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ADVANCING STUDENT ACHIEVEMENT IN THE UNITED STATES PUBLIC SCHOOLS THROUGH LABOR-MANAGEMENT COLLABORATION: THE FMCS'S EVOLVING ROLE IN EDUCATION REFORM

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INTRODUCTION

I am privileged to submit this paper addressing a task that is at once vital to our national interest while posing a potpourri of daunting challenges.

In the United States, alarm bells have been ringing about the quality of education in public school classrooms since the 1983 publication of the landmark government-sponsored study, *A Nation at Risk*.¹ The widely-publicized report, commissioned by the U.S. Department of Education, declared, in ominous terms, that “the educational foundations of [U.S.] society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people.”² The report, statistically flawed as some suggest,³ nonetheless served as an across-the-board wake up call for our educators, academics, legislators, and concerned parents. The report generated a multi-decade effort to reform our education system that continues today, and it spawned ongoing finger-pointing by educational experts, critics, and advocates who have been and remain disappointed with the results.⁴ By accepted international measures of educational

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¹ THE NAT'L COMM'N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (1983), *available at* teachertenure.procon.org/sourcefiles/a-nation-at-risk-tenure-april-1983.pdf.

² *Id.* at 5.

³ DAVID C. BERLINER & BRUCE J. BIDDLE, *THE MANUFACTURED CRISIS: MYTHS, FRAUD, AND THE ATTACK ON AMERICA'S PUBLIC SCHOOLS* 3 (1995).

⁴ W. James Popham, *A Nation at Risk Really Ought To Take a Few*, *EDUC. LEADERSHIP*, Dec. 2002/Jan. 2003, at 83, 83.

attainment, the dual related problems of underperforming schools and underachieving students persist, despite many years of U.S. government grants, incentives, and programs aimed at improvement.⁵

In a November 2010 speech, U.S. Secretary of Education Arne Duncan provided a gloomy assessment of American public school education.⁶ One quarter of our high school students drop out or fail to graduate on time, he said.⁷ A separate report rendered by retired U.S. military leaders concerning recruitment for our armed forces in 2009 found that more than twenty percent of recent high school graduates in the United States were unable to enlist in the military because they did not possess the necessary math, reading, science, and problem-solving skills, as measured by the Armed Forces Qualifications Test.⁸ The stark reality is that in 2009 the United States ranked seventeenth among the sixty-five nations participating in the Organisation for Economic Co-operation and Development (OECD) Program for International Assessment, based on the results of an international sampling of reading, math, and science skills among fifteen-year-olds conducted every three years.⁹ The message is sobering. As President Obama aptly observed, "whoever out-educates us today will out-compete us tomorrow."¹⁰ What more perfect introduction to this global conference?

⁵ See *In Ranking, U.S. Students Trail Global Leaders*, USA TODAY, Dec. 7, 2010, http://www.usatoday.com/news/education/2010-12-07-us-students-international-ranking_N.htm; *Poor Academic Showing Hurts U.S. High Schoolers*, USA TODAY, Feb. 25, 1998, at 11A.

⁶ Thomas L. Friedman, Op-Ed., *Teaching for America*, N.Y. TIMES, Nov. 21, 2010, at WK8.

⁷ See *id.*

⁸ CHRISTINA THEOKAS, EDUC. TRUST, SHUT OUT OF THE MILITARY: TODAY'S HIGH SCHOOL EDUCATION DOESN'T MEAN YOU'RE READY FOR TODAY'S ARMY 3 (2010), available at http://blogs.orlandosentinel.com/news_education_edblog/files/2010/12/educationtruststudy.pdf.

⁹ HOWARD L. FLEISCHMAN ET AL., U.S. DEP'T OF EDUC., HIGHLIGHTS FROM PISA 2009: PERFORMANCE OF U.S. 15-YEAR-OLD STUDENTS IN READING, MATHEMATICS, AND SCIENCE LITERACY IN AN INTERNATIONAL CONTEXT, at iii-iv (2010), available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2011004>.

¹⁰ Barack Obama, President of the United States, Remarks by the President at an Event for Senator Boxer in Los Angeles, California (Oct. 22, 2010), available at <http://www.whitehouse.gov/the-press-office/2010/10/22/remarks-president-event-senator-boxer-los-angeles-california>.

In recent years, the debate concerning how best to address this problem has been shaped by reform-minded critics, armed with the scores on standardized student tests, who pointedly blame incompetent, union-protected teachers for the lack of student achievement.¹¹ Zealous education reformers are currently focusing with laser-like intensity on teacher unions and the job protections and lay-off procedures they have attained through collective bargaining. They contend that such protections and procedures primarily serve to grant immunity to those teachers.¹² In the words of Joel Klein, former Chancellor of the New York Public Schools and an outspoken critic of those teacher rights, “[t]he long-standing holy trinity in education—life tenure, seniority and lock-step pay (followed by a lifetime pension)—encourages sticking around rather than doing well. You can expect that, in an effort to truly professionalize teaching, the assault on this established, dysfunctional structure will be vigorous.”¹³ The remedy these reformers espouse is the abolition or modification of seniority and tenure systems and the implementation of teacher evaluation systems based in whole or in part on student test scores.

The potential short-sightedness of this simple fix has not escaped the notice of many professionals in the education community. For example, they have pointed out that if student test scores become the do-all end-all barometer of teacher performance, this would create an incentive to remove from the curriculum subjects for which there are no standardized tests, but which assuredly are critical to establishing a well-rounded student body—subjects like history, poetry, and art.¹⁴ Equally to the point is their concern that according test scores a preeminent

¹¹ Randi Weingarten, President, Am. Fed’n of Teachers, *Saving Public Education, Not As We Know It, But As We Know It Ought To Be* (July 8, 2010), available at www.aft.org/pdfs/press/sp_weingarten070810.pdf; see also Larry Leverett, *Are Teacher Unions the Problem?: A Clear Look at a Cloudy Issue*, EDUTOPIA, Nov. 1, 2006, <http://www.edutopia.org/are-teacher-unions-problem>.

¹² See Leverett, *supra* note 11; see also *Bargaining Away Quality*, TEACHERS UNION EXPOSED, <http://teachersunionexposed.com/bargaining.cfm> (last visited Oct. 17, 2012).

¹³ Joel I. Klein, Editorial, *The New Reformers*, WASH. POST, June 12, 2011, at A19.

¹⁴ See Carol Burris & Kevin Welner, *5 Reasons Parents Should Oppose Evaluating Teachers on Test Scores*, WASH. POST (June 5, 2011, 11:43 AM), http://www.washingtonpost.com/blogs/answer-sheet/post/5-reasons-parents-should-oppose-evaluating-teachers-on-test-scores/2011/06/05/AGTppaJH_blog.html.

place in teacher evaluations and compensation would induce teachers to adapt a practical defense mechanism—okay, so be it. We will teach to the test, irrespective of the negative impact it may well have on genuine learning.¹⁵

For their part, teachers' union leaders have professed to be shocked that they are being made the villains for all underachieving students, maintaining not only that the vast majority of teachers are performing satisfactorily, but also that a host of factors are at work outside the classroom, including cultural and socio-economic distinctions and the lack of sufficient resources.¹⁶ The reformers have recently created such a drumbeat of criticism that Randi Weingarten, President of the American Federation of Teachers, felt compelled to remark last year, "[N]ever before have I seen such attacks on public employees, teachers[,] and the unions that represent them."¹⁷ She continued, "The blame-the-teacher crowd would have Americans believe that there is only one choice when it comes to public education: [E]ither you're for students, or you're for teachers. That is a bogus choice."¹⁸

At this juncture, a word of caution concerning the merits of the debate: It is for the parties, not an individual mediator or the Federal Mediation and Conciliation Service ("FMCS"), to determine what role, if any, student test scores should play in teacher evaluations and/or compensation. What the foregoing discussion augurs, however, is the likelihood that for the foreseeable future, this issue—along with others I will identify throughout this paper—will present a recurring problem in collective bargaining negotiations between school districts and their respective teacher unions.

I. THE TRIGGERING EVENT FOR FMCS'S CURRENT ROLE

In February 2010, the Superintendent of Central Falls, Rhode Island School District embarked upon an unprecedented course of action. She notified all seventy-seven teachers—who were represented by an AFT local—that they would be dismissed at the end of the school year and ordered to reapply for their positions, notwithstanding that not one had received an

¹⁵ *See id.*

¹⁶ *See* Weingarten, *supra* note 11.

¹⁷ *Id.*

¹⁸ *Id.*

unsatisfactory evaluation.¹⁹ Evidently this was the Superintendent's "solution" to her concern that the students—many of whom were from minority backgrounds—were not performing at a satisfactory level. In 2009, only seven percent were proficient in math and fifty-five percent were skilled in reading.²⁰ The Superintendent's ultra-aggressive—some would say "knee-jerk"—reaction sparked national media attention directed at both her school and the quality of teachers generally.²¹ Par for the course, the teachers' union responded with a broad-based lawsuit against the school board, including a request for immediate injunctive relief.²²

Closely on the heels of those high-profile events, I received a request to offer FMCS's services to the disputed parties. Given the evident serious implications of the controversy, I contacted the key behind-the-scenes representatives from the Office of Rhode Island Elementary and Secondary Education—Charles Rose, General Counsel of the United States Department of Education, and Randi Weingarten, President of the American Federation of Teachers—for a background briefing. That outreach ultimately succeeded in producing a joint formal request from the disputing parties for a mediator to assist the parties in resolving their overall dispute, which by then contained both collective bargaining and litigation components.²³ I immediately responded by naming Jack Buettner, one of the Agency's senior managers who had a long and successful record of mediating difficult disputes, to carry out that all-important function.²⁴ Over the course of the next sixty days, he and I

¹⁹ Randi Kaye, *All Teachers Fired at Rhode Island School*, CNN (Feb. 24, 2010, 11:43 AM), <http://www.cnn.com/2010/US/02/24/rhode.island.teachers/index.html?hpt=T2>.

²⁰ *Id.*

²¹ See *id.*; Katie Zezima, *A Vote To Fire All Teachers at a Failing High School*, N.Y. TIMES (Feb. 24, 2010), <http://www.nytimes.com/2010/02/24/education/24teacher.html>.

²² See Jennifer D. Jordan, *Central Falls Teachers File Unfair Labor Practice Complaint*, PROVIDENCE J. (Mar. 2, 2010), <http://news.providencejournal.com/breaking-news/2010/03/central-falls-teachers-file-un.html#.TqOw1xzIyH8>.

²³ Ray Henry, *Mediator To Lead Talks Between Central Falls and its Fired Teachers*, BOSTON.COM (Mar. 12, 2010), http://articles.boston.com/2010-03-12/news/29314175_1_firings-school-day-teachers.

²⁴ News Release, Fed. Mediation & Conciliation Serv., Statement by FMCS Director George H. Cohen on Rhode Island Teachers Agreement (May 17, 2010), available at http://fmcs.gov/assets/files/Public%20Affairs/2010%20Documents/RI_teachers_agreement_5-17-10.pdf.

regularly coordinated our strategies. Specifically, during this period, I explored an array of possible solutions with the aforementioned representatives, while Mr. Buettner met on numerous occasions with the parties pursuing our one overriding goal—to help them reach an agreement that would accommodate both the educational needs of the students while avoiding the proposed highly-inflammatory, legally suspect teacher dismissal initiative. The mediator's job was made doubly difficult because, as he put it, “all the media attention required him to conduct the mediation in a fish bowl.”

I am pleased to report that logic and common sense ultimately prevailed. A comprehensive settlement was reached between the Central Falls School District and the Central Falls Teachers' Union.²⁵

Central to the solution was the district's agreement to rescind the putative dismissals—provided that each teacher successfully completed an agreed-upon interview process—in consideration for which the union agreed that there would be established a new rigorous but fair and objective evaluation system.²⁶ Further, a series of provisions was incorporated, directed at aiding underachieving students—such as adding one hour of tutoring by teachers before or after school each week, a longer school day, and providing a student communal lunch with each teacher once per week.²⁷ The need for advancing the professional status and competence of the teachers was likewise recognized, for example, by adding summer professional development courses.²⁸ Finally, the desirability of labor-management collaboration was accorded the attention it sorely needed. The agreement, among other things, provided for a joint committee to develop and implement criteria-based staffing systems for use in promotions, transfers, assignments, and hiring, as well as to enable input from teachers in developing the district's school schedules and a teacher evaluation and support system.²⁹

²⁵ Settlement Agreement Between Central Falls School District and Central Falls Teachers' Union (May 15, 2010), *available at* <http://box745.bluehost.com/~cfschool/wp-content/uploads/2011/05/Settlement-Agreement.pdf>.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

In a word, the agreement set the predicate for the dawning of a new era at that school district by upgrading student achievement and teacher development within a framework of labor-management cooperation.

My involvement in the Rhode Island dispute was a defining moment. Informed by the successful resolution of that dispute, my colleagues—Deputy Director Scot Beckenbaugh, himself a former Iowa public school teacher, and Deputy Director Allison Beck—and I decided to scour the waterfront in search of materials explaining the pros and cons of whether, as a general proposition, meaningful education reform could be achieved through collective bargaining.

Preliminarily, I harkened back to my recollections of a prior life as a union labor lawyer. Commencing in the late 1960s, when public sector bargaining first appeared on the scene with much ado, and continuing for the next twenty years, I represented a number of teacher unions in Northern Virginia chartered by the National Education Association. I served as the chief spokesperson in collective bargaining agreements with three Virginia school systems—Arlington County, Fairfax County, and the City of Alexandria—that successfully culminated in about a dozen agreements. As those experiences occurred during the most formative stages of those relationships, the countless challenges we faced centered around the threshold problem of how to accommodate the competing interests of the parties. My role in forging agreements that cut across a plethora of both economic benefits and working conditions left me cautiously optimistic: The best interests of students need not be sacrificed by virtue of a collective bargaining relationship.

In addition, to broaden our horizons, my colleagues and I embarked upon a wide-ranging, information-gathering project. Initially, current events captured our attention. We read countless newspaper reports describing pending public education negotiation disputes, feature stories abounding in analysis of bargaining strategies, and extensive editorial commentary. As expected, the latter source offered much in the way of strongly held, competing opinions.

But what about the facts? We turned to a multitude of studies generated by academics and scholars whose writings were designed to provide the reader a birds-eye view of the nature and scope of our crisis in public education and, further, to

explain how collective bargaining relations could adapt to the need for reform. A Rutgers School of Management and Labor Relations paper authored by Saul A. Rubinstein and John E. McCarthy entitled *Collaborating on School Reform: Creating Union-Management Partnerships To Improve Public School Systems*, presented a compelling point of departure for our analysis.³⁰ In a nutshell, the authors focused upon six school districts throughout the country, each identified by the AFT as having a lengthy track record of innovative reforms.³¹ The studies offered an insight into how each district was instrumental in establishing a partnership with its union that demonstratively improved the quality of public education.³²

I also quickly learned that the FMCS would not be writing on a clean slate. In the decades in which public sector employees have been authorized to engage in collective bargaining, the FMCS has been involved in dispute resolution concerning public schools in twenty-one states that lack a state mediation system, and in those states with mediation agencies that nonetheless requested FMCS assistance on a case-by-case basis.³³ The recent FMCS case data show that the Agency mediates approximately 1,100 public sector collective bargaining negotiations each year, including several hundred teacher-school board negotiations.³⁴ With a settlement rate of approximately eighty-five percent,³⁵ the FMCS has earned a reputation for helping those parties to work together creatively to resolve a myriad of issues related to teacher evaluations, student performance, teacher compensation, and a host of day-to-day working conditions.

³⁰ SAUL A. RUBINSTEIN & JOHN E. MCCARTHY, *COLLABORATING ON SCHOOL REFORM: CREATING UNION-MANAGEMENT PARTNERSHIPS TO IMPROVE PUBLIC SCHOOL SYSTEMS* (2010), available at <http://smlr.rutgers.edu/collaborating-school-reform>.

³¹ *Id.* at 1.

³² *Id.*

³³ The 21 states are: Alaska, Arizona, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Maryland, Nebraska, Nevada, New Hampshire, New Mexico, Ohio, Oklahoma, Tennessee, Utah, Vermont, and Wyoming. The remaining states are those in which state mediation services exercise exclusive jurisdiction over public sector labor-management disputes involving teachers. These states may request assistance from the FMCS at their discretion.

³⁴ FED. MEDIATION & CONCILIATION SERV., 2010 ANNUAL REPORT 7 (2010), available at http://fmcs.gov/assets/files/annual%20reports/fy2010_annual_report.pdf.

³⁵ *Id.*

In that same vein, we reviewed our own experience with the FMCS grant program. In 2008, faced with financial crisis, declining student enrollment, public demand for performance improvements, decreased property values, and a falling population, the Charlotte County, Florida school district was embroiled in contentious contract negotiations with its teachers.³⁶ Fortunately, with mediation and training support from FMCS in previous years, including an FMCS grant to fund the establishment of a labor-management council, the Charlotte County School Board, Charlotte Florida Education Association, and the Charlotte County Support Personnel Association had developed a highly effective partnership. Re-establishing this productive relationship with the renewed help of an FMCS mediator, the parties successfully worked through the challenges of their 2008 negotiation.³⁷

Of particular relevance here, this effective partnership in what once had been a troubled Florida school system brought about marked improvements in student performance. Since 2002, the graduation rate in Charlotte County Public Schools has increased from sixty-eight percent to eighty-five percent last year.³⁸ Advanced Placement Test scores rose from twelfth place in Florida in 2004 to first in the state in recent results.³⁹ Equally impressive, Scholastic Aptitude Test scores in reading, math, and writing for Charlotte County students have shown a twenty-one percent increase since 2004.⁴⁰

Be advised that there was no rest for the weary. Our research travels proceeded apace. Here is a sample of the quality literature we reviewed:

1. *Leading for Equity: The Pursuit of Excellence in Montgomery County Public Schools*, Childress, Doyle, Thomas, 2009;
2. *A Chance to Make History: What Works and What Doesn't in Providing an Excellent Education for All*, Kopp, 2011;
3. *Getting It Right: Empirical Evidence and Policy Implications from Research on Public-Sector Unionism and Collective*

³⁶ See CHARLOTTE CNTY. PUB. SCH. ET AL., COLLABORATING FOR STUDENT SUCCESS: PARTNERSHIP AND PERFORMANCE IN CHARLOTTE COUNTY PUBLIC SCHOOLS 20 (2011), available at <http://yourcharlotteschools.net/documents/humanresources/CCPSCollaboration.pdf>.

³⁷ See *id.*

³⁸ *Id.* at 10.

³⁹ *Id.* at 11.

⁴⁰ *Id.*

Bargaining, Lewin, Kochan, Cutcher-Gershenfeld, Ghilarducci, Katz, Keefe, Mitchell, Olson, Rubinstein, Weller, March 16, 2011;

4. *Teacher Collective Bargaining and the Flexible Deployment of Teaching Resources: Evidence from Cities in New York State*, Donn, Karper, Kirby;
5. *A Blueprint for Reform: The Reauthorization of the Elementary and Secondary Education Act*, U.S. Department of Education, March, 2010;
6. *The Hamilton Project: Advancing Opportunity, Prosperity and Growth*, Gordon, Kane, Staiger, April, 2006;
7. *Turning Around the Nation's Lowest-Performing Schools: Five steps Districts Can Take To Improve Their Chances of Success*, Baroody, January, 2011;
8. *Class: Classroom Assessment Scoring System*, Pianta, Hamre, Haynes, Mintz, La Paro, 2007.

At bottom, my colleagues and I emerged from this learning experience reinforced with the belief that the best interest of our students could be well served where constructive labor-management relationships were in place. We also concluded that reforming the public education system through labor-management collaboration had become nothing less than a number one national priority.

Consistent with that conclusion, the next step in our progression was for me to initiate discussions with the leadership of the Department of Education concerning the FMCS's willingness to provide its assistance in connection with all aspects of the education reform movement. Fortuitously, those discussions dovetailed with an initiative being developed by Secretary Duncan that was intended to utilize labor-management collaboration as a technique for advancing student achievement throughout the public school system. The FMCS was honored to be asked by the Secretary to partner with the Department of Education, together with the two major teachers' unions—AFT and NEA—and the organizations representing school administrators and major urban school systems—American Association of School Administrators, the National School Boards Association, and the Council of the Great City Schools.⁴¹ The newly-formed partnership agreed, as its opening

⁴¹ The American Association of School Administrators has a membership of 13,000 educational leaders from the United States and around the world; the National School Boards Association represents its State Association members and

public event, to co-sponsor a conference in Denver, Colorado on February 15–16, 2011 called, “Advancing Student Achievement Through Labor-Management Collaboration.”⁴²

Secretary Duncan described the purpose of this historic event as a visionary effort to reform our public school system:

[D]istricts and teachers’ unions must forge new compacts—compacts in which [all the parties] acknowledge their shared responsibility to establish a strong and stable school environment, and give educators resources and tools to transform all schools so that all students receive a genuine opportunity to obtain a high quality education.⁴³

At FMCS, we were aware of the inevitable gap between rhetoric and reality. So, in advance of the Denver conference, the FMCS senior managers offered to share the Agency’s real world perspective to its counterparts at the Department of Education and the teachers’ unions. We convened a “brainstorming session” at which our mediators, who were already experienced in handling public sector education disputes, exchanged their experiences and paved the way for developing a set of “best practices” that could be used both to build more cooperative relationships and to focus upon how to help the parties advance student achievement. Among the core issues addressed by the mediators were those that had captured our attention throughout the period of our research: the need to establish objective, fair, and rigorous teacher evaluation processes designed to identify and remedy individual teacher deficiencies; tutoring of underachieving students after school hours and the related compensation issues; exploring the possibility of extending the length of the school day and/or the length of the school calendar and its attendant cost implications; the relationship, if any, between student test scores and teacher evaluations and/or compensation; and the merit pay issue.

their more than 90,000 local school board members; the Council of Great City Schools is a coalition of 66 of the largest urban public school systems in the United States.

⁴² News Release, Fed. Mediation & Conciliation Serv., FMCS Partners with U.S. Department of Education and Others To Convene Labor-Management Conference for Public Education Reform (Jan. 4, 2011), *available at* http://www.fmcs.gov/assets/files/Public%20Affairs/2011%20Documents/Education_Conference-1-4-11.pdf.

⁴³ U.S. DEP’T OF EDUC. ET AL., ADVANCING STUDENT ACHIEVEMENT THROUGH LABOR-MANAGEMENT COLLABORATION 7 (2011), *available at* <http://www.ed.gov/sites/default/files/labor-management-collaboration-program.pdf>.

One important fringe benefit of that session from the Agency's perspective is that it demonstrated to us that the cadre of mediators who participated was well positioned to share their knowledge and provide training to their fellow mediators so that they can more effectively assist the parties in addressing the emerging challenges of education reform.

For inspiration, if we needed any, there was a school system that had established a noteworthy method of teacher evaluation, accepted by its teachers' union, administrators, and the school board, right at our doorstep in Montgomery County, Maryland—a suburb of Washington, D.C. The district, under the impressive leadership of Superintendent Jerry Weast, was well known as championing a form of labor-management negotiation based on shared understanding of the goals and rationale each party brought to the table. This so-called interest-based approach allowed labor and management to bypass the traditional adversarial style of negotiating and pursue, instead, a joint problem-solving mode.

Apart from the information-gathering process taking place within the Agency, the partnership also was busy at work. In advance of the conference, the partners met regularly on an informal basis. Facts were presented concerning the current state of education reform throughout the country. A bevy of ideas was exchanged concerning how to launch the project at hand. Significantly, we were encouraged by a number of success stories that were identified—some, where reform had already achieved desirable results and others reform was a work in progress.

As to the conference itself, the planners not only carefully drafted an agenda to include plenary sessions (at which each of the seven partners was to speak), but they also arranged for thirteen school districts—selected based upon their “success stories in labor-management collaboration”—to conduct workshops in which their trio of spokespersons would detail the techniques they had utilized to provide students the highest quality of learning experience available.

A consensus emerged among the partners that, although the upcoming conference would not be a panacea by any means, the hope was that it would serve as a springboard to catapult school districts into action.

The conference was attended by 150 school districts—representing urban, suburban, and rural areas of varying sizes and geographical locations—that applied to and were accepted by the Department of Education. As a prerequisite for acceptance, the superintendent together with the union president and school board chairman, were obliged to pledge that they would jointly attend, and, further, that they were committed to advancing student achievement through negotiating reform-oriented collective bargaining agreements. A commitment that surely falls within the “would you believe” category!

The meat of the conference was supplied by the workshop presentations which set a very high bar for their peer school districts. The superb quality of those presentations was exemplified by that of the Montgomery County (Maryland) public schools (MCPS). Superintendent Weast, Doug Prouty and Merle Cuttitta, Presidents of the Montgomery County Education Association and Service Employees International Union Local 500, respectively, together with Christopher Barclay, President, Montgomery County Board of Education, endorsed the same goals and principles of education reform. In summary form, first they invested in developing a mutually respectful and trusting relationship by such common sense activities as regularly “breaking bread” together at breakfasts and lunches. Next, under the aegis of Superintendent Weast, the parties reached a shared optimal goal—having one hundred percent of its students graduate high school and eighty percent prepared for college or careers—a goal which the community enthusiastically embraced. Beyond that, the parties developed a Professional Growth System (PGS) for teachers and a supportive Peer Assistance and Review (PAR) component that allows both novice and underperforming teachers to be returned to successful employment or removed if improvement is insufficient. In the MCPS, each teacher’s professional development is a critical element in improving student achievement. The teachers’ PGS not only contains six standards of performance derived from the highly respected National Board for Professional Teaching Standards, but also provides ongoing training for teachers and evaluators. Given this limited space, the foregoing description does not do justice to the breadth of the MCPS program. If I had to select one gem

from that presentation it would be Superintendent Weast's response to the question concerning the cost of the PAR program—"priceless," he remarked!

Ironically, just as the various teams representing school administrators, unions, and school boards were extolling the benefit of achieving reform through labor-management cooperation and were jointly proclaiming that the teaching profession must be viewed as an integral part of any solution, a polar opposite view of the value of collective bargaining appeared with a bang. To the naysayers, the institution of collective bargaining was deemed to be the evil that had to be eradicated for the public good. Indeed, contemporaneous with the conference, a contest appeared to be taking place among various states trying to outdo each other by placing drastic limitations on public teacher bargaining rights. The scorecard included the Idaho state legislature which passed a bill to limit collective bargaining for teachers and to exclude unions from deliberations over the design of education policies⁴⁴; Wisconsin, where the governor signed a bill into law to eliminate collective bargaining rights for all teachers; Ohio, where the governor signed similar legislation; and, Tennessee, which also recently adopted a law to strip teachers of collective bargaining rights.⁴⁵ But this did not put an end to the feeding frenzy. Other states such as Indiana, Illinois, Michigan, Florida, Iowa, New Jersey, and Massachusetts have jumped on the band wagon and have passed laws or are considering legislation to restrict the rights of public employees, including teachers, to bargain over various important substantive subjects.⁴⁶

⁴⁴ Betsy Z. Russell, *Idaho Moves To Strip Collective Bargaining Rights from Teachers*, SPOKESMAN-REVIEW (Mar. 8, 2011), <http://www.spokesman.com/stories/2011/mar/08/idaho-moves-strip-collective-bargaining-rights-tea>.

⁴⁵ See James Kelleher, *Wisconsin Governor Signs into Law Union Curbs*, REUTERS (Mar. 11, 2011, 3:34 PM), <http://www.reuters.com/article/2011/03/11/us-wisconsin-idUSTRE72909420110311>; Steven Greenhouse, *Ohio's Anti-Union Law Is Tougher than Wisconsin's*, N.Y. TIMES (Mar. 31, 2011), <http://www.nytimes.com/2011/04/01/us/01ohio.html>; Tim Ghianni, *Tennessee Limits Collective Bargaining Rights for Teachers*, REUTERS (June 1, 2011, 4:52 PM), <http://www.reuters.com/article/2011/06/01/us-unions-states-tennessee-idUSTRE75071120110601>.

⁴⁶ Joseph E. Slater, *State Legislators Target Public Sector Labor Rights*, LAB. & EMP. L., Spring 2011, at 1, 7; Chris Wright, *New Indiana Law Limits Teachers' Collective Bargaining Rights*, WDRB.COM (Apr. 21, 2011, 9:07 PM), <http://www.wdrb.com/story/14494584/new-indiana-law-limits-teachers-collective-bargaining-rights-felt-immediately-in-new-albany>; Melissa Leu, *Teacher Collective*

Although these attacks were directed at public sector labor relations, they were an anathema to what the FMCS stands for because they go to the heart and soul of the private sector mission and responsibility Congress carved out for the FMCS in 1947.⁴⁷ The Agency was created for the overriding purpose of assisting parties engaged in collective bargaining by

proffer[ing] its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute Whenever the Service does proffer its services in any dispute, it shall . . . use its best efforts, by mediation and conciliation, to bring them to agreement.⁴⁸

Apart from that fundamental principle, those of us who have functioned in or observed the history of private sector collective bargaining are aware that, dating back at least to the late 1980s, on a recurring basis unions have confronted and dealt with “concession bargaining.” Thus, simply put, time and again the institution of collective bargaining has proven to be sufficiently flexible to deal with the vicissitudes of our economic cycles.

Further, my tenure as director has been characterized by a multitude of parties struggling mightily to deal with the related traumas of an economic downturn, increased foreign competition, soaring healthcare costs, and massive layoffs. And yet, the defining point is that somehow, some way the good faith give-and-take at the negotiating tables resulted in achieving agreements—all within the framework of our collective bargaining system. Thus, the fact that the states referred to above have felt constrained to declare collective bargaining off limits purportedly as a savior to protect their fiscal interests runs counter to all these documented realities.

And lest we forget, the key tenet of the federal labor policy governing private sector disputes announced in the Wagner Act of 1935 and continuing uninterrupted to date is to “encourag[e]

Bargaining Rights Still up for Grabs in Ill., WATCHDOG.ORG (Apr. 6, 2011), <http://watchdog.org/29966/shno-teacher-collective-bargaining-rights-still-up-for-grabs/>; Jennifer Levitz, *Massachusetts Curbs Bargaining*, WALL ST. J. (July 2, 2011), <http://online.wsj.com/article/SB10001424052702303763404576420294248965916.html>; Ginger Gibson, *Gov. Chris Christie Signs N.J. Public Worker Pension Overhaul Bill*, NJ.COM (June 28, 2011, 2:27 PM), http://www.nj.com/news/index.ssf/2011/06/gov_chris_christie_signs_nj_pu.html.

⁴⁷ See 29 U.S.C. § 173(a) (2006).

⁴⁸ *Id.* § 173(b).

the practice and procedure of collective bargaining.”⁴⁹ One state, county, and municipality after another adopted that preeminent principle when enacting their respective public sector labor codes. Today we are witnessing a growing sentiment that it is indeed sad to have to observe—some states choosing to retreat from that high mark of what many proudly referred to in the private sector as “industrial democracy.”

Notwithstanding this contemporary barrage of anti-collective bargaining sentiment, we were especially pleased that the attendees, as a whole, departed the Denver conference inspired by the accounts of labor-management cooperation they had heard and the success stories of the presenting school districts which provided “how-to” manuals on working together to benefit students.

II. FMCS ACTIVITIES POST THE DENVER CONFERENCE

FMCS field mediators witnessed first-hand the impact of the conference almost immediately. For example, the Jefferson County Public Schools, the largest public school district in Colorado, needed to cut nearly forty million dollars from its proposed operating budget attributable to the decrease in state contributions.⁵⁰ Reducing a school system budget is never an easy task, but with FMCS assistance the school board and its teachers agreed to apply a new format influenced largely by the model utilized by the Montgomery County Public Schools as presented by Superintendent Jerry West in Denver. The parties adopted an interest-based approach. Their budget discussions were conducted using a format that radically departed from their prior budget setting processes. The participants were expanded to include two representatives from each of five groups—the school board, two employee unions, administrators, and district leaders. On March 4–5, 2011, an unprecedented gathering took place at the school district headquarters where a two-day summit was facilitated by an FMCS mediator. The stated goal was ambitious to say the least: to reach a consensus on millions of dollars of cuts that ultimately affected employee compensation, eliminated jobs, closed schools,

⁴⁹ *Id.* § 151.

⁵⁰ Kevin Simpson, *Jeffco District May Use Pay Cuts, School Closures To Cut Budget by \$40 Million*, DENVER POST (Mar. 11, 2011), http://www.denverpost.com/breakingnews/ci_17592264.

suspended popular programs, and added transportation and activity fees for students. The parties adopted a problem-solving mode as well as a “failure is not an option” attitude. An agreement was hammered out and just sixty days thereafter, the Jefferson County board approved the budget. As one observer later told us: “It is an affirmation of the collective bargaining process. . . . [T]hey embraced it and reached a better outcome than they could have in any other approach.”

Later that same month, I was offered the opportunity to facilitate discussions between the AFT and the American Association of School Administrators aimed at providing their respective constituencies an agreed-upon general framework for dealing with the all-important core issues relating to education reform. Under the leadership of AFT President Weingarten and AASA Executive Director Dan Domenech, a series of meetings was convened in Washington, DC, which were attended by labor and management representatives from school districts throughout the country.⁵¹ Significant common ground emerged from the discussions that my colleague, FMCS Commissioner Conrad Bowling, a highly-skilled, experienced mediator, and I facilitated. The constructive discussions between the organizations, often seen as having diametric views on issues affecting the teacher workforce, culminated in a comprehensive twenty-five page document captioned *Educator Quality for the 21st Century: A Collaborative Effort of the American Association of School Administrators and the American Federation of Teachers*.⁵²

The Prologue set the tone for what followed: “The quality of an education system cannot exceed the quality of its teachers and principals, since student learning is ultimately the product of what goes on in classrooms.”⁵³ The document pinpointed the issue the parties deemed critical to reforming our current

⁵¹ News Release, Am. Ass’n of Sch. Adm’rs, Groundbreaking Partnership Will Revamp Teacher Workforce (June 29, 2011) [hereinafter Groundbreaking Partnership], available at <http://www.aasa.org/uploadedFiles/Newsroom/6-29-1-AASA-AFT-release.pdf>.

⁵² See generally AM. ASS’N OF SCH. ADM’RS ET AL., *EDUCATOR QUALITY FOR THE 21ST CENTURY: A COLLABORATIVE EFFORT OF THE AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS AND THE AMERICAN FEDERATION OF TEACHERS*, available at <http://www.aft.org/pdfs/teachers/AFTAASA062811.pdf>.

⁵³ *Id.* at 1.

educational system—namely, the support and development of the educator workforce. An accompanying press release announced that the ground-breaking partnership was committed

to ensur[ing] a skilled teacher workforce for the knowledge-based economy. As a first [concrete] step, we need to systematically recruit, develop and retain great educators. [We] have adopted a framework to continuously improve the nation's teaching force, revamp teacher development and evaluation systems, and provide teachers and schools the tools and support they need.⁵⁴

The framework is said to rely upon the same principles utilized by the countries throughout the world with the most successful education systems.

A list of what is envisioned by this agreed-upon framework offers an insight into the challenges that lie ahead for the thousands of our school districts and their leaders: (1) establishing professional teaching standards; (2) creating a fair, objective, and comprehensive system for evaluating teacher performance that accords due process; (3) developing a procedure that includes regular observations of teachers by administrators and other qualified persons—master teachers, for example; (4) identifying specific teacher deficiencies and promptly advising the teacher of them, both orally and in writing; and (5) establishing an improvement team—preferably peer instructional experts—that reviews the evaluation and conducts its own observations to confirm the unsatisfactory performance. A program for improving the teacher performance—the improvement plan—is established after input from the teacher, the evaluator, and the improvement team. The improvement plan provides clearly articulated measures of success, necessary timelines, and resources and support to meet the teacher's particular needs. All parties should sign off on the plan, and follow-up observations should be conducted to assess whether the teacher has progressed consistent with the improvement plan, including regular and timely feedback to the teacher. No improvement plan should continue for more than the equivalent of one school year, and at the conclusion of that period, the administrator should make a recommendation to the school district which is to be reviewed by a neutral third party—for

⁵⁴ Groundbreaking Partnership, *supra* note 51.

example, a joint labor-management committee. The standard of review is whether the district complied with the entire agreed upon evaluation process described above.

The framework understandably leaves to the collective bargaining parties at each school district level the discretion to work out the specific details of the entire evaluation process; where no collective bargaining relationship exists, the appropriate consultative procedure would apply.

Thus, from the mediator's standpoint, whether the parties call upon our Agency to facilitate discussions on the issue of teacher evaluation alone or to mediate disputes concerning that issue at contract expiration, the framework offers virtually unlimited "food for thought" for what constructive role we can play in the future.

In my mind, the sheer breadth of the AFT-ASSA agreed-upon framework is proof positive that at the highest level of their respective organizations whatever differences may have existed concerning how to achieve education reform have been replaced by an uncommon meeting of the minds. What remains, to be sure, is the extent to which other constituents—individual school districts and their local bargaining units—will embrace the framework and adapt its principles to their particular workplaces in future collective bargaining. Further, several important players—the NEA and the Association of School Boards—have not yet officially been heard from and we await their input and reactions with interest.

In sum, how far and how fast the reforms can be achieved through labor-management collaboration remain open questions. What is clear, however, is that the FMCS will be poised—ready, willing, and able to help the reform cause to any extent practicable.

This provides the perfect lead-in to our Agency's most recent outreach. Our starting premise is that the Agency's full complement of 175 professional mediators could not be expected to cover all the education reform initiatives that conceivably might be generated by thousands of school districts. Accordingly, I reached out to the leadership of the nation's most prestigious private mediation/arbitration organizations—The National Academy of Arbitrators—with a simple proposition. It was to afford the Academy an opportunity for its 1,000+ members to supplement the FMCS activities by offering to provide

facilitation and/or mediation services in connection with the anticipated uptick in public sector teacher education reform negotiations.

Upon receiving a favorable response, we have followed through by arranging to co-sponsor a one-day workshop in Miami, Florida, on September 16, 2011. The agenda was prepared with the core issues of education reform described throughout this paper in mind. An all-star cast has agreed to serve as presenters, including Ms. Weingarten, NEA President Dennis Van Roekel, AASA Executive Director Domenech, the Department of Education General Counsel Charles Rose, a panel of prominent Academy experts (Arnold Zack, Richard Bloch, and Professor James Oldham), FMCS Deputy Director Scot Beckenbaugh, and myself.

CONCLUSION

Throughout my former career as a labor relations practitioner and especially so since being appointed Director of FMCS, I have consistently observed that the three most important words in my vocabulary are Relationships, Relationships, Relationships. The manner in which our Agency has been able to function together with its partners in the education reform movement is a fitting testimonial to the ongoing vitality of that observation.