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## Performance Measures for Teachers and Teacher Education: Corporate Education Reform Opens the Door to New Legal Issues

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**Abstract:** Recent efforts to change the teaching profession and teacher preparation include a number of innovations to use portfolio assessment, value added measures (VAM), accountability metrics and other corporate education reform ideas. These approaches may provoke considerable potential legal consequences. Traditional constitutional and civil rights issues will continue to be important considerations. In addition, because education is increasingly seen as a consumer product, new types of legal issues are arising from the way evidence about performance is gathered and used and about the privacy of data. Legal claims more familiar to a business context are being asserted and can be expected to increase. Whistle-blower claims concerning fraud in government-funded programs have been filed, as well as claims of breach of contract and defective products. Finally, criminal prosecutions are being utilized to address systemic cheating in evaluation systems.

**Keywords:** Legal issues; corporate education reform; accountability; teacher education; teacher evaluation; teacher licensure; value added models (VAM); privacy; civil rights

**Las Medidas de Desempeño para Docentes y la Formación del Profesorado: La Reforma de la Educación Corporativa abre la Puerta a Nuevas Cuestiones Legales**

**Resumen:** Los recientes esfuerzos para cambiar la profesión docente y formación del profesorado incluyen una serie de innovaciones como la utilización de evaluación de portafolios docentes, medidas de valor agregado (VAM), métricas de rendición de cuentas y otras ideas de reforma de la educación corporativas. Estos enfoques pueden provocar potenciales consecuencias legales de gran consideración. Además, dados que la educación es vista cada vez más como un producto de consumo, nuevos tipos de problemas legales surgen de la forma en la evidencia sobre rendimiento es recogida y usada y cuestiones sobre la privacidad de los datos. Las demandas legales más familiares en un contexto de negocios se están afirmando y se puede esperar que aumenten. Reclamos relativos a fraudes en programas financiados por el gobierno se han presentado, así como las reclamos de incumplimiento de contrato y productos defectuosos. Por último, se están utilizando los procesos penales para hacer frente a las trampas sistémicas en los sistemas de evaluación.

**Palabras clave:** Cuestiones jurídicas; reforma de la educación empresarial; rendición de cuentas; profesor de educación; evaluación de los maestros; otorgamiento de licencias del profesorado; modelos de valor añadido (VAM); privacidad, derechos civiles

### **As Medidas de Desempenho para Professores e Formação de Professores: A Reforma da Educação Corporativa abre a Porta a Novas Questões Jurídicas**

**Resumo:** Os recentes esforços para mudar a profissão docente e a formação de professores incluem uma série de inovações, tais como a utilização de carteiras de avaliação de professores, as medidas de valor agregado (MVA), métricas de prestação de contas e outras ideias para reformar a educação corporativa. Estas abordagens podem causar potenciais consequências jurídicas de uma abrangência séria. Além disso, dado que a educação é cada vez mais vista como um produto de consumo, novos tipos de problemas jurídicos surgem da forma como evidências sobre o desempenho é recolhida e usada e sobre a privacidade dos dados. As demandas judiciais mais familiares a um contexto de negócios estão sendo afirmadas e pode ser esperado um aumento. Créditos sobre a fraude em programas financiados pelo governo foram apresentados, bem como as reivindicações de violação de contrato e produtos com defeito. Finalmente, demandas judiciais estão sendo usadas para resolver fraudes sistêmicas dos sistemas de avaliação.

**Palavras-chave:** Questões jurídicas; reforma do ensino do empreendedorismo; prestação de contas; formação de professores; avaliação de professores; licenciamento de professores; modelos de valor agregado (MVA); privacidade, direitos civis

## **Introduction**

One current focus of education reform efforts: educators and the institutions preparing them (Cochran-Smith, Piazza, & Power, 2012; Darling-Hammond, 2013; Darling-Hammond, Wise & Klein, 1999; Earley, Imig & Michelli, 2011; Superfine, 2014). Following up on Race to the Top federal and state initiatives to substantially change approaches to the evaluation of teachers (Umpstead, Pogodzinski & Lund, 2013), the Obama Administration has announced new federal requirements to judge teacher education programs by the performance of their graduates (U.S. Department of Education, 2014). The Council for the Accreditation of Education Preparation (CAEP) now uses student outcomes results for both graduates and the P-12 students they eventually teach to judge the quality of educator preparation programs (CAEP, 2013; Sawchuk, 2013). These follow recent efforts to use new portfolio assessments for educator licensure. Future educators in several states are now being licensed on the basis of edTPA or other portfolio performance assessments, rather than solely on the basis of completion of a state-approved higher education program and passage of an examination (American Council for the Accreditation of Teacher

Education, n.d.). States and local districts have now begun to define and assess the quality of employed educators through the use of enhanced evaluations and value-added models (VAM) approaches (Amrein-Beardsley, 2014; Pullin, 2014; Knight, Lloyd, Arbaugh, et al., 2014). Current educators have been terminated or have received significant bonuses on the basis of VAM scores or new standardized teacher evaluation rubrics (Amrein-Beardsley, 2014; National Research Council, 2015; Pullin, 2013). Individual teacher performance rankings in some districts have been published in local newspapers (Los Angeles Times, 2012) to inform the public about educator performance.

The new approaches arise in a broader context in which education is increasingly seen as a consumer good where a credential and enhanced socioeconomic status are more important than improvement of worldview or enhancement of the common good. At the same time, businesses and business-based approaches are increasingly utilized in the delivery of education programs and services. These recent approaches and associated increasingly high stakes for individuals and institutions have led to vigorous public policy debate and the prospect of considerable legal controversy (Superfine, 2014). The legal system is becoming a new battleground for weighing a variety of sources of new types of legal claims as well as new types of evidence concerning educator and institutional quality. Policymakers, judges and hearing officers are being tasked with assessing both traditional and well as novel types of legal claims in the implementation of the new evaluation and accountability systems. While traditional types of constitutional and civil rights issues will be important considerations, the new initiatives may also raise legal claims less frequently asserted in the field of education law but potentially more powerful. Privacy issues are arising from the way evidence about performance is gathered, used and managed. Civil claims more familiar to a business context are being asserted and can be expected to increase. Whistle-blower claims concerning fraud in government-funded programs have been filed, as well as claims of breach of contract and defective products. Finally, criminal prosecutions are being utilized to address systemic cheating in evaluation systems.

This article provides an overview of legal issues in portfolio or performance assessments in a broad range of contexts related to educator licensure, evaluation, and institutional accountability. It discusses the use of VAM and standardized evaluation rubrics for evaluating educators and educational institutions. It addresses traditional legal challenges under U.S. Constitution and federal civil rights statutes. The article then outlines new types of legal issues that arise in the implementation of these new approaches and provides a survey of legal claims in two broad categories: first, individual proprietary and privacy interests of educators, future educators, students, and education service providers and, second, fraud and error problems in the design and implementation of the systems. While limited to an overview of a wide range of potential legal issues, this article seeks to stimulate consideration of emerging public policy issues and problems of practice as well as future research on the new accountability challenges facing educators at all levels of the system and the prospects for new external scrutiny of education practices through legal claims.

## **New Types of Evidence of Educator Quality**

Many of the recent quality indicators for educators and the institutions that prepare them are premised on a theory of action focused on a human capital approach that imposing incentives on educators and educational institutions is the key to improved educational outcomes (Ballou & Podgursky, 1997; Cochran-Smith, Piazza, & Power, 2012; Gratz, 2009; Springer, 2009). They rely upon new types of evidence of performance. The initiatives move beyond the standardized, in person multiple choice and short answer examinations of individuals utilized in the past. Current

initiatives include the use of value-added measures, standardized rubrics to assess portfolios of performance, and online big data collection systems. Included in any of these approaches is not only information about an educator, but also students the educator has taught or other students elsewhere in the school or the school system (Amrein-Beardsley, 2014; Cook v. Bennett, 2013; Umpstead, Pogodzinski & Lund, 2013).

Value-added, or student growth, measures of educator performance (VAM) “refer to a variety of sophisticated statistical techniques that use one or more years of prior student test scores, as well as other data, to adjust for preexisting difference among students when calculating contributions [of educators or institutions] to student test performance” (National Research Council, 2010, p.1). Most of these statistical approaches are an effort to calculate the “value” an educator adds to student test performance, mostly relying upon a statistical comparison of students’ performance at two different points in time and a normative approach in which teacher performance is compared to that of other teachers (Amrein-Beardsley, 2014; Floden, 2012; Harris, 2011; Harris & Herrington, 2015a, 2015b; Kane, Kerr, & Pianta, 2014). This article uses the term “VAM” to apply to the wide array of statistical approaches that use changes in student scores to assess educators or institutions. While VAM approaches have most often been implemented in the context of K-12 schools, the approach will now be used as an indicator of the performance of educator preparation programs; the use of student performance data from graduates and the students of graduates of educator preparation programs will be used in the new CAEP accreditation (CAEP, 2013).

Another new initiative uses portfolio submissions to determine educator licensure; edTPA is one recent iteration of this approach (Cochran-Smith, Piazza & Power, 2012; Knight, Lloyd, Arbaugh, Gamson et al., 2014; Sato, 2014; Wilkerson, 2015). These assessments are based upon online submission of representations of classroom performance and accompanying professional materials. They are scored on a standardized rubric by a for-profit vendor (Cochran-Smith, Piazza & Power, 2012; Sato, 2014). The American Association of Colleges for Teacher Education (AACTE) and a consortium of states has designed and implemented these approaches through the Council of Chief State School Officers and has now handed off administration of the program and portfolio scoring to Pearson, the international for-profit education corporation (American Association of Colleges for Teacher Education, n.d.; Wilson, Hallam, Pecheone & Moss, 2014).

All of these new accountability approaches occur in a context in which there is increasing use of outside, nontraditional and for-profit vendors of education services and products in both K-12 schools and educator preparation. Most are part of a move toward reliance on analytical metrics based upon the collection of big data sets of information accumulating evidence on all sorts of education matters, particularly assessment data. The sources of these data vary from institutional self-reports to attributed data gathered from other public or private sources. The collection and use of big data sets to generate information about educational performance range from the long-standing work of the federal government through its regulation of higher education and its data reporting at the National Center for Education Statistics (National Research Council, 2001), to the US News and World Reports (2014) ranking of higher education institutions, The National Council on Teacher Quality (NCTQ) rankings of teacher education programs (Cochran-Smith, Piazza & Power, 2012), to local news media (many using in-house analytic journalists or hired statistical consultants) (Los Angeles Times, 2012).

### **Corporate Reform and Educator Quality**

These types of initiatives are part of a contemporary context privileging what some have defined to as “neoliberal” or “corporate education reform” (Au & Ferrare, 2015; Cochran-Smith,

Piazza & Power, 2012; Ratvich, 2013/2014; Saltman, 2012; Spring, 2011; Watkins, 2012). While definitions vary, these focus on increased use of marketplace approaches to the provision of public services, increasing corporate influence, privatization to nonprofit or for-profit vendors of what were formerly government-provided services, widespread influence of entrepreneurial philanthropists, and utilization of performance metrics to enhance accountability and drive change (Au & Ferrare, 2015; Reckhow, 2013; Spring, 2011; Springer, 2009; Watkins, 2012).

Associated with these shifts in perspective on the role of government and the provision of public services, either as an independent phenomenon or as an explicit component of the neoliberal or corporate education approach, there is a shift in perspective on the role of education in our society. Beginning in the late twentieth century, scholars noted changing perspectives on the role of education in our society associated with the changing economic, cultural and political contexts in which education occurs. From this perspective, the most important purpose of education is economic (Mehta, 2015). To a growing number of scholars, the choices concerning education by policymakers and the public is increasingly interpreted as based on a view of education not as a mechanism for promoting the common good but instead as a commodity purchased for individual credentialing and economic gain (Altbach, Gumport & Berdahl, 2011; Au & Ferrare, 2015; Gratz, 2009; Labaree, 1997; Mehta, 2015; Molesworth, Nixon & Scullion, 2009). One example of these approaches is an argument recently put forth that parents should be able to obtain access to district measures of a teacher's effectiveness in the same way that travelers obtain ratings of their Uber car service drivers (Song & Walker, 2015).

At the same time that students are taking a more consumerist approach to their pursuit of education, particularly higher education, their consumerism and the increasingly loud critique of traditional teacher education are having a marked impact on how teacher education programs are regarded. U.S. Secretary of Education Arne Duncan has lambasted teacher education as "mediocre" and "laughable" and called for greater accountability (Cochran-Smith, Piazza & Power, 2012, p. 7). Enrollments in teacher education programs have plummeted dramatically across the nation (Sawchuk, 2014b). In face of these threats, teacher education itself is developing its own form of a consumerist perspective, the need to protect its existence as a viable entity in the marketplace and in the eyes of government regulators.

The issues of public policy and professional practice associated with reforms focused on educator quality arise in the context of contemporary corporate education reform and increasing consumerism in higher education. Given the nature of the reforms and the context, the legal issues that can be anticipated will range across a wide variety of fields of law, some based on fairly traditional claims and some presenting more novel issues associated with the types of disputes that arise in the commercial sector. What follows will be an overview of the possibilities for legal controversies.

## **Traditional Legal Issues**

Given the magnitude of the educational enterprise in this nation, legal disputes and court cases over education are not common (Pullin, 1999; Zirkel & Johnson, 2011). When legal controversies over education arose in the late twentieth and early twenty-first century, they most frequently arose over concerns whether government was treating people fairly, whether civil rights were being protected, or whether the conditions the federal government attached to the receipt of its funding were being met (Kaplin & Lee, 2014; Pullin, 2014; Ryan, 2009; Yudof et al., 2012). These issues will continue to be important, so this overview first highlights how the particular focus of the

traditional types of legal challenges may look given the current context for the provision of educational programs and services.

### **Fair Treatment and Defensible Decision-making**

Challenges to government programs such as efforts to ensure the competence of educators can be based upon claims arising under United States or state constitutions or federal or state statutes. Challenges could be made by future or current teachers concerned about their treatment by the state government or public educational institutions. In addition, teacher education programs or teacher educators might challenge state efforts to regulate their work. When courts assess such claims, the inquiry focuses upon the goals or purposes of the governmental program being scrutinized. For example, absent evidence of invidious discrimination, challenges arising under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the U.S. Constitution, will most often be based on assessing whether the government is attempting to further a legitimate governmental interest and whether it is using a rational means to do so. Qualifications for licensure imposed by the state must have a rational connection with the applicant's fitness or capacity for the occupation (Baker, Oluwole, & Green, 2013; Pullin, 2014; 2010; 2001; Rossow & Logan-Fain, 2013; Ryan, 2009).

Courts generally recognize the importance of state regulation of certain occupations particularly those serving the public good like the teaching profession (Pullin, 2001, 2010). Courts have consistently recognized the importance of states' efforts to ensure the quality of the teaching force and have concluded that states can redefine the standards for assessing minimum educator competence and that the use of educator tests and assessment is acceptable (Pullin, 2001, 2014; Rossow & Logan-Fain, 2013). Of course, one problem with efforts to regulate the teaching profession through licensure is the fact that not all teachers have to be licensed (Pullin, 2001) or evaluated through the same systems (Green, Donaldson & Oluwole, 2014). For example, the promotion of publicly funded charter schools as a market-based innovation to foster education reform often includes an exemption or flexibility for their teachers when it comes to licensure or evaluation systems applied to other teachers in traditional public schools (Green, Donaldson & Oluwole, 2014).

Judges regularly declare that determinations about the provision of education programs should for the most part be left in the hands of professionals and elected officials (Flanders, 2007; Melnick & Pullin, 2000; O'Neil, 2010; Pullin, 2010). This doesn't mean that education officials always win court cases. And, legal issues aside, it is in the interest of all of us to have assurance that when government sets out to improve schools, the approach it takes will lead us there through fair and evidence-based approaches to the attainment of meaningful increases in learning outcomes.

While judges are generally reluctant to second-guess educators' judgments of educational performance based on purely subjective evaluations, they will review decisions involving standardized multiple-choice tests or requirements for a diploma, licensure, or continued participation in a program of professional education (Baker, Oluwole & Green, 2013; Pullin, 2013, 2001). They engage in more rigorous review in high stakes contexts, as when a license is already held and might be taken away or where a teacher has an ongoing contract or tenure and might lose his employment. In situations in which the individual stakes are not as high, such as during an educator preparation program for an initial licensure or during a probationary year of employment, fewer protections are required (Pullin, 2001, 2010, 2014).

If a case can be made, however, that government is operating in a manner that is irrational, fundamentally unfair, arbitrary or capricious, then courts can be asked to look more closely at governmental action (Melnick & Pullin, 2000; Pullin, 2010; Ryan, 2009). Questions about the

fairness of teacher performance assessments for both future teachers and the institutions that prepare them have arisen (Cochran-Smith, Piazza, & Power, 2012; Duckor, Castellano, Tellez, et al., 2014; National Research Council, 2001; Wilkerson, 2015). Included in these critiques have been concerns about the nature of the obligation of educator programs to “teach to the test” (Duckor et al., 2014, p. 146), as well as concerns that current evidence doesn’t warrant the use of some portfolio assessments as formative evaluations to guide future educators or teacher preparation programs on how to improve their practice (Duckor et al., 2014; Sato, 2014; Wilkerson, 2015).

The challenge of how to use new types of evidence to improve practice is a challenge for future teachers, teacher preparation programs, and current teachers and the institutions where they work. While there is not yet litigation over fairness of the new types of assessments concerning future teachers or their preparation programs, there is now litigation concerning current teachers and it may illuminate how judges will approach the fairness problem. Claims of unfairness in the operation of new educator assessment approaches are now being asserted in litigation concerning the evaluation of current teachers through VAM, when teachers are assessed on the basis of student test scores for students they do not actually teach, as is happening for teachers who teach untested grades or subjects. Only about 30 to 40% of teachers teach grades, subjects, or students used to calculate VAM scores (McGuinn, 2012; Prince et al., n.d.). In a Florida case, the first decision in litigation challenging VAM for teacher evaluation, the named plaintiff never taught any of the students whose achievement test scores used for her VAM calculations; her VAM evaluation scores were generated from students in another school building where scores were available and were then attributed to her to evaluate her performance (*Cook v. Bennett*, Complaint, 2013). A federal district court recently upheld this evaluation system without hearing any evidence. The judge noted the unfairness of the system, but determined that the program furthered a governmental interest in incentivizing all teachers to improve (*Cook v. Stewart*, 2014); his decision was affirmed on appeal.

Although the Florida judge was not concerned, fairness issues can arise under state or federal equal protection and due process protections if government decision-making fails to draw rational distinctions between those who pass a performance requirement and those who fail to pass (Baker, Oluwole, & Green, 2013; Pullin, 2001; 2010; 2014; Ryan, 2009). One federal civil rights case was brought not only against the state, but also against local school districts that relied upon results from the state teacher test to make local employment decisions. A settlement between the parties occurred after a federal district court judge found that the private company that developed the test for the state engaged in unprofessional practices violating the minimum professional requirements for test development. Among the problems the judge found were test development decisions that resulted in scores that were arbitrary and capricious and bore no rational relationship to teacher competence (*Allen v. Alabama State Board of Education*, 2000; *Richardson v. Lamar County Board of Education*, 1991).

Claims of the denial of fairness in educator assessment systems could arise from a variety of implementation practices, such as issues of technical quality, inadequate decision-making processes, or failure to provide useful information to guide improvement (Baker, Oluwole, & Green, 2013; Duckor et al., 2014; *Gulino v. Board of Education*, 2014; *Nordberg v. Massachusetts*, 2011; Pullin, 2013; Sato, 2014; Wilkerson, 2015). In addition, social scientists have raised concerns about methods for collecting and verifying data about an individual educator’s performance, the potential misattribution of a teacher’s scores from other teachers, and the fairness, reliability, and validity of the scoring system used to evaluate educators (American Educational Research Association, American Psychological Association and National Council for Measurement in Education, 2014; American Statistical Association; Amrein-Beardsley, 2014; Baker et al., 2013; Darling-Hammond, Amrein-Beardsley, Haertel, & Rothstein, 2012; Pullin, 2013).



## Procedural Protections

The procedural protections under the federal and state constitutions' due process clauses or clauses protecting the right to enter into contracts that are available to persons or groups impacted by the new requirements should be carefully considered. In North Carolina, a legislative effort to eliminate teacher job protections was rejected by state courts as an unlawful intrusion on teachers' contractual rights under Article I of the U.S Constitution which requires government to provide just compensation when taking property like salary and eventual pension benefits (North Carolina Association of Educators, Inc. v. State of North Carolina, 2015). Some state statutes and regulations may have applicable procedural requirements as well. And, to the extent that an educator may be a member of a collective bargaining unit because they are a paraprofessional or a licensed educator seeking an additional license, the local collective bargaining agreement may contain applicable procedural protections (Pullin, 2001; 2014; Rossow & Logan-Fain, 2013). Courts have traditionally recognized that individuals have a general interest in a reasonable level of accuracy in governmental decisions that affect an important interest, most often in the form of an opportunity to be heard in person when significant property or liberty interests are at stake (Pullin, 2010; Rossow & Logan-Fain, 2013). These types of protections for teachers are under new attack. For example, a state court in California ruled to limit protections for teachers in the interest of protecting student access to educational opportunity (*Vergara v. California*, 2014); the case is on appeal.

To determine procedural protections that might be necessary under the federal constitution, courts will look at the nature of the private interests at stake in a program, the risks to the affected individual(s) resulting from errors in determinations that might be made, the nature of the government's interest, and the administrative and other burdens that procedural protections might cause (Pullin, 2001, 2010). However, for initial educator licensure decisions, most situations don't involve sufficient individual interests to trigger procedural protections. But these issues, associated with candidate interests in their reputations, can be expected to increase. See, for example, a case in which an intern teacher attempted, unsuccessfully, a constitutional claim against a private corporate online alternate teacher education provider and the local district in which the candidate had been teaching over loss of professional reputational after a job and teacher education participation were terminated (*Broughton v. Livingston*, 2010).

## Religious and Expressive Rights

In the context of the increasingly consumerist perspective on what education means to individuals in our society, some of the most powerful legal challenges to public education practices in recent years have been initiated by social or religious groups based on claims of violations of the speech and religious freedom provisions of federal and state constitutions; religious freedom claims have been particularly power bases for challenge to government requirements (Greenawalt, 2005; Kaplin & Lee, 2014). In this context, claims could be made that the definitions of teaching competence and the standards for assessing educators intrude upon rights to freedom of speech and religious belief and practice.

Teacher education faculty have begun to raise concerns about the ideological differences between faculty determinations about what teachers need to know and be able to do and what the government defines as competence, particularly as measured on the performance assessment (National Association for Multicultural Education, 2014; Sato, 2014). The legal argument here would rest on faculty claims under the free speech clause of the First Amendment to the U.S. Constitution to academic freedom to determine curricular content and instructional approaches. In the general spirit of judicial deference to education officials, the presumption here probably tips in favor of the state's choice on what teachers should know and be able to do in order to qualify for a

license. In addition, courts have been reluctant to protect the academic freedoms of individual faculty as opposed to the freedoms of the higher education institution itself (Pullin, 2004).

Students whose work or images are captured in a teacher performance assessment could also raise religious challenges. Examples would include individuals whose bona fide religious beliefs bar use of their own video or photographic images or members of groups who, on grounds of religious belief, do not engage in what some evaluators might consider fair treatment of a homosexual or transgender student in their classroom (see *Hennesy v. City of Melrose*, 1999).

Government can intrude on religious-based practice or expressive rights, but must have appropriate grounds for doing so, which means the governmental interest being pursued by the program and the means for achieving that goal will be important, as will the extent of the intrusion on individual religious belief and practice or expression (Greenawalt, 2005; Kaplin & Lee, 2014).

### **Opportunity to Learn for Future Teachers**

Another set of issues concerning how educator preparation fits in the new marketplace for education arises from state and federal constitutions and claims that might be presented either by future teachers who assert that their teacher education program didn't well prepare them for licensure assessment or by educator preparation programs themselves who might feel they have claims against the state over the ways in which their programs are regulated. In addition to implementing or overseeing the award of teaching credentials, each state also regulates the process of educator preparation through the state's mechanisms for approval of educator preparation programs. This control imposes on states another set of requirements to ensure that there is a relationship between teacher credentialing and teacher preparation (Duckor et al., 2014; Gitomer & Zisk, 2015). This would be true regardless of whether the state directly performs these functions or delegates them to some quasi-public or other agency, an accrediting body, or outside vendor or contractor (Pullin, 2001).

Accountability for individuals seeking a license is one goal of teacher performance assessment programs; another is accountability for teacher education programs (Knight, Lloyd, Arbaugh, et al., 2014). In a special issue of the *Journal of Teacher Education* devoted to teacher performance assessment, the editors note that one goal of the use of teacher performance portfolios like the edTPA is to provide information not just for accountability but also for program improvement in teacher education programs (Knight, Lloyd, Arbaugh, et al., 2014). They note that the extent to which performance assessments and teacher education programs are congruent is important.

Performance assessment of future educators is a component of professional preparation programs to determine progress through the program. However, the new uses of external performance assessment for licensure assume that a performance assessment is used for both summative and formative purposes to guide future teachers as well as those who prepare them during an educator preparation program (Wei & Pecheone, 2010). As a result, questions can arise whether the state-regulated educator preparation programs have a meaningful opportunity to incorporate into their programs what the state requires educators to know and be able to do as reflected in the licensure assessment. This would obligate the state to ensure that its standards for program approval are consistent with what would be required to prepare future educators to meet licensure requirements including the performance assessment requirements. This obligation would include the provision of sufficient feedback on performance to allow a meaningful opportunity to improve future performance, particularly when the performance is being judged in a formative evaluation (Pullin, 2001). Some teacher educators have argued that contracting out to a private vendor the scoring of edTPA eliminates the opportunity for teacher educators to understand and

influence the assessments (Duckor, 2015; Wilkerson, 2015). These issues of alignment to allow a fair opportunity for educators to prepare themselves become a particular challenge when states move rapidly to implement the new common core curriculum standards.

The state may have a constitutional obligation to assess whether teacher candidates are offered instruction in the state's approved or accredited programs, including programs within higher education institutions as well as programs by other types of providers (Pullin, 2001). In addition, the state may be obligated to assess whether educator preparation programs are offering the curriculum and instruction that will prepare students in educator preparation programs to meet the testing or assessment requirements for certification or licensure. In a similar situation requiring successful performance on a minimum competency test in order to receive a high school diploma, courts ruled that, where compulsory attendance is required and students expected that they would receive a diploma as a result of having met high school requirements, the state must show that schools provided students a fair opportunity to be taught what is covered on the test (*Debra P. v. Turlington*, 1981).

### **Civil Rights Statutes Barring Discrimination in Licensure and Employment**

The heightened attention on educator evaluation, with higher stakes consequences with potential loss of important credentials for future employment, will mean more potential individual suits claiming invidious discrimination in the form of differential treatment of individuals during the evaluation process (see, for example, *Hutchins v. Bibb County Sch. Dist.*, 2014).

Federal civil rights laws (and, often, analogous state laws) have been used to successfully challenge criteria used to make decisions concerning employment, training programs, and licensure (Baker et al., 2013; Pullin, 2001, 2013; Ryan, 2009). If an employment test, selection process, or evaluation has disparate results for protected groups or individuals, such as racial or ethnic minorities or older workers, or creates barriers to participation for individuals with disabilities or based on gender role stereotypes, the nondiscrimination requirements of federal statutes will apply (Baker, Oluwole, & Green, 2013; Green, Baker, & Oluwole, 2012; Pullin, 2011; Ryan, 2009). Some critics of edTPA have raised concerns that the assessment undermines efforts at multicultural education in particular (Sato, 2014).

Title VI of the Civil Rights Act of 1964 bars discrimination in education programs receiving federal financial support, including state and local educational agencies. The more widely used basis for challenging discrimination in testing, selection, and evaluation is Title VII of the Civil Rights Act of 1964, which bars employment discrimination on the basis of race, color, religion, sex, or national origin. Title VII bars discrimination in employment, but permits the use of professionally developed ability tests for employment decisions, provided that they are not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin. It is in the application of Title VII that courts have in the past been most heavily involved in issues of the validity and reliability of inferences based on tests and evaluations. Local school systems that use an assessment are subject to Title VII requirements, even if they only use the assessment because the state requires them to do so. For example, successful race discrimination claims were brought against the New York City Public Schools on grounds that the district was utilizing an invalid licensure test, even though that test was state-mandated and created by a vendor under the direction of the state (*Gulino v. Board of Education*, 2014, 2015; see also, *Association of Mexican-Am. Educators v. California*, 2000).

The provisions of other federal civil rights statutes also allow tests and objective criteria, but only if they do not cause unlawful discrimination on the basis of gender (regulated under Title IX, which bars gender-based discrimination in federal education programs or activities receiving federal

financial assistance), age (Age Discrimination in Employment Act), or disability (Section 504 and the Americans with Disabilities Act) (Pullin, 2001, 2013, 2014).

Traditionally, a test that has a disparate impact on protected groups requires a demonstration by the employer that the test is job-related with regard to the position in question and consistent with business necessity. This requires evidence that the test actually measures skills, knowledge, or ability required for job performance. Broad coverage also exists under Title VII and the Equal Employment Opportunity Commission's (EEOC) Uniform Guidelines for Title VII concerning all employee selection approaches, including performance evaluations.

Title VII requirements were recently used by a federal court in New York in determining the illegality of one of that state's teacher licensure tests. Where a licensing test has a disproportionate impact on racial or ethnic minorities, there must be evidence that the test validly measures *only* the specific knowledge, skills, and abilities necessary for competent job performance based upon validity studies utilizing appropriate job analysis of the work of teaching according to the requirements of the federal Equal Employment Opportunity Commission (EEOC) Guidelines (*Gulino v. Bd. of Ed. of City School Dist. of City of New York*, 2015).

Recent legal claims of discrimination in access to online education programs and services are being brought on behalf of people with disabilities (Lewin, 2015; National Federation for the Blind, 2014). Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act (ADA) are broad nondiscrimination laws that apply to educational institutions and activities, including all public elementary and secondary education programs, the vast majority of higher education programs in all of their educational and employment activities, all state departments of education, and independent licensing boards (*Bartlett v. N.Y. State Bd. of Law Examiners*, 2000). Both Section 504 and the ADA bar discrimination on the basis of disability when employers use job criteria that intentionally or unintentionally screen out individuals with disabilities who are capable of performing a specific job. An assessment cannot be utilized for a job requirement if it bars individuals with disabilities from employment unless the test can be shown to be job-related and necessary to meet legitimate business needs for a particular position. Therefore, if an assessment is used as a requirement for qualifying for a teaching credential or job, evidence should exist that the assessment measures an essential function of the job and no reasonable accommodation in the assessment could be provided given the specific disability a candidate presents.

The ADA includes specific provisions requiring nondiscrimination in the administration of examinations (42 U.S.C. § 12189; see also 28 C.F.R. § 36.309). These provisions include ADA requirements that testing sites be physically accessible and that test formats be the most effective manner for persons to demonstrate that they can perform necessary job-related skills and knowledge.

One of the key issues in using performance assessment for educator licensure for individuals with visual and other physical disabilities will be the extent to which they can access the online platforms for the assessment (Areheart & Stein, 2015). Online submission is the approach used by edTPA for its performance assessment for licensure and multiple platform vendors are utilized in different states. A growing number of concerns have been addressed about accessibility to online educational platforms for individuals with visual impairments. And, there is now a claim that individuals with disabilities ought to be included in field tests during assessment development when accommodations can be tried out, so that they have a fair opportunity to participate in field tests and to have their needs considered during the development process rather than being forced to face accommodations or refusals to provide accommodations later when the assessments have high stakes consequences (National Federation for the Blind, 2014).

## Next Generation Legal Issues

The types of civil rights and constitutional law claims addressed above have been to date the most common legal issues in disputes over educator preparation and licensure. Certainly many other legal issues have arisen in the contexts of educator evaluation for termination (Pullin, 2010), but those are not within the scope of this article. However, worth further attention here are new types of what might be deemed “next generation” legal issues involving educator quality and educator preparation as seen from the perspective of the new consumerism and corporate approaches to education reform. These fall into two broad categories: first, issues related to the privacy, reputation, and proprietary interests of educators and their students and, second, issues that are more common in the business context and involve fraud, error, and misrepresentation, and professional negligence.

### Privacy Law Issues

One of the cornerstones of corporate education reform is the utilization of performance metrics to enhance accountability and drive change. Many of these metrics and associated products and services to improve performance are provided by outside vendors, often for-profit entities. For example, edTPA portfolio submissions are sent to Pearson for scoring, which means that all of the licensure candidate materials and considerable information on the students the candidate teaches are in the hands of a multinational for-profit corporation that sells many assessments and educational programs and services ([www.pearson.com](http://www.pearson.com)). Enthusiasm for these approaches by policymakers and many practitioners are now beginning to conflict with consumer concerns to protect their individual data and those of their family members.

Portfolio assessments for teachers include representations of their own work as well as student work and video recordings of classroom interactions; in addition online metadata may be collected as a result of online submission of materials in the assessment. One characteristic of the new consumerism in education is an increasing level of vigilance on the part of parents of K-12 students about data collection from or about their children. Increasing attention to individual privacy rights in the implementation of education reform initiatives can be expected, presenting issues for both P-12 students and their parents as well as current and future teachers. State and federal laws set out individual privacy rights for educators and both P-12 students and students in educator preparation programs (Cascia, 2011; Mutkoski, 2014; Sprague, 2015; Trainor, 2015). These individual interests must be weighed against the public right to accountability from educators and educational institutions. And individual privacy interests must be balanced against the state’s right to have access to assessment information that is needed to meet statutory requirements (Herold, 2014a).

Privacy interests potentially arise in classroom observation and video or audio recording, in VAM calculations, and in use of P-12 student work in the teacher performance assessment evidence submitted for licensure. A second set of privacy issues arise when the assessment information might be used for purposes other than the licensure of the individual candidate who submitted the assessment materials. Concerns have been raised about how the content of how an assessment might be used once it is in the hands of the entity receiving the materials (Sprague, 2015; Winerip, 2012). What will happen to the work of the educator submitting the work once it is scored and what will be done with the information collected about the P-12 students and their parents included in the portfolio or incidental information collected about the cooperating classroom teacher or school administrators? Will privacy of all these people be protected? Will other products be created from information in the submission? Several different potential sets of privacy considerations are implicated: privacy of all the P-12 students (and their parents) in the classes used for the candidate’s performance assessment; privacy of the individual students whose work is examined in the

assessment; privacy of the individual classroom teacher (teacher of record); and privacy of the candidate or future educator. These individual interests need to be balanced against the potential interests of: the P-12 school/district in which the performance occurs, the state regulating P-12 and higher education systems, and the interests of the public in the performance and accountability of educational institutions, educators, and public education systems.

In an era in which the economic and property interests associated with education are increasingly privileged in our society, privacy and the ownership or control of personal information potentially become major issues. And, increasingly, as interest in the use of big data sets to enhance performance and accountability continues to grow, more attention needs to be paid to identifying and understanding the interests not only of individual students and educators, but others impacted by these systems: educator preparation institutions; the state agency implementing the licensure system; the state agency overseeing P-12 school accountability; the state agency overseeing educator preparation institutions; the educator preparation programs themselves; and the federal government (U.S. Department of Education, 2014) and independent accrediting bodies, such as the Council for the Accreditation of Educator Preparation (CAEP), which are all now more focused on outcomes measures of program and student quality. The new standards for accreditation adopted by CAEP, for instance, call for the use of performance data for program graduates based on the performance of the P-12 students those graduates teach (CAEP, 2013; Sawchuk, 2014). In addition to these interests, the public at large may have an interest in data on educational performance reflected in efforts by the press seeking access to information on the performance of P-12 schools and educators under new data journalism approaches to news gathering (Los Angeles Unified Sch. Dist. v. Superior Court, 2014; Morris Publishing Group v. Florida, 2014) or educator preparation institutions by an outside entity that conducts rankings like the National Council on Teacher Quality (NCTQ) (2014) or the US News and World Report (2014).

There is wide a range of privacy issues associated with educator assessment materials, particularly when the materials contain the work of P-12 students or video or audio recordings of actual classrooms or other school experiences. Privacy concerns arise for the P-12 students (both those who are focused upon in the portfolio and also for non-focus students who may be incidentally captured in records, work products, or recordings), the families of the P-12 students, and their classroom teachers of record. The educator candidate may have his or her own privacy interests at stake as well if the assessment materials are used for purposes other than licensure, as will be discussed below.

To the extent that legal issues concerning claims of privacy turn in part on considerations of what are reasonable expectations of privacy in our society, it is worth considering the rapid changes in our notions of what constitutes a “reasonable” privacy expectation today (Reidenberg, 2014). Note, for example, the recent U.S. Supreme Court decision recognizing that there are particular legitimate privacy expectations related to cell phones (Riley v. California, 2014). No matter how much society may be changing in terms of (over)sharing one’s own information, fundamental issues concerning the protection of personally identifiable information (PII), the privacy of children, and the expectations around the intimacy of relationships between parents and their children suggest that great care is warranted in adopting an approach to protections for PII.

Perhaps inspired in part by prominent media accounts of national security and credit/debit card hacking, as well as a flurry of social media-targeted marketing initiatives based upon information in databases, a new digital privacy rights movement has quickly developed (Crawford & Schultz, 2014; Reidenberg, Russell, Kovnot, Norton, Cloutier & Alvarado, 2013; Rotenberg & Barnes, 2013). This follows efforts on the part of social conservative advocacy groups to protect parental rights to influence or control what happens to their children in schools and to amend state laws to do so

(American Legislative Exchange Council (ALEC), 2014, 2013; Ujifusa, 2014). As a result, more attention to privacy issues is warranted. The issue is complicated by the fact that the existence of big databases on educational performance, available in an era of increasing focus on accountability, have resulted in calls for access to the data on the part of journalists and activists. The fact that many of these databases are in the hands of private vendors, some with associated corporate interests to generate new programs and materials, only complicates the matter further (Mutkowski, 2014; Reidenberg et al., 2013; Rotenberg & Barnes, 2013). For example, one of the biggest education vendors in the nation, Pearson, is also the vendor providing edTPA scoring (AACTE, n.d.).

One reaction to these types of concerns is increased legislative activity. California, for example, recently amended its state statutes concerning business and the professions with a “Student Online Personal Information Protection Act” (California, 2014). The law requires online services to promote student privacy with security protections and limits targeted advertising by data warehouses. It does allow the online providers to engage in data use for their own purposes in developing and improving education services; how far this opportunity will extend remains to be determined.

### **Common Law Privacy Law Protections**

State court case law and some state statutes set broad parameters for protecting privacy in situations in which individuals would ordinarily expect privacy. In settings in which privacy is expected, unreasonable or serious interference with privacy that causes harm to individuals can result in cases seeking damage awards from the parties or the institutions or entities alleging privacy violations (Blair v. Rutherford Cnty Bd. of Ed., 2013; Carr & Bellia, 2015; Fishman & McKenna, 2014; Reidenberg et al., 2013).

### **Laws Related to Video Recording or Audio Recording of Students and Classrooms**

Legal issues associated with educator assessment arise from the inclusion of any videotapes of classroom or individual student performance as part of the materials submitted. There are two potential sets of issues here, those concerning the future educator himself and those concerning his students who are video recorded as part of the educator’s performance assessment. Federal student records laws can apply and these will be discussed in a later section of this paper. State and federal general privacy laws and wire-tapping laws are relevant to these recordings and videotapes; those state laws can vary considerably (Carr & Bellia, 2015).

The use of video or audio recording requires consideration of where the recording occurs and the expectations of privacy that exist in that context or are specifically defined by state or federal law (Carr & Bellia, 2015). The general principle is that recording of a private place or of a private interaction requires prior and specific consent from those being recorded or from the parents of P-12 students, while videotaping in a public place doesn’t require consent (Reidenberg, 2014; Sprague, 2015). The language and interpretation of state laws vary from state to state on whether a school or a classroom should be regarded as private places and the ways schools operate can impact this consideration as well. Many courts have found no legitimate expectation of privacy from videotaping for either students or teachers in classrooms (Fishman & McKenna, 2014). For example, if security cameras are widely deployed in schools and everybody knows that, little reasonable expectation of privacy may exist. In most instances, the more publicly accessible parts of schools are probably not regarded as private. What is less clear is whether the individual classroom is private or the more intimate interactions between educator and student or among students themselves are private. This is likely a matter of state law or may not be clearly resolved yet under state law. It will also be a matter of federal student privacy law, as will be discussed in a later section of this article.

As an example of one atypical state approach, California imposes criminal sanctions on those who surreptitiously record in a classroom (Cal. Educ. Code § 51512 (West, 2015) but it has explicitly addressed the issue of using classroom videotape by a teacher to improve her individual performance:

Any classroom teacher who, in the interest of improving his or her personal teaching techniques, wishes to use an audio recording device in a classroom to record classroom instructional presentations, may employ that device without the necessity of obtaining the approval of the school principal or other school officials (Cal. Educ. Code § 44034, 2015).

Texas has a similar provision in its law (Tex. Educ. Code Ann. § 26.009, 2015)). These are rare state provisions compared to most states, which have not addressed the issue.

In addition to specific issues about videotaping, some states have wiretapping laws that can apply broadly, including at school (Carr & Bellia, 2015). In Massachusetts, for example, there is a very broad privacy law protecting individual privacy (Massachusetts Gen. Laws 214 § 1B). Under these types of laws, when one person records another (unless a court order or appropriate consent by a third party is in place) the law presumes that the recording cannot be secret and requires the prior consent of those whose utterances or actions might be picked up by the recording. The broad Massachusetts law requires consent of all participants. Under federal law, the consent of just one of the participants is required. In the case of P-12 students, the permission required to use a recording presumably would be from the parents or legal guardians of students (Shmueli & Blecher-Prigat, 2011). Under some state laws, both parental and school administrator permission are required prior to classroom recording.

### **Federal Statutes Protecting Student and Family Privacy**

The primary federal statute concerning student privacy is the Family Educational Rights and Privacy Act (FERPA), which will be discussed in detail below. In addition to FERPA, several other federal statutes and regulations protect family and individual privacy and the use of personally identifiable information (PII) (Mutkoski, 2014).

Among the federal laws, the most noteworthy here are the Children's Online Privacy Protection Act (COPPA) and the Protection of Pupil Rights Amendment (PPRA). Also potentially applicable are the provisions of Health Insurance Portability and Accountability Act (HIPPA), which protects medical information about individuals and the Individuals with Disabilities Education Act (IDEA), which focuses on addressing the education of individuals with disabilities who need special education and provides privacy protections.

The COPPA regulates the online collection of personal information from children under the age of 13 to promote children's privacy and provide security of personal information about them. It requires parental notification and consent to data gathering, along with a provision that allows a parent to limit the use of information already collected about a child. The Federal Trade Commission (FTC) is responsible for administering this law (Mutkoski, 2014). Parents overwhelmingly oppose the sale of individual student data (Cascia, 2011).

At least one commentator has noted that COPPA is out-of-date given recent technology developments (Cascia, 2011). In response to an effort to exclude school-based data gathering from the coverage of COPPA and to allow schools to be deemed consent providers on behalf of parents when online data is gathered at school, the FTC determined that COPPA can apply in schools, but that if information is obtained directly from school districts, and not from a child under 13, then COPPA does not apply (Federal Trade Commission, 2013). This leaves a clear ambiguity about whether and how COPPA would apply to information gathered at school by future teachers or by



commercial vendors processing school data or teacher performance data. To the extent COPPA might apply, parental consent for data gathering from students under age 13 will be important, particularly when schools or educators allow or require students to participate in online activities or e-learning that teacher candidates might incorporate into their assessment materials.

Some of the information that educator candidates collect about P-12 students represented in their assessment materials could involve very sensitive information addressed under the Protection of Pupil Rights Amendment (PPRA). This information might be presented, for example, in an effort for the future educator to explain student performance or might be elicited from the student herself in the course of class participation or in the completion of class assignments. The PPRA provides parents of P-12 children the opportunity to opt a student out of school surveys involving protected personal information and the data collection, disclosure, or use of personal information obtained from students for marketing, sale, or for other distribution of the information to third parties. It addresses marketing to students or sale of information about students, but might also be applicable to the gathering of personal information by a school or a teacher.

The PPRA covers eight protected categories of information: political affiliations or beliefs of the student or his or her parents; mental or psychological problems of the student or the student's family; sexual behavior or attitudes; illegal, anti-social, self-incriminating, or demeaning behavior; critical appraisals of other individuals with whom respondents have close familial relationships; legally recognized privileged or analogous relationships; religious practices or beliefs; and information about family income other than when required by law to determine eligibility for programs or financial support (20 U.S.C. §1232h).

### **Family Educational Rights and Privacy Act (FERPA)**

The most significant federal statute concerning PII of students is the Family Educational Rights and Privacy Act (FERPA). FERPA creates a statutory privacy right for parents and age-eligible students to inspect and review student records, to exercise prior consent over the disclosure of many education records, to know school records policies (including a requirement that logs be maintained of disclosures to outside parties), and to have due process protections in records disputes, including the right to seek corrections or deletions of inaccurate, misleading, or otherwise inappropriate data. FERPA applies to both P-12 and higher education programs that receive federal financial assistance (Daggett, 2008; Mutkoski, 2014; Penrose, 2011). It is also extremely out of date given recent initiatives (Daggett, 2008). And, it has been argued that while FERPA was enacted to protect student and family access to and protection of PII, the most frequent use of the law has become instead its use by educational institutions to shield themselves from accountability to the public or media (Penrose, 2011).

The cornerstone of FERPA is the requirement for prior written parental consent (or student consent for higher education students) prior to the disclosure of PII. FERPA exceptions can apply to this requirement and are potentially relevant to educator assessment materials submissions. Prior consent is not required when information is provided to those with a legitimate educational need to know information, such as school officials, those conducting studies on behalf of an educational agency, and those conducting evaluations of programs funded with federal money. Some have argued that these provisions have been loosely followed, at best (Daggett, 2008). Recently, the exceptions to the general prior consent to disclosure of PII requirement have been considerably expanded by the U.S. Department of Education, as will be discussed below.

Judges are now being asked to determine whether the broad protections of the federal Family Educational Rights and Privacy Act (FERPA), which will be discussed below, apply to videos made in schools. In one controversy over access to information in a legal dispute, one state court

judge recently held that hallway videos were education records covered by FERPA, allowing parental access to a video of a hallway altercation, but requiring the parent to pay for the redaction of the identities of other children (*Bryner v. Canyons School District*, 2015). This is consistent with the U.S. Department of Education's interpretation of FERPA (U.S. Department of Education, 2013b).

FERPA controversies have been addressed by courts in other litigation where evidence about a student is needed, but it is important to note that FERPA doesn't provide an individual right to go to court directly to enforce its provisions, despite the word "rights" in the title of the law (*Gonzaga University v. Doe*, 2002). The ultimate remedies for FERPA violations are federal monetary sanctions, such as the withdrawal of federal funding, or sanctions on researchers and vendors barring them from activities supported by the U.S. Department of Education (Daggett, 2008). These are rarely imposed sanctions, but when imposed, they could be stiff; the ultimate result for educational agencies could be denial of or required payback of federal funding for educational programs. For vendors or others outside education programs who use PII from schools, the remedy is limited to the withdrawal of federal funds to the sponsoring entity or a not less than five year ban on accessing PII from education records.

### **Data Warehouses, Outside Vendors, Security, and Digital Privacy Rights**

Current FERPA provisions are not really sufficient to address all of the new innovations in information collection and use (Daggett, 2008; Penrose, 2011). Race to the Top funding called for longitudinal data systems to support instruction (U.S. Dept of Ed, 2009), as did the America COMPETES Act of 2013. Every state created a P-12 Statewide Longitudinal Education Data System (SLED) as a result of these requirements if they didn't already have such systems. Many of these systems were turned over to private for-profit vendors to manage and they often do so using cloud-based computing (Reidenberg et al., 2013; U.S. Department of Education, 2013a).

A new opportunity that might be offered by these private vendors is the collection and analysis of data across classrooms, schools, districts and states, as well as the collection and use of data across platforms, including data from educator assessment materials. These vendors collect data, with identifying information, at the individual student and teacher level. They often have more control, or ownership, over data than do public education authorities, so the use of the data they collect, including any metadata they may capture, may create new commercial opportunities for them. Many new types of legal issues concerning privacy arise from the current focus on big data approaches to education reform and accountability (Cascia, 2011; Mutkoski, 2014) and the widespread increase in the privatization of many information functions as a result of efforts to maximize technical expertise and offset the dwindling workforce of many government agencies. And, one of the challenges of determining how to proceed in this context is that it is simply impossible to forecast the ways those handling big data sets and generating metadata associated with them will innovate to create new uses of data not yet imagined by most people (Crawford & Schultz, 2014).

Strong concerns have been raised about: the security of the cloud storage of personal data; insufficient public control in the contractual relationships with vendors providing information services; insufficient parental privacy protections and provisions for parental control over student data; lack of consent to data collection and dissemination; and commercialization of school and student data, with particular concerns that private information companies can track students online for marketing or other purposes (Cascia, 2011; Class Size Matters, 2013; Common Sense Media, 2013; Reidenberg et al., 2013; Rotenberg & Barnes, 2013).

The U.S. Department of Education (2011, 2014) clarified its FERPA implementation guidance to make clear its interpretation that FERPA should permit easy handoff of student data

from schools to private vendors for statewide longitudinal education data systems SLEDs or other data management activities. Taking a very broad interpretation of the law, the Department broadened its approach concerning who can use PII without prior parental consent. The new regulation allows disclosure without consent to entities and programs not administered by educational agencies or institutions directly (34 C.F.R. 99.31). This change was coupled with broad flexibility to entities regulated by FERPA in terms of how they implement FERPA requirements and how they designate authorized representatives with legitimate interests to handle data on their behalf as part of audit, evaluation, enforcement, or compliance activities. Further, it broadened the definition of the “school officials” covered by FERPA to include “contractors, consultants, volunteers, and other parties to whom an educational agency or institution has outsourced institutional services or functions it would otherwise use employees to perform” (34 C.F.R. § 99.31(a)(1)(i)(B)). The same revision of the regulations was also designed to broaden access to student PII “to organizations conducting studies for, or on behalf of, educational agencies or institutions to: (a) develop, validate, or administer predictive tests; (b) administer student aid programs; or (c) improve instruction” (34 C.F.R. § 99.31(a)(6)(i)); see Reidenberg, et al., 2013).

The most recent FERPA regulations require educational institutions or agencies providing student records to vendors to have a written agreement specifying terms of use (U.S. Department of Education, 2013a). The entity providing the PII to a vendor is assumed to retain control over the data. The obligations imposed on a vendor include parental access provisions and recording of re-disclosures of PII. The U.S. Department of Education recognizes that a vendor receiving student records can be involved in the development of educational products for the schools from which PII student records information is received. The Department seems to envision a role for the use of student records data to create or improve educational products so long as the product was intended for use in the district that disclosed the PII to a vendor, but would not allow the provision of student records data to a vendor solely for the purpose of creating a product. Of course, the lines here can be quite blurry. The recent regulations on digital data privacy rights do not directly address the potential privacy intrusions that may arise in the implementation of a performance assessment, either in terms of what might occur relative to a candidate or to the students that candidate teaches.

The expansion of FERPA regulations to broaden access to outside vendors and researchers has been challenged in court already by privacy advocates, although the case was dismissed on grounds that the plaintiffs didn’t have standing to bring the case to court (*Electronic Privacy Information Center v. U.S. Department of Education*, 2014). Given the extent of concern about these changes among privacy rights advocates, more legal challenges to the new approaches can be expected.

### **State Privacy Laws**

Federal privacy laws may allow data disclosures that state laws might prohibit (Cascia, 2011; Ujifusa, 2014). A state court case was filed in New York on behalf of parents seeking to prohibit the New York Department of Education from moving data collected by local schools to a cloud-based service (*Davids v. King*, 2013). The data at issue involved data warehouses with millions of students’ individual grades and test performance, SES and race, language proficiency, attendance, suspensions, and eligibility for special education. The data were intended to serve as the basis for data dashboards maintained by third-party vendors for local schools and districts under the Race to the Top funding received from the federal government. One New York advocacy group asserted that the cloud storage vendor couldn’t guarantee the security of the information stored or that the information will not be intercepted when it was being transmitted (*Class Size Matters*, 2013; Molnar, 2013). The court case presented legal claims arising from an assertion that the state failed to meet its obligations

to protect student privacy and the private company data sharing program subjected students' PII to commercial use and potential identity theft, grave risk of data hacking by the private vendors who provide cloud services, and the probable "grave risk of injury to students' future educational and career opportunities" (Davids v. King complaint, p. 2). The complaint in the case asserted that state privacy laws were violated by the data arrangements when government entities gave up control of PII to private vendors without sufficient assurances that data privacy and confidentiality requirements would be met by the vendors. The case was dismissed by a trial court. New York recently amended its statutes to limit vendor activities and one leading education warehouse vendor (InBloom) announced that it was ending its operations, in part due to the difficult controversies in New York over privacy (Herold, 2014b; Singer, 2014).

### **The Public's Right to Know About Public Education Versus the Privacy of Individuals**

As more and more data are collected on current and future educators, as more and more metrics are calculated, and as the demands for educational accountability increase, another new type of legal issue has arisen concerning performance data. These arise from tensions between the provisions of state freedom of information and public records laws designed to protect the public's interest in government transparency and accountability versus the protections for individual privacy embedded in most state laws. The federal government and many states have freedom of information statutes and regulations designed to allow access to certain government information. At the same time, state and federal laws and regulations protect the privacy of individuals for certain information held by the government. These two types of provisions, one set allowing for transparency in government and the other protecting individual and family privacy, are increasingly coming into conflict. In the context of a dispute between teacher privacy rights and the public interest in knowing more about teacher performance, some state statutes are unclear (Dammeier, 2012).

An issue recently brought to the attention of a few state courts involves efforts of journalists to obtain access to individual educator performance information that is based on their students' test performance. This student growth, or value-added modeling (VAM), information was sought for current practitioners either because a local district had calculated the information or because a newspaper wanted to hire an expert to calculate its own teacher performance metrics (Los Angeles Unified v. Superior Court, 2014; Morris Publishing Group v. Florida Dept. of Ed., 2014; Song, 2012). While these controversies have focused on k-12 educators, similar issues could arise concerning teacher educators.

State courts in Florida and Los Angeles have been asked to review efforts by the media to obtain public release of data on individual teacher performance, student test scores, or VAM results. These disputes brought into direct conflict educators' privacy interests in protecting their professional reputations and the media's interest in reporting on government programs. Similar issues might arise when public interest or advocacy research entities like National Council for Teacher Quality (NCTQ, 2014) seek information about individuals or educator preparation programs. Since public school teachers serve in the public interest, the media asserted it was in the public's interest to know individual teacher scores so that citizens could assess the quality of their schools and parents could know more about their children's current or future teachers.

A state court interpreting New York laws allowed release of individual teacher performance data because release of public sector job-performance information did not, in the court's view, constitute an unwarranted invasion of privacy (Mulgrew v. Bd of Ed., 2011). Subsequently, the state, in response to concerns of the teacher unions, revised state law to limit access to a teacher's evaluation data to the parents or guardians of students in that teacher's class. In Florida, an intermediate state appellate court held that the state's public records law did not exempt from

disclosure individual VAM scores for educators since the statute did not clearly exempt those scores from disclosure (*Morris Publishing Group v. Florida Dept. of Ed.*, 2014; the state statute also allows disclosure of individual teacher evaluations after a waiting period of a school year).

The detailed consideration of the balancing of interests undertaken by a California state court in interpreting that state's laws is notable for the manner in which it frames the competing interests of individual educator privacy and the public's right to know about government performance. The court held that the interests of an individual parent in knowing the evaluation scores of teachers so they could know about their own child's current or future potential teachers were not "public interests". The "public interest" is in knowing about the functioning of government agencies (*Los Angeles Unified v. Superior Ct.*, 2014).

### **New Types of Legal Issues from the Business Context**

The new contexts for assessment in education suggest that many types of legal claims that previously were either not used, or infrequently used, will be possible, as was highlighted above in the consideration of privacy issues. These new types of legal challenges require some new ways of thinking about legal issues and public policy goals in education. The challenges arise from the increasing consumerist and proprietary influences on the provision of education. These phenomena suggest that the types of legal issues that come up in a commercial or business context may be used with more frequency to challenge practices rather than the more traditional constitutional or civil rights challenges to government programs. This section of the article discusses issues of intellectual property and commercial interests as well as highlighting new types of criminal and fraud concerns that are starting to arise.

### **Intellectual Property Interests and Copyright**

When education is increasingly seen through a consumerist lens, education providers can be expected to become more vigilant about their own proprietary interests. While court cases are not happening in any number yet, one new potential business law issue associated with performance assessment of educators seeking licensure arise from questions that have already been presented in public policy disputes over performance assessments for licensure. A boycott over the Massachusetts field testing of edTPA focused in part on the ownership of student submitted materials in the performance assessment system (Cochran-Smith, Piazza, & Power, 2013; Winerip, 2012). This issue focuses on ownership of the teaching materials created for the performance assessments used for licensure. In addition to commercially available products, a small industry has already developed online where practicing teachers sell teaching materials to other teachers or provide them for free. The practice may be particularly active now as teachers struggle to find materials appropriate for teaching to the new common core curriculum standards.

When educator assessment materials are submitted to a scoring or review body, does the educator candidate "own" the materials? Can the scoring entity use the materials a candidate submits for benchmarking scores or as samples for training future scorers or for training future educator candidates or to create other education programs or services? This can be a particular concern if the scoring entity might generate revenue from the use of candidate materials in its other lines of business such as the provision of education programs and services.

The resolution of the legal issues concerning ownership or copyright of a teacher's curricular and instructional materials is not clear in many states. Most of the relevant cases have arisen in the context of professors, not P-12 educators (Straus, 2011; VerSteeg, 1990). However, while emphasizing that the legal standards are not definitive, some contextual issues might be determinative in the outcome of a dispute over who "owns" a candidate portfolio and the instructional materials created for it by a teacher seeking licensure.

The general rule of copyright is that the individual (or group of individuals) creating an intellectual product has copyright ownership of that product, can control use and obtain resulting profits. Exceptions to this broad rule can exist if the creator contracts away their ownership or if the context in which the work was created takes the presumption of ownership away from the creator. An employee who creates materials as part of meeting their job responsibilities often doesn't own a "work", the employer does under the "work for hire" exception to the general rule of copyright law. Under this rule, it is up to the employer to determine what will be done with creative materials and to obtain whatever financial gains might result (Straus, 2011; VerSteeg, 1990).

One basis for determining ownership of P-12 teaching materials by employees of a school could be based on local factors, such as the contract between a school and an employee, a collective bargaining agreement with a union, or a stated policy of an institution about ownership of teaching materials. Another might be a specific provision of state law or regulations concerning ownership of teaching materials. But in many instances, these issues have not been spelled out (Straus, 2011).

The creation of teaching materials by future teachers is another matter, however, since the considerations above apply to employees. While some teacher candidates may be employees of a school district, most are not. Most teacher candidates serve in schools solely as unpaid participants in an educator preparation program, but others are in a preparation program while also employed at that school (as part of a educator residency program, for example, or because they are seeking a second license). This might suggest that the broad "work for hire" exception has no role at all concerning the creative work of student teachers and that they own full copyright for the teaching materials they create. This, however, creates a strange anomaly in which employed teachers, if they have not been granted copyright protections for their work by their employer, may have fewer rights than student teachers who work in a school but are not employed there.

### **Commercial Law Approaches Using Contract Law, Misrepresentation, Anti-trust or a Defective Products Approach to Challenge Assessments or Their Use**

Once the possible commercial issues arising from educational assessments begin to be considered, several other new varieties of legal claims become evident. The number of business fraud and breach of contracts cases filed against higher education institutions or companies has been increasing. Many of these disputes have focused on whether students or graduates received the educational programs or services they were led to believe they would receive when they enrolled in a program or a course, paid tuition, and participated in the program only to be disappointed in some respect subsequently (Olivas, 2013). These cases can result in both compensatory and punitive damages awarded to successful plaintiffs, which makes these cases particularly high stakes.

In fact, these types of legal issues have already arisen over a scoring error on a teacher licensure exam. A federal multi-district class action case was brought on behalf of over 30,000 future teachers denied licensure due to a scoring error on PRAXIS, an Educational Testing Service (ETS) teacher licensure test. The future teachers asserted claims under four theories: (1) breach of contract for failure to fairly administer the test, correctly score the test, and issue a correct score report; (2) negligence in failure to exercise reasonable care in the design, administration and scoring of the licensure test; (3) negligent misrepresentation of performance; and (4) violation of federal anti-trust laws. The argument brought by the educators was, in short, that the scoring error was the result of bad business practices. The case was quickly settled for over \$11 million in favor of the plaintiffs (In re Educational Testing Services PRAXIS Principles of Learning and Teaching: Grades 7-12 Litigation, 2006, 2007).

Because these new types of claims are no doubt associated with the growing socio-cultural and economic phenomenon in which education credentials are seen as a consumer good as well as

an educational benefit, as discussed previously, the potential exists for many more business law types of claims, most often filed by attorneys with little familiarity with education or civil rights issues, but with a great familiarity with business law claims, some of which can be lucrative, as the ETS case was for the attorneys who brought it. Of course, not all these issues relate to attorney creativity. An individual in Texas, acting as his own attorney, brought an unsuccessful federal case alleging denials of constitutional rights and tortious interference with prospective business relations and injurious falsehoods. The case was brought against the state, a school district, and a private corporate online alternate teacher education program after the teacher was pressed to resign his job due to poor performance in evaluations and placed on inactive status by the certification program on grounds that teaching was not the best career for him. The claims were dismissed (*Broughton v. Livingston Ind. Sch. Dist.*, 2010), but the plaintiff's notion that a bad performance evaluation result was part of a set of bad business practices is worth noting.

### **Whistleblower Claims and Criminal Charges - Fraud, Breach of Contract, and Making False Claims to the Government**

The increasingly high stakes for individuals and institutions associated with test scores, performance measures, or analytic metrics like VAM scores or institutional performance report cards suggest some other possible fallout and associated legal controversies. When student performance data is used in an assessment system, two new types of legal controversies over the use of student test scores are now arising: criminal prosecutions for systemic test cheating on student tests used for high-stakes educator accountability and whistle-blower claims that teacher evaluation programs have resulted in fraudulent use of federal or state funds. While these have arisen among experienced educators in public k-12 schools, similar issues may arise in the new systems under consideration in this paper.

As the stakes grow higher, incentives for cheating increase (Amrein-Beardsley, Berliner, & Rideau, 2010; Cohen & Wollack, 2006). Given the increasing use of student test performance data to determine educator or institutional quality, it is perhaps not surprising that recent high stakes accountability initiatives have led to allegations of inappropriate teacher and administrator behavior. States have acted accordingly, suspending or revoking licenses and, in one case successfully incarcerating the El Paso, Texas superintendent after a criminal case (Strauss, 2012). Courts tend to support education officials in these types of actions to address cheating. For example, a Georgia appellate court found that it was appropriate for the state to temporarily suspend the license of a kindergarten teacher who changed some of her student's incorrect answers on the Iowa Tests of Basic Skills (*Professional Standards Commission v. Denham*, 2001).

**Whistleblower lawsuits.** In Washington, D.C., student test scores were used as part of individual value-added measures used for teacher terminations and bonuses as part of a highly visible initiative led by then Schools Chancellor Michelle Rhee (Brill, 2011; National Research Council, 2015). The U.S. Department of Education Inspector General and the District of Columbia Inspector General became involved when a former D.C. principal filed a whistleblower case alleging fraudulent use of federal funds from the Race to the Top initiative in the implementation of the program when educators cheated in the administration of student tests used for school and educator evaluations. A successful whistleblower case can result in fines or criminal penalties for those committing fraud, coupled with substantial monetary awards for the individuals who successfully blew the whistle, so the stakes are high on both sides. The Inspectors General found evidence of cheating and educator admissions of cheating but concluded the evidence was insufficient to substantiate criminal or whistleblower claims (Brown, 2013; Office of the District of Columbia Inspector General, 2014; U.S. Dept of Ed. Office of the Inspector General, 2013). This was one of

the first uses of federal whistleblower claims in k-12 public education, but it foreshadows a new set of legal possibilities.

**Criminal law cases involving irregularities in assessments.** In Atlanta, Georgia, the former superintendent and 34 high level education leaders faced criminal charges and substantial prison time for engaging in a criminal conspiracy in violation of state laws by either perpetrating, covering up or turning a blind eye to cheating on student tests used in high stakes accountability programs. The allegations focused on teachers and principals altering answer sheets or committing other violations of appropriate test security or use including teaching to the test. The student tests were used for school accountability calculations and substantial salary bonuses for school leaders resulted. The Atlanta cheating charges followed an extensive statistical investigation by the local newspaper. A substantial forensic investigation followed, conducted by a large team of experienced criminal investigators working under the purview of the state governor's office (Office of the Governor of Georgia, 2011). Criminal charges resulted and a number of accused educators pled guilty; one educator was acquitted. Following a lengthy trial, guilty verdicts were entered for the remaining teachers and administrators, not including the former superintendent who had passed away. (Maxwell, 2013, 2015). The punishment for three of the convicted defendants exemplify the magnitude of the consequences: each was sentenced to 2000 hours of community service, a \$10,000 fine, seven years in prison, and three years of probation (Fausett & Blinder, 2015; Mitchell, 2015).

### **Professional Negligence**

The ultimate legal outcome of the new consumerism in education may be what several commentators suggest as one potential result of the new approaches to educational accountability: the reincarnation of educational malpractice claims against educational institutions seeking the award of monetary damages and attorney fees for acts of educational negligence for failure to follow professional norms of good practice. In addressing these types of assertions in the past, courts across the country were overwhelming unwilling to embrace the legal claims in large part because they couldn't define what the obligation to educate entails. Now, it is asserted, the recent initiatives to quantify teacher performance and the performance of teacher education programs create established professional norms that could be used to hold educators and education institutions accountable for monetary damages through negligence law for bad professional practice (DeMitchell, DeMitchell, & Gagnon, 2012; Hutt & Tang, 2013).

## **Conclusion and Implications**

Recent efforts to address the quality of the education professions have received considerable attention and garnered considerable political support from many different constituencies. However, as these activities proceeded, little attention was paid initially to the potential legal complications associated with these programs. The uses of productivity measures and analytic metrics to judge or incentivize educators and education preparation programs are approaches based on what some characterize as types of corporate education reform. The responses of the individuals and institutions negatively impacted by these reforms may be legal challenges based on traditional constitutional or civil rights claims. But a growth in less traditional types of legal challenges may be even more likely. These challenges will arise from a contemporary context in which the value of education is increasingly seen as individual economic benefit and where the early 21<sup>st</sup> century has already been marked with uncertainties over privacy protections and privatization of educational services.

It is early yet in the emergence of these new types of legal claims, but there are clearly ample reasons to predict considerable activity in the future. The implications of these new legal issues for



k-12 educators, teacher educators, teacher preparation programs, public education officials, and members of the public will not be entirely clear until further into the implementation of the new reform initiatives. However, one clear implication can be drawn at present. People are beginning to view education and its role in their lives differently than in the past. When they are concerned about how education is being conducted, they now have new ways of using legal issues to present challenges. This is not to suggest that educators and education officials should fear lawyers but rather to suggest that we could all benefit from understanding the different ways people now view, and may challenge, policies and practices aimed at the reform of the education professions and how law is used to pursue different policy perspectives on education in our society.

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