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# The State of Education Reform in Rhode Island:

## Tangled Up in a Blue State

Anthony F. Cottone, Esq.\*

### INTRODUCTION

On February 17, 2009, the Commissioner of the Rhode Island Department of Elementary and Secondary Education directed the Superintendent of Schools for the Providence Public School Department (“PPSD”) to introduce “criterion-based hiring and job assignment processes” for teachers (the “CBH Directive”).<sup>1</sup> Although the Commissioner did not linger on precisely what he meant by “criterion-based” policies, he did make clear that these policies were to be “driven by student need rather than by

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1. See Letter from Peter McWalters, former R.I. Educ. Commissioner, to Thomas M. Brady, former Providence Sch. Superintendent at 3 (Feb. 17, 2009) (on file with author) [hereinafter CBH Directive]. Under the Providence Home Rule Charter (the “Charter”), the Superintendent serves at the pleasure of the School Board and acts as its administrative agent. See PROVIDENCE, R.I., HOME RULE CHARTER, art. 7, § 706(c), available at <http://library.municode.com/index.aspx?clientID=14446&stateID=39&statename=Rhode%20Island>, quoted, *infra*, at note 102.

seniority.”<sup>2</sup>

The Providence School Board viewed the deceptively simple directive as merely reflecting an existing mandate under the state’s Basic Education Program, and believed that compliance was within its management prerogative and thus not a proper subject for collective bargaining. On the other hand, the Providence Teachers Union, AFT Local 958, AFL-CIO (“PTU”), viewed the CBH Directive as a frontal attack upon seniority, one of its bedrock principles, which is enshrined throughout its collective bargaining agreement (“CBA”) with the School Board. Thus, the teachers union mounted a federal court challenge to the

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2. See CBH Directive, *supra* note 1, at 3. The section on Human Capital within the Basic Education Program Regulations promulgated by the Board of Regents for Elementary and Secondary Education, dated June 4, 2009, provides that:

Improving achievement requires recruitment of talented educators driven by strategic human capital management. Human capital management involves the practices of recruiting, developing, rewarding and retaining talented and demonstrably successful staff. The human capital management system enables the [Local Education Agency] to address the following functions: *Recruit, Support and Retain Highly Effective Staff; Use Information for Planning and Accountability*, and *Ensure Equity and Adequacy of Fiscal and Human Resources*. In order to effectively meet these functions, each LEA shall maintain control of its ability to recruit, hire, manage, evaluate, and assign its personnel.

Each LEA shall develop, implement, and monitor a human capital management system that is connected to its educational improvement strategy, and supports the people with the knowledge and skills necessary to execute that strategy. Human capital management systems shall adhere to standards and state regulations that relate to professional knowledge, skills, and competencies expected of all staff.

R.I. BD. OF REGENTS FOR ELEMENTARY & SECONDARY EDUC., BASIC EDUC. PROGRAM REGULATIONS, § G-15-2.2 (2009); see also Jennifer D. Jordan, *Teacher Contract Turmoil*, PROVIDENCE J., April 3, 2011, at A1. The literature on the efficacy of banning teacher staffing policies based solely upon seniority is mixed. Compare, e.g., JESSICA LEVIN, JENNIFER MULHERN & JOAN SCHUNCK, UNINTENDED CONSEQUENCES: THE CASE FOR REFORMING THE STAFFING RULES IN URBAN TEACHERS UNION CONTRACTS 32 (2005), available at <http://tntp.org/files/UnintendedConsequences.pdf> (school districts should eliminate all transfer provisions that require or allow voluntary transfers to be forced onto schools based upon seniority), with William S. Koski & Eileen L. Horng, *Facilitating the Teacher Quality Gap? Collective Bargaining Agreements, Teacher Hiring and Transfer Rules, and Teacher Assignment Among Schools in California*, 2 EDU. FIN. & POL’Y, 262, 262-300 (2007) (finding no effect).

School Department's "criterion-based" hiring and assignment policy within months of its promulgation.<sup>3</sup>

In fact, protracted disagreement over CBH and seniority-related issues created what would-be education reformers in Providence might describe as a perfect storm: they were a factor in the decisions to resign made by the City's Superintendent of Schools<sup>4</sup> and its School Board President,<sup>5</sup> and at least contributed to an environment in which the City's new mayor felt it necessary in February 2011 to preliminarily dismiss all 1934 teachers employed by the City,<sup>6</sup> just as the state's new governor was replacing the chairman and four members of the Board of Regents for Elementary and Secondary Education.<sup>7</sup> Indeed, ongoing conflict between the reform-minded School Board and the new Providence mayor concerning these issues was put to rest (at least temporarily) only after state-wide legislation was enacted transferring the "power and duty" to negotiate and "enter into" CBAs from the School Board to the Mayor.<sup>8</sup>

Yet, despite all the legal maneuvering, resignations, teacher dismissals and legislation, the question posed by the union's legal challenge to the CBH Directive, i.e., whether and to what extent a

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3. See Complaint, *Providence Teachers Union v. Brady*, C.A. No. 09-356 (D.R.I. July 17, 2009), ECF No. 1. Some of the same issues have been raised in a pending Superior Court action commenced by the Portsmouth School Committee. See *Portsmouth Sch. Comm. v. NEA Portsmouth*, C.A. No. PC 11-3239, slip op. at 1-2 (R.I. Super. Ct. Nov. 7, 2011), available at <http://www.courts.ri.gov/Courts/SuperiorCourt/DecisionsOrders/decisions/11-3239.pdf>. The issues were also touched upon in a case involving East Providence Schools. *E. Providence Sch. Comm. v. E. Providence Educ. Ass'n*, C.A. No. PB 09-1421, slip. op. at 3-4 (R.I. Super. Ct. Mar. 15, 2010), available at <http://www.courts.ri.gov/Courts/SuperiorCourt/DecisionsOrders/09-1421.pdf>. An appeal in the East Providence case is pending and is scheduled for argument before the Rhode Island Supreme Court this term. Both cases are discussed at *infra* Part I.A.

4. See Linda Borg, *Schools Chief Makes Rounds One Last Time*, PROVIDENCE J., July 16, 2011, at A1.

5. See Linda Borg, *School Board Leader Resigns*, PROVIDENCE J., July 12, 2011, at A1.

6. See Linda Borg, *Board Votes to Dismiss Teachers*, PROVIDENCE J., Feb. 25, 2011, at A1; see also *infra* Part I.B.

7. See Jennifer D. Jordan, *A New Start for Education Board*, PROVIDENCE J., Apr. 1, 2011, at A10.

8. See Act of June 21, 2011, Ch. 265, § 1, 2011 R.I. Gen. Laws Adv. Legis. Serv. (LexisNexis) (amending R.I. GEN. LAWS §16-2-9 (a)(18), (c)); see also *infra* at Part I.A.

state regulatory agency in Rhode Island can abrogate seniority principles enshrined in a teacher's contract, remains unanswered, at least as of this writing. The fundamental difference of opinion that prompted the union to call the question reflects a power struggle over whether seniority should continue to be the dominant factor controlling the manner by which teachers are hired and assigned in our public schools, a struggle which is taking place, in one form or another, in many urban communities across the nation which, like Providence, are attempting to cope with an alarming lack of school funding while at the same time coming to grips with the catastrophic failure of their public schools to actually educate children.<sup>9</sup>

Obtaining clarity with respect to seniority-related issues is

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9. See generally STEVEN BRILL, *CLASS WARFARE: INSIDE THE FIGHT TO FIX AMERICA'S SCHOOLS* (2011); DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM* (2010). Both books have been reviewed by the author. See Anthony F. Cottone, *Book Reviews*, R.I. B. J. (forthcoming 2012). Despite the fact that federal education funding to local schools has increased by some forty percent since 2001, Brill notes that "we're not just behind—way behind—countries like China, South Korea, and Japan, whose educated masses our media typically depict as threatening out competitiveness. We're also behind Estonia, Slovenia, Poland, Norway, New Zealand, Canada, and the Netherlands." BRILL, *supra* at 27 (citing a 2010 study of the International Organization for Economic Cooperation and Development). Brill adds that "our minorities and the poor rank so far below the low national average that they're basically at or near the bottom among the developed countries." *Id.* In addition, he claims "[w]e are now spending about 50 percent more per student than what other developed nations spend (and about 60 percent more than South Korea, for example), while our children continue to stagnate or fall farther behind." *Id.*

Unfortunately, Rhode Island's statistics, especially in its cities, are no exception. For example, based on up-to-date New England Common Assessment Program ("NECAP") results, in Providence—a district where 84% of students come from families with incomes at or below 185% of the federal poverty level, 45% of students come from non-English speaking households, and forty-seven distinct languages are spoken—49% of fourth graders were at or above proficiency levels for reading and 42% were at or above proficiency levels for math, as compared with 69% and 63% proficiency levels (for math and reading, respectively) statewide. Additionally, 44% of eighth graders in Providence were proficient in reading, and 25% in math, as compared with 74% and 54% statewide. See EDUCATION WORKING GROUP, *EDUCATE PROVIDENCE: A REPORT OF THE EDUCATION OPPORTUNITY WORKING GROUP 10* (2011), available at <http://providenceri.com/efile/1695>. In addition, Providence has a high school graduation rate of 68%, as compared with a statewide rate of 76%. *Id.* NECAP results are available at the RIDE website located at <http://www.ride.ri.gov/Assessment/Results.aspx>.

complicated by the frequent inability of arbitrators, hearing officers and judges to accurately identify issues that should be exempt from collective bargaining. Effectively distinguishing between issues that, in the words of the Rhode Island Supreme Court, involve “the essence of the educational mission,”<sup>10</sup> and those which, to quote a relevant Rhode Island labor statute, primarily “concern[] hours, salary, working conditions, and all other terms and conditions of professional employment,”<sup>11</sup> is made more difficult by the variety of interested stakeholders that may be involved in their resolution. Indeed, decision makers have struggled not only with the substantive distinction, but also with deciding which court, department, or agency should make it.

Part I of the article will recount recent events in Providence in some detail as they illustrate many of the structural roadblocks to meaningful education reform more poignantly than any merely theoretical legal discussion. Part II will explore the light recent events can shed on the central task of balancing a school board’s management rights and duties with its statutory duty to bargain collectively and comply with existing Collective Bargaining Agreements (“CBAs”), a task that likely will confront an increasing number of cities and towns throughout the state, as well as the Rhode Island Supreme Court.<sup>12</sup> Part III will explore how various stakeholders, as well as the federal and state courts, may become involved in resolving ongoing debates over public education policy. And finally, in Part IV, the article will make some concluding observations and suggestions.<sup>13</sup>

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10. See *N. Providence Sch. Comm. v. N. Providence Fed’n of Teachers*, 945 A.2d 339, 347 (R.I. 2008).

11. R.I. GEN. LAWS § 28-9.3-2 (2003).

12. See, e.g., *E. Providence Sch. Comm. v. E. Providence Educ. Ass’n*, C.A. No. PB 09-1421 (R.I. Super. Ct. Mar. 15, 2010), available at <http://www.courts.ri.gov/Courts/SuperiorCourt/DecisionsOrders/09-1421.pdf> (an appeal to the Rhode Island Supreme Court is currently pending).

13. The following acronyms and abbreviations will be used throughout the article: Rhode Island Board of Regents for Elementary and Secondary Education (“Board of Regents”), Basic Education Program (“BEP”), Basic Education Program Regulations (“BEP Regs”), City of Providence (“City”), Providence School Board (“PSB” or “School Board”), Providence Public School Department (“PPSD” or “School Department”), Providence Teachers Union, AFT Local 958, AFL-CIO (“PTU”), and Rhode Island Department of Elementary and Secondary Education (“RIDE”).

## I. THE RESPONSE TO AN EDUCATION CRISIS IN PROVIDENCE

In April 2009, the PPSD complied with the CBH Directive that had been issued by RIDE some three months earlier by promulgating a policy for the criterion-based hiring and assignment of teachers (the “PPSD CBH Policy”).<sup>14</sup> In order to understand this new CBH policy and appreciate the PTU’s reaction to its promulgation, one must have some understanding of the CBA between the parties.

Under the Providence CBA then in effect, an annual job fair was held by the PPSD each summer at which senior teachers had the right to occupy any teaching position held by a more junior teacher. As long as they were qualified, a senior teacher could “bump” a junior teacher from his or her position.<sup>15</sup> The ensuing annual cascade of bumping, as bumped junior teachers proceeded to bump even more junior teachers and so on, was an administrative nightmare and became a hot button issue among parents, who watched as popular junior teachers disappeared from their children’s schools. By contrast, the CBH Policy promulgated in 2009 eliminated bumping and provided that teachers would be hired pursuant to an interview process supervised by a hiring committee responsible for scoring applicants with reference to five teacher competencies.<sup>16</sup>

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14. The promulgated PPSD CBH Policy was approved by RIDE on March 25, 2009. See *City of Providence v. Providence Teachers Union*, C.A. No. PC 11-2526 (R.I. Super. May 3, 2011). The Plaintiffs’ memo seeking expedited review is available at <http://www.providenceschools.org/media/140345/dja%20memo%20support.pdf>.

15. See Collective Bargaining Agreement (expired) between the Providence School Board and the Providence Teachers Union arts. 8, 11-12 (June 28, 2004) (on file with author).

16. See Providence Public School Department, Mediated Criterion-Based Hiring Policy 7 (2011), available at <http://www.betterprovidence.org/wp-content/uploads/2011/09/CBH-Final-Mediated-Version-2.pdf> [hereinafter Mediated CBH Policy]. Under the Policy, applications are reviewed by the principal and a committee and given between one and twenty points on each of five teacher competencies: content knowledge and pedagogy, achievement, critical thinking, communication skills, and professional engagement. See *id.* at 18 n.vii.

### A. The PTU's First Federal Lawsuit and the Mediated CBH Policy

The PTU filed a complaint in federal court some three months after the PPSD CBH Policy was put into effect<sup>17</sup> and alleged that the CBH Directive had violated state labor law by in effect requiring that PPSD violate its CBA, which, as noted, made hiring decisions solely a function of seniority, a practice now prohibited by RIDE.<sup>18</sup> The City moved to dismiss the complaint for lack of federal jurisdiction, but before the jurisdictional issue could be decided the parties agreed to mediate and finally agreed on October 20, 2010 to submit a tentatively agreed upon version of a CBH policy (the "Mediated CBH Policy") to the PTU rank and file and School Board for possible ratification.

Under the Mediated CBH Policy, applicants for teaching positions would automatically be awarded a maximum ten out of a possible one hundred points solely on the basis of seniority, and the five most senior applicants for each position would have to be invited to interview, regardless of their scores.<sup>19</sup> In addition, a displaced PTU teacher would have the right to be placed in any vacant position for which he or she was qualified pursuant to a process designed to match teacher and principal preferences, to be conducted without external candidates *prior* to the commencement of the regular CBH hiring process.<sup>20</sup>

The School Board formally rejected the Mediated Policy and made clear its categorical objection to any form of bumping. Eventually, the Board approved a new policy of its own which did not include any scoring or other preferences based solely upon a teacher's seniority or a pre-CBH match process for displaced teachers.<sup>21</sup> Soon thereafter, the PPSD Superintendent, who had

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17. See Complaint, *supra* note 3, at 2.

18. See *id.* at 7 (citing R.I. GEN. LAWS § 28-7-1 to -49 (2003) and R.I. GEN. LAWS § 28-9.3-1 to -16 (2003)). In addition, the PTU alleged that the PPSD Superintendent and PSB had: (a) refused to negotiate as required under state law with respect to the implementation of the CBH Directive, and (b) violated the state's Teacher Tenure Act as well as the CBA by implementing the PPSD CBH Policy. See *id.* at 5-6.

19. See Mediated CBH Policy, *supra* note 16, at 7.

20. See *id.* at 12-13.

21. See Providence School Board, Resolution of August 17, 2011 (on file with author).

negotiated the Mediated CBH Policy, announced his resignation,<sup>22</sup> and collective bargaining between the PTU and the PSB broke down due (among other things) to the parties' inability to reach agreement with respect to the Mediated Policy.

B. The Mayor's Decision to Dismiss the Teachers and the City's Action for Declaratory Relief

In one of his first actions after being inaugurated in January of 2011, Mayor Angel Taveras (the "Mayor") signed an executive order creating a Municipal Finances Review Panel to "expeditiously review the current financial condition of all City departments," and to report its findings to the Mayor.<sup>23</sup> In its February 28, 2011 report, the Panel found that the City had a structural deficit of fifty-seven million dollars, as well as a fourteen million dollar operating deficit in its General Fund at the end of fiscal year 2010, an operating deficit that was largely attributable to cost overruns in school operations.<sup>24</sup>

Even before the Review Panel had published its report, the new City administration inferred that drastic measures, including school closures and/or teacher dismissals, would likely be necessary to deal with a financial crisis that increasingly appeared to be of unprecedented proportions. However, the administration was unable to make specific recommendations to the PSB or PTU concerning necessary savings (i.e., which specific schools would have to be closed and/or which specific teachers dismissed) until it fully understood the depths of the financial crisis and had, among other things, considered the specific recommendations of the Review Panel.

Thus, absent the information necessary to make informed decisions concerning specific school closings and teacher

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22. Borg, *supra* note 4, at A1. Differences of opinion between the PSB and the Superintendent relative to CBH created a challenge for attorneys from the City's Law Department, whose "client" was the School Board, but who by necessity took marching orders from the Superintendent. See generally Anthony F. Cottone, *Identifying the Municipal Client: Some Shelter from the Storm*, R.I. B. J., Jan.-Feb. 2011, at 11, 11.

23. See Mayor of Providence, Exec. Order No. 2011-2 Appointing a Municipal Finances Review Panel (Jan. 11, 2011), available at <http://cityof.providenceri.com/efile/453>.

24. See CITY OF PROVIDENCE, REPORT OF THE MUNICIPAL FINANCES REVIEW PANEL 1 (2011), available at <http://www.providenceri.com/efile/558>.

dismissals, it would appear that neither the PSB nor the City administration was able to “bargain” with the PTU during January and February of 2011. Indeed, it was this very lack of information which led the Mayor and the PPSD Superintendent to recommend to the PSB that it preserve all necessary financial options by complying with a somewhat arbitrary provision in the state Teachers’ Tenure Act (the “Tenure Act”),<sup>25</sup> which mandated that any teacher to be dismissed be provided with written notice of the planned dismissal by March 1 of the preceding year.<sup>26</sup> The PSB approved the recommendation on February 24, 2011 and preliminary dismissal notices were sent to each and every one of the City’s 1934 teachers the very next day.

From the outset, the Mayor made clear that the dismissal notices were preliminary in the sense that even in the worst of economic circumstances, the great majority would be rescinded, and in fact the Mayor and the PSB began bargaining with the PTU concerning the manner by which the bulk of the teachers would be recalled soon after the preliminary dismissal notices had been sent.<sup>27</sup> Nonetheless, on February 28, 2011—the same day

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25. R.I. GEN. LAWS §§ 16-13-1 to -8 (2001 & Supp. 2011).

26. *See id.* § 16-13-3(a). The Teachers’ Tenure Act provides that

Whenever a tenured teacher in continuous service is to be dismissed, the notice of the dismissal shall be given to the teacher, in writing, *on or before March 1st of the school year immediately preceding the school year in which the dismissal is to become effective.*

*Id.* (emphasis added). Although several courts have held that a *bona fide* economic exigency can constitute “good and just cause” for dismissal under the Tenure Act, see *infra* Part II, whether the Act’s March 1 notice provision would apply in an economic emergency of this nature (i.e., when time is of the essence) has not been decided. It should be noted, however, that RIDE has suggested that the Act’s strictures would apply. *See* Letter from RIDE Commissioner Deborah A. Gist to State Senator James C. Sheehan (March 8, 2011). In addition to a March 1 deadline, the Tenure Act also mandates that:

The statement of cause for dismissal shall be given to the teacher, in writing, by the governing body of the schools at least one month prior to the close of the school year. The teacher may, within fifteen (15) days of the notification, request, in writing, a hearing before the full board. The hearing shall be public or private, in the discretion of the teacher. Both teacher and school board shall be entitled to be represented by counsel and to present witnesses.

R.I. GEN. LAWS § 16-13-4(a). The PTU has consistently opposed amending the Tenure Act so as to remove the artificial March 1 deadline.

27. Although the City’s obligation to bargain prior to sending out the initial dismissal notices is unclear, there would seem to be little doubt that

that the Review Panel published its report and recommendations—the PTU filed an unfair labor practice charge (a “ULPC”) against the School Board, claiming that the Board had breached a duty to bargain *prior* to sending the dismissal notices.<sup>28</sup>

The PSB voted to recall almost eighty percent of the teachers on May 2, 2011 (the “PSB Rescission and Recall Plan”).<sup>29</sup> The City, still facing the uncertainty created by the PTU’s pending federal court action and its ULPC challenging the City’s right to dismiss *any* teachers, filed an action for declaratory relief in Superior Court seeking: (1) a ruling as to the legality of the PSB’s dismissal of some teachers and its Rescission and Recall Plan; and (2) a stay of the PTU’s ULPC.<sup>30</sup> The PTU responded by filing: (1) a motion to remove the case to federal court; and (2) a second action in federal court, alleging federal due process violations and seeking to enjoin the City from dismissing *any* teachers due to fiscal exigency.<sup>31</sup>

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the School Board did have an obligation to bargain collectively with PTU regarding the effect of the dismissal notices and the methodology of any rescissions or recalls. *See Providence Hosp. v. NLRB*, 93 F.3d 1012, 1018 (1st Cir. 1996).

28. *See* Complaint at 1, Providence School Board and Providence Teachers Union, AFT Local 958, R.I. SLRB Case No. ULP-6030 (February 28, 2011) (citing R.I. GEN. LAWS § 28-7-13 (6), (10) (2003)) (on file with author). The PTU later mailed an amended charge on March 18, 2011, which added the claim that by sending out the dismissal notices, the PSB had attempted to interfere with the PTU’s very existence. *See id.* (citing R.I. GEN. LAWS § 28-7-13(3) (2003)).

29. The remaining teachers were either informed of the process by which some of them might be recalled or considered on a case-by-case basis.

30. *See*, Plaintiffs’ Memorandum in Support of Their First Amended Verified Complaint and Expedited Motion to Stay Arbitration at 1, City of Providence, et al. v. Providence Teachers Union, C.A. No. PC 11-2526 (R.I. Super. Ct. June 17, 2011). The City argued that the CBA had expired as a matter of law almost a year prior, on August 31, 2010. The parties’ June 22, 2009 agreement purporting to extend the term of their CBA from three to four years, to August 31, 2011 (which was approved by the City Council on or about July 27, 2009 *as part of its approval of the original CBA*) was, the City claimed, in direct contravention of Rhode Island General Laws section 28-9.3-4, which expressly provides that “no contract shall exceed the term of three (3) years.” *Id.* at 5 (quoting R.I. GEN. LAWS § 28-9.3-4 (2003)); *see also* E. Providence Sch. Comm. v. E. Providence Educ. Ass’n, C.A. No. PB 09-1421, slip. op. at 18 (R.I. Super. Ct. Mar. 15, 2010) (CBA no longer binding after three years under Rhode Island General Laws section 28-9.3-4).

31. *See* Complaint, Providence Teachers Union v. Brady, C.A. No. 11-cv-

### C. Enter the General Assembly

Under these circumstances, the Mayor and/or the PTU—having failed to convince the School Board to modify its strict “no bumping” position and resume collective bargaining—turned to the General Assembly for assistance. A bill sponsored by Providence state senator Paul Jabour and others was quickly introduced in the General Assembly in June 2011, at the very end of the legislative session, that stripped appointed school boards like the PSB of various powers, including the power to negotiate and “enter into” CBAs, and transferred these powers to mayors.<sup>32</sup> The bill was quickly approved (without the benefit of a public hearing) and signed into law by the Governor (the “Jabour Act”).<sup>33</sup> The “power and duty to” negotiate and “enter into” CBAs, a “power and duty” which had resided with the School Board, was thus transferred to the Mayor.<sup>34</sup>

The School Board President responded to the hastily enacted new law by resigning.<sup>35</sup> The Mayor responded by hiring his own attorney and successfully negotiating a successor CBA with the PTU (the “2011 CBA”), which was to be effective through August 31, 2014 and which contained significant monetary concessions by the PTU.<sup>36</sup> Of course, the 2011 CBA also adopted the Mediated CBH Policy that had been expressly rejected by the School Board and retained other provisions in the expiring CBA which the Board indicated it had wanted to revise.<sup>37</sup> Significantly, the 2011

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182 (D.R.I. 2011).

32. See S. 1062, 2011 Gen. Assembly, Jan. Sess. (R.I. 2011).

33. See Act of June 21, 2011, Ch. 265, § 1, 2011 R.I. Gen. Laws Adv. Legis. Serv. (LexisNexis) (to be codified at R.I. GEN. LAWS §§ 16-1-19.1, -2-9, -7-29 (Supp. 2011)). By substituting the Mayor for the PSB in all relevant labor statutes, the legislation stripped the PSB of its power and duty to bargain with the teachers union. See *id.* The measure also removed from the PSB the power to implement certain optional plans to incentivize teacher retirements and a minimum salary schedule for certified personnel. See *id.* (amending R.I. GEN. LAWS §§ 16-1-19.1 and -7-29 (Supp. 2011)).

34. See R.I. GEN. LAWS §§ 16-2-9(a)(18), (c) (Supp. 2011).

35. See Borg, *supra* note 5, at A1. The resigning PSB President was quoted as saying that “she could no longer stand working in a system that is driven by politics, power and patronage, not what’s best for children.” *Id.*

36. See Linda Borg, *Tentative Teachers Contract Reached*, PROVIDENCE J., August 3, 2011, at A1.

37. Members of the PSB had consistently expressed the opinion that the teachers’ contract was too long and contained too many arcane procedural

CBA negotiated by the Mayor, which was ratified by the City Council on September 27, 2011,<sup>38</sup> also contained a clause that ostensibly mandated that for the next three years, no teacher in the City could be dismissed or laid off for reasons of “fiscal exigency.”<sup>39</sup>

## II. THE STATE’S “ESSENTIAL EDUCATIONAL MISSION” AND

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requirements, which impeded meaningful reform. Of course, these sentiments are not unique to Providence. As Brill notes, in New York City, the first teachers’ contract negotiated by Albert Shanker in 1962 was thirty-nine pages; by 1965 it was seventy-five pages; in 1969, the contract grew to 111 pages; by 1997, it was 185 pages, and there was a teachers’ manual four times thicker; and by 2002 it was 206 pages. BRILL, *supra* note 9, at 35-36, 75, 89. According to some commentators:

Today’s teacher collective bargaining agreements are vestiges of the industrial economic model that prevailed in the 1950s, when assembly-line workers and low-level managers were valued less for their knowledge or technical skills than for their longevity and willingness to serve loyally as a cog in a top-down enterprise. They are a harmful anachronism in today’s K-12 education system, where effective teachers are demanding to be treated as respected professionals and forward thinking leaders are working to transform schools into nimble organizations focused on student learning.

FREDERICK M. HESS & MARTIN R. WEST, *A BETTER BARGAIN: OVERHAULING TEACHER COLLECTIVE BARGAINING FOR THE 21ST CENTURY 2* (2010), available at <http://www.defendcharterschools.org/ABetterBargain.pdf>; see also EMILY COHEN, KATE WALSH & RISHAWN BIDDLE, *INVISIBLE INK IN COLLECTIVE BARGAINING: WHY KEY ISSUES ARE NOT ADDRESSED* (2008), available at [http://www.nctq.org/p/publications/docs/nctq\\_invisible\\_ink\\_20080801115950.pdf](http://www.nctq.org/p/publications/docs/nctq_invisible_ink_20080801115950.pdf). Brill notes that it is problematic that advancement in the occupation employing the second most people in the nation (apparently there are more retail sales clerks than teachers) is based upon one’s ability to breathe. *After Words with Steven Brill* (C-SPAN2 BookTV broadcast on August 1, 2011) (Diane Ravitch interviews Steven Brill), available at <http://www.c-spanvideo.org/program/300570-1>.

38. The brand new acting PPSD Superintendent signed the tentatively agreed-upon CBA at the Mayor’s request without having obtained the authority of the School Board. However, on September 26, 2011, the Board adopted a resolution stating that “[t]he PSB considers the action of the PPSD Superintendent in signing the August 3 CBA to be of no legal force or effect, and specifically rejects the suggestion that the Superintendent’s signature on the August 3 CBA in any way binds the PSB, the PPSD, or any other party.” See Providence School Board, Resolution of September 26, 2011 (on file with author).

39. See Agreement Between the Providence Teachers Union, AFT Local 958 and the Providence School Board, PROVIDENCE TEACHERS UNION, Art. 21 (effective Sept. 1, 2011 – Aug. 31, 2014), available at [www.proteun.org/CBA-9-1-11.pdf](http://www.proteun.org/CBA-9-1-11.pdf).

## COLLECTIVE BARGAINING

The fact that teachers perform a task which is qualitatively different from that of many other employees who have been afforded the right to collectively bargain explains, in part, why a teacher's right to engage in collective bargaining was not recognized in Rhode Island until the Michaelson Act became law in 1966,<sup>40</sup> some twenty years after the Rhode Island Labor Relations Act ("RILRA")<sup>41</sup> had extended the right to collectively bargain to other employees not covered by the National Labor Relations Act (the "NLRA").<sup>42</sup> Indeed, even after the right to collectively bargain had been extended to teachers, its application presented unique difficulties.

Under Rhode Island law, it is clear that "[c]ontracts entered into in contravention to a state statute . . . are illegal, and no contract rights are created thereby."<sup>43</sup> Thus, CBA provisions concerning items which are a part of the "essence of the educational mission of a school board" are not enforceable.<sup>44</sup> Stating the rule, however, has been a lot easier than applying it, especially considering the rather narrow view of school board

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40. See R.I. GEN. LAWS § 28-9.3-1 to -16 (2003). Teachers were afforded the right to collectively bargain "concerning hours, salary, working conditions, and all other terms and conditions of professional employment." *Id.* § 28-9.3-2.

41. See R.I. GEN. LAWS §§ 28-7-1 to -49 (2003 & Supp. 2011).

42. See 29 U.S.C. §§ 151-169 (2006). Employees exempted from the NLRA's coverage typically were employed by businesses that were not large enough to be deemed to affect interstate commerce.

43. See *Vose v. R.I. Bhd. of Corr. Officers*, 587 A.2d 913, 915 (R.I. 1991) (quoting *Power v. City of Providence*, 582 A.2d 895, 900 (R.I. 1990)) (alteration in original). In *Vose*, the court refused to enforce a CBA provision entered into between the Adult Correctional Institute and correctional officers, which prohibited mandatory overtime. The Court reasoned that "the agreement strips the director of his ability to '[m]ake and promulgate necessary rules and regulations incidental to the exercise of his or her powers [to provide for] . . . safety, discipline . . . care, and custody for all persons committed to correctional facilities.'" *Id.* at 915 (alteration in original).

44. See, e.g., *Woonsocket Teachers' Guild v. Woonsocket Sch. Comm.*, 770 A.2d 834, 838 (R.I. 2001) (school committee's duty to provide health services to students was non-delegable and thus committee had authority to a compel school nurse to dispense medication despite collective bargaining agreement language to the contrary); *Pawtucket Sch. Comm. v. Pawtucket Teachers' Alliance*, 652 A.2d 970, 972 (R.I. 1995) (upholding the right of the Pawtucket School Committee to require English as a Second Language Program teachers to submit lesson plans in derogation of a CBA).

management rights that has on occasion been adopted by the Rhode Island Supreme Court

For example, in *Belanger v. Matteson*, a faculty hiring committee, superintendent and school committee all approved the promotion of a teacher to the position of Business Department Head at Warwick Veterans Memorial High School.<sup>45</sup> Matteson, an unsuccessful candidate for the position who had more seniority, filed a grievance alleging that awarding the promotion to a less senior teacher violated the applicable CBA. After Belanger had been on the job for a year, a panel of arbitrators agreed with Matteson.<sup>46</sup> Belanger then grieved his demotion, arguing that the arbitrators had exceeded their authority as the hiring decision was within the management rights of the school committee and not a proper subject for a CBA. In the subsequent litigation, the Superior Court agreed with Belanger and vacated the arbitration award.<sup>47</sup> However, the Rhode Island Supreme Court reversed, holding that "the Warwick School Committee was well within its power when it agreed that its promotions of teachers could be subject to review by the arbitrators through the use of the grievance mechanism set forth in the [CBA]."<sup>48</sup> The *Belanger* Court noted that:

The legislative mandate for good-faith bargaining is broad and unqualified and we will not limit its thrust in the absence of an explicit statutory provision which specifically bars a school committee from making an agreement as to a particular term or condition of employment. When § 16-2-18 and the School Teachers' Arbitration Act are placed in their respective time frames, it is obvious that the tightfisted grip which a school committee in 1903 might have held over the day-to-day operations of its schools has been relaxed somewhat when, at its January 1966 session, the Legislature directed such committees to act as responsible public employers; otherwise the goal of affording the advantage of collective bargaining

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45. 346 A.2d 124, 127 (R.I. 1975).

46. *Id.* at 128.

47. *Id.* at 128-29.

48. *Id.* at 137.

procedures to this particular group of public employees could never be realized.<sup>49</sup>

Three years later, the New Jersey Supreme Court expressed the flip side of *Belanger* in *Ridgefield Park Education Association v. Ridgefield Park Board of Education*,<sup>50</sup> where the court noted that:

[P]ublic employees' special access to government applies only where the government is acting in the capacity of an employer, and not where it is acting in its capacity as public policymaker. A private employer may bargain away as much or as little of its managerial control as it likes . . . . However, the very foundation of representative democracy would be endangered if decisions on significant matters of governmental policy were left to the process of collective negotiation, where citizen participation is precluded. This Court would be most reluctant to sanction collective agreement on matters which are essentially managerial in nature, because the true managers are the people. Our democratic system demands that governmental bodies retain their

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49. *Id.* at 136-37 (emphasis added) (internal citation omitted); see also *Barrington Sch. Comm. v. R.I. State Labor Relations Bd.*, 388 A.2d 1369, 1373-75 (R.I. 1978). In *Barrington*, the Court, while giving lip service to the basic principle that certain matters of education policy were not subject to collective bargaining, nonetheless upheld the SLRB's conclusion that the school committee had a duty to bargain with the union before unilaterally eliminating eleven departmental chairmanships and abolishing the position of athletic director. *Id.* at 1375. The Court noted that:

While we postulate no general rule, in the circumstance here we conclude that the abolition of the 12 department chairmanships is not completely a matter of educational policy but is an appropriate matter for negotiating or bargaining concerning the effect on the individual teachers involved. In addition, to require the committee to bargain about the matter at issue would not in our opinion significantly abridge its freedom to manage and control the school system. We do not mean that the union should be able to dictate to the committee on matters strictly within the province of management. What we do say is that when, as here, the problem involved concerns both a question of management and a term or condition of employment, it is the duty of the committee to negotiate with the teachers involved.

*Id.*

50. 393 A.2d 278 (N.J. 1978).

accountability to the citizenry.<sup>51</sup>

More recently, the Rhode Island Supreme Court has at least suggested that it may be willing to modify the narrow concept of non-delegable school board management rights it articulated in *Belanger*. For example, in *North Providence School Committee v. North Providence Federation of Teachers*,<sup>52</sup> the Court considered a school committee's challenge to an arbitrator's award in a dispute involving the need to provide English teachers with "composition periods."<sup>53</sup> Although the Court eventually concluded that the issue was in fact arbitrable and affirmed the arbitrator's decision in favor of the union,<sup>54</sup> it also affirmed the "basic rule of law that school committees are not at liberty to bargain away their powers and responsibilities with respect to the essence of the educational mission."<sup>55</sup> The *North Providence* Court noted that it was "figuratively standing on the banks of the Rubicon," and that "a very strong argument can be made that a decision about having or not having a composition period for teachers of English is directly related to the essence of the educational mission and is therefore non-arbitrable."<sup>56</sup>

Significantly, the *North Providence* Court based its holding upon the fact that the school committee had "opted to ground the abolition of the composition period primarily on a fiscal

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51. *Id.* at 287; see also *Bd. of Directors of Me. Sch. Admin. Dist. No. 36 v. Me. Sch. Admin. Dist. No. 36 Teachers Ass'n*, 428 A.2d 419, 422 (Me. 1981) (school board cannot lawfully delegate its statutory responsibility for choosing teachers in a CBA); *Sch. Comm. of Holbrook v. Holbrook Educ. Ass'n*, 481 N.E.2d 484, 488 (Mass. 1985) (holding that an arbitrator impermissibly usurped the powers and responsibilities granted to the superintendent and school committee when ordering the school district to recall a more senior teacher to the position of school counselor); *Sch. Comm. of Springfield v. Springfield Adm'rs' Ass'n*, 628 N.E.2d 33, 34 (Mass. App. Ct. 1994) ("[A] school committee may not be relieved of—indeed it may not bargain away—its statutory responsibility . . . to appoint teachers and managers of teachers, such as a principal.").

52. 945 A.2d 339 (R.I. 2008).

53. See *id.* at 341.

54. *Id.* at 347.

55. *Id.* The Court added that, "[i]t goes without saying that statutory duties that are specifically imposed upon school committees by law (and activities closely associated therewith) may not be made the subject of the arbitral process." *Id.* at 346 n.12.

56. *Id.* at 347.

rationale.”<sup>57</sup> Perhaps as significantly, in a seeming departure from the requirement in *Belanger* that any abrogation of duties imposed by the law of collective bargaining be supported by “an explicit statutory provision which specifically bars a school committee from making an agreement as to a particular term or condition of employment,”<sup>58</sup> the Court has also noted (albeit in *dicta*) that “[e]ven in the absence of . . . specific statutory mandates . . . school committees are vested with a plethora of powers and responsibilities that relate to the essence of the educational mission that may not be bargained away.”<sup>59</sup>

Of course, the notion that there is an undefined area of school board management rights which cannot be bargained away has never been enthusiastically embraced by teachers unions, which have a vested interest in opposing certain types of education reform that necessarily thin the ranks of their members.<sup>60</sup> Although the state’s preemption of the field of education suggests

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57. *Id.* Indeed, the court’s consistent use of the term “essence” when distinguishing matters that are within a school board’s “educational mission” at least suggests that there is some relevant distinction between essential and non-essential matters relating to educational policy. However, no such distinction is reflected in the statute, which confers jurisdiction over educational policy upon school committees. See R.I. GEN. LAWS § 16-2-9(a)(2), (6), (14), (19), (20) (Supp. 2011).

58. *Belanger v. Matteson*, 346 A.2d 124, 136-37 (R.I. 1975).

59. *N. Providence Sch. Comm.*, 945 A.2d at 346 n.12.

60. As early as 1969, in an official statement given to the Advisory Commission on Intergovernmental Relations, as quoted in *National Education Association of Shawnee Mission v. Board of Education*, 512 P.2d 426, 434 (Kan. 1973), the National Education Association (“NEA”) declared that:

It is our position that private sector definitions are unduly restrictive when applied to teacher-school board negotiation. We believe that a teacher, having committed himself to a career of socially valuable service and having invested years in preparation . . . has a special identification with the standards of his “practice” and the quality of the service provided to his “clientele.” As a result of this identification, teachers characteristically seek to participate in decision-making in respect to teaching methods, curriculum content, educational facilities and other matters designed to change the nature or improve the quality of the educational service being given to the children, and they see negotiation as the vehicle for such participation. Accordingly, we propose that a broad and somewhat open-ended definition of scope of negotiation be adopted . . . [namely in regard to] “. . . *matters of mutual concern.*”

*Id.* (emphasis added) (citation omitted).

that RIDE should be afforded wide latitude by the courts when defining management rights,<sup>61</sup> it often is difficult to determine whether any given CBA provision constitutes a violation of the BEP in the absence of a specific implementing order or decision, which, somewhat understandably, RIDE has been reluctant to provide. And teachers unions are well aware that often the most effective way to prevent a district from implementing a reform is to effectively prohibit the reform in obscure CBA language, and then characterize its attempted implementation as an unfair labor practice and bog down the often cash-strapped and underperforming urban school district in the seemingly endless mediation and arbitration processes that characterize dispute resolution in the labor field.

In *Portsmouth School Committee*, the Committee asked RIDE for an opinion as to the legality of its newly-adopted CBH policy ("Policy 4111"), which empowered the Superintendent and Committee to select and appoint school department personnel without significant input from the teachers union, and without reference to the strict seniority provisions in the applicable CBA.<sup>62</sup> The union had filed a ULPC alleging that the Committee had failed to bargain prior to implementing the new policy.<sup>63</sup> When it did not receive a response from RIDE, the School Committee filed a complaint in Superior Court seeking an injunction to prevent the SLRB from deciding the ULPC on the ground that the charge

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61. For example, RIDE insists that CBA provisions that conflict with the BEP or with RIDE orders or directives interpreting the BEP are unenforceable as a matter of law. As noted by RIDE Commissioner Gist following recent amendments to the BEP:

On July 1, 2010, the BEP will become law in the state of Rhode Island. As such, the requirements of the BEP will effectively be read into every collective-bargaining agreement entered into after that date. Contract language cannot conflict with existing state law, including regulations, and contract language that conflicts with existing law may be unenforceable.

*See* Memorandum from RIDE Commissioner Deborah A. Gist to her colleagues regarding Basic Education Regulations and Seniority-Based Teacher Assignments (Oct. 20, 2009), *available at* <http://www.ride.ri.gov/Commissioner/news/advisories/2009/bep%20regulations%20and%20seniority-based%20teacher%20assignments.pdf>.

62. *Portsmouth Sch. Comm. v. NEA Portsmouth*, C.A. No. PC 11-3239, slip op. at 2 (R.I. Super. Nov. 7, 2011), *available at* <http://www.courts.ri.gov/Courts/SuperiorCourt/DecisionsOrders/decisions/11-3239.pdf>.

63. *Id.*

required the SLRB to act outside its jurisdiction and “determine the scope of the School Committee’s authority under Title 16.”<sup>64</sup>

Although the court in *Portsmouth School Committee* recognized that “there exists a substantial gray area between the black of educational policy, and the white of bargainable employment issues,”<sup>65</sup> it was not a gray area into which the court wanted to venture. Instead, relying upon the narrow formulation of management rights in *Belanger*, the court granted the union’s motion to dismiss, holding that “[t]he term ‘educational policy’ is not a talisman for the avoidance of the obligation to collectively bargain,”<sup>66</sup> and “declin[ing] the School Committee’s invitation to declare, as a matter of law, that the authority granted to the School Committee by law in educational policy matters brings the adoption of Policy 4111 outside the category of mandatory subjects of collective bargaining.”<sup>67</sup>

The outcome in *Portsmouth School Committee*, which has been appealed, was in certain respects a function of RIDE’s refusal to exercise its jurisdiction under Title 16. After all, the court made clear that it “value[d] an agency’s specialized understanding of a particular area of the law,”<sup>68</sup> a comment which could be read as pertaining to RIDE’s refusal to exercise jurisdiction as well as to SLRB’s labor law expertise.

Interestingly, the decision in *Portsmouth School Committee* is at odds with an advisory opinion issued by RIDE’s Commissioner at the request of the Lincoln School Committee, which had adopted a professional and support hiring policy after its CBA had expired and it was unable to reach agreement with the teachers union.<sup>69</sup> In the Lincoln Advisory Opinion, which was issued the very same day as the Superior Court’s decision in *Portsmouth School Committee*, Commissioner Gist noted that school committees should “develop, implement and monitor” policies and procedures for “recruitment, hiring and retention of school

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64. *Id.* at 3.

65. *Id.* at 10.

66. *Id.* at 9.

67. *Id.*

68. *Id.* at 7.

69. See Formal Legal Advisory Opinion from RIDE Commissioner Deborah A. Gist at the Request of Lincoln School Committee (Nov. 7, 2011), available at <http://www.ride.ri.gov/Commissioner/news/advisories/default.aspx> (the “Lincoln Advisory Opinion”).

staff . . . independently of the collective bargaining process,”<sup>70</sup> and concluded that “staffing decisions relating to providers of instructional services are vested in the non-delegable managerial responsibilities of the school district.”<sup>71</sup>

The analysis is perhaps simpler when a specific statutory mandate, such as the requirement that school boards and committees maintain a balanced budget, is involved.<sup>72</sup> For example, in a recent case involving East Providence, which also is on appeal as of this writing, the school committee made certain unilateral changes to the salary and benefits of teachers after the applicable three-year CBA had expired.<sup>73</sup> The union immediately filed a ULPC with the SLRB alleging that the school committee had failed to bargain in good faith, and argued that in any event, the committee did not have the authority to unilaterally alter provisions in the CBA following impasse.<sup>74</sup> In response, the school committee filed a declaratory judgment action in Superior Court seeking a declaration that its actions had been dictated by the statutory imperative that it balance its budget.<sup>75</sup>

The Superior Court, while leaving it to the SLRB to decide whether the school committee had bargained in good faith following the expiration of the CBA, found that the committee was in fact facing an actual budget deficit<sup>76</sup> and held that: (1) “a determination of what actions are lawful and possibly even required under § 16-2-9(d) falls outside the jurisdiction to determine unfair labor practices afforded to the SLRB under Chapter 28”;<sup>77</sup> and (2) the school committee had acted lawfully in

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70. *Id.* at 2-3.

71. *Id.* at 7.

72. See R.I. GEN. LAWS § 16-2-9(d) (2001) (“The school committee of each school district shall be responsible for maintaining a school budget which does not result in a debt.”); see also *Sch. Comm. of Cranston v. Bergin-Andrews*, 984 A.2d 629, 644 (R.I. 2009) (“[I]t is clear that the General Assembly intended school committees to amend their budgets, request waivers, and request additional appropriations from their host municipalities at the first indication of a possible or actual deficit.”).

73. *E. Providence Sch. Comm. v. E. Providence Educ. Ass’n*, No. PB/09-1421, slip. op. at 3 (R.I. Super. Ct. Mar. 15, 2010), available at <http://www.courts.ri.gov/Courts/SuperiorCourt/DecisionsOrders/09-1421.pdf>.

74. *Id.*

75. *Id.* at 3, 4-5.

76. See *id.* at 16.

77. *Id.* at 18.

unilaterally changing the terms and conditions of the teachers' employment after the CBA had expired.<sup>78</sup>

As to the state of affairs in Providence, it would appear that *dicta* in *East Providence* and *North Providence* would support the notion that the clause in Providence's 2011 CBA prohibiting teacher dismissals and layoffs actuated by fiscal exigency would be held to be unenforceable in most situations, if not facially invalid. After all, the facts surrounding most actions attempting to enforce the clause likely would involve the same statutory and similar charter prohibitions against school budget deficits implicated in *East Providence*. Moreover, if the Rhode Island Supreme Court felt in *North Providence* that it was "figuratively standing on the banks of the Rubicon" when faced with the loss of a composition period for English teachers,<sup>79</sup> it is hard to see how it would not feel that the Rubicon had been crossed were it to uphold a clause with a blanket prohibition on a school board dismissing or laying off *any* teachers for *any* reason related to "fiscal exigency," especially since it appears that "fiscal exigency" constitutes a "good and just cause" for the outright dismissal of a tenured teacher under the Tenure Act.<sup>80</sup>

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78. *Id.* at 17-18. However, it is important to note that in *East Providence*, the unilateral changes made by the school committee were made only *after* the parties had engaged in the mediation and arbitration procedures mandated by Title 28, and by their very nature necessarily involved the expenditure of money, thus falling outside an arbitrator's enforcement jurisdiction under statutorily-mandated impasse procedures. *See id.* at 14, 17-18. *Cf.* Local 732 of the Int'l. Ass'n of Firefighters v. City of Woonsocket, No. 09-947, 2009 R.I. Super. LEXIS 161, at \*45 (R.I. Super. Ct. Mar. 4, 2009) (denying a union's motion for an injunction to prevent layoffs and unilateral salary and benefit reductions during a fiscal crisis).

79. *See* N. Providence Sch. Comm. v. N. Providence Fed'n of Teachers, 945 A.2d 339, 347 (R.I. 2008).

80. *See* Clifford v. Board of Regents, No. PC 83-4787, 1987 WL 859783, at \*4 (R.I. Super. Ct. Aug. 20, 1987) (bona fide financial exigency constitutes good and just cause under the Tenure Act); Stiefer v. New Shoreham Sch. Comm., No. C.A. 78-843, 1980 WL 336047, at \*6 (R.I. Super. Ct. Feb. 21, 1980) ("[E]conomic conditions would be a 'good and just cause' even for a tenured teacher's contract to be terminated."). It also seems unlikely that the clause would be held applicable to dismissals of teachers pursuant to a RIDE mandated and approved intervention model at designated persistently low-achieving schools, since, as will be discussed, neither RIDE's designation of a PLA School, nor any resulting teacher displacement, would be premised upon "fiscal exigency," but would likely be held to have been for other "good and just cause" under the Tenure Act. *See infra* Part III.B.

In *East Providence*, the Superior Court also held that the expired CBA “was no longer binding,”<sup>81</sup> citing *Litton Financial Printing Division v. NLRB*.<sup>82</sup> In *Litton*, the United States Supreme Court set forth and approved the unilateral change doctrine, which has been recognized *in dicta* by the Rhode Island Supreme Court.<sup>83</sup> In essence, the doctrine provides that an employer can make a unilateral change to an existing term or condition of employment spelled out in an expired CBA, as long as the employer has first bargained to impasse.<sup>84</sup> Of course, *Litton* did not involve the public sector and must be read against the backdrop of statutory impasse procedures binding school boards in Rhode Island, which, somewhat counter-intuitively, results in an arbitration process *that is only enforceable as to non-economic items*.<sup>85</sup>

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81. *E. Providence Sch. Comm.*, No. PB/09-1421, slip op. at 15.

82. 501 U.S. 190, 206 (1991).

83. See *Providence Teachers Union v. Providence Sch. Bd.*, 689 A.2d 388, 393 n.2 (R.I. 1997).

84. See *Litton*, 501 U.S. at 199.

85. R.I. GEN. LAWS § 28-9.3-9(c)-(d) (2003). This statute provides that

(c) In the event that the negotiating or bargaining agent and the school committee are unable within ten (10) days of the scheduled close of school in June of the last year of the contract in effect to reach an agreement on a contract, any and all unresolved issues shall be submitted to the director of labor and training for compulsory mediation. . . . [and]

(d) If the parties cannot mutually agree upon a mediator within twenty-four (24) hours, the director of labor and training shall select a mediator from a panel previously established by the director comprised of persons knowledgeable in the field of labor management relations to mediate the dispute. The department of labor and training is empowered to compel the attendance of all the parties to any and all meetings it deems necessary until the dispute is resolved.

Read literally, section 28-9.3-9(d) would seem to empower the SLRB to compel mediation indefinitely, but such a reading would render the arbitration provisions superfluous. If mediation fails, either party may request arbitration before a three-arbitrator panel, with each side selecting an arbitrator and with the third (neutral) selected by the other two. See *id.* § 28-9.3-10. The arbitrators are required to hold a preliminary hearing within ten (10) days after their appointment. See *id.* § 28-9.3-11(a). The final hearing “shall be concluded within twenty (20) days of the time of commencement, and within ten (10) days after the conclusion of the hearings, the arbitrators shall make written findings and a written opinion upon the issues presented . . . .” *Id.* § 28-9.3-11(d). Finally,

In *East Providence*, however, the court did not have to determine whether there even was a duty to bargain following the CBA's expiration, although imposing such a duty would seem problematic with respect to terms that were statutorily mandated or otherwise outside the realm of collective bargaining. In any event, it is clear under Rhode Island law that a failure to bargain claim must be premised upon a *refusal* to bargain, and therefore a timely request for bargaining is a condition precedent to liability.<sup>86</sup> What is less clear is what specific items constitute mandatory, permissive, or prohibited items of collective bargaining, especially in the context of public education.<sup>87</sup>

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The decision of the arbitrators shall be made public and shall be binding on the certified public school teachers and their representative and the school committee on all matters *not involving the expenditure of money*; provided, that nothing contained in this section shall prevent the representative of the certified public school teachers and the school committee from mutually agreeing to submit all unresolved issues to binding arbitration pursuant to the procedures set forth in §§ 28-9.3-10—28-9.3-12.

*Id.* § 28-9.3-12 (emphasis added).

86. *Id.* § 28-9.3-4 ("It shall be the obligation of the school committee to meet and confer in good faith with the representative or representatives of the negotiating or bargaining agent *within ten (10) days after receipt of written notice from the agent of the request for a meeting for negotiating or collective bargaining purposes*. This obligation includes the duty to cause any agreement resulting from negotiation or bargaining to be reduced to a written contract; *provided, that no contract shall exceed the term of three (3) years*. An unfair labor practice charge may be complained of by either the bargaining agent or the school committee to the state labor relations board which shall deal with the complaint in the manner provided in chapter 7 of this title") (emphasis added); *see also id.* § 28-7-13.1 (premiering liability upon a *refusal* to bargain). For example, in *Town of Burrillville v. Rhode Island State Labor Relations Board*, the chief of police promulgated a general order containing several procedural changes to the process by which police officers applied for injured-on-duty benefits. 921 A.2d 113, 116-17 (R.I. 2007). The chief met with the union president and showed him the proposed general order one week prior to its implementation. *Id.* at 116. The union president claimed that he had made no request to bargain because he had assumed that the parties would have additional discussions prior to implementation, and filed an ULPC. *See id.* at 116-17. In reversing the SLRB's finding that the town had committed an unfair labor practice by failing to bargain with the union prior to implementing the general order, Justice Robinson noted that "[a] union must do more than merely protest the proposed change or file an unfair labor practice action in order to preserve its right to bargain; a union must affirmatively advise the employer of its desire to engage in bargaining." *Id.* at 120.

87. *See, e.g., Barrington Sch. Comm. v. R.I. State Labor Relations Bd.,*

The Rhode Island Supreme Court frequently has looked to the federal courts for guidance in the area of labor law,<sup>88</sup> and two United States Supreme Court cases—*First National Maintenance Corp. v. NLRB*<sup>89</sup> and *Fibreboard Paper Products Corp. v. NLRB*<sup>90</sup>—are occasionally cited by Rhode Island litigants arguing over whether an item is suitable for collective bargaining. In *First National Maintenance Corp.*, the employer, First National Maintenance Corp. (“FNM”), was unable to agree on the terms for the renewal of a maintenance contract with a third party, Greenpark Care Center.<sup>91</sup> As a result, FNM’s unionized employees who had been working at Greenpark were summarily discharged.<sup>92</sup> The union filed a ULPC against FNM under the NLRA alleging that it had breached its duty to negotiate with the union before discharging the employees.<sup>93</sup> The *First National Maintenance Corp.* Court noted that although

Congress did not explicitly state what issues of mutual concern to union and management it intended to exclude from mandatory bargaining . . . [n]onetheless, in view of an employer’s need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of

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388 A.2d 1369 (R.I. 1978). Recent legislative efforts to curtail the bargaining rights of public sector labor unions in other states have varied. Some have been limited to purely economic items, such as employee contributions to health care and cost-of-living adjustments. See, e.g., N.J. S. No. 2937, Assembly No. 4133, 214th Leg. (N.J. 2011); Assembly Bill 11, 2011-2012 Leg., Jan. 2011 Spec. Sess. (Wis. 2011). Others have been broader in scope. See Amend. Sub. S. Bill No. 5, 129th Gen. Assembly (Ohio 2011) (allowing management to refuse to negotiate on items such as employee qualifications and work assignments, the number of workers to be employed or on duty, and the use of certain safety equipment).

88. As the Rhode Island Supreme Court noted, “[i]n the past, in view of the parallels between our state system of labor regulations and the federal system, we have recognized the persuasive force of federal cases which have construed the phrase ‘terms and conditions of employment.’” *Barrington School Comm.*, 388 A.2d at 1374-75 (citing *Narragansett v. Int’l Ass’n of Fire Fighters, Local 1589*, 380 A.2d 521 (R.I. 1977); *E. Providence v. Local 850, Int’l Ass’n of Firefighters*, 366 A.2d 1151 (R.I. 1976); *Belanger v. Matteson*, 346 A.2d 124 (R.I. 1975)).

89. 452 U.S. 666 (1981).

90. 379 U.S. 203 (1964).

91. 452 U.S. at 668-69.

92. *Id.* at 669.

93. *Id.* at 675-77.

employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.<sup>94</sup>

*First National Maintenance Corp.* can be contrasted with *Fibreboard* in which the court held that a manufacturer-employer was required to bargain with its unionized employees before contracting out its maintenance operation.<sup>95</sup>

The problem with analogizing these federal cases involving the private sector to local cases involving public education (and it is a serious problem) is that the policy objectives counterbalancing the goals of the applicable labor law in these federal cases, (i.e., economic profitability, or more broadly, the efficient functioning of free markets in the private sector) bear slight resemblance to the “essential educational mission” of local school boards. In short, courts faced with the task of defining the contours of collective bargaining by separating items that are part of the “essential

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94. *Id.* at 679 (footnote omitted); *see also* *Pan Am. Grain Co. v. NLRB*, 558 F.3d 22, 26-27 (1st Cir. 2009) (applying the *First National Maintenance Corp.* balancing test); *Keystone Steel & Wire v. NLRB*, 606 F.2d 171, 178 (7th Cir. 1979) (determinations made on a case-by-case basis and hinge upon whether the subject matter will have a “material or significant effect or impact upon a term or condition of employment”). As the First Circuit noted in *Pan American Grain*:

Evaluating the scope of mandatory subjects of bargaining, the Supreme Court identified three categories of management decisions in *First National Maintenance Corp.* Decisions that affect the employment relationship only tangentially, such as advertising and product design, are not mandatory subjects of bargaining. Decisions directly affecting the relationship—wages, working conditions, and the like—are mandatory subjects of bargaining. This requirement ensures that when an employer aims to reduce labor costs, employees are presented with the opportunity to negotiate concessions that reduce overall costs and thus spare jobs.

*Pan Am. Grain*, 558 F.2d at 26-27 (citations omitted).

95. *Fibreboard Paper Prod. Corp.* 379 U.S. at 209. Despite the breadth of some of the language in *Fibreboard*, “[c]ourts have consistently refused to extend the duty to bargain recognized in *Fibreboard* to analogous management decisions which are more central to management’s autonomous control over the direction of the business’ operations.” *Int’l Ass’n of Machinists & Aerospace Workers v. Ne. Airlines, Inc.*, 473 F.2d 549, 556 (1st Cir. 1972). In *Northeast Airlines*, the First Circuit suggested that it would not apply a duty to bargain in the context of a merger or the sale of a business. *Id.* at 557.

educational mission” of a school board from those which are “mandatory” or “permissive” “terms and conditions of professional employment”<sup>96</sup> should be wary of mechanically applying law created in private sector cases where employers have not been tasked with educating children.

### III. THE DIVISION OF POWER OVER EDUCATION POLICY

Rhode Island law pertaining to the control and management of its public schools can be described as Madisonian, at least with respect to the manner by which power is divided. The Rhode Island Constitution, while expressly recognizing the right of cities and towns to home rule,<sup>97</sup> also expressly provides that “it shall be the duty of the general assembly to promote public schools . . . and to adopt all means which it may deem necessary and proper to secure to the people the advantages and opportunities of education.”<sup>98</sup>

Pursuant to this constitutional grant of authority, the General Assembly in 1983 directed the Board of Regents to “adopt regulations for determining the basic education program and the maintenance of local appropriation to support the basic education program” in the state.<sup>99</sup> Thus, the Board of Regents promulgated the BEP, which expressly provides that each local education agency (“LEA”)<sup>100</sup> “shall ensure that its schools are compliant with the BEP, as well as with all other requirements related to student achievement as measured by state and local assessments.”<sup>101</sup> Yet, while affording the Board of Regents sweeping power over education policy, the Rhode Island Legislature simultaneously vested the “entire care, control, and management of all public school interests of the several cities and towns . . . in the school

96. R.I. GEN. LAWS § 28-9.3-2 (2003).

97. R.I. CONST. art. XIII, § 1.

98. *Id.* art. XII, § 1.

99. *See* Sch. Comm. of Johnston v. Santilli, No. Civ.A. 04-6801, 2005 WL 1023070, at \*2 n.4 (R.I. Super. Ct. Apr. 27, 2005) (citing R.I. GEN. LAWS § 16-7-24) *appeal dismissed as moot* 912 A.2d 941 (R.I. 2007).

100. The BEP’s definition of LEA is broad enough to include both the PSB and the PPSD. *See* R.I. DEPT. OF ELEMENTARY AND SECONDARY EDUC., BASIC EDUCATION PROGRAM REGULATIONS 44 (2009). The BEP encompasses hundreds of pages of regulations covering everything from minimum classroom hours to nutrition.

101. *Id.* at 6.

committees of the several cities and towns.”<sup>102</sup>

#### A. School Boards and State Preemption

In Providence, the school board—one of two appointed (as opposed to elected) school boards in the state—has nine members, all of whom are appointed by the Mayor.<sup>103</sup> The Board has broad power over education policy and procedure, a function of both state statute as well as the City Charter.<sup>104</sup> However, as noted,

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102. R.I. GEN. LAWS § 16-2-9(a) (Supp. 2011). These broad powers are often reflected in various Home Rule Charters. For example, under the Providence Charter, the PSB is empowered:

- (a) To determine and control all policies affecting the administration, maintenance and operation of the public schools;
- (b) To provide rules and regulations for the use, operation and maintenance of public school properties;
- (c) To appoint a superintendent of schools to serve as the chief administrative agent of the school board;
- (d) To establish the compensation for said superintendent; [and]
- (e) To appoint and remove all school department employees and fix their salaries within limits established by appropriation of the city council for the school department.

PROVIDENCE HOME RULE CHARTER, *supra* note 1, § 706.

103. *See id.* § 701.

104. R.I. GEN. LAWS § 16-2-9 (2001 & Supp. 2011), entitled “General powers and duties of school committees,” provides, in pertinent part, that “[t]he entire care, control, and management of all public school interests of the several cities and towns shall be vested in the school committees of the several cities and towns.” *Id.* § 16-2-9(a). The statute also expressly empowers the Board:

- (1) To identify educational needs in the community.
- (2) To develop education policies to meet the needs of the community.
- (3) To provide for and assure the implementation of federal and state laws, the regulations of the board of regents for elementary and secondary education, and of local school policies, programs, and directives.
- (4) To provide for the evaluation of the performance of the school system.
- (5) To have responsibility for the care and control of local schools.
- (6) To have overall policy responsibility for the employment and discipline of school department personnel.
- (7) To approve a master plan defining goals and objectives of the school system. These goals and objectives shall be expressed in terms of what men and women should know and be able to do as a result of their educational experience. The committee shall periodically

evaluate the efforts and results of education in light of these objectives.

(8) To provide for the location, care, control, and management of school facilities and equipment.

(9) To adopt a school budget to submit to the local appropriating authority.

(10) To adopt any changes in the school budget during the course of the school year.

(11) To approve expenditures in the absence of a budget, consistent with state law.

(12) To employ a superintendent of schools and assign any compensation and other terms and conditions as the school committee and superintendent shall agree, provided that in no event shall the term of employment of the superintendent exceed three (3) years. Nothing contained in this chapter shall be construed as invalidating or impairing a contract of a school committee with a school superintendent in force on May 12, 1978.

(13) To give advice and consent on the appointment by the superintendent of all school department personnel.

(14) To establish minimum standards for personnel, to adopt personnel policies, and to approve a table of organization.

(15) To establish standards for the evaluation of personnel.

(16) To establish standards for conduct in the schools and for disciplinary actions.

(17) To hear appeals from disciplinary actions.

(18) To enter into contracts; provided, however, that notwithstanding any other provision of the general or public laws, whether of specific or general application, and notwithstanding the provisions of any charter of any municipality where the school committee is appointed and not elected, but not including, the Central Falls school district board of trustees established by § 16-2-34, the power and duty to enter into collective bargaining agreements shall be vested in the chief executive officer of the municipality and not in the school committee.

(19) To publish policy manuals which shall include all school committee policies.

(20) To establish policies governing curriculum, courses of instruction, and text books.

(21) To provide for transportation services which meet or exceed standards of the board of regents for elementary and secondary education.

(22) To make any reports to the department of education as are required by the board of regents for elementary and secondary education.

(23) To delegate, consistent with law, any responsibilities to the superintendent as the committee may deem appropriate.

local school boards like the PSB must comply with the BEP,<sup>105</sup> and state control over education policy is not limited to the BEP.

Over a decade ago, the Board of Regents, collaborating with teachers, parents, community agencies, administrators and policy makers throughout the state, developed a “comprehensive education strategy” (the “CES”). Aspects of the CES, including a system for “school accountability for learning and teaching” (“SALT”), were then enacted into law in 1997.<sup>106</sup> In 2002, Rhode Island implemented the New England Common Assessment Program (the “NECAP”) to determine which schools and districts within the state were falling behind so-called adequate yearly progress (“AYP”) standards under the federal No Child Left Behind Act of 2001 (“NCLB”).<sup>107</sup>

The City of Providence, which is the largest school district in Rhode Island,<sup>108</sup> was included on the list of school districts with schools not passing AYP and/or “identified for corrective action,”

(24) To address the health and wellness of students and employees.

(25) To establish a subcommittee of the school board or committee to decrease obesity and address school health and wellness policies for students and employees consistent with § 16-21-28.

(26) To annually undertake a minimum of six (6) hours of professional development as set forth and described in § 16-2-5.1.

*Id.*; see also *id.* § 16-2-9(d). Moreover, section 16-2-18 states that “the selection and appointment of teachers and other school department personnel shall be made by the superintendent with the consent of the school committee.” Significantly, however, section 16-2-9(b) provides that “[n]othing in this section shall be deemed to limit or interfere with the rights of teachers and other school employees to collectively bargain pursuant to chapters 9.3 and 9.4 of title 28.”

105. See Memorandum from RIDE Comm’r Gist, *supra* note 69, at 2.

106. See An Act Making Appropriations for the Support of the State of the Fiscal Year Ending June 30, 1998, Pub. L. No. 1997, ch. 30, art. 31, sec. 1-3 (codified at R.I. GEN. LAWS §§ 16-7.1-1 to -19) (colloquially referred to as “Article 31”).

107. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified at 20 U.S.C. §§ 6301-7941).

108. In 2009, there were a total of forty-five schools, four annexes, one center, and two charter schools under the jurisdiction of the PPSD, which were attended by approximately 23,000 students, over seven percent of whom were bilingual. *Providence Schools at a Glance*, PROVIDENCE PUB. SCH. 1 (2008-2009), available at [www.providenceschools.org/media/50994/ppsd%20fact%20sheet\\_0910%20\(engspa\).pdf](http://www.providenceschools.org/media/50994/ppsd%20fact%20sheet_0910%20(engspa).pdf). As of 2011, the PPSD employed some 1934 teachers, all of whom were members of the PTU, which is the exclusive bargaining representative of the teachers.

from nearly the inception of the NECAP (along with the cities of Central Falls, Woonsocket, and Pawtucket).<sup>109</sup> Thus, for the past several years, the PPSD has contractually agreed to implement a so-called “District Corrective Action Plan” providing specific measures designed to “increas[e] student achievement,” “build[] capacity through an infrastructure of support,” and “strengthen[] parent and community engagement.”<sup>110</sup>

RIDE has been statutorily empowered by the General Assembly to “carry out the policies and program formulated by the board of regents,”<sup>111</sup> and to adopt a series of progressive support and intervention strategies consistent with CES and SALT, and RIDE was given very specific powers—including the complete reconstitution of a school—in the event that a school was not improving as required.<sup>112</sup> Thus, in addition to issuing the CBH Directive in 2009, RIDE continued to supervise the reconstitution of Hope High School in Providence. RIDE also adopted a protocol for intervention in schools designated as “persistently lowest-achieving” and “in need of improvement, corrective action, or restructuring” (the “PLA Protocol,” and “PLA Schools,” respectively), and using federal guidelines, identified four (4) possible intervention models: the “Turnaround,” “Restart,” “School Closure,” and “Transformation” Models.<sup>113</sup> Significantly, RIDE’s

109. *Appendix B: Rhode Island List of Persistently Lowest-Achieving Schools*, R.I. DEPT. OF ELEMENTARY AND SECONDARY EDUC., [http://www.ride.ri.gov/commissioner/edpolicy/Documents/20110411\\_FY10\\_PLA\\_list\\_v1\\_JM.pdf](http://www.ride.ri.gov/commissioner/edpolicy/Documents/20110411_FY10_PLA_list_v1_JM.pdf) (last visited Mar. 11, 2012).

110. PROVIDENCE SCHOOL DISTRICT CORRECTIVE ACTION PLAN, 2007-2008 ACADEMIC YEAR, PROVIDENCE PUB. SCH. 2 (2007) (PPSD’s negotiated agreement with RIDE).

111. R.I. GEN. LAWS § 16-1-5 (Supp. 2011).

112. *See id.* § 16-7.1-5 (Supp. 2011). In addition, RIDE and the Board of Regents share appellate jurisdiction over actions of local school boards, including the dismissal of tenured teachers. Under the state’s Tenure Act, appeals from school board or committee actions dismissing teachers are decided first by RIDE, and then if appealed, by the Board of Regents, and then only if necessary, by the Superior Court. *See id.* § 16-13-4 (Supp. 2011). By contrast, any party aggrieved by an action of a school board or committee can appeal to RIDE, then to the Board of Regents, and then can file a petition for certiorari to the Supreme Court. *See id.* § 16-39-1 to -4 (2001 & Supp. 2011).

113. *See* COMM’R DEBORAH A. GIST, R.I. DEPT. OF ELEMENTARY AND SECONDARY EDUC., PROTOCOL FOR INTERVENTIONS: PERSISTENTLY LOWEST-ACHIEVING SCHOOLS 2-7 (2010), *available at* [http://www.ride.ri.gov/ride/Docs/Protocol\\_for\\_Interventions.pdf](http://www.ride.ri.gov/ride/Docs/Protocol_for_Interventions.pdf). RIDE has approved plans for 2011-

Turnaround Model mandates that the principal be replaced and no more than fifty percent of existing staff be retained,<sup>114</sup> the Restart Model contemplates a complete change in administration,<sup>115</sup> and the Transformation Model provides that the principal be replaced and that teachers and principals mutually consent to all staff assignments, regardless of seniority.<sup>116</sup>

Although not as involved as state agencies in the day-to-day supervision of local school districts, the federal government's involvement in local education matters is not limited to the development of intervention models at PLA Schools. For the last decade, standardized tests in English and mathematics have been administered to all students throughout the state in grades three through eight pursuant to NCLB,<sup>117</sup> and recently, the federal government has become even more involved in local education matters as a result of its "Race to the Top" initiative.<sup>118</sup>

Overlapping jurisdiction and responsibility between federal

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2012 with respect to four PLA schools in the PPSD.

114. *Id.* at 4-5.

115. *Id.* at 5-6.

116. *Id.* at 6-7. As a result, it is likely that a significant number of PTU teachers at PLA Schools will be displaced.

117. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified at 20 U.S.C. §§ 6301-7941); *see also Rhode Island School and District Accountability System*, R.I. DEPT. OF ELEMENTARY AND SECONDARY EDUC. (Mar. 2011), *available at* <http://www.eride.ri.gov/reportcard/11/documents/RIAccountabilitySystem-TechnicalBulletin.pdf>.

118. Brill notes that President Obama's signature education initiative, although committing less than one percent of the \$600 billion spent on education annually (a set aside of some five billion dollars of federal stimulus funds), nonetheless caused, in Brill's words, "something unusual [to break] out across America: a substantive policy debate that engaged a broad swath of the citizenry and their elected officials in villages, cities, state capitals, and in Washington . . . that actually produced results." BRILL, *supra* note 9, at 7. As Brill recounts, the "Race to the Top" contest between the states involved:

[A] scoring system, totaling a maximum of five hundred points, that tracked the reform network's agenda with exquisite specificity, establishing six broad areas of reform, which were then divided into nineteen subcategories, with each given a maximum point allocation depending on how important it was believed to be in achieving real reform. Although it was in nearly impenetrable language that reflected all the cooks – including the lawyers – in the drafting kitchen, it was a state-of-the-art blueprint for achieving the reformers' agenda.

*Id.* at 259.

and state education agencies and local school boards describe only part of the dynamic. The application of state labor law often can effectively prevent issues of education policy from even being heard as such. Frequently, a policy that a school board may believe is mandated by the BEP may be seen as the mere breach of a CBA by a teachers union, arbitrator, or the SLRB, as has been discussed.

Finally, one attempting to understand the legal and practical dynamics of education policy in the state must also weigh the influence of local and state politicians, as illustrated by recent events in Providence. Even if mayors, city council members, and state legislators do not have the express legal authority over education policy conferred upon school boards and state agencies, one ignores political power at one's peril, especially if unions are involved, and especially in Rhode Island. After all, it is the mayors and city councils—whose political fortunes are often dramatically impacted by the comings and goings of school superintendents—who appoint or endorse school board members and actually fund school budgets. In Rhode Island (as in most states), these politicians, more often than not, owe their positions to the money and hard work contributed by labor unions, especially the teachers unions.<sup>119</sup> To quote the former leader of

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119. As Brill reports, from 1989 through 2010, the teachers unions contributed some \$60.7 million to candidates for federal office, with ninety-five percent going to Democrats. BRILL, *supra* note 9, at 177. In fact, the two national teachers unions—the National Education Association and its rival, and more moderate, United Federation of Teachers—“donate three times more money to Democrats than any other union or industry group” and their members “account for more than 25 percent of all union members in the country and 10-15 percent of the delegates to the Democratic Party convention that chooses the presidential nominee.” *Id.* at 2-3. Thus, as Brill notes, “[i]f unions were the base of the Democratic Party, teachers were the base of the base.” *Id.* at 40.

The picture in Rhode Island is similar. According to the National Institute on Money in State Politics, public sector labor unions in Rhode Island contributed \$402,123 to candidates for state office in 2010 alone, with roughly a third coming from the teachers unions. *See Rhode Island 2010*, NAT'L INST. ON MONEY IN STATE POLITICS, [http://www.followthemoney.org/database/state\\_overview.phtml?s=RI&y=2010](http://www.followthemoney.org/database/state_overview.phtml?s=RI&y=2010) (last visited Feb. 5, 2012) (click on “Contributors,” then expand “Labor” and “Public Sector Unions”). Efforts to stem the tide of union money have not met with much success. *See, e.g.*, *Comm'n Workers of Am. v. Christie*, 994 A.2d 545, 573 (N.J. Super. Ct. App. Div. 2010) (Governor's executive order extending “pay-to-play” restrictions to public sector labor unions violates separation of powers).

one of the largest public sector labor unions in the country, the unions “have the ability, in a sense, to elect [their] own boss.”<sup>120</sup>

## B. Mayors and School Boards

To further complicate matters, tension between a mayor and a city’s school board are not unique to Providence. Indeed, such tension is almost an expected outgrowth of their differing constituencies and interests, although admittedly, rarely (if ever) have such tensions prompted specific statewide legislation such as the Jabour Act. The Act, which, as noted, transferred the “power and duty” to negotiate and “enter into” CBAs from appointed school boards to mayors, appears to be constitutional, as it applies alike to all cities and towns and does not affect the form of government of any city or town.<sup>121</sup> However, the Act raises as

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120. Daniel Disalvo, *The Trouble with Public Sector Unions*, NAT’L AFF., Fall 2010, at 3, 10 (quoting Victor Gottbaum, in 1975, while serving as AFSCME District Council 37 leader in New York City). Despite the stalwart support teachers unions have provided to Democrats, it is hard to paint the anti-union bias of the present education reform movement with an ideological brush. As noted by one commentator:

Even President Franklin Roosevelt, a friend of private-sector unionism, drew a line when it came to government workers: “Meticulous attention,” the president insisted in 1937, “should be paid to the special relations and obligations of public servants to the public itself and to the Government. . . . The process of collective bargaining, as usually understood, cannot be transplanted into the public service.” The reason? F.D.R. believed that “[a] strike of public employees manifests nothing less than an intent on their part to obstruct the operations of government until their demands are satisfied. Such action looking toward the paralysis of government by those who have sworn to support it is unthinkable and intolerable.” Roosevelt was hardly alone in holding these views, even among the champions of organized labor. Indeed, the first president of the AFL-CIO, George Meany, believed it was “impossible to bargain collectively with the government.”

*Id.* at 6 (alterations in original).

121. On its face, the Act applies to every city and town throughout the state, even if its practical application is limited to the one functionally non-exempt city—Providence—with an appointed, as opposed to an elected, school board. See R.I. GEN. LAWS § 16-2-9(a)(18) (Supp. 2011). (Central Falls was specifically exempted from the Act). Thus, it would appear to be “a general act applicable to all cities and towns alike” within the meaning of *Opinion to the House of Representatives* and *Bruckshaw v. Paolino*. 557 A.2d 1221, 1223 (R.I. 1989); 87 A.2d 693, 696 (R.I. 1952). In addition, it would not appear to affect the form of government of any city or town within the meaning of

many questions as it purports to answer by further clouding the line dividing mayoral and school board control over education policy.

As noted, in Providence, the City Charter describes the powers of the PSB in the most sweeping fashion and makes express reference to those powers and duties "imposed on school boards by state law,"<sup>122</sup> which, as discussed, are no less broad in scope.<sup>123</sup> As a matter of practice, CBAs involving the teachers union in Providence historically have been signed by the School Board.<sup>124</sup> Mayoral administrations have been involved in negotiating teachers' contracts to varying degrees. However, even though the mayor functions as the chief executive officer of all City departments,<sup>125</sup> it would appear that under the Charter, any authority the mayor might have had to negotiate a teachers' contract prior to the Jabour Act would have been obtained, whether expressly or impliedly, from the school board, which, as noted, has sole power under the Charter "[t]o determine and control all policies affecting the administration, maintenance and operation of the public schools."<sup>126</sup> What effect, if any, the Jabour Act will have on this division of power in Providence remains unclear, at least as of this writing.

What is clear under Rhode Island law is that "[a] state statute preempts a local ordinance only when the Legislature manifests a

*Marran v. Baird*, at least if construed narrowly. 635 A.2d 1174, 1178-79 (R.I. 1994)

122. See PROVIDENCE HOME RULE CHARTER, *supra* note 1, § 706.

123. See GIST, *supra* note 69. Yet, the Charter does not expressly confer the exclusive power to enter into CBAs upon either the School Board or the Mayor. However, in *Providence City Council v. Cianci*, the Court, while upholding a City ordinance mandating that all CBAs be ratified by the City Council, made clear that the mayor did not have independent authority to enter into a valid and binding contract with a public employees' union. See 650 A.2d 499, 502 (R.I. 1994). In addition, under the Charter, the Board's power over financial matters is expressly circumscribed. See PROVIDENCE HOME RULE CHARTER, *supra* note 1, §§ 707, 802-805. This point was made in *Providence Teachers Union v. Providence School Board*, where the Court noted that Home Rule Charter sections 706 and 707, clearly authorize the city's mayor and its city council to not only control, but also to monitor the school department's budget and expenditures. 689 A.2d 384, 386-88 (R.I. 1996).

124. See, e.g., R.I. GEN. LAWS § 28-9.3-2(a) (2003).

125. PROVIDENCE HOME RULE CHARTER, *supra* note 1, §§ 301, 302.

126. *Id.* § 706(a).

clear intent to do so or when the statute and the ordinance are in clear conflict.”<sup>127</sup> In addition, the Rhode Island Supreme Court has affirmed that once the General Assembly ratifies a municipal home rule charter, the Court “view[s] the conflicting charter provision as ‘a special act [that] takes precedence over any inconsistent provisions of the general laws.’”<sup>128</sup> Moreover, as with all statutes, municipal charters should be construed “so as to give, so far as possible, reasonable meaning and effect to all parts of the section in question,”<sup>129</sup> and the Rhode Island Supreme Court adheres to the rule that when faced with “competing statutory provisions that cannot be harmonized . . . the specific governs the general . . . .”<sup>130</sup>

Thus, the powers conferred upon the PSB under state law should be read together with those conferred under the City Charter, and the Jabour Act must be read, if possible, so as to give effect to these Charter provisions as well as each of the twenty-six subsections contained in the statute that it purports to amend.<sup>131</sup> When so read, it does not appear that transferring the “power and duty” to negotiate and “enter into” teachers’ contracts to the mayor *necessarily* conflicts with the broad grants of power over education policy expressly conferred upon school boards.<sup>132</sup> Indeed, narrowly interpreted, a mayor’s exercise of the powers transferred under the Jabour Act would appear to be no different from any chief executive officer’s exercise of similar powers, which in the normal course would be subordinate to clear policy

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127. *Providence City Council*, 650 A.2d at 501 (citing *Powers ex rel. McGowan v. Jocelyn*, 120 A.2d 143, 147 (R.I. 1956)).

128. *Town of Johnston v. Santilli*, 892 A.2d 123, 129 (R.I. 2006) (citing *Local No. 799, Int’l Ass’n of Firefighters v. Napolitano*, 516 A.2d 1347, 1349 (R.I. 1986)) (first alteration added).

129. *Foster Gloucester Reg’l Sch. Bldg. Comm. v. Sette*, 996 A.2d 1120, 1126 (R.I. 2010) (quoting *Stewart v. Sheppard*, 885 A.2d 715, 720 (R.I. 2005)).

130. *Id.* (quoting *Felkner v. Chariho Reg’l Sch. Comm.*, 968 A.2d 865, 870 (R.I. 2009)); *see also Providence Teachers Union, Local 958 v. Sch. Comm. of Providence*, 276 A.2d 762, 765 (R.I. 1971) (“Statutes which are not inconsistent with one another and which relate to the same subject matter are in *pari materia* and should be considered together so that they will harmonize with each other and be consistent with their general object and scope.”).

131. *See* R.I. GEN. LAWS § 16-2-9(a) (Supp. 2011).

132. *Id.* § 16-2-9(a)(18).

directives from a board of directors.<sup>133</sup> Yet, how any legislative act is construed often is decided as much by who does the construing as by what would appear to be the applicable law.

### C. Possible Forums for Resolving Disputes Involving Public Education

Determining whether an action raises issues which primarily involve: (1) “laws relating to elementary and secondary schools and education,” and thus remains within the exclusive original jurisdiction of RIDE;<sup>134</sup> or (2) permissive or mandatory subjects of collective bargaining, and thus within the exclusive original jurisdiction of the SLRB,<sup>135</sup> is rarely simple, as has been discussed. In addition, the task can be complicated by the need to determine whether the Superior Court has jurisdiction under the Rhode Island Declaratory Judgment Act (“RIDJA”)<sup>136</sup> or whether there is federal question jurisdiction.

The RIDJA provides that the Superior Court has the power to:

[D]eclare rights, status, and other legal relations whether or not further relief is or could be claimed . . . The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.<sup>137</sup>

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133. *See, e.g.*, *Fournier v. Fournier*, 479 A.2d 708, 712 (R.I. 1984) (“Too broad a delegation of powers, either express or implied, may be interpreted as an unlawful abdication by the board of directors of its management functions.”).

134. The comprehensive legislation establishing the authority of the Regents and of the Commissioner over public education clearly delegates to the Commissioner the authority to interpret state education law. R.I. GEN. LAWS §§ 16-1-5, 16-60-6 (2001 & Supp. 2011).

135. *See id.* § 28-7-21 (2003). The SLRB is responsible for, among other things, conducting union elections, certifying collective bargaining representatives, and hearing and deciding ULPCs. *See id.* § 28-7-9 & -21. ULPCs are filed with the SLRB, and then heard on appeal by the Superior Court. *See id.* § 28-9-25. It also should be noted that most teachers’ contracts provide for mandatory arbitration. For example, in Providence, CBA Article 15-2.3 mandates arbitration if there are contract issues in dispute, which, again, would be appealable to the Superior Court. *See id.*

136. *See* R.I. GEN. LAWS § 9-30-1 to -16 (1997).

137. *Id.* § 9-30-1.

However, jurisdiction under the RIDJA is largely discretionary,<sup>138</sup> and under the doctrine of administrative exhaustion a plaintiff may not be able to simply ignore mandatory CBA grievance and arbitration procedures, and/or elect not to file either a state ULPC (exclusive jurisdiction over which resides with the SLRB in the normal course) or a claim under the Tenure Act.<sup>139</sup>

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138. See *Sullivan v. Chafee*, 703 A.2d 748, 751 (R.I. 1997) (“The decision to grant or to deny declaratory relief under the [DJA] is purely discretionary.”). In *State v. Cianci*, the court added that “[t]he main prerequisite to successful prosecution of an action for declaratory judgment is the existence of an actual or justiciable controversy.” 496 A.2d 139, 146 (R.I. 1985). As the Rhode Island Supreme Court has noted:

[A] necessary predicate to a court’s exercise of its jurisdiction under the Uniform Declaratory Judgments Act is an actual justiciable controversy.” By definition, a justiciable controversy must contain a plaintiff who has standing to pursue the action; that is to say, a plaintiff who has suffered “injury in fact.” Injury in fact may be characterized as “an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Furthermore, justiciability is not present unless the facts of the case yield some legal hypothesis which will entitle the plaintiff to real and articulable relief.

*Meyer v. City of Newport*, 844 A.2d 148, 151 (R.I. 2004) (citations omitted) (alterations in original).

139. See *Laura V. v. Providence Sch. Bd.*, 680 F.Supp. 66, 68-69 (D.R.I. 1988) (dismissing claim under federal Education for All Handicapped Children Act, 20 U.S.C. §1400); *Jacob v. Burke*, 296 A.2d 456, 459 (R.I. 1972) (dismissing state Teacher Tenure Act claim). The administrative exhaustion doctrine was explained and justified by the Rhode Island Supreme Court as follows: “Requiring the exhaustion of administrative remedies (1) aids judicial review by allowing the parties and the agency to develop the facts of the case, and (2) it promotes judicial economy by avoiding needless repetition of administrative and judicial factfinding, perhaps avoiding the necessity of any judicial involvement.” *Doe v. E. Greenwich Sch. Dept.*, 899 A.2d 1258, 1266 (R.I. 2006) (quoting *Almeida v. Plasters’ & Cement Masons’ Local 40 Pension Fund*, 722 A.2d 257, 259 (R.I. 1998)). Dismissal (or remand) would be mandated under the doctrine unless plaintiff could establish that:

(1) the administrative process would be “futile or inadequate;” (2) the administrative process would “waste resources, and work severe or irreparable harm on the litigant;” (3) the issues raised “involve purely legal questions;” or (4) the agency prevents “the litigant from pursuing [his or] her claim at the administrative level.”

*Id.* (quoting *Pihl v. Mass. Dept. of Educ.*, 9 F.3d 184, 190-91 (1st Cir. 1993)); see also *Arnold v. Lebel*, 941 A.2d 813, 818 (R.I. 2007) (not mandated when futile with respect to the relief sought); *Almeida*, 722 A.2d at 259 (exhaustion not mandated); *Newbay Corp. v. Annarummo*, 587 A.2d 63, 64-66 (R.I. 1991) (exhaustion not mandated where agency practice interferes with or threatens to impair the rights or privileges of a party).

In addition, declaratory relief is not generally appropriate in the absence of some particularized injury in fact.<sup>140</sup> That being said, the Rhode Island Supreme Court has recognized that this general requirement should not be applied mechanically in cases involving “extreme public importance.”<sup>141</sup> Also, it may be that in certain cases involving public education none of the relevant administrative forums have the ability to decide all of the material, legal issues and/or to provide complete relief to the parties, not to mention the impossibility of obtaining needed relief in a timely manner. In cases such as this, it is delay itself that constitutes the contemplated “injury in fact.”<sup>142</sup>

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140. The Rhode Island Supreme Court has noted:

[T]he mere fact that a court is being asked to render an advisory opinion does not automatically preclude a declaratory judgment in all situations. This court previously has held that the rule against judicial consideration of moot, abstract, academic, or hypothetical questions is not absolute. But in such cases the issuance of declaratory relief has been deemed appropriate only when the question(s) presented, although technically moot or deficient in some other respect, involved issues “of extreme public importance, which are capable of repetition but which evade review.”

*Sullivan*, 703 A.2d at 752 (internal citation omitted).

141. See, e.g., *In re Amanda M.*, 626 A.2d 1277, 1278 (R.I. 1993) (clarifying obligation of Department of Children, Youth and Families to make rent payments); *Burns v. Sundlun*, 617 A.2d 114, 116 (R.I. 1992) (addressing the right of the public to vote at a public referendum on a matter of local interest); *Providence Journal Co. v. Superior Court*, 593 A.2d 446, 448 (R.I. 1991) (addressing the issue of a closure of trial court during voir dire examination of prospective jurors); *Gelch v. State Bd. of Elections*, 482 A.2d 1204, 1207 (R.I. 1984) (addressing a citizen’s eligibility to hold public office); *Morris v. D’Amario*, 416 A.2d 137, 139 (R.I. 1980) (a bail case). This is in marked contrast to the narrow view of such jurisdiction expressed by the Superior Court in *Portsmouth School Committee v. NEA Portsmouth*. No. PC 11-3239, slip op. at 6 (R.I. Super. Ct. Nov. 7, 2011), available at <http://www.courts.ri.gov/Courts/SuperiorCourt/DecisionsOrders/decisions/11-3239.pdf>.

142. See *R.I. Ophthalmological Soc’y v. Cannon*, 317 A.2d 124, 129-31 (R.I. 1974). As the Court has noted:

We do not believe that it would be an economical use of our judicial resources to require the parties simultaneously to pursue judicial review in separate forums. It makes a good deal more sense to us to hold that the jurisdiction of the Superior Court, when invoked pursuant to [Rhode Island General Laws] § 16-13-4, extends to the entire case, including issues raised on cross-appeal by a party who otherwise would have had no right of appeal to the Superior Court.

*Barber v. Exeter-West Greenwich Sch. Comm.*, 418 A.2d 13, 17 (R.I. 1980) (citations omitted).

Issues occupying the space between education policy and labor law also have the potential to involve the federal courts. In almost all cases involving a teachers union and a school board, a federal court's jurisdiction is dependent upon the existence of federal-question jurisdiction because in such cases all parties likely would be citizens of the same state.<sup>143</sup> The presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule,"<sup>144</sup> which provides that jurisdiction exists only when a federal question is presented on the face of a plaintiff's properly pleaded complaint.<sup>145</sup>

For example, in the PTU's recent attempt to secure a federal forum to challenge a CBH policy in Providence, the union relied primarily upon the Contract Clause of the United States Constitution<sup>146</sup> and NCLB.<sup>147</sup> Although the existence of federal

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143. In addition, it should be noted that any attempt to remove a state court action likely would be complicated by the "unanimity requirement." As has been noted:

Where the action involves multiple defendants . . . the right of removal is subject to the so-called "unanimity requirement." . . .

The unanimity requirement is derived from 28 U.S.C. § 1446, which sets forth the procedure for removing a state action to federal court. In a case where a plaintiff has sued multiple defendants in state court, an "all for one and one for all" rule applies with respect to removal. *That is, subject to a few exceptions not applicable here, all defendants must consent to remove the case for removal to be effected.*

*Esposito v. Home Depot U.S.A., Inc.*, 590 F.3d 72, 75 (1st Cir. 2009) (emphasis added) (citations omitted).

144. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987).

145. *See id.*

146. The Contract Clause prohibits states from passing "any . . . Law impairing the Obligation of Contracts." U.S. CONST. art. I, § 10, cl. 1. The relevant jurisprudence was succinctly set forth by Judge Selya, who noted:

[A] court first must inquire whether a contract exists. If so, the court next must inquire whether the law in question impairs an obligation under the contract. If so, the court then must inquire whether the discerned impairment can fairly be characterized as substantial. Affirmative answers to these three queries compel a court to abrogate the proposed application of the challenged state law.

*McGrath v. R.I. Ret. Bd.*, 88 F.3d 12, 16 (1st Cir. 1996).

147. The PTU also cited the federal Declaratory Judgment Act (the "DJA"). 28 U.S.C. § 2201. However, the DJA is not a substitute for the lack of a federal question. As the First Circuit has noted, the DJA

[M]erely "makes available an added anodyne for disputes that come within the federal courts' jurisdiction on some other basis." Thus

jurisdiction under the Contract Clause must be determined with reference to particular facts, generally speaking, it would seem that the statutory scheme developed by the state to implement the CES, SALT, and the BEP, as well as RIDE's method of progressive control over troubled schools and districts pursuant to that scheme, would be considered to be in furtherance of an important public purpose, which would often preclude federal jurisdiction.<sup>148</sup> In addition, the administrative relief and recourse to the courts

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"[t]here must be an independent basis of jurisdiction . . . before a federal court may entertain a declaratory-judgment action." Section 2201 is the cart; plaintiff still needs a horse.

*Alberto San, Inc. v. Consejo De Titulares Del Condominio San Alberto*, 522 F.3d 1, 5 (1st Cir. 2008) (citations omitted); *see also* *N. Am. Catholic Educ. Programming Found., Inc. v. Sprint Corp.*, No. C.A. 04-473 T, 2006 WL 1207670, at \*4 n.5 (D.R.I. May 2, 2006) ("The Declaratory Judgment Act, 28 U.S.C. § 2201, does not provide an independent basis for federal jurisdiction.").

148. In *McGrath*, Judge Selya added that "this tripartite test actually has a fourth component. In an appropriate case the model expands to include an inquiry as to whether the impairment, albeit substantial, is reasonable and necessary to fulfill an important public purpose." *McGrath*, 88 F.3d at 16 (citing *Energy Reserves Grp. v. Kan. Power & Light*, 459 U.S. 400, 411-12 (1983)). As the Supreme Court has noted:

The States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result. Otherwise, one would be able to obtain immunity from the state regulation by making private contractual arrangements. This principle is summarized in Mr. Justice Holmes' well-known dictum: "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them."

*U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 22 (1977) (quoting *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908)); *see also* *Oliver v. Trunkline Gas Co.*, 796 F.2d 86, 89-90 (5th Cir. 1986) ("[W]e are aware of no cases in which any court . . . has held that a *private* contract can give rise to federal-question jurisdiction simply by 'incorporating' some federal regulatory standard that would not have been binding on the parties by its own force."); *New Jersey State AFL-CIO v. State of New Jersey*, 747 F.2d 891, 892 (3d Cir. 1984) (rejecting allegation of Contract Clause jurisdiction where underlying claim did not arise under federal law); *Danfelt v. Bd. of Cnty. Comm'rs*, 998 F. Supp. 606, 608 (D. Md. 1998) (observing that federal jurisdiction over a state-created claim with an embedded federal component will not lie when the federal statute at issue did not create a private cause of action); *J.A. Jones Constr. Co. v. City of New York*, 753 F. Supp. 497, 505 (S.D.N.Y. 1990) (refusing to assert federal jurisdiction over what was essentially a state-law breach of contract claim merely because the parties' contract incorporated federal regulations as a method to calculate payment).

built into the state's statutory scheme to implement education policy<sup>149</sup> would not seem to support Contract Clause jurisdiction.<sup>150</sup>

As an independent corollary to the well-pleaded complaint rule, the "complete preemption doctrine" posits that "Congress may so completely preempt a particular area [of law] that any civil complaint raising this select group of claims is necessarily federal in character."<sup>151</sup> Such complete pre-emption would not appear to be the case in most cases involving education policy. As noted, the PTU recently invoked NCLB in support of its federal claim against the PSB. However, NCLB expressly provides that it should not be construed so as to "alter or otherwise affect the rights, remedies, and procedures afforded school or school district employees under Federal, State, or local laws . . ."<sup>152</sup> In addition, "every court to have considered the question whether the NCLBA creates a private right of action has answered that question in the

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149. See *supra* note 139 and accompanying text.

150. Judge Posner has noted that Contract Clause analysis "is trickier" when it is applied to public, as opposed to private, contracts. See *Horwitz-Matthews, Inc. v. City of Chicago*, 78 F.3d 1248, 1250 (7th Cir. 1996). "It would be absurd," he claims, "to turn every breach of contract by a state or municipality into a violation of the federal Constitution." *Id.* As Judge Posner explains:

The cases struggle to articulate the distinction. They differentiate between a mere breach of contract and a measure that defeats the promisee's "reasonable" or "legitimate" "expectations," or between a mere breach and a repudiation of the contractual obligation itself, or between a measure that leaves the promisee with a remedy in damages for breach of contract and one that extinguishes the remedy.

*Id.* (emphasis added); see also *Univ. of Haw. Prof'l. Assembly v. Cayetano*, 183 F.3d 1096, 1108 (9th Cir. 1999) (emphasizing the need to show a deprivation of all remedies in absence of jurisdiction).

151. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987); see also *Franchise Tax Bd. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 22-24 (1983) (complete preemption doctrine serves as independent corollary to well-pleaded complaint rule).

152. See 20 U.S.C. § 6316(d); see also *Rogers v. Tyson Foods, Inc.*, 308 F.3d 785, 791 (7th Cir. 2002) ("Ordinary [as opposed to complete] preemption is an affirmative defense that [a party] may assert in state court; it is not a basis for federal jurisdiction under the complete preemption doctrine."); *Smith v. GTE Corp.*, 236 F.3d 1292, 1313 (11th Cir. 2001) ("[O]ur conclusion that the complete preemption doctrine does not provide a basis for federal jurisdiction in this action does not preclude the parties from litigating [the defense of ordinary preemption] in any subsequent state court action.").

negative.”<sup>153</sup>

Moreover, the doctrine of administrative exhaustion may preclude a court from exercising whatever federal-question jurisdiction might exist.<sup>154</sup> Finally, Rhode Island’s constitutional reference to public schools and the unique manner by which the state imposes and enforces uniform educational standards, as well as the interplay between this effort and the equally specific labor law policies that the state has developed, presents the kind of backdrop that has prompted federal courts to abstain from exercising jurisdiction, or to stay the action pending clarification under state law.<sup>155</sup>

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153. *Alliance for Children, Inc. v. City of Detroit Pub. Sch.*, 475 F. Supp. 2d 655, 658 (E.D. Mich. 2007) (citing *Fresh Start Acad. v. Toledo Bd. of Educ.*, 363 F. Supp. 2d 910 (N.D. Ohio 2005); *ACORN v. N.Y. City Dept. of Educ.*, 269 F. Supp. 2d 338 (S.D.N.Y. 2003); *Stokes ex rel. K.F. v. U.S. Dept. of Educ.*, C.A. 05-11764, 2006 WL 1892242 (D. Mass. July 10, 2006); *Blanchard ex rel. Blanchard v. Morton Sch. Dist.*, No. C06-5166, 2006 WL 2459167 (W.D. Wash. Aug. 25, 2006); *Coachella Valley Unified Sch. Dist. v. California*, No. C 05-02657, 2005 WL 1869499 (N.D. Cal. Aug. 5, 2005)).

154. See *supra* note 139 and accompanying text.

155. The doctrine of ripeness, like the doctrine of administrative exhaustion, “reflects constitutional considerations that implicate ‘Article III limitations on judicial power,’ as well as ‘prudential reasons for refusing to exercise jurisdiction.’” *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S.Ct. 1758, 1767 n.2 (2010) (quoting *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993)). As the First Circuit has noted, “[t]he ripeness doctrine is designed to prevent courts from ‘entangling themselves in abstract disagreements over administrative policies’ and from improperly interfering in the administrative decision-making process.” *City of Fall River v. Fed. Energy Regulatory Comm’n*, 507 F.3d 1, 6-7 (1st Cir. 2007) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977)); see also *Perry v. Sindermann*, 408 U.S. 593, 603 (1972) (Burger, J., concurring) (“[T]he relationship between a state institution and one of its teachers is essentially a matter of state concern and state law.”).

The *Pullman* abstention doctrine, which rests on the desirability of having federal courts avoid unnecessary rulings on constitutional issues, also may be applicable. See *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 500-01 (1941); *Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311, 321-22 (1st Cir. 1992). As noted by the First Circuit, “federal courts should abstain when state law is uncertain, and a clarification of the law in a pending state court case might make the federal court’s constitutional ruling unnecessary.” *Rivera-Puig*, 983 F.2d at 321-22; see also *Burford v. Sun Oil Co.*, 319 U.S. 315, 334 (1943) (“a sound respect for the independence of state action requir[ed] the federal equity court to stay its hand” and not interfere with the centralized system of juridical review of state Railroad Commission orders in Texas). Subsequently, in *Younger v. Harris*, the Court held that absent

## IV. CONCLUSION

Almost thirty years ago, President Ronald Reagan's Commission on Excellence in Education gave birth to the modern education reform movement by publishing what has been described as "the all-time blockbuster of education reports."<sup>156</sup> The report, *A Nation at Risk: The Imperative for Educational Reform*, opened with the claim that "the educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a nation and a people."<sup>157</sup>

It is now clear that risk has become reality,<sup>158</sup> especially in our cities, a reality that is being enabled, in part, by our legal system's inability to effectively distinguish between rules applicable to public education and those pertinent to collective bargaining. Without brighter lines to untangle core policy issues involving public education from the grist of the collective bargaining mill, meaningful education reform will continue to stumble.

One way to help untangle these issues is to insist that those who decide what is essential to the educational mission of a school board and thus exempt from collective bargaining should, at least in the first instance, actually have some expertise in the field of public education. If difficult policy decisions, especially the task of identifying the essential educational mission of school boards, are controlled by those who lack necessary expertise and/or who

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extraordinary circumstances, federal courts should not enjoin pending state criminal prosecutions. 401 U.S. 37, 41 (1971). This concern caused the Supreme Court to apply the rationale of *Younger* various civil as well as criminal contexts. See, e.g., *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 367-68 (1989). In addition to abstaining under *Burford* and progeny, the U.S. Supreme Court also has held that

[I]n cases where the relief being sought is equitable in nature or otherwise discretionary, federal courts not only have the power to stay the action based on abstention principles, but can also, in otherwise appropriate circumstances, decline to exercise jurisdiction altogether by either dismissing the suit or remanding it to state court [under the *Colorado River* stay doctrine.]

See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 721 (1996).

156. See RAVITCH, *supra* note 9, at 24.

157. Nat'l Comm'n on Excellence in Educ., *A Nation at Risk: The Imperative for Educational Reform*, 84 ELEMENTARY SCH. J. 112, 112 (1983).

158. See *supra* note 9 and accompanying text.

depend upon the continued good will of the teachers unions, the results of these decisions, while predictable, may not necessarily be in the best interests of students.<sup>159</sup> On the other hand, if such decisions are made by those who actually have been trained in education policy, or at least by those who have been specifically selected by the General Assembly to decide education policy issues, the boundary between Titles 16 (Education) and 28 (Labor and Labor Relations) of the Rhode Island General Laws likely will be clarified. Indeed, in other contexts the Rhode Island Supreme Court has recognized that courts should defer to those with the requisite expertise whom the General Assembly has expressly selected to make policy decisions in a specific area.<sup>160</sup>

Thus, in the best of worlds, a school board's claim that it is acting pursuant to non-delegable management rights should be evaluated by RIDE, and it is suggested that neither the SLRB nor an arbitrator selected by the parties, who more likely than not lack both relevant expertise as well as the legislative authority to make policy decisions in the field of public education,<sup>161</sup> should exercise jurisdiction over such claims. Indeed, legislation should

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159. Brill notes that it always confounded New York City Schools Chancellor Joel Klein that UFT President Randi Weingarten, who is a lawyer, "never admitt[ed] who her real—and only—clients were. Her counterparts at the rival NEA had no compunction about whom they worked for. But Weingarten's line was always that what was good for teachers was always good for children." BRILL, *supra* note 9, at 101. Brill quotes longtime NEA general counsel Robert Chanin who, in a valedictory speech on the eve of his retirement opined that his union was effective:

[N]ot because we care about children, and it is not because we have a vision of a great public school for every child. NEA and its affiliates are effective advocates because we have power. And we have power because there are more than 3.2 million people who are willing to pay us hundreds of millions of dollars in dues each year because they believe that we are the unions that can most effectively represent them . . . protect their rights and advance their interests. . . . When all is said and done . . . NEA and its affiliates must never lose sight of the fact that they are unions, and what unions do first and foremost is represent their members.

*Id.* at 250 (first and second omission in original).

160. See, e.g., *Robert E. Derecktor of R.I., Inc. v. United States*, 762 F. Supp. 1019, 1022 (D.R.I. 1991) ("Where an agency's decision is highly technical, and specialized knowledge is required, judicial deference is necessary."); cf. *Chambers v. Ormiston*, 935 A.2d 956, 965 (R.I. 2007) ("The role of the judicial branch is not to make policy.").

161. See *supra* note 135 and accompanying text.

be enacted to create a rebuttable presumption that RIDE has exclusive jurisdiction under Title 16 over a school board's claim that a challenged action was mandated by a statute, the BEP, or an integral part of the school board's essential educational mission. Such legislation, it is suggested, would help to ensure that policy issues impacting public education are decided by those with appropriate expertise and authority.<sup>162</sup>

Of course, it is clear that we do not live in the best of worlds. Thus, in the absence of the suggested legislation, courts should not hesitate to stay SLRB actions and/or arbitration proceedings involving public education policy and remand them to RIDE, when appropriate. By the same token, the courts should make clear that these remanded cases should be decided by RIDE narrowly so as not to intrude upon the legitimate original jurisdiction of the SLRB to decide matters which truly concern "terms and conditions of employment," and which do not necessarily intrude upon core policy issues.

Admittedly, to date, RIDE has been hesitant to inject itself into what have been too easily characterized as labor contract disputes between school boards and teachers unions. However, the BEP will have little effect if RIDE is unwilling to aggressively and creatively exercise the broad jurisdiction over education policy that it has been granted by the General Assembly.<sup>163</sup> In fact, even if willing and even if its jurisdiction to hear relevant claims is protected, RIDE will not succeed in promoting and enforcing the BEP unless it is provided with necessary financial resources and,

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162. This would be quite different from the legislation enacted in Wisconsin, Ohio and New Jersey, which carves out specific areas that are *per se* outside the realm of collective bargaining. *See supra* note 87.

163. *See supra* note 112 and accompanying text; *see also* PAUL HILL & PATRICK MURPHY, CTR. ON REINVENTING PUB. EDUC., WORKING PAPER #2011-3, ON RECOVERY SCHOOL DISTRICTS AND STRONGER STATE EDUCATION AGENCIES: LESSONS FROM LOUISIANA (2011), available at [http://www.crpe.org/cs/crpe/download/csr\\_files/WP\\_States\\_Recovery\\_Jun11.pdf](http://www.crpe.org/cs/crpe/download/csr_files/WP_States_Recovery_Jun11.pdf) (using recent success in Louisiana to suggest that state educational agencies, like RIDE, need to create new structures and acquire additional resources to promote change in urban districts); Sarah Yatsko & Melissa Bowen, CTR. ON REINVENTING PUB. EDUC., 2011 PIE NETWORK SUMMIT POLICY BRIEFS, BEATING THE ODDS: HOW STATE EDUCATION AGENCIES CAN BETTER SUPPORT SCHOOL TURNAROUNDS, available at [http://www.crpe.org/cs/crpe/download/csr\\_files/PIE\\_Beating%20the%20Odds\\_Oct11.pdf](http://www.crpe.org/cs/crpe/download/csr_files/PIE_Beating%20the%20Odds_Oct11.pdf).

just as importantly, political independence, and unless the Rhode Island Supreme Court liberalizes the constricted view of school board management rights it expressed thirty-five years ago in *Belanger v. Matteson*.<sup>164</sup>

If additional clarity as to the appropriate contours of collective bargaining is not provided and if RIDE's ability to promote and enforce the BEP is not enhanced, it is likely that most disputes between school boards and teachers unions will continue to be based upon the economic concerns of interested adults, rather than upon the educational needs of students. Tragically, the real cost of our continued inability to reverse this unfortunate dynamic will be borne, not by the state's taxpayers, but by its poorest children.

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164. See *supra* notes 45-49 and accompanying text.