

UNIONIZED CHARTER SCHOOL CONTRACTS AS A MODEL FOR REFORM OF PUBLIC SCHOOL JOB SECURITY

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To have a strong public education system, it is imperative to recruit and maintain high-caliber public school teachers and ensure that school administrators can terminate underperformers. Teachers unions have contributed to this effort by increasing professionalism in teaching and giving teachers a role in school management, but they have also detracted from it by making it too difficult to terminate incompetent teachers. Nonunionized charter schools that employ teachers at will, on the other hand, may leave teachers vulnerable to arbitrary or malicious terminations. Unionized charter schools, a relatively recent phenomenon, produce teacher contracts that, as the result of labor negotiations between two prominent players in education, could provide valuable lessons for reform to the American public education system. This Note's analysis of contracts from the unionized charter schools in New York City reveals that they provide teachers with more job protection than employment at will but far less than provided in the public school union contract. Traditional public schools and unions should reform their collective bargaining agreements to provide a level of job security similar to that in the unionized charter school contracts. This may create the right balance between allowing principals to terminate incompetent teachers and protecting teachers from arbitrary or malicious terminations.

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INTRODUCTION

The primary purpose of a public education system is to provide an excellent education for all children.¹ American public schools are failing at that task.² Whether a student has enough to eat, a safe place to sleep, and supportive parents or guardians—among other factors—all affect that student's ability to learn. But of the factors within a school's control, the quality of that student's teacher has the greatest impact on his or her academic achievement.³ Therefore it is vital to recruit and maintain high-caliber public school teachers and allow administrators to terminate underperformers.⁴ Putting children in

¹ Federal, state, and local government expenditures on public education total more than \$600 billion per year, which creates demand for a massive textbook publication industry, funds education technology development, and employs over three million citizens as teachers, not to mention administrators and support staff. See TERRY M. MOE, SPECIAL INTEREST: TEACHERS UNIONS AND AMERICA'S PUBLIC SCHOOLS 325 (2011) (describing the amount the government spends on education); see generally THE CARTEL (Bowdoin Media 2011) (documenting how money in the education sector is spent). This Note assumes that neither these economic benefits, nor any of the other beneficial functions provided by the public education system, is the system's primary purpose.

² In 1983, Ronald Reagan's National Commission on Excellence in Education released its groundbreaking report, *A Nation at Risk*, a sobering portrait of the American public school system and a call to arms for education reform at the local, state, and federal level. NAT'L COMM'N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (1983). Nearly three decades later, subpar performance still plagues American public schools. Roughly one-third of eighth graders are considered proficient in math or reading. See, e.g., Kyle Stokes, *What We Learned from the Latest Release of National Standardized Test Scores*, STATEIMPACT (Nov. 1, 2011, 1:00 PM), <http://stateimpact.npr.org/indiana/2011/11/01/what-we-learned-from-the-latest-round-national-standardized-test-scores>. Barely 75% of students graduate from high school with their class. CIVIC ENTERS. ET AL., *BUILDING A GRAD NATION: EXECUTIVE SUMMARY 2* (2012). Few of those who do are academically prepared for success in college. ACT, INC., *THE CONDITION OF COLLEGE & CAREER READINESS 4* (2011) (reporting that just one in four high school students who took the ACT exam met all four benchmarks for college readiness).

³ See MCKINSEY & CO., *HOW THE WORLD'S BEST-PERFORMING SCHOOL SYSTEMS COME OUT ON TOP 12* (2007) ("The available evidence suggests that the main driver of the variation in student learning at school is the quality of the teachers."); MOE, *supra* note 1, at 307 ("[T]eacher quality is the single most important determinant of student achievement (aside from the social backgrounds of the students themselves)."); S. Paul Wright, Sandra P. Horn, & William L. Sanders, *Teacher and Classroom Context Effects on Student Achievement: Implications for Teacher Evaluation*, 11 J. PERSONNEL EVALUATION IN EDUC. 57, 63 (1997) ("[T]he most important factor affecting student learning is the teacher.").

⁴ See MCKINSEY & CO., *supra* note 3, at 12 ("Studies . . . suggest that students placed with high-performing teachers will progress three times as fast as those placed with low-performing teachers."). Stanford economist Eric Hanushek estimates that, "were the bottom 5 percent of teachers permanently replaced, U.S. students . . . would move from well below average in the international test-score ranking to somewhere near the top." MOE, *supra* note 1, at 307–08. Yet "only 23% of U.S. teachers come from the top third of the academic pool, fewer than 7% of public school teachers graduated from selective colleges," and those who plan to major in education on average have lower standardized test

front of outstanding teachers gives them the best chance to attain an excellent education; forcing them to remain in classrooms with incompetent teachers hurts that chance and undermines the goal of public education.⁵

Teachers unions have helped public education by making teaching a more attractive career, but they have also weakened it by obstructing principals' ability to operate their schools effectively.⁶ Before teachers unions gained collective bargaining rights in the 1960s, treatment of public school teachers was poor. The largely female workforce was underpaid, had no collective voice, and was vulnerable to arbitrary and discriminatory decisions from a mostly male administrative staff.⁷ A small percentage of teachers were union

scores than non-education majors. Breakthrough Collaborative, *The Alchemy of Effectiveness: The Path from High Potential Candidates to Highly Effective Teachers*, 1 (Dec. 2011), <http://www.breakthroughcollaborative.org/sites/default/files/Dec%202011%20Research%20Brief%20-%20Alchemy%20of%20Effectiveness.pdf>.

⁵ See *Teacher Performance Unit*, N.Y.C. DEP'T OF EDUC., <http://schools.nyc.gov/Offices/GeneralCounsel/Disciplinary/TPU/default.htm> (last visited Aug. 17, 2013) (defining "incompeten[t]" teachers as "ineffective tenured pedagogues"). Although there is consensus that teacher quality is the factor within the school's control with the highest impact on student achievement, it is difficult to draw a causal connection between a teacher's actions and student achievement, making it difficult to define incompetence precisely. Signals that this paper assumes to constitute incompetency, and which should be sufficient to terminate a teacher under an incompetence standard, include "chronic . . . failure to complete report cards . . . [or] correct student work"; smelling of alcohol while at school, and being found "'in an unconscious state' in her classroom." Steven Brill, *The Rubber Room: The Battle Over New York City's Worst Teachers*, *NEW YORKER*, Aug. 31, 2009, at 30, 32–33 (describing the actions of New York City teachers whom principals were unable to terminate for incompetence).

⁶ Former Secretary of Education Rod Paige, for example, decried the National Education Association as a "terrorist organization" for its alleged efforts to impede national education reform efforts. Dan Goldhaber, *Are Teachers Unions Good for Students?*, in *COLLECTIVE BARGAINING IN EDUCATION* 141, 142 (Jane Hannaway & Andrew J. Rotherham eds., 2006). John E. Chubb, a faculty member at Stanford University, and Terry M. Moe, a senior fellow at Stanford University's Hoover Institution, claim that unions "wage a war against principals—restricting their discretion, stripping them of managerial and policymaking power . . . purposely prevent[ing] [them] from staffing the organization and arranging incentives according to [their] best judgment." JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS AND AMERICA'S SCHOOLS* 49 (1991). *But see* DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM* 174–77 (2010) (acknowledging some of the common criticisms of teachers unions yet recognizing "the importance of the labor movement as a political force that has improved the lives of working people in many sectors of American life, including education").

⁷ Teachers lacked collective bargaining rights and were often paid less than the average factory worker, saddled with "noneducational responsibilities such as removing snow on school grounds," and subject to "[s]exist rules [requiring] . . . female teachers [to] leave the classroom as soon as they became pregnant." Richard D. Kahlenberg, *The History of Collective Bargaining Among Teachers*, in *COLLECTIVE BARGAINING IN EDUCATION*, *supra* note 6, at 7–11.

members.⁸ But after teachers unions in many states obtained collective bargaining rights under state law, teachers across the nation joined in droves.⁹ Today, 90% of public school teachers are union members.¹⁰ Through collective bargaining, teachers unions have increased the professionalism of the career, secured salary raises and pension benefits, and guaranteed that teachers have an active role in school management.¹¹ But they have also bargained successfully for very strong job security protections that have made the termination process prohibitively expensive and time-consuming.¹² In many jurisdictions it is nearly impossible to fire public school teachers, regardless of their competence.¹³

Partially in reaction to overly restrictive provisions in teachers union collective bargaining agreements and partially resulting from the school choice movement begun by economist Milton Friedman, charter schools rose to the forefront of education reform in the 1990s.¹⁴ Charter schools are publicly funded yet privately managed schools that allow parents to choose whether to send their children to a traditional public school or to a charter school in their district, which fosters competition in public education.¹⁵ Charter school operators

⁸ *Id.* at 8–10.

⁹ *Id.* at 10–14.

¹⁰ *Id.* at 15. Most collective bargaining agreements “force employees to join a union (or to pay agency fees, which are considered their ‘fair share’ of the group effort) if a majority votes the union in,” so it is difficult to determine what percentage of public school teachers would voluntarily agree to join the union. Terry M. Moe, *Union Power and the Education of Children*, in *COLLECTIVE BARGAINING IN EDUCATION* 229, 230 (2006).

¹¹ From 1961 to 2001, the average annual salary of public school teachers rose from \$5264 to \$43,262, and from 1960 to 2001, student-teacher ratios fell from 25.8:1 to 15.9:1. Kahlenberg, *supra* note 7, at 16–17. Most collective bargaining agreements contain clauses that restrict administrators’ ability to require teachers to perform noneducational tasks such as bathroom supervision and that mandate that a portion of teachers’ days are reserved for preparation time. *Id.*; see also *id.* at 11 (analogizing “professionalism” in teaching to that in law or medicine, marked by “good pay, autonomy, and freedom from arbitrary treatment by supervisors”).

¹² See *infra* Part II.A (discussing job security in traditional public school contracts).

¹³ See *infra* Part II.A (describing the difficulties faced by New York City principals attempting to terminate public school teachers).

¹⁴ Free-market economists drew on Friedman’s seminal article, *The Role of Government in Education*, and called for a federal voucher system where parents, “as rational education consumers with the ability to take their business elsewhere . . . [would] force all schools to increase their efficiency.” DANNY WEIL, *CHARTER SCHOOL MOVEMENT* 213 (2d ed. 2009). This created an ideological dilemma for progressives who agreed that competition begets creativity and efficiency, but who staunchly opposed the privatization of public education. *Id.* at 214. Charter schools—schools that were public but gave parents an element of choice and the ability to avoid underperforming neighborhood schools—presented a workable compromise.

¹⁵ Charter schools, by expanding school choice within the public school system, remain a strange political beast as part of “a left-wing movement with right-wing money.” NAT’L CHARTER SCH. RESEARCH PROJECT, *THE FUTURE OF CHARTER SCHOOLS AND TEACHERS*

accept greater accountability in exchange for greater autonomy.¹⁶ They are granted exemptions from most state and local regulations that govern traditional public schools, but in return their charter schools are subject to review every few years, so that if a school fails to perform adequately, its charter is revoked and the school dismantled.¹⁷ Since the first charter school opened in 1991, charter schools have rapidly become one of the most controversial topics in primary and secondary education.¹⁸ By 2010, there were approximately 5200 charter schools in the country serving over 1.8 million students.¹⁹

Data suggest that charter school performance varies. Schools in well-managed charter school networks such as the Knowledge Is Power Program (KIPP) attain outstanding academic results.²⁰ But the charter school movement's focus on freeing charter school operators from district regulations is not by itself a guarantee of excellent schools. Studies analyzing whether charter schools are able to increase student achievement over traditional public schools offer mixed

UNIONS 8 (2006), http://www.crpe.org/sites/default/files/pub_ncsrp_unions_oct06_0.pdf (last visited Aug. 17, 2013); see also MOE, *supra* note 1, at 327–29 (describing how charter schools garner bipartisan support because Republicans are in favor of school choice and tend to oppose unions, while Democrats can appease the unions by opposing vouchers and appease parents from traditionally disadvantaged communities by supporting charter schools); Sandra Vergari, *The Politics of Charter Schools*, 21 EDUC. POL'Y 15, 23 (2007) (noting that charter schools are backed by an uneasy “coalition that crosses Democratic and Republican party lines”).

¹⁶ See Julie F. Mead, *Devilish Details: Exploring Features of Charter School Statutes That Blur the Public/Private Distinction*, 40 HARV. J. ON LEGIS. 349, 351 (2003) (describing charter schools' tradeoff between accountability and autonomy).

¹⁷ *Id.* at 370–73; see also Kevin S. Huffman, Note, *Charter Schools, Equal Protection Litigation, and the New School Reform Movement*, 73 N.Y.U. L. REV. 1290, 1294 (1998) (“At the conclusion of the schools' charter (typically five years), state or local officials may renew or revoke the charter, depending on the school's performance.”).

¹⁸ See Diane Ravitch, *The Myth of Charter Schools*, N.Y. REV. BOOKS, Nov. 11, 2010, at 22 (noting a “media frenzy” about the charter-school-focused documentary *Waiting for Superman* and describing how charter schools are at the center of a “clash of ideas occurring in education right now” between two ideological camps); see generally WAITING FOR “SUPERMAN” (Paramount Vantage 2010) (discussing entities that oppose and support the charter school movement while following five families as they strive to have their children accepted at New York City charter schools).

¹⁹ *The Public Charter School Dashboard*, NAT'L ALLIANCE FOR PUB. CHARTER SCHS., <http://dashboard.publiccharters.org/dashboard/schools/page/overview/year/2011> (last visited Aug. 17, 2013). The 5200 schools represent 5.4% of all public schools in the country. *Id.* The federal government aims to increase this number. As part of President Obama's Race to the Top initiative, state applicants can receive a greater portion of the \$4.35 billion in federal funding if they “ensur[e] successful conditions for high-performing charter schools and other innovative schools.” Race to the Top, 75 Fed. Reg. 19,496, 19,505 (Apr. 14, 2010).

²⁰ See RAVITCH, *supra* note 6, at 135 (discussing KIPP's student achievement results).

results.²¹ Even though there is no guarantee that the students in a charter school will receive an excellent education, charter schools' freedom from restrictive collective bargaining agreement provisions creates a space for testing innovative theories on how to run an ideal public school. In exceptional cases like KIPP, innovative theories have yielded a model that works well for children from traditionally disadvantaged communities.²² These strategies appear to be replicable, at least on a small scale.²³ Still, there is a great deal of ferment, experimentation, and controversy in the charter school arena.

Charter schools and teachers unions are often at odds with one another for ideological reasons,²⁴ but also because charter schools reduce union funding and undermine union clout.²⁵ Charter schools

²¹ In 2004, Caroline Hoxby of Stanford University found that, compared to regular public school students, charter school students achieve 5.2% higher proficiency rates in reading and 3.2% higher in math as tested by their state's exams. CAROLINE M. HOXYBY, *ACHIEVEMENT IN CHARTER SCHOOLS AND REGULAR PUBLIC SCHOOLS IN THE UNITED STATES 1* (2004). In 2009, Stanford University published a landmark study on charter schools in sixteen states, finding that 17% of schools had significantly higher academic gains than traditional public schools; 46% showed no difference; and 37% did significantly worse than their traditional public school counterparts. CTR. FOR RESEARCH ON EDUC. OUTCOMES (CREDO), *MULTIPLE CHOICE: CHARTER SCHOOL PERFORMANCE IN 16 STATES 44–46* (2009). Hoxby contested the validity of the report, which sparked an ongoing debate between CREDO and Hoxby. *See, e.g.*, CAROLINE M. HOXYBY, *A SERIOUS STATISTICAL MISTAKE IN THE CREDO STUDY OF CHARTER SCHOOLS 1* (2009) (arguing that the report uses “the achievement data as both the dependent variable and (lagged) an independent variable,” which resulted in an inaccurately unfavorable measure of charter school effectiveness). This debate further indicates the difficulty in comparing charter schools and public schools, as well as the need to refrain from drawing hasty conclusions based on such comparisons.

²² *See* RAVITCH, *supra* note 6, at 136 (“KIPP has demonstrated that youngsters from some of the toughest neighborhoods in the nation can succeed in a safe and structured environment . . .”).

²³ *See infra* notes 68–73 and accompanying text (discussing qualities, such as greater teacher autonomy, that have led to successful charter schools); *see also* Andrew J. Rotherham, *Charter Schools: The Good Ones Aren't Flukes*, *TIME* (Oct. 14, 2010), <http://www.time.com/time/nation/article/0,8599,2025310,00.html> (describing “the top tier of charter networks” as “solid evidence that [individual schools'] successes can be reproduced and scaled up in networks”).

²⁴ *See* Leo Casey, *The Educational Value of Democratic Voice*, in *COLLECTIVE BARGAINING IN EDUCATION* 181, 199 (2006) (summarizing how unions are diametrically opposed to the typical nonunionized charter school practice of at-will employment).

²⁵ *See* NAT'L CHARTER SCH. RESEARCH PROJECT, *supra* note 15, at 1 (discussing how charter schools are sometimes characterized as “direct threats to teachers unions, since charter school teachers generally do not need to join existing collective bargaining units”). For their part, teachers unions have tried “to hold down the numbers of charter schools, block or repeal charter school laws, and sue school districts that use chartering.” *Id.*; *see also* MITCH PRICE, *ARE CHARTER SCHOOL UNIONS WORTH THE BARGAIN?* 14 (2011), available at <http://www.crpe.org/publications/are-charter-school-unions-worth-bargain> (“[U]nions . . . organize[] charter school teachers at the local level, while at the same time lobby[] against charter school interests—for example, by pressing for a cap on the number of charter schools—at the state level.”).

are typically exempt from the collective bargaining agreement formed between traditional public schools and the local teachers union. This means that charter schools do not have to bargain with unions over employment contracts unless a majority of teachers in the particular school vote to unionize.²⁶ And most charter school teachers—unlike the vast majority of traditional public school teachers—are not union members.²⁷ As a result, most charter schools, like most nonunion employers in the United States, operate under the default rule of employment at will, which allows administrators to terminate and replace underperforming teachers more easily.²⁸

Despite their differences, charter schools and teachers unions must find common ground.²⁹ Increasingly, charter schools and teachers unions are working together by law (some statutes require

²⁶ Only “health and safety, civil rights, and student assessment requirements applicable to other public schools” apply to charter schools. Charter Schools Act, N.Y. EDUC. LAW § 2854(1)(b) (McKinney 2009) (“A charter school shall be exempt from all other state and local laws, rules, regulations or policies governing public or private schools, boards of education and school districts, including those relating to school personnel and students, except as specifically provided in the school’s charter or in this article.”); *see also* § 2854(3)(b-1) (discussing how employees of a charter school that is not converted from an existing public school are exempt from existing collective bargaining agreements).

²⁷ Over ninety percent of teachers at traditional public schools are union members. *See supra* note 10 and accompanying text. Yet in New York City, for example, as of 2012, only around eleven percent of the charter schools have unionized teachers. *See* N.Y.C. CHARTER SCH. CTR., THE STATE OF THE NYC CHARTER SCHOOL SECTOR 4 (2012); UNITED FED’N OF TEACHERS, UFT-REPRESENTED CHARTER SCHOOLS, <http://www.uftacts.org/who-we-are/uft-represented-charter-schools> (last visited Aug. 17, 2013) (detailing which New York City schools have union representation).

²⁸ *See infra* Part II.B (summarizing job security provided by nonunionized charter schools).

²⁹ Beyond disagreements over teacher contracts, charter schools and teachers unions must resolve two other major conflicts—funding and co-location—neither of which turn on the job security provided in teacher contracts. Charter schools receive an amount per student from the school district where the student otherwise would have attended school, so one criticism often leveled at charter schools is that they drain money from non-charter public schools. *See* CHARTER SCHS. INST., STATE UNIV. OF N.Y., NEW YORK STATE CHARTER SCHOOLS AT A GLANCE 3 (2009) (“The foundation of charter school funding is the per pupil payments charter schools receive from the district of residence of the student attending the charter school.”); *see generally* Stephen D. Sugarman, *Charter School Funding Issues*, in 10 EDUCATION POLICY ANALYSIS ARCHIVES, 1–8 (2002), available at <http://epaa.asu.edu/ojs/article/view/313/439> (providing an overview of the charter school funding controversy and how funding charter schools can mean less money for traditional public schools). As for co-location, most charter schools share space with district schools, so charter schools are sometimes accused of overcrowding district schools. *See* N.Y.C. CHARTER SCH. CTR., *supra* note 27, at 3 (noting that most charter schools are housed in district facilities); Rachel Cromidas, *Showdown Set for Year’s First Charter School Co-Location Hearing*, GOTHAM SCHOOLS (Nov. 29, 2011, 4:48 PM), <http://gothamschools.org/2011/11/29/showdown-set-for-years-first-charter-school-co-location-hearing> (describing the first New York City charter school co-location hearing “in a season of rancorous co-location hearings”).

new charters to abide by collective bargaining agreements);³⁰ by design (some charter school leaders have agreed to negotiate with the union before opening a school);³¹ and by vote (some charters have been forced to negotiate with the union because a majority of their staff chose to initiate collective bargaining procedures).³² Both charter schools and teachers unions have a strong investment in the bargaining process because their future is at stake.³³

This Note focuses on unionized and nonunionized charter school contracts in New York City³⁴ as well as the traditional public school

³⁰ See, e.g., EDUC. § 2854(3)(b) (“The school employees of a charter school that has been converted from an existing public school . . . shall be subject to the collective bargaining agreement covering that school district negotiating unit.”); see also Martin H. Malin & Charles Taylor Kerchner, *Charter Schools and Collective Bargaining: Compatible Marriage or Illegitimate Relationship?*, 30 HARV. J.L. & PUB. POL’Y 885, 931 & nn.237–38 (2007) (discussing how states vary in whether they require charter schools to abide by district collective bargaining agreements or allow charters and their teachers to opt out).

³¹ See, e.g., Elizabeth Green, *Highly Anticipated UFT, Green Dot Contract Is on the Way*, GOTHAM SCHOOLS (May 15, 2009, 3:33 PM), <http://gothamschools.org/2009/05/15/highly-anticipated-uft-green-dot-contract-is-on-the-way/> (describing how Green Dot and the UFT worked together to put a collective bargaining agreement in place before the school opened).

³² The New York City Public Employees Fair Employment Act, more commonly known as the Taylor Law, is an exception to charter schools’ exemption from state regulations and guarantees that charter school teachers retain the right to join a union or employee-centered organization, regardless of whether their original contract is governed by the teachers union or not. See EDUC. § 2854(3)(a) (“An employee of a charter school shall be deemed to be a public employee solely for purposes of article fourteen of the civil service law.”); Taylor Law, N.Y. CIV. SERV. § 202 (McKinney 2011) (“Public employees shall have the right to form, join and participate in . . . any employee organization of their own choosing.”); see also ATLANTIC LEGAL FOUND., *LEVELING THE PLAYING FIELD: WHAT NEW YORK CHARTER SCHOOL LEADERS NEED TO KNOW ABOUT UNION ORGANIZING* 1, 7 (2005) (explaining how the Charter Schools Act reserves for charter school teachers their right under the Taylor Law to “take affirmative steps to make a union [their] legally recognized bargaining agent”). The Taylor Law’s tradeoff was that public employees gained the right to express their voice through collective action, but sacrificed their right to strike. CIV. SERV. § 210(1) (“No public employee or organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage, or condone a strike.”). The UFT will become the bargaining representative of a charter school staff if a simple majority of teachers sign a “union authorization card.” ATLANTIC LEGAL FOUND., *supra*, at 10.

³³ When charter school teachers vote to unionize, charter schools tend to negotiate aggressively to preserve autonomy in staffing, one of the main motivations for creating charter schools. See Mead, *supra* note 16, at 351 (discussing charter schools’ tradeoff of public accountability for autonomy). For their part, the unions may negotiate aggressively for a contract that resembles the union contract, not only because that is what they think their members want but because they fear that union opponents could use union-charter contracts as evidence of the wisdom and possibility of reforming the union contract across the board. See PRICE, *supra* note 25, at 15 (“The more reformist agreements [teachers unions] sign onto and the more common the portfolio approach to contracts becomes then the harder it gets to defend a lot of the work rules that exist in many places.”).

³⁴ “Nonunionized charter contracts” refers to the contracts governing charter schools whose teachers are not represented by a union.

contract bargained for by the United Federation of Teachers (UFT), the New York City teachers union. New York, a bellwether of teachers union efforts since the 1960s,³⁵ is an appropriate place to view this unfolding drama. It has two unionized charter schools—Green Dot and Amber³⁶—that have successfully reached agreements with the teachers union, and several other New York charter schools are currently negotiating with the union over new contracts.³⁷ On average, New York City’s charter schools consistently outperform traditional public schools.³⁸ As it is the biggest school district in the

³⁵ From the 1930s through the 1950s, there were a few isolated cases of collective action by teachers, but “the watershed development came in New York City in the early 1960s.” Kahlenberg, *supra* note 7, at 11. Following a strike organized by the newly formed UFT, the teachers union signed “the nation’s first major teacher collective bargaining contract, including a \$995 pay increase and a duty-free lunch period.” *Id.* at 13. This groundbreaking moment in New York City led to “an explosion of teacher unionism” in the 1960s, where teachers unions across the country swelled in membership and other states followed New York’s example by passing public employee collective bargaining laws. *Id.* at 14 (internal quotation marks omitted); see also Julia E. Koppich, *The As-Yet-Unfulfilled Promise of Reform Bargaining: Forging a Better Match Between the Labor Relations System We Have and the Education System We Want*, in COLLECTIVE BARGAINING IN EDUCATION, *supra* note 6, at 203, 206 (detailing how teacher unionism began in New York City in the 1960s).

³⁶ See *infra* note 44.

³⁷ See, e.g., Robert Callaghan, *Harlem Bilingual Charter Educators Choose UFT*, UNITED FED’N OF TEACHERS (Mar. 22, 2012), <http://www.uft.org/news-stories/harlem-bilingual-charter-educators-choose-uft> (explaining that teachers at New York French American Charter School voted to unionize); Geoff Decker, *Teachers Win Money, Lose Protection in New Green Dot Contract*, GOTHAM SCHOOLS (Oct. 14, 2011, 5:57 PM), <http://gothamschools.org/2011/10/14/teachers-win-money-lose-protection-in-new-green-dot-contract/> (discussing how teachers at the Bronx Academy of Promise, Opportunity Charter School, and Fahari Academy Charter School organized on their own). The number of unionized charter schools in New York City is likely to change as the charter school landscape is rapidly evolving. This Note only analyzes the contracts from the two New York City charter schools that had collective bargaining agreements in place at the time of publication.

³⁸ CREDO, the Stanford University center which published the 2009 piece evaluating charter schools nationally, later published a report finding that more than half of New York City charter school students outperform their public school district counterparts in math, and nearly a third in reading. CTR. FOR RESEARCH ON EDUC. OUTCOMES (CREDO), CHARTER SCHOOL PERFORMANCE IN NEW YORK CITY 2 (2010). Margaret Raymond, CREDO’s lead researcher, stated that “[n]ot only were charter schools as a whole better in New York than in any other city we have studied; there was also less range in quality.” N.Y.C. CHARTER SCH. CTR., *supra* note 27, at 16 (internal quotation omitted). “Discounting for families who apply to more than one school,” nearly every charter school in the city has an enrollment waiting list such that an estimated 51,473 students are still hoping for acceptance to a charter school. *New York City Charter Schools: 2011-2012 Enrollment Lottery Trends*, N.Y.C. CHARTER SCH. CTR. 1, http://www.nyccharterschools.org/sites/default/files/resources/Lottery2011Report_v5.pdf (last visited Aug. 17, 2013). The 2010 film *The Lottery*, similar to *Waiting for “Superman,”* *supra* note 18, documents the lives of four families from Harlem and the Bronx whose children applied for seats at the Harlem Success Academy, one of the city’s charter school networks. THE LOTTERY (Vantage Films 2010). The fact that families compare winning a seat at a charter school network, such that their child does not have to attend a traditional public school, to

country³⁹ and a pioneer in unionized education, union leaders and charter school advocates nationwide are closely watching the ongoing negotiations between the UFT and New York City charter schools.⁴⁰ The lessons learned in New York may be highly relevant to public schools in other cities.⁴¹

Although much has been written both about charter schools and about the difficulty of firing incompetent teachers in unionized traditional public schools, unionized charter schools are a new phenomenon that has received much less attention.⁴² By examining how the unionized charter school contracts in New York City balance principals' interest in staffing autonomy and teachers' interest in job security, this Note can help interested parties both to predict the likely shape of due process protections in future unionized charter school contracts and, more importantly, guide future decisions about what kind of due process protections ought to govern in traditional public school contracts.⁴³

winning a lottery ticket indicates that parents and guardians perceive New York City charter schools to have high success rates.

³⁹ See NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 2011, at 145 (2008) (comparing the enrollments of public school districts with more than 15,000 students).

⁴⁰ See PRICE, *supra* note 25, at 5 (discussing how recent “[t]eacher-led union organizing” has resulted in negotiations between high-profile union and charter organizations in New York, Chicago, Los Angeles, and Baltimore).

⁴¹ The lessons learned in New York City may be most helpful, and will probably play out most prominently, in New Orleans. After Hurricane Katrina, city officials essentially wiped out the local teachers union and replaced the public schools with charter schools such that, as of 2010, nearly 61% of New Orleans children attend charter schools. See MOE, *supra* note 1, at 215–16; see generally THE EXPERIMENT (Fleurish Productions 2012) (documenting the radical experiment being attempted with the public schools of New Orleans). When the New Orleans teachers union regroups and teachers begin asking for union representation, the union will have to bargain with the vast array of new charter schools. See MOE, *supra* note 1, at 216 (describing how the “local union may eventually regenerate itself”).

⁴² See generally, e.g., Brill, *supra* note 5 (discussing efforts by the teachers union to keep allegedly incompetent teachers on school district payrolls); Huffman, *supra* note 17 (describing charter schools as part of the “new school reform movement”).

⁴³ “Unionized charter school contracts” refers to the employment contracts that govern charter schools whose teachers have appointed a teachers union as their bargaining representative. The analysis of unionized charter school contracts is relevant for nonunionized charter schools as well because, if they want to remain nonunionized, they must structure their own contracts to meet teacher demands and remove the incentive for their teachers to initiate collective bargaining procedures. See, e.g., PRICE, *supra* note 25, at 15 (discussing a national study of charter school contracts, which found that “[f]or non-unionized charter schools, attention to basic management practices and employment policies can go a long way toward building work environments that keep teachers satisfied and productive without a labor contract”). For a discussion of how charter schools can structure themselves to “make[] a union unnecessary,” see ATLANTIC LEGAL FOUND., *supra* note 32, at 49–60.

There are three public school teacher contracts currently in operation in New York City: the public school union contract and the contracts with Green Dot New York and Amber Charter School.⁴⁴ The Green Dot and Amber contracts represent a compromise: Both contracts provide more due process protections and job security than the bare-bones employment-at-will terms found in nonunionized charter contracts, but less process and job security than that in the union contract.⁴⁵ As the product of successful negotiation between two constituencies that tend to hold opposing views on teacher job security,⁴⁶ the balance struck in these contracts may represent the optimal amount of due process protection for the ideal public school employment contract.⁴⁷ This Note focuses on the job security provisions in these school employment contracts.

Part I discusses the conflicting beliefs about job security that must be balanced in a teacher contract. It argues that nonunionized charter schools should employ teachers at will while traditional public schools should not, primarily because teachers unions staunchly oppose employment at will, but also due to problems with employment at will

⁴⁴ Green Dot New York is the first New York City charter school opened by Green Dot Public Schools, a California-based charter management organization which “encourages its teachers to be represented by unions.” Elizabeth Green, *At Long Last, Bronx Green Dot Finalizes (Tenure-Free) Contract*, GOTHAM SCHOOLS (June 24, 2009, 12:01 AM), <http://gothamschools.org/2009/06/24/at-long-last-bronx-green-dot-finalizes-tenure-free-contract/>. Steve Barr, the leader of Green Dot, and the UFT’s president at the time, Randi Weingarten, signed the Green Dot teacher contract on June 24, 2009. *Id.* Amber Charter School was founded in 2000 by the Association of Progressive Dominicans and signed a teacher contract with the UFT on September 1, 2007. *See Who Are We?*, AMBER CHARTER SCHOOL (last updated July 23, 2013), http://www.ambercharter.org/site_res_view_template.aspx?id=c0629579-7ee6-4e8d-9ce2-bdfae6b32906; AMBER CHARTER SCHOOL, AMBER CHARTER SCHOOL AND UFT COLLECTIVE BARGAINING AGREEMENT (Sept. 1, 2009) [hereinafter AMBER CONTRACT], available at http://www.uft.org/files/contract_pdfs/amber-charter-school-contract-2009-2010.pdf. As of late 2012, the UFT has not come to an agreement with any of the charter schools whose teachers voted to unionize. UNITED FED’N OF TEACHERS, *supra* note 27 (detailing which New York City schools have union representation); *see supra* note 37 and accompanying text (explaining how the union is in negotiations with several charter schools whose teachers have voted to unionize).

⁴⁵ *See infra* Part II.C (comparing the unionized charter contracts to the union contract and the nonunionized charter contracts).

⁴⁶ *See infra* Part II (describing how certain unionized contracts strike a balance between schools’ preference for autonomy over employment decisions and teachers unions’ preference for job security).

⁴⁷ PAUL T. HILL ET AL., THE FUTURE OF CHARTER SCHOOLS AND TEACHERS UNIONS 19 (2006), available at http://www.crpe.org/sites/default/files/pub_ncsrp_unions_oct06_0.pdf (“[M]oderates in both camps think charter schools can work effectively with some forms of unionization (for example, school-specific bargaining units and ‘thin’ agreements), and that teachers can benefit from taking greater responsibility for key decisions and being employed in schools that must either perform or close.”). *But see* PRICE, *supra* note 25, at 14 (“Several charter leaders questioned whether unions could simultaneously represent the interests of both charter schools and traditional schools . . .”).

in the public school context. Part II describes the provisions governing teacher termination in the teachers union contract and in nonunionized charter schools, then analyzes how the unionized charter schools' contracts find a middle ground between these two contract models. Part III analyzes the lessons unionized charter school contracts can provide for reforming the union contract. Part III concludes by arguing that traditional public schools and teachers unions should agree to a level of job security similar to that provided in the unionized charter school contracts.

I

THE PROBLEM

Giving principals the autonomy to terminate incompetent teachers efficiently and protecting teachers from arbitrary or malicious terminations are two essential, yet conflicting, goals that all public schools must balance to operate successfully.⁴⁸ Neither the unions' desire to protect their members' jobs nor charter schools' desire to maintain staffing autonomy are unwise or unreasonable.⁴⁹ Student achievement suffers if principals terminate outstanding veteran teachers due to personal disagreements, and likewise if principals must leave the worst teachers on staff because it is too difficult and expensive to terminate them.⁵⁰

The union contract currently governing traditional public schools has not successfully balanced these tensions.⁵¹ Teacher quality is the factor within the school with the greatest impact on student achievement;⁵² yet as Part II will show, the union contract and its tenure provisions make it nearly impossible to terminate incompetent teachers.⁵³ Constraining principals' staffing autonomy in this way obstructs their ability to provide excellent education opportunities by forcing students to stay in classrooms with incompetent teachers.⁵⁴

⁴⁸ See Casey, *supra* note 24, at 199 (summarizing the UFT's position on school staffing as a balance between allowing termination decisions to proceed efficiently and preventing principals from having unfettered discretion).

⁴⁹ *Id.*; see also *infra* Part II.B (explaining that nonunionized charter schools, given the choice, tend to employ their teachers at will).

⁵⁰ See *supra* note 3 and accompanying text (explaining the link between teacher quality and student achievement).

⁵¹ See *supra* note 2 and accompanying text (discussing the failures of the public education system with regard to student achievement).

⁵² See *supra* notes 3–4 and accompanying text.

⁵³ See *infra* Part II (detailing how the union contract obstructs principals' ability to terminate bad teachers).

⁵⁴ See MOE, *supra* note 1, at 207 ("It's important not to make this more complicated than it needs to be. If bad teachers can't be removed from the classroom, that is definitely bad for children. . . . This is not rocket science.").

Therefore, tenure provisions, which entitle traditional public school teachers to a lengthy and expensive termination procedure and several opportunities to appeal, and which deter principals from terminating incompetent teachers, should be eliminated.⁵⁵ Without tenure, the question becomes whether employment at will or a “just cause” termination standard is best.⁵⁶ Each has its own merits.

Employment at will has several advantages. The primary benefit is that principals who hire teachers at will have the most flexibility in choosing whom to terminate and for what reason.⁵⁷ In theory, principals governed by at-will contracts will terminate incompetent teachers, increasing the chances that students will have strong educators leading their classrooms. Removing incompetent teachers could also attract a more talented cadre of teacher applicants who would otherwise not want to work on a staff riddled with incompetent colleagues.⁵⁸

Additionally, contrary to what critics contend, the employment-at-will legal regime does not give principals carte blanche authority to fire teachers.⁵⁹ Although employment at will originally meant that employees could be fired for “good cause or for no cause, or even for bad cause,”⁶⁰ several “bad causes” have been declared unlawful by statute or common law such that, in the modern era, it is more accurate to say that employment at will means that employers are not required to provide a cause for termination.⁶¹ Even under an employment-at-will contract, teachers retain important legal rights.⁶² For

⁵⁵ See *infra* Part II.A (describing the effects of tenure provisions in the current union contract).

⁵⁶ Part II.B explains that nonunionized charter schools use employment at will while Green Dot and Amber both have “just cause” standards.

⁵⁷ See *infra* notes 60–61 and accompanying text (describing how employment at will lets employers terminate employees without providing a reason for doing so).

⁵⁸ Cf. Courtney L. Malloy & Priscilla Wohlstetter, *Working Conditions in Charter Schools: What’s the Appeal for Teachers?*, 35 EDUC. AND URB. SOC’Y, 219, 233–35 (2003) (noting charter school teachers’ satisfaction with colleagues).

⁵⁹ See Casey, *supra* note 24, at 199 (explaining that under an at-will standard of employment a dismissal still cannot “violate legal prohibitions of discrimination against protected classes of individuals”).

⁶⁰ Payne v. W. & Atl. R.R. Co., 81 Tenn. 507, 518 (1884).

⁶¹ See Frank J. Cavico, *Employment at Will and Public Policy*, 25 AKRON L. REV. 497, 511 & nn.72–74 (1992) (discussing specific statutory exceptions such as the duty to serve on a jury and the right to worker’s compensation, litigated through the public policy exception to employment at will); Arthur S. Leonard, *A New Common Law of Employment Termination*, 66 N.C. L. REV. 631, 642 n.66, 643 (1988) (summarizing statutory exceptions to employment at will which prevent, *inter alia*, discrimination based on age, race, and gender, and protect employees who are terminated for engaging in collective action).

⁶² A threshold question is whether charter schools are state actors. Nationally, this issue is far from resolved, as the Supreme Court has not ruled on it. Maren Hulden, Note, *Charting a Course to State Action: Charter Schools and § 1983*, 111 COLUM. L. REV. 1244,

example, teachers can bring wrongful termination claims if terminated for refusing to violate a clearly established state public policy or expressing their First Amendment right to free speech.⁶³ Teachers are also protected from discriminatory termination because they can bring wrongful discharge claims under Title VII.⁶⁴

These significant state and federal wrongful discharge doctrines and statutes restrict principals' staffing autonomy even under an employment-at-will contract. But employment at will fails to protect teachers in several ways. Under an employment-at-will regime, principals can terminate teachers for reasons that, while lawful, generate negative outcomes for either the teachers or, more importantly, their students. For example, employment at will allows principals to terminate teachers who voice disagreement with their management decisions, regardless of those teachers' abilities in the classroom or the merits of their opinions. Teachers might therefore teach only uncontroversial subjects and choose not to criticize school policy decisions rather than risk losing their jobs. Moreover, due to the lockstep pay scale that increases salary based solely on seniority, principals have a strong incentive to terminate veteran teachers in favor of younger teachers to cut costs, which they can do more easily when teachers are

1248 (2011). There is a circuit split on whether teacher dismissals or related actions by charter schools constitute state action. *Compare* *Caviness v. Horizon Cmty. Learning Ctr.*, 590 F.3d 806, 810–11 (9th Cir. 2010) (finding no state action by an Arizona charter school when an employee brought a federal claim after being dismissed), *with* *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1188 (10th Cir. 2010) (holding that a Colorado charter school was a “local governmental entity” when addressing former teachers’ claims). Every court considering the matter in New York has found that charter schools are state actors. *See, e.g.*, *Scaggs v. N.Y. State Dep’t of Educ.*, No. 06-CV-0799 (JFB)(VVP), 2007 WL 1456221, at *1 (E.D.N.Y. May 16, 2007) (allowing a claim regarding a charter’s special education accommodations to proceed because the charter management organization was a state actor); *Matwijko v. Bd. of Trs.*, No. 04-CV-663A, 2006 WL 2466868, at *3–5 (W.D.N.Y. Aug. 24, 2006) (finding that charter schools are state actors for purposes of a teacher’s First Amendment claim that she was dismissed for criticizing the school board); *see also* *Meadows v. Lesh*, No. 10-CV-00223(M), 2010 WL 3730105, at *1 (W.D.N.Y. Sept. 17, 2010) (acknowledging a circuit split but allowing the case to go forward).

⁶³ *See, e.g.*, *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (rejecting the argument that “teachers may be constitutionally compelled to relinquish First Amendment rights they would otherwise enjoy as citizens”). *But see* *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (finding that a public employee’s speech had no First Amendment protection because the statements were made pursuant to his work); *Connick v. Myers*, 461 U.S. 138, 147 (1983) (holding that a public employee’s statements about his employer’s personnel policies are not protected because they are not “a matter of public concern”).

⁶⁴ *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2006) (“It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate . . . because of such individual’s race, color, religion, sex, or national origin.”).

employed at will.⁶⁵ Even if principals terminate only incompetent veteran teachers, this still could harm recruitment and retention of excellent teachers because contractual job security convinces talented individuals to devote themselves to a highly demanding and emotionally draining profession for less pay than they could receive in other fields.⁶⁶ The high turnover rates that accompany employment-at-will contracts also risk the loss of institutional knowledge and could create an unstable environment for schoolchildren that might not be compensated by the fresh energy of new teachers.⁶⁷

Although it is difficult to determine whether employment at will would be better for public schools as a whole, it has worked well in nonunionized charter schools in New York City.⁶⁸ Though the UFT is vehemently opposed to employment at will,⁶⁹ some teachers, including those who are drawn to nonunionized charter schools, are willing to accept less job security in exchange for greater autonomy.⁷⁰ Moreover, principals' inability to terminate underperforming teachers is bad not only for students, but also for committed and competent teachers. In a school where some teachers are inadequately disciplining students, maintaining school culture, and teaching fundamental skills, every teacher's job is more difficult.⁷¹

Moderate termination provisions that strike a fair balance between job security and staffing autonomy may be possible; however, they should not be required for all charter schools. Nonunionized charter schools, particularly those like KIPP and Uncommon, which have obtained outstanding results,⁷² should retain their employment-at-will contracts. They can continue to serve as experimental grounds

⁶⁵ Cf. Casey, *supra* note 24, at 181, 197–99 (describing the difficulties schools would face if they removed seniority-based pay).

⁶⁶ See PAOLA SANTONOCITO, *Redefining Job Security*, HRWIRE (2008), http://askhrs.com/HRWire_security (finding that job security consistently rates highly as an attractive aspect in selecting employment).

⁶⁷ One common complaint about charter schools is that their teacher turnover rate is high. See, e.g., Casey, *supra* note 24, at 196–97 (discussing high turnover rates at charter schools and the perils of teacher attrition).

⁶⁸ See *supra* note 38 and accompanying text (summarizing evaluations of New York City charter schools); see also *infra* Part II.B (describing how nonunionized charter schools in New York City tend to have employment-at-will contracts).

⁶⁹ Casey, *supra* note 24, at 199.

⁷⁰ See Malloy & Wohlstetter, *supra* note 58, at 237 (explaining that teachers are happy to work at charter schools even though they have less job security because they “want[] the freedom to make their own instructional and curricular decisions and an environment that foster[s] professional opportunities for collaboration with like-minded colleagues”).

⁷¹ Cf. *id.* at 233–35 (discussing the benefits to teachers of working with like-minded and highly competent colleagues).

⁷² See *supra* note 23 and accompanying text (describing the success of “the top tier of charter networks”).

for whether employment at will is feasible in the public school setting while providing an opportunity for teachers who prefer to trade low job security for potentially higher rewards, an option not available under the current union contract.⁷³ Additionally, there are two safety valves in charter school employment-at-will contracts that protect teachers and students if the contracts stop functioning effectively. If principals abuse their staffing autonomy to the detriment of student achievement, the charter authorizing institutions can revoke those schools' charters, or the teachers can exercise their right to collectively bargain for higher job security.⁷⁴

Employment at will, however, is not the right level of job security for traditional public schools.⁷⁵ Many teachers would not forgo job security for higher pay or greater freedom, and teachers unions protect this preference.⁷⁶ Whether one believes either that the downsides of employment at will outweigh the benefits or that employment at will is simply not an outcome that teachers unions will accept, it is crucial to identify a middle ground—a form of “just cause” protection that gives principals adequate room to fire inadequate teachers. Unionized charter school contracts, because they reflect *both* teachers unions' and many teachers' preference for job security *and* charter schools' preference for staffing autonomy, could help to identify and test that middle-ground solution.

II

CONTRACTS ANALYSIS

This Part will analyze how the unionized contracts from Green Dot and Amber represent a compromise between charter schools' desire for greater staffing autonomy and teachers unions' desire for greater job protection. Additionally, this Part will conclude that negotiations between charter schools and teachers unions are likely to

⁷³ See *infra* Part II.A (describing the strong job security provided by the union contract). The union contract follows a lockstep pay schedule with salary increases based only on years teaching, with higher pay schedules available depending on teachers' education levels. See UNITED FED'N OF TEACHERS, AGREEMENT BETWEEN THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK AND THE UNITED FEDERATION OF TEACHERS app. A (Oct. 31, 2009), available at http://www.uft.org/files/contract_pdfs/teachers-contract-2007-2009.pdf [hereinafter UFT CONTRACT] (providing the salary schedule).

⁷⁴ See *supra* note 17 and accompanying text (describing the charter revocation option); see also *supra* note 32 and accompanying text (discussing how teachers retain their right to collectively bargain under the Taylor Law).

⁷⁵ See *supra* notes 64–67 and accompanying text.

⁷⁶ See *supra* note 24 and accompanying text (summarizing the union's position on employment at will).

produce optimal results because of the increased bargaining power of charter schools.

A. *Union Contract*

Before examining Green Dot and Amber contracts, it is necessary to understand the teacher termination provisions in the union contract and the typical nonunionized charter school contract. Through collective bargaining, the UFT has successfully obtained several benefits for New York City public school teachers, including due process protections against wrongful terminations.⁷⁷ But one of the most common criticisms of teachers unions like the UFT is that the due process protections they bargain for make it virtually impossible for administrators to terminate an underperforming teacher if that teacher has tenure.⁷⁸

Under the union contract, New York City teachers typically receive tenure status after a three-year probationary period.⁷⁹ To terminate an incompetent tenured teacher, a principal must first document incompetence to justify assigning a teacher an “unsatisfactory” rating. Article 21 of the union contract describes detailed procedures for the creation and maintenance of material that may criticize a teacher’s performance. Teachers, for example, must sign a copy of any negative material before it is placed in their file and written materials must be removed from the file three years after entered unless disciplinary charges follow.⁸⁰

Despite those restrictions, a principal who believes he or she has sufficiently documented incompetence may assign a teacher an “unsatisfactory” rating.⁸¹ But before the process can continue, a teacher can appeal the unsatisfactory rating to “a committee

⁷⁷ See *supra* note 11 and accompanying text (discussing the benefits unions have achieved in collective bargaining agreements).

⁷⁸ See, e.g., Howard L. Fuller et al., *Collective Bargaining in Milwaukee Public Schools, in* CONFLICTING MISSIONS? TEACHERS UNIONS AND EDUCATIONAL REFORM 110, 128 (Tom Loveless ed., 2000) (“[D]uring a twelve-year period, negative evaluations led to an average of only 1.5 terminations a year.”); PETER BRIMELOW, *THE WORM IN THE APPLE* 41 (2003) (comparing the 7.9% involuntary dismissal rate for the Florida work force as a whole to the 0.05% rate for teachers).

⁷⁹ N.Y. EDUC. LAW § 3012(1)(a) (McKinney 2009) (“Teachers and all other members of the teaching staff of school districts . . . shall be appointed . . . for a probationary period of three years”); *Tenure*, UNITED FED’N OF TEACHERS, <http://www.uft.org/our-rights/know-your-rights/tenure> (last visited Aug. 17, 2013) (“Tenure is a status that appointed pedagogues achieve after completing a probationary period with satisfactory service. . . . The normal probationary period is three years, although this can be reduced by prior service or extended if the tenure grade is in doubt.”).

⁸⁰ UFT CONTRACT, *supra* note 73, art. 21(A)(5).

⁸¹ See *id.* art. 21(D)(3) (“Teachers who receive doubtful or unsatisfactory ratings may appeal under Section 4.3.1 of the by-laws of the Board of Education.”).

designated by the Chancellor,”⁸² who then submits their decision to the Chancellor “for a final decision.”⁸³ If either the commission or the Chancellor does not overturn the “unsatisfactory” rating, which would send the principal back to the documentation step, the principal has successfully entered an “unsatisfactory” rating into a teacher’s file.⁸⁴

Teachers worried that they are “in danger of receiving [disciplinary] charges . . . for incompetence” due to an “unsatisfactory” rating can voluntarily apply to enter the Peer Intervention Plus Program (PIP Plus).⁸⁵ Teachers in PIP Plus are coached by “independent consulting teachers” who observe the underperforming teacher and suggest how to improve their practice.⁸⁶ This is an admirable attempt to improve the performance of eager yet underperforming teachers without requiring them to leave the classroom. Nevertheless, it is another hurdle for principals because participating teachers cannot be terminated for incompetence, which adds another year to the termination process.⁸⁷

After the completion of PIP Plus, if a principal still stands by the “unsatisfactory” rating, a tenured teacher has three options. First, the teacher can choose not to appeal the rating.⁸⁸ Second, the teacher can file a case in state court to have the Chancellor’s decision reversed, where the litigation proceeds under the state court’s schedule.⁸⁹ Third, a teacher can appeal the Chancellor’s decision to the State Commissioner of Education.⁹⁰ This process may also take a while because even though the Department of Education “endeavor[s] to issue a decision within six to eight months (i.e., eight to ten months after the petition is filed) . . . hundreds of complex appeals are filed

⁸² PANEL FOR EDUCATIONAL POLICY, BYLAWS § 4.3.1 (2012), available at <http://schools.nyc.gov/NR/rdonlyres/B432D059-6BFE-4198-8453-466FDE2B22D5/69835/PEPBylawsFinal91409.pdf> (“Any person . . . who appears before the Chancellor, or a committee designated by the Chancellor . . . in respect to an appeal from a rating . . . other than a satisfactory rating . . . shall be afforded the opportunity for review.”).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ UFT CONTRACT, *supra* note 73, art. 21(J)(2).

⁸⁶ *See id.*

⁸⁷ *See id.* art. 21(G)(9).

⁸⁸ *See* Jon Stossel, *How to Fire an Incompetent Teacher: An Illustrated Guide to New York’s Public School Bureaucracy*, REASON, Oct. 2006, at 50, 53 (describing the process for terminating a teacher for incompetence in New York).

⁸⁹ *Id.*

⁹⁰ N.Y. EDUC. LAW § 310 (McKinney 2009) (“Any party conceiving himself aggrieved may appeal by petition to the commissioner of education who is thereby authorized and required to examine and decide the same.”).

each year, so it is impossible to guarantee a specific date.”⁹¹ If at either of the stages of appeal the evidence supporting the rating is insufficient, the principal’s rating is rejected and the process to document the incompetence begins again.⁹²

If the teacher loses both appeals or chooses not to appeal, this does not mean the teacher is terminated, only that the principal has successfully given the teacher an unsatisfactory rating.⁹³ The principal can then initiate the termination process. Tenured teachers facing a potential termination are subject to a “3020-a hearing,” governed by Section 3020-a of the New York State Education Law, as modified by the union contract.⁹⁴ After termination charges are filed, 3020-a requires the principal to prove to a majority of the school district board that “probable cause exists to bring a disciplinary proceeding against an employee.”⁹⁵ If the board finds that probable cause exists, the teacher can request a hearing in front of a hearing officer or panel of three arbitrators.⁹⁶

Before the hearing, 3020-a allows for a discovery process that offers substantial protections for teachers and very few privileges for the state. Through discovery, the union can “receive copies of investigatory statements, notes, other exculpatory evidence, and relevant student records,” while the Department of Education is only entitled to receive evidence from the union by “showing during the hearing that [the evidence sought] is relevant.”⁹⁷ Presumably, it is difficult for the factfinder to assess the relevance of evidence without knowing beforehand what evidence the opposing party holds. Moreover, although each party has the right to obtain counsel and subpoena and

⁹¹ N.Y. STATE DEPT. OF EDUC., FREQUENTLY ASKED QUESTIONS CONCERNING APPEALS TO THE COMMISSIONER OF EDUCATION, <http://www.counsel.nysed.gov/appeals/faqs.htm> (last visited Aug. 17, 2013).

⁹² The principal may not be able to rely on all of the evidence previously gathered in a second attempt to assign an “unsatisfactory” rating because material is removed from a teacher’s file after three years when disciplinary charges are not filed and assigning the rating does not constitute a disciplinary charge. *See supra* note 80 and accompanying text (discussing how material must be removed within three years if no disciplinary charges follow).

⁹³ The fact that the vast majority of teachers across the nation receive a “satisfactory” rating each year indicates the difficulty of successfully assigning an “unsatisfactory” rating. *See MOE, supra* note 1, at 187 (“In districts that use binary evaluation ratings (generally ‘satisfactory’ or ‘unsatisfactory’), more than 99 percent of teachers receive the satisfactory rating.”).

⁹⁴ UFT CONTRACT, *supra* note 73, art. 21(G) (“Tenured teachers facing disciplinary charges . . . will be subject to Section 3020-a of the Education Law as modified by paragraphs 1-10 below.”).

⁹⁵ EDUC. § 3020-a(2)(a).

⁹⁶ *Id.* § 3020-a(2)(c).

⁹⁷ UFT CONTRACT, *supra* note 73, art. 21(G)(8).

cross-examine witnesses,⁹⁸ the Department of Education cannot require a teacher to testify even though the teacher has the right to testify on his or her behalf.⁹⁹

Furthermore, there are contractual restrictions that complicate the scheduling of hearings. To schedule the hearing, the school board and the union must coordinate with the arbitrators to find mutually agreeable dates. Under the union contract, arbitrators who hear termination cases are only required to hear cases seven days a month during the school year and two days a month over the summer.¹⁰⁰ With such a limited number of hearing days, it may take several months for arbitrators to conduct a full hearing such that they can render a decision.¹⁰¹

If the school does not demonstrate at the hearing that it took remedial steps to improve the teacher's performance, the arbitrators may recommend some form of professional training rather than termination.¹⁰² If the arbitrators decide termination is appropriate, the teacher is terminated from the school's payroll.¹⁰³ But, within ten days of the arbitrators' decision, the teacher "may make an application to the New York [S]tate [S]upreme [C]ourt to vacate or modify the decision of the hearing officer."¹⁰⁴ Then the school board must engage in trial and appellate litigation with the union in the state court system.

Engaging in this process of documentation, arbitration, and litigation is extremely expensive,¹⁰⁵ but it is rendered even more costly by

⁹⁸ EDUC. § 3020-a(3)(c)(i) ("Each party shall have the right to be represented by counsel, to subpoena witnesses, and to cross-examine witnesses.").

⁹⁹ *Id.*

¹⁰⁰ See UFT CONTRACT, *supra* note 73, art. 21(G)(2)(a) ("Each arbitrator selected to serve on this rotational panel must agree to provide five (5) consecutive hearing dates per month for the months of September through July and two (2) hearing dates for the months of June and August."); Letter from Joel I. Klein, Chancellor, N.Y.C. Dept. of Educ., to Michael Mulgrew, Pres., United Fed'n of Teachers (Apr. 15, 2010), available at <http://www.uft.org/files/attachments/temporary-reassignment-centers-agreement-april-2010.pdf> ("Arbitrators serving on the competence panel must agree to provide seven (7) consecutive hearing dates . . . per month for the months of September through June and two (2) hearing dates for the months of July and August."); Brill, *supra* note 5, at 30 (describing how teachers used to be assigned to Teacher Reassignment Centers—colloquially referred to as "rubber rooms"—for several years, receiving their full salary while waiting for completion of their trial).

¹⁰¹ See, e.g., Jennifer Medina, *Progress Slow in Bloomberg Goal to Rid Schools of Bad Teachers*, N.Y. TIMES, Feb. 24, 2010, at A1 (explaining that a single case can take "years to reach a hearing" and then the hearings themselves can take several months due to the limited number of days per month arbitrators hear cases).

¹⁰² EDUC. § 3020-a(4)(a).

¹⁰³ *Id.* § 3020-a(4)(a)-(b).

¹⁰⁴ *Id.* § 3020-a(5).

¹⁰⁵ See Kahlenberg, *supra* note 7, at 18 ("The average cost of dismissing a teacher in New York State during the 1990s was reportedly \$200,000.").

the contractual requirement that teachers, unless they are charged with “serious misconduct,” be retained on staff and paid throughout the process regardless of how long it takes.¹⁰⁶ This means principals who want to fire a teacher who they view as incompetent may have to pay the teacher’s salary for several years—even though the teacher is not teaching—while also paying the arbitration and litigation costs in an attempt to terminate that teacher.

This Note does not argue that teachers should be denied the right to due process protections from arbitrary or malicious decisions by principals,¹⁰⁷ but rather that there can be too much of a good thing, even due process. In the 1990s, the average cost to fire a teacher in New York State was \$200,000, leading many administrators to choose not to initiate the termination proceeding at all.¹⁰⁸ The entire process can take several years without even resulting in a successful termination.¹⁰⁹ The net effect of these provisions is that, in New York City from 2008 to 2010, only three out of the 55,000 tenured teachers in the school system were terminated for incompetence.¹¹⁰

¹⁰⁶ UFT CONTRACT, *supra* note 73, art. 21(E) (“Any teacher who is suspended pending hearing and determination of charges shall receive full compensation pending such determination and imposition of any penalty . . .”). “Serious misconduct” is defined as charges involving the sale of drugs, physical abuse of a minor, or felonies involving firearms. *See id.* art. 21(G)(5). Sexual abuse of a minor also results in suspension without pay. *Id.* art. 21(G)(6).

¹⁰⁷ For a discussion of how even charter schools that employ their teachers at will recognize they are entitled to legal protections against arbitrary termination, see HILL ET AL., *supra* note 47, at 11–13.

¹⁰⁸ Kahlenberg, *supra* note 7, at 18; *see also* Brill, *supra* note 5, at 34 (detailing how paying arbitrators and lawyers costs “the city and the state . . . about four hundred thousand dollars”); Scott Waldman, *Solving Puzzle of Bad Teachers*, TIMES UNION, Oct. 24, 2011 (“[T]he process for firing bad teachers—called a 3020-a hearing—is so drawn out and costly that most districts can’t afford it.”).

¹⁰⁹ *See, e.g.*, Brill, *supra* note 5, at 32 (“It takes between two and five years for cases to be heard by an arbitrator . . .”); Medina, *supra* note 101 (explaining that a single case can take several years to reach completion); Waldman, *supra* note 108 (“[Incompetence cases] last an average of 502 days and cost \$216,588 . . .”).

¹¹⁰ Medina, *supra* note 101; *see also* Brill, *supra* note 5, at 34 (“[I]n the past two years arbitrators have terminated only two teachers for incompetence . . .”). Large cities across the country face similar difficulties terminating teachers employed under a union contract. *See, e.g.*, Evan Thomas & Pat Wingert, *Why We Must Fire Bad Teachers*, NEWSWEEK (Mar. 5, 2010, 7:00 PM), <http://www.thedailybeast.com/newsweek/2010/03/05/why-we-must-fire-bad-teachers.html> (“The percentage of teachers dismissed for poor performance in Chicago between 2005 and 2008 . . . was 0.01 percent. In Akron, Ohio, zero percent. In Toledo, 0.1 percent. In Denver, zero percent.”). From 2008 to 2010 in New York City, where just three out of 55,000 teachers were dismissed, the average percentage of teachers dismissed for incompetence was 0.0027% per year. Medina, *supra* note 101.

B. *Nonunionized Charter School Contracts*

Unlike traditional public schools, nonunionized charter schools are excused from state regulations and the collective bargaining agreement with the union;¹¹¹ therefore, their procedures for terminating teachers are simpler and less expensive. Most nonunionized charter schools employ their teachers at will.¹¹² Employment at will in its modern form essentially means that employers are not required to provide a cause for termination.¹¹³ The modern version of employment at will is reflected in the nonunionized charter schools' employment agreements, such as those which state that "an employee's relationship with [the school] is an employment 'at will'" such that "[t]he employment relationship may be terminated at any time without notice, with or without cause."¹¹⁴

Because charter schools employ teachers at will, they have much more flexibility than traditional public schools to terminate incompetent teachers. They do not need to go through multiple rounds of hearings and appeals to justify giving a teacher a negative evaluation, nor do they need to produce evaluations at all to justify termination.¹¹⁵ Teachers cannot appeal charter school principals' decisions, except by bringing the legal claims available to all private and public employees based on state and federal carve-outs to employment at will.¹¹⁶ Charter schools are also not required to provide tenure for their teachers, and the vast majority choose not to do so. Their teachers are not entitled to anything resembling a 3020-a hearing.¹¹⁷

¹¹¹ See *supra* note 26 and accompanying text (discussing charter schools' exemptions under state law).

¹¹² See WEIL, *supra* note 14, at 425 ("[T]he management of anti-union charter schools insist that the only acceptable standard of employment is 'at-will employment.'"); HILL ET AL., *supra* note 47, at 15 (explaining that union leaders are concerned about charter schools employing teachers "at will"); *supra* note 26 and accompanying text (discussing how charter school teachers have less job security than their counterparts in traditional schools).

¹¹³ See *supra* notes 60–61 and accompanying text.

¹¹⁴ E.g., FAHARI ACADEMY CHARTER SCHOOL, EMPLOYEE HANDBOOK 7 (Aug. 1, 2010) (on file with the New York University Law Review) (showing that nonunionized charter school contracts provide for employment at will.)

¹¹⁵ See *supra* notes 60–61 and accompanying text (explaining that at-will employment means employers need not provide cause for termination).

¹¹⁶ See HILL ET AL., *supra* note 47, at 11 ("[T]eachers employed 'at will' have the same rights under state and federal law as employees in private companies and nonprofits, including legal protections about being fired without just cause.").

¹¹⁷ See Malloy & Wohlstetter, *supra* note 58, at 225 (explaining that ten percent of teachers in non-conversion charter schools have tenure and that "[n]o teachers in charter schools operated by educational management organizations held tenure"); see also *supra* note 26 and accompanying text (discussing charter schools' exemptions from state laws and the collective bargaining agreement governing traditional public schools).

Nonunionized charter schools have used that flexibility to aggressively terminate underperforming teachers, resulting in much higher termination rates than in the traditional public schools.¹¹⁸

C. Unionized Charter School Contracts

In order to create contracts that are best for schools, unionized charter schools' contracts must strike a balance between providing teachers with job security and allowing for dismissal of incompetent teachers. Although it is better for student achievement if charter schools can efficiently terminate incompetent teachers,¹¹⁹ giving charter school principals too much staffing autonomy may leave teachers vulnerable to arbitrary terminations.¹²⁰ Therefore, an analysis of contracts from unionized charter schools should examine whether those contracts lean more toward providing principals with the autonomy found in nonunionized charter school contracts or the strong job security found in the union contract. If the Green Dot and Amber contracts resemble the union contract, that suggests charter schools that unionize would functionally become union schools. This has the potential to reintroduce the excessive protections that characterize traditional union contracts and frustrate one of the original purposes of charter schools. But if the contracts provide no due process protections to charter school teachers, that may harken back to the era before teachers unions gained collective bargaining rights to provide much-needed protections for public school teachers.

1. Amber Charter School

The Amber Charter School collective bargaining agreement with the UFT, only fifteen pages long, has far fewer termination restrictions than the 165-page UFT contract, but more restrictions than the nonunionized charter schools that employ teachers at will.¹²¹ The job security section of the Amber contract is a mere four sentences long, while the due process and grievance section of the UFT contract for

¹¹⁸ Compare Michael Podgursky & Dale Ballou, *Personnel Policy in Charter Schools*, THOMAS B. FORDHAM FOUNDATION, at 15 (Aug. 2001), <http://www.defendcharterschools.org/PersonnelPolicy.pdf> (“Eighty percent indicated that they had terminated at least one teacher’s employment for poor performance either at the end of a year or in mid-year. . . . [A]bout one-fifth of charter schools dismiss 5 to 10 percent of their teachers annually.”), with *supra* note 110 and accompanying text (describing termination rates close to zero for incompetent teachers in traditional public schools).

¹¹⁹ See *supra* notes 3–4 and accompanying text (explaining that students achieve more and progress more quickly with high-performing than low-performing teachers).

¹²⁰ See Casey, *supra* note 24, at 199 (“[U]nfettered management rights bedevil[] efforts to reform dismissal and disciplinary procedures.”).

¹²¹ See generally AMBER CONTRACT, *supra* note 44; UFT CONTRACT, *supra* note 73.

classroom teachers alone spans twenty-seven pages.¹²² The Amber contract lacks many of the protections afforded teachers governed by the union contract. For example, there are no restrictions on the evaluation materials placed in a teacher's file, nor is there a program analogous to PIP Plus if a teacher is assigned a negative rating based on the materials in their file.¹²³ Teachers can appeal an unsatisfactory rating. But unlike traditional public school teachers, they cannot take their appeals outside the schools' control,¹²⁴ which protects teachers from the arbitrary decision of a single principal but is less likely to hinder the school's ability to terminate an incompetent teacher.¹²⁵ There is also no hearing analogous to a 3020-a hearing in the Amber contract.¹²⁶

Still, the Amber contract provides more due process protections than employment at will. The most notable example is that teachers employed longer than a "three-month probationary period shall not be disciplined except for just cause."¹²⁷ The contract does not specify further what is meant by "just cause" or how it is proven if not with a 3020-a hearing, but requiring principals to provide a justification for their decision is a higher standard than that of employment at will, which allows principals to terminate teachers without any demonstration of cause.¹²⁸ Like employment at will, which allows principals to

¹²² Compare AMBER CONTRACT, *supra* note 44, art. 3, with UFT CONTRACT, *supra* note 73, art. 22–23 (detailing the due process and grievance procedures). The Amber contract references a grievance procedure contained in the personnel manual, but that is outside the bounds of the collective bargaining agreement and thus not part of the union's negotiations. See AMBER CONTRACT, *supra* note 44, art. 3(3); *cf.* Anderson v. Regis Corp., 185 F. App'x 768, 772 (10th Cir. 2006) (holding that job security provisions in the employer's employment manual, as opposed to provisions in an employment contract, do not create a binding obligation for the employer to abide by a "commitment to follow the claimed termination policies").

¹²³ See AMBER CONTRACT, *supra* note 44.

¹²⁴ See *id.* art. 3(3) ("The final determination on a Bargaining Unit Member's complaint . . . shall be made by a committee of the School's Board of Trustees consisting of the Chairperson, the Teacher member (or their designee) and a third trustee jointly selected by them.").

¹²⁵ Compare *id.* ("[Teachers] may lodge grievances [But] [t]he final determination on a [teacher's] complaint . . . shall be made by a committee of the School's Board of Trustees consisting of the Chairperson, the Teacher member (or their designee) and a third trustee jointly selected by them."), with *supra* notes 88–90 and accompanying text (explaining how teachers can appeal an "unsatisfactory" rating to state courts and the Commissioner of Education).

¹²⁶ See generally AMBER CONTRACT, *supra* note 44.

¹²⁷ *Id.* art. 3(2).

¹²⁸ See *supra* notes 60–64 and accompanying text (discussing how employment at will traditionally meant that employers could fire employees "for good cause or for no cause, or even for bad cause" (quoting Payne v. W. & Atl. R.R. Co., 81 Tenn. 507, 518 (1884))).

terminate teachers “at any time without notice,”¹²⁹ there is no similar requirement restricting when principals can terminate.¹³⁰ But, employees “are entitled to be accompanied by a [u]nion representative at any meeting with management that may result in discipline,” which suggests the school must give notice to teachers about a potential disciplinary charge so that they have time to inform their union representative.¹³¹

2. *Green Dot Charter School*

Green Dot provides more extensive due process procedures than Amber or employment at will in its sixty-seven-page contract,¹³² but far less job security than the union contract. The Green Dot documentation and notice requirements are similar to those in the union contract.¹³³ For example, unlike Amber, Green Dot mirrors the union contract in its requirements for when material can be put in a teacher’s file.¹³⁴ It is reasonable for teachers to not want unflattering material to sit in their files through their careers. But it also makes it more difficult for a principal to build a strong case of incompetence over the course of a teacher’s career without the ability to keep material on file for more than three years. Like Amber and the union contract, Green Dot states that employees are entitled to have a union representative present “at any meeting that may result in discipline,” which differs from employment at will in that disciplinary steps cannot be taken at any time without notice.¹³⁵

The Green Dot standard for termination is higher than employment at will but lower than that in the union contract. Like Amber, the Green Dot contract says that “[n]o employees shall be disciplined without just cause.”¹³⁶ Unlike Amber, Green Dot expands on just cause by explaining that “discipline shall be in accordance with the procedures for progressive discipline.”¹³⁷ Progressive discipline is

¹²⁹ *E.g.*, FAHARI ACADEMY CHARTER SCHOOL, EMPLOYEE HANDBOOK 7 (Aug. 1, 2010) (on file with the New York University Law Review).

¹³⁰ *See generally* AMBER CONTRACT, *supra* note 44.

¹³¹ *See id.* art. 3(1).

¹³² *See* GREEN DOT, GREEN DOT NEW YORK CHARTER SCHOOL AND THE UNITED FEDERATION OF TEACHERS COLLECTIVE BARGAINING AGREEMENT art. 4 (2009), available at http://www.uft.org/files/contract_pdfs/green-dot-contract-2008-2011.pdf [hereinafter GREEN DOT CONTRACT].

¹³³ *Compare id.*, with UFT CONTRACT, *supra* note 73, art. 21 (detailing notice requirements).

¹³⁴ *See* GREEN DOT CONTRACT, *supra* note 132, art. 4(D) (stating the conditions by which teacher personnel files must be maintained).

¹³⁵ *Id.* art. 4(F).

¹³⁶ *Id.* art. 4(A).

¹³⁷ *Id.* art. 4(B).

“intended to correct [e]mployee misconduct” by slowly ratcheting up consequences from “verbal counseling” to “a short suspension” and potentially dismissal.¹³⁸ If a Green Dot administrator determines that a teacher is not performing up to standards, that teacher may be placed on a forty-five day “development plan,” where the teacher is given suggestions for how to improve and the resources to do so.¹³⁹ The development plan is an optional tool for administrators; the forty-five day “improvement plan” is not. According to the Green Dot contract, “all teachers assigned a ‘practice does not meet standards’ rating *shall* be given an improvement plan.”¹⁴⁰ Similar to the development plan, the teacher will be given suggestions on how to improve and resources for doing so, but the principal must also “take affirmative action” to support the teacher.¹⁴¹

If a teacher does not show sufficient improvement as determined by a Green Dot administrator, Green Dot may then terminate the teacher, having shown just cause by demonstrating that the teacher did not meet the standard set by the improvement plan.¹⁴² Even if principals elect to offer teachers a development plan and an improvement plan, the termination process takes a maximum of ninety days—forty-five days if only the improvement plan is offered—as compared to a one-year delay when traditional public school teachers enroll in PIP Plus.¹⁴³ Requiring principals to decide whether a teacher has met the standard of an improvement plan is vastly less onerous than requiring them to convince a panel of arbitrators in a 3020-a hearing that termination is appropriate.¹⁴⁴

Green Dot teachers have the right to appeal their termination.¹⁴⁵ Upon appeal, teachers are required to meet with a Green Dot Designee, an administrator appointed by the Green Dot Board of Directors, who has thirty days to decide whether the termination is appropriate and must produce a written memo detailing his or her

¹³⁸ *Id.*

¹³⁹ *See id.* (explaining Green Dot’s teacher evaluation system and progressive discipline approach).

¹⁴⁰ *Id.* (emphasis added).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *See supra* notes 85–87 and accompanying text (discussing how principals cannot bring charges against teachers for the year they are enrolled in PIP Plus).

¹⁴⁴ *See* N.Y. EDUC. LAW § 3020-a(3)(c)(i) (McKinney 2009) (outlining the limited procedures a hearing officer must follow when conducting a 3020-a hearing).

¹⁴⁵ GREEN DOT CONTRACT, *supra* note 132, app. B, at 3 (“The notice shall include the reason for the action and notification of an opportunity to appeal, pursuant to Articles 4 and 5 of this Agreement.”).

justification.¹⁴⁶ If the union disagrees with the Green Dot Designee's decision, the union may appeal to the Chairman of the Board of Trustees or his/her designee, who has thirty days to decide whether the termination is appropriate and also has to provide a written memo justifying the decision.¹⁴⁷ If the union does not agree with the Chairman's decision, the Green Dot contract allows for an appeal to a panel of arbitrators.¹⁴⁸

The arbitration provided for in the Green Dot contract, however, is different from that provided by Section 3020-a, as modified by the union contract, in several ways. First, the arbitration process is an ex post grievance that the union must initiate that asks arbitrators to overrule a principal's decision to terminate a teacher, rather than a request by a principal to arbitrators in a 3020-a hearing to assign termination as the appropriate penalty.¹⁴⁹ Not having to receive permission from arbitrators to terminate a teacher grants greater staffing autonomy to Green Dot principals. Second, there are no restrictions creating an imbalance in discovery.¹⁵⁰ Third, unlike Section 3020-a, there are no restrictions in the Green Dot Contract on how many days per month the arbitrators can hear cases, making it more likely that they can reach a decision within the thirty-day limit.¹⁵¹ Fourth, a smaller share of the arbitration costs is borne by the school under the Green Dot contract, increasing the cost to the teacher of challenging an adverse employment action.¹⁵² Fifth, there are no restraints on whether a teacher can be made to testify, and teachers have no

¹⁴⁶ See *id.* art. 4(E) (“An Employee who is grieving discipline pursuant to the evaluation systems contained in Article 11 and Appendi[ces] B and C shall initiate the grievance at Level Two.”); *id.* art. 5(C) (discussing how Level Two gives a Green Dot designee fifteen days to set up a meeting and fifteen days to resolve the grievance).

¹⁴⁷ *Id.* art. 5(C).

¹⁴⁸ *Id.*

¹⁴⁹ See *id.* (detailing the Green Dot grievance procedure).

¹⁵⁰ See *supra* note 97 and accompanying text (explaining the discrepancy in evidence available to a teacher and the Department of Education in a 3020-a hearing).

¹⁵¹ Compare GREEN DOT CONTRACT, *supra* note 132, art. 5(C), with UFT CONTRACT, *supra* note 73, art. 21(G)(2)(a) (restricting the number of days arbitrators can hear cases), and Letter from Joel I. Klein to Michael Mulgrew, *supra* note 100, at 4–5 (modifying the UFT contract to require arbitrators to hear cases two days a month over the summer and seven days per month over the rest of the year).

¹⁵² Under the Green Dot Contract, the “services of the arbitrator . . . and the cost, if any, of a hearing room, shall be shared by the School and the Union.” GREEN DOT CONTRACT, *supra* note 132, art. 5(C). Under Section 3020-a, in contrast, most costs are borne by the New York State Education Department. See N.Y. EDUC. LAW § 3020-a(3)(c)(i)(D) (McKinney 2009) (requiring that an “accurate record of the proceedings . . . be kept at the expense of the department at each such hearing” and that a “copy of the record of the hearings shall, upon request, be furnished without charge to the employee and the board of education involved”).

explicit right “to subpoena . . . and to cross-examine witnesses,”¹⁵³ making it less likely that principals would have to be absent from the school for several days of testimony and thus increasing the likelihood principals will attempt termination.¹⁵⁴ Finally, there are no provisions allowing teachers to appeal to the New York State Supreme Court to vacate or modify the arbitrators’ decision.¹⁵⁵ Litigating in state court significantly increases the cost for principals attempting to terminate a teacher; that cost is a disincentive to principals pursuing termination.¹⁵⁶

D. *Differences Between Union-Charter and Union-District Negotiations*

The preceding discussion raises the question of why one could expect negotiations between teachers unions and charter schools to produce a better contract than negotiations between teachers unions and school districts. School districts, presumably, care about their ability to control staffing decisions just as much as charter schools. This Part discusses several reasons that unionized charter school contracts are likely to reach a better balance of staffing autonomy and teacher job protection than the union contract.

First, the current job security provisions in the standard union contract reflect an earlier pre-charter era in which traditional public schools had a virtual monopoly on providing public education.¹⁵⁷ Without competition, school district leaders had less incentive to demand autonomy over teachers’ terminations and prevent their organizations from being “hindered by restrictive work rules.”¹⁵⁸ They did not have to worry that their schools would close if confining contractual provisions prevented the schools from operating successfully. Charter school operators, on the other hand, risk having their charters

¹⁵³ EDUC. § 3020-a(3)(c)(i).

¹⁵⁴ See note 98 and accompanying text (describing the rights of a teacher in a 3020-a hearing); see also Brill, *supra* note 5, at 34 (discussing the concern that principals may be reluctant to pursue termination due to the amount of time it could require them to be away from their schools).

¹⁵⁵ Compare GREEN DOT CONTRACT, *supra* note 132, with UFT CONTRACT, *supra* note 73, art. 21(G)(8) (providing that the union is entitled to “investigatory statements, notes, other exculpatory evidence, and relevant student records” while the school board is only entitled to access evidence that it can show is relevant at a hearing).

¹⁵⁶ See *supra* notes 108–10 and accompanying text (describing the costs of pursuing a successful termination).

¹⁵⁷ See *supra* note 14 (noting that one reason for creating charter schools was a perceived need for greater competition in the public school system). School vouchers preceded charter schools, but vouchers typically create competition between the public school and private school systems rather than intra-public school competition. *Id.*

¹⁵⁸ MOE, *supra* note 1, at 40.

revoked and their students returned to traditional public schools if overly restrictive contract provisions prevent them from operating effectively. Thus they have an incentive to bargain aggressively to retain their autonomy over staffing.¹⁵⁹

Even if school district leaders want to adopt radical change to the termination process, they may not want to risk dislodging the status quo because their actions have much broader effects than those of charter school leaders.¹⁶⁰ Charter schools are growing rapidly, but still represent only roughly 5% of public schools nationally.¹⁶¹ One of the benefits of giving charter schools greater autonomy in exchange for holding them more accountable is that they have the freedom to experiment with innovative education strategies. If it turns out that significantly diminishing teachers' job security has disastrous effects on student achievement, the charter schools which took that experimental step can be shuttered with relative ease.¹⁶² Because the contracts that school district leaders bargain for apply to a much greater number of schools, they may choose not to upset the status quo even if the school system as currently set up is not attaining excellent results.

Finally, and probably the most significant reason the negotiations between charter schools and unions will be better able to reach an optimal balance of staffing autonomy and job security, is that charter schools, because they can fire their employees at will due to their exemption from the collective bargaining agreement, come to the bargaining table with strong staffing autonomy.¹⁶³ Conversely, school districts come to the bargaining table with little leverage given that the contracts make firing even incompetent teachers very difficult.¹⁶⁴ In

¹⁵⁹ See *supra* note 17 and accompanying text (describing how charter schools typically have to apply for a renewal of their charter after their first five years of operation).

¹⁶⁰ This reluctance to advocate for radical change could either be because district leaders are uncertain about the benefits of more moderate job security or because union leaders resist changes to the termination process far more strenuously than when the changes are district-wide rather than discrete and experimental.

¹⁶¹ See *supra* note 19 and accompanying text (discussing the number of charter schools by 2010).

¹⁶² See *supra* note 17 and accompanying text (describing how a school's charter can be revoked).

¹⁶³ See, e.g., *supra* note 26 (discussing how New York state regulations excuse charter schools from the district collective bargaining agreement).

¹⁶⁴ See *supra* Part II.A (explaining how the union contract makes it nearly impossible to terminate a public school teacher for incompetence). It is possible that, if teachers unions and school districts began labor negotiations anew, they would not arrive at such extreme job security provisions as exist in the current contract. Part of the problem with current negotiations may be an endowment effect, where any efforts to reform the contract encounter strenuous objection from the teachers unions due to a cognitive bias leading them to, perhaps irrationally, resist giving up what they already have.

labor negotiations, charter schools are trading away some of their autonomy for concessions from the union. School districts, on the other hand, must ask for greater flexibility to terminate incompetent teachers in exchange for concessions like higher salaries or better pension benefits.¹⁶⁵

Traditional public schools must balance principals' ability to terminate incompetent teachers against teachers' protection from arbitrary or malicious decisions by principals. It is reasonable to expect that charter schools and unions will create a better compromise than school districts and unions have produced.¹⁶⁶

III

LESSONS FROM UNIONIZED CHARTER SCHOOL CONTRACTS

The analysis in Part II of the unionized charter school contracts reveals that they strike a balance between the conflicting beliefs on job security discussed in Part I. They provide more job protection than the employment-at-will contracts from nonunionized charter schools but far less than the union contract.¹⁶⁷ This is not unexpected because, as explained in Part II.D, there are several reasons why negotiations between teachers unions and charter schools are a better source of compromise than those between teachers unions and school districts. This Part will propose the ideal level of job security for traditional public schools, using the unionized charter school contracts as a basis for comparison.

The viewpoints on job security from the leaders of two entities involved in this analysis provide a guiding framework. Steven Barr, founder of the Green Dot network, agrees that tenure is unreasonable but finds it reasonable to require principals to demonstrate their

¹⁶⁵ Charter schools are also aided by mounting pressure on teachers unions from increasing public opprobrium over the difficulties faced by administrators trying to terminate incompetent teachers and waning support from the Democratic Party, traditionally the political party most closely associated with the teachers unions. *See supra* note 19 (highlighting President Obama and former Education Secretary Arne Duncan's full-throated support for charter schools). Furthermore, the teachers at unionized charter schools, despite the fact that the majority voted to unionize, presumably chose to work at a charter school rather than a traditional public school originally because they supported charter ideals and therefore have different bargaining objectives than teachers at traditional public schools. *See supra* note 70 and accompanying text (describing the appeal to some teachers of working at a charter school).

¹⁶⁶ *See supra* Part II.D (describing the differences between union-charter and union-district negotiations).

¹⁶⁷ *See supra* Part II.C (comparing the unionized charter contracts to the union contract and the nonunionized charter contracts).

rationale for terminating allegedly incompetent teachers.¹⁶⁸ Similarly, Leo Casey, former vice president of the UFT and the “union’s leading intellectual voice in recent years,”¹⁶⁹ agrees that the due process protections may be too lengthy, but that adopting an at-will standard is not an option. He says that:

There is little question that most disciplinary and dismissal processes could and should be expedited, with the elimination of largely redundant steps, and that much shorter time lines for hearings and decisions could and should be established. What teachers unions cannot and will not agree to is the wholesale elimination of due process, with the establishment of the “at will” standard of employment that is used in the nonunionized, private sector. Under such a standard, a teacher could be disciplined or dismissed, without appeal, for any reason whatsoever, provided that the action does not violate legal prohibitions of discrimination against protected classes of individuals. That is, once again, simply unfettered management power.¹⁷⁰

As seen from the analysis of the Amber and Green Dot contracts, there are two job-security-related issues the contracts must resolve: what cause a principal must show and the procedural protections necessary to prevent due process violations.¹⁷¹ In terms of what constitutes cause, it is just to terminate teachers for not competently teaching children but not for personal reasons, irrelevant reasons, or factors outside teachers’ control.¹⁷² It is therefore reasonable to require principals to make some causal showing of why a teacher is being terminated, as long as the procedural requirements for making that showing are not so drawn out and expensive so as to deter principals from terminating incompetent teachers.¹⁷³

In the due process section of its contract, Amber specifies that teachers “who have completed the three-month probationary period

¹⁶⁸ PRICE, *supra* note 25, at 8 n.24 (quoting Steve Barr, the founder of Green Dot, as saying: “We don’t have tenure, we have just cause”).

¹⁶⁹ Geoff Decker, *Top UFT Official to Leave for Union’s Washington, D.C. Think Tank*, GOTHAM SCHOOLS (June 14, 2012, 6:31 PM), <http://gothamschools.org/2012/06/14/top-uft-official-to-leave-for-unions-washington-d-c-think-tank/#more-85505>.

¹⁷⁰ Casey, *supra* note 24, at 199. Both leaders of Green Dot and the UFT agree that principals should need to provide some justification for their termination decisions and that the process in which principals prove their justification should not become so cumbersome that it deters principals from pursuing the termination of incompetent teachers.

¹⁷¹ See *supra* Part II.C (analyzing the unionized charter contracts’ due process provisions).

¹⁷² For example, principals should not be able to fire teachers because the two have a romantic relationship that goes sour or because they like different sports teams.

¹⁷³ The appropriate due process protections for underperforming principals is a subject relevant to the proper level of staffing autonomy that should be given to those individuals, but is outside the scope of this Note.

shall not be disciplined except for just cause” without expanding on what that just cause would entail.¹⁷⁴ It is helpful to leave the definition of “just cause” vague so that principals have more discretion in deciding whom to terminate, but it also makes it more difficult for teachers to know if they are acting in a way that leaves them vulnerable to termination. Under a vague “just cause” definition, for example, teachers might be terminated for using the principal’s parking space, not updating their bulletin boards, or missing school due to a debilitating injury.¹⁷⁵ That unpredictability, which leaves teachers vulnerable to arbitrary decisions by principals, is a large part of what teachers unions oppose about employment at will.¹⁷⁶

The mandatory progressive discipline system used by Green Dot provides a more elaborate example of a just-cause termination standard. Green Dot, like Amber, requires that teachers shall not be “disciplined without just cause,” but states that “[a]ny discipline shall be in accordance with the procedures for progressive discipline.”¹⁷⁷ This progressive discipline system fleshes out what would give principals just cause to terminate a teacher for incompetence.¹⁷⁸

Under the progressive discipline system, teachers are required to meet the “Green Dot Standards for [the] Teaching Profession.”¹⁷⁹ Green Dot breaks down each of the six standards into several elements and defines for each element the criteria that determine if a teacher “[d]oes [n]ot [m]eet,” “[p]artially [m]eets,” “[m]eets,” or “[e]xemplifies” the standard.¹⁸⁰ If a teacher only partially meets one of the standards, the school may create a development plan where the teacher is given resources and suggestions to improve his practice.¹⁸¹ If a teacher makes “no evident progress” on the development plan

¹⁷⁴ AMBER CONTRACT, *supra* note 44, art. 3(2).

¹⁷⁵ *Cf.* Alford v. Ingram, 931 F. Supp. 768, 770–73 (M.D. Ala. 1996) (evaluating whether the “just cause” standard was void for vagueness); Hatfield v. Johnson Controls, Inc., 791 F. Supp. 1243, 1253 n.6 (E.D. Mich. 1992) (expressing concern that the “presence of such vaguely defined conduct” in employment agreements “threatens to make illusory the employer’s promise that the employment relationship is, except for special circumstances, a just-cause contract”).

¹⁷⁶ *See* Casey, *supra* note 24, at 199 (quoting the vice president of the UFT as opposing employment standards that grant principals authority to terminate teachers “for any reason whatsoever”).

¹⁷⁷ GREEN DOT CONTRACT, *supra* note 132, art. 4(A)–(B).

¹⁷⁸ *See infra* notes 179–82 (describing the progressive discipline system).

¹⁷⁹ *See* GREEN DOT CONTRACT, *supra* note 132, app. B, at 6. Those standards are “engaging & supporting students in learning,” “creating & maintaining effective environments for student learning,” “understanding & organizing subject matter for student learning,” “planning instruction & designing learning experiences for all students,” “assessing student learning,” and “developing as a professional educator.” *Id.*

¹⁸⁰ *Id.* at 17–24.

¹⁸¹ *Id.* app B. at 3.

after forty-five days or ever receives a rating of “practice does not meet standards,” the teacher is placed on an improvement plan.¹⁸² If teachers “on an improvement plan [have] not improved their performance to meet the standard, Green Dot shall terminate and/or not re-hire for the following year.”¹⁸³ Progressive discipline systems like this are better than the vague definition of “just cause” in the Amber contract because they provide a more clear description of what “just cause” a principal must provide to terminate an incompetent teacher: The teacher has consistently not met the criteria of a competent educator as determined by the school district.¹⁸⁴

But beyond defining the dismissal standard, it is vital that the termination procedure not become so lengthy, expensive, and obstructive that principals choose not to participate or cannot terminate incompetent teachers successfully. The most noteworthy features of the Amber and Green Dot contracts in this regard are not what they contain, but what they do not. As discussed in Part II, unlike in the union contract, teachers assigned a negative rating at either school cannot grieve their rating to the Chancellor, have a year-long reprieve from further discipline, litigate in state court, or appeal to the State Commissioner of Education.¹⁸⁵ Teachers at neither school are entitled to an expensive 3020-a hearing—a hearing that can add several months to the termination process and cost thousands of dollars.¹⁸⁶ And if principals at Amber or Green Dot successfully terminate an incompetent teacher, those teachers do not have the contractual right to then engage in state trial and appellate litigation regarding the termination decision.¹⁸⁷

The purposes of due process provisions are to protect effective teachers from arbitrary or malicious principals while allowing

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ For this to happen in traditional public schools would require a shift in the way teachers are evaluated from the binary system of “satisfactory” or “unsatisfactory” ratings to a more nuanced rating system. Although the highly contentious topic of teacher evaluations remains outside the scope of this Note, the fact that New York City schools as of 2013 are shifting to an evaluation system that bases 40% of a teacher’s rankings on test scores and 60% on subjective measures is a sign that such a shift may be coming nationwide. See Philissa Cramer, *New State Evaluation Framework Leaves Much Up to Local Districts*, GOTHAM SCHOOLS (Feb. 16, 2012, 7:01 PM), <http://gothamschools.org/2012/02/16/new-state-evaluation-framework-leaves-much-up-to-local-districts/> (describing New York City’s upcoming teacher evaluation system).

¹⁸⁵ See *supra* Part II.C (comparing the union contract to the unionized charter school contracts).

¹⁸⁶ See *supra* Part II.C.

¹⁸⁷ See *supra* Part II.C.

incompetent teachers to be terminated.¹⁸⁸ The absence in the Green Dot and Amber contracts of many of the obstructive procedural protections granted to district school teachers should result in the retention of fewer incompetent teachers.¹⁸⁹ On the other hand, both Amber and Green Dot have procedural protections that safeguard against principals unreasonably terminating competent teachers. Amber requires the “final determination” in a due process challenge to be made by a committee consisting of “the Chairperson [of the school board], the Teacher member (or their designee), and a third trustee jointly selected by them.”¹⁹⁰ Similarly, difficult due process complaints at Green Dot are heard by a “Green Dot Designee,” the “Board President or alternate,” or a panel of three arbitrators “mutually acceptable for both parties.”¹⁹¹ Creating a check on a principal’s discretion outside the authority of the school—in the form of the teacher for Amber, arbitrators for Green Dot, and the jointly appointed authorities for both—should be a sufficient procedural protection to ensure strong teachers are not terminated without justification.

CONCLUSION

This Note does not claim that unionized or nonunionized charter school contracts should replace the employment contract for traditional public schools. There are a number of components the teachers union would have to negotiate before such contracts could be implemented on a wide scale. For example, teachers unions, school districts, and state legislators would have to work out how Section 3020-a integrates into a new collective bargaining agreement, or revoke 3020-a procedures and devise a simpler procedure similar to that found in the unionized charter contracts. They would also have to write coherent progressive discipline structures like Green Dot’s for a hugely diverse group of teachers, which may not even be feasible.¹⁹²

¹⁸⁸ See Casey, *supra* note 24, at 199 (describing the appropriate balance provided by job security); John Baratz-Snowden, CTR. FOR AM. PROGRESS, *Fixing Tenure: A Proposal for Assuring Teacher Effectiveness and Due Process* 1–4 (June 2009), http://www.american-progress.org/issues/2009/06/pdf/teacher_tenure.pdf (discussing the balance between the “initial impulse for developing tenure laws[, which] was to protect teachers from unfair dismissal” and the sense that “guarantees of due process are still necessary” versus the view of “[m]any education policymakers now” who believe modern “tenure laws . . . often lead to unnecessary complications in dismissing veteran teachers who are ineffective”).

¹⁸⁹ See *supra* note 124 and accompanying text (discussing how charter schools can use their autonomy to terminate underperforming teachers).

¹⁹⁰ AMBER CONTRACT, *supra* note 44, art. 3(3).

¹⁹¹ GREEN DOT CONTRACT, *supra* note 132, art. 5(C).

¹⁹² For example, a progressive discipline structure that evaluates full-time teachers of subjects that are frequently tested on standard aptitude tests might not work for part-time

This Note does claim, however, that the “just cause” standard and procedural due process protections in unionized charter school contracts provide a better balance than traditional public school contracts between the need to protect teachers from the arbitrary or malicious decisions of principals and principals’ need to terminate incompetent teachers efficiently. Assuming either that the downsides of employment at will outweigh the benefits or that it is not an outcome teachers unions will accept, these unionized contracts provide a level of job security that the union contracts governing traditional public schools should also offer. The Green Dot and Amber contracts are only the first products in a series of unionized charter school contracts that will be produced across the nation over the next few years as charter schools either design their school in partnership with their local union, or form collective bargaining agreements with the union if their teachers vote to unionize.¹⁹³ Teachers unions and school districts should experiment with the contracts produced from negotiations between charter schools and teachers unions and use them as models to find a workable contract for traditional public schools.¹⁹⁴

teachers, or those who teach world languages, arts, physical education, or gifted and talented classes.

¹⁹³ See *supra* note 37 and accompanying text (discussing how several charter schools are currently in negotiation with the union over new contracts).

¹⁹⁴ Some education reformers argue that the unwavering opposition by teachers unions to employment at will, and their protection of incompetent teachers, means that teachers unions should be stripped of power and eliminated from public schools. See, e.g., MOE, *supra* note 1, at 371 (arguing that the power of teachers unions should be reduced significantly “so that real reform can flow”). They see teachers unions as an outmoded relic of a more bountiful era when employers could afford to concede greater job security, higher salaries, and better health benefits, and that teachers unions, like many of their public-sector union compatriots, are living on borrowed time. See *id.* at 368–71 (describing how the “political tide has begun to move against [teachers unions]”). Even if teachers unions have undoubtedly gone too far in securing nearly impenetrable job security for their constituents, that does not mean that teachers unions should be stripped of their collective bargaining rights or banned from the public school system. Teachers unions play an invaluable role in increasing professionalism, raising salaries, and ensuring teachers have a collective voice so teachers are not forced to endure the unfair conditions they faced in the pre-collective-bargaining era. See *supra* note 11 and accompanying text (describing the benefits teachers unions have won for teachers). The fact that unionized charter school contracts such as the ones from Green Dot and Amber exist suggest that it is possible for charter schools and teachers unions to work together, though not necessarily amicably, to increase student achievement.