negotiating team,” consisting of seven other officers and employees of the district.<sup>269</sup> However, the “legislative body” of a public employer has the authority to accept or reject a proposed collective bargaining agreement. For the CMSD, this means the board of education.<sup>270</sup>

Mandatory topics of bargaining include “all matters pertaining to wages, hours, or terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement . . . .”<sup>271</sup> Additionally, the Act gives public school employees specifically the right to bargain over health care benefits.<sup>272</sup> The only topics specifically restricted from bargaining by statute are “the conduct and grading of civil service examinations, the rating of candidates, the establishment of eligible lists from the examinations, and the original appointments from the eligible lists.”<sup>273</sup> Unless otherwise agreed to in a collective bargaining agreement, a public employer is free to: determine matters of inherent managerial policy; direct, supervise, evaluate, or hire employees; maintain and improve the efficiency of its operations; suspend, discipline, demote, discharge, lay off, or transfer employees; determine the adequacy of the work force; determine its overall mission and take actions to carry out such mission; and effectively manage the work force.<sup>274</sup>

In early 2011, the Ohio Legislature and governor attempted to severely restrict public employees’ rights and massively overhaul the collective bargaining laws. Senate Bill 5 proposed to, among many other provisions, restrict public employee rights to bargain over health care benefits, employer contributions to the state teachers’ retirement system, the number of employees required to be employed, maximum number of students in a classroom, determining the order of layoffs, and would ban strikes.<sup>275</sup> In what was perhaps the most notable provision of Senate Bill 5, the legislature proposed to implement a mandatory, statewide merit pay system for

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<sup>265</sup> OHIO REV. CODE ANN. § 4117.03(A).

<sup>266</sup> *Id.* § 4117.04(B).

<sup>267</sup> *Id.* § 4117.01(B).

<sup>268</sup> *Id.* § 4117.01(G).

<sup>269</sup> AGREEMENT BETWEEN THE BOARD OF EDUCATION OF THE CLEVELAND METROPOLITAN SCHOOL DISTRICT AND CLEVELAND TEACHERS UNION LOCAL NO. 279 AMERICAN FEDERATION OF TEACHERS, AFL-CIO, CLEVELAND METROPOLITAN SCH. DIST. iii (2007), *available at* [oh.aft.org/CTU/index.cfm?action=downloadasset&assetid=6b6b0363-9dd3-4a3f-a9a9-c9817b831a9f](http://oh.aft.org/CTU/index.cfm?action=downloadasset&assetid=6b6b0363-9dd3-4a3f-a9a9-c9817b831a9f).

<sup>270</sup> *See* OHIO REV. CODE ANN. § 4117.10(B)-(C).

<sup>271</sup> *Id.* § 4117.08(A).

<sup>272</sup> *Id.* § 4117.03(E).

<sup>273</sup> *Id.* § 4117.08(B).

<sup>274</sup> *See id.* § 4117.08(C).

<sup>275</sup> *See* S.B. 5, 129th Gen. Assemb., Reg. Sess. (Ohio 2011-2012).

teachers, in which pay would be partly determined by student performance on a new test.<sup>276</sup> Ohio would have been the first state to adopt such a system.<sup>277</sup> Although the governor signed Senate Bill 5 into law on March 31, 2011, the new provisions never went into effect.<sup>278</sup> Citizens of Ohio immediately circulated a petition and obtained a sufficient number of signatures to put a voter referendum on the November 2011 ballot seeking to repeal Senate Bill 5.<sup>279</sup> On November 8, 2011, voters overwhelmingly voted to repeal Senate Bill 5 by an approximate 61% to 39% margin.<sup>280</sup> Thus, the changes that could have made Ohio's collective bargaining laws among the toughest in nation will not take effect.<sup>281</sup>

#### **d. Low-Performing Schools**

The Ohio Legislature has passed two different sets of laws relating to low-performing schools, which both apply only to the CMSD as a municipal school district: the Pilot Project Scholarship Program, originally enacted in 1995 before mayoral control was implemented, and House Bill 269.

##### **1. Pilot Project Scholarship Program and *Zelman v. Simmons-Harris***

In the years leading up to mayoral control over the CMSD, student academic performance was dismal. Even the United States Supreme Court noted that Cleveland public schools had been among the worst performing public schools in the nation, that only one in ten ninth graders were able to pass a basic proficiency examination, and that more than two-thirds of high school students either dropped or failed out before graduation.<sup>282</sup> This disastrous student performance in part led to the legislature's 1995 enactment of one of the first publicly-funded voucher programs in the country, known as the Pilot Project Scholarship Program.<sup>283</sup> The Pilot Project Scholarship Program applies only to school districts "that are or have ever been under federal court order requiring supervision and operational management of the district by the state superintendent."<sup>284</sup> Thus, the program applies to the CMSD.

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<sup>276</sup> Fields, Reginald. "Teacher Merit Pay System in Ohio's New Collective Bargaining Law Could be First of its Kind in the Country." *Cleveland.com*. The Plain Dealer, 23 Apr. 2011. Web. 15 Dec.2011.

<sup>277</sup> Fields, 2011.

<sup>278</sup> "Ohio Governor Signs Senate Bill 5 into Law." *CBSNews.com*. The Associated Press, 31 Mar. 2011. Web. 15 Dec. 2011.

<sup>279</sup> Siegel, Jim. "SB 5 Opponents Move Swiftly to Get Referendum on Ballot." *Dispatch.com*. The Columbus Dispatch, 4 Apr. 2011. Web. 16 Dec. 2011.

<sup>280</sup> Siegel, Jim and Joe Vardon. "Unions Get Revenge as Issue 2 Fails." *Dispatch.com*. The Columbus Dispatch, 9 Nov. 2011. Web. 16 Dec. 2011.

<sup>281</sup> Greenhouse, Steven. "Ohio's Anti-Union Law is Tougher than Wisconsin's." *NYTimes.com*. The New York Times, 31 Mar. 2011. Web. 16 Dec. 2011.

<sup>282</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 644 (2002).

<sup>283</sup> *Id.* Note that although the Pilot Project Scholarship Program was originally enacted in 1995, it was struck down in 1999 by the Ohio Supreme Court on the grounds that it violated procedural requirements of the state constitution. The legislature immediately cured the defects identified by the Ohio Supreme Court and re-enacted the law later that same year. The basic provisions of the program did not change. *Id.* at 648 (citing *Simmons-Harris v. Goff*, 711 N.E.2d 203, 211 (Ohio 1999)).

<sup>284</sup> OHIO REV. CODE ANN. § 3313.975(A). Because the law was passed before H.B. 269, the legislature had not yet adopted the term "municipal school districts."



With the aim of increasing educational options for the children in the CMSD, the legislature created two different government aid programs within the Pilot Project Scholarship Program: a certain number of students may receive scholarships to attend “alternative schools,” and an equal number of students may receive tutorial assistance grants if they choose to continue to attend a public school in the CMSD.<sup>285</sup> Preference for both forms of aid is given to students from low-income families.<sup>286</sup> Private schools located within the boundaries of the CMSD and public schools in districts adjacent to the CMSD may sign up to participate in the tuition scholarship program. Such schools may be religiously-affiliated, but may not discriminate on the basis of religion and may not “advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion . . . .”<sup>287</sup> Parents of students receive, based on their income levels, either seventy-five percent or ninety percent of the private school’s tuition from the state, with a current annual maximum cap of \$4,250 for grades kindergarten through eight and \$5,000 for grades nine through twelve.<sup>288</sup> The state funds are paid by check directly to the parents, who then endorse the checks over to the participating private school of their choice.<sup>289</sup>

Alternatively, students who choose to remain enrolled in a public school in the CMSD may apply for a tutorial assistance grant. The grant may be used to purchase “instructional services provided to a student outside of regular school hours . . . .” Such instructional services must be provided by an “approved provider,” meaning “any person or governmental entity . . . who appear[s] to possess the capability of furnishing instructional services they are offering to provide.”<sup>290</sup> Under this grant program, the state also funds either seventy-five or ninety percent of the tutoring costs, based on the parents’ income level, with a current annual maximum cap of \$400.<sup>291</sup> The grants are paid by the state directly to the entity or person providing the tutorial assistance.<sup>292</sup>

Students must apply for the tuition scholarships and tutorial assistance grants; the SPI may award as many scholarships and grants as can be funded. The Pilot Project Scholarship Program is currently set to continue as long as the Ohio Legislature appropriates sufficient money to fund it. However, a pending Senate Bill proposes to repeal the program entirely in favor of new, revised scholarship programs.<sup>293</sup>

In the 1999-2000 school year, forty-six out of the fifty-six private schools participating in the program were religiously-affiliated and ninety-six percent of students participating in the scholarship program were enrolled in religiously-affiliated schools.<sup>294</sup> As such, a group of taxpayers in Ohio filed a lawsuit in federal court seeking to end the program on the grounds that it violated the prohibition of the Establishment Clause of the United States Constitution that

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<sup>285</sup> *Id.*

<sup>286</sup> *Id.* § 3313.978(A).

<sup>287</sup> *Id.* § 3313.976.

<sup>288</sup> H.R. 153, 129th Gen. Assemb., Reg. Sess. (Ohio 2011-2012) (to be codified at OHIO REV. CODE ANN. § 3313.978(C)(1)).

<sup>289</sup> *Id.* § 3313.979.

<sup>290</sup> *Id.* § 3313.976(D).

<sup>291</sup> *Id.* § 3313.978(C)(3)(b).

<sup>292</sup> *Id.* § 3313.979(C).

<sup>293</sup> See S.B. 128, 129th Gen. Assemb., Reg. Sess. (Ohio 2011-2012).

<sup>294</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 647 (2002).

“congress shall make no law respecting an establishment of religion . . . .”<sup>295</sup> The case, *Zelman v. Simmons-Harris*, made its way up to the United States Supreme Court, which rejected the plaintiffs’ arguments and upheld the Pilot Project Scholarship Program.<sup>296</sup> The Court first noted that the program was clearly enacted “for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system.”<sup>297</sup> Thus, the only question left to answer was whether the program had the “forbidden ‘effect’ of advancing or inhibiting religion.”<sup>298</sup> After reviewing similar precedents, the Court set forth the general rule that if a government aid program is neutral with respect to religion and provides assistance directly to a broad class of citizens who then direct the aid to religious schools as a result of their own “genuine and independent private choice,” the program is constitutionally permissible.<sup>299</sup>

The Supreme Court found that Ohio’s Pilot Project Scholarship Program was such a type of constitutionally-valid government aid program. The program was neutral with regards to religion in all respects: any parent of a student residing in the CMSD could apply, any private or adjacent public school could participate, and benefits were provided on a religion-neutral basis.<sup>300</sup> Furthermore, the program maintained genuine opportunities for parents, as their children could remain in a CMSD public school, receive state-funded tutoring aid, attend a private religious school using scholarship aid, attend a nonreligious private school using scholarship aid, or enroll in community or magnet schools.<sup>301</sup> Ultimately, because it was the parents who were choosing to direct the state funds to religious schools as one of several options, the program did not violate the constitution.<sup>302</sup>

## 2. Low-Performing Schools and Mayoral Control

The legislature also included provisions in H.B. 269, the mayoral control law, relating to low-performing schools in municipal school districts. The school board in a municipal school district is directed to set goals for the district’s educational progress and to establish accountability standards used to measure such progress.<sup>303</sup> Apart from that provision, it is the CEO of a municipal school district who is generally in control over low-performing schools. The CEO must “develop, implement, and regularly update a plan to measure student academic performance at each school within the district.”<sup>304</sup> If such measurements indicate that students in particular schools are not achieving or improving at an “acceptable rate,” the CEO is authorized to take corrective action.<sup>305</sup> The corrective actions include reallocation of academic and financial resources, reassignment of staff, redesign of academic program, and deploying additional assistance to students. However, the school board must concur with the CEO’s action.<sup>306</sup>

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<sup>295</sup> U.S. CONST. amend. I; *Zelman*, 536 U.S. at 643.

<sup>296</sup> *Zelman*, 536 U.S. at 643.

<sup>297</sup> *Id.* at 649.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.* at 652.

<sup>300</sup> *Id.* at 654.

<sup>301</sup> *Id.* at 655.

<sup>302</sup> *Id.* at 662-63.

<sup>303</sup> OHIO REV. CODE ANN. § 3311.74(A).

<sup>304</sup> *Id.* § 3311.74(B).

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

The CEO is also required to issue annual reports to CMSD residents. These reports must include: the results of achievement measurements, the nature of any reforms or corrective actions being taken at schools that have failed to achieve at an acceptable rate, descriptions of efforts taken to improve the overall quality or efficiency of the district's operation, a list of the source of all district revenues, and a description of all district expenditures for the prior fiscal year.<sup>307</sup>

## ii. Review of Empirical Research

In order to identify effects, if any, associated with the increased level of mayoral influence in Cleveland Metropolitan School District (CMSD) since 1998, we reviewed high-quality, methodologically sound research reports; journal articles; books; and book chapters published within the last five years that focused on outcomes for students, teachers, and administrators in CMSD and across urban districts generally. While empirical data on outcomes in CMSD are limited, recent research provides evidence for the following general trends in the district.

### a. Governance

The mayor was given control of CMSD in 1998 when the district was returned to local control after a period of state takeover.<sup>308</sup> The state takeover was credited with providing needed stability for a district with very low student achievement that was in financial crisis. The earliest years of mayoral control, under mayors Michael White and Jane Campbell and schools CEO Barbara Byrd-Bennett, were marked by reform and momentum and some increase in student test scores.<sup>309</sup> Despite early promise, this momentum did not persist through a 2003 budget crisis, political tensions between the mayor and the CEO, a financial scandal in the district, and subsequent flattening of student test scores. Byrd-Bennett resigned and Campbell lost her bid for another term in 2005.<sup>310</sup> Cleveland has had three mayors and four CEOs since the transition to mayoral control, each with different levels of commitment and different approaches to the many problems that persist in a district with very high neighborhood poverty.<sup>311</sup> One hundred percent of students in CMSD are eligible for free or reduced price lunch.<sup>312</sup>

In a gaps analysis of CMSD conducted by the American Institutes for Research in 2008, researchers found that CMSD CEO Eugene Sanders and his administration were strategic and had good working relationships with each other, with Mayor Frank Jackson, and with the Board

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<sup>307</sup> *Id.* § 3311.74(C).

<sup>308</sup> Wong, et al., 2007.

<sup>309</sup> Kirst, Michael. "Mayoral Control of Schools: Politics, Trade-offs, and Outcomes." In Joseph Viteritti (Ed.), *When Mayors Take Charge: School Governance in the City*. Washington, D.C.: The Brookings Institution, 2009. Print.

<sup>310</sup> Henig, Jeffery. "Mayoral Control: What we Can and Cannot Learn from Other Cities." In Joseph Viteritti (Ed.), *When Mayors Take Charge: School Governance in the City*. Washington, D.C.: The Brookings Institution, 2009. Print; Kirst, 2009.

<sup>311</sup> Kirst, 2009; Ott, Thomas. "Cleveland Schools Transformation Plan Faced Distractions; CEO Eric Gordon Sees Progress." *Cleveland Live*. Cleveland Live, 14 Aug. 2011. Web. 8 Nov. 2011; Wong et al., 2007.

<sup>312</sup> Ohio Department of Education. "2010-2011 School Year Report Card: Cleveland Metropolitan School District." n.d. Web; Osher, David, Jeffrey Poirier, Kevin Dwyer, Regenia Hicks, Leah Brown, Stephanie Lampron, and Carlos Rodriguez. "Cleveland Metropolitan School District Human Ware Audit: Findings and Recommendations." *American Institute for Research* (2008): 1-170. Web.

of Education.<sup>313</sup> The audit also found weak conditions for learning in many schools, including poor adult supervision and role modeling; a lack of positive and appropriate discipline practices in both families and schools; chronic absenteeism and tardiness by students; relatively low teacher attendance rates compared with other urban districts in Ohio; widespread issues of safety; and a lack of capacity in the form of personnel, training, or systems to deal with these and the many other social-emotional issues faced by students in CMSD.<sup>314</sup> In 2011, resources remain limited, the city continues to experience significant poverty, and challenges related to student attendance, tardiness, and achievement remain.<sup>315</sup>

## **b. Finance**

We identified one study that systematically evaluated the effects of mayoral control on financial resources and spending in school districts across the United States. Using ten years (1993-2003) of financial data for 104 large school districts, researchers found that the ability of the mayor to appoint the majority of the school board, as in Cleveland, was associated with small increases in the relative spending on instruction and instructional support as compared to districts without this form of mayoral control.<sup>316</sup>

While schools CEO Byrd-Bennett, under mayoral control, did initially have access to increased funds from the state as well as local and private sources which she spent on CMSD programs, CMSD has been short of resources and has experienced repeated, deep cuts in programs and personnel since 2003.<sup>317</sup> In October 2011, the school board voted to cut an additional \$13.1 million to comply with state requirements to balance the budget. Cuts included the elimination of pre-school and summer school; the elimination of new textbook purchases; the elimination of busing for high school students; and the elimination of almost all after-school sports; as well as reductions in the number of principals, assistant principals, and security personnel.<sup>318</sup>

## **c. Collective Bargaining**

We did not identify any recent, high-quality research studies that examined changes related to collective bargaining in CMSD.

## **d. Performance**

We identified one study that systematically evaluated the effects of mayoral control on student test scores in reading and mathematics across the United States. Using five years of data (1999-2003), researchers found that the mayor's ability to appoint a majority of the school board,

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<sup>313</sup> Osher et al., 2008.

<sup>314</sup> Osher et al., 2008.

<sup>315</sup> O'Donnell, Patrick. "Cleveland School Board Votes to Cut Preschool, Sports and Busing over Shouts and Boos from Residents and Teachers." *Cleveland Live*. Cleveland Live, 25 Oct. 2011. Web. 15 Nov. 2011; Ott, Thomas. "Cleveland Schools Try to Solve Attendance, Tardiness Problems." *Cleveland Live*. Cleveland Live, 5 Oct. 2010. Web. 8 Nov. 2011; Ott, 2011.

<sup>316</sup> Wong, et al., 2007.

<sup>317</sup> Kirst, 2009; O'Donnell, 2011.

<sup>318</sup> O'Donnell, 2011.

as in Cleveland, was associated with slightly higher relative average student performance on state tests, on average, as compared with districts where the mayor did not have this power.<sup>319</sup>

While 4th and 6th grade test scores and high school graduation rates increased in CMSD between 1998 and 2004, these gains did not continue after cuts in spending.<sup>320</sup> Students in CMSD perform more poorly on national assessments, on average, than students in other large urban districts. In the most recent rounds of national testing, 8% of CMSD 4th graders and 11% of CMSD 8th graders tested “proficient” in reading, 11% of CMSD 4th graders and 10% of CMSD 8th graders tested “proficient” in math, and 4% of CMSD 4th graders and 6% of CMSD 8th graders tested “proficient” in science.<sup>321</sup> All of these scores were lower than the average in other large cities and not statistically different from the average performance of students in CMSD in 2009, 2007 or 2003.<sup>322</sup> While the high school graduation rate for 2009-2010 increased 8% from the previous year, it remains low, at 63%; the on-time four-year high school graduation rate for CMSD is 52%.<sup>323</sup>

## B. Detroit, Michigan

The Detroit Public Schools (DPS) has long suffered from a dramatically decreasing student enrollment, much like the population of the City of Detroit in general,<sup>324</sup> and the after-effects of one of the most notorious racial desegregation cases in history, *Milliken v. Bradley*.<sup>325</sup> In fact, as recently as 2005, Detroit was considered the most segregated area in the United

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<sup>319</sup> Wong et al., 2007.

<sup>320</sup> Kirst; 2009; Williams, Helen. “The Cleveland Literacy System: A Comprehensive Approach to Changing Instructional Practice in the Cleveland Municipal Schools.” *The Aspen Institute* (2005): 1-38. Web.

<sup>321</sup> The most recent NAEP scores available at the district level are from 2011 for reading and mathematics and 2009 for science.

<sup>322</sup> National Center for Education Statistics, *The Nation’s Report Card: Trial Urban District Assessment, (Mathematics, Reading, Science), 2009 and 2011*, <http://nationsreportcard.gov>.

<sup>323</sup> Cleveland Metropolitan School District. “Despite Gains in Attendance, Test Scores, School Ratings and Graduation Rates, CMSD Loses Continuous Improvement Rating.” Web. 18 Aug. 2011; Ohio Department of Education, 2011.

<sup>324</sup> Rich, Wilbur. “Who’s Afraid of a Mayoral Takeover of Detroit Public Schools?.” In Joseph Viteritti (Ed.), *When Mayors Take Charge: School Governance in the City*. Washington, D.C.: The Brookings Institution, 2009. Print.

<sup>325</sup> 418 U.S. 717 (1974). In *Milliken*, the plaintiffs filed a lawsuit against several state and Detroit school district officials, alleging that the DPS was purposefully racially segregated and that the state legislature enacted laws intending to interfere with the DPS’ voluntary desegregation plan. *Id.* at 722-23. The federal district court found that the DPS had created attendance zones that had the “‘natural, probable, foreseeable and actual effect’ of allowing white pupils to escape identifiably Negro schools,” and that the Detroit Board of Education bused black students to predominantly black schools away from closer white schools that had available space. *Id.* at 725-26. As such, the court ordered defendants to implement a desegregation plan that involved not only the City of Detroit, but fifty-three adjacent school districts as well. *Id.* at 733-34. The United States Court of Appeals approved the multi-district desegregation plan, agreeing that a plan limited to the boundaries of Detroit would only “lead directly to a single segregated Detroit school district overwhelmingly black in all of its schools, surrounded by a ring of suburbs and suburban school districts overwhelmingly white . . . .” *Id.* at 739. However, the United States Supreme Court struck down the multiple-district plan and ordered defendants to develop a new desegregation plan, limited to the City of Detroit. The Court ruled that it could not constitutionally require an inter-district remedy when it was only the Detroit schools that had evidence of de jure segregation. *Id.* at 752-53.

States.<sup>326</sup> Over the years, the DPS has experimented with several different programs to reform its struggling schools.

### **i. Mayoral Influence**

The late 1990s push for mayoral control over the DPS came from the former governor of Michigan, John Engler, rather than the mayor of Detroit at the time, Dennis Archer.<sup>327</sup> In fact, Archer was initially reluctant to take over the DPS; however, as public support for the idea grew, his position changed.<sup>328</sup> This led to the state legislature’s passage of the Michigan School Reform Act (MSRA) in 1999. Mayoral control as established by the MSRA was fleeting, lasting only until 2005, as the result of a mandatory voter referendum.

### **a. Governance**

#### **1. Michigan School Reform Act**

The MSRA was set to apply only to qualifying school districts—this meant “districts of the first class,” which are districts with more than 100,000 students enrolled.<sup>329</sup> The legislature denied any intent to target a particular school district with the MSRA; however, at the time of its enactment, the Detroit Public Schools, with 180,000 students, was the only one to qualify as a school district of the first class.<sup>330</sup> The next most populous school district had just 27,000 students.<sup>331</sup> In 2000, the legislature slightly amended the definition of a “qualifying school district” to clarify that *any district* would become a qualifying district if its student enrollment rose above 100,000 at any time while the MSRA was in effect.<sup>332</sup>

The MSRA established “school reform boards” to take over as the new boards of education for school districts of the first class.<sup>333</sup> A school reform board consisted of seven members, with six appointed by the mayor of the city in which the school district was located.<sup>334</sup> For the first five years after the reform board took control, the seventh member was appointed by the state Superintendent of Public Instruction (SPI). After that, all seven members were to be appointed by the mayor.<sup>335</sup> Because the MSRA was only in effect for five years, the mayor of Detroit never gained the authority to appoint the entire board. Members of the reform board appointed by the mayor served staggered terms of two, three, or four years and could be removed

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<sup>326</sup> Fair Housing Center of Grand Rapids, “Detroit Still the Most Racially Segregated Region in America.” *Fair Housing News*, Winter 2005. Web. 16 Dec. 2011.

<sup>327</sup> Rich, 2009.

<sup>328</sup> Rich, 2009.

<sup>329</sup> MICH. COMP. LAWS ANN. § 380.402 (West 2011). Prior to 1996, Michigan state law divided its public school system between primary school districts and school districts of the first through fourth “classes,” which were based on student population. Citizens Research Council of Michigan. “School District Organization in Michigan.” 1990. PDF file. In 1996, the state legislature consolidated the primary and second through fourth class school districts into “general powers school districts” and created “intermediate school districts.” See MICH. COMP. LAWS ANN. §§ 380.11a(1), 380.601.

<sup>330</sup> *Moore v. Detroit School Reform Bd.*, 293 F.3d 352, 354 (6th Cir. 2002).

<sup>331</sup> *Id.*

<sup>332</sup> *Id.* at 356.

<sup>333</sup> MICH. COMP. LAWS ANN. §§ 380.372(1)-(2), 380.371(b).

<sup>334</sup> *Id.* § 380.372(2).

<sup>335</sup> *Id.*

at the mayor's will.<sup>336</sup> No members serving on the elected board that was in place just before the MSRA took effect were eligible to be appointed to the reform board.<sup>337</sup> Instead, all powers and duties of the elected board were suspended, and the elected board served as an advisory board until the terms of its members expired.<sup>338</sup>

The MSRA authorized the reform board to select a Chief Executive Officer (CEO) by two-thirds majority vote. For the first five years after the reform board took control, the majority vote was required to include the vote of the board member appointed by the SPI.<sup>339</sup> The CEO was employed at the will of the reform board.<sup>340</sup> The MSRA authorized the CEO to immediately take over all powers and duties, and to accede to all the rights, duties, and obligations of the prior elected school board. This included, but was not limited to: authority over the expenditure of all school district funds, rights and obligations under collective bargaining agreements and employment contracts entered into by the elected board, rights to prosecute and defend litigation, obligations under any judgments against the elected school board, rights and obligations under any laws or rules, the authority to delegate any powers and duties, and the power to terminate any contract (other than a collective bargaining agreement) previously entered into by the elected school board.<sup>341</sup> The CEO was also required to appoint a chief financial officer, chief academic officer, chief operations officer, and chief purchasing officer. These appointments required the approval of the reform board; however, each officer served at the will of the CEO.<sup>342</sup> Although the CEO was given great powers, the MSRA provided a check over the CEO—the school reform board was directed to provide the mayor an annual evaluation of the CEO's performance and to make the evaluation available to the public. The board was authorized to hire an independent auditor to conduct the evaluation and financial audit of the CEO's activities.<sup>343</sup>

The MSRA authorized the reform board to establish "community assistance teams," which would "work with the school reform board to implement a cohesive, full service community school program addressing the needs and concerns of the qualifying school district's population."<sup>344</sup> The reform board was permitted to delegate to the community assistance teams the authority to "devise and implement family, community, cultural, and recreational activities to assure that the academic mission of the schools is successful."<sup>345</sup> The community assistance teams were themselves empowered to develop parental involvement activities designed to promote parenting education, parent and family involvement in education, and adult and family literacy.<sup>346</sup> The MSRA gave no further details on how these teams were to be established or how their members would be selected.

The MSRA was originally intended only to be a five-year pilot program. The legislature required a citywide referendum to occur in the next November general election occurring five

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<sup>336</sup> *Id.* § 380.372(2)(b)(4).

<sup>337</sup> *Id.* § 380.372(2)(b)(3).

<sup>338</sup> *Id.* § 380.373(1).

<sup>339</sup> *Id.* § 380.374(1).

<sup>340</sup> *Id.*

<sup>341</sup> *Id.* § 380.373(4)-(5).

<sup>342</sup> *Id.* § 380.374(2).

<sup>343</sup> *Id.* § 380.420(11)(d).

<sup>344</sup> *Id.* § 380.373(9).

<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

years after the school reform board was first appointed.<sup>347</sup> The referendum asked voters whether the DPS should be governed by a nine-member elected school board together with a CEO, or to create an eleven-member elected board with no CEO.<sup>348</sup> Thus, either way, the DPS would return to an elected board; the only question was whether the mayor would retain his or her influence over the district through appointment of a CEO. The CEO would be chosen by the mayor, but the board would have veto power by majority vote over the mayor's selection. The CEO would be removable only for good cause by the mayor or by vote of the board with the mayor's approval.<sup>349</sup> Regardless of the outcome of the referendum, the reform board would not expire until the next January occurring at least one year after the date the referendum took place, providing an approximate fourteen-month period before the new governance structure would be implemented.<sup>350</sup>

On November 2, 2004, voters overwhelmingly struck down mayoral control, approving the eleven-member elected board without a CEO. Thus, DPS' experiment with mayoral control officially ended on January 1, 2006, when the elected board took the place of the reform board.<sup>351</sup> Currently, four members of the board are elected at large and the remaining seven are elected from seven voting districts.<sup>352</sup> Instead of a CEO, the school board of the DPS now appoints a superintendent for a contract term of up to six years.<sup>353</sup> However, since 2008, the powers of the school board and superintendent have been limited and suspended in favor of an emergency manager appointed by the governor, as explained below in section 2.

## **2. *Moore v. Detroit School Reform Board***

The MSRA and the mayor's new reform board was instantly unpopular among DPS teachers, serving as motivation, along with other factors, to go on strike in September 1999, just one day before the schools were scheduled to re-open for the school year.<sup>354</sup> Furthermore, a lawsuit was filed in federal court challenging the constitutionality of the MSRA later that same month. The resulting litigation, *Moore v. Detroit School Reform Board*, ultimately made its way to the Sixth Circuit, the same court that issued the opinion in Cleveland's *Mixon v. Ohio*.<sup>355</sup>

Five citizens of Detroit and ten organizations representing students, teachers, and other city residents brought claims challenging the validity of the MSRA based on the state constitution, the Voting Rights Act, and the Fourteenth and Fifteen Amendments to the United States Constitution.<sup>356</sup> The court first addressed the plaintiffs' argument that the MSRA violated Article IV, section 29 of the Michigan Constitution, which prohibits the legislature from enacting any "local or special act in any case where a general act can be made applicable" and is similar

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<sup>347</sup> *Id.* § 380.410(1).

<sup>348</sup> *Id.* § 380.410(2).

<sup>349</sup> *Id.* § 380.420.

<sup>350</sup> *Id.* § 380.375.

<sup>351</sup> See H.R. 92-4508, Reg. Sess., at 2 (Mich. 2004); Bellant, Russ. "Robert Bobb and the Failure of Public Act 72: A Case Study." 2011. PDF file.

<sup>352</sup> MICH. COMP. LAWS ANN. § 380.403a.

<sup>353</sup> *Id.* § 380.471a(1)-(2).

<sup>354</sup> Meredith, Robyn. "On Eve of New School Year, Detroit Teachers Vote to Strike." *NYTimes.com*. The New York Times, 31 Aug. 1999. Web. 16 Dec. 2011.

<sup>355</sup> 293 F.3d 352 (6th Cir. 2002); *Mixon v. Ohio*, 193 F.3d 389 (6th Cir. 1999).

<sup>356</sup> *Moore*, 293 F.3d at 354.



to the Uniformity Clause of the Ohio Constitution discussed in *Mixon*.<sup>357</sup> The plaintiffs argued that the MSRA was a local act, due to its limited application to the Detroit Public Schools, impermissibly passed by the state legislature. The Sixth Circuit struck down this argument—the MSRA was not a local act because it used population size as the determining factor for applicability, and there was a reasonable relationship between the 100,000 student standard and the purpose of the MSRA to address the unique challenges inherent in large school districts.<sup>358</sup> The court found that the legislature had a valid basis for its belief that an appointed school board might be more capable of addressing the problems of large school districts, similar to the findings in *Mixon*.<sup>359</sup>

The *Moore* plaintiffs also brought a challenge to the MSRA based on section 2 of the Voting Rights Act, arguing that the MSRA had a discriminatory effect by denying the citizens of Detroit the right to vote for the DPS school board on the basis of race (the Detroit population is largely African-American).<sup>360</sup> The Sixth Circuit addressed this argument using the same reasoning it had used in *Mixon*, discussing *Mixon* at length.<sup>361</sup> The court first discussed *Reno v. Bossier Parish School Board*, a United States Supreme Court case decided after *Mixon*. The plaintiffs argued that *Bossier Parish* overruled *Mixon* by suggesting that changing from an elective to appointed system *could* be challenged under the VRA.<sup>362</sup> However, the *Moore* court found that *Bossier Parish* was distinguishable from *Mixon*. Because *Mixon* was still good law and its facts were substantially similar to the facts of *Moore*, the court found that the MSRA did not violate the Voting Rights Act.<sup>363</sup> In both cases, the school boards had been changed from elected offices to appointed offices, which was not subject to VRA attack.<sup>364</sup>

Lastly, the court addressed the plaintiffs' claims brought under the Fourteenth and Fifteenth Amendments to the U.S. Constitution, arguing that the MSRA constituted racial discrimination and deprived plaintiffs of equal protection under the laws by taking away their opportunity to vote for the DPS school board members.<sup>365</sup> The court acknowledged that the MSRA had a substantial impact on African-American citizens, but found that the state legislature did not have a discriminatory purpose in enacting the MSRA. Thus, there was no Fifteenth Amendment violation.<sup>366</sup> Regarding the equal protection argument, because no fundamental rights were involved, the MSRA was only required to withstand rational basis review. The Sixth Circuit, as it had similarly found in *Mixon*, found that the MSRA was rationally related to a legitimate government interest. Based on the size of the DPS alone, the legislature had sufficient justification for believing that a “different approach to governance” was necessary.<sup>367</sup>

Therefore, based on reasoning similar to that displayed in *Mixon*, the Sixth Circuit upheld the entirety of the MSRA. The plaintiffs appealed to the United States Supreme Court, which

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<sup>357</sup> *Id.* at 358; *Mixon*, 193 F.3d at 408.

<sup>358</sup> *Moore*, 293 F.3d at 360-61.

<sup>359</sup> *Id.* at 361; *Mixon*, 193 F.3d at 403.

<sup>360</sup> *Moore*, 293 F.3d at 363.

<sup>361</sup> *Id.* at 363-68.

<sup>362</sup> *Id.* at 364-67.

<sup>363</sup> *Id.* at 365-67.

<sup>364</sup> *Id.* at 367-68; *Mixon*, 193 F.3d at 406-08.

<sup>365</sup> *Moore*, 293 F.3d at 367.

<sup>366</sup> *Id.* at 370.

<sup>367</sup> *Id.* at 371; *see also* *Mixon*, 193 F.3d at 406.

refused to review the Sixth Circuit's decision.<sup>368</sup> One important difference between *Moore* and *Mixon*, however, is that the *Moore* plaintiffs attempted to argue that the MSRA also violated the fundamental right of parents to direct the education of their children.<sup>369</sup> Because the plaintiffs raised this argument for the first time on appeal, the Sixth Circuit refused to discuss it.<sup>370</sup> This claim will be important to consider for the possibility of litigation in California.<sup>371</sup>

## **b. Finance**

The Michigan Constitution directs the legislature to “maintain and support a system of free public elementary and secondary schools as defined by law.”<sup>372</sup> To that end, the constitution also provides for the establishment of a state school aid fund to be used exclusively to aid school districts, higher education, and school employees' retirement systems.<sup>373</sup> Furthermore, the state is authorized to borrow funds for the purpose of making loans to school districts.<sup>374</sup>

### **1. Budget and Finance Before and During the MSRA**

The budgeting process for first class school districts is governed by Michigan state law known as the Property Tax Limitation Act, which was in place well before the MSRA and applies to all “local units” throughout the state.<sup>375</sup> Local units are “divisions, districts, and organizations of government that are or may be established by law and that have the power to levy taxes against property located within their respective areas,” including first-class school districts.<sup>376</sup> Each local unit must prepare an annual budget that contains an itemized statement of proposed expenditures and estimated revenues for all its departments and activities, covering the expenditures of the next fiscal year that will be met from the next tax levy.<sup>377</sup> The local unit must also prepare a statement of the total assessed valuation of property located within its area.<sup>378</sup> Each local unit must file its budget and statements with the county tax allocation

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<sup>368</sup> *Moore v. Detroit School Reform Bd.*, 537 U.S. 1226 (2003) (mem.).

<sup>369</sup> *Moore*, 293 F.3d at 371.

<sup>370</sup> *Id.*

<sup>371</sup> Parents have a constitutionally-protected liberty interest to direct the education of their children. *E.g.*, *Pierce v. Society of Sisters*, 268 U.S. 510, 534-45 (1925). Historically, courts applied a rational basis review to this right, meaning that a state could restrict a parent's right so long as the restriction was rationally related to a proper government interest. *See Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923). However, in *Jonathon L. v. Superior Court*, the California Court of Appeal noted that the proper standard of review to apply to a parent's right to direct the education of their children has become unclear. 81 Cal. Rptr. 3d 571, 592-93 (Cal. Ct. App. 2008). Although the court did not declare the proper standard to apply in every case, it chose to apply the strict scrutiny standard, which requires the state to prove that the interference with parental rights is *narrowly-tailored* to serve a *compelling* government interest. *Id.* at 593. It is not clear whether *Jonathon L.*, a dependency court case which questioned the right of *unfit* parents to homeschool their children, would similarly apply to a claim based on a mayor-controlled school district. At the least, *Jonathon L.* serves as an example that strict scrutiny could possibly be applied to a parent's claim that their right to control the education of their children has been infringed.

<sup>372</sup> MICH. CONST. art. VIII, § 2.

<sup>373</sup> *Id.* art. IX, § 11.

<sup>374</sup> *Id.* § 16.

<sup>375</sup> MICH. COMP. LAWS ANN. §§ 211.201-211.217a, 380.1218(2) (West 2011).

<sup>376</sup> *Id.* § 211.202(a).

<sup>377</sup> *Id.* § 211.209.

<sup>378</sup> *Id.*

board.<sup>379</sup> The county tax allocation board examines the budgets to determine the tax rates that are required pursuant to the proposed budget. The county board makes a preliminary order approving a maximum tax rate for each local unit and provides written notice of the order to the local unit. Next, the county board must hold a final hearing on the maximum tax rate, at which officers of the local unit may object to the tax rate and request a redetermination.<sup>380</sup> Within five days of the hearing, the county board makes a final order approving a maximum tax rate for the local unit and provides written notice of the order.<sup>381</sup>

State law directs school districts generally to follow the budgeting process of the Property Tax Limitation Act as outlined above.<sup>382</sup> As applied to first class school districts, the MSRA changed who within the district would handle the budget and finance, giving most control to the new CEO. This was because the CEO took over all powers and duties of the former elected school board, including the “authority over the expenditure of all school district funds.”<sup>383</sup> The MSRA directed the CEO to develop financial goals and strategies that would be used to accomplish those goals.<sup>384</sup> The CEO was responsible for submitting an annual budget and procurement goals to the school board for its approval.<sup>385</sup> Because voters rejected continued mayoral control in the 2004 referendum, state law provides that the budgeting process for first class school districts is handled solely by the board of education.<sup>386</sup>

## 2. Budget and Finance Under the Emergency Manager Law

However, since 2008, the finance and budget of the Detroit Public Schools has been under state control, through an emergency financial manager.<sup>387</sup> The Michigan Legislature originally enacted the emergency manager law in 1990 and revised it substantially effective March 2011.<sup>388</sup> The law, officially entitled the Local Government and School District Fiscal Accountability Act, but otherwise known as the “emergency manager law,” was enacted because of legislative findings that the “health, safety, and welfare of the citizens of this state would be materially and adversely affected by the insolvency of local governments . . . .”<sup>389</sup> As applied to school districts, the emergency manager law allows the SPI to conduct a preliminary review of

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<sup>379</sup> *Id.* § 211.210.

<sup>380</sup> *Id.* § 211.215. Every county has its own county tax allocation board. The board consists of: the county treasurer, the chairperson of board of county auditors, the intermediate school district superintendent, a resident of a municipality in the county selected by a county judge, a member not connected with or employed by any local or county unit who is selected by the board of county commissioners, and a township supervisor who is selected by a majority of the township supervisors in the county. *Id.* § 211.205.

<sup>381</sup> *Id.* § 211.216.

<sup>382</sup> *Id.* § 380.1218(2).

<sup>383</sup> *Id.* § 380.373(4)(a).

<sup>384</sup> *Id.* § 380.373(7).

<sup>385</sup> *Id.* § 380.420(11)(b).

<sup>386</sup> *See id.* §§ 380.432, 380.483a(j).

<sup>387</sup> “Office of the Emergency Manager.” *Detroitk12.org*. Detroit Public Schools, n.d. Web. 31 Oct. 2011; Ackley, Martin. “Detroit Schools in Financial Emergency; Financial Manager to be Appointed.” *Michigan.gov*. Michigan Department of Education, 8 Dec. 2008. Web. 31 Oct. 2011. The current emergency manager is Roy S. Roberts.

<sup>388</sup> *See* MICH. COMP. LAWS ANN. §§ 141.1501-141.1531; “Frequently Asked Questions Regarding Public Act 72 of 1990, Local Government Fiscal Responsibility Act, and the Appointment of Emergency Financial Managers.” *MI.gov*. State of Michigan, n.d. Web. 31 Oct. 2011.

<sup>389</sup> MICH. COMP. LAWS ANN. § 141.1503.

the school district to determine whether a financial problem exists, when any one of eighteen conditions occurs.<sup>390</sup> Some situations include: a written request by the school board, district superintendent, or creditor of the school district; a petition setting forth specific allegations of financial distress signed by a certain number of registered voters in the school district's jurisdiction; or a resolution from the senate or house of representatives requesting a review.<sup>391</sup> After giving notice to the school district, the SPI conducts a preliminary review. If a finding of "probable financial stress" is made, the governor appoints a review team for the school district. The review team consists of: the state treasurer, the SPI, the director of the department of technology, management, and budget, and nominees of both the senate majority leader and speaker of the house of representatives.<sup>392</sup> After conducting its review, the review team must reach a conclusion that the school district is not in financial stress, is in mild financial stress, is in severe financial stress, or that a financial emergency exists.<sup>393</sup> The review team sends its findings to the governor and the SPI. The governor will then make the final determination of the school district's status. If the governor determines that a financial emergency exists and that there is no satisfactory plan in place to resolve the emergency, the governor must provide a detailed, written notification to the district board of education and district superintendent explaining the factual findings underlying the determination.<sup>394</sup> The school board or superintendent may request a hearing and may also appeal the governor's determination in limited circumstances. Ultimately, the governor will declare the school district to be in receivership and appoint an emergency manager.<sup>395</sup>

Once appointed, the emergency manager has vast powers over the school district. Generally, the emergency manager is directed to "act for and in the place and stead of the governing body and the [district superintendent]" of the school district.<sup>396</sup> The emergency manager has broad powers to "rectify the financial emergency and to assure the fiscal accountability" of the school district. The emergency manager law prohibits the board of education and superintendent from exercising *any of their powers* during receivership unless specifically authorized in writing by the emergency manager.<sup>397</sup> The emergency manager must issue orders that he or she considers necessary to accomplish the purposes of the emergency manager law, which includes orders for the implementation of a financial and operating plan and an academic and educational plan for school districts. In regards to finance, the emergency manager is authorized to: analyze the factors contributing to the financial emergency and initiate steps to correct the condition; amend, revise, approve, or disapprove the school district's budget; receive and disburse on behalf of the school district all federal, state, and local funds; require a plan for paying all outstanding obligations of the school district; and examine all records and books.<sup>398</sup> As applied to school districts only, the emergency manager may enter into contracts on the district's behalf, seek approval from the SPI for a reduced class schedule, sell assets to

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<sup>390</sup> *Id.* §§ 141.1503, 141.1505(k)(ii).

<sup>391</sup> *Id.* § 141.1512(1)(a)-(r).

<sup>392</sup> *Id.* § 141.1512(3).

<sup>393</sup> *Id.* § 141.1513(4).

<sup>394</sup> *Id.* § 141.1515(2).

<sup>395</sup> *Id.* § 141.1515(3)-(4). The emergency manager must be an individual who has a minimum of five years' experience and demonstrable expertise in business, financial, or local or state budgetary matters. The emergency manager serves at the pleasure of the governor. *Id.* § 141.1515(5).

<sup>396</sup> *Id.* § 141.1515(4).

<sup>397</sup> *Id.*

<sup>398</sup> *Id.* § 141.1519(1).

meet past or current obligations, and “exercise . . . all other authority and responsibilities affecting the school district that are prescribed by law to the school board and superintendent of the school district.”<sup>399</sup>

The receivership ends when the emergency manger declares the financial emergency to be rectified in one of his or her quarterly reports to the state treasurer. The emergency manager’s declaration is subject to the concurrence of both the state treasurer and SPI.<sup>400</sup> In addition to the DPS, three cities in Michigan are currently under the control of an emergency manager. The recent changes to the emergency manager law are already facing criticism and an attempt to get a voter referendum repealing the law on the February 2012 ballot. Critics of the law argue that the emergency managers are given too much power and that citizens are being deprived of the right to choose for local officials.<sup>401</sup>

### **c. Collective Bargaining**

Like the finance category discussed above, there are three different sets of state law that govern collective bargaining between the DPS and its employees: the Public Employment Relations Act, the MSRA, and the emergency manager law.

#### **1. Collective Bargaining Under the Public Employment Relations Act and MSRA**

Article IV, section 48 of the Michigan Constitution authorizes the legislature to “enact laws providing for the resolution of disputes concerning public employees . . . .”<sup>402</sup> The Michigan Legislature has so acted, passing the Public Employment Relations Act (PERA) in 1947.<sup>403</sup> The PERA gives public employees the right to “organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice.”<sup>404</sup>

Before the MSRA was enacted, the PERA defined a “public school employer” as the board of a school district.<sup>405</sup> Thus, prior to 1999, the collective bargaining rights and obligations fell on the board of education of the Detroit Public Schools. Under the PERA, a public employer is required to bargain collectively with the representatives of its employees.<sup>406</sup> The duty to bargain collectively requires both the employer and employee representative to “meet at reasonable times and confer in good faith” regarding the mandatory topics of bargaining, or to “negotiate an agreement, or any question arising under the agreement, and to execute a written contract, ordinance, or resolution incorporating any agreement reached if requested by either party . . . .”<sup>407</sup> Mandatory topics of bargaining are wages, hours, and other terms and conditions

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<sup>399</sup> *Id.* § 141.1520.

<sup>400</sup> *Id.* § 141.1524.

<sup>401</sup> Pluta, Rick. “Opponents of Michigan’s Emergency Manager Law Hope to Collect Enough Signatures for Challenge.” *MichiganRadio.org*. Michigan Radio, 23 Sept. 2011. Web. 31 Oct. 2011.

<sup>402</sup> MICH. CONST. art. IV, § 48.

<sup>403</sup> *See* MICH. COMP. LAWS ANN. §§ 423.201-423.217.

<sup>404</sup> *Id.* § 423.309.

<sup>405</sup> *Id.* § 423.201(1)(h).

<sup>406</sup> *Id.* §§ 423.201(1), 423.215.

<sup>407</sup> *Id.* § 423.215(1).

of employment.<sup>408</sup> The Supreme Court of Michigan has declared that the specific mandatory bargaining topics must be determined on a case by case basis.<sup>409</sup> However, because employees are prohibited from striking, the range of mandatory bargaining topics is to be construed broadly.<sup>410</sup>

The PERA also sets forth a list of sixteen restricted topics of bargaining that are specific to public schools.<sup>411</sup> Notable topics restricted from bargaining include: establishment of the first day of the school year and amount of pupil contact time required to receive full state school aid; the decision of whether to contract with a third party for non-instructional services; and decisions concerning the use of experimental or pilot programs and the staffing of such programs. In 2011, the state legislature further restricted the rights of school employees to bargain over, among other subjects: any decision regarding the placement of teachers or the impact of that decision on an employee or bargaining unit; decisions about the development, content, standards, procedures, adoption, and implementation of policies regarding personnel decisions such as reductions in force, elimination of positions, the employer's decisions made pursuant to such policies, and the impact of such decisions; and decisions about the employer's performance evaluation system and employee discipline procedures.<sup>412</sup> Any other topic that is not restricted or mandatory is permissive; decisions regarding permissive subjects may be changed unilaterally without negotiating.<sup>413</sup>

In 1999, the MSRA changed who is in charge with regards to collective bargaining between school districts of the first class and their employees. The MSRA allowed the CEO to take over all powers and duties of the former elected school board, including "rights and obligations under collective bargaining agreements and employment contracts."<sup>414</sup> Accordingly, the PERA was revised to reflect these changes, including the "[CEO] of a school district in which a school reform board is in place" in the definition of public school employer. Thus, during mayoral control in the DPS, it was the CEO who was required to bargain with DPS employees. Furthermore, the MSRA declared that all employees not covered by a collective bargaining agreement were employed at will by the CEO.<sup>415</sup>

The PERA includes provisions that apply exclusively and specifically to public school employers. For example, although the PERA prohibits all public employees from striking, only public school employers are restricted from instituting a lockout.<sup>416</sup> The PERA authorizes fines for employees, bargaining representatives, school districts, and individual school board members who violate the striking or lockout prohibitions.<sup>417</sup> The PERA also provides additional mediation procedures if a public school employer and employee representative reach an impasse and specifically prohibits employee representatives or education associations from in any way

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<sup>408</sup> *Id.*

<sup>409</sup> *Southfield Police Officers Ass'n v. City of Southfield*, 445 N.W.2d 98, 102 (Mich. 1989).

<sup>410</sup> *See, e.g., Bay City Educ. Ass'n v. Bay City Public Schools*, 422 N.W.2d 504, 506 (Mich. 1988).

<sup>411</sup> MICH. COMP. LAWS ANN. § 423.215(3).

<sup>412</sup> *See id.*

<sup>413</sup> *See, e.g., Grand Rapids Cmty. Coll. Faculty Ass'n v. Grand Rapids Cmty. Coll.*, 609 N.W.2d 835, 839 (Mich. Ct. App. 2000).

<sup>414</sup> MICH. COMP. LAWS ANN. § 380.373(4)(b).

<sup>415</sup> *Id.* § 380.373(6).

<sup>416</sup> *Id.* § 423.202.

<sup>417</sup> *Id.* § 423.202a(4)-(5).

“prohibit[ing] or prevent[ing] the bargaining unit from entering into, ratifying, or executing a collective bargaining agreement.”<sup>418</sup>

## **2. Collective Bargaining Under the Emergency Manager Law**

As mentioned above, the DPS is currently under control of an emergency manager. In addition to finance, the emergency manager also exercises a strong influence over collective bargaining in the DPS. With regards to employment, the emergency manager is authorized to approve or disapprove the creation of any new position or the filling of any vacancy in a position by any appointing authority.<sup>419</sup> In terms of collective bargaining specifically, the emergency manager has the power to reject, modify, or terminate one or more terms or conditions of an existing contract.<sup>420</sup> However, a certain procedure must be followed before the emergency manager may do so. First, the emergency manager must meet and confer with the bargaining representative. The emergency manager must find, in his or her sole discretion, that “a prompt and satisfactory resolution is unlikely to be obtained” without the manager’s action.<sup>421</sup> The emergency manager may then reject, modify, or terminate provisions of an existing agreement if the emergency manager and the state treasurer determine that all of the following conditions exist: (1) the financial emergency in the DPS has created a circumstance in which it is reasonable and necessary for the state to intercede to serve a significant and legitimate public purpose; (2) the changes to the provisions of an existing collective bargaining contract are reasonable and necessary to deal with a broad, generalized economic problem; (3) the changes to the provisions of an existing collective bargaining contract are directly related to and designed to address the financial emergency for the benefit of the public as a whole; and (4) the changes to the provisions of an existing collective bargaining contract are temporary and do not target a specific class of employees.<sup>422</sup>

The PERA was also revised in 2011 to reflect that every collective bargaining contract entered into after March 16, 2011 must include a provision authorizing an emergency manager to act as outlined above.<sup>423</sup> To provide an illustration of the extent of an emergency manager’s powers over collective bargaining and employees, current DPS emergency manager Roy S. Roberts altered the contract with the Detroit Federation of Teachers, although it was set to be in effect through June 2013, by imposing a ten percent pay cut and twenty percent mandatory employee premium contribution for medical and dental insurance, discontinuing step increases in pay and payouts of unused sick days, eliminating compensation for teachers with large classes, and discontinuing a longevity bonus.<sup>424</sup>

### **d. Low-Performing Schools**

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<sup>418</sup> *Id.* § 423.217(1).

<sup>419</sup> *Id.* § 141.1519(1)(g).

<sup>420</sup> *Id.*

<sup>421</sup> *Id.* § 141.1519(1)(k).

<sup>422</sup> *See id.*

<sup>423</sup> *Id.* § 423.215(7).

<sup>424</sup> Waldman, Anneline. “Teacher Unions Fight \$81 Million Pay Cuts With Re[s]training Order & Injunction.” *Thejobmouse.com*. The Job Mouse LLC, 8 Aug. 2011. Web. 31 Oct. 2011.

To improve school performance, the MSRA created the school district accountability board within the state department of education and required the CEO to draft and submit school improvement plans.<sup>425</sup> The school district accountability board was comprised of the SPI, the state treasurer, the state budget director, and two members of the general public appointed by the governor. The school district accountability board was directed to receive and review each qualifying school district's improvement plan, monitor the progress being made by the school reform board in achieving goals and benchmarks identified in the improvement plan, and make recommendations to the governor for additional resources for the qualifying school district. The accountability board was required to conduct all of its business at public meetings.<sup>426</sup>

The CEO of a qualifying district was required, with the approval of the school reform board, to submit the initial school improvement plan to the school district accountability board within ninety days of taking office.<sup>427</sup> The school improvement plan was required to include "detailed academic, financial, capital, and operational goals and benchmarks for improvement and a description of strategies to be used to accomplish those goals and benchmarks."<sup>428</sup> After the initial improvement plan, the CEO was required to submit such plans "at least annually."<sup>429</sup> The annual reports were to be submitted to the mayor, governor, school district accountability board, and legislature. The annual report was required to include at least: a summary of initiatives that had been implemented to improve school quality; measurements that could be useful in determining improvements in school quality, such as standardized test scores, dropout rates, daily attendance figures, and enrollment figures; and a description of long-term performance goals.<sup>430</sup> Additionally, the CEO was required to submit monthly reports to the school board and make the monthly reports available to the community. The monthly reports included summaries of the initiatives that had been implemented to improve school quality, daily attendance figures, a description of steps taken to implement the CEO's school district improvement plan, a description of the progress made toward achieving the goals and benchmarks in the district improvement plan, a description of progress made toward achieving the long-term goals identified in the annual report, and copies of all completed financial audits authorized by the school district.<sup>431</sup>

As the terms of the MSRA are no longer effective, school accountability and performance in the DPS is now governed by state law that applies to all school districts throughout the state. Michigan's system for monitoring schools is based on the federal "Race to the Top" program.<sup>432</sup> Every year, the state Superintendent of Public Instruction must publish a list identifying the public schools that are among the lowest achieving five percent of schools in the state, based on the formulae used in the Race to the Top program.<sup>433</sup> The SPI places each of the lowest

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<sup>425</sup> MICH. COMP. LAWS ANN. §§ 380.373(7), 380.376.

<sup>426</sup> *Id.* § 380.376(3)-(5).

<sup>427</sup> *Id.* § 380.373(7).

<sup>428</sup> *Id.*

<sup>429</sup> *Id.*

<sup>430</sup> *Id.* § 380.373(8).

<sup>431</sup> *Id.* § 380.420(10).

<sup>432</sup> *See* American Recovery and Reinvestment Act of 2009, div. A, tit. XIV, 123 Stat. 279; MICH. COMP. LAWS ANN. § 380.1280c.

<sup>433</sup> MICH. COMP. LAWS ANN. §§ 380.1280c(1), (15).



achieving schools under the supervision of the state school reform/redesign officer.<sup>434</sup> Once a school is placed on the list, the school board operating the school must develop, with input from the teacher bargaining unit and district superintendent, a “redesign plan” to submit to the reform/redesign officer. The plan must set forth one out of four school intervention models that are provided for in the Race to the Top program: turnaround, restart, school closure, or transformation.<sup>435</sup>

In sum, low-performing schools in Michigan are ultimately subject to state takeover. If the school reform/redesign officer does not approve the redesign plan or determines that the redesign plan is not achieving satisfactory results, the reform/redesign officer places the school in a separate “state school reform/redesign school district.”<sup>436</sup> The state school reform/redesign school district is its own school district, a body corporate, and a governmental agency, and is subject to the leadership and general supervision of the state board of education. The state school reform/redesign officer acts as the superintendent of the reform/redesign district and possesses all powers and duties that would otherwise apply to the school board that previously operated the school.<sup>437</sup>

However, a school located in a district in which an emergency manager is in place may not be placed under the supervision of the state school reform/redesign officer.<sup>438</sup> Therefore, schools in the DPS are not currently subject to the school reform/redesign program and instead remain under control of the emergency manager.

## **ii. Review of Empirical Research**

In order to identify effects, if any, associated with the relatively low level of mayoral influence in Detroit Public Schools (DPS) since 2005, we reviewed high-quality, methodologically sound research reports; journal articles; books; and book chapters published within the last five years that focused on outcomes for students, teachers, and administrators in DPS and across urban districts generally. While empirical data on outcomes in DPS are limited, recent research provides evidence for the following general trends in the district.

### **a. Governance**

DPS returned to an elected school board after voters rejected a continuation of mayoral control in November of 2005. The school district ended the period of mayoral control \$200 million in debt.<sup>439</sup> DPS has a history of severe budget problems and issues related to financial mismanagement and corruption, and is currently serving under a state-appointed emergency financial manager.<sup>440</sup> A comprehensive analysis of DPS by the Council of the Great City Schools in 2008 found a lack of leadership, vision, communication, and long-term and strategic

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<sup>434</sup> *Id.* § 380.1280c(2). The state school reform/redesign officer is directly responsible to and is hired by the SPI “on the basis of his or her competence and experience in educational reform and redesign.” *Id.* §§ 380.1280c(2), (9).

<sup>435</sup> *Id.* § 380.1280c(2).

<sup>436</sup> *Id.* § 380.1280c(6).

<sup>437</sup> *Id.*

<sup>438</sup> *Id.* § 380.1280c(16).

<sup>439</sup> Aarons, Dakarai. “State, District Leaders Press School Transformations.” *Education Week*. Web. 17 March 2011.

<sup>440</sup> Aarons, Dakarai. “Decline and Fall: Crisis Financial Manager Tries to Fix Detroit Schools' Budget.” *Education Week* 28.37 (2009): 24-27. Print; Zehr, Mary, and Nirvi Shah, “Detroit Plans to Turn 41 Schools Over to Outside Operators.” *Education Week* 30.26 (2011): 1-6. Print.

planning, and as well as poor moral, distrust, and tension across DPS departments. The analysis also identified a lack of consistency and lack of guidelines for instructional practice; a near absence of quality teacher professional development; and significant disciplinary problems, poor performance, and high drop-out rates among students in DPS.<sup>441</sup> Between 1998 and 2011, DPS lost more than 60% of its students, reducing from approximately 175,000 students in 1998 to approximately 66,000 in 2011.<sup>442</sup> More than 50,000 students currently attend charter schools in Detroit and its suburbs.<sup>443</sup>

## **b. Finance**

We identified one study that systematically evaluated the effects of mayoral control on financial resources and spending in school districts across the United States. Using ten years (1993-2003) of financial data for 104 large school districts, researchers found slightly higher levels of relative spending on instruction and instructional support by mayors with the ability to appoint the majority of the school board, as was the case in Detroit between 1999 and 2005, as compared to districts without this form of mayoral control.<sup>444</sup> Since 2005, Detroit has had an elected school board.

Despite this finding, the analysis by the Council of the Great City Schools, mentioned earlier, found that DPS spent a larger percentage of its resources on operations and school-site administration and a smaller percentage of its resources on instruction and special education costs than other large urban districts during the last year of mayoral control. DPS had more administrators and instructional and school support staff but fewer teachers than the average large urban district in 2005-2006.<sup>445</sup> The district overspent its budget by tens of millions of dollars between 2002 and 2009, partially because of unsystematic financial practices, and partially because the district did not address declining enrollment with commensurate reductions in schools or staffing.<sup>446</sup> Despite financial oversight from the state, the district is currently operating with a \$327 million deficit.<sup>447</sup>

## **c. Collective Bargaining**

We did not identify any recent, high-quality research studies that examined changes related to collective bargaining in DPS.

## **d. Performance**

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<sup>441</sup> Council of the Great City Schools. "Reforming and Improving the Detroit Public Schools: Report of the Strategic Support Teams of the Council of the Great City Schools." *Council of the Great City Schools* 2008: Print.

<sup>442</sup> Chambers, Jennifer. "DPS Plans to Cut 1,500 teachers." *The Detroit News*. The Detroit News, 20 Sept. 2011 Web. 8 Nov. 2011; Gawlik, Marytza, C. Philip Kearney, Michael Addonizio, and Frances LaPlante-Sosnowsky. "Teacher Quality in Michigan: A School-level Analysis of the Detroit Metropolitan Region." *Education and Urban Society* (2010):1-36. Print.

<sup>443</sup> Gulosino, Charisse, and Christopher Lubienski. "School's Strategic Responses to Competition in Segregated Urban Areas: Patterns in School Locations in Metropolitan Detroit." *Education Policy Analysis Archives*, 19.13 (2011):1-29. Print.

<sup>444</sup> Wong, et al., 2007.

<sup>445</sup> Council of the Great City Schools, 2008.

<sup>446</sup> Council of the Great City Schools, 2008; Aarons, 2009.

<sup>447</sup> Chambers, 2011.

We identified one study that systematically evaluated the effects of mayoral control on student test scores in reading and mathematics across the United States. Using five years of data (1999-2003), researchers found that the mayor's ability to appoint a majority of the school board without oversight, (as was the case in Detroit between 1999 and 2005) was associated with lower student achievement on state tests, on average, as compared with districts where the mayor did not have this power (as in Detroit currently, where the mayor does not appoint any members of the school board).<sup>448</sup>

The analysis by the Council of the Great City Schools, mentioned earlier, found that while students in DPS performed much more poorly than their peers on the Michigan state achievement test (MEAP), as would be expected given differences in student demographics, students in DPS improved their math scores to a greater degree than their peers across the state during 2005-2007, just after mayoral control. The gap between the performance of students across the state and DPS students increased, however, across most other content areas at most grade levels during this time. Performance gaps were greater as grade level increased.<sup>449</sup>

In the most recent rounds of national testing, students in DPS performed more poorly than students in any other large urban district. Seven percent of DPS 4<sup>th</sup> and 8<sup>th</sup> graders tested "proficient" in reading, 3% of DPS 4<sup>th</sup> graders and 4% of DPS 8<sup>th</sup> graders tested "proficient" in math, and, 4% of DPS 4<sup>th</sup> graders and 3% of DPS 8<sup>th</sup> graders tested "proficient" in science.<sup>450</sup> All of these scores were well below the average in other large cities.<sup>451</sup>

## **C. Comparison of Detroit and Cleveland**

### **i. Governance**

In both the Cleveland Metropolitan School District and the Detroit Public Schools, the state laws establishing mayoral control applied only to those school districts. In Ohio, applicability of mayoral control is determined based on whether a district has ever been under federal court-ordered state supervision and in Michigan, mayoral control applied based on the school district's population. The governance structures currently in place in the CMSD and formerly in place in the DPS are rather similar. In the CMSD, the mayor appoints the entire school board; in the DPS, from 1999 to 2005, the mayor chose all but one member of the school board. However, in the CMSD, the mayor's selections for the board are limited by the candidates proposed by the nominating panel, of which the mayor appoints three out of eleven members.

In both the Cleveland and Detroit systems, the school board selects the CEO—in the CMSD, the school board has approval authority over the mayor's initial CEO selection and in the DPS, the school reform board selected the CEO by two-thirds majority vote. The DPS, during its years of mayoral control, utilized a stronger CEO than in the CMSD. The CEO of the DPS

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<sup>448</sup> Wong et al., 2007.

<sup>449</sup> Council of the Great City Schools, 2008.

<sup>450</sup> The most recent NAEP scores available at the district level are from 2011 for reading and mathematics and 2009 for science.

<sup>451</sup> National Center for Education Statistics, *The Nation's Report Card: Trial Urban District Assessment, (Mathematics, Reading, Science), 2009 and 2011*, <http://nationsreportcard.gov>.

took over all powers of the former elected school board, while the CEO of the CMSD takes the place of the former superintendent. Thus, in the CMSD and former DPS structure, the mayor has a direct role in the school district governance system.

Yet another similarity between the two school districts is that both mayoral control laws required a voter referendum to take place a few years after the laws were passed. In Cleveland, the 2002 referendum extended mayoral control; however, in Detroit, voters resoundingly rejected mayoral control in the 2004 referendum, thereby ceasing mayoral control.

## **ii. Finance**

In the CMSD currently and the DPS from 1999 to 2005, the respective mayors exercised indirect authority over the budgeting process and finance structure of the school districts. In the CMSD, the school board adopts and approves the annual budget. Furthermore, state law provides mayors of all cities in Ohio, not just Cleveland, with a slight but direct role in the school district's budget, but only if the district is in fiscal emergency status. If so, the mayor appoints one out of five members of the financial planning and supervision commission, which generally creates a financial recovery plan and has extensive control and oversight authority of the district. In the DPS, the mayoral control law provided the CEO with authority over all district funds, but required the school reform board to approve the annual budget. Thus, the mayor of Detroit previously had and the mayor of Cleveland currently has a largely indirect role in the budgeting process, based on their respective powers of appointment over the school boards, and in turn, the school boards' authority to either approve or select the CEO.

## **iii. Collective Bargaining**

In the Cleveland mayoral control system the mayor has an ancillary effect over the collective bargaining process. The same was true in the now-ended Detroit mayoral control system. In the CMSD, the school district is considered the employer for purposes of state public employee collective bargaining law. The CMSD has designated the CEO and seven other officials and employees to represent the district in negotiations; however, the school board must approve all contracts. Thus, the mayor's role is indirect because he or she appoints the CEO, with the board's approval, who directly participates in negotiations. Furthermore, the mayor appoints every member of the school board, which approves bargaining contracts. During the period of mayoral control in the DPS, the CEO exercised all authority over collective bargaining and was considered the employer for purposes of public employee collective bargaining laws. Therefore, the mayor also exerted indirect influence over collective bargaining through his power to appoint six out of seven members of the school reform board, which in turn selected the CEO.

However, there are some differences between Cleveland and Detroit in terms of the mandatory and restricted topics of bargaining. In Ohio, bargaining topics are largely determined by statute and by case law. Public school employees in Michigan are perhaps more restricted in terms of bargaining topics than their counterparts in Ohio, because Michigan state law sets forth a specific list of topics over which school employees may not bargain. Furthermore, public employees in Michigan are not permitted to strike; however, as a result, courts broadly construe which topics are considered mandatory.

#### **iv. Low-Performing Schools**

In the Cleveland mayoral control system, the CEO and school board are generally in control of low-performing schools. The same was true of the Detroit mayoral control system under the terms of the Michigan School Reform Act. In the CMSD, the CEO is responsible for developing plans to measure academic performance at each school and may take corrective action in regards to schools that do not reach performance goals. However, the school board must approve of the CEO's proposed corrective action. Thus, although the mayor cannot independently make decisions, he or she exercises indirect influence over low-performing schools through the power to appoint the entire school board and CEO (with the board's approval).

The laws relating to struggling schools in Detroit under the terms of the Michigan School Reform Act were similar. Under the MSRA, the CEO was responsible for drafting school improvement plans, with the approval of the school reform board. These plans were submitted to the School District Accountability Board (which was comprised of state officials and other members appointed by the governor; thus, the mayor had no influence over it). Therefore, like the mayor of Cleveland, the mayor of Detroit also had indirect control over the formulation of school improvement plans through his power to appoint a majority of the board, which in turn selected the CEO.

### **V. Strong Category**

#### **A. Boston, Massachusetts**

The City of Boston is perhaps more known for being home to, or neighboring, several top-tier universities and colleges, rather than for its elementary and secondary public school system. The Boston Public Schools, like most other urban school districts in the United States, has historically struggled with segregation, declining student enrollment, and poor academic performance. However, the BPS, currently home to 134 schools and 57,050 students,<sup>452</sup> has recently experienced periods of stability and harmony among its officials due in part to school reform legislation.<sup>453</sup>

#### **i. Mayoral Influence**

Of the relationship between the BPS and the Mayor of Boston, former mayor Raymond Flynn remarked that "public education is an area that can swallow up the most promising career and politicians are counseled at every step to 'stay away from the schools.'"<sup>454</sup> In stark contrast, Flynn's successor and current Mayor Thomas Menino has professed his responsibility for the BPS, stating "I want to be judged as your mayor by what happens now in the Boston Public Schools. I expect you to hold me accountable . . . If I fail, judge me harshly."<sup>455</sup> Mayoral

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<sup>452</sup> BPS Communications Office. "Boston Public Schools at a Glance 2010-2011." 2011. PDF file.

<sup>453</sup> Portz, John and Robert Schwartz. "Governing the Boston Public Schools: Lessons in Mayoral Control." In Joseph Viteritti (Ed.), *When Mayors Take Charge: School Governance in the City*. Washington, D.C.: The Brookings Institution, 2009. Print.

<sup>454</sup> Portz, John. "External Actors and the Boston Public Schools: The Courts, the Business Community, and the Mayor." *Woodrow Wilson International Center for Scholars. Comparative Urban Studies Project Occasional Paper No. 12* (2011): 1-20. PDF file.

<sup>455</sup> Portz, 2011.

control over the BPS has been in effect for approximately twenty years and Mayor Menino has held office for eighteen of those years, a record for Boston.<sup>456</sup>

### a. Governance

The laws increasing the mayor's control over the BPS arose out of "special legislation"<sup>457</sup> passed by the Massachusetts General Court in 1991.<sup>458</sup> To understand how the changes to BPS governance came about first requires a brief overview of the general local government system in Massachusetts.

#### 1. Massachusetts' Home Rule Amendment

The Massachusetts Constitution provides its citizens with a right of self-government in local matters.<sup>459</sup> Under the "Home Rule Amendment" to the constitution, any city or town may adopt or revise a charter, provided that it is not inconsistent with the constitution or state law.<sup>460</sup> Furthermore, even without a charter, every city and town has the authority, through the adoption, amendment, or repeal of local ordinances, to "exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court . . . ."<sup>461</sup>

However, the Supreme Court of Massachusetts has noted of the Home Rule Amendment that "the scope of the disability imposed on the legislature by the amendment is quite narrow,"<sup>462</sup> meaning that the state legislature retains some authority to act with respect to local government affairs. The state legislature may enact general laws, which apply to at least two cities or towns, or special laws, which apply only to one city or town.<sup>463</sup> One method by which the legislature may enact special laws is by granting a petition from a city or town approved by the local voters, city council, or mayor of that city or town.<sup>464</sup>

#### 2. Governance of Boston Public Schools

Before 1991, the BPS governing board, known as the Boston School Committee (BSC), consisted of thirteen elected members.<sup>465</sup> Given the broad local government powers for municipalities in Massachusetts, it would seem that the City of Boston could have easily revised its charter to provide for a school committee appointed by the mayor. However, since 1984, Massachusetts state law has *required* school committees to be elected by the voters, regardless of any city charter provision to the contrary.<sup>466</sup> Boston citizens could not simply choose to revise

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<sup>456</sup> Bernstein, David. "Tom Menino's Final Term as Mayor? Don't Bet on It." *ThePhoenix.com*. The Boston Phoenix, 27 Apr. 2011. Web. 16 Dec. 2011.

<sup>457</sup> See *infra* footnotes 470-471 and accompanying text.

<sup>458</sup> The Massachusetts General Court is the state legislature.

<sup>459</sup> MASS. CONST. amend art. II, § 1.

<sup>460</sup> *Id.* § 2.

<sup>461</sup> *Id.* § 6.

<sup>462</sup> See *Powers v. Sec'y of Admin.*, 587 N.E.2d 744, 748 (Mass. 1992) (quoting *Arlington v. Bd. of Conciliation & Arbitration*, 352 N.E.2d 914, 918 (Mass. 1976)).

<sup>463</sup> MASS. CONST. amend. art. II, § 8.

<sup>464</sup> *Id.*

<sup>465</sup> Portz and Schwartz, 2009.

<sup>466</sup> MASS. GEN. LAWS. ANN. ch. 43b, § 20(a) (West 2011). City charters may provide for the number of members on the school committee and for the members' terms. *Id.* § 20(c)-(d).

the city charter to have the mayor appoint the members of the BSC, because to do so would impermissibly conflict with state law.

In 1989, former Mayor Flynn set out to change the law to allow the mayor to appoint the BSC. In November 1989, Flynn submitted a non-binding referendum<sup>467</sup> to Boston voters to discern local opinion on whether the mayor should take control over the BPS.<sup>468</sup> The referendum indicated that public opinion was barely in favor of mayoral control, indicating support for a mayor-appointed school committee by just 50.6 percent.<sup>469</sup> In 1991, the Boston City Council voted to take a petition to the state legislature to seek the enactment of a special law, which would apply only to Boston and provide for a mayor-appointed school committee.<sup>470</sup> The state legislature approved the petition and passed “An Act Reorganizing the School Committee of the City of Boston” (Chapter 108).<sup>471</sup> The BSC is now comprised of seven members who are appointed by the mayor.<sup>472</sup> Members on the BSC serve staggered terms of four years each.<sup>473</sup> The mayor does not have *complete* discretion to select board members and is limited in two regards: by the command to appoint members who “reflect the ethnic, racial and socioeconomic diversity of the city of Boston and its public school population,”<sup>474</sup> and by the list of candidates provided by the nominating panel.

Chapter 108 created the thirteen-member nominating panel “whose sole function [is] to nominate persons for consideration by the mayor for appointment to the school committee.”<sup>475</sup> The nominating panel is comprised of: four parents of children attending school in the Boston public school system, one BPS teacher, one BPS headmaster or principal, one representative from the “business community,” one president of a public or private college or university, one person who is the commissioner of education of the commonwealth, and four additional persons appointed by the mayor.<sup>476</sup> Although the mayor’s selections for school committee members are limited to the list of candidates provided by the nominating panel, the mayor’s input is heard at the nominating phase as well, through the four out of thirteen members that he or she appoints to the nominating panel. Members on the nominating panel each serve for two years.<sup>477</sup> The nominating panel meets in public to hear comments and to deliberate on compiling the list of

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<sup>467</sup> Massachusetts state law provides that “a nonbinding public opinion advisory question may be placed on the ballot for a regular municipal election in any city or town . . . by vote of the city council of such city, with approval of its mayor where so required by the city charter . . .” MASS. GEN. LAWS ANN. ch. 53, § 18A.

<sup>468</sup> Portz and Schwartz, 2009.

<sup>469</sup> Howe, Peter J., and Diego Ribadeneira, “Flynn’s School Plan Gains Razor-Thin Win.” *Boston Globe* 8 Nov. 1989: n. pag. Web. 31 Aug. 2011.

<sup>470</sup> Portz and Schwartz, 2009.

<sup>471</sup> An Act Reorganizing the School Committee of the City of Boston, ch. 108, 1991 Mass. Acts 222 (1991).

<sup>472</sup> § 2, 1991 Mass. Acts at 223.

<sup>473</sup> § 4, 1991 Mass. Acts at 223. Committee members can serve another term if they are re-nominated by the nominating panel. *Id.*

<sup>474</sup> § 2, 1991 Mass. Acts at 223.

<sup>475</sup> § 6, 1991 Mass. Acts at 223.

<sup>476</sup> *Id.* at 223-24. The four parent members are selected as follows: one is selected by the citywide parents council, one is selected by the citywide educational coalition, one selected by the Boston special needs parent advisory council, and one is selected by the bilingual education citywide parent advisory council. The teacher member is selected by the Boston teachers union. The headmaster or principal is selected by the Boston association of school administrators and supervisors. As for the representative from the business community, the private industry council, the Boston municipal research bureau, and the Boston chamber of commerce rotate each year to select a member. The chancellor of higher education of the commonwealth selects the college or university president member. *Id.*

<sup>477</sup> § 6(g), 1991 Mass. Acts at 224.

nominees to present to the mayor. The panel must submit a list of three to five candidates for each school committee office that will become vacant the following year. If the panel fails to do so by the first Monday in December, the mayor may appoint “any person he deems suitable.”<sup>478</sup>

Despite the mayor’s appointment powers over the BSC, Chapter 108 clarified that the committee would continue to possess “all existing powers and duties hitherto exercised.”<sup>479</sup> The BSC has the power to select and terminate the superintendent, review and approve the district budget, establish educational goals and policies for the district, and approve or reject the superintendent’s management plan.<sup>480</sup> The BSC also must establish performance standards for teachers and other school district employees.<sup>481</sup> The BSC’s powers are limited in that it cannot take action on any matter without the recommendation of the superintendent.<sup>482</sup>

However, as mentioned above, the BSC selects the superintendent by majority vote for a six-year contract term, determines his or her compensation, and may remove the superintendent by three-fifths vote for “just cause.”<sup>483</sup> Superintendents in Massachusetts generally are directed to “manage the system in a fashion consistent with state law and the policy determinations of that school committee.”<sup>484</sup> The superintendent of the BPS is described as the “executive officer of the school committee in all matters pertaining to the powers and duties of the school committee.”<sup>485</sup> Although state law gives superintendents in Massachusetts the power to appoint a principal for each school in the district and to dismiss any employee in the district,<sup>486</sup> law applying exclusively to Boston gives the BPS superintendent greater control over all school district employees.<sup>487</sup> In Boston, the superintendent possesses the authority to: make appointments and promotions for all positions;<sup>488</sup> to set compensation for employees;<sup>489</sup> to “supervise and direct” employees; and to assign, reassign, demote, dismiss, remove, suspend, and lay-off any school department employee.<sup>490</sup> Additional powers and duties of the BPS superintendent include the exclusive authority to make contracts and amendments to contracts for purchases, rentals, leases, repairs, and professional services, but this authority does not include the power to enter into collective bargaining agreements.<sup>491</sup> The BPS superintendent also has a role in finance, with the duty to create an annual budget subject to the approval of the BSC and mayor.<sup>492</sup>

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<sup>478</sup> § 7(c), 1991 Mass. Acts at 225.

<sup>479</sup> § 3, 1991 Mass. Acts at 223.

<sup>480</sup> MASS. GEN. LAWS ANN. ch. 71, § 37 (West 2011); An Act Reorganizing the Boston School Department, ch. 613, § 1(c), 1987 Mass. Acts 1150 (1987).

<sup>481</sup> MASS. GEN. LAWS ANN. ch. 71, § 38.

<sup>482</sup> § 1(b), 1987 Mass. Acts at 1151. If the superintendent fails to make a recommendation, the committee can take action without it. *Id.*

<sup>483</sup> § 1(a), 1987 Mass. Acts at 1150. The school committee must also give “proper notice” and hold a public hearing. *Id.*; see also MASS. GEN. LAWS ANN. ch. 71, § 59.

<sup>484</sup> MASS. GEN. LAWS ANN. ch. 71, § 59.

<sup>485</sup> § 1(b), 1987 Mass. Acts at 1150-51.

<sup>486</sup> MASS. GEN. LAWS ANN. ch. 71, §§ 42, 59B.

<sup>487</sup> See § 1A, 1987 Mass. Acts 1151-53.

<sup>488</sup> *Id.* at 1151. The appointments and promotions are subject to BSC approval. *Id.*

<sup>489</sup> § 1A(d), 1987 Mass. Acts at 1152.

<sup>490</sup> This does not apply to school committee members. § 1A(e), 1987 Mass. Acts at 1152.

<sup>491</sup> § 2, 1987 Mass. Acts at 1153.

<sup>492</sup> § 1D, 1987 Mass. Acts at 1153.



Just two years after the enactment of Chapter 108, the Massachusetts General Court, as part of the Education Reform Act of 1993 (ERA), created a school council for every public school in Massachusetts.<sup>493</sup> School councils are made up of the school’s principal, parents of students attending the school, teachers at the school, “other persons” who are not parents or teachers of students at the school, and, for grade nine through twelve schools, at least one student.<sup>494</sup> The principal is responsible for “defining the composition of and forming the group.”<sup>495</sup> The school council’s role consists of: assisting in the identification of students’ educational needs; making recommendations to the principal for the development, implementation, and assessment of the curriculum accommodation plan; assisting in reviewing the annual school budget; and assisting in formulating a school improvement plan.<sup>496</sup>

Approximately two years after gaining the power to appoint the BSC, Raymond Flynn stepped down from office to become the Ambassador to the Vatican, with current Mayor Thomas Menino taking his place.<sup>497</sup> By its own terms, Chapter 108 required a referendum to take place in 1996 to determine whether to return to an elected school committee.<sup>498</sup> Citizens voted against returning to an elected school committee, thereby validating the mayor’s appointment powers.<sup>499</sup> Chapter 108 may only be amended or repealed by a process laid out in the Massachusetts Constitution, which requires a two-thirds vote of the Boston City Council and the concurrence of the mayor.<sup>500</sup> Thus, it appears that mayoral appointment of the BSC members is here to stay.

## **b. Finance**

The Massachusetts Constitution provides that “it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the . . . public schools and grammar schools in the towns . . . .”<sup>501</sup> Pursuant to this constitutional command, the state legislature has directed every town to maintain “a sufficient number of schools for the instruction of all children who may legally attend a public school therein.”<sup>502</sup> The Supreme Court of Massachusetts has

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<sup>493</sup> MASS. GEN. LAWS ANN. ch. 71, § 59C (West 2011).

<sup>494</sup> *Id.* The parent members are elected by the parents of students attending the school. The teacher members are selected by the other teachers in the school. Note that a similar election scheme for local school councils was found unconstitutional for the Chicago Public Schools in *Fumarolo v. Board of Education*, see *infra* Section V.B.i.a.2. It does not appear that this has been similarly challenged in Massachusetts. The “other persons” are “drawn from such groups or entities as municipal government, business and labor organizations, institutions of higher education, human services agencies, or other interested groups . . . .” MASS. GEN. LAWS ANN. ch. 71, § 59C.

<sup>495</sup> *Id.*

<sup>496</sup> *Id.*

<sup>497</sup> Portz, 2011.

<sup>498</sup> An Act Reorganizing the School Committee of the City of Boston, ch. 108, § 8, 1991 Mass. Acts 225. The referendum was to be phrased as: “Shall an act passed in the General Court in 1991, entitled ‘An Act Reorganizing the School Committee of the City of Boston’ be repealed as of January 1998 and in place thereof the school committee structure as existing in 1991 be reconstituted after an election held in 1997?” *Id.*

<sup>499</sup> Portz and Schwartz, 2009.

<sup>500</sup> MASS. CONST. art. LXXXIX; MASS. CONST. amend. art. II, § 4; § 10, 1991 Mass. Acts at 225-26.

<sup>501</sup> MASS. CONST. pt. 2, ch. 5, § 2.

<sup>502</sup> MASS. GEN. LAWS ANN. ch. 71, §§ 1, 4.

interpreted this statutory scheme as placing the “primary responsibility to fund the public schools for the minimum school year on the *city*.”<sup>503</sup>

The funding scheme for all public schools in Massachusetts was revised with the Education Reform Act, in which the legislature declared its intent “to assure fair and adequate minimum per student funding for public schools in the commonwealth by defining a foundation budget and a standard of local funding effort applicable to every city and town in the commonwealth.”<sup>504</sup> The ERA provides complicated formulas that determine the amount of state aid to allocate to each municipality for the support of the public schools. Every municipality is required to make a “local contribution” to cover the difference between net school spending and the amount that the municipality receives in state and federal aid.<sup>505</sup>

Once funds are distributed to the City of Boston, the BPS budget is determined by the superintendent, BSC, city council, and mayor, with opportunity for input from the public. Thus, the mayor has a direct role in and strong influence over the formulation of the BPS budget as part of the citywide budget.<sup>506</sup> The budgeting process begins with the BPS superintendent, who must submit a budget to the BSC for its approval for the upcoming fiscal year.<sup>507</sup> The school committee must hold a public hearing on the proposed annual budget so that “all interested persons” have an opportunity to be heard.<sup>508</sup> The BSC may then adopt, reject, reduce, or increase any item in the recommended budget.<sup>509</sup> After approving the budget, the BSC submits the budget to the mayor, who may approve or reduce the total budget.<sup>510</sup> After approving the budget, the mayor submits the budget to the city council for an appropriation of funds.<sup>511</sup> As mentioned above, each individual school may create its own budget, to be reviewed by the school council.<sup>512</sup>

### c. Collective Bargaining

The Supreme Court of Massachusetts has recognized that the state’s public policy strongly favors collective bargaining between public employers and employees over the terms and conditions of employment.<sup>513</sup> Collective bargaining between educational employees and the BPS is governed mainly by Chapter 150E of the Massachusetts General Laws, which applies specifically to public employers and their employees, and case law interpreting Chapter 150E. For the most part, the statutes and cases governing collective bargaining between the BPS and its employees apply to all of Massachusetts and are not unique to Boston. With the passage of Chapter 150E in 1973, the legislature gave public employees the rights to self-organize and form,

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<sup>503</sup> Bd. of Educ. v. City of Boston, 434 N.E.2d 1224, 1229 (Mass. 1982) (emphasis added).

<sup>504</sup> MASS. GEN. LAWS ANN. ch. 70, § 1.

<sup>505</sup> *Id.* §§ 2, 6.

<sup>506</sup> For the 2010-2011 budget, Mayor Menino asked the BPS to reduce its allocations by one percent, but requested a five percent reduction for all other city departments. Boston Public Schools. “Superintendent Presents Preliminary Budget for Boston Public Schools.” *Boston Public Schools Communications Office*, 6 Feb. 2010. Web. 16 Dec. 2011.

<sup>507</sup> An Act Reorganizing the Boston School Department, ch. 613, § 1D, 1987 Mass. Acts 1150, 1153 (1987).

<sup>508</sup> MASS. GEN. LAWS ANN. ch. 71, § 38N.

<sup>509</sup> § 1D, 1987 Mass. Acts at 1153.

<sup>510</sup> *Id.*

<sup>511</sup> *Id.*

<sup>512</sup> MASS. GEN. LAWS ANN. ch. 71, § 59C ; *see supra* note 496 and accompanying text.

<sup>513</sup> Sch. Comm. of Pittsfield v. United Educators of Pittsfield, 784 N.E.2d 11, 18 (2003).

join, or assist any employee organization for the purpose of collective bargaining.<sup>514</sup> Employees also have the right to refrain from the above activities, but they must pay service fees to the exclusive representative.<sup>515</sup> However, a recently-introduced Senate Bill, if passed, would exempt the employees who refrain from collective bargaining activities from paying any “dues, fees or other charges of any kind in order to secure or continue employment” and from the terms of employment negotiated by the employee organization.<sup>516</sup>

Chapter 150E requires the public employer and the employees’ exclusive representative to meet at “reasonable times,” including meetings before the employer’s budget-making process.<sup>517</sup> In the case of school employees, the municipal employer is represented by the school committee or its designated representative.<sup>518</sup> As applied to Boston, although the City of Boston is considered the “employer” of school employees, the city is represented in negotiations with employees by the BSC.<sup>519</sup> School committees are also permitted to “employ legal counsel in connection with collective bargaining with employee organizations for school employees.”<sup>520</sup> In 1993, as part of the Education Reform Act, the legislature gave mayors a direct role in collective bargaining with school employees, providing that, as between a school committee and school employees, “the chief executive officer of a city or town or his designee shall participate and vote as a member of the city or town school committee . . . .”<sup>521</sup> In Boston, this means that in addition to the votes of the seven members of the BSC appointed by the mayor, the mayor him or herself (or a designee) must participate and vote in the collective bargaining process.<sup>522</sup>

Regarding the scope of bargaining, Chapter 150E describes rather generally the topics over which employers must bargain. Section 6 of Chapter 150E requires employers and employees to “negotiate in good faith with respect to wages, hours, standards or productivity and performance, and *any other terms and conditions of employment, . . .*”<sup>523</sup> Even the Massachusetts Court of Appeal has lamented the legislature’s broad description, commenting that “any attempt to define with precision and certainty the subjects about which bargaining is mandated by [Chapter 150E] is doomed to failure.”<sup>524</sup>

Because the scope of bargaining laid out in Chapter 150E is so broad, the appropriate scope of collective bargaining between a school committee and school employees has been

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<sup>514</sup> MASS. GEN. LAWS ANN. ch. 150E, § 2.

<sup>515</sup> *Id.*

<sup>516</sup> S.B. 01998, 187th Leg., Reg. Sess. (Mass. 2011).

<sup>517</sup> MASS. GEN. LAWS ANN. ch. 150E, § 6.

<sup>518</sup> *Id.* § 1.

<sup>519</sup> See *Boston Teachers Union, Local 66, Am. Fed’n of Teachers (AFL-CIO) v. Sch. Comm. of Boston*, 350 N.E.2d 707, 719 (Mass. 1976) (citing MASS. GEN. LAWS ANN. ch. 150E, § 1).

<sup>520</sup> MASS. GEN. LAWS ANN. ch. 71, § 37E. The school committee may not spend more than \$25,000 for these purposes without the mayor’s prior approval. *Id.*

<sup>521</sup> MASS. GEN. LAWS ANN. ch. 150E, § 1.

<sup>522</sup> See MASS. GEN. LAWS ANN. ch. 43, § 58 (“There shall be a mayor . . . , who shall be the chief executive officer of the city.”); *id.* § 74 (“The mayor shall be the chief executive office of the city, commissioner of administration, and ex officio, chairman of the school committee. When present, he shall preside at all meetings of the city council and of the school committee and at all joint conventions thereof.”).

<sup>523</sup> See MASS. GEN. LAWS ANN. ch. 150E, § 6 (emphasis added).

<sup>524</sup> *City of Lynn v. Labor Relations Comm’n*, 681 N.E.2d 1234, 1237 (Mass. App. Ct. 1997) (quoting Greenbaum, *The Scope of Mandatory Bargaining Under Massachusetts Public Sector Labor Relations Law*, 72 MASS. L. REV. 102 (1987)).

determined on a case-by-case basis.<sup>525</sup> When collective bargaining disputes result in litigation,<sup>526</sup> a court will first determine if the topic is appropriately within the scope of negotiation.<sup>527</sup> Section 6 of Chapter 150E specifically mentions only “the right of any employee to run as candidate or to hold elective office” as a restricted subject of negotiating.<sup>528</sup> A law recently signed by the Governor of Massachusetts in July 2011 also limits the rights of municipal employees to bargain over health insurance coverage, in exchange for greater mayoral and city council control over providing this benefit.<sup>529</sup> Apart from statutory law, the Supreme Court of Massachusetts has declared that topics outside the appropriate scope of collective bargaining are those subjects that are exclusive areas of “managerial prerogative,” and for schools, “educational policy.”<sup>530</sup> Case law shows that topics such as conferring tenure on teachers, abolishing positions, and reducing budget outlays are outside the scope of bargaining.<sup>531</sup>

If the subject at issue is within the proper scope of bargaining, in that it is not restricted, a court will then determine if it is mandatory, meaning that it is included in the definition of “any other terms and conditions of employment” per section 6.<sup>532</sup> Although the extent of mandatory bargaining topics is unclear from the statute, for teachers it includes but is not limited to class size and workload.<sup>533</sup> Other specific subjects that have been found to be mandatory in terms of school employees are: the decision to achieve a reduction in force by laying off employees, the timing of a decision to lay off employees, and the number of employees and which employees to lay off.<sup>534</sup>

#### **d. Low-Performing Schools**

In *McDuffy v. Secretary of Executive Office of Education*, the Supreme Court of Massachusetts found that the commonwealth had been failing in its constitutional duty to educate all of its children.<sup>535</sup> The *McDuffy* court, quoting a 1991 report from the state Board of Education, noted that “schools in the Commonwealth of Massachusetts are in a state of emergency due to grossly inadequate financial support.”<sup>536</sup> Just three days after the court’s decision, the Massachusetts General Court passed the Education Reform Act of 1993 (ERA),

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<sup>525</sup> Sch. Comm. of Newton v. Newton Sch. Custodians Ass’n, Local 454, SEIU, 784 N.E.2d 598, 606 (Mass. 2003) (citing Town of Burlington v. Labor Relations Comm’n, 454 N.E.2d 465, 469 (Mass. 1983)).

<sup>526</sup> Failing to bargain over a mandatory bargaining topic is a prohibited labor practice, which may potentially lead to review by the state courts. See MASS. GEN. LAWS ANN. ch. 150E, § 11.

<sup>527</sup> See Sch. Comm. of Newton v. Labor Relations Comm’n, 447 N.E.2d 1201, 1206 (1983).

<sup>528</sup> MASS. GEN. LAWS ANN. ch. 150E, § 6.

<sup>529</sup> See MASS. GEN. LAWS ANN. ch. 32B, §§ 2. The new laws will not affect the BTU until its current contract with BPS expires in 2015.

<sup>530</sup> See, e.g., Sch. Comm. of Newton v. Labor Relations Comm’n, 447 N.E.2d 1201, 1208 (Mass. 1983); Boston Teachers Union, Local 66, Am. Fed’n of Teachers (ALF-CIO) v. Sch. Comm. of Boston, 350 N.E.2d 707, 712 (1976).

<sup>531</sup> 18 DOUGLAS A. RANDALL & DOUGLAS E. FRANKLIN, MASSACHUSETTS PRACTICE SERIES: MUNICIPAL LAW AND PRACTICE § 12.7 (5th ed. 2011) (citing collection of cases).

<sup>532</sup> MASS. GEN. LAWS ANN. ch. 150E, § 6.

<sup>533</sup> *Id.*

<sup>534</sup> Sch. Comm. of Newton v. Labor Relations Comm’n, 447 N.E.2d 1201, 1208 (Mass. 1983).

<sup>535</sup> 615 N.E.2d 516, 553-54 (Mass. 1993)

<sup>536</sup> *Id.* at 520 (quoting A Policy Position on Distressed School Systems and School Reform (Nov. 26, 1991); Report of the Committee on Distressed School Systems and School Reform (Nov. 26, 1991)).

which it had been deliberating while the *McDuffy* case was pending, as an emergency law.<sup>537</sup> The goal of the ERA is to “provide a public education system of sufficient quality to extend to all children the opportunity to reach their full potential and to lead lives as participants in the political and social life of the commonwealth and as contributors to its economy.”<sup>538</sup>

As such, the ERA overhauled the public school finance system, set standards for student and school performance, and created a plan for struggling schools.<sup>539</sup> Regarding low-performing schools, the ERA initially directed the state Elementary and Secondary Board of Education (Board) to “establish regulations defining when a school or school district has chronically failed to improve the educational program provided to students served by the school or district.”<sup>540</sup> Schools that had “consistently failed to improve the academic performance of their students” would be deemed “underperforming.”<sup>541</sup> The Commissioner of Elementary and Secondary Education (Commissioner)<sup>542</sup> would then appoint an independent fact-finding team to assess the reasons for the schools’ failure, and the school district would present to the Board a remedial plan setting forth specific goals for improvement. If the school did not demonstrate significant improvement within twenty-four months, the Board was authorized to designate the school as “chronically underperforming,” at which point several actions could be taken, including immediate removal of the principal, designation of a new principal by the superintendent, and appropriating more funds to recruit and retain talented personnel.<sup>543</sup>

However, provisions of the ERA relating to underperforming schools were substantially revised in 2010, with the aim of improving uneven student performance and competing for federal Race to the Top funding.<sup>544</sup> The 2010 amendments created a much more detailed process, giving control over underperforming schools to district superintendents. Current law directs the Board to establish regulations creating standards based on which the Commissioner may declare a school or school district to be underperforming or chronically underperforming.<sup>545</sup> Schools scoring in the lowest twenty percent statewide on certain student performance and improvement data are eligible to be designated as underperforming or chronically underperforming; however, no more than four percent of all the public schools may be designated as such at any time.<sup>546</sup>

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<sup>537</sup> *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134, 1141; *see also* An Act Establishing the Education Reform Act of 1993, ch. 71, 1993 Mass. Acts 159.

<sup>538</sup> MASS. GEN. LAWS ANN. ch. 69, § 1 (West 2011).

<sup>539</sup> *See id.*; *Hancock*, 822 N.E.2d at 1141; *see also supra* notes 504-505 and accompanying text.

<sup>540</sup> § 29, 1993 Mass. Acts at 179.

<sup>541</sup> *Id.*

<sup>542</sup> The commissioner is appointed by two-thirds vote of the Board, with the approval of the Secretary of Education. The Board may remove the commissioner by majority vote. MASS. GEN. LAWS ANN. ch. 15, § 1F.

<sup>543</sup> § 29, 1993 Mass. Acts at 179-80.

<sup>544</sup> Vaznis, James. “Lawmakers Approve Education Bill.” *Boston.com*. The Boston Globe, 15 Jan. 2010. Web. 16 Dec. 2011.; MacQuarrie, Brian. “Patrick Trumpets Education Legislation.” *Boston.com*. The Boston Globe, 19 Jan. 2010. Web. 16 Dec. 2011.

<sup>545</sup> MASS. GEN. LAWS ANN. ch. 69, § 1J(a). The regulations adopted by the Board must take into account “multiple indicators of school quality,” such as student attendance, dismissal and exclusion rates, promotion and graduation rates, and lack of demonstrated significant improvement in core academic subjects. *Id.* For the regulations, see 603 MASS. CODE REGS. 2.01-2.07 (2011), *available at* <http://www.doe.mass.edu/lawsregs/603cmr2.html?section=all>.

<sup>546</sup> MASS. GEN. LAWS ANN. ch. 69, § 1J(a).

Once a school is designated as underperforming, the superintendent of the district in which the school is located must create a “turnaround plan” for the school, to be approved by the Commissioner.<sup>547</sup> To create the turnaround plan, the superintendent must first convene a “local stakeholder group” of up to thirteen individuals who make recommendations to ensure that the plan will “maximize the rapid academic achievement of students at the school.”<sup>548</sup> The stakeholder group must include at least ten specific individuals, one of whom is the mayor of the city or the mayor’s designee.<sup>549</sup> Thus, the mayor has slight input in developing a plan for the underperforming schools, as one out of the ten to thirteen members of the stakeholder group. Meetings of the group are open to the public and all recommendations made to the superintendent must be publicly available.<sup>550</sup>

The turnaround plan must include measurable, annual goals regarding a variety of factors. In developing the plan, the superintendent is given vast powers, regardless of any other law to the contrary. Section 1J sets forth a list of sixteen expansive powers, including the authority to: revise curriculum and program offerings at the school; reallocate the existing budget of the school and provide additional funds to the school from the district budget; provide funds to increase staff salaries or to attract and retain highly-qualified staff; require principals, administrators, teachers, and staff to reapply for their positions at the school; and to suspend or change provisions of collective bargaining contracts.<sup>551</sup> After receiving the recommendations of the local stakeholder group, the superintendent must submit the plan to the group, the school committee, and the Commissioner, who each may propose modifications to the plan.<sup>552</sup> The superintendent must at least consider the modifications, but may either accept or reject them, to create a final turnaround plan.<sup>553</sup> This marks the end of the superintendent’s involvement in developing the plan; however, the process does not stop here. The school committee or a local union may appeal to the Commissioner regarding one or more components of the plan. The Commissioner may then modify the plan if certain findings are made, and the Commissioner’s decision will be final.<sup>554</sup>

Regarding the actual implementation of the plan, the superintendent may, in certain conditions, select an external receiver to operate the school or assist the superintendent in implementing the plan. The school committee may appeal the superintendent’s appointment of an external receiver to the Commissioner, but the Commissioner may only reverse the appointment if the superintendent “made the decision on the basis of demonstrably false

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<sup>547</sup> *Id.* § 1J(b).

<sup>548</sup> *Id.* The stakeholder group must include: (1) the Commissioner (or a designee), (2) the chair of the school committee (or a designee), (3) the president of the local teacher’s union (or a designee), (4) an administrator from the school, (5) a teacher from the school, (6) a parent from the school, (7) representatives of applicable state and local social service, health and child welfare agencies, (8) representatives of state and local workforce development agencies, (9) for elementary schools, a representative of an early education and care provider and, for middle schools or high schools, a representative of the higher education community, and (10) a member of the community appointed by the mayor of the city. *Id.*

<sup>549</sup> *Id.*

<sup>550</sup> *Id.*

<sup>551</sup> For the whole list of powers, see *id.*

<sup>552</sup> *Id.* § 1J(e).

<sup>553</sup> *Id.*

<sup>554</sup> *Id.* § 1J(f).

information or evidence.”<sup>555</sup> The turnaround plan may be in place for up to three years, during which time the superintendent and principal make annual reviews of the school.<sup>556</sup> If annual performance goals have been met, the turnaround plan will continue. If the school fails to meet goals, the commissioner may appoint an examiner to evaluate the implementation of the plan, require changes to the plan, or appoint an external partner to assist the superintendent.<sup>557</sup> When the turnaround plan expires, the Commissioner may determine that the school is no longer underperforming, has made some improvements but remains underperforming, or is chronically underperforming.<sup>558</sup>

If a school is designated as chronically underperforming, a turnaround plan is created using the same process as outlined above; however, the Commissioner, rather than district superintendent, is in control of its development and implementation.<sup>559</sup> The Commissioner possesses the same powers as the superintendent in creating the turnaround plan.<sup>560</sup> The Commissioner must provide written quarterly reports to the school committee regarding the chronically underperforming school’s performance, and must also evaluate the school at least annually to determine whether the school has met its annual goals. The annual reviews must also be in writing and are submitted to the superintendent and school committee. At the expiration of the turnaround plan, the Commissioner may: remove the “chronically underperforming” designation, appoint an external receiver to operate the school, or transfer operation of the school from an external receiver to the superintendent or a different receiver.<sup>561</sup>

An entire school *district* may also be designated as chronically underperforming.<sup>562</sup> The Board, rather than the Commissioner, makes such a determination. A district is eligible to be designated as chronically underperforming if it scores in the lowest ten percent statewide based on some measure that takes into account student achievement and improvement data.<sup>563</sup> The process for creating, implementing, and reviewing a turnaround plan for a chronically underperforming school district is substantially similar to the process described above, with the Commissioner and a mandatory external receiver in joint control.<sup>564</sup> One notable difference is that a school district may be designated as chronically underperforming due to fiscal reasons alone. If a *municipality* has “failed to fulfill its fiscal responsibilities,” the Commissioner may designate the corresponding school district as chronically underperforming, subject to the Board’s approval. The municipality’s mayor must also have an opportunity to present evidence to the Board. If the Board votes to designate a district as chronically underperforming for fiscal reasons, the Commissioner is authorized to petition for an increase in funds for the school district. The Commissioner of Revenue may then order the municipality to provide a certain sum of money to make up for the deficiency.<sup>565</sup>

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<sup>555</sup> *Id.* § 1J(h).

<sup>556</sup> *Id.* § 1J(j)-(k).

<sup>557</sup> *Id.* § 1J(k).

<sup>558</sup> *Id.* § 1J(l).

<sup>559</sup> *Id.* § 1J(m)-(p).

<sup>560</sup> *Id.* § 1J(o); *see also supra* note 551 and accompanying text.

<sup>561</sup> MASS. GEN. LAWS ANN. ch. 69, § 1J(w).

<sup>562</sup> *Id.* § 1K.

<sup>563</sup> *Id.* § 1K(a).

<sup>564</sup> *Id.* § 1K(a)-(j).

<sup>565</sup> *Id.* § 1K(k).

## ii. Review of Empirical Research

In order to identify effects, if any, associated with the increased level of mayoral influence in the Boston Public Schools (BPS) in recent years, we reviewed high-quality, methodologically sound research reports; journal articles; books; and book chapters published within the last five years that focused on outcomes for students, teachers, and administrators in BPS and across urban districts generally. It is not methodologically possible to directly link the structure of increased mayoral control to specific outcomes in BPS, especially as the current mayor has held office continuously since the inception of increased mayoral control, and the Massachusetts Education Reform Act of 1993 was enacted at roughly the same time. Still, recent research provides evidence for the following general trends in Boston.

### a. Governance

Since increased mayoral control in 1992, the leadership in BPS has been remarkably consistent and free of conflict as compared both with other urban districts and with BPS prior to mayoral control.<sup>566</sup> The positions of mayor, superintendent, president of the school committee, and president of the teacher's union have experienced little turnover and the various parties have worked well with each other.<sup>567</sup> Beginning in 1995, the superintendent established a focused, long-term reform agenda for the Boston schools that centered on improving instruction for all students.<sup>568</sup> He maintained this agenda from 1995 through his retirement in 2006, at which time the new superintendent assumed the agenda. It is generally accepted that mayoral control made this stability and long-term approach possible.<sup>569</sup>

Reform initiatives in BPS since increased mayoral control have focused on increased accountability and use of data; recruitment and retention of a highly qualified, diverse pool of teachers; improved instruction through teacher professional development and coaching; improved student literacy; the conversion of all high schools to small schools or smaller learning communities; and increased choice in the form of pilot schools and charters.<sup>570</sup> We identified

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<sup>566</sup> The Aspen Institute Education, Society Program, and Annenberg Institute for School. "Strong Foundation, Evolving Challenges: A Case Study to Support Leadership Transition in the Boston Public Schools." In Paul Reville and Celine Coggins (Eds.), *A Decade of Urban School Reform: Persistence and Progress in the Boston Public Schools*. Cambridge, MA: Harvard Education Press, 2007. Print; Portz and Schwartz, 2009; Neufeld, Barbara. "Instructional Improvement in the Boston Public Schools: The Limits of Focus and Stability." In Paul Reville & Celine Coggins (Eds.), *A Decade of Urban School Reform: Persistence and Progress in the Boston Public Schools*. Cambridge, MA: Harvard Education Press, 2007. Print; Payzant, Thomas, and Christopher Horan, "The Boston Story: Successes and Challenges in Systemic Education Reform." In Paul Reville & Celine Coggins (Eds.), *A Decade of Urban School Reform: Persistence and Progress in the Boston Public Schools* Cambridge, MA: Harvard Education Press, 2007. Print.

<sup>567</sup> Aspen, 2007; Portz & Schwartz, 2009; Payzant & Horan, 2007.

<sup>568</sup> Aspen, 2007; Portz, John. "Governance and the Boston Public Schools." In Paul Reville and Celine. Coggins (Eds.), *A Decade of Urban School Reform: Persistence and Progress in the Boston Public Schools*. Cambridge, MA: Harvard Education Press, 2007. Print; Neufeld, 2007; Payzant & Horan, 2007.

<sup>569</sup> Reville, Paul. "Setting the Stage." In Paul Reville and Celine. Coggins (Eds.), *A Decade of Urban School Reform: Persistence and Progress in the Boston Public Schools*. Cambridge, MA: Harvard Education Press, 2007. Print; Payzant & Horan, 2007; Portz & Schwartz, 2009.

<sup>570</sup> Citizen Commission on Academic Success for Boston Children. "Transforming the Boston Public Schools: A Roadmap for the New Superintendent." *Citizen Commission on Academic Success for Boston Children* 2006. Print; Portz, 2007; Steinberg, Adria, and Lili Allen. "On the Road to Reform: Building a System of Excellent and Equitable High Schools in Boston." In Paul Reville and Celine. Coggins (Eds.), *A Decade of Urban School Reform:*



one recent, high-quality study that looked explicitly at changes in aspects of school structure and classroom activities within schools in BPS in response to reforms at the high school level. A multilevel three year case study of two small schools and four small learning communities in BPS documented consistent and unresolved issues that impeded the implementation of the small-school model including insufficient leadership capacity at some sites and inadequate support for and development of school leadership at the district level.<sup>571</sup> These findings are consistent with past research studies that have identified issues with the quality and completeness of implementation of multiple BPS reforms.<sup>572</sup> Both researchers and the former superintendent have noted large variation in the leadership and capacity of schools across BPS.<sup>573</sup>

## **b. Finance**

We identified one study that systematically evaluated the effects of mayoral control on financial resources and spending in school districts across the United States. Using ten years (1993-2003) of financial data for 104 large school districts, researchers found that the ability of the mayor to appoint the majority of the school board, as in Boston, was associated with small increases in the relative spending on instruction and instructional support, on average, as compared to districts without this form of mayoral control.<sup>574</sup>

In the first ten years of increased mayoral control, BPS saw increased levels of state funding and nearly \$100 million in philanthropic dollars, including substantial grants from organizations such as the Carnegie Corporation, the Annenberg Foundation, and the Bill & Melinda Gates Foundation.<sup>575</sup> The school department received a larger portion of general funds from the city during this time as compared with the period before mayoral control, and per pupil spending almost doubled between 1994 and 2004.<sup>576</sup> Since that time, the district, like other urban districts, has faced repeated financial difficulties and budget gaps, in part due to reductions in state funds and increases in fixed costs such as teacher salaries and benefits at the same time student enrollment has decreased.<sup>577</sup>

For the 2011-2012 school year, in order to balance the budget, BPS reduced staff positions without reducing teaching positions. BPS also allocated funds by student rather than by school in an attempt to increase equity in funding for students with similar needs and

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*Persistence and Progress in the Boston Public Schools*. Cambridge, MA: Harvard Education Press, 2007. Print; Payzant & Horan, 2007.

<sup>571</sup> Neufeld, Barbara. "Final Evaluation Report: High School Renewal in the Boston Public Schools, 2003-2006." *Education Matters* 2007. Print.

<sup>572</sup> Neufeld, Barbara. "Instructional Improvement in the Boston Public Schools: The Limits of Focus and Stability." In Paul Reville and Celine. Coggins (Eds.), *A Decade of Urban School Reform: Persistence and Progress in the Boston Public Schools*. Cambridge, MA: Harvard Education Press, 2007. Print.

<sup>573</sup> Citizen Commission, 2006; Neufeld, 2007; Neufeld, Final Evaluation Report, 2007; Payzant & Horan, 2007.

<sup>574</sup> Wong, et al., 2007.

<sup>575</sup> Aspen, 2007; Citizen Commission, 2006; Neufeld, 2007.

<sup>576</sup> Aspen, 2007; Portz, 2007; Portz & Schwartz, 2009.

<sup>577</sup> Aspen, 2007; Ouimette, Monique, and Rosann Tung. "Family and Student Choices in Boston Public Schools." Boston: *Center for Collaborative Education* (2008): 1-11. Print; Tyler, Samuel, and Elaine Beattie. "The Real Cost of the Contract: An Analysis of the Salaries and Benefits of Boston Public Schools Teachers." *The Boston Foundation and the Boston Municipal Research Bureau* (2011): 1-19. Print.

backgrounds who attend different schools. The district also increased the funding allocated for support of students with limited proficiency in English and students with disabilities.<sup>578</sup>

### **c. Collective Bargaining**

We did not identify any recent, high-quality research studies that examined the impact of increased mayoral influence on collective bargaining practices in BPS.

### **d. Performance**

There is evidence and general agreement that district policies during the period of increased mayoral control have had a positive impact on student achievement in BPS. We identified one study that systematically evaluated the effects of mayoral control on student test scores in reading and mathematics across the United States. Using five years of data (1999-2003), researchers found that the ability of the mayor to appoint the majority of the school board, as in Boston, was associated with slightly higher average student achievement on state tests, on average, as compared with other districts in the same state at both the elementary and high school level, holding other factors constant.<sup>579</sup> In BPS, student test scores, high school graduation rates, and levels of college enrollment have all trended upwards since the institution of mayoral control, and students in BPS perform well on national assessments at all grade levels when compared with other large urban districts.<sup>580</sup>

At the same time, change has been slow, and students in BPS continue to attain proficiency on state and national exams, graduate from high school, and complete college in lower-than-desired numbers. In addition, average scores mask wide disparities in performance at BPS's exam and non-exam schools and across particular sub-groups.

There is evidence to suggest that there is wide disparity in the quality of education and expectations across BPS schools, and that reforms in BPS have not substantially changed teaching practices at some sites. The multilevel three-year case study of small schools and small learning communities described earlier found that, because of issues with implementation, classroom practice did not change significantly for the vast majority of teachers observed. Students reported low levels of engagement and the perception of low expectations for their performance by school personnel across the sample despite the reform's focus on increasing student engagement.<sup>581</sup> Similarly, in a description of multi-year efforts to assist BPS with strategies for data collection and use, a team from the Harvard University Graduate School of Education reported that they noted wide disparity in capacity across schools, as well as a lack of

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<sup>578</sup> Boston Public Schools. "Boston School Committee Unanimously Approves FY2012 Budget." *Boston Public Schools Communications Office*, 23 March 2011. Web. 28 Sept. 2011.

<sup>579</sup> Wong, 2009; Wong and Shen, 2007; Wong, et al., 2007.

<sup>580</sup> Boston Public Schools. "Four-year High School Graduation Rate: 2010 Cohort." Boston Public Schools Office of Research, Assessment and Evaluation: 2011. Web. 28 Sept. 2011; Citizen Commission, 2006; Boston Higher Education Partnership. "From College Access to College Success. College Preparation and Persistence of BPS Graduates." *Boston Higher Education Partnership* (2007): 1-70. Print; Sum, Andrew, Ishwar Khatiwada, Joseph McLaughlin, Sheila Palma, Jacqui Motroni, Neil Sullivan and Nahir Torres. "The college success of Boston public school graduates from the classes of 2000-2008: Findings from a Post-secondary Longitudinal Tracking Study and the Early Outcomes of the Success Boston College Completion Initiative." *Center for Labor Market Studies and Boston Private Industry Council*: 2010. Print. National Center for Education Statistics, 2009.

<sup>581</sup> Neufeld, 2007 Report.

transfer of data examination practices to classroom teaching practices.<sup>582</sup> Likewise, in a 2006 study of former BPS students in college, focus groups revealed large disparities in preparation for college among students from different BPS high schools.<sup>583</sup> Students at BPS's three competitive exam schools graduate and enroll in college at much higher rates than their peers at non-exam schools, and students in BPS who graduate from exam schools go on to take fewer remedial courses in college and complete college at more than double the rate of students from non-exam schools.<sup>584</sup> In 2009, the six-year graduation rate for BPS students who enrolled in college was 69% for exam school graduates and 28% for students who did not attend an exam school.<sup>585</sup>

Still, average performance by students in BPS on national exams is significantly higher, on average, than that of students in other urban districts. On the most recent national (NAEP) exams, 26% of BPS 4<sup>th</sup> graders and 24% of BPS 8<sup>th</sup> graders tested "proficient" in reading, 33% of BPS 4<sup>th</sup> graders and 34% of BPS 8<sup>th</sup> graders tested "proficient" in math, and, 18% of BPS 4<sup>th</sup> graders and 15% of BPS 8<sup>th</sup> graders tested "proficient" in science.<sup>586</sup> Proficiency rates for students at these grade levels on the state MCAS exam in 2011 were similar. Approximately two-thirds of students in BPS reached proficiency on the 10<sup>th</sup> grade MCAS exam, required for high school graduation and considered a proxy for college readiness, in 2011.<sup>587</sup> According to data from the Boston Public Schools, just over 60% of students who began ninth grade in 2006 graduated from high school.<sup>588</sup> According to a study by the Center for Labor Market Studies at Northeastern University, just over 70% of BPS students who graduated from the Class of 2003 attended a two- or four-year college sometime during the next six years; 41% of these students graduated with a college degree.<sup>589</sup>

## **B. Chicago, Illinois**

The Chicago Public Schools (CPS) is notorious for being deemed the "worst schools in the nation" by former Education Secretary William J. Bennett in 1987.<sup>590</sup> The CPS, which currently hosts 675 schools and approximately 409,000 students, is the third-largest school district in the nation.<sup>591</sup>

### **i. Mayoral Influence**

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<sup>582</sup> Murnane, Elizabeth, and Kristan Singleton. "Using Data to Inform Decision Making in Urban School Districts: Progress and New Challenges." In Paul Reville and Celine. Coggins (Eds.), *A Decade of Urban School Reform: Persistence and Progress in the Boston Public Schools*. Cambridge, MA: Harvard Education Press, 2007. Print

<sup>583</sup> Boston Higher Education Partnership, 2007.

<sup>584</sup> Sum et al., 2010; Boston Higher Education Partnership, 2007.

<sup>585</sup> Sum et al., 2010.

<sup>586</sup> National Center for Education Statistics, *The Nation's Report Card: Trial Urban District Assessment, (Mathematics, Reading, Science), 2009 and 2011*, <http://nationsreportcard.gov>. The most recent NAEP scores available at the district level are from 2011 for reading and mathematics and 2009 for science.

<sup>587</sup> Boston Public Schools. "MCAS Results Show Remarkable Growth for Turnaround Schools." *BPS Communications Office*. 20 Sept. 2011. Web. 28 Sept. 2011; Steinberg & Allen, 2007.

<sup>588</sup> BPS, Four Year High School Graduation Rates, 2010.

<sup>589</sup> Sum et al., 2010.

<sup>590</sup> "Schools in Chicago Are Called the Worst by Education Chief." *NYTimes.com*. The New York Times, 8 Nov. 1987. Web. 16 Dec. 2011.

<sup>591</sup> "Stats and Facts." *CPS.edu*. Chicago Public Schools, n.d.. Web. 8 Dec. 2011.

Regarding the possibility for improvement of the CPS, Bennett further commented that it would take a “man or woman of steel” to clean up the Chicago school system.<sup>592</sup> Richard Daley took on this task in 1989, when he was elected the Mayor of Chicago. During his twenty-two total years holding office, the Illinois General Assembly passed reforms transferring greater control and influence over the CPS to the office of the mayor. Changes to Illinois law since 1988 have affected the mayor’s control and influence in relation to governance, finance, collective bargaining, and low-performing schools.

### **a. Governance**

The Chicago Public Schools are governed primarily by Article 34 of the Illinois School Code, which applies specifically and exclusively to cities with a population exceeding 500,000 people.<sup>593</sup> The current governing scheme for CPS arises out of the Chicago School Reform Act, or the Amendatory Act of 1988 (“1988 Act”) which was first passed in 1988 and amended substantially in 1995. Even before the 1988 Act was passed, the mayor of Chicago had always appointed the members of the board of education (“board”) of the Chicago Public Schools.<sup>594</sup> Prior to May 1, 1989, the board had consisted of eleven members appointed by the mayor and subject to the approval of the Chicago city council, for staggered terms of one to five years.<sup>595</sup>

#### **1. Chicago School Reform Act/Amendatory Act of 1988**

The 1988 Act, intended to increase local control over each school,<sup>596</sup> changed the process of selecting board members. With the aim of decentralizing school governance, the 1988 Act created three new bodies within CPS: subdistrict councils, Local School Councils (LSC), and the School Board Nominating Commission (SBNC).

The 1988 Act initially created an interim seven-member board of education appointed solely by the mayor. The interim board was to remain in control until May 15, 1990, or until a new board could be selected.<sup>597</sup> After the interim board’s term expired, the 1988 Act provided that the new board would consist of fifteen members appointed by the mayor. The mayor’s appointments remained subject to city council approval; however, the 1988 Act additionally required the mayor to select his appointments from a list of candidates compiled by the newly-created SBNC. The 1988 Act provided that the SBNC would be comprised of one parent or community member elected by and from each subdistrict council,<sup>598</sup> and that the mayor would appoint five additional members with expertise in the fields of business, educational management, and human relations.<sup>599</sup> The SBNC nominated candidates for the board of education by holding public hearings and subsequently meeting to consider the prospective

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<sup>592</sup> “Stats and Facts,” 2011.

<sup>593</sup> 105 ILL. COMP. STAT. ANN. 5/34-1 (West 2011).

<sup>594</sup> See Act of Dec. 12, 1988, Pub. L. No. 85-1418, 1988 Ill. Laws 3438, 3467.

<sup>595</sup> See *id.*

<sup>596</sup> See *Fumarolo v. Bd. of Ed.*, 566 N.E.2d 1283,1302 (Ill. 1990) (“In amending the Act, the General Assembly intended to give greater authority at the local school level and to remove much of the centralized authority.”).

<sup>597</sup> 105 ILL. COMP. STAT. ANN. 5/34-3(a).

<sup>598</sup> The 1988 Act divided the district into “subdistricts” and established subdistrict councils. The subdistrict councils were composed of “one parent or community member elected by and from the parent or community members of each local school council within the subdistrict.” Subdistricts were abolished in 1995. *Id.* § 34-2.5 (repealed 1995).

<sup>599</sup> *Id.* § 34-3.1 (repealed 1995).

candidates' qualifications. The SBNC would then submit to the mayor a slate of three different candidates for each vacant or new board position, from which the mayor was required to select the board members.<sup>600</sup> The mayor was permitted to reject every candidate proposed by the board, in which case the board would be required to come up with an entirely new slate of candidates.<sup>601</sup> Thus, through the creation of the SBNC, the 1988 Act somewhat decreased the mayor's control over school board selection.

Another limit on the mayor's power in the 1988 Act was the creation of a Local School Council for every school in the district. The LSCs were originally comprised of the school principal and ten elected members. Out of the elected members, six were parents of students enrolled at the school, two were community residents in the attendance area, and two were teachers employed at the school. Voting eligibility was limited: only parents of students enrolled at the school were eligible to vote for the six parent members; only school staff members were eligible to vote for the teacher members; and only community residents were eligible to vote for the community members.<sup>602</sup> Among other powers, the LSCs were notably given control over principal selection. The 1988 Act eliminated principal tenure by declaring that all then-existing principal contracts would expire either June 30, 1990 or June 30, 1991 (to be determined by lottery), and thereafter, principals would instead serve four-year contract terms. LSCs were given the complete authority to select new principals and to decide whether to renew a principal's contract.<sup>603</sup>

## **2. *Fumarolo v. Chicago Board of Education and its Aftermath***

Certain principals and voters residing in Chicago did not agree with legislature's changes, immediately challenging provisions of the 1988 Act in *Fumarolo v. Chicago Board of Education*.<sup>604</sup> Before the 1988 Act even took effect, the *Fumarolo* plaintiffs sought a declaratory judgment that sections of the Act relating to the elimination of principal tenure and method of electing LSC members were unconstitutional.<sup>605</sup> The voter-plaintiffs argued that the 1988 Act violated their constitutional rights to equal protection, because citizens with children attending a CPS school were entitled to vote for six LSC members, while citizens who did not have children attending a CPS school could only vote for two LSC members. The Supreme Court of Illinois did not agree with the defendants' arguments that the difference in voting power was justified because parents of students were more interested in and more greatly benefited by the LSCs activities.<sup>606</sup> Instead, the court found that the LSCs had "broad, important and general" powers, such that their "actions and decisions certainly were intended to have a primary and far-reaching effect on the public education system in the City of Chicago."<sup>607</sup> Thus, the voting scheme was required to comply with the general "one person, one vote" principle mandated by the Equal Protection Clause of the United States Constitution. Because voting power was unequal and the

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<sup>600</sup> See *id.* § 34-3.1 (repealed 1995); see also *Fumarolo*, 566 N.E.2d at 1301-02.

<sup>601</sup> 105 ILL. COMP. STAT. ANN. 5/34-3.1 (repealed 1995).

<sup>602</sup> Act of Dec. 12, 1988, Pub. L. No. 85-1418, 1988 Ill. Laws 3438, 3455.

<sup>603</sup> 105 ILL. COMP. STAT. ANN. 5/34-2.3.

<sup>604</sup> *Fumarolo v. Bd. of Educ.*, 566 N.E.2d 1283 (Ill. 1990).

<sup>605</sup> *Id.* at 1288.

<sup>606</sup> *Id.* at 1290.

<sup>607</sup> *Id.* at 1295.

court found that the manner of electing LSC members was not necessary to achieve the 1988 Act's goal of educational reform, the court declared voting system unconstitutional.<sup>608</sup>

However, the court did not agree with the principal-plaintiffs' argument that the elimination of tenure unconstitutionally violated their contractual rights, deprived them of property without due process of law, and violated equal protection. Although the court concluded that only the provisions of the Act relating to election of LSC members were unconstitutional, the entire 1988 Act was struck down because "the remainder of the statute cannot stand independently."<sup>609</sup>

After the *Fumarolo* decision, the legislature reacted by revising the LSC election provisions to conform to the court's decision, and subsequently re-enacted the 1988 Act in 1991. The LSCs now consist of twelve or thirteen members: the principal, two teachers at the school, six parents of students enrolled at the school, one school district employee who is not a teacher but who is assigned to "perform the majority of their employment duties" at the school, two community residents, and for secondary schools, a full-time student member. The six parent members and two community resident members are elected by the parents and community residents in the attendance area of each school. The teachers, non-teacher employee, and student members are appointed by the CPS board of education.<sup>610</sup> The LSCs still enjoy substantial powers, notably including, to: annually evaluate principal performance; determine whether the principal's contract should be renewed; select a new principal; establish criteria to be included as part of the principal's performance contract; approve the principal's expenditure plan; make recommendations concerning textbook selection and curriculum development; advise the principal regarding attendance and discipline policies; and approve a school improvement plan.<sup>611</sup>

### 3. Amendatory Act of 1995

In contrast to the 1988 Act decreasing the mayor's control in exchange for greater local influence over individual schools, the Illinois legislature drastically increased the mayor's control over school district governance with the Amendatory Act of 1995 ("1995 Act"). The General Assembly declared that the Chicago Public Schools were in the throes of an "education crisis"<sup>612</sup> and as a result, abolished the terms of all then-existing board of education members and replaced the board with an interim, five-member Chicago School Reform Board of Trustees ("Trustees"), directed to "bring educational and financial stability to the system."<sup>613</sup> The Trustees were appointed solely by the mayor and had "all powers and duties exercised and performed by the Chicago Board of Education."<sup>614</sup> The Trustees held four-year terms until June 30, 1999, or until a new board of education could be appointed pursuant to the new process provided by the 1995 Act.<sup>615</sup>

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<sup>608</sup> *Id.* at 1300.

<sup>609</sup> *Id.* at 1303.

<sup>610</sup> 105 ILL. COMP. STAT. ANN. 5/34-2.1 (West 2011).

<sup>611</sup> *Id.* § 34-2.3.

<sup>612</sup> *Id.* § 34-3.3.

<sup>613</sup> *Id.*

<sup>614</sup> *Id.*

<sup>615</sup> *Id.*

After the Trustees' terms expired, the 1995 Act created a seven-member board, once again named the board of education.<sup>616</sup> However, the 1995 Act abolished the SBNC and did away with the requirement of city council approval of the mayor's board member appointments.<sup>617</sup> Thus, the mayor currently enjoys complete discretion to appoint each member of the board of education, not limited to a list of candidates and not required to obtain consent or approval by city council.<sup>618</sup> The 1995 Act originally allowed the mayor to select a president of the Trustees as well; however, the board now enjoys the power to elect its president and vice-president each year.<sup>619</sup> A minor change to the composition of the board occurred again in 2005, granting the board the authority to select a non-voting student advisory member if it desired.<sup>620</sup>

In addition to altering the process of selecting the board members, the 1995 Act created a new position of Chief Executive Officer (CEO) to take the place of the former General Superintendent. Section 5/34-3.3 provides that the CEO "shall be responsible for the management of the system, and . . . shall have all other powers and duties of the general superintendent . . ."<sup>621</sup> The mayor appoints the CEO and determines his or her compensation.<sup>622</sup> The power and duties of the general superintendent, and thus, the CEO include: control over courses of study mandated by State law, textbooks, and discipline; the authority to monitor performance of schools and to place them on remediation and probation, and to recommend that a school be placed on intervention or be reconstituted; the duty to conduct annual evaluations of each principal; and the power to approve contracts and expenditures if the board delegates the authority to do so.<sup>623</sup> In sum, the CEO makes recommendations to the board regarding contracts, policies, and procedures.<sup>624</sup> The CEO is also permitted to appoint a management team, consisting of a chief operating officer, chief fiscal officer, chief educational officer, and chief purchasing officer, each of whose duties and responsibilities are assigned by the CEO.<sup>625</sup>

Regarding qualifications and background, the CEO is currently only required to have "recognized administrative ability and management experience."<sup>626</sup> The fact that the CEO of the third-largest school district in the nation need not possess education credentials has been met with controversy;<sup>627</sup> indeed, current CEO Jean-Claude Brizard is the first CEO in sixteen years to have an education background.<sup>628</sup> However, a pending House Bill introduced in January

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<sup>616</sup> *Id.* § 34-3(b).

<sup>617</sup> *Id.*

<sup>618</sup> *Id.* The laws do not specify whether the mayor also has the power to remove school board members.

<sup>619</sup> *Id.*

<sup>620</sup> *Id.* § 34-3(c).

<sup>621</sup> *Id.* § 34-3.3(b).

<sup>622</sup> *Id.* § 34-3(a).

<sup>623</sup> *See id.* § 34-8.

<sup>624</sup> *See id.* § 34-3.3(b).

<sup>625</sup> *Id.* § 34-3.3(c).

<sup>626</sup> *Id.* § 34-3.3(b).

<sup>627</sup> "Bills on Vouchers, Charters, CEO Credentials Proposed for Chicago Schools." *Catalyst-Chicago.org*. Catalyst Chicago, 11 Mar. 2011. Web. 16 Dec. 2011.

<sup>628</sup> Ahmed-Ullah, Noreen. "Brizard Sailing into Rough Waters at Helm of CPS Reform." *ChicagoTribune.com*. Chicago Tribune, 30 Aug. 2011. Web. 16 Dec. 2011.

2011, if passed by the General Assembly, would require the CEO to have a Master of Education degree and a current teaching certificate.<sup>629</sup>

Although it appears that the mayor has vast authority over the Chicago Public Schools through the power to appoint the board members and CEO, by statute the board continues to “exercise general supervision and jurisdiction over the public education and public school system of [Chicago]”<sup>630</sup>. The board has numerous powers under the School Code, notably including, but not limited to: establishing and maintaining schools, co-operating with the circuit courts, establishing and approving system-wide curriculum objectives and standards including graduation standards, developing a policy for capital improvement of schools and buildings, contracting with third parties for services, and promulgating rules establishing procedures governing layoff, reduction in force, or recall of employees.<sup>631</sup> Furthermore, as mentioned above, the CEO can merely make recommendations to the board. Despite the statutory scheme, commentators have noted that while Mayor Daley held office, the board “virtually never contest[ed] CEO recommendations” and that the board’s public meetings served merely to “report on and sanction decisions already made in private discussions among its members, the CEO, and the mayor.”<sup>632</sup> Those comments suggest that the mayor has even more unofficial authority and influence over the board than is granted by the legislature. This trend might continue with new Mayor Rahm Emanuel; during his first few months in office, questions have already arisen about who is really running the district – Mayor Emanuel, the CEO, or the board President.<sup>633</sup>

## **b. Finance**

Article X, Section 1 of the Illinois Constitution commands that “The State shall provide for an efficient system of high quality public educational institutions and services,” and that “the State has the primary responsibility for financing the system of public education. Ill. Const. Art. X. S 1. In *Bond v. Board of Education*, the Supreme Court of Illinois clarified that “the responsibility for effectuating this constitutional mandate is delegated to the school boards,” and that school boards are “charged not only with providing for the continuum of educational services, but with the fiscal management incidental thereto.”<sup>634</sup> As such, the board is empowered to levy property taxes at a specified maximum rate, for “educational purposes.”<sup>635</sup>

Section 34-43 of the School Code requires the board to adopt a budget within the first sixty days of each fiscal year. The board must balance the budget within certain standards that it has the authority to establish.<sup>636</sup> The board is assisted by the Chicago School Finance Authority (SFA), established by the School Finance Authority Act, which was passed in 1980.<sup>637</sup> The

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<sup>629</sup> H.R. 0209, 97th Gen. Assemb., Reg. Sess. (Ill. 2011).

<sup>630</sup> 105 ILL. COMP. STAT. ANN. 5/34-18.

<sup>631</sup> *See id.* § 34-18.

<sup>632</sup> Shipps, Dorothy. “Neo-Progressivism as School Reform in Chicago.” In William Lowe Boyd, Charles Taylor Kerchner, and Mark Blyth (Eds.), *The Transformation of Great American School Districts: How Big Cities are Reshaping Public Education*. Cambridge, Massachusetts: Harvard Education Press, 2008. Print.

<sup>633</sup> Ahmed-Ullah, 30 Aug. 2011.

<sup>634</sup> 408 N.E.2d 714, 716 (1980).

<sup>635</sup> 105 ILL. COMP. STAT. ANN. 5/34-53.

<sup>636</sup> *See id.* § 34-43.

<sup>637</sup> *Id.* § 34A-101.



legislature created a School Finance Authority for each district in cities having a population exceeding 500,000, in order to promote financial integrity and sound financial management.<sup>638</sup> The purpose of the SFA is to “exercise financial control over the board, and to furnish financial assistance . . . .”<sup>639</sup> The SFA has all powers necessary to meet its responsibilities and to carry out its purposes.<sup>640</sup> The governing board of the Authority consists of five directors: two appointed by the Governor with the mayor’s approval, two appointed by the mayor with the governor’s approval, and one appointed jointly by the governor and mayor.<sup>641</sup> After adopting a budget, the board must submit it to the SFA, which must then approve or reject the budget. A budget has no effect until it has been approved by the SFA.<sup>642</sup>

Once a budget is approved and funds distributed to each school, the LSCs and principals share the control over how the funds are used. The principal prepares an expenditure plan, but the LSC has the power to approve it and to transfer allocations by supermajority vote. In 1997, the legislature authorized the CEO to appoint a “representative of the business community with experience in finance and management to serve as an advisor,” if the board determines that an LSC is not “carrying out its financial duties effectively.”<sup>643</sup> If such a fiscal advisor has been appointed, the advisor must report to the CEO, board, LSC, and principal on the progress made in addressing any financial deficiencies. If the deficiencies have not been corrected, the CEO may appoint a financial supervision team to develop and implement school budgets.<sup>644</sup>

### **c. Collective Bargaining**

Collective bargaining in the Chicago Public Schools is governed by the Illinois Educational Labor Relations Act (IELRA) and Article 34 of the Illinois School Code. With the passage of the IELRA in 1984, the legislature recognized that “harmonious relationships are required between educational employees and their employers,” and that such relationships may best be accomplished by granting educational employees the right to organize; requiring educational employers to negotiate and bargain with employee organizations and to enter into written agreements; and by establishing procedures to protect the rights of employees, employers, and the public.<sup>645</sup>

In the 1988 Act, the legislature prescribed that the general superintendent “shall negotiate contracts with all labor organizations which are exclusive representatives of educational employees.”<sup>646</sup> Thus, since the 1995 Act in which the legislature granted to the new CEO all the powers and duties of the general superintendent, the CEO has been responsible for negotiating collective bargaining contracts.<sup>647</sup> Such contracts are subject to the board’s approval.<sup>648</sup> In 1993, the legislature granted principals some control over collective bargaining contracts as well,

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<sup>638</sup> *Id.* § 34A-102(iii).

<sup>639</sup> *Id.* § 34A-201.

<sup>640</sup> *Id.*

<sup>641</sup> *Id.* § 34A-301.

<sup>642</sup> *Id.* § 34A-404.

<sup>643</sup> *Id.* § 34-2.1(a).

<sup>644</sup> *Id.* § 34-8.3(a).

<sup>645</sup> 115 ILL. COMP. STAT. ANN. 5/1 (West 2011).

<sup>646</sup> 105 ILL. COMP. STAT. ANN. 5/34-6.

<sup>647</sup> *Id.* §§ 34-6, 34-3.3.

<sup>648</sup> *Id.* § 34-6.

through the enactment of mandatory waiver provisions. Section 8.1a of the School Code provides that, regardless of any other law or collective bargaining contract, a principal has the right to “declare waived and superseded a provision of the teachers’ collective bargaining agreement as it applies in or at the attendance center to the bargaining unit’s employees,” provided that at least 51% of the employees in the bargaining unit at the school agree.<sup>649</sup> All contracts entered into after the 1995 Act are required to include such a waiver provision.<sup>650</sup>

Although the laws have not changed much in terms of who negotiates and approves contracts on behalf of the Chicago Public Schools, the legislature has greatly varied the mandatory, permissive, and restricted topics of bargaining over the years. With the passage of the IELRA in 1984, the legislature declared for the first time the subjects over which educational employers would be required to negotiate with their employees. The IELRA provides that employers are *not required* to bargain over “matters of inherent managerial policy,” which include the functions of the employer, standards of services, overall budget, organizational structure, and selection of new employees.<sup>651</sup> The IELRA *required* employers to bargain with regard to “policy matters directly affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by employee representatives.”<sup>652</sup> In 2003, the legislature specified that exclusive of the IELRA, “matters of inherent managerial policy necessary to comply with the federal No Child Left Behind Act of 2001 . . . and the impact of these decisions on individual employees or the bargaining unit” are permissive topics of bargaining and are within the sole discretion of the employer to decide to bargain.<sup>653</sup>

The legislature made further changes to collective bargaining topics and the right to strike with the Amendatory Act of 1995. As the mayor gained increased control over school district with the 1995 Act, educational employees in Chicago Public Schools lost the rights to bargain over certain topics. The legislature initially banned strikes outright for the first eighteen months following the effective date of the Act,<sup>654</sup> and set forth a list of topics that, regardless of any other law to the contrary, would be *prohibited* subjects of bargaining: (1) decisions to grant or deny a charter school proposal; (2) decisions to contract with a third party for services otherwise performed by employees in a bargaining unit; (3) decisions to layoff or reduce in force employees; (4) decisions to determine class size, staffing and assignment, class schedules, academic calendar, hours and places of instruction, or pupil assessment policies; and (5) decisions concerning use and staffing of experimental or pilot programs.<sup>655</sup> However, in 2003, the legislature eased up a bit, declaring the above topics (with the exception of decisions regarding charter schools) *permissive subjects* of bargaining within the employer’s discretion to decide to bargain, but only if the educational employer is *required* to bargain over “the impact of a decision concerning such subject or matter on the bargaining unit upon request by the exclusive representative.”<sup>656</sup>

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<sup>649</sup> *Id.* § 34-8.1a.

<sup>650</sup> *Id.*

<sup>651</sup> 115 ILL. COMP. STAT. ANN. 5/4 (West 2011).

<sup>652</sup> *Id.* (emphasis added).

<sup>653</sup> 105 ILL. COMP. STAT. ANN. 5/34-3.5(b).

<sup>654</sup> 115 ILL. COMP. STAT. ANN. 5/13(a).

<sup>655</sup> Act of May 30, 1995, Pub. L. No. 89-0015, 1995 Ill. Laws 440, 517.

<sup>656</sup> Act of Apr. 16, 2003, Pub. L. No. 93-0003, 2003 Ill. Laws 18, 38-39.

Recent events have strained the relationship between the Chicago Teachers Union (CTU) and the Chicago Public Schools, and the legislature has reacted. As of August 2011, the CTU and CPS were engaged in contentious negotiations over increasing the length of the school day by 90 minutes, a Mayor Emanuel initiative, and how much of a raise, if at all, the teachers will receive in return.<sup>657</sup> Adding fuel to the fire is the legislature's response: as of June 2011, the length of the work and school day and year were added to the list of topics that are within the *sole discretion* of the employer to decide to bargain.<sup>658</sup> Relations between the district and teachers' union had declined to the point that, although there have been no teacher strikes in Chicago since a nineteen-day strike in 1987, CTU President Karen Lewis stated in August 2011 that the possibility of a strike was "very high."<sup>659</sup> The legislature has responded in this area as well, adding a new requirement before educational employees in CPS may go on strike. As of June 2011, educational employees in the CPS may not strike unless, among other requirements, at least three-fourths of the bargaining unit employees have voted to authorize the strike.<sup>660</sup>

#### **d. Low-Performing Schools**

On the heels of Bennett's November 1987 comment labeling Chicago Public Schools as among the "worst in the nation," the 1988 Act set goals for academic improvement in the district. The legislature aimed for the CPS to steadily, year-by-year, increase graduation rates, improve average daily student attendance rates, decrease the percentage of students not promoted to the next higher grade, to have each student make "significant progress" toward meeting and exceeding state standards, and for every school in the district to realize "appropriate improvement and progress."<sup>661</sup> With these goals in mind, the 1988 Act currently requires each school to come up with a three-year "school improvement plan."<sup>662</sup> Under section 2.4, the principal of each school, in consultation with the LSC, staff, parents, and community residents, must develop a plan to be approved by the LSC. The principal is responsible for directing the implementation of the plan and the LSC is responsible for monitoring the plan's implementation. Plans must be designed to achieve several "priority goals," including, but not limited to: assuring significant student progress in State performance standards; student attendance and graduation rates that equal or exceed national averages; and adequately preparing students for transition to further education, life experiences, and employment.<sup>663</sup>

Under the terms of the 1988 Act, the legislature originally required each subdistrict superintendent to monitor individual schools' performance and to identify the schools that had failed to develop or implement a school improvement plan, failed to progress, or failed or

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<sup>657</sup> Ahmed-Ullah, Noreen. "CPS Budget to be Reconsidered Wednesday as Teachers Union and Mayor Fight Battles." *ChicagoTribune.com*. Chicago Tribune, 24 Aug. 2011. Web. 16 Dec. 2011; Hood, Joel. "Fight Between CPS, Teachers Union Echoes Talk Leading up to 1987 Strike." *ChicagoTribune.com*. Chicago Tribune, 29 Aug. 2011. Web. 16 Dec. 2011.

<sup>658</sup> 115 ILL. COMP. STAT. ANN. 5/4.5(a)(4). However, this will not apply in the CPS until the current contract with the CTU expires. The CPS is required to bargain over the *impact of decisions* regarding such topics.

<sup>659</sup> "Chicago Teachers Strike? Union Leader Karen Lewis Says Odds are 'Very High'." *HuffingtonPost.com*. Huff Post Chicago, 15 Aug. 2011. Web. 16 Dec. 2011. Lewis later promised that teachers would not strike during the 2011-2012 school year.

<sup>660</sup> 115 ILL. COMP. STAT. ANN. 5/13(b)(2.10).

<sup>661</sup> 105 ILL. COMP. STAT. ANN. 5/34-1.02 (West 2011).

<sup>662</sup> *Id.* § 34-2.4.

<sup>663</sup> *See id.*

refused to comply with the improvement plan or any other laws.<sup>664</sup> Such schools are deemed “non-performing schools,” and the 1988 Act set forth a process for the subdistrict superintendent to place the school on either “remediation” or “probation,” with the approval of the subdistrict council.<sup>665</sup> The purpose of remediation is to “correct the deficiencies in the performance of the attendance center” by drafting a new school improvement plan; applying for more funding to train the LSC; directing implementation of a school improvement plan; or mediating disputes or “other obstacles to reform.”<sup>666</sup> The 1988 Act provided that if a school’s problems were “serious” or unable to be remediated, the superintendent could place the school on probation, with approval of subdistrict council. A school on probation has one year to make adequate progress in correcting deficiencies, and if it fails to do so, is subject to the ordering of new LSC elections, removing and replacing the principal, replacing faculty members, and closing the school.<sup>667</sup> The school must have an opportunity to be heard and the board must approve before the foregoing actions are taken.<sup>668</sup>

With the 1995 Act, the legislature transferred the responsibility to monitor schools and identify non-performing schools to the CEO.<sup>669</sup> Furthermore, the legislature created the Chicago Schools Academic Accountability Council (“Council”) “to assist the board . . . in ensuring the continuous improvement in all schools operated by the board.”<sup>670</sup> The purpose of the Council was to “develop and implement a comprehensive system of review, evaluation, and analysis of school performance within the Chicago public schools.” The size, makeup, and process of appointing members were determined by the Trustees in consultation with the State Board of Education. By its own terms, the Council would expire June 30, 2000, which was later extended to June 30, 2004.<sup>671</sup> As such, the Council no longer exists.

In addition to the creation of the Council, the 1995 Act established more actions that may be taken in regards to non-performing schools. Now, once the CEO identifies a school as “non-performing,” the school *must* be placed on remediation and a remediation plan must be developed.<sup>672</sup> A school on probation that fails to make adequate progress after one year is now additionally subject to reconstitution, replacement and reassignment of all employees in the school, and intervention.<sup>673</sup> The legislature added yet another option in 2009, the operation of the school as a contract turnaround school.<sup>674</sup>

## ii. Review of Empirical Research

In order to identify effects, if any, associated with the increased level of mayoral influence in the Chicago Public Schools (CPS) in recent years, we reviewed high-quality,

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<sup>664</sup> Act of Dec. 12, 1988, Pub. L. No. 84-1418, 1988 Ill. Laws 3438, 3474-75.

<sup>665</sup> *Id.* at 3475.

<sup>666</sup> *Id.*

<sup>667</sup> *Id.*

<sup>668</sup> *Id.*

<sup>669</sup> Act of May 30, 1995, Pub. L. No. 89-0015, 1995 Ill. Laws 440, 477-78.

<sup>670</sup> *Id.* at 476.

<sup>671</sup> 105 ILL. COMP. STAT. ANN. 5/34-3.4 (repealed 2004).

<sup>672</sup> *Id.* § 34-8.3(b).

<sup>673</sup> *Id.*

<sup>674</sup> A “contract turnaround school” is defined as: “an experimental contract school created by the board to implement alternative governance in an attendance center subject to restructuring or similar intervention under federal law that has not made adequate yearly progress for 5 consecutive years or a time period set forth in federal law.” *Id.* § 34-1.1.

methodologically sound research reports; journal articles; books; and book chapters published within the last five years that focused on outcomes for students, teachers, and administrators in CPS and across urban districts generally. While it is not methodologically possible to directly link the structure of increased mayoral control to specific outcomes in CPS, especially as a single mayor held office from the time of the reform until early in 2011, recent research provides evidence for the following general trends in Chicago.

### **a. Governance**

Since increased mayoral control in 1995, a large number of programs and policies have been implemented in CPS in an attempt to identify and improve failing schools.<sup>675</sup> These programs and policies have included an increased focus on testing and accountability, the end of social promotion across grade levels, more rigorous graduation requirements, increased autonomy for high-performing schools, and reconfiguration of large numbers of low-performing high schools as charters, contract schools, and small schools.<sup>676</sup>

There is evidence that policies enacted under increased mayoral control in Chicago have been associated with changes in school structure, activities, curriculum and focus in at least some schools and for at least some initiatives. Numerous schools were restructured or opened during Mayor Daley's time in office.<sup>677</sup> We identified three high-quality studies that looked explicitly at changes in aspects of school structure and classroom activities within schools in CPS in response to reforms at the high school level. A carefully designed, extensive five year case study of three low performing high schools documented substantial changes in school focus and instructional activities in response to high-stakes testing policies focused on literacy enacted during Mayor Daley's tenure.<sup>678</sup> Two other studies found dramatic increases in student enrollment in more challenging English and mathematics courses in ninth grade and high school science courses in general in response to new high school graduation requirements.<sup>679</sup>

### **b. Finance**

In the early years of increased mayoral control, Mayor Daley and his administration were credited with establishing and maintaining labor peace, reducing waste and corruption, improving capital funding, and increasing efficiency in CPS, as well as beginning capital improvement projects in a subset of schools, mostly in the neighborhoods around the Loop,

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<sup>675</sup> Shipps, Dorothy. "Updating Tradition," In Joseph Viteritti (Ed.), *When Mayors take Charge: School Governance in the City*. Washington, D.C.: The Brookings Institution, 2009. Print; Wong, 2009.

<sup>676</sup> Humphrey, Daniel, and Patrick Shields. "High School Reform in Chicago Public Schools: An Overview." *Menlo Park, CA: SRI International* (2009): 1-17. Print; Shipps, 2009; Wong, Kenneth. "Redesigning Urban Districts in the USA: Mayoral Accountability and the Diverse Provider Model." *Educational Management Administration and Leadership* 39.4 (2011): 486-500. Print.

<sup>677</sup> Cassidy, Lauren, Daniel Humphrey, Marjorie Wechsler, and Viki Young. "High School Reform in Chicago Public Schools: Renaissance 2010." *Menlo Park, CA: SRI International* (2009): 1-33. Print. De la Torre, Marisa, and Julia Gwynne. "Changing Schools: A Look at Student Mobility Trends in Chicago Public Schools Since 1995." *Chicago: Consortium on Chicago School Research* (2009): 1-60. Print; Wong, 2011.

<sup>678</sup> Wong, et al., 2007

<sup>679</sup> Allensworth, Elaine, Takako Nomi, Nicholas Montgomery, and Valerie Lee. "College Preparatory Curriculum for All: Academic Consequences of Requiring Algebra and English 1 for Ninth Graders in Chicago," *Educational Evaluation and Policy Analysis*, 31.4 (2009): 367-391. Print; Montgomery, Nicholas and Elaine Allensworth, "Passing through Science: The Effects of Raising Graduation Requirements in Science on Course-taking and Academic Achievement in Chicago." *Chicago: Consortium on Chicago School Research* (2010):1-52. Print.

Chicago's downtown business district.<sup>680</sup> Standard and Poor's raised the bond rating of the district from BBB- in March 1996 to A- in 1997 in response to this increased stability and efficiency.<sup>681</sup> During this period, the budget for the school district grew by \$1.5 billion.<sup>682</sup> Since this time, billions of philanthropic dollars have been donated to various pieces of the Chicago reforms<sup>683</sup> but according to data obtained by reporters at the Chicago Tribune, CPS has lost more than 22,000 students since 2000, while general operating expenses for the district have increased by more than \$2 billion, or 47 percent. The number of administrators per student and average salaries for administrators both increased between 2000 and 2010. The budget deficit for CPS in 2011 was \$712 million.<sup>684</sup>

We identified one study that systematically evaluated the effects of mayoral control on financial resources and spending in school districts across the United States. Using ten years (1993-2003) of financial data for 104 large school districts, researchers found that the ability of the mayor to appoint the full school board without oversight, as in Chicago, was associated with decreased revenues per pupil five years after the institution of the reform, on average, holding other factors constant.<sup>685</sup> At the same time, the researchers reported small increases in the levels of relative spending on instruction and instructional support, on average, by mayors with the ability to appoint the majority of the school board, as in Chicago, as compared to districts without this form of mayoral control.<sup>686</sup> Despite these findings, according to data obtained by reporters at the Chicago Tribune, spending on general operating expenses in CPS increased more quickly than spending on instruction between 2000 and 2010.<sup>687</sup>

### **c. Collective Bargaining**

We did not identify any recent, high-quality research studies that examined changes related to collective bargaining in CPS.

### **d. Performance**

There is little evidence that district policies have had a substantial positive impact either on student learning and achievement or on the quality of classroom teaching in CPS. We identified one study that systematically evaluated the effects of mayoral control on student test scores in reading and mathematics across the United States. Using five years of data (1999-2003), researchers found that the ability of the mayor to appoint the full school board without oversight, as in Chicago, was associated with lower student achievement on state tests, on average, as compared with other districts in the same state at both the elementary and high school level, holding other factors constant.<sup>688</sup> In an analysis of twenty years of outcomes in CPS, researchers at the Consortium for Chicago School Research identified increases in test scores at the elementary and middle school levels during the period of mayoral control. These

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<sup>680</sup> Kirst; 2009; Shipps, 2009; Wong and Shen, 2007; Wong, et al., 2007.

<sup>681</sup> Shipps, 2009; Wong and Shen, 2007; Wong, et al., 2007.

<sup>682</sup> Shipps, 2009.

<sup>683</sup> Wong, 2011.

<sup>684</sup> Hood, Joel, and Noreen Ahmed-Ullah, "New CPS Leaders Face Red Ink, Vow 'Courageous Decisions'." *Chicago Tribune*, Chicago Tribune 19 Aug. 2011. Web. 13 Sept. 2011.

<sup>685</sup> Wong, 2009; Wong, et al., 2007.

<sup>686</sup> Wong, et al., 2007.

<sup>687</sup> Hood and Ahmed-Ullah, 2011.

<sup>688</sup> Wong, 2009; Wong and Shen, 2007; Wong, et al., 2007.

increases did not accumulate over grade levels, however, suggesting that students were learning how to do better on particular assessments over time rather than increasing their skills and knowledge in the subject matter.<sup>689</sup>

In addition, we identified four recent, high-quality studies that looked at effects of particular reforms on student achievement in CPS. In a study of Chicago's High School Redesign Initiative (CHSRI), a program which opened 23 new small high schools between 2002 and 2007 in an attempt to improve student outcomes, researchers found that students at the new smaller CHSRI schools experienced a more positive school climate, had better attendance and grades in core subjects, and were more likely to persist to graduation than similar students at non-CHSRI schools, but that the students did no better on state exams or the ACT than similar students at non-CHSRI schools.<sup>690</sup> Similarly, researchers who evaluated the effects of policies at the high school level to end remedial coursework in English and mathematics and increase the number of science courses taken found large increases in the number of students taking and completing the required courses, but no increases in test scores, graduation rates, or college attendance and persistence as a result. Students who took English and mathematics under the new requirements had slightly lower GPAs and were slightly less likely to attend a four-year college, on average, than similar students at the same schools before the reform. Math failure rates increased for the lowest-performing students, and absences increased for average and high ability students.<sup>691</sup> Likewise, five of six students earned a C or lower in science after the change in science policy; two years after the reform those who earned Bs or better in science were less likely to attend and persist in college than students before the change.<sup>692</sup>

The lack of evidence for improved mastery by students may be related to lack of evidence for changes in instructional quality as a result of reforms. In the analysis of CHSRI small schools described earlier, teachers reported higher levels of trust and collegiality but not higher levels of factors associated with instructional improvement when compared to non-CHSRI schools. Nor did students in CHSRI schools report differences in quality or type of instruction as compared with students in non-CHRSI schools.<sup>693</sup> In an analysis of 78 classroom observations across several initiatives at 17 CPS high schools, researchers found that, while veteran teachers were much more effective, on average, than novice teachers at such activities as managing classroom procedures and managing student behavior, average effectiveness ratings across teachers were low, and both veteran and novice teachers received very low average ratings on the quality of their questions to students.<sup>694</sup> In the careful and comprehensive case study of the three low-performing schools mentioned above in which reforms led to large changes in focus and structure at the schools, researchers found that the rigor of questions posed

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<sup>689</sup> Luppescu, Stuart and Elaine Allensworth, Paul Moore, Marisa de la Torre, James Murphy and Sanja Jagesic. "Trends in Chicago's Schools Across Three Eras of Reform: Full Report." *Chicago: Consortium on Chicago School Research* (2011): 1-112. Print.

<sup>690</sup> Kahne, Joseph, Susan Sporte, Marisa de la Torre, and John Easton. "Small High Schools on a Larger Scale: The Impact of School Conversions in Chicago." *Educational Evaluation and Policy Analysis* 30.3 (2008): 281-315. Print; Sporte, Susan and Marisa de la Torre. "Chicago High School Redesign Initiative: Schools, Students, and Outcomes." *Chicago: Consortium on Chicago School Research* (2010):1-37. Print.

<sup>691</sup> Allensworth, et al., 2009.

<sup>692</sup> Montgomery and Allensworth, 2010.

<sup>693</sup> Kahne, et al., 2008.

<sup>694</sup> Joy Lesnick, et al., *High School Reform in Chicago Public Schools: A Snapshot of High School Instruction*, (Menlo Park, CA: SRI International, 2009).

by teachers were uniformly low across all three schools after the reform.<sup>695</sup> In the analysis of outcomes in CPS over a twenty year period cited earlier, researchers found that students' reported levels of engagement and participation and the level to which they were challenged in school did not improve during the study period.<sup>696</sup>

On average, students in CPS continue to perform poorly on national assessments and graduate from high school and attend college in low numbers. In the most recent rounds of NAEP testing, 18% of CPS 4th graders and 21% of CPS 8th graders tested "proficient" in reading, 20% of CPS 4th and 8th graders tested "proficient" in math, and 12% of CPS 4th graders and 7% of CPS 8th graders tested "proficient" in science.<sup>697</sup> All of these scores were lower than the average in other large cities and not statistically different from the average performance in 2009 or 2007.<sup>698</sup> While students in CPS perform better than students in other parts of Illinois who attend schools that serve similar populations of students, the gap in performance between students who are African American and those who are white or Asian has increased in CPS during mayoral control at the same time this gap has decreased nationally.<sup>699</sup> High school graduation rates have improved in recent years, but the average ACT score in CPS is below 20, well below the level required for college admission.<sup>700</sup> For every 100 students who start high school in CPS, approximately half graduate, seventeen enroll in college, and eight obtain a bachelor's degree in six years.<sup>701</sup>

## C. Comparison of Boston and Chicago

### i. Governance

The strong forms of mayoral control over the school district governance systems in Boston in Chicago are rather similar to each other, with only minor differences. The school district governance systems in both the Boston Public Schools and Chicago Public Schools are established by state law that applies only to those school districts—in Massachusetts, the law mentions the BPS specifically, and in Illinois, the relevant law applies only to Chicago based on its population. In both cities, the mayors appoint the entire seven-member governing boards of their respective school districts. Furthermore, both school districts have local school councils for each school site.

A slight difference in the BPS is that the mayor's selections for board members are limited by the candidates proposed by the nominating panel. However, the mayor of Boston appoints four out of the thirteen members on the nominating panel. The mayor of Chicago is not limited by a list of candidates and additionally enjoys the power to appoint the

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<sup>695</sup> Wong, et al., 2007.

<sup>696</sup> Luppescu, 2011.

<sup>697</sup> The most recent NAEP scores available at the district level are from 2011 for reading and mathematics and 2009 for science.

<sup>698</sup> National Center for Education Statistics, *The Nation's Report Card: Trial Urban District Assessment, (Mathematics, Reading, Science), 2009 and 2011*, <http://nationsreportcard.gov>.

<sup>699</sup> Luppescu, 2011.

<sup>700</sup> John Easton, Stephen Ponisciak, and Stuart Luppescu, *From High School to the Future: The Pathway to 20*, (Chicago: Consortium on Chicago School Research, 2008); Humphrey and Shields, 2009; Luppescu, 2011.

<sup>701</sup> Elaine Allensworth, *From High School to the Future: A First Look at Chicago Public School Graduates' College Enrollment, College Preparation, and Graduation from Four-Year Colleges*, (Chicago: Consortium on Chicago School Research, 2006).



superintendent/CEO. In Boston, the school committee, rather than the mayor, selects the superintendent. This might not be much of a difference in practice, because in Boston, the mayor appoints every member of the school committee. As such, the school committee would not likely hire a superintendent without the mayor's concurrence. In sum, the mayors in both Boston and Chicago exert direct influence over school board governance.

## **ii. Finance**

In both Boston and Chicago, the school boards participate in developing the school district budget. The common feature between the BPS and CPS is that the school board, which is appointed entirely by the mayor, is involved in the budget-making process in consultation with other entities. The mayor of Chicago has indirect influence over the budget through the appointment powers over the school board and, partially, the School Finance Authority, which approves the budget that the school board adopts.

Boston's system differs from Chicago's in that the mayor him or herself is inserted into the budget-making process. This is because in Massachusetts, school funding is tied directly to the cities; therefore, the mayors and city councils are given a say in the school districts' budgets and appropriations. As such, the mayor of Boston additionally has a direct role in shaping the budget. The mayor may approve or reduce the total BSC budget and seek the appropriation of funds directly from the city council.

## **iii. Collective Bargaining**

The comparison of the CPS and BPS collective bargaining process is similar to the comparison of the budgeting process in such school districts. For example, the mayor of Chicago has only an indirect role in collective bargaining, while the mayor of Boston has an additional direct role. In Chicago, the mayor exerts indirect influence over collective bargaining between the CPS and its educational employees, because the mayor appoints both the CEO, who negotiates the contracts, and the entire board of education, which approves the contracts. In Boston, the mayor plays a greater role: in addition to appointing the board that negotiates with employees, the mayor him or herself participates and votes in the bargaining process. The mayor's authority to participate in the bargaining process applies to districts and cities throughout Massachusetts.

In both cities, the rights of the educational employees are limited in terms of the topics over which employees may compel bargaining, thereby increasing the power of the board, and indirectly, the mayor, over collective bargaining. In Massachusetts and Illinois, mandatory and restricted topics of bargaining are generally set by state law.

## **iv. Low-Performing Schools**

The mayors in both Boston and Chicago exert indirect influence, through appointment powers, over low-performing schools in the districts. In Chicago, the CEO must monitor school performance and identify which schools are "non-performing," and also has the power to take action in regards to such schools. In Boston, the mayor's influence is even more indirect because although the district superintendent plays a large role in overseeing underperforming schools, the mayor does not appoint the superintendent. However, the Mayor of Boston does have a direct but small role in developing the turnaround plan for underperforming schools, as one out of the

ten to thirteen individuals in the local stakeholder group. The Mayor of Boston must also present evidence to the state board when a school district is designated as chronically underperforming due to fiscal deficiencies. This requirement is not unique to Boston and applies generally throughout Massachusetts.

## **VI. Control Category**

### **A. New York City, New York**

The New York City school district, now known as the New York City Department of Education (NYCDOE), is the largest school district in the nation, hosting more than one million students.<sup>702</sup> The NYCDOE has utilized various forms of centralized and decentralized school district governance models, with the mayor exercising some degree of influence over the district throughout history. The NYCDOE is currently comprised of an expansive network of officials and entities at the citywide and local community district levels.<sup>703</sup> This may not be surprising, given that the NYCDOE is home to more students than some U.S. states' entire population.

#### **i. Mayoral Influence**

Mayoral involvement in the public school system is nothing new to New York City; in fact, the mayor of New York City began selecting members of the board of education as early as 1882.<sup>704</sup> Until 1969, the New York City public schools were governed by a mayor-appointed central school board in conjunction with several local community school boards, whose members were chosen by the city board.<sup>705</sup> In that same year, the laws pertaining specifically and exclusively to the governance structure of the NYCDOE were compiled into Article 52-a of Chapter 16 of the New York Consolidated Laws.<sup>706</sup>

#### **a. Governance**

##### **1. New York City Public Schools, 1969-1996**

Effective April 30, 1969, in a continued attempt to decentralize New York City school district governance and reduce the mayor's power,<sup>707</sup> the legislature provided for an interim board of education to serve until a new, permanent board could be elected. The interim board consisted of five members, with each borough president appointing one member.<sup>708</sup> Per Article 52-a, the permanent board would consist of seven members. Originally, two of the seven members were to be appointed by the mayor of New York City and the remaining five would be

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<sup>702</sup> "About Us." *NYC.gov*. New York City Department of Education, n.d. Web. 19 Oct. 2011.

<sup>703</sup> *Bylaws of the Panel for Educational Policy of the Department of Education of the City School District of the City of New York*, N.Y.C. DEP'T EDUC., pmb., <http://schools.nyc.gov/NR/rdonlyres/B432D059-6BFE-4198-8453-466FDE2B22D5/69835/PEPBylawsFinal91409.pdf> (last visited Oct. 20, 2011) [hereinafter *Panel Bylaws*].

<sup>704</sup> Ravitch, Diane. "A History of Public School Governance in New York City." In Joseph Viteritti (Ed.), *When Mayors Take Charge: School Governance in the City*. Washington, D.C.: The Brookings Institution, 2009. Print.

<sup>705</sup> Ravitch, 2009.

<sup>706</sup> Act of Apr. 30, 1969, ch. 330, 1969 N.Y. Laws 1079, 1080 (codified as amended at N.Y. EDUC. LAW §§ 2590-2590-u (McKinney 2011)); see also *Oliver v. Bd. of Educ.*, 306 F.Supp. 1286, 1287 (S.D.N.Y. 1969).

<sup>707</sup> See Act of June 5, 1968, ch. 568, § 1, 1968 N.Y. Laws 1978, 1978.

<sup>708</sup> 1969 N.Y. Laws at 1113.

elected from each county, or borough, in New York City.<sup>709</sup> However, the voting scheme for the five board members was struck down in *Oliver v. Board of Education*, in which the plaintiff sought a declaratory judgment that the new laws were unconstitutional before the election could even take place.<sup>710</sup> In an opinion dated November 20, 1969, a federal district court held that the voting scheme violated the Fourteenth Amendment guarantee of equal protection, because the counties varied greatly in population; therefore, the vote of a citizen in a more populous county would “carry less weight” than the vote of one in a smaller county.<sup>711</sup> Because the board had “broad powers to run the city schools,” school board elections were required to conform to the “one man, one vote” doctrine.<sup>712</sup>

After the court’s decision, the legislature revised the board to consist of seven appointed members: two chosen by the mayor and five by the borough presidents.<sup>713</sup> The new board possessed all powers given to the interim board elsewhere in the law, plus the specific authority to: approve the chancellor’s determinations relating to curriculum requirements, estimates for operating and capital purposes of all schools, and site selection; hold public hearings “on any matter relating to the educational welfare of the city school district;” be the public employer of all employees appointed or assigned by the board; require the chancellor to prepare an annual report regarding the city school system; and to require community boards to make periodic reports.<sup>714</sup>

The 1969 legislation created the position of chancellor of the New York City school district, giving him all the powers and duties of the previous superintendent of schools, in addition to a specified list of several powers.<sup>715</sup> These powers included, among others, the authority to: establish, control, operate, or discontinue high schools, special education programs, and any city-wide programs; employ or retain counsel; promulgate minimum educational standards and curriculum requirements for all schools in the district and to evaluate all schools; require each community board to make annual reports regarding the schools under its jurisdiction; and to delegate powers and duties to subordinate officers or employees.<sup>716</sup> The chancellor was selected and employed by the city board for a two- to four-year contract term.<sup>717</sup>

The interim board, and thus, the permanent board, was empowered to divide the city district into thirty to thirty-three “community districts.”<sup>718</sup> Each community district would have its own community board composed of seven to fifteen members to be elected by the local voters.<sup>719</sup> The community boards had jurisdiction over all “pre-kindergarten, nursery, kindergarten, elementary, intermediate, and junior high schools and programs in connection

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<sup>709</sup> *Oliver*, 306 F.Supp. at 1287.

<sup>710</sup> *Id.*

<sup>711</sup> *Id.* at 1289-91.

<sup>712</sup> *Id.* at 1291.

<sup>713</sup> Act of June 22, 1973, ch. 915, § 1, 1973 N.Y. Laws 2713, 2713-14.

<sup>714</sup> Act of Apr. 30, 1969, ch. 330, § 4, 1969 N.Y. Laws 1079, 1091-93.

<sup>715</sup> For the current list of powers and duties of the Superintendent of Schools in other districts, see EDUC. § 2566.

<sup>716</sup> 1969 N.Y. Laws at 1093-95.

<sup>717</sup> *Id.* at 1093.

<sup>718</sup> *Id.* at 1082.

<sup>719</sup> *Id.*

therewith in the community district.”<sup>720</sup> The community boards possessed a non-exhaustive list of nineteen powers and duties, notably including to: employ a community superintendent; delegate to the superintendent any of the board’s administrative and ministerial powers and duties; to appoint, define the duties, assign, promote, and discharge all employees and to fix their compensation and conditions of employment; determine matters relating to the instruction of students; generally manage and operate schools and facilities under their jurisdiction; maintain discipline in schools and programs; and to submit budget proposals directly to the mayor.<sup>721</sup> Despite these broad powers, the chancellor had substantial oversight over the community boards. The chancellor could supersede, suspend, or remove an entire community board or any of its members, if he determined that the community board failed “to comply with any applicable provisions of law, by-laws, rules or regulations, directives and agreements, and after efforts at conciliation” had failed.<sup>722</sup>

Each community district had its own community superintendent selected by the community board. Community superintendents were to act “under the direction of” their community board. Each community superintendent had strong authority, possessing the “same powers and duties with respect to the schools and program under the jurisdiction of his community board as the superintendent of schools of the city district of the city of New York . . . .”<sup>723</sup> The community superintendents were also authorized to delegate their powers and duties to any subordinate officers or employees.<sup>724</sup>

Although the legislature’s 1969 changes to the city board and community boards were an attempt at decentralizing school district governance by decreasing the mayor’s influence and increasing the strength of the community boards, “[i]t should be noted that the mayor was never powerless during decentralization; . . . . At no time was the mayor a powerless bystander.”<sup>725</sup>

## 2. New York City Governance Reform Act of 1996

The next major changes to the governance of the New York City public school system occurred during Mayor Rudolph Giuliani’s tenure, with the New York City Governance Reform Act of 1996 (Governance Reform Act).<sup>726</sup> The Governance Reform Act increased the authority of the chancellor and community superintendents at the expense of the citywide and local community boards, marking the beginning of a return to a more centralized governance model. Although the Governance Reform Act made no statutory changes relative to the mayor’s authority over the school district, in 2000, the *New York Times* noted that “for all intents and purposes, [Mayor Giuliani] has been in charge of the schools since taking office.”<sup>727</sup>

In the Governance Reform Act, the legislature specified that the city board was authorized only to “*advise* the chancellor on matters of policy affecting the welfare of the city

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<sup>720</sup> *Id.* at 1089.

<sup>721</sup> *Id.* at 1089-91.

<sup>722</sup> *Id.* at 1104 (codified as amended at EDUC. § 2590-I).

<sup>723</sup> 1969 N.Y. Laws at 1091.

<sup>724</sup> *Id.*

<sup>725</sup> Ravitch, 2009.

<sup>726</sup> New York City Governance Reform Act, ch. 720, 1996 N.Y. Laws 3598 (1996).

<sup>727</sup> Levine, Arthur. “Make Giuliani the Education Mayor.” *NYTimes.com*. The New York Times, 8 Jan. 2000, Web. 16 Dec. 2011.

school district and its pupils.”<sup>728</sup> The legislature clarified that the city board had *no authority* to exercise “executive power” or to perform any “executive or administrative functions,” unless specifically permitted by other law.<sup>729</sup> The board was given a list of specified powers and duties to: approve standards, policies, objectives, and regulations proposed by the chancellor that were directly related to educational achievement, student performance, internal fiscal integrity, or any others at the chancellor’s request; be the public employer of appointed employees; maintain jurisdiction over high school policies; and to create regulations and bylaws requiring officers and employees to make annual written disclosures to the board regarding conflicts of interest.<sup>730</sup>

In contrast, the chancellor’s power was significantly expanded with the Governance Reform Act, which increased the chancellor’s list of powers and duties from twenty-seven to thirty-seven.<sup>731</sup> Notable additions to the chancellor’s powers included the authority to: promulgate regulations establishing qualifications, performance record criteria, and performance standards for the superintendents and principals (subject to the approval of the city board); select the community superintendents from candidates recommended by the community boards; remove a community superintendent in certain conditions; intervene in any district or school that was “persistently failing to achieve educational results and standards,” or where the chancellor determined there existed “a state of uncontrolled or unaddressed violence;” appoint a deputy for each borough; and require community school board members to participate in training.<sup>732</sup> However, legislation adopted earlier in 1996 (not part of the Governance Reform Act) imposed a slight limit on the chancellor’s power. Any community board, member, or superintendent that the chancellor had suspended or removed may appeal the suspension or removal to the city board within fifteen days.<sup>733</sup>

The Governance Reform Act also increased the powers of the community superintendents while curtailing the powers of the community boards. The legislature first declared that the community boards possessed *only* the powers that were specifically enumerated.<sup>734</sup> The Governance Reform Act then transferred the following powers and duties from the community boards to the community superintendents: to appoint, define the duties, assign, promote, discharge, and set the compensation and terms of employment of all employees; to determine matters relating to the instruction of students; to operate cafeteria or restaurant services; to employ or retain counsel; and to maintain discipline in the schools.<sup>735</sup> The community superintendents were additionally given control over principal selection, evaluation, removal, and transfer; as well as control over school-based budgets.<sup>736</sup>

The distribution of power between the chancellor, city board, community board, and community superintendents created by the Governance Reform Act was upheld by a federal

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<sup>728</sup> 1996 N.Y. Laws at 3605 (codified as amended at N.Y. EDUC. LAW § 2590-g (McKinney 2011)) (emphasis added).

<sup>729</sup> *Id.*

<sup>730</sup> *Id.*

<sup>731</sup> *Id.* at 3605-10.

<sup>732</sup> *Id.*

<sup>733</sup> Act of Apr. 9, 1996, ch. 45, §1, 1996 N.Y. Laws 107, 107.

<sup>734</sup> 1996 N.Y. Laws at 3605.

<sup>735</sup> *See id.* at 3601-05.

<sup>736</sup> *Id.* at 3604.

district court against Equal Protection and Due Process claims in *Warden v. Pataki*.<sup>737</sup> This system of a seven-member appointed city board, strong chancellor and community superintendents, and weakened community boards remained in effect until 2002, when the legislature passed laws increasing the mayor's control and officially returning to a centralized governance system.

### 3. Mayor Bloomberg and Further Reforms in 2002

Current Mayor Michael Bloomberg was first elected in November 2001.<sup>738</sup> In his inaugural address in January 2002, Bloomberg vowed to improve the public schools and demanded that “the public through the mayor must control the school system.”<sup>739</sup> Bloomberg's wish was granted approximately five months later, when the legislature passed sweeping reforms to the public school system.<sup>740</sup> The 2002 reforms renamed the New York City public schools the “New York City Department of Education,” making it a branch of city government.<sup>741</sup> In passing the laws, the legislature criticized the prior board of education as acting “accountable to no one” and the local community school boards as “ineffective,” and therefore sought to create a “school administration with a direct line of accountability to the voters.”<sup>742</sup>

As such, the 2002 legislation abolished the board of education in exchange for the Panel for Education Policy (Panel), which consisted of thirteen members: one appointed by each borough president, seven appointed by the mayor, and the chancellor (who was then, and currently remains, appointed by the mayor as well, see below).<sup>743</sup> The twelve appointed members served “at the pleasure of the appointing authority.”<sup>744</sup> The 2002 legislation created a new requirement that the board hold at least twelve meetings per year in addition to any other meetings called by the chancellor.<sup>745</sup> However, note that there was no requirement that the Panel hold any *public* meetings. The Panel was criticized for no longer being a “deliberative public body that holds open hearings about important decisions,” and was “perceived as a rubber stamp for decisions made by the chancellor and the mayor . . . .”<sup>746</sup> The board's powers were further decreased, with the legislature clarifying that the board possessed *absolutely no executive or*

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<sup>737</sup> 35 F.Supp.2d 354 (S.D.N.Y. 1999). The court rejected plaintiffs' equal protection claim because New York City's education system was *not* similarly situated as other school districts within the state, and no other school district utilized community boards. Thus, it was not a violation of equal protection for the community boards in New York City to be more limited than the governing boards of other school districts. Furthermore, plaintiffs were not deprived of due process because they had no “legally protected interest in a particular distribution of power between the community boards and the city board . . . .” *Id.* at 360-63.

<sup>738</sup> “Biography.” *NYC.gov*. The City of New York, n.d. Web. 12 Oct. 2011.

<sup>739</sup> Bloomberg, Michael. New York City, NY. 1 Jan. 2002. Inaugural Address.

<sup>740</sup> The legislature passed the laws reforming the school governance structure on June 14, 2002. Act of June 14, 2002, ch. 91, 2002 N.Y. Laws 2817.

<sup>741</sup> See *Panel Bylaws*, *supra* note 703, pmb.; “Mayoral and City Agencies.” *NYC.gov*. The City of New York, n.d. Web. 12 Oct. 2011.

<sup>742</sup> 2002 N.Y. Sess. Laws memo ch. 91 (McKinney).

<sup>743</sup> N.Y. EDUC. LAW § 2590-b (McKinney 2002). Although the statute continues to refer to the Panel as the “board of education of the city school district of the city of New York,” the board has explicitly deemed itself the “Panel for Educational Policy” in its bylaws. *Panel Bylaws*, *supra* note 703, pmb.; see also “DOE Leadership.” *NYC.gov*. New York City Department of Education, n.d. Web. 12 Oct. 2011.

<sup>744</sup> EDUC. § 2590-b.

<sup>745</sup> *Id.*

<sup>746</sup> Ravitch, 2009.

*administrative powers*, deleting the “except as otherwise provided by law” qualification that had formerly existed.<sup>747</sup> The legislature specified that the board was *not authorized* to supervise the day-to-day affairs or administration of any school within the district.<sup>748</sup> Otherwise, the board’s list of specific powers and duties remained largely the same as before 2002, except that the board was given the additional power to approve litigation settlements if the settlement “would significantly impact the provision of educational services or programming within the district.”<sup>749</sup>

With the view of increasing accountability, the 2002 changes allowed the mayor to appoint the chancellor.<sup>750</sup> The chancellor now serves “at the pleasure of” the mayor, rather than the city board.<sup>751</sup> The chancellor may be appointed for a contract term that extends no more than two years beyond the term of the mayor who appointed him or her.<sup>752</sup> Continuing the trend that began in 1996 of increasing the chancellor’s powers, the 2002 legislation expanded the chancellor’s list of powers and duties from thirty-seven to forty-eight.<sup>753</sup> Additions to the chancellor’s authority included the ability to: appoint and set salaries for non-represented managerial employees, dispose of or sell personal property used in the schools, make rules and regulations for the operation of extra classroom activities, maintain an effective visitation and inspection of all schools and classes controlled by the city department of correction, and to grant employees the power to conduct investigations and hearings on behalf of the chancellor.<sup>754</sup> The chancellor was no longer required to consult with or obtain the approval of the city board for several actions, for example, developing regulations regarding the hiring and performance of superintendents and principals, developing a procurement policy for the district, and establishing a system of internal administrative and accounting controls.<sup>755</sup>

Given the legislature’s disdain for the community school boards,<sup>756</sup> the 2002 legislation abolished the community boards, but kept the concept of community districts intact. Although the law was passed June 14, 2002, the community boards would not expire until June 30, 2003.<sup>757</sup> In the meantime, the legislature established a task force directed to “develop a proposal and make recommendations regarding the community school boards and their powers and duties,” to be given to the governor and legislature by February 15, 2003.<sup>758</sup>

This massive overhaul of the public school system was not meant to be permanent. The legislature provided that the thirteen-member board, mayoral selection of the chancellor, increased chancellor’s powers, and changes to the powers of the city board would be deemed

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<sup>747</sup> Act of June 14, 2002, ch. 91, § 11, 2002 N.Y. Laws 2817, 2821.

<sup>748</sup> EDUC. § 2590-g.

<sup>749</sup> *Id.*

<sup>750</sup> The legislature claimed that one of the “tools for real improvement in education” was “a Chancellor directly accountable to the Mayor.” 2002 N.Y. Sess. Laws memo ch. 91 (McKinney).

<sup>751</sup> EDUC. § 2590-h.

<sup>752</sup> *Id.*

<sup>753</sup> 2002 N.Y. Laws at 2822-26 (codified as amended at EDUC. § 2590-h).

<sup>754</sup> *Id.* at 2824-26 (codified as amended at EDUC. § 2590-h).

<sup>755</sup> *Id.* at 2823-24.

<sup>756</sup> *See supra* note 742 and accompanying text.

<sup>757</sup> *See* 2002 N.Y. Laws at 2821, 2833.

<sup>758</sup> *Id.* at 2831.

repealed on June 30, 2009, when the system would revert to its pre-2002 status, unless the legislature voted to extend the changes further.<sup>759</sup>

#### **4. Creation of Community District Education Councils and Citywide Council on Special Education in 2003**

As required by the 2002 legislation, the community boards were abolished on June 30, 2003. Pursuant to the findings of the task force discussed above, the legislature replaced the community boards with “community district education councils.”<sup>760</sup> The council members are no longer elected and now consist of eleven voting members plus one non-voting member.<sup>761</sup> Nine of the voting members must be parents of students attending a school in the council’s jurisdiction. The parent members are selected by the presidents and officers of the parents’ or parent-teachers’ associations for two-year terms.<sup>762</sup> The two remaining voting members are appointed by the borough presidents corresponding to the local district, also for two-year terms. These members must have “extensive business, trade, or education experience and knowledge,” and must “make a significant contribution to improving education in the district.”<sup>763</sup> The non-voting member is a high school senior appointed by the superintendent.<sup>764</sup>

The community district education councils (CDECs) have the following powers and duties, in sum, to: “promote achievement of educational standards and objectives relating to the instruction of students;” cooperate with the chancellor in removing a council member from office; require council members, the community superintendent, and any other school employee to make annual disclosures regarding finances and conflicts of interest; participate in training and continuing education programs; prepare an annual “school district report card” and transmit it to the local newspapers along with the proposed budget; hold monthly, public meetings with the superintendent; and to annually evaluate the superintendent and all other instructional supervisory personnel.<sup>765</sup>

In addition to the CDECs, the 2003 legislature created a “citywide council on special education.”<sup>766</sup> Currently, the citywide council on special education is comprised of eleven voting members and one non-voting member. Nine of the voting members must be parents of students with individualized education programs (IEPs) and are selected by parents of students with IEPs “pursuant to a representative process developed by the chancellor.”<sup>767</sup> The remaining voting members are appointed by the public advocate of New York City and must have “extensive experience and knowledge in the areas of educating, training, or employing individuals with handicapping conditions.”<sup>768</sup> The non-voting member is a high school senior with an IEP, appointed by an administrator designated by the chancellor.<sup>769</sup> The city wide

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<sup>759</sup> See *id.* at 2832.

<sup>760</sup> Act of July 9, 2003, ch. 123, § 1, 2003 N.Y. Laws 2703, 2703-04 (codified as amended at EDUC. § 2590-b(2)).

<sup>761</sup> EDUC. § 2590-c.

<sup>762</sup> *Id.* § 2590-c(1)(a).

<sup>763</sup> *Id.* § 2590-c(1)(b).

<sup>764</sup> *Id.* § 2590-c(1)(c).

<sup>765</sup> See *id.* § 2590-e.

<sup>766</sup> *Id.* § 2590-b(4).

<sup>767</sup> *Id.* § 2590-b(4)(a)(1).

<sup>768</sup> *Id.* § 2590-b(4)(a)(2).

<sup>769</sup> *Id.* § 2590-b(4)(a)(3).



council on special education is authorized to: advise and comment on any policy involving the provision of services for students with disabilities, advise and comment on the process of establishing committees on special education in community school districts, issue an annual report on and make recommendations regarding the city district's effectiveness in providing services to students with disabilities, and to hold at least one public meeting per month.<sup>770</sup>

## 5. NYC Department of Education, 2009 to Present

As discussed above, the sweeping changes to the governance system that the legislature authorized in 2002 and 2003 were set to expire June 30, 2009, unless the legislature affirmatively re-authorized the relevant provisions. The legislature did so; however, not until August 11, 2009.<sup>771</sup> This delay was inconsequential—although control over the school system technically returned to the seven-member board appointed by the mayor and borough presidents in the meantime, this board expired as soon as the governor signed into law the extension of mayoral control.<sup>772</sup> Mayoral control over the school system is now scheduled to remain in place until June 15, 2015, when the system will revert back to its pre-2002 status.<sup>773</sup>

In authorizing the extension of mayoral control, the legislature made additional changes to the governance structure. The board, or Panel for Education Policy, now consists of thirteen voting members, with five appointed by the borough presidents and eight appointed by the mayor.<sup>774</sup> The chancellor is now a non-voting member. All members continue to serve at the pleasure of the appointing authority.<sup>775</sup> An important new requirement is that the Panel must hold *public* meetings. The Panel is required to hold one regular public meeting per month, with at least one meeting held in each borough per year. Notice of the meeting, the meeting's agenda, and the meeting's minutes must be made publicly available. The Panel must ensure that there is "sufficient period of time to allow for public comment on any topic on the agenda prior to any city board vote" at each meeting.<sup>776</sup>

The 2009 legislature also created citywide councils on English language learners and on high schools. The composition, selection process, and powers of these councils are largely the same as those for the citywide council on special education, except in regards to English language learners and high schools, respectively.<sup>777</sup>

Currently, there are two bills pending in the legislature that would affect the mayor's influence over the Panel. Assembly Bill 6755 proposes the use of a nominating panel. If the law is passed, the nominating panel would be nearly identical to that used in Boston—its "sole function shall be to nominate persons for consideration by the mayor for appointment to the

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<sup>770</sup> *Id.* § 2590-b(4)(b).

<sup>771</sup> Act of Aug. 11, 2009, ch. 345, § 14.

<sup>772</sup> Hernandez, Javier. "As Law Expires, Bloomberg Moves to Keep Authority Over Schools." *NYTimes.com*. The New York Times, 30 June 2009. Web. 16 Dec. 2011; Cheung, Jen. "Mayoral Control of Schools Ends, Board of Education Back." *Gothamist.com*. Gothamist, 1 July 2009. Web. 16 Dec. 2011.

<sup>773</sup> Act of Aug. 11, 2009, ch. 345, § 14.

<sup>774</sup> EDUC. § 2590-b(1)(a).

<sup>775</sup> *Id.*

<sup>776</sup> *Id.* § 2590-b(1)(b).

<sup>777</sup> *See id.* § 2590-b(5)-(6); *see also supra* note notes 766-770 and accompanying text.

board of education.”<sup>778</sup> Four out of the thirteen members on the nominating panel would be selected by the mayor, which is also the same as in Boston.<sup>779</sup> Next, Assembly Bill 4996 would have the Panel members “serve a term coterminous with that of the appointing authority,” rather than “at the pleasure of” the appointing authority.<sup>780</sup>

## **b. Finance**

The New York State Constitution directs the legislature to “provide for the maintenance and support of a system of free common schools.”<sup>781</sup> Although the primary responsibility to fund the schools is on the state, the legislature requires cities to make a financial contribution each year as well.<sup>782</sup> The state appellate court has found that the state is “ultimately responsible for providing students with the opportunity for a sound basic education. . . . Nevertheless, . . . the state could require the City to maintain a certain level of education funding.”<sup>783</sup> The provisions pertaining to finance and the budgeting process of the NYCDOE are contained in Article 52-a, applying specifically and exclusively to New York City, and the New York City Charter. The current statutory sections relating to the budget are part of the package of legislation that is set to expire on June 30, 2015.<sup>784</sup>

Because the NYCDOE is a part of city government, the finance and budget is tied directly to the city. Thus, the comptroller of New York City has the authority to conduct audits of the NYCDOE to the same extent as with any other city agency.<sup>785</sup> Furthermore, the New York City independent budget office may “provide analysis and issue public reports regarding financial and education matters of the city district, to enhance official and public understanding of such matters . . . .”<sup>786</sup> Budget formation is handled at the city government level. The city school board must first adopt fiscal estimates of the total sum of money necessary to operate the district during the next fiscal year.<sup>787</sup> The community district education councils (CDECs) must each adopt their own estimates as well, and the chancellor annually advises the CDECs regarding the “form and content of the budget requests and accompanying fiscal estimates” that must be submitted.<sup>788</sup> The chancellor must then submit to the mayor the estimates of the city board and CDECs, an estimate of the money to be received from the state, and an estimate of the amount to be received from sources other than city or state funds.<sup>789</sup> The estimates must “set forth the total

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<sup>778</sup> Assemb. 6755, 234th Leg., Reg. Sess. (N.Y. 2011); *see also* An Act Reorganizing the School Committee of the City of Boston, ch. 108, § 2, 1991 Mass. Acts 222, 223 (1991).

<sup>779</sup> Assemb. 6755; *see also* 1991 Mass. Acts at 223.

<sup>780</sup> Assemb. 4996, 234th Leg., Reg. Sess. (N.Y. 2011).

<sup>781</sup> N.Y. CONST. art XI, § 1.

<sup>782</sup> *See* EDUC. § 2576(5-b)(b)).

<sup>783</sup> Campaign for Fiscal Equity v. State, 744 N.Y.S.2d 130, 146 (N.Y. App. Div. 2002).

<sup>784</sup> *See* EDUC. § 2590-q.

<sup>785</sup> *Id.* § 2590-t.

<sup>786</sup> *Id.* § 2590-u(1).

<sup>787</sup> *Id.* § 2590-q(4)(a).

<sup>788</sup> *Id.* § 2590-q(1).

<sup>789</sup> *Id.* § 2590-q(4)(a)-(c); *see also id.* § 2576(1), (5). Although section 2576 applies generally to cities with 125,000 or more inhabitants and not specifically to New York City, section 2590-g directs the chancellor of the NYCDOE to “perform all functions in connection with” section 2576. *Id.* § 2590-g(12).

amounts proposed for programs or activities of the [CDECs] in units of appropriation separate from those set forth for programs or activities operated by the city board . . . .”<sup>790</sup>

Pursuant to the New York City Charter, the mayor must submit to the city council a preliminary budget for the city and its agencies.<sup>791</sup> Subject to the mayor’s veto, the New York City Council may increase or decrease the total amount of each unit of appropriation for CDECs.<sup>792</sup> After the city council has acted on the budget, the mayor is authorized to “disapprove any increase or addition to the budget, any unit of appropriation, or any change in any term or condition of the budget.”<sup>793</sup> However, the city council may override any such disapproval by a two-thirds vote of all members.<sup>794</sup> Once the budget is adopted, the chancellor must, within thirty days, send to each CDEC a statement setting forth the federal, state, city, and private funds that have been allocated to such CDEC.<sup>795</sup> The chancellor must also transmit to each CDEC a statement showing the amount of funds allocated to fund the city board programs and operations, chancellor’s office, and other administrative bureaus and divisions.<sup>796</sup> The chancellor may allocate any money that is appropriated to or authorized for expenditure by the city board to *any* CDEC or any “innovative programs or activities.” Such allocations must be based on the needs of the CDEC or the merits of the program in comparison to other citywide programs or schools.<sup>797</sup>

After funds are allocated to the city board and CDECs, the budgeting process for the individual schools begins. Pursuant to the legislature’s directive, the chancellor, in consultation with the city board and community superintendents, has developed regulations providing a process for school-based budgeting.<sup>798</sup> In sum, each school principal is responsible for developing a school-based budget, but the principal must seek the input of the school community.<sup>799</sup> The school-based budgets are then reviewed by the relevant community superintendent (or chancellor, if the school is under the chancellor’s jurisdiction). The community superintendent or chancellor will either approve the budget or provide a written response to the budget, after which the principal must immediately revise the budget.<sup>800</sup>

Current law provides that as of June 30, 2015, provisions for the budgeting process found elsewhere in the New York Education Laws pertaining to all cities with more than 125,000 inhabitants will apply to the NYCDOE.<sup>801</sup> This will not change much in terms of the process—

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<sup>790</sup> *Id.* § 2590-q(5).

<sup>791</sup> N.Y.C., N.Y., CHARTER § 236 (2011), *available at* <http://24.97.137.100/nyc/charter/entered.htm> [hereinafter N.Y.C. CHARTER].

<sup>792</sup> EDUC. § 2590-q(6).

<sup>793</sup> N.Y.C. CHARTER, *supra* note 791, at § 255(a).

<sup>794</sup> *Id.* § 255(b).

<sup>795</sup> EDUC. § 2590-q(7)(b).

<sup>796</sup> *Id.* § 2590-q(7)(c).

<sup>797</sup> *Id.* § 2590-q(10).

<sup>798</sup> *See id.* § 2590-r; N.Y.C. DEP’T EDUC., REGULATION OF THE CHANCELLOR NO. B-801 (2011), *available at* <http://schools.nyc.gov/NR/rdonlyres/381F4607-7841-4D28-B7D5-0F30DDB77DFA/97060/B8011202011FINAL.pdf>.

<sup>799</sup> N.Y.C. DEP’T EDUC., REGULATION OF THE CHANCELLOR NO. B-801 (2011), *available at* <http://schools.nyc.gov/NR/rdonlyres/381F4607-7841-4D28-B7D5-0F30DDB77DFA/97060/B8011202011FINAL.pdf>.

<sup>800</sup> *See id.*

<sup>801</sup> *See* EDUC. §§ 2576, 2590-q.

the school board, rather than the chancellor, will submit the district's budget to the mayor.<sup>802</sup> A more notable change is that if the district requests from the city an amount that is equal to or less than the average of the prior three years' proportion of school district appropriations to the total city budget, the city must appropriate the requested amount.<sup>803</sup>

### c. Collective Bargaining

The laws regarding collective bargaining for school employees in the NYCDOE are found in the Public Employees' Fair Employment Act (PEFEA), also known as the Taylor Law, which applies generally to public employees throughout the state.<sup>804</sup> The New York Legislature passed the PEFEA in 1967, declaring the public policy of the state and purpose of the act to "promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government."<sup>805</sup> To further this policy, the PEFEA gives public employees the rights to form, join, and participate in, or to refrain from so doing, any employee organization; requires state and local governments to negotiate and enter into written agreements with employee organizations; encourages public employers and employee organizations to agree on procedures for resolving disputes; and creates a public employment relations board to assist in resolving disputes.<sup>806</sup>

The Public Employment Relations Board (PERB) created by the PEFEA is comprised of three members who are appointed by the governor with the advice and consent of the senate.<sup>807</sup> A non-exhaustive list of the PERB's many powers and functions includes the authority to: establish procedures to resolve disputes concerning the representation status of employee organizations, establish procedures for the prevention of improper employer and employee organization practices and to issue cease and desist orders regarding such practices, make studies of the conditions of employment of public employees, request assistance from any government, make available statistical data, hold hearings and examine witnesses and documents, and to make rules and regulations governing its internal organization and conduct of affairs.<sup>808</sup>

However, the PEFEA allows local governments to establish their own local "mini-PERBs" to further "the state interest in allowing local governments to develop their own machinery to supervise their own public employees."<sup>809</sup> The legislative body of any local government, other than the state or a state public authority, may adopt local laws, ordinances, or resolutions that are "substantially equivalent" to the PEFEA's provisions and procedures. If a local government does so, certain provisions of the PEFEA will not apply.<sup>810</sup> New York City

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<sup>802</sup> *Id.* § 2576(1), (5).

<sup>803</sup> *Id.* § 2576(5). For example, in 2010 Education comprised thirty percent of the estimated spending out of the total New York City budget. New York City Independent Budget Office. "Understanding New York City's Budget." 2009. PDF file.

<sup>804</sup> Public Employees' Fair Employment Act, ch. 392, § 2, 1967 N.Y. Laws 1102-11 (codified as amended at N.Y. CIV. SERV. LAW §§ 200-14 (McKinney 2011)).

<sup>805</sup> 1967 N.Y. Laws at 1102-03 (codified at CIV. SERV. § 200).

<sup>806</sup> CIV. SERV. §§ 200, 202.

<sup>807</sup> *Id.* § 205(1).

<sup>808</sup> *Id.* § 205(5).

<sup>809</sup> *See* Civil Serv. Emps. Ass'n v. Helsby, 439 F.Supp. 1272, 1279-80 (S.D.N.Y. 1977).

<sup>810</sup> CIV. SERV. § 212(1).

has implemented its own local collective bargaining law and has established its own mini-PERB, known as the Board of Collective Bargaining (BCB).<sup>811</sup> However, it is important to note that the BCB lacks jurisdiction over teachers in the New York City school district.<sup>812</sup> The definition of “teachers” is expansive, including the superintendent of schools, associate and assistant superintendents, directors and assistant directors, supervisors and assistant supervisors, principals, vice-principals, assistants to principals, heads of departments, all regular and special teachers in public day schools, all appointed employees of the board of education, teacher aides, educational assistants or associates, and family assistants or associates.<sup>813</sup> Thus, the terms of the PEFEA alone, rather than local city provisions, apply to most school employees in New York City.

The requirement that public employers negotiate collectively with recognized employee organizations directs the public employer and the employee representative to “meet at reasonable times and confer in good faith” over the mandatory topics of bargaining.<sup>814</sup> Although the NYCDOE is a branch of city government, both Article 52-a and the PEFEA explicitly specify that the board of education, not the city government itself, is considered the government or public employer of all school employees.<sup>815</sup> Despite the NYCDOE’s status as a city agency, courts have confirmed that for employment litigation purposes, “the Board of Education is an entity separate from the City itself . . . .”<sup>816</sup> Therefore, as applied to the NYCDOE, the board of education, or Panel for Education Policy, bears the responsibility of negotiating with recognized employee organizations.

Regarding the scope of bargaining between the public employer and employees, the mandatory topics of bargaining include wages, hours, and other terms and conditions of employment.<sup>817</sup> The PEFEA provides a definition for the “terms and conditions of employment,” albeit a circular and broad one: “salaries, wages, hours, and other terms and conditions of employment . . . .”<sup>818</sup> Specifically exempted from the terms and conditions of employment are: benefits to be provided by a public retirement system, payments to a fund or insurer to provide income for retirees, or payments to retirees or their beneficiaries.<sup>819</sup> To provide more guidance regarding the mandatory topics of bargaining, the PERB has authority to determine what constitutes a “term or condition of employment.”<sup>820</sup> A court has no power to

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<sup>811</sup> N.Y.C., N.Y., ADMINISTRATIVE CODE § 12-301 (2011); N.Y.C. CHARTER, *supra* note 791, at § 1171; *see also* *Patrolmen’s Benevolent Ass’n of New York v. City of New York*, 729 N.Y.S.2d 789, 792 (N.Y. App. Div. 2001).

<sup>812</sup> N.Y.C., N.Y. ADMINISTRATIVE CODE § 12-304(c); “About the OCB.” *OCB-NYC.org*. Office of Collective Bargaining, n.d. Web. 19 Oct. 2011.

<sup>813</sup> N.Y.C., N.Y., ADMINISTRATIVE CODE § 13-501(7)(a).

<sup>814</sup> CIV. SERV. § 204.

<sup>815</sup> *See* N.Y. EDUC. LAW § 2590-g(2) (McKinney 2011); *see also* CIV. SERV. § 201 (including “a school district or any government entity operating a public school” in the definition of “government or public employer”).

<sup>816</sup> *Linder v. City of New York*, 263 F.Supp. 585, 590 (E.D.N.Y. 2003) (citations omitted); *see also* *Missick v. City of New York*, 707 F.Supp.2d 336, 346 (E.D.N.Y. 2010); *Campbell v. City of New York*, 611 N.Y.S.2d 248, 249 (N.Y. App. Div. 1994) (“It is well-settled that the Board of Education and the City of New York are separate and distinct entities . . . .”).

<sup>817</sup> CIV. SERV. § 204(3).

<sup>818</sup> *Id.* § 201(4).

<sup>819</sup> *Id.*

<sup>820</sup> *Town of Carmel Police Benevolent Ass’n v. Public Emp’t Relations Bd. of New York*, 701 N.Y.S.2d 169, 171 (N.Y. App. Div. 1999).

substitute its own interpretation, provided that the PERB's interpretation is lawful and violates no constitutional rights.<sup>821</sup> Topics that have been found to be mandatory in the context of school district employees include: educational expenses, health and life insurance benefits, promotion practices, modification of a superintendent's power to transfer teachers, job security, discipline or removal, and notice of tenure or termination.<sup>822</sup> In contrast, restricted topics of bargaining have included class size, a school district's decision to participate in cooperative educational programs, and a school district's decision to apply for Excellence in Teaching funds.<sup>823</sup>

The Education Law, rather than the PEFEA, provides the procedures governing the abolition of positions and layoffs. Per state law, when teaching and supervisory positions are abolished, the "last in, first out" policy applies, in which "the services of the person . . . who has the least seniority in the city school district . . . shall be discontinued . . ."<sup>824</sup> As such, the chancellor is required to create a list of seniority rankings of all teaching and supervisory employees and to update it annually.<sup>825</sup> However, a pending Assembly Bill proposes to change this policy. If passed, the law would "not permit an employee's length of service to be the sole factor in any decision regarding which positions are to be abolished and which persons occupying such positions shall be laid off."<sup>826</sup> Instead the "length of faithful and competent service" could only be considered in a manner that is beneficial to employees. The bill would allow school districts and employee collective bargaining representatives to establish procedures governing the abolishment and reduction of positions, but also proposes a list of certain teachers and supervisors who must be laid off before any others. The list includes teachers and supervisors who, within the last five years, among other things: received two ratings of "unsatisfactory" on annual performance reviews, had been fined or suspended without pay, or were convicted of certain criminal offenses.<sup>827</sup>

In enacting the PEFEA, the legislature maintained the prohibition against strikes which had existed prior to 1967; however, the penalties for striking have been lessened.<sup>828</sup> Prior to the enactment of the PEFEA, any employee who went on strike would lose his or her position and could be re-employed only upon the imposition of a three-year salary freeze and five years' probation without tenure.<sup>829</sup> Currently, the law provides for a penalty of two days' worth of pay for each day that an employee strikes.<sup>830</sup> However, a pending Assembly Bill, if passed by the legislature, would allow public employees to strike if the collective bargaining negotiation process set forth in the PEFEA has been completely utilized and exhausted.<sup>831</sup>

#### **d. Low-Performing Schools**

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<sup>821</sup> *Id.* (quoting *In re West Irondequoit Teachers Ass'n v. Helsby*, 35 N.Y.2d 46, 50 (N.Y. 1974)).

<sup>822</sup> 19 PAUL M. COLTOFF ET AL., *NEW YORK JURISPRUDENCE: CIVIL SERVANTS* § 459-60 (2d ed. 2011) (citing to a collection of cases).

<sup>823</sup> *Id.* § 462.

<sup>824</sup> N.Y. EDUC. LAW § 2588(3)(a)-(b) (McKinney 2011).

<sup>825</sup> *Id.* § 2588(3)(c).

<sup>826</sup> Assemb. 7642, 234th Leg., Reg. Sess. (N.Y. 2011).

<sup>827</sup> *Id.*

<sup>828</sup> *See* N.Y. CIV. SERV. LAW § 210 (McKinney 2011).

<sup>829</sup> *Id.* § 108, *repealed by* Public Employees' Fair Employment Act, ch. 392, § 1, 1967 N.Y. Laws 1102, 1102 (1967).

<sup>830</sup> *Id.* § 210(2)(f).

<sup>831</sup> Assemb. 5788, 234th Leg., Reg. Sess. (N.Y. 2011).

Control over low-performing schools is exercised both at the state level, through a series of lengthy and detailed regulations, and at the local NYCDOE level. The provisions relating to low-performing schools at the state level are found in the regulations adopted by the state Commissioner of Education. The Commissioner is described as the “chief executive officer of the state system of education and of the board of regents.”<sup>832</sup> The Commissioner is elected by and serves “during the pleasure of” the board of regents.<sup>833</sup> Generally, the Commissioner’s role is to enforce laws relating to the state educational system and to execute the educational policies determined by the board of regents.<sup>834</sup> Among many other specific powers and duties, the Commissioner is directed to develop a “school progress report card” to assess the schools.<sup>835</sup> The chancellor of the NYCDOE is required to produce the school report card for the New York City school district and to present it to the city board of education.<sup>836</sup>

The board of education for every school district in New York must, through its superintendent (therefore, the chancellor in NYCDOE) “initiate measures designed to improve student achievement on the state learning standards.”<sup>837</sup> In any district in which a school performs below a certain benchmark established by the Commissioner, the superintendent (again, in the NYCDOE, the chancellor) or community district superintendent must develop a “local assistance plan” to set forth the actions that will be taken to improve student results.<sup>838</sup> The plan must include the process by which it was developed, the resources that will be provided to each school to implement the plan, the professional development activities that will be taken to support implementation of the plan, and the timeline for implementation of the plan. The plan must also be approved by the board of education, and for the NYCDOE, both the city board of education and relevant community district education council.<sup>839</sup> The plan must be made publicly available.<sup>840</sup>

The performance of a school district, individual school, or charter school is based on whether the district or school has made “adequate yearly progress (AYP).” To measure AYP, students are categorized into several “accountability groups” at each grade level. The accountability groups are: all students, students from major racial and ethnic groups, students with disabilities or those identified as having a disability within the prior two school years, students with limited English proficiency or those previously identified as limited English proficient within the prior two school years, and economically disadvantaged students.<sup>841</sup> A school or district has made AYP in an accountability performance criterion (for example, English language arts or mathematics) if each accountability group in the district or school achieved AYP on that criterion.<sup>842</sup> An accountability group has made adequate yearly progress in a criterion if,

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<sup>832</sup> N.Y. EDUC. LAW § 305(1) (McKinney 2011).

<sup>833</sup> *Id.* § 302.

<sup>834</sup> *Id.* § 305(1).

<sup>835</sup> *Id.* § 305(39).

<sup>836</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 100.2(m)(1)-(2) (2011).

<sup>837</sup> *Id.* § 100.2(m)(6); *see also supra* notes 715-717 and accompanying text.

<sup>838</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 100.2(m)(6) (2011).

<sup>839</sup> *Id.* § 100.2(m)(6)(i)-(v).

<sup>840</sup> *Id.* § 100.2(m)(7).

<sup>841</sup> *Id.* § 100.2(p)(1)(i).

<sup>842</sup> *Id.* § 100.2(p)(5).

depending on the size of the group, the group's participation rate<sup>843</sup> is at least 95 percent or the group met, exceeded, or did not differ significantly from the Commissioner's annual measurable objectives for that criterion.<sup>844</sup>

When a school or district fails to make AYP, it is designated into an accountability phase and a phase category.<sup>845</sup> The accountability phases are Improvement, Corrective Action, or Restructuring, and the phase categories are Basic, Focused, or Comprehensive.<sup>846</sup> In sum, a school or district's phase and categorization depends largely on the length of time and number of consecutive years that the school has failed to make adequate yearly progress.<sup>847</sup> Depending upon which overall designation the school or district receives, the school or district must develop a school improvement plan, a corrective action plan, or a restructuring plan.<sup>848</sup> For the New York City school district, each plan must be approved by both the city board and the relevant community district education council.<sup>849</sup>

Ultimately, a school or district that has been designated as failing to make AYP and placed into one of the above categories is subject to various consequences. Possible actions for intervention include conducting a review of the schools' registration with the Board of Regents and implementing a turnaround model, restart model, school closure model, or transformation model. Depending on the model, the school is further subjected to several possible consequences, such as replacement of the principal, screening all existing staff and selecting new staff, adopting a new governance structure, providing services and supports for students, converting a school to a charter school, and closing a school.<sup>850</sup>

In addition to the state's detailed regulations, the NYCDOE retains some local control over its struggling schools. The NYCDOE "remains committed to closing and replacing schools that consistently do not offer students the education they deserve."<sup>851</sup> The decision to close a school is based on a school's academic progress and demonstrated ability to improve, as determined by the school's progress report card.<sup>852</sup> As mentioned above, the Chancellor of the NYCDOE is authorized to intervene in any district or school which is "persistently failing to achieve educational results and standards approved by the city board or established by the state board of regents, or has failed to improve its educational results and student achievement in accordance with such standards . . . ."<sup>853</sup> As part of such intervention, the chancellor may require the principal or district to prepare a corrective action plan and must monitor implementation of the plan.<sup>854</sup> The chancellor may also recommend that a school be closed. Before the decision to

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<sup>843</sup> For elementary and middle level students, the participation rate is the percentage of students enrolled on all days of test administration who did not have a significant medical emergency and who received valid scores on State assessments. For high schools, participation rate means the percentage of students in at least their fourth year of high school who received a valid score on the required assessments for high schools. *Id.* § 100.2(p)(1)(xi)-(xii).

<sup>844</sup> *Id.* § 100.2(p)(5)(iv).

<sup>845</sup> *Id.* § 100.2(p)(6)(i).

<sup>846</sup> *Id.* § 100.2(p)(6)(i)(a)-(b).

<sup>847</sup> *Id.*

<sup>848</sup> *Id.* § 100.2(p)(6)(iv).

<sup>849</sup> *See id.*

<sup>850</sup> *See id.* § 100.2(p)(10).

<sup>851</sup> "Changes to Our Schools." *NYC.gov*. New York City Department of Education, n.d. Web. 19 Oct. 2011.

<sup>852</sup> "Changes to Our Schools," 2011.

<sup>853</sup> N.Y. EDUC. LAW § 2590-h(31) (McKinney 2011).

<sup>854</sup> *Id.*



close a school or to make any “significant change” in school utilization is made, a specified process must be followed. The chancellor must prepare an “educational impact statement” regarding the closure or change, which must be made publicly available. The chancellor must then hold a public hearing with the affected community council and school management team, allowing all interested parties an opportunity to present comments. A school may not be closed until the city board approves the closure.<sup>855</sup> Despite the required Panel vote and public input, recent school closures have shown that in reality, the decision to close a school lies solely with the mayor.<sup>856</sup>

## ii. Review of Empirical Research

In order to identify effects, if any, associated with the increased level of mayoral influence in the New York City (NYC) public schools in recent years, we reviewed high-quality, methodologically sound research reports; journal articles; books; and book chapters published within the last five years that focused on outcomes for students, teachers, and administrators in NYC public schools and across urban districts generally. It is not methodologically possible to directly link the structure of increased mayoral control to specific outcomes in NYC public schools. A single mayor has held office continuously since the inception of increased mayoral control in 2002; a number of national and state-level reforms, including the national No Child Left Behind Act, were enacted prior to or at roughly the same time as increased mayoral control; and strikingly little empirical research is available to assess the reforms in NYC to date. Still, recent research provides evidence for the following general trends in the district.

### a. Governance

Joel Klein served as chancellor of the NYC schools under Mayor Bloomberg between 2003 and 2010. This period was defined by sweeping school reforms, called the Children First initiative, the focus of which has evolved over time.<sup>857</sup> Initially, Children First required the use of a common, uniform curriculum in English/language arts and mathematics; mandated the use of coaches at all school sites; and focused on accountability and the careful monitoring of the implementation of district mandates.<sup>858</sup> Children First has since evolved to focus on improving school leadership and teacher quality and providing both for autonomy and accountability at the school level.<sup>859</sup>

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<sup>855</sup> *Id.* § 2590-h(2-a).

<sup>856</sup> Winerip, Michael. “In Panel’s Votes to Close Low-Performing Schools, Rage and Foregone Decisions.” *NYTimes.com*. The New York Times, 4 Feb. 2011. Web. 16 Dec. 2011.

<sup>857</sup> O’Day, Jennifer. *Education Reform in New York City: Ambitious Change in the Nation’s Most Complex School System*. Cambridge, MA: Harvard Education Press, 2011. Print

<sup>858</sup> Childress, Stacey, Monica Higgins, Ann Ishimaru, & Sola Takahashi. Managing for results at the New York City department of education. In J. O’Day, C. Bitter & L. Gomez (Eds.) *Education Reform in New York City: Ambitious Change in the Nation’s Most Complex School System*. Cambridge, MA: Harvard Education Press, 2011. Print; O’Day, 2011; O’Day, Jennifer, & Catherine Bitter. “Improving Instruction in New York City.” In J. O’Day, C. Bitter & L. Gomez (Eds.) *Education Reform in New York City: Ambitious Change in the Nation’s Most Complex School System*. Cambridge, MA: Harvard Education Press, 2011. Print.

<sup>859</sup> Childress, 2011; Goertz, Margaret, Susanna Loeb, and Jim Wyckoff. “Recruiting, Evaluating and Retaining Teachers: The Children First Strategy to Improve New York City’s Teachers.” In J. O’Day, C. Bitter & L. Gomez (Eds.) *Education Reform in New York City: Ambitious Change in the Nation’s Most Complex School System*. Cambridge, MA: Harvard Education Press, 2011. Print; O’Day, 2011; O’Day and Bitter, 2011.

There is evidence that the quality of school leadership has affected the degree to which at least one policy enacted under increased mayoral control in NYC was associated with changes in school structure and classroom activities. In spring 2010, researchers studied the implementation of collaborative inquiry at thirteen schools with high to moderate populations of students who were struggling. A key component of the Children First initiative since 2007, collaborative inquiry entails the systematic, ongoing discussion of and use of student data to improve teaching and learning at the school site. The researchers found that schools with principals who had a participatory leadership style and who supported shared decision-making among teachers and administrators experienced the highest levels of implementation and the highest benefits from the reform.<sup>860</sup> Implementation of collaborative inquiry has varied greatly across schools in the district.<sup>861</sup>

In general, Children First has been marked by sweeping, rapid, and ongoing change coupled with a lack of systematic evaluation of outcomes, in part due to lack of available valid, longitudinal data on outcomes associated with the reforms.<sup>862</sup>

### **b. Finance**

We identified one study that systematically evaluated the effects of mayoral control on financial resources and spending in school districts across the United States. Using ten years (1993-2003) of financial data for 104 large school districts, researchers found that the ability of the mayor to appoint school board members without oversight, as in New York City, was associated with decreased revenues per pupil five years after the institution of the reform, on average, holding other factors constant.<sup>863</sup> At the same time, the researchers reported small increases in the levels of relative spending on instruction and instructional support, on average, by mayors with the ability to appoint the majority of the school board, as in New York City, as compared to districts without this form of mayoral control.<sup>864</sup>

An analysis of actual funding in NYC schools during the eight-year period (1999-2007) surrounding the switch to mayoral control found increased revenues but decreased relative spending on public education after increased mayoral control. Both per-pupil expenditures and overall spending on public schools in NYC, as a share of the average percentage of city revenues, declined in the four-year period following the institution of mayoral control, and budget surpluses during this period were not allocated to the school system.<sup>865</sup> Contrary to the findings described above for districts across the United States, the analysis of NYC data also

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<sup>860</sup> Robinson, Marian. "School Perspectives on Collaborative Inquiry: Lessons Learned from New York City, 2009-2010." *Consortium for Policy Research in Education, Columbia University* (2010): 1- 29. Web. 8 Nov. 2011.

<sup>861</sup> Talbert, Joan. "Collaborative Inquiry to Expand Student Success in New York City Schools." In J. O'Day, C. Bitter & L. Gomez (Eds.) *Education Reform in New York City: Ambitious Change in the Nation's Most Complex School System* (131-156). Cambridge, MA: Harvard Education Press, 2011. Print.

<sup>862</sup> Childress et al., 2011; Goertz et al., 2011; O'Day et al., 2011; O'Day and Bitter, 2011; Siskin, Leslie. "Changing Contexts and the Challenge of High School Reform in New York City." In J. O'Day, C. Bitter & L. Gomez (Eds.) *Education Reform in New York City: Ambitious Change in the Nation's Most Complex School System* (181-198). Cambridge, MA: Harvard Education Press, 2011. Print.

<sup>863</sup> Wong, 2009; Wong, et al., 2007.

<sup>864</sup> Wong, et al., 2007.

<sup>865</sup> Noreen Connell. "Adding Up the Numbers: The Education Budget Under Mayoral Control. Update and Summary of 2005-06 EPP Bulletins." *Educational Priorities Panel* (2007):1-28. Web. 28 Sept. 2011.

identified slight decreases in the average share of spending allocated for student instruction and programs in NYC schools in the period after increased mayoral control.<sup>866</sup>

While the *percentage* of city funds allocated to the public schools decreased after mayoral control in NYC, the *dollars* available to the city of New York and to the schools increased substantially in the period immediately following increased mayoral control. Total revenues for NYC public schools increased by approximately \$5000 per student<sup>867</sup> in the first six years of mayoral control.<sup>868</sup> These additional funds for the NYC schools came from a combination of federal, state, and local sources.<sup>869</sup> In addition, millions of philanthropic dollars were donated to the school district during this period, though these funds accounted for less than 0.5% of the total annual budget for NYC public schools.<sup>870</sup> While additional funds were available to NYC schools during the period 2002-2008, the district also experienced increased expenses during this time. Between 2002 and 2008, the number of students identified by the district as full-time special education students, who are expensive to educate, increased by 20%, and teacher salaries (including benefits) increased by approximately 25%.<sup>871</sup>

Beginning in 2008, NYC public schools converted to a weighted student funding formula, in which funds are allocated according to characteristics of students, rather than to particular teacher positions, in each school.<sup>872</sup> School budgets have been cut by approximately 14%, on average, in the years since 2007.<sup>873</sup>

### **c. Collective Bargaining**

We did not identify any recent, high-quality research studies that examined the impact of increased mayoral influence on collective bargaining practices in NYC public schools.

### **d. Performance**

Despite the district's intensive efforts to re-shape teaching and learning since 2002, we found little methodologically sound, recent research that investigated outcomes of the Children First reforms in NYC public schools.

We identified one study that systematically evaluated the effects of mayoral control on student test scores in reading and mathematics across the United States. Using five years of data (1999-2003), researchers found that the ability of the mayor to appoint the full school board without oversight, as in New York City after increased mayoral control, was associated with

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<sup>866</sup> Connell, 2007.

<sup>867</sup> Adjusted for inflation.

<sup>868</sup> Connell, 2007; Stiefel, Leanna and Amy Ellen Schwartz. "Financing k-12 education in the Bloomberg years, 2002-2008." In J. O'Day, C. Bitter & L. Gomez (Eds.) *Education Reform in New York City: Ambitious Change in the Nation's Most Complex School System* (55-86). Cambridge, MA: Harvard Education Press, 2011. Print.

<sup>869</sup> Steifel & Schwartz, 2011.

<sup>870</sup> Steifel & Schwartz, 2011.

<sup>871</sup> Steifel & Schwartz, 2011; Adjusted for inflation.

<sup>872</sup> Steifel & Schwartz, 2011.

<sup>873</sup> Santos, Fernanda. "School Layoffs About to Fall Heaviest on the Poorest and Most Struggling." *New York Times* 3 Oct. 2011. Web. 8 Dec. 2011.

lower student achievement on state tests, on average, as compared with other districts in the same state at both the elementary and high school level, holding other factors constant.<sup>874</sup>

While there have been widespread reports of increases in student achievement on New York state exams and increases in graduation rates since increased mayoral control, these increases have been compromised to some degree by identified issues with the reliability and validity of the data.<sup>875</sup> Average performance by students in NYC public schools on national exams has been mixed. In the most recent rounds of the national NAEP exam, 29% of NYC 4th graders and 24% of NYC 8th graders tested “proficient” in reading, 32% of NYC 4th and 24% of NYC 8th graders tested “proficient” in mathematics, and 18% of NYC 4th graders and 13% of NYC 8th graders tested “proficient” in science.<sup>876</sup> Students in NYC scored higher in 4th grade reading, lower in 8th grade science, and no different in 4th grade mathematics or science and 8th grade reading or mathematics, on average, than students in other large urban districts, with little change in average scores over time.<sup>877</sup>

## VII. Implications for California Law

The preceding review of changes made to the law in order to implement various levels of mayoral control over the public school systems in other cities provides a useful comparison tool for California. Using the seven focus cities as models of weak, moderate, strong, and control forms of mayoral influence over school districts, the implications for adopting similar systems in California can be identified. Before passing legislation providing for any level of mayoral influence, whether weak, moderate, strong, or control, various changes would need to be made to the state constitution, statutes, or local city charters.

### A. Introduction to Constitutional, Statutory, and Case Law Limiting Mayoral Control

Most of the state constitutional provisions that potentially limit mayoral control over local school districts are found in Article IX, which relates to education. Article IX contains thirty-two different sections that are currently or were formerly in effect.<sup>878</sup> This is a stark contrast to the constitutions of the six other states with cities included in this study, which have far fewer provisions specifically mentioning education or the public school system.<sup>879</sup> If

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<sup>874</sup> Wong, 2009; Wong and Shen, 2007; Wong, et al., 2007.

<sup>875</sup> O’Day and Bitter, 2011; Kemple, James. “Children First and Student Outcomes: 2003-2010.” In J. O’Day, C. Bitter, & L. Gomez (Eds.), *Education Reform in New York City: Ambitious Change in the Nation’s Most Complex School System* (255-292). Cambridge, MA: Harvard Education Press, 2011. Print; Viteritti, Joseph. New York: Past, present, future. In Joseph Viteritti (Ed.), *When Mayors Take Charge: School Governance in the City* (206-234). Washington, D.C.: Brookings Institution Press, 2009. Print.

<sup>876</sup> The most recent NAEP scores available at the district level are from 2011 for reading and mathematics and 2009 for science.

<sup>877</sup> National Center for Education Statistics, *The Nation’s Report Card: Trial Urban District Assessment, (Mathematics, Reading, Science), 2009 and 2011*, <http://nationsreportcard.gov>.

<sup>878</sup> See CAL. CONST. art. IX.

<sup>879</sup> The Pennsylvania Constitution does not contain an article specifically relating to education, but includes two sections regarding the public school system in Article III (“Legislation”). PA. CONST. art. III, §§ 14-15. Ohio’s state constitution has six sections relating to education and Michigan’s has nine. OHIO CONST. art. VI, §§ 1-6; MICH. CONST. art. VIII, §§ 1-9. The Constitution of Massachusetts includes only one section speaking specifically to the public school system. MASS. CONST. pt. 2, ch. 5, § 2. Illinois’ Article X, entitled “Education,” has three sections, as does New York’s Article XI. ILL. CONST. art. X, §§ 1-3; N.Y. CONST. art. XI, §§ 1-3.

legislation providing for mayoral control is ultimately passed, it must be within the bounds of the constitution. It is therefore necessary to review the key constitutional provisions involved before examining the possibility of weak, moderate, strong, or control levels of mayoral influence over public schools in California.

**i. Article IX of the California Constitution and *Mendoza v. State***

A previous attempt to pass laws providing for mayoral control in the Los Angeles Unified School District (LAUSD) resulted in litigation and an ultimate overturning of the legislation by a California court of appeal. *Mendoza v. State* is an important and instructive opinion in which the court interpreted certain key sections of Article IX in the context of mayoral involvement in the LAUSD.<sup>880</sup> In 2006, the California Legislature experimented with granting the mayor (at the time and currently, Antonio Villaraigosa) more control over the LAUSD by passing the Romero Act (Act).<sup>881</sup> The Act included several provisions, but the key features were the Mayor's Partnership and the Council of Mayors.<sup>882</sup>

The Council of Mayors was comprised of the mayors of each city included within the attendance boundaries of the LAUSD.<sup>883</sup> The Council took action by ninety percent of the weighted vote of its members. Each mayor's vote was weighted according to the proportion of the LAUSD population that resided in each mayor's city. Because eighty-two percent of the LAUSD population resided in Los Angeles, the Council was unable to take any action without the vote of the Mayor of Los Angeles. The Council's key power was to ratify the "appointment, contract term, contract renewal, refusal to renew a contract, or removal of the district superintendent."<sup>884</sup> The court summarized this as granting to the Mayor of Los Angeles "complete veto power over the selection of the District Superintendent."<sup>885</sup> The Act also increased the powers of the district superintendent to levels "far exceed[ing] the powers of the district superintendent of any other school district in California."<sup>886</sup> In addition to existing powers in the Education Code, the Romero Act authorized the superintendent of the LAUSD to: seek waivers of Education Code sections from the SBE, assign and reassign a principal, make all employment decisions for all non-represented personnel, negotiate and execute contracts, prepare the proposed budget, and to develop and manage the facilities program.<sup>887</sup>

The Mayor's Partnership consisted of the Mayor of Los Angeles "in partnership with the LAUSD, parent and community leaders and organizations, and school personnel and employee organizations."<sup>888</sup> The Mayor's Partnership was to exercise control over three clusters of low-performing schools within Los Angeles. The Mayor's Partnership would have complete control over the clusters, regardless of any other provisions of law. The Mayor's Partnership would have to seek approval from the County Superintendent of Schools before taking control of a

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<sup>880</sup> 57 Cal. Rptr. 3d 505 (Cal. Ct. App. 2007).

<sup>881</sup> *Id.* at 509.

<sup>882</sup> *Id.* at 513-16.

<sup>883</sup> *Id.* at 513 (citing CAL. EDUC. CODE § 35920(a) (repealed 2009)).

<sup>884</sup> *Id.* (quoting EDUC. § 35921(b) (repealed 2009)).

<sup>885</sup> *Id.*

<sup>886</sup> *Id.* at 513-14.

<sup>887</sup> *Id.* at 514.

<sup>888</sup> EDUC. § 35931(a)(1) (repealed 2009).

cluster. However, the County Superintendent was required to grant approval unless, and could later withdraw approval only if, one of three “narrowly-drawn” conditions existed.<sup>889</sup>

Throughout the process of passing the Romero Act, the state legislature received opinions from the Legislative Counsel that proposed legislation allowing for various forms of mayoral control over school districts would likely be unconstitutional.<sup>890</sup> The Act was crafted with these warnings in mind; however, the legislature was not successful in drafting a law that could withstand constitutional muster. The Act was struck down by the court of appeal in 2007 after being in effect for less than one year.<sup>891</sup> The court of appeal declared the Act unconstitutional based on three key sections of Article IX of the California Constitution. These sections have important implications for drafting legislation to increase mayoral control over school districts in California.

### **1. Article IX, Section 6:**

The Public School system shall include all kindergarten schools, elementary schools, secondary schools, technical schools, and State colleges, established in accordance with law, and in addition, the school districts and the other agencies authorized to maintain them. *No school or college or any part of the Public School System shall be, directly or indirectly, transferred from the Public School System or placed under the jurisdiction of any authority other than one included within the Public School System.*<sup>892</sup>

The *Mendoza* court noted that the purpose of Section 6 was to guarantee that “the ability of that *system* to discharge its duty fully is not impaired by the dissipation of authority and loss of control that would result if parts of the system were transferred from the system or placed under the jurisdiction of some other authority.”<sup>893</sup> The court determined that the Mayor’s Partnership and Council of Mayors were not “part of the public school system,” and therefore, no part of the school system could be transferred to such entities. Although the legislature’s attempt in the Romero Act to define the two entities as “part of the public school system of the state . . . within the meaning of section 6 of Article IX of the California Constitution” was entitled to great weight, it was not controlling.<sup>894</sup> Instead, the court concluded that the Council and Partnership were not part of the system because they were not entities listed in Article IX, section 6 of the constitution, and they were controlled by the Mayor of Los Angeles, an elected city official.<sup>895</sup>

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<sup>889</sup> *Mendoza*, 57 Cal. Rptr. 3d at 515. The conditions were: if: (1) the Mayor and Mayor’s Partnership were “demonstrably incapable . . . of implementing a sound educational program,” (2) the Mayor and Mayor’s Partnership had “an irremediable and significant conflict of interest,” or (3) the Mayor and Mayor’s Partnership were “demonstrably incapable . . . of providing sufficient financial oversight” of the schools. EDUC. § 35930.5(b) (repealed 2009).

<sup>890</sup> *Mendoza*, 57 Cal. Rptr. 3d at 512-13.

<sup>891</sup> The Romero Act became law on September 8, 2006, and the *Mendoza* court issued its opinion on April 17, 2007. *Id.* at 505, 513.

<sup>892</sup> CAL. CONST. art. IX, § 6 (emphasis added).

<sup>893</sup> *Mendoza*, 57 Cal. Rptr. 3d at 523 (emphasis in original) (quoting California Sch. Emps. Ass’n v. Sunnyvale Elementary Sch. Dist., 111 Cal. Rptr. 433 (1973)).

<sup>894</sup> *Id.* at 524 (quoting EDUC. § 35900(e) (repealed 2009)).

<sup>895</sup> *Id.* at 524-25 (quoting L.A., CAL., CHARTER § 230); *see also* CAL. CONST. art. IX, § 6.

The court went on to determine whether the Romero Act actually transferred *control* of any part of the public school system to the Mayor’s Partnership or Council of Mayors in violation of Section 6. The court concluded that the Mayor’s Partnership was not acting in a mere “advisory capacity,” which is permissible under the constitution, but instead would take “complete operational control” over the three clusters of low-performing schools.<sup>896</sup> Allowing the Mayor’s Partnership to take such control over the schools “in the absence of any real oversight by public school system authorities” violated Section 6.<sup>897</sup>

Regarding the Council of Mayors, the court found that the legislature could legally increase the powers of the district superintendent. However, it was unconstitutional to then grant the Mayor of Los Angeles, through the Council of Mayors, an effective “veto power” over the selection of the superintendent. Although the court acknowledged that the question of whether the mayor could be given veto power over superintendent selection was a closer call than the constitutionality of the Mayor’s Partnership, it ultimately concluded that taking “the very crucial selection of the District Superintendent [out] of the hands of the public school system” violated Section 6.<sup>898</sup> It was irrelevant that the LAUSD school board was permitted to make the initial selection of superintendent, because that selection would mean nothing without the approval of the Council of Mayors.<sup>899</sup> The constitution vests “*complete* authority over the public school system in the school districts and other agencies authorized to maintain it,” which does not include the mayor.<sup>900</sup>

2. **Article IX, Section 14:** “The Legislature may authorize the governing boards of all school districts to initiate and carry on any programs, activities, or to otherwise act in any manner which is not in conflict with the laws and purposes for which school districts are established.”<sup>901</sup>

The *Mendoza* court interpreted Section 14 to read that if the legislature chooses to delegate power over local school districts, the governing boards of such districts are the only entities to which the power may be delegated.<sup>902</sup> In a footnote, the court reviewed the history of Proposition 5, which added the above language to Section 14, emphasizing that “[t]here was never any suggestion that the Legislature somehow also possessed the authority to delegate increased decision-making power over local schools *to a city’s mayor and various appointees.*”<sup>903</sup> Thus, an important limit on the legislature’s authority to delegate power over a school district is that such power may be delegated only to governing board which voters have the right to elect.<sup>904</sup>

The court found that the Mayor’s Partnership “substantially interfere[d]” with the board’s control over the low-performing school clusters and that the Council of Mayors “completely

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<sup>896</sup> *Mendoza*, 57 Cal. Rptr. 3d at 527.

<sup>897</sup> *Id.*

<sup>898</sup> *Id.* at 528.

<sup>899</sup> *Id.*

<sup>900</sup> *Id.* at 528 n.27 (emphasis in original).

<sup>901</sup> CAL. CONST. art. IX, § 14 (emphasis added).

<sup>902</sup> *Mendoza*, 57 Cal. Rptr. 3d at 519.

<sup>903</sup> *Id.* at 520 n.15 (emphasis added).

<sup>904</sup> *Id.*

divested” the board of its statutory right to “employ” a district superintendent.<sup>905</sup> Because the court had already found the Act unconstitutional on other grounds, it did not determine whether the Act violated Section 14. Nonetheless, Section 14 and the relevant discussion in *Mendoza* are important to the extent that the court’s discussion suggests that granting veto power to a mayor over the board’s selection of superintendent would violate Section 14. Therefore, Section 14 would likely need to be amended in a manner that allows the legislature to authorize the mayor, in addition to the boards of education, to act.

### **3. Article IX, Section 16:**

It shall be competent, in all charters framed under the authority given by Section 5 of Article XI, to provide, . . . for the manner in which, the times at which, and the terms for which the members of boards of education shall be elected or appointed, for their qualifications, compensation and removal, and for the number which shall constitute any one of such boards.

Section 16 provides charter cities with a constitutional right to decide whether their boards of education will be elected or appointed. The court stated in dicta that, as applied to charter cities, “[i]t would be a clear violation of the plain language of article IX, section 16, if the Legislature passed a law *giving the Mayor the right to appoint the members of the Board.*”<sup>906</sup> Furthermore, the *Mendoza* court found that the Romero Act violated Section 16, although the Act did not directly grant the mayor the right to appoint members of the board.<sup>907</sup> It was the interference with the board’s powers by the Council of Mayors and Mayor’s Partnership that constituted a violation of the right of the citizens of Los Angeles to elect their board of education.<sup>908</sup> This is because Section 16 “would be annulled if the Legislature could simply bypass it by taking the powers of the Board away from that entity and giving them to the Mayor, or the Mayor’s appointee.”<sup>909</sup> Thus, *Mendoza* stands for the proposition that, as applied to charter cities, the state legislature may not constitutionally pass a law giving the mayor the power to appoint the district superintendent.

At the end of its opinion, the court acknowledged in dicta that, hypothetically, the citizens of Los Angeles could “*choose* to amend their charter to allow the Mayor to appoint the members of the Board,” and if so, “such amendment would indisputably be proper.”<sup>910</sup> However, the court made no mention of the relationship, if any, between Sections 6 and 16 of Article IX. Section 6 of Article IX prohibits the transfer of any part of the public school system to any entity outside of the school system; on the other hand, Section 16 clearly provides charter cities with the right to determine “the manner in which . . . the members of boards of education shall be elected or appointed.” If Section 16 is interpreted as providing charter cities with unlimited authority to permit any entity or official, even those that are not a part of the public school system, to appoint any number of members on the boards of education, it would seem inconsistent with Section 6.

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<sup>905</sup> *Id.* at 519.

<sup>906</sup> *Id.* (emphasis added). The City of Los Angeles is a charter city.

<sup>907</sup> *Id.* at 523.

<sup>908</sup> *Id.* at 519.

<sup>909</sup> *Id.*

<sup>910</sup> *Id.* at 529 (emphasis in original).



This leaves open the issue of whether a city charter amendment providing for a mayor-appointed board of education would be subject to the restrictions of Section 6. Other case authority on this issue is limited. As discussed above in the section on the Oakland Unified School District, a California Court of Appeal in an unpublished decision upheld the charter city amendment allowing the mayor to appoint only a minority of school board members, without even mentioning Section 6 of Article IX.<sup>911</sup> As such, citizens seeking to amend a city charter to provide for mayoral control should keep in mind that opponents could use Article IX, Section 6 as a potential basis for litigation, although the outcome of any such litigation is unclear.

## ii. Statutory and City Charter Limitations on Mayoral Control

In addition to the sections included in Article IX discussed in *Mendoza*, other statutes and city charter issues may pose potential obstacles to the extent of mayoral control over the public school system in California. Many sections of the Education Code are currently in direct conflict with the idea of mayoral control. For example, section 35010 requires every school district to be “under the control of a board of school trustees or a board of education.”<sup>912</sup> Such school boards must be comprised of three, five, or seven elected members.<sup>913</sup> Furthermore, the powers and duties of the school boards and district superintendents and the manner of selecting a district superintendent are set by statute.<sup>914</sup> School district finance, collective bargaining rights, and control over low-performing schools are each set by state law, found in the Education Code and in other sources as well.

There are additional considerations that arise in attempting to apply mayoral control laws to charter cities. The state constitution vests charter cities with the right to determine whether school boards will be elected or appointed, as discussed above in *Mendoza*. The legislature may not simply pass a law requiring charter cities to have mayor-appointed school boards. If Article IX, Section 16 is left intact, charter cities whose charters do not currently allow the mayor to appoint school board members could independently choose to amend their charters.<sup>915</sup> A city charter amendment may be proposed by one of two methods: a ballot initiative through voter petition or a ballot measure supported by the city’s governing body.<sup>916</sup> However, it is important to note that if the boundaries of a school district extend beyond those of the city whose charter governs the school district board of education, any changes to the city charter regarding the election, appointment, qualifications, compensation, removal, or number of board members must be approved by “a majority vote of all the qualified electors of the school district . . . .”<sup>917</sup> In other words, a proposed amendment to the city charter must be approved by all of the residents in the *school district*, including those who live outside the boundaries of the *city* whose charter would be amended.

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<sup>911</sup> Hazzard v. Brown, 2002 WL 863186 (Cal. Ct. App. May 7, 2002); *see also supra* notes 63-66 and accompanying text.

<sup>912</sup> CAL. EDUC. CODE § 35010 (West 2011).

<sup>913</sup> *Id.* § 35012.

<sup>914</sup> *See id.* §§ 35031, 35035, 35160.

<sup>915</sup> Out of the 120 charter cities in California, it is unknown how many allow the mayor to appoint school board members. According to the Education Commission of the States, the Oakland Unified School District (from 2000 to 2004) was the only district in California with a partially mayor-appointed school board. “Local School Boards.” *ECS.org*. Education Commission of the States, n.d. Web. 1 Dec. 2011.

<sup>916</sup> CAL. CONST. art. XI, §3; *Hernandez v. County of Los Angeles*, 84 Cal. Rptr. 3d 10, 16 (Cal. Ct. App. 2008).

<sup>917</sup> CAL. CONST. art. IX, § 16(b).

## B. Weak (Oakland & Philadelphia)

In the School District of Philadelphia (SDP), currently, and the Oakland Unified School District (OUSD), formerly, the mayor generally exercises an indirect influence over school district finance, collective bargaining, and low-performing schools. In regards to governance, the mayors hold a direct but small role in selecting school board members.

### i. Governance

In the Oakland Unified School District from May 2000 to May 2004, Mayor Brown appointed a minority (three out of ten) of the school district governing board members. This is similar to the present situation in the School District of Philadelphia, where the mayor appoints two out of five members of the School Reform Commission. For both the OUSD and SDP, the school district governing board selects the district superintendent. Given that the OUSD is governed by California law, the OUSD/SDP example of weak mayoral control over school district governance could be adopted in other California school districts through a relatively simple process.

Charter cities in California, like the City of Oakland, are given more freedom than are general law cities to determine the composition of and manner of selecting their corresponding school district boards of education. Article IX, Section 16 of the state constitution allows city charters to include provisions determining whether school board members will be elected or appointed.<sup>918</sup> As such, without repealing or changing Article IX, Section 16, the California Legislature could not simply pass a law requiring the mayor in every city to appoint a minority of the school board members. To do so would violate the constitutional right of a charter city to determine whether the board of education will be elected or appointed.<sup>919</sup> Instead, charter cities in California could independently choose to amend their charters to increase the size of the board of education and to provide that a minority of its members will be appointed by the mayor, as was done by Measure D in Oakland.

It is important that under the weak form of mayoral influence, the mayor appoints only a minority of school board members. Although neither *Mendoza* nor *Hazzard* specify a “magic number” of board members that a mayor could appoint without running afoul of the constitutional prohibition against transferring control of the public school system to an outside official, it is likely that appointing only a minority of school board members would be permissible. To do so would not give the mayor complete control over the decision-making body, but would only provide the mayor with an indirect voice on the board, not sufficient to control votes or to direct action.

If city charters are amended to provide for mayoral appointment powers, conflicting provisions of the Education Code need not be revised or repealed. The Education Code provides that if a unified school district is “coterminous with or includes within its boundaries a chartered city,” the district must be “governed by the board of education provided for in the charter of the

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<sup>918</sup> *Id.* § 16(a).

<sup>919</sup> *Mendoza v. State*, 57 Cal. Rptr. 3d 505, 519 (Cal. Ct. App. 2007) (“It would be a clear violation of the plan language of article IX, section 16, if the Legislature passed a law giving the mayor the right to appoint the members of the Board.”).

city . . . .”<sup>920</sup> Thus, the terms of the city charter will prevail in a unified school district over the provisions of the Education Code that otherwise require a three-, five-, or seven-member elected school board.<sup>921</sup> As for school districts that are not unified, the district *may be* governed by the terms of the corresponding city charter only if so approved by a majority of voters in the school district.<sup>922</sup> In either of the two situations—a unified school district the boundaries of which include a charter city or a non-unified school district in which the residents vote for the district to be governed by a city charter—the Education Code would not need to be changed. Instead, the terms of the city charter would control over the conflicting Education Code provisions.

However, general law cities do not have a constitutional right to determine the make-up of their school district boards of education;<sup>923</sup> thus, the terms of the Education Code are controlling. Therefore, the pertinent sections of the Education Code would need to be repealed or revised to reflect that the mayor has the authority to appoint a minority of the school board members.<sup>924</sup>

## ii. Finance

During the years that Mayor Brown selected three of the OUSD governing board members, the finance and budgeting process remained subject to the Education Code, which provides that the district superintendent initially drafts the budget, the district board of education votes to adopt the budget, and the budget is then passed on to the county superintendent for his or her approval. This system is similar to that currently in place in the SDP, where the SRC is responsible for creating the budget and is in control of all school district expenditures. The SRC is explicitly given the power to levy taxes; however, school districts in California are also authorized to levy taxes in limited circumstances if approved by the voters in the district.<sup>925</sup>

Thus, the Education Code already provides for a budgeting process that is identical to that used in the OUSD and rather similar to that currently used in the SDP. The only role played and influence held by the mayors of Oakland and Philadelphia over school district budget and finance is through their appointment powers. To give mayors in California the power to appoint a minority of school district board members, and therefore, an indirect role in decisions regarding the budget, would require the same changes to the constitution and Education Code discussed above in the governance section.

## iii. Collective Bargaining

As with finance and budgeting, Mayor Brown’s former role was, and the role of the Mayor of Philadelphia currently is, only indirect in regards to collective bargaining between the respective school districts and their educational employees. In the OUSD from 2000 to 2004,

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<sup>920</sup> CAL. EDUC. CODE § 5200 (West 2011).

<sup>921</sup> *See, e.g., id.* § 35012.

<sup>922</sup> *Id.* § 5201. Out of the ten cities in California considered to be potential targets of mayoral control laws (Los Angeles, San Diego, San Jose, San Francisco, Sacramento, Fresno, Long Beach, Oakland, Anaheim, and Santa Ana), only the City of Anaheim does not have a unified school district.

<sup>923</sup> *See* CAL. CONST. art. IX, § 16(a), which only applies to charter cities.

<sup>924</sup> For example, section 35012 of the Education Code generally requires the governing board of a school district to have five members elected at large. A unified school district may have a seven-member governing board and an elementary school district must have a three-member governing board.

<sup>925</sup> *See* CAL. CONST. art. 13A, § 4.

collective bargaining remained subject to the state Educational Employment Relations Act and related provisions of the Education Code, which provides district boards of education with the authority to designate a representative for purposes of negotiating but requires all contracts to be approved by the board. In the School District of Philadelphia, the School Reform Commission (SRC) is also in control of negotiating and entering into collective bargaining agreements. Furthermore, just as in California, the SRC may delegate negotiating authority to an employee of the district.

Therefore, to adopt this model of weak mayoral control in regards to collective bargaining, in which the mayor's role is only indirect through his or her appointment powers, would require the same changes to the constitution and Education Code as discussed for governance and finance.

#### **iv. Low-Performing Schools**

Again, in regards to low-performing schools, the influence of Mayor Brown from 2000 to 2004 was, and of the current Mayor of Philadelphia is, indirect. In Oakland, Mayor Brown's influence was not only indirect, but minimal, because the Education Code gives control over low-performing schools largely to the state rather than local school districts or officials. In comparison, the SRC in Philadelphia, and thus, the mayor indirectly, has more control over low-performing schools. The SRC is empowered to develop achievement plans, testing, and evaluation procedures and is authorized to contract with outside entities to provide educational services. Just as with collective bargaining and finance, to give a mayor in California appointment power over a minority of school board members and thereby, indirect influence over low-performing schools, would require the same changes to the constitution and Education Code as outlined above.

If changes are made allowing for mayoral appointment of school board members, the SRC example provides two options to further increase mayoral influence: revising the Education Code to provide for greater local school district control over low-performing schools or revising the Education Code to provide school districts with the authority to contract with outside entities to manage low-performing schools. The first option would require repeal or revision of the lengthy and detailed provisions of the Public Schools Accountability Act, which runs approximately thirty pages in the Education Code.<sup>926</sup> The latter option already exists somewhat in the Education Code under the sections relating to charter schools. School districts are permitted to contract with outside individuals and entities to run charter schools; however, a certain petition process must first be followed.<sup>927</sup> The district board of education may not simply decide on its own initiative to enter into such a contract. The relevant Education Code sections could be revised to indicate that the board of education may decide on its own to contract with outside entities. However, neither of the two options alone would have any effect on the mayor's influence if he or she is not also permitted to appoint some number of school board members.

### **C. Moderate (Cleveland & Detroit)**

#### **i. Governance**

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<sup>926</sup> See EDUC. §§ 52050-52059.

<sup>927</sup> See *id.* § 47605.

In the system of mayoral control formerly in place in the Detroit Public Schools (DPS) and currently in place in the Cleveland Metropolitan School District (CMSD), the mayors are much more empowered in terms of governance than are their counterparts in Oakland and Philadelphia. A moderate style of mayoral influence presents three features: allowing the mayor to appoint all or nearly all of the governing board, giving the mayor a role in selecting the CEO/superintendent, and increasing the powers of the CEO/superintendent. There are slight differences between the governance models currently in place in the CMSD and formerly in place in the DPS: in the CMSD, the mayor chooses the CEO with the board's approval, while in the DPS, the board chose the CEO by two-thirds majority vote; furthermore, in the CMSD, the mayor's selections for board members are limited to the list of candidates proposed by a nominating panel. The mayors' extent of control over governance in the moderate category poses greater challenges to adopting a similar system in California than does the weak model.

#### **a. Constitutional Limitations on Mayoral Control**

##### **1. Article IX, Section 6**

Regarding the first feature of moderate mayoral control, allowing the mayor to appoint either all members (CMSD) or all but one member (DPS) of the school board is problematic under Article IX, Section 6. *Mendoza* does not specifically address the question of whether granting the mayor appointment powers over the board of education violates Section 6; however, it is likely that such powers would also be found unconstitutional in that control over the selection of board members would be transferred to the mayor, an official outside of the public school system.<sup>928</sup> One problem with the Romero Act was that an entity outside the public school system was given veto power over the selection of the official or entity within the public school system who exercised management and control over the schools. The court's inquiry was not necessarily focused on the superintendent specifically, but "whether the Legislature may grant to a non-member of the public school system veto power over the appointment of *an important official* in that system."<sup>929</sup> It follows that if the board of education remains in control of the public school system, a mayor could not constitutionally appoint the board members. A slight difference between the Cleveland and Detroit systems is that in Cleveland, the mayor's selections for the school district governing board are limited to candidates proposed by a nominating panel. Placing this limit on a mayor's appointment powers might not be sufficient to pass constitutional muster in California, because the mayor would still retain "ultimate control" over selection of the board members.<sup>930</sup>

The next option presented in the former Detroit-style governance system is to increase the powers of the CEO; however, this would only indirectly strengthen the mayor's influence over the school system if the mayor is first given the authority to select the CEO or appoint the board members who, in turn, select the CEO. Under *Mendoza*, there is nothing wrong *per se* with increasing the powers of a CEO/superintendent beyond what is currently provided for in the Education Code. However, in terms of Article IX, Section 6, the issue is with who has the authority to select the CEO/superintendent.

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<sup>928</sup> However, the exact limitations, if any, that Section 6 places on a charter city's right to utilize a mayor-appointed board of education is unclear.

<sup>929</sup> *Mendoza*, 57 Cal. Rptr. 3d at 528 n.27 (emphasis added).

<sup>930</sup> *See id.* at 528.

This then raises a question regarding the third feature of moderate-style mayoral influence over governance: exactly how much authority does the state constitution permit a mayor to have in selecting the CEO/superintendent? In the CMSD, the mayor chooses the CEO but the board must approve the selection. This would not likely be permitted in California under *Mendoza*. Although the mayor would not technically possess “ultimate control” in that his or her selection would be subject to the board’s approval, in practice, the board’s approval might be seen as a mere “rubber stamp” of the mayor’s decisions, because the board was appointed entirely by the mayor. On the other hand, a court could alternatively find that the mayor would be acting merely in an “advisory capacity,” because the school board, an entity included within the definition of the public school system under Article IX, Section 6, has the last say in who is hired as CEO/superintendent. In the DPS, the school board chose the CEO by two-thirds vote; the board member appointed by the SPI was required to be part of that majority. This presents a lesser degree of mayoral influence over CEO selection than is apparent in the CMSD. As such, this would likely be permissible under Article IX, Section 6 because the mayor would have no direct role in choosing the CEO; furthermore, the Education Code currently permits school boards to hire superintendents.

The preceding discussion highlights the limitations that Article IX, Section 6, as construed in *Mendoza*, places on the possibility of increased mayoral control over school district governance. In the Romero Act, the legislature attempted to include the mayor in the definition of the “public school system” under Section 6, but that did not hold up in court, which shows that legislative labels alone may not be sufficient. Therefore, to allow a mayor in California to appoint all (or all but one) members of the board of education, and to give the mayor ultimate authority in CEO/superintendent selection, Section 6 would need to be amended or revised, perhaps to specifically include the mayor as part of the school system or to allow control of part of the public school system to be transferred to an entity or office outside the system.<sup>931</sup>

## **2. Article IX, Section 14**

As discussed above, the *Mendoza* court discussed, but did not specifically make a ruling regarding Article IX, Section 14 of the state constitution. The court’s opinion suggests that Section 14 allows the legislature to delegate “decision-making power” over schools only to the school boards, and not to the mayor or the mayor’s appointees. Under this reasoning, mayoral appointment of school board members would not be consistent with Section 14, because it would amount to giving decision-making power to the mayor’s appointees. Those seeking to pass laws allowing for mayor-appointed school boards might consider revising or amending Section 14 in a manner that authorizes the legislature to delegate some degree of authority to the mayor or the mayor’s appointees.

## **3. Article IX, Section 16**

Section 16 provides charter cities with the right, among others, to determine whether their boards of education will be elected or appointed. It is therefore apparent that the legislature may not constitutionally pass a law requiring charter cities to have mayor-appointed school boards.

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<sup>931</sup> If the requisite constitutional changes are made allowing control of the public school system to be transferred to an entity outside of the school system, the legislature would then have to enact a statute detailing which outside entities or offices may control parts of the school system and in what manner.

What is less obvious is that other features of moderate-style mayoral control, such as allowing the mayor to have a role in appointing the CEO/superintendent, might also violate Section 16. This is because any such law would divest the board of education of its current statutory authority to employ a district superintendent. The *Mendoza* court specifically rejected the contention that Section 16’s “grant of power to choose whether to elect a board of education is limited *only* to that power, and does not imply that any such elected board of education would have any particular powers or duties.”<sup>932</sup> Instead, the court concluded that “[t]he Legislature cannot transfer a local board of education’s powers to a *different entity* and then say the charter city has no right to determine the composition of *that* entity since it is not a board of education.”<sup>933</sup> In this regard, utilizing a strong CEO/superintendent who takes over all the powers and duties of the former elected board of education, as was done in the DPS, violates Section 16 as well.

In handling Section 16 to allow for a law providing mayoral appointment of the district superintendent and/or board of education, there are a few options. Section 16 could be repealed or revised to restrict the right of charter cities to independently determine whether to elect or appoint the members of the board. Alternatively, each city charter could be amended one-by-one to allow for mayoral appointment of the board members.<sup>934</sup> Lastly, legislation granting the mayor appointment powers over board and/or district superintendent could simply apply only to general law cities, in which Section 16 does not apply. However, it is important to note that Section 16 is an additional constitutional obstacle for charter cities; any legislation would also have to pass constitutional muster under Sections 6 and 14 as well.

#### **b. Statutory and City Charter Limitations on Mayoral Control**

If the changes described above are made to the state constitution, sections of the Education Code would then need to be revised or repealed to allow for mayoral appointment of board members and for the mayor to have some role in choosing the district superintendent. The key Education Code provisions are found in sections 35000 and following. Section 35012 provides that the governing board of a school district shall be elected at large by the voters of the district. This section would have to be revised to allow for the option of mayoral appointment instead of election by voters. Next, section 35026 provides that “the governing board of any school district may employ a district superintendent . . . .” To allow for mayoral appointment of a superintendent, the “employ” language would need to be revised to clearly reflect that there is an option for the mayor, rather than school board, to select the superintendent. Section 35031, pertaining to the term of employment for the district superintendent, would need to be revised to indicate that the mayor has the power to select the superintendent, rather than the board. Any other sections of the Education Code, for example, sections 5000 et seq., and sections 35100 through 35107, or the Election Code pertaining to the details of board of education elections would need to be revised or repealed.

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<sup>932</sup> *Mendoza*, 57 Cal. Rptr. 3d at 520 (emphasis in original).

<sup>933</sup> *Id.* at 521 (emphasis in original).

<sup>934</sup> *See id.* at 529 (“If the citizens of Los Angeles *choose* to amend their charter to allow the mayor to appoint the members of the Board, such amendment would indisputably be proper. What is not permissible is for the Legislature to ignore that constitutional right and to bypass the will of the citizens of Los Angeles and effectively transfer many of [the] powers of the Board to the Mayor . . . .”).

Lastly, as for charter cities, any city charter providing for election rather than appointment of school board members would need to be revised, as discussed above. However, if the state constitution is revised or amended to divest charter cities of the right to determine whether to elect or appoint school board members, the substance of city charters will not be an issue.

## **ii. Finance**

The laws pertaining to the finance and budgeting process of both the CMSD and the DPS are similar to the current corresponding laws in California. In the CMSD, the board of education adopts and approves the budget; while in the DPS, the former CEO retained all authority over finances and expenditures, but the budget was subject to the approval of the board of education. This is comparable to the current system in California, in which the district superintendent initially drafts the budget and the board of education approves it.

In general, the mayor's authority regarding budget and finance in the CMSD and formerly, the DPS, is indirect through his or her power to appoint the board members who ultimately make decisions regarding the budget. To adopt this form of indirect mayoral influence in California would require giving the mayor appointment powers over the board of education. This would necessitate the same changes to the constitution and Education Code as are discussed above in the governance section.

Ohio state law provides an additional opportunity for the mayor to be indirectly involved in a school district's financial affairs: for school districts in a state of fiscal emergency (the CMSD from 1996-1999), the mayor appoints one out of the five members of the financial planning and supervision commission, which drafts a recovery plan for the district and may assume all powers and duties of the board of education. Comparable California law allows school districts to seek emergency apportionment loans from the state in exchange for the superintendent of public instruction (SPI) assuming control of the district,<sup>935</sup> which occurred in the Oakland Unified School District in 2003. Those provisions of the Education Code could be revised or amended to set up a system more similar to that in the CMSD. For example, rather than having the SPI assume control of a district accepting an emergency apportionment loan, the law might establish something similar to Ohio's financial planning and supervision commission of which the mayor is entitled to appoint a certain number of members.

## **iii. Collective Bargaining**

As with finance, the mayors in the moderate-level mayoral influence cities exercise only indirect authority, through appointment powers, over the collective bargaining process between their corresponding school districts and educational employees. Furthermore, the collective bargaining laws and procedures applicable to the CMSD and, formerly, the DPS, are largely similar to those currently in place in California. In the CMSD, the school board may designate a representative for negotiating purposes (it currently uses the CEO and a team of other school district employees), but the school board must approve the resulting contract. This is nearly identical to California law, in which school boards are permitted to delegate contracting authority to the district superintendent, but the board retains the final say in approving contracts.

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<sup>935</sup> See CAL. EDUC. CODE §§ 41325-27 (West 2011).



Therefore, to adopt a system similar to the CMSD's in which the mayor has indirect influence over collective bargaining would require giving a California mayor the authority to appoint board members.

The collective bargaining provisions that were in effect in the DPS during the years of mayoral control were slightly different from the CMSD and California. There, the CEO was considered the "employer," and therefore exercised complete control over negotiating and contracts. As with the mayor of Cleveland, the former mayor of Detroit held indirect authority over collective bargaining through his power to appoint the school board members who ultimately selected the CEO. To implement the Detroit model in California would require giving the mayor appointment powers over the school board and subsequently altering the statutory powers of the CEO/superintendent to specifically include control over collective bargaining negotiations and agreements. This raises the concerns noted above in the governance section—if the powers of the CEO/superintendent are significantly expanded and the mayor is given the ultimate authority in CEO/superintendent selection, such a law could be found to violate Article IX, Section 6 of the California Constitution.

If a mayor in California is given appointment authority over a school board, his or her powers could be further, yet indirectly, increased by limiting the scope of mandatory bargaining topics. For example, Michigan state public employee collective bargaining law specifies a much longer list of restricted bargaining topics for educational employees than exists in California. Restricting the scope of bargaining could, in theory, increase the power of the school district by allowing the district to set its own terms regarding certain topics without having to negotiate with union representatives. This would be done by changing the terms of California's Educational Employment Relations Act. However, this would have no effect on a mayor's influence if he or she is not also given the authority to appoint school board members or to have a role in superintendent selection.

#### **iv. Low-Performing Schools**

In regards to low-performing schools, the mayor's influence in a moderate level mayoral control school district is indirect. However, the laws pertaining to low-performing schools in the CMSD and formerly in effect in the DPS are rather different from corresponding provisions of California law. In the CMSD, the CEO is responsible for adopting plans to measure student academic performance and may take certain corrective actions with respect to schools that are not progressing at desired levels, so long as the school board approves. Similarly, in the DPS during the years of mayoral control, the CEO was authorized to draft school improvement plans, with the approval of the school reform board, and was required to report on school performance to the governor, mayor, school district accountability board, legislature, and the public.

Compare this to California, where the state largely controls the programs and consequences for low-performing schools. The *Mendoza* discussion makes it clear that the mayor or a mayor's appointees may not constitutionally be given "complete operational control" over the low-performing schools, as the Romero Act attempted to do with the Mayor's Partnership. The *Mendoza* court found that this violated Article IX, Section 6's prohibition on transferring any part of the public school system to an outside entity or official, and for charter cities, also violated Article IX, Section 16. However, the CMSD and DPS systems would not likely violate Section 6 because even if it is found that the mayor retains ultimate authority over

CEO selection, the CEO does not have complete control over low-performing schools. To achieve a moderate mayoral control system in which the mayor has indirect influence over low-performing schools through appointment powers would first require giving the mayor some kind of appointment power over the school board. The terms of California's Public Schools Accountability Act could then be revised, or a new set of legislation applying only to mayor-control school districts could be enacted.

#### **D. Strong (Boston & Chicago)**

##### **i. Governance**

In the models of strong mayoral control used in the Boston Public Schools (BPS) and Chicago Public Schools (CPS), the respective mayors currently appoint all seven members of the school districts' boards of education. In Boston, the mayor's selections are limited to a list of candidates proposed by the nominating panel (similar to the CMSD) and the school board selects the district superintendent. However, in Chicago, there is no nominating panel and the mayor is additionally authorized to select the district CEO. In both Boston and Chicago, there are local bodies organized at each school within the district ("school councils" in Boston or "local school councils" in Chicago), which are comprised of local principals, teachers, and parents. The Boston and Chicago examples of strong mayoral control present two features: allowing the mayor to appoint every member of the board of education (with or without the use of a nominating panel) and to select the CEO.

##### **a. Constitutional Limitations on Mayoral**

###### **1. Article IX, Section 6**

The *Mendoza* decision is instructive as to both features of strong mayoral control. Although the CMSD is part of the moderate category, the mayor of Cleveland, like the mayors of Boston and Chicago, is also authorized to appoint every member of the corresponding boards of education. Therefore, the same analysis, in terms of *Mendoza* and Article IX, Section 6, regarding mayoral appointment of school board members applies here as applied to the governance section in the moderate category. As such, a court would likely find that allowing a mayor in California to appoint every member of a local school district board of education would violate the Section 6 prohibition against transferring control of the public school system to an outside entity or official. Furthermore, the BPS also utilizes a nominating panel to propose candidates for the board of education, just as in the CMSD.

One difference between moderate and strong mayoral control is that Chicago allows the mayor to directly select the CEO without board approval, a feature not present in CMSD or DPS. Similarly, in Boston, although the law allows the school board to choose the superintendent, the mayor appoints each school board member. As a result, in reality, the school board does not hire a superintendent whom the mayor does not support. According to *Mendoza*, directly granting to a mayor actual appointment power over the district superintendent/CEO, which goes beyond the

Romero Act’s “veto power,” likely violates Section 6 because the mayor is not part of the public school system.<sup>936</sup>

Therefore, to allow a mayor in California to appoint a district superintendent and members of the board of education, with or without a nominating panel, Section 6 would need to be amended or revised, perhaps to specifically include the mayor as part of the school system, or to allow control of part of the public school system to be transferred to an entity or office outside the system.

## **2. Article IX, Section 14**

Again, the same discussion in the moderate category regarding Article IX, Section 14 applies to the strong category as well, in terms of allowing a mayor in California to appoint school board members. Assuming that a law allowing the mayor to appoint the school board members would constitute a delegation of “decision-making power” to mayoral appointees in violation of Section 14, those seeking to pass laws allowing for mayor-appointed school boards might consider revising or amending Section 14 in a manner that additionally authorizes the legislature to delegate some degree of authority to the mayor or the mayor’s appointees.

## **3. Article IX, Section 16**

As applied to charter cities, *Mendoza* held that giving a mayor appointment power over the district superintendent through the Council of Mayors violates Section 16, although the literal language of Section 16 speaks only to the election or appointment of the board of education. Therefore, as applied to charter cities, Section 16 would need to be repealed, revised, or amended before a law could be passed allowing the mayor to appoint the superintendent and/or board of education members. If no changes are made to Section 16, charter cities could simply revise their charters to provide for mayor-appointed school boards. However, Section 16 is an additional constitutional obstacle for new laws that apply to charter cities; any legislation would also have to pass constitutional muster under Sections 6 and 14 as well.

### **b. Statutory and City Charter Limitations on Mayoral Control**

If the changes described above are made to the state constitution, conflicting sections of the Education Code and any city charter provisions would then need to be revised or repealed to allow for mayoral appointment of board members and the district superintendent. This entails much of the same discussion as in the moderate category.<sup>937</sup>

### **ii. Finance**

The processes of adopting a budget for the BPS, CPS, and school districts in California each involve input from and exchange between the district boards of education and at least one other official or entity. In the BPS, the budget is initially drafted by the superintendent and then makes its way to the school board, mayor, and city council. In the CPS, the school board adopts the budget with the approval of the School Finance Authority. Unlike mayors in Boston and

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<sup>936</sup> The *Mendoza* court found that granting veto power over the selection of the superintendent amounted to “ultimate control” because the board of education could not select, fire, or retain the superintendent without approval of the Council of Mayors. 57 Cal. Rptr. 3d at 528.

<sup>937</sup> See *supra* Section VII.C.i.b of this report.

Chicago, mayors in California do not have formal control or influence over any official or entity that is involved in the adoption of local school district budgets.

To indirectly increase mayoral control over school district budgets, the California Legislature could give mayors appointment powers over the district boards of education. Thus, the discussion above regarding governance applies to finance as well. To allow for mayoral appointment of the members of the board of education, the same changes to Sections 6, 14, and 16 of Article IX of the California Constitution, as well as the related provisions of the Education Code, must be made. In both Boston and Chicago, the mayor also has some degree of control over the entity or official that approves the budgets after they are proposed by the school district governing boards—in Chicago, it is the School Finance Authority, over which the mayor shares appointment power, and in Boston, it is the mayor him or herself who next approves the school district's budget. In California, a mayor has no control or influence over the officer who approves local school district budgets (the county superintendent). Although *Mendoza* does not address mayoral appointment power of the *county* superintendent, it likely would not be constitutional for mayors within a county to have some form of appointment over the county superintendent, because the same issues with Article IX, Section 6 of the California Constitution arise: control over a part of the public school system would be transferred to an official who is not a part of the public school system.

Boston's system differs from Chicago's in that the mayor him or herself is inserted into the budget-making process. This is because in Massachusetts, school funding is tied directly to the cities; therefore, the mayors and city councils are given a say in the school districts' budgets and appropriations. Giving a mayor in California the power to, for example, approve the budget developed by the district before it is passed on to the county superintendent would likely raise the same concerns with Article IX, Section 6 discussed above. Under *Mendoza*, an entity outside the school system is constitutionally permitted to act in an "advisory capacity only," provided that there is sufficient oversight by the school system.<sup>938</sup> However, giving the mayor some kind of "advisory" role only over the budget would not provide the strong level of control found in the Boston and Chicago school districts.

### **iii. Collective Bargaining**

In the BPS, the City of Boston is considered the public employer, but is represented by the school board in negotiations. In the CPS, the CEO is responsible for negotiations, but the school board must approve the collective bargaining contracts. Therefore, the influence and input of the mayors in Boston and Chicago over the collective bargaining process stems from the mayor's appointment powers over the CEO (Chicago only) and the members of the boards of education (Boston and Chicago). To adopt a similar system in California, it will be necessary to amend, revise, or repeal Sections 6, 14, and 16 of Article IX of the constitution and the relevant sections of the Education Code as noted above.

If such changes are made to allow for mayoral appointment of the board of education and the district superintendent, section 3543.3 of the Government Code should be revised to provide that it is the *district superintendent* specifically, rather than any employee that the board of education designates, who negotiates the contracts with employee bargaining units.

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<sup>938</sup> *Mendoza*, 57 Cal. Rptr. 3d at 525, 527.

Furthermore, the rights of educational employees to bargain over certain topics could be limited, as has been the recent trend in Chicago, by revising Government Code section 3543.2. However, to do so without providing for mayoral appointment powers would not likely have any effect on the mayor's role in collective bargaining between school districts and their employees.

Additionally, Massachusetts state law allows all mayors, or their designees, to directly participate and vote in the bargaining process between school districts and educational employees. It is not clear whether allowing a mayor in California one vote among the board members in the negotiating process would amount to an unconstitutional transfer of management and control to an official outside the school system, but even if it were not, this would not give a mayor the same level of influence as those in Boston and Chicago, unless the mayor is also given greater authority in school board and CEO/superintendent selection.

#### **iv. Low-Performing Schools**

As with finance and collective bargaining, the mayors' influences over low performing schools in both Boston and Chicago are exerted indirectly through their appointment powers. In Chicago, the CEO must monitor school performance and identify which schools are "non-performing," and has the power to take action in regards to such schools. In Boston, the mayor's influence is even more indirect because although the district superintendent plays a large role in overseeing low-performing schools, the mayor does not appoint the superintendent. However, the Mayor of Boston does have a slight, direct role in developing the turnaround plan for underperforming schools, as one out of the ten to thirteen individuals in the local stakeholder group, and in presenting evidence to board when a school district is designated as chronically underperforming due to fiscal deficiencies. In contrast to the local control over low-performing schools exercised by the CEO and district superintendent in Chicago and Boston, the control over low-performing schools in California is at the state level. In both the Boston and Chicago models, the CEO/superintendent is generally given vast authority over low-performing schools.

To transfer control of individual, underperforming schools to a district superintendent in California would not likely violate state constitutional provisions, but would only require revisions to or repealing of the provisions of the PSAA. However, to do so would not increase the mayor's power or influence over low-performing schools unless the mayor is also given appointment powers over the board or the superintendent. This would raise problems under *Mendoza*, which suggests that complete control over low-performing schools may not constitutionally be given to the mayor or mayor's appointees.

Another option to consider is the creation of something similar to the Mayor's Partnership in the Romero Act, but only for school districts that are severely under-performing. Although the *Mendoza* court found the Mayor's Partnership unconstitutional, it agreed that "the state may, and in some circumstances must, interfere with a local school board's management of its schools when an emergency situation threatens the students' constitutional right to *basic equality of educational opportunity*."<sup>939</sup> However, the court found that the Romero Act was not about any sort of "constitutional crisis," because the legislature made no such findings regarding the LAUSD, nor could it possibly have made such findings because the LAUSD schools were

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<sup>939</sup> *Id.* at 523 (emphasis added) (citing *Cobb v. O'Connell*, 36 Cal. Rptr. 3d 170 (Cal. Ct. App. 2005); *Butt v. State*, 842 P.2d 1240 (Cal. 1992)).

“not the worst in the state by any measure.”<sup>940</sup> In the Romero Act, the legislature made findings that the LAUSD had “unique challenges and resources that require and deserve special attention to ensure that all pupils are given the opportunity to reach their full potential.”<sup>941</sup> The court concluded that such findings of “uniqueness” were not sufficient to justify the Act’s interference with the board’s authority over the low-performing schools.

As such, the court’s opinions suggests, although it did not specifically hold, that the state legislature may transfer control over low-performing schools away from the district board of education if the circumstances are severe enough to constitute a “constitutional crisis” amounting to a violation of equal educational opportunity for the students. This is something to consider for the possibility of mayoral control over low-performing schools.

## **E. Control (New York City)**

### **i. Governance**

The New York City Department of Education presents the strongest model of mayoral control. In the NYCODE, the mayor of New York City appoints eight out of the thirteen members of the city board of education, while the five borough presidents select the remaining five members. This board is largely advisory; the ultimate control over the NYCDOE is vested with the chancellor, who is chosen by and employed at the will of the mayor. The governance structure also includes local community district education councils and community superintendents. The control model of mayoral influence thus presents three features: the mayor appointing a majority of the school board members, an advisory school board, and a strong chancellor appointed by the mayor.

#### **a. Constitutional Limitations on Mayoral Control**

The powers of the mayor over the NYCDOE are even greater than those possessed by the mayors in the moderate and strong categories; therefore, the possibility of implementing an NYCDOE-style governance model in California raises the same concerns under Article IX and the *Mendoza* opinion, to an even greater extent. The first feature of the control category, allowing the mayor to appoint a majority of school board members, has been discussed at length in the moderate and strong sections of this report. A state law allowing the mayor to appoint a majority of school board members raises concerns with, and would likely require repeal, revision, or amendment of, Sections 6, 14, and, as applied to charter cities, Section 16 of Article IX of the California Constitution.

However, if the board of education is established to generally be advisory only, as is the case in the NYCDOE, the potential conflict with Article IX, Section 6’s prohibition against transferring control of any part of the public school system to outside officials or entities is alleviated. Section 6 does not prohibit outside officials from acting in an advisory capacity only to the public school system.<sup>942</sup> Thus, legislation could be passed in California allowing a mayor to appoint an advisory school board, without altering Article IX. This idea raises two problems of its own: first, the Education Code requires school districts to be under the control of a school

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<sup>940</sup> *Id.*

<sup>941</sup> *Id.* (quoting EDUC. § 35900(a)(1) (repealed 2009)).

<sup>942</sup> *Id.* at 525 (citing California Sch. Emps. Ass’n v. Sunnyvale Elementary Sch. Dist., 111 Cal. Rptr. 433 (1973)).

board, and second, giving a mayor appointment authority over a merely advisory school board, with nothing more, would not achieve the same level of mayoral control as is present in the NYCDOE.

The last feature of control-level mayoral influence, a mayor-appointed chancellor in control of the school district, raises constitutional issues as well. Transferring the powers of the board of education to one individual (whether that individual is titled the chancellor, CEO, or superintendent), likely violates Sections 6, 14, and 16 of Article IX. The *Mendoza* court found that increasing the powers of the district superintendent, and in turn giving the mayor veto power over superintendent selection, conflicted with Sections 6 and 16 of Article IX, and in dicta, contemplated that it would likely violate Section 14 as well. In sum, under current law, a mayor in California could not likely be given the ultimate authority to appoint the official who is given vast decision-making power over the school district.

As such, California legislation implementing an NYCDOE-style governance structure would likely require repeal, revision, or amendment of Sections 6, 14, and 16 of Article IX of the state constitution.

#### **b. Statutory and City Charter Limitations on Mayoral Control**

If the above changes are made to the constitution, for example, allowing control of the public school system to be transferred, including the mayor or mayor's appointees as part of the public school system, or altering the right of charter cities to determine the composition of their boards of education, any conflicting provisions of the Education Code would likewise need to be repealed, revised or amended. Such provisions of the code include those relating to school board composition and election, the powers and duties of a school board and superintendent, and the command that school districts be under the control of a board of education.

#### **ii. Finance**

The budgeting and finance process for the NYCDOE is rather similar to that of the Boston Public Schools. In the New York, both the state and city are responsible for contributing to the school district. At the city level, the budgeting process for the NYCDOE is handled just like any other city department, because the NYCDOE is a branch of city government. The city board of education submits a budget to the chancellor, who in turn submits the budget to the mayor. Once the budget reaches the mayor, the mayor and city council share power over final actions taken in regards to the budget and appropriations. The mayor not only has influence over the budget through his power to appoint board members and the chancellor, but himself has a direct role in decision-making. As such, this process is nearly identical to that used in Boston.

Given that the budgeting laws for the NYCDOE are so similar to those applicable to the BPS, the same analysis regarding the implications for California follows. To achieve a similar system in California would first require giving a mayor appointment powers over the board of education and superintendent. To then allow the mayor to have a direct role in making decisions regarding the budget could create a conflict with Article IX, Section 6, if a court construes granting to a mayor approval authority over the annual budget as a transfer of control over part of the public school system. In the least, an NYCDOE/BPS style finance structure would require changes to the detailed Education Code provisions governing the budgeting process.

Furthermore, in the NYCDOE and the BPS, the mayor's role in the budget is justified by the fact that the city directly funds the education system. To do this in California would require a substantial overhaul of the constitutional and statutory school finance scheme.

### **iii. Collective Bargaining**

Although the NYCDOE utilizes the strongest level of mayoral control, its collective bargaining process is similar to that used in school districts in California. The city board of education is considered the public employer of school employees and is responsible for negotiating with employee representatives. Therefore, the mayor's influence in negotiations is indirect through his authority to appoint eight out of the thirteen Panel members. To achieve a similar system in California in which a mayor has indirect influence over collective bargaining negotiations would require providing the mayor with appointment powers over the district superintendent and board of education.

Furthermore, even the topics of bargaining are similar for educational employees in California and New York. In both states, the Public Employment Relations Boards are authorized to determine the exact scope of bargaining beyond what is specifically listed by statute.

### **iv. Low-Performing Schools**

Control over low-performing schools in the NYCDOE is exercised both at the state and local levels. The law providing for state oversight of low-performing schools is comparable to that currently in effect in California. In New York, the Commissioner of Education promulgates regulations to measure student performance, similar to the Superintendent of Public Instruction in California. The difference between the New York and California systems is in regards to local district control over low-performing schools. In the NYCDOE, the chancellor is authorized to intervene in schools that are not performing up to standards by requiring the principal to adopt and implement a corrective action plan. The chancellor is further permitted to make significant changes, such as closing schools; however, this first requires a report, public hearing, and city board approval. Therefore, by statute, the mayor of New York City does not have a direct role in school performance, but exercises indirect influence through his power to appoint the chancellor.

As discussed above in the strong category, amending or revising the terms of the PSAA to give district superintendents greater local authority regarding low-performing schools does not likely create a constitutional conflict. The problem that arises is giving a mayor appointment authority over the superintendent who is in control of low-performing schools. This is impermissible under *Mendoza*, which stands for the proposition that complete control over low-performing schools may not be transferred to the mayor or mayor's appointees. However, the *Mendoza* court was concerned that the Mayor's Partnership was given control "in the absence of any real oversight by public school system authorities."<sup>943</sup> Although the *Mendoza* court did not specify what sort of limits on mayoral control would be considered sufficient oversight, adopting a system like the NYCDOE's in which a report, public hearing, and school board approval are required before making any major changes to low-performing schools might alleviate any Article IX, Section 6 concerns.

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<sup>943</sup> *Id.* at 527.



## VIII. Changing California Law to Allow for Mayoral Control of Schools

As discussed above, to achieve laws that support any of the mayoral control models for education in California, several provisions of the California Constitution, Education Code, and Government Code relating to public education would need to be amended, revised, or repealed. This section explores some of the questions that might arise in the course of effectuating those changes.

The amount of drafting will depend on the level of mayoral control that is sought, the strategy chosen to achieve it, and the scope of applicability of any resulting laws. Nevertheless, the same constitutional provisions will likely require amendment regardless of whether the overall strategy is to grant weak, medium or strong control to mayors. As explained below, two sections would require amendment. Depending on the strategy chosen with respect to charter cities, a third section might also require amendment.

It appears from the *Mendoza* case that any attempt to move to mayoral control would require an amendment or revision of Article IX of the California Constitution to include a city mayor or a charter city in the definition of the public school system.<sup>944</sup> After an alteration of Article IX to include mayors or chartered cities in the definition of those entities that have a role in the system of public education, there are more or less comprehensive changes to the Education Code that could be implemented either through the legislative or initiative process. The initiative process can include both constitutional and statutory changes. Of course, any Education Code provision originally enacted through the initiative process would need to be amended through the initiative process.<sup>945</sup>

### A. Changes Through the Initiative Process To The California Constitution and Statutes

#### i. Articles and Sections Requiring Amendment

##### 1. Changes to Art. IX of the Constitution

As indicated above, one section that would require amendment is Article IX, Section 6. Section 6 defines the entities included within the “Public School System.” This section would require amendment to include chartered cities within the parameters of the “Public School System.” One possibility would be to add “mayors” to the list of entities within the “Public School System” (change is in **bold**):

SEC. 6. The Public School System shall include all kindergarten schools, elementary schools, secondary schools, technical schools, and state colleges, established in accordance with law and, in addition, the school districts, **mayors, chartered cities**, and other agencies authorized to maintain them. No school or

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<sup>944</sup> *Mendoza*, 57 Cal. Rptr. 3d at 517.

<sup>945</sup> CAL. CONST. art. II, § 10(c).

college or any other part of the Public School System shall be, directly or indirectly, transferred from the Public School System or placed under the jurisdiction of any authority other than one included within the Public School System.

The second section that would require amendment is Article IX, Section 14. The current version authorizes only the Legislature to provide for the incorporation and organization of “school districts, high school districts and community college districts.” It also gives the Legislature power to authorize the governing boards of school districts to initiate and carry on programs and activities. A modest amendment to Section 14 would change the language to give the Legislature the power to authorize mayors to initiate and carry on programs, activities, etc.

SEC. 14. The Legislature shall have power, by general law, to provide for the incorporation and organization of school districts, high school districts, and community college districts, of every kind and class, and may classify such districts.

The Legislature may authorize the governing boards of all school districts, **as well as mayors**, to initiate and carry on any programs, activities, or to otherwise act in any manner which is not in conflict with the laws and purposes for which school districts are established.

The precise scope of a mayor’s authority to, for example, appoint board members and the district superintendent will be defined by the legislature.

A third section, Article IX, Section 16, may also require amendment. Section 16(a) currently provides charter cities with the authority to decide, in their charters, whether their boards of education will be elected or appointed.

One option would be to repeal Section 16(a). However, doing so would remove constitutional authorization for city charters to contain provisions regarding the appointment of members of boards of education. A second option would be to amend each city charter to allow for mayoral appointment of board members. A third, and likely best, option would be to amend Section 16 to allow for mayoral appointment of board members. One way to do this would be to revise Section 16(a) to *require* that charters grant mayors complete power over the appointment of board members, as well as their qualifications and compensation. Such a provision might look like the following:

SEC. 16. (a) **In addition to hereby authorizing charters to contain any provisions allowable by this Constitution and by the laws of the State, it shall be required** in all charters framed under the authority given by Section 5 of Article XI and **designated as “special charter cities” by the Legislature to provide the mayor with authorization to appoint all members of boards of education and to decide on** their qualifications, compensation and removal, and for the number which shall constitute any one of such boards.

Revising Section 16(a) in this manner would not require every charter city in California to have mayor-appointed school boards; instead, this language allows the legislature to specify (in the

Education Code) the “special charter cities” to which any resulting mayoral control law would apply. For example, the text of the voter initiative could direct the legislature to define “special charter cities” as the ten largest cities in the state. If the above provision (or some version of it) is adopted, Section 16(b), providing for voter approval of charter amendments regarding changes with respect to the election, appointment, qualifications, compensation or removal of members of boards of education, should be repealed.

## **2. Statutory Changes**

Regardless of the strategy chosen, it is likely that various provisions in Sections 5200-5399 and 35000-35199 of the Education Code will need to be amended or repealed. Many of the amendments will depend on whether mayoral control is desired for both charter and non-charter cities, only for non-charter cities, only for charter cities, or only for cities exceeding a certain population. For example, if a decision is made to grant mayors in non-charter cities influence over education, sections relating to the election of the governing board of a school district would need to be repealed or amended. On such section, § 35012, provides for the election of the governing board of a school district. The provision is below:

(a) Except as otherwise provided, the governing board of a school district shall consist of five members elected at large by the qualified voters of the district. The terms of the members shall, except as otherwise provided, be for four years and staggered so that as nearly as practicable one-half of the members shall be elected in each odd-numbered year.

One possible amendment would be the following:

(a) The governing board of a school district located within a “special charter city,” defined as any charter city with a population of more than 320,000,<sup>946</sup> shall be appointed by the mayor. The terms of the members shall, except as otherwise provided, be for four years and staggered so that as nearly as practicable one-half of the members shall be appointed in each odd-numbered year.

### **ii. Drafting Considerations**

#### **a. Revision v. Amendment Distinction**

Amendments to the California Constitution are permitted through the initiative process. Revisions are not. A qualitative change to the Constitution can be determined to be a revision if there is a change to the basic governmental structure or if one branch of government is being given control that another previously had.

### **1. Constitutional Amendment**

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<sup>946</sup> The 320,000 figure was chosen based on city population. This number could be recalculated based on the desired scope of any resulting mayoral control laws. Out of the ten California cities intended as a potential target of mayoral control, the City of Santa Ana is the smallest, with 324,528 people. “Santa Ana (city), California.” *Census.gov*. U.S. Census Bureau, 23 Dec. 2011. Web. 9 Jan. 2012.

The people of California have the power to amend the California Constitution through the initiative process.<sup>947</sup> Changes to the constitution must be proposed through the Secretary of State supported by certified signatures of a number of voters equaling eight percent of the votes for all candidates for Governor at the last gubernatorial election.<sup>948</sup> At the time of this writing, the requirement for signatures for a Constitutional Amendment is 807,615.<sup>949</sup> The number of signatures required on a petition for a statutory change is less, only equal to five percent of the votes at the last gubernatorial election. However, since a strong mayor model would require constitutional amendment, not just statutory changes, the provisions relating to amendment of the constitution are primarily relevant.

There are a number of constitutional and statutory prerequisites to placing an initiative constitutional amendment on the ballot. The California Constitution requires the Secretary of State to present any qualified ballot measure to the people at the next general or statewide special election held at least 131 days after the measure qualifies.<sup>950</sup> The California Elections Code sets forth the requirements leading up to submission to the Secretary of State, including the requirement that a proposed amendment be presented to the Attorney General's Office for the creation of a ballot title and summary that must be presented to prospective signers during the petition process.<sup>951</sup> The initiative petition may be in circulation for up to 150 days from the official summary date, which is set when the Attorney General returns the petition to the proponents.<sup>952</sup> Petitions signatures must be organized by county, and must be submitted to the appropriate county elections official.<sup>953</sup>

Once an initiative constitutional amendment qualifies for the ballot, it can be adopted by a simple majority vote of the electorate at the general or special election in which it appears.<sup>954</sup> If there are two conflicting measures appearing on the same ballot, the one with the greater number of votes takes effect.<sup>955</sup>

As a practical matter, the process for drafting an initiative, circulating it, and qualifying it for the ballot can take longer than proponents anticipate. The Attorney General's office has fifteen days from the time it receives the final draft of an initiative measure to craft the title and summary.<sup>956</sup> If the Attorney General's office determines that the measure will have a fiscal impact, the initiative is referred to the Department of Finance and Joint Legislative Budget Committee.<sup>957</sup> The process for obtaining an opinion and financial estimate takes time, and the Attorney General's timeframe is extended if a referral is necessary.<sup>958</sup> Finally, there is a recently-enacted restriction limiting the elections at which initiative measures may be presented

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<sup>947</sup> CAL. CONST. art. II, § 8(a).

<sup>948</sup> *Id.* § 8(b).

<sup>949</sup> "How to Qualify an Initiative." *California Secretary of State Debra Bowen*. California Secretary of State, n.d. Web. 5 Oct. 2011.

<sup>950</sup> CAL. CONST. art. II, § 8(c).

<sup>951</sup> *See* CAL. ELEC. CODE §§ 9001-9096 (West 2011).

<sup>952</sup> *Id.* § 9014.

<sup>953</sup> *Id.* § 9030.

<sup>954</sup> CAL. CONST. art. II, § 10(a).

<sup>955</sup> *Id.* § 10(b).

<sup>956</sup> ELEC. § 9002(a).

<sup>957</sup> *Id.* § 9005.

<sup>958</sup> *Id.* § 9002(a).

to California citizens for the vote. Senate Bill 202 was passed during the Fall 2011 legislative session and no longer allows the Secretary of State to place initiative measures on primary election ballots.<sup>959</sup>

Shortly after the bill was signed into law, opponents of the change circulated a referendum petition seeking to prevent the change from taking effect. However, the petition failed to obtain the required number of signatures to qualify for the ballot. Therefore, the new law remains in place and from now on, all initiative measures may appear only on the ballots during November general elections.

## 2. Constitutional Revision

It is highly desirable that an initiative that makes constitutional changes be labeled a constitutional amendment rather than a constitutional revision. The process required for making a constitutional revision is substantially different, and more involved, than that required to make a constitutional amendment. For a revision, a constitutional convention must be convened and popular ratification of changes is required through the initiative process.<sup>960</sup> Alternatively, the legislature may place a submission before the people if the bill passes with a two-thirds vote of both houses of the legislature.<sup>961</sup> Both sections 1 and 2 of Article XVIII of the California Constitution contemplate that the Legislature will initiate a constitutional revision. Article XVIII, Section 2 charges the Legislature with the job of calling a constitutional convention when revision of the constitution is required.

A number of courts have suggested that the difference in the process for constitutional amendments and constitutional revisions is the result of the need for more “formality, deliberation and discussion” when making comprehensive changes to the constitution.<sup>962</sup> The last constitutional revision in California took place in 1966, and it emerged from a Constitutional Revision Commission set up through the Legislature.

## 3. Substantive Analysis of Amendment or Revision

A revision has been defined as “a change in the nature or operation of our governmental structure.”<sup>963</sup> The inquiry is both quantitative and qualitative in nature.<sup>964</sup> The determination about whether an initiative affects a quantitative or qualitative change sufficient to amount to a revision takes place at the time the initiative is passed and it must “necessarily and inevitably” appear from the face of the initiative that the change will effectuate a structural change to the government.<sup>965</sup>

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<sup>959</sup> Act of Oct. 7, 2011, ch. 558, § 1, 2011 Cal. Stat. 95 (codified at ELEC. § 9016).

<sup>960</sup> CAL. CONST. art. XVIII, § 2.

<sup>961</sup> *Id.* § 1.

<sup>962</sup> *Raven v. Deukmejian*, 801 P.2d 1077, 1085 (Cal. 1990); *Cal. Ass’n of Retail Tobacconists v. State of California*, 135 Cal. Rptr. 2d 224, 257 (Cal. Ct. App. 2003).

<sup>963</sup> *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1284 (Cal. 1978).

<sup>964</sup> *Id.* at 1286.

<sup>965</sup> *Rippon v. Bowen*, 73 Cal. Rptr. 3d 421, 430-32 (Cal. Ct. App. 2008).

There has been one example in California history where an initiative was struck down as a result of making quantitative changes.<sup>966</sup> In *McFadden*, the initiative added or changed 21,000 words of the then 55,000 word Constitution. The California Supreme Court deemed the initiative a revision because of the sizable change that was made.<sup>967</sup> Numerous courts have upheld quite comprehensive constitutional changes as amendments since the *McFadden* case was decided.<sup>968</sup>

In terms of the qualitative inquiry, a number of courts have explained that “a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision also.”<sup>969</sup> The California Supreme Court in *Amador* concluded that Proposition 13 was not a revision, but a permissible amendment, even though it placed restrictions on the ability of charter cities and counties to set tax rates on real property.<sup>970</sup>

Rarely have initiative measures been deemed to be revisions after being passed by the people as constitutional amendments. One example of a change that was deemed an impermissible revision involved Proposition 115, a comprehensive criminal justice initiative passed in 1988.<sup>971</sup> The *Raven* court struck down one provision of the criminal justice package as a revision, not an amendment, because it “contemplates such a far-reaching change in our governmental framework as to amount to a qualitative constitutional revision, an undertaking beyond the reach of the initiative process.”<sup>972</sup> The provision that was struck down aimed to change the California Constitution to say that with respect to criminal defendants, a wide-range of rights could only be construed by California courts consistent with, but not broader than, interpretations by the U.S. courts.<sup>973</sup> The shift in interpretive power away from the California judiciary and over to the federal courts amounted to a revision according to the California Supreme Court.<sup>974</sup>

A number of recent California Supreme Court and appellate court cases have examined initiative constitutional amendments and found some arguably far-reaching changes to tax structures, individual rights, and government functions to be amendments, rather than revisions.<sup>975</sup> The *Strauss* case went into a detailed history of the dichotomy between revisions and amendments that stressed the monumental nature of alterations to the constitution that would require a convention or much more deliberative legislative process.

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<sup>966</sup> See *McFadden v. Jordan*, 196 P.2d 787 (Cal. 1948).

<sup>967</sup> *Id.* at 796-97.

<sup>968</sup> See, e.g., *Brosnahan v. Brown*, 651 P.2d 274 (Cal. 1982); *Manduley v. Superior Court*, 41 P.3d 3 (Cal. 2002).

<sup>969</sup> *Amador*, 583 P.2d at 1286 (noting that everyone agrees that vesting judicial power in the legislature would be a revision); see also *Raven v. Deukmejian*, 801 P.2d 1077, 1087 (Cal. 1990); *Rippon*, 73 Cal. Rptr. 3d at 425.

<sup>970</sup> 583 P.2d at 1286-89.

<sup>971</sup> *Raven*, 801 P.2d at 1087.

<sup>972</sup> *Id.* at 1080.

<sup>973</sup> *Id.* at 1086.

<sup>974</sup> *Id.*

<sup>975</sup> See, e.g., *Strauss v. Horton*, 46 Cal.4th 364, 389 (2009) (upholding Proposition 8 banning same-sex marriage as an amendment, rather than a revision); *Rippon v. Bowen*, 73 Cal. Rptr. 3d 421, 428 (Cal. Ct. App. 2008) (reasserting that Proposition 140 implementing term limits and budget restrictions on the Legislature was an amendment, not a revision); *Cal. Ass'n of Retail Tobacconists v. State of California*, 135 Cal. Rptr. 2d 224, 257 (Cal. Ct. App. 2003) (upholding Proposition 10 creating an excise tax on tobacco and state and county commissions to administer programs funded by the tax).

The process for resolving the revision or amendment distinction is generally through litigation after the initiative has passed. Importantly, *Rippon v. Bowen* made clear that taxpayers have standing to sue to challenge the implementation of an initiative after it has passed and taken effect.<sup>976</sup> While pre-election challenges are generally not favored, the question of whether a measure constitutes a revision has been litigated in pre-election challenges in the past.<sup>977</sup> Therefore, any challenges to a comprehensive or structural change to education law could come prior to or after a measure standing for a vote and could be brought by interested citizens who are taxpayers.

### **b. Single Subject Rule**

In addition to amendments to the California Constitution, a move to a strong mayor approach will also likely require significant changes to statutory law. As indicated above, any education statutes that were passed through the initiative process would need to be amended through the initiative process.<sup>978</sup> Other enactments can be brought through the legislative process or the initiative process as independent changes or in a comprehensive package.

The only barrier to presenting all the changes in a single initiative is the single subject rule.<sup>979</sup> A number of the cases discussed above relating to revision challenges also presented single subject rule challenges.<sup>980</sup> Most of these cases held that the provisions of comprehensive initiatives satisfied the single subject rule because the changes were all reasonably germane to a uniform theme or common purpose.<sup>981</sup> For an initiative not to pass muster under the single subject rule, generally there must be some evidence that the proponents have tried to craft a common theme that is excessively broad in order to win support for an unpopular provision or that the proponents have tried to insert changes that will confuse voters.<sup>982</sup>

Any well-crafted reform package that focuses on a theme of strong mayoral control in education is likely to avoid a single subject rule challenge, even if some of the changes implicate statutory sections and others make constitutional amendments. Moreover, even those initiative measures that alter provisions of divergent statutory codes can be read as consistent with the

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<sup>976</sup> 73 Cal. Rptr. 3d at 431 n.3.

<sup>977</sup> *Senate v. Jones*, 90 Cal. Rptr. 2d 810, 818 (Cal. Ct. App. 1999) (citing *McFadden v. Jordan*, 196 P.2d 787 (Cal. 1948)).

<sup>978</sup> CAL. CONST. art. II, § 10(c).

<sup>979</sup> *Id.* § 8 (d).

<sup>980</sup> *See, e.g., Manduley v. Superior Court*, 41 P.3d 3 (Cal. 2002); *Senate*, 90 Cal. Rptr. 2d at 818; *Legislature v. Eu*, 816 P.2d 1309 (Cal. 1991); *Raven v. Deukmejian*, 801 P.2d 1077 (Cal. 1990).

<sup>981</sup> *Manduley*, 41 P.3d at 28-29 (finding that extensive criminal justice changes were reasonably germane to juvenile crime and gang prevention); *Legislature*, 816 P.2d at 1321-22 (concluding that political reform act provisions were reasonably germane to a common purpose of incumbency reform).

<sup>982</sup> *See Senate*, 90 Cal. Rptr. at 821 (explaining that the goals of the single subject rule are to avoid logrolling and voter confusion); *Chem. Specialties Mfrs. Ass'n v. Deukmejian*, 278 Cal. Rptr. 128, 133-34 (Cal. Ct. App. 1991) (indicating that logrolling evidence was sufficient where the common purpose was overly general); *California Trial Lawyers Ass'n v. Eu*, 245 Cal. Rptr. 916, 360-61 (Cal. Ct. App. 1988) (discussing that placement of an unrelated provision in the middle of a ballot measure would lead to voter confusion), *abrogated on other grounds by Lewis v. Superior Court*, 970 P.2d 872, 881 (Cal. 1999).

single subject rule as long as the changes are reasonably germane to a common theme or purpose.<sup>983</sup>

### **c. Mechanics and Timing of Initiative Process**

The required number of signatures for a constitutional amendment is presently 807,615.<sup>984</sup> Since any change to allow for mayoral influence on K-12 education will require some amendment of the California Constitution, this is the number of signatures that will be needed to qualify a ballot measure. Even if the initiative ultimately contains both constitutional and statutory changes, the higher number of signatures required for constitutional amendments must be secured.

The time period allowed for obtaining this number of signatures is 150 days. The days are counted from the date the Title and Summary for the initiative are provided by the Attorney General's office. The initiative must appear on the next regularly scheduled election that occurs 131 days after the petition signatures are verified. As mentioned above, the Governor recently signed a bill moving all statewide initiatives to the November election cycle, and an effort seeking to repeal the law via voter referendum failed. Regardless of this new restriction, it is already too late to qualify a ballot measure for the June 2012 election, and likely too late to qualify one for the November 2012 ballot as well.

Generally, the Secretary of State's Office recommends that the process for qualifying a ballot measure commence more than a year before the election in which proponents wish the measure to appear.<sup>985</sup> There are two methods for signature verification, random sample and full check. The full check is triggered if the random sample does not yield a verification rate of 110% or greater. Proponents of a measure should always attempt to leave sufficient time for either method of signature verification, which usually means presenting a petition to the Attorney General's Office approximately eighteen months prior to the targeted election.

The other way to obtain access to the ballot for an initiative measure is to have the legislature place the ballot initiative on the next regularly scheduled election ballot. There are some limitations relating to this process, both constitutional and practical.<sup>986</sup> For the purpose of this discussion, it would be unlikely for the changes sought to be implemented through this route.

### **d. Scope of Changes and Uniformity Rule**

Changes to the Constitution and the statutory framework will be directed at only certain cities. When drafting legislation that targets particular cities or counties, Article IV, Section 16, of the California Constitution is implicated. That provision provides: "A local or special statute is invalid in any case if a general statute can be made applicable."<sup>987</sup> Therefore, any law directed toward the ten largest charter cities in the state will need to comply with this provision of the constitution by providing a reason for passing special, rather than general legislation.

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<sup>983</sup> *Manduley*, 41 P.3d at 28-29.

<sup>984</sup> CAL. CONST. art. II, sec. 8(b), CAL. GOV. CODE § 9035 (West 2011), "How to Qualify an Initiative." *California Secretary of State Debra Bowen*. California Secretary of State, n.d. Web. 5 Oct. 2011.

<sup>985</sup> California Secretary of State. *Statewide Initiative Guide*. 2011. PDF file.

<sup>986</sup> CAL. CONST. art. IV, § 8.5.

<sup>987</sup> *Id.* § 16(b).



As a starting point, the courts have defined “special legislation” as legislation that “applies only to particular members of a class.” In contrast, “general legislation . . . applies uniformly to all members of a class.”<sup>988</sup> If schools districts or cities are the members of a class, legislation that applies only to some school districts or some cities may be subject to the special legislation prohibition.

The court in the *City of Malibu* case explained that the difference between special and general legislation “turns on the reasonableness of the classification used to pull out certain members from the ‘general’ group for ‘special’ treatment.”<sup>989</sup> In the case before it, the *City of Malibu* court found that there was a rational basis for the legislature to single the city out for special treatment by the California Coastal Commission because the city had disproportionately placed a burden on the state commission and the state had the authority to incrementally address a problem starting with “the worst offenders first.”<sup>990</sup> The same could be said for reform of educational control. There are likely many reasons that can be articulated for why the largest ten charter cities in California should be singled out for inclusion of mayoral influence in the realm of k-12 education. Pursuant to the California Constitution, and interpretive cases, those reasons should be included in any drafting of statutory changes.

In addition to the special legislation prohibition, the California Constitution equal protection clause also places restrictions on the implementation of laws that treat similar classes of people differently.<sup>991</sup> As discussed in more detail below, the California Constitution has been interpreted to make public education “uniquely a fundamental concern of the State” and basic equality across districts is required.<sup>992</sup> Taken together with the California Constitutional mandate that all laws of a general nature should have uniform application,<sup>993</sup> the drafting of laws that apply to only some school districts or cities must be done in a manner that rationally relates to a legitimate state interest – and to comport with the equal protection concerns of those living within the impacted districts, the differentiations should be as limited as possible.

## **B. Potential Post-Passage Challenges**

### **i. Timing of Judicial Review**

Initiative measures are not generally subject to pre-election review. As a result, challenges to the drafting or the constitutionality of a measure mainly occur after the election. Proponents of an initiative need to be ready to defend the initiative after the election. Recently, the California Supreme Court has reaffirmed that proponents of an initiative have standing to defend the initiative even if the State Attorney General and Governor refuse to do so.

### **ii. Equal Protection Challenges**

#### **a. Unequal Educational Opportunity**

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<sup>988</sup> *City of Malibu v. Cal. Coastal Comm’n*, 18 Cal. Rptr. 3d 40, 44 (Cal. Ct. App. 2004).

<sup>989</sup> *Id.*

<sup>990</sup> *Id.* at 44-45.

<sup>991</sup> CAL. CONST. art. I, §. 7.

<sup>992</sup> *Butt v. State of California*, 842 P.2d 1240, 1251 (Cal. 1992).

<sup>993</sup> CAL. CONST. art. IV, § 16.

The equal protection clause of the California Constitution has been held to be more protective of equality in the area of education than the federal Constitution.<sup>994</sup> Responding to a United States Supreme Court case, which held that education is not a fundamental interest protected by the federal Constitution, the California Supreme Court reaffirmed that under the state Constitution, education is a fundamental interest.<sup>995</sup>

Given that California recognizes education as a fundamental interest, challenges to inequality in educational opportunities can give rise to significant equal protection challenges, and California courts will apply a strict scrutiny test to laws that provide for unequal educational opportunity. In *Butt*, the California Supreme Court explained that “the California Constitution makes public education uniquely a fundamental concern of the State and prohibits maintenance and operation of the common public school system in a way which denies basic educational equality to the students of particular districts.”<sup>996</sup> Concluding that the State, rather than school districts, was “the entity with ultimate responsibility for equal operation of the common school system,” the *Butt* court required the state to save the Richmond school district from its financially motivated decision to shorten the school year by six weeks.<sup>997</sup> Application of strict scrutiny in cases of educational inequity means that any law that results in different educational opportunities for students in some district must serve a compelling state interest and be narrowly tailored to meet that interest.<sup>998</sup>

The difference in structures of appointment or election could be argued to lead to different educational opportunities. If the social science research bears out that one model leads to better educational results for students in some districts, there could be a challenge under the *Butt* equal opportunities approach.

#### **b. Vote Denial: Appoint v. Election and Non-Contiguous Districts**

A basic vote denial challenge could come as a result of changes that move the school board positions to appointed rather than elected. This is particularly true if the changes are made for some cities and not others and if some school district lines are non-contiguous with the cities whose mayors are granted appointment power over the school board. Some cases looking at changes from elected to appointed school board positions have applied a rational basis test. Almost any change being proposed would pass this test.

The unique problem arising in California is the one of non-city residents who are part of a school district that will be placed under the control of that city’s mayor. Those citizens might make a challenge for vote dilution or denial depending on how the appointment structure is drafted. Challengers could frame a vote denial challenge in a situation where some members of the school district have a say in the election of the person in charge of the schools and others do not. This problem could be remedied by changing the school district lines to parallel the city

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<sup>994</sup> See *id.* at 1250; *Cobb v. O’Connell*, 36 Cal. Rptr. 3d 170 (Cal. Ct. App. 2005).

<sup>995</sup> *Serrano v. Priest*, 557 P.2d 929, 948-51 (Cal. 1976) (citing *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973)).

<sup>996</sup> *Butt*, 842 P.2d at 1251.

<sup>997</sup> *Id.* at 1256.

<sup>998</sup> *Id.*

boundary lines; however, to do so requires a lengthy and complex process under the Education Code.<sup>999</sup>

The key to guarding against any equal protection challenge is to have a well-articulated state interest for changing the law in some places but not others. Here, the attempt to move to an appointment system in large charter cities could be viewed as a pilot project (which is a permissible basis for reforming an area of law in a piecemeal fashion) or could be characterized as a necessary amendment for only those school districts that are suffering from problems unique to large city social and economic demographics.

### **iii. Voting Rights Act**

#### **a. Section 5**

Certain counties in California are considered “covered jurisdictions” under the Voting Rights Act (“VRA”).<sup>1000</sup> Therefore, any change to transfer school board positions that were once elected positions to appointed positions will require pre-clearance by the United States Department of Justice (“DOJ”) or the United States District Court for the District of Columbia (“USDC”).<sup>1001</sup>

Section 5 of the VRA is given broad scope and has been interpreted to reach a wide range of changes relating to form and content of elections, as well as changes in voting systems or mechanics.<sup>1002</sup> Importantly for electoral changes made in California, the Supreme Court has made clear that Section 5 preclearance applies to a covered county’s non-discretionary efforts to implement a voting change that is mandated by state law, even if the state as a whole is not covered by the VRA.<sup>1003</sup> This means that even though only a few California counties are covered jurisdictions for Section 5 purposes, any law that provides the potential of abolishing school board elections in favor of mayoral appointment systems will require preclearance before it can take effect. Even changes that are required by order of a state court must be pre-cleared through to the DOJ before they take effect.<sup>1004</sup>

The process for preclearance requires submission of certain information to the Attorney General. The list of contents required for submission is found in the regulations promulgated by the Attorney General.<sup>1005</sup> The DOJ has sixty days after final submission of the preclearance materials to object to the change, make a statement of non-objection, or request more materials.<sup>1006</sup> Statutes that are subject to Section 5 are ineffective as laws until they have been pre-cleared.<sup>1007</sup> However, silence from the DOJ for a period of sixty days after submission of the request to pre-clear is sufficient to clear the new practice.

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<sup>999</sup> See CAL. EDUC. CODE §§ 35500-35768 (West 2011).

<sup>1000</sup> 42 U.S.C. § 1973c (2006).

<sup>1001</sup> *Id.* § 1973c(a); *Robinson v. Ala. State Dep’t of Educ.*, 652 F. Supp. 484, 485-486 (M.D. Ala. 1987).

<sup>1002</sup> *NAACP v. Hampton Cnty. Elec. Comm’n*, 470 U.S. 166, 175-76 (1985).

<sup>1003</sup> *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999).

<sup>1004</sup> *Branch v. Smith*, 538 U.S. 254, 262 (2003).

<sup>1005</sup> 28 C.F.R. § 51.27 (2011).

<sup>1006</sup> 42 U.S.C. § 1973c(a); *Branch*, 538 U.S. at 264.

<sup>1007</sup> *NAACP*, 470 U.S. at 175 n.19.

The alternative to the administrative review through the DOJ is to bring a lawsuit in the United States District Court for the District of Columbia. This is a much more costly procedure and the vast majority of voting changes are pre-cleared through the administrative review process.

The substantive test for preclearance is that the change to a voting system or practice must be non-discriminatory in purpose and effect.<sup>1008</sup> Since there is no indication that the changes to allow for mayoral control of education are based on discriminatory purpose or will have a discriminatory effect, it is very likely that if the process for pre-clearance is completed, the changes should receive approval by the DOJ.

## **b. Section 2**

A number of cases have explored whether a change from school board elections to school board appointments can constitute a Section 2 challenge under the Voting Rights Act. While those claims have been allowed to proceed, they have generally not been successful.<sup>1009</sup>

In *Mixon*, the Sixth Circuit explained that all cases which have addressed Section 2 have concluded that it does not apply to appointive systems, only elective ones.<sup>1010</sup> The clear-cut appointive vs. elective distinction under Section 2 of the Voting Rights Act often is attributed to *Chisom v. Roemer*, a case in which the Supreme Court suggested that Louisiana could exclude its judicial selection practices from Section 2 of the Voting Rights Act by moving from an elective to an appointive system.<sup>1011</sup> Cases prior to *Chisom* had reached this conclusion.<sup>1012</sup>

Based on this history, it is unlikely that a challenge under Section 2 of the VRA to a change to a mayor appointed school board would succeed. The case law on this point is fairly settled, and a Section 2 challenge will only be considered if the system proposed is elective in nature.

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<sup>1008</sup> *Branch*, 538 U.S. at 263; *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 328 (2000).

<sup>1009</sup> *See, e.g.,* *Mixon v. Ohio*, 193 F.3d 389 (6th Cir. 1999).

<sup>1010</sup> *Id.* at 407.

<sup>1011</sup> 501 U.S. 380, 401 (1991).

<sup>1012</sup> *See* *Irby v. Virginia State Bd. of Educ.*, 889 F.2d 1352, 1357 (4th Cir. 1989) (acknowledging that a number of courts had held Section 2 inapplicable to appointive positions); *Dillard v. Crenshaw County, Ala.*, 831 F.2d 246, 251 n.13 (11th Cir. 1986); *Searcy v. Williams*, 656 F.2d 1003, 1010 (5th Cir. 1981).