

WHO MAY HIRE TEACHERS: HOW MUTUAL CONSENT FITS INTO THE CURRENT COLORADO HIRING FRAMEWORK

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In 2010, the Colorado General Assembly passed the Ensuring Quality Instruction through Education Effectiveness Act (S.B. 191). The law ties teachers' job security to the performance of their students, among other things, and changes the way that teachers and principals are evaluated. One crucial aspect of the law, and the subject of this Comment, is the mutual consent provision. This provision provides principals with the power to ensure the effectiveness of their teachers within their own schools by means of allowing them to oversee the hiring process of teachers. The mutual consent provision states that teachers can only be hired at a school with the consent of the principal. This law is at odds with section 22-32-109(1)(f)(I) of the Colorado Revised Statutes (the hiring statute), which delegates to school boards, not principals, the exclusive hiring power. Before the passage of S.B. 191, the Colorado Supreme Court had determined that school boards have the nondelegable power to hire teachers. This tension between S.B. 191 and the hiring statute raises a number of issues regarding the hiring of teachers.

After presenting the history of hiring teachers in Colorado and an overview of S.B. 191, this Comment addresses the inherent conflict between the hiring statute and the mutual consent provision. I propose that S.B. 191 empowers

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principals to take a leadership role in the hiring process, while the hiring statute provides for school boards to continue playing a role in oversight. This reading of the two laws strengthens the overall hiring process.

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INTRODUCTION

The State of Colorado has become a national leader in education reform practices in the last few years.¹ United States Secretary of Education Arne Duncan praised Colorado for its progressive reform effort, stating that it will serve as a model for other states, particularly with regard to measuring student

1. See Jeremy Meyer, “Positive Model” for States Weighing Teacher Reforms, DEN. POST, May 13, 2010, http://www.denverpost.com/education/ci_15074264?source=pkg. The recent reforms are “nothing less than remarkable,” said Kate Walsh, the president of the National Council on Teacher Quality. *Id.*

growth and establishing a stronger teacher evaluation system.² The United States government acknowledged Colorado's reforms by providing it a waiver from the federal No Child Left Behind Act,³ which (otherwise) subjects states to federal oversight and punishment by the United States Department of Education.⁴ Colorado was one of only ten states to receive a waiver.⁵ Thus, the course has been set for Colorado to be a leader in education reform, and State Senator Michael Johnston has taken the lead in doing so.

Senator Johnston drafted and passed some of the most prominent education bills in the United States, most notably the controversial, yet acclaimed, Ensuring Quality Instruction Through Education Effectiveness (S.B. 191), which ties teachers' job security to the performance of their students, among other things.⁶ He has received requests from legislators in more than ten states to assist them in drafting similar teacher-effectiveness bills.⁷ Most recently, Colorado received a

2. Nelson Garcia, *U.S. Secretary of Education Applauds Colorado School Reforms*, CHANNEL 9 NEWS (Feb. 28, 2012, 6:49 P.M.), <http://www.9news.com/news/article/252484/222/US-Secretary-of-Education-applauds-Colorado-school-reforms>. Joe Williams, the executive director of Democrats for Education Reform, said the way that Colorado dealt with teacher tenure reforms "was very thoughtful. . . . It took into consideration a myriad of issues. In many states, it was more like piecemeal." Yesenia Robles, *Colorado's Education Reform Leader Spreads Ideas Nation-Wide*, DEN. POST, Jan. 16, 2011, http://www.denverpost.com/news/ci_17109350.

3. See Garcia, *supra* note 2. The waivers apply to certain requirements of the No Child Left Behind Act, including flexibility for: the 2013–2014 timeline for determining adequate yearly progress under 1111(b)(2)(E) of the Elementary and Secondary Education Act (ESEA); implementation of school improvement requirements under section 1116(b); implementation of local educational agencies (LEA) improvement requirements in section 1116(c); rural LEA's; school-wide programs support school improvement; reward schools; highly qualified teacher improvement plans; transfer certain funds; and school improvement grant funds to support priority schools. More thorough explanations of the flexibility awarded to these states is beyond the scope of this Comment, but for more information, see *ESEA Flexibility Policy Document, Elementary and Secondary Education: ESEA Flexibility*, U.S. DEPT OF EDUC. (last modified July 9, 2013), <http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html>.

4. Garcia, *supra* note 2; see also *ESEA Flexibility Policy Document*, *supra* note 3.

5. See Robles, *supra* note 2.

6. See generally the enacted provisions of S.B. 191 found in Title 22 of the Colorado Revised Statutes.

7. See Robles, *supra* note 2. Senator Johnston has advised legislators in Illinois, Florida, and New Jersey as they attempt to craft their own education reform bills. See *id.* The Seattle Times published an article encouraging its lawmakers to "listen to [Senator] Johnston" as the state works on its own reforms.

grant of \$5.9 million from the Bill and Melinda Gates Foundation in acknowledgement of its excellent work (i.e., the reform initiatives begun under S.B. 191).⁸ The grant will be used to expand the state's high school graduation rates and better prepare its students for college.⁹

S.B. 191 changes the way that teachers, principals, and other education-licensed personnel are evaluated.¹⁰ Some provisions of S.B. 191 went into effect immediately, while other provisions followed a timeline dictating the years in which each would go into effect.¹¹ One crucial component of the bill, and the subject of this Comment, provides principals with the power to ensure the effectiveness of their teachers within their own schools through the mutual consent provision, which allows principals to oversee the hiring process of teachers.¹² At its core, S.B. 191 ties measures of teacher and principal effectiveness to student achievement growth (which is measured by test scores based on the Colorado Model Content Standards)¹³ and allows for ineffective teachers to lose their nonprobationary status (the equivalent of tenure in Colorado).¹⁴ The law is grounded in the principle that to improve student outcomes, there must be mechanisms in place for measuring and acting upon educator effectiveness.¹⁵ While the most controversial component of the law seeks to achieve

Lynne K. Varner, *Look to Colorado for Education-Reform Advice*, SEATTLE TIMES, May 30, 2013, http://seattletimes.com/html/opinion/2021090761_lynnevarnercolumn.xml.html.

8. *Gates Foundation Awards \$5.9 Million to Expand Colorado Education Reform Effort*, PHILANTHROPY NEWS DIGEST (Nov. 12, 2012), <http://foundationcenter.org/pnd/news/story.jhtml?id=399900014>. See also Nancy Mitchell, *Forced Placement of Teachers is a Hot Topic*, EDNEWS COLORADO (Feb. 19, 2010), <http://www.ednewscolorado.org/news/education-news/limiting-forced-placements-draws-applause-opposition>.

9. PHILANTHROPY NEWS DIGEST, *supra* note 8.

10. S.B. 191, 66th Leg. (Colo. 2010).

11. In 2011, the Council provided the State Board with recommendations for teacher and principal evaluations and guidelines for implementing and testing a new performance evaluation system. For more information on provisions already in place, see S.B. 191; COLO. REV. STAT. § 22-9-105.5(3)(a)–(h) (2013).

12. See *infra* Part II.B.

13. *About CSAP/TCAP*, THE COLORADO DEP'T OF EDUC. (last modified July 21, 2013), <http://www.cde.state.co.us/assessment/CoAssess-About.asp>.

14. *S.B. 10-191: Great Teachers & Leaders*, MIKE JOHNSTON, <http://www.mikejohnston.org/issues/sb-10-191/>. See also S.B. 10-191, *supra* note 10; COLO. REV. STAT. § 22-9-102(1), § 22-63-202(2)(c.5)(IV). See *infra* note 17 for an explanation of Colorado's version of tenure prior to the passage of S.B. 191.

15. See *S.B. 10-191: Great Teachers & Leaders*, *supra* note 14.

this goal is the elimination of provisions of the law that guaranteed jobs for teachers (by changing the definition of nonprobationary teacher),¹⁶ another potentially problematic method employed by S.B. 191 is eliminating “forced placement” hiring, which is the typical hiring process¹⁷ in public schools. Under a forced placement system, the school board has the exclusive authority to hire and fire teachers.¹⁸ S.B. 191 replaces the forced placement system with a new hiring practice referred to either as “mutual consent,” or, as the statute identifies it, “school-based hiring.”¹⁹ Mutual consent changes the procedure so that teachers can only be hired at a school “with the consent of the hiring principal.”²⁰ Mutual consent gives principals the power to hire their own teachers, thereby aiming to ensure teacher effectiveness within their own schools.²¹

However, S.B. 191’s mutual consent provision is at odds with section 22-32-109(1)(f)(I) of the Colorado Revised Statutes (hereinafter the hiring statute). This statute delegates to school boards, not principals, the exclusive hiring power.²² Section 22-63-202(2)(c.5)(I) specifically states: “each employment contract . . . shall contain a provision stating that a teacher

16. See, e.g., Jeremy Meyers, *Colorado Teacher Bill Ignites Firestorm of Support, Opposition*, DEN. POST, April 25, 2010, http://www.denverpost.com/education/ci_14953971 (“The aspect of Johnston’s bill that has sparked a stormy backlash from the state’s largest teachers union is how it affects teacher tenure.”). Prior to the passage of S.B. 191, a teacher who completed three years of satisfactory teaching achieved what is commonly known as “tenure,” meaning that due-process hearings are required to remove them. *Id.* The due-process system made it nearly impossible to dismiss a veteran teacher for poor performance and costs the districts too much money. *Id.* Cindy Stevenson, the Superintendent of Jefferson County Public Schools, said, “in eight years she has tried to dismiss five teachers for poor performance or misconduct. All but two won their jobs back under the due-process system.” *Id.* Under S.B. 191, teachers achieve nonprobationary status after three years of “effective ratings,” but can be relegated back to probationary status if found “ineffective” for two consecutive years. COLO. REV. STAT. § 22-63-103(7).

17. *Bumping HR: Giving Principals More Say Over Staffing*, NAT’L COUNCIL ON TEACHER QUALITY 2 (Oct. 2010), http://www.nctq.org/dmsView/Bumping_HR_Giving_Principals_More_Say_Over_Staffing_NCTQ_Report.

18. *Id.*

19. S.B. 10-191, *supra* note 10; COLO. REV. STAT. § 22-63-202(2)(c.5)(II)(A). This Comment will refer to it by its national term, “mutual consent.”

20. S.B. 10-191, *supra* note 10; COLO. REV. STAT. § 22-63-202(2)(c.5)(I).

21. See *Bumping HR: Giving Principals More Say Over Staffing*, *supra* note 17, at 9.

22. COLO. REV. STAT. § 22-32-109(1)(f)(I).

may be assigned to a particular school only with the consent of the hiring principal and with input from at least two teachers employed at the school.”²³ In contrast, the hiring statute has been interpreted by the Colorado Supreme Court to delegate *sole* authority to hire and fire teachers to school boards, and there has been no clear overruling of the hiring statute or its interpretation since S.B. 191 was passed.²⁴ Furthermore, S.B. 191 is unclear on the scope of the mutual consent provision and how it affects hiring authority between the school boards and the principals.²⁵ The tension between S.B. 191 and the hiring statute raises a number of issues regarding the hiring of teachers in schools. For example, what happens if a principal wants to exclusively take over all hiring practices and its school board resists, or a school board delegates all hiring practices to its principal and the principal does not want the exclusive responsibility? There is no clear answer under the current laws, which could lead to prolonged litigation and unnecessary spending of precious dollars by the districts.

Moreover, the ambiguity presents problems for courts in deciding employment cases regarding teacher-hiring. Under the hiring statute, a court could conclude that only school boards may make hiring decisions. But under S.B. 191, the same court could determine that the principal, not the school board, has sole hiring authority. Depending on the statute to which the court refers, it could come to opposite and conflicting opinions. Such ambiguity will cause confusion in school administrations and lead to unnecessary spending and time they can ill-afford. Additionally, schools may experience tension or power struggles between school boards and principals as each entity tries to assert control over hiring. The legal ambiguity and possible employment ramifications of the tension between S.B. 191 and the hiring statute cannot stand. Therefore, this Comment proposes a solution to clarify the hiring procedures of teachers. It recommends that school personnel and the Colorado courts adopt a reading of the two laws that S.B. 191 places the final hiring determinations in the hands of principals, while still retaining school boards in a

23. *Id.* § 22-63-202(2)(c.5)(I).

24. *See, e.g.,* Holdridge v. Bd. of Educ. of Keenesburg, 879 P.2d 448 (Colo. App. 1994).

25. *See* S.B. 10-191; COLO. REV. STAT. § 22-63-202(2)(c.5)(I). The statute provides no guidance on the scope of mutual consent’s power.

supportive role by giving them oversight authority. This interpretation satisfies the legislative intent behind S.B. 191 and promotes the most effective teachers.

This Comment addresses the tension between S.B. 191 and the hiring statute and provides guidance for schools in their hiring role and courts in their adjudicatory role. Part I examines the Colorado law on hiring practices prior to S.B. 191. It explains how the courts have interpreted the hiring statute to give school boards absolute and non-delegable power to hire and fire teachers.²⁶ Part II provides a general overview of S.B. 191, with a focus on the mutual consent provision.²⁷ Part III analyzes the tension between the hiring statute and S.B. 191. It proposes and briefly discusses three possible interpretations of how to reconcile the two laws.²⁸ Part IV argues for the adoption of an interpretation that allows the two laws to co-exist in harmony. It proposes that principals assume the primary authority to hire teachers, in conjunction with the support of the school board, which will remain invested with the power of oversight.²⁹ Part V concludes that S.B. 191 requires that principals hire their own teachers in order to fulfill the law's overall goal of improving teacher effectiveness.³⁰ Principals must be able to choose their work team to foster a productive learning environment. However, school boards should retain oversight power because they are the elected voice of the public and play an important democratic role in the process.

I. COLORADO EDUCATION HIRING LAWS BEFORE S.B. 191

Prior to the passage of S.B. 191, hiring in the Colorado education field looked very different, as described below.³¹ Part I.A examines the statutory definitions and procedures that governed the teaching hiring process prior to the passage of S.B. 191. Part I.B describes the judicial interpretations and case law on hiring practices before S.B. 191, as well as a survey of the case law through the decades that led to the passage of

26. *See infra* Part I.

27. *See infra* Part II.

28. *See infra* Part III.

29. *See infra* Part IV.

30. *See infra* Part V.

31. *See infra* Part I.A and I.B.

S.B. 191.

A. *The Statutory Background Prior to S.B. 191*

The Colorado statutes governing teacher employment were fairly clear prior to the passage of S.B. 191. A “probationary teacher” meant a teacher who had “not completed three full years of continuous employment with the employing school district and who ha[d] not been reemployed for the fourth year.”³² A school board could choose not to renew a probationary teacher’s contract for any reason.³³ Teachers were considered “nonprobationary” after completing three continuous years of employment.³⁴ Once they received nonprobationary status, they could only be removed for two reasons: good cause³⁵ or, in the case of a “justifiable decrease in the number of teaching positions,” based on seniority with a first in, first out policy.³⁶

Colorado’s former hiring practice embraced the forced placement of teachers,³⁷ as the majority of states continue to do.³⁸ Forced placement describes the practice of school districts directly assigning teachers to a school, without giving teachers the opportunity to seek job offers from schools where they think they would be a good fit, and without giving the principal the authority to refuse a teacher he thinks would be a bad fit for the school.³⁹ Denver Public Schools, Colorado’s largest school

32. COLO. REV. STAT. § 22-63-103(7) (amended 2010).

33. *Id.* § 22-63-203(4)(a).

34. *Id.* § 22-63-103(7).

35. *Id.* § 22-63-301 (teacher may be dismissed for incompetency, neglect of duty, or other good and just cause).

36. *Id.* § 22-63-202(3). What constitutes a justifiable decrease in teaching positions is determined by each school district, but include such events as a fiscal emergency or program change. See *Sample Policy GCQA*, CASBE (last revised Nov. 10, 2011), <http://www.monte.k12.co.us/Boardpolicies/policies/GCQA.pdf>.

37. See Nancy Mitchell, *DPS Leads Pack in Direct-Placing Teachers*, EDNEWS COLORADO (Mar. 9, 2010), <http://www.ednewscolorado.org/news/dps-leads-other-districts-in-direct-placement-rates>. (“Direct placement, also called forced placement or involuntary transfer, occurs when veteran teachers lose their jobs and their school district must find them new positions.”)

38. See, e.g., *Bumping HR: Giving Principals More Say Over Staffing*, *supra* note 17, at 2 (“Most American school districts centrally hire and assign teachers to schools. There is one location in the central office where applications are received and processed and where candidates are interviewed, hired, and placed.”).

39. See COLO. LEGACY FOUND., IMPLEMENTING COLORADO SENATE BILL 10-191: SCHOOL DISTRICT GUIDANCE ON MUTUAL CONSENT HIRING FOR TEACHERS 4 (2011).

district, placed 377 teachers into schools they did not choose—and whose principals did not choose them—between 2007 and 2010.⁴⁰ This forced placement had immediate and apparent negative effects for both the students and principals. For example, a student from Montbello High School came home to tell his mother, “Mom, we have a teacher in our building today who said, ‘I don’t want to be here.’”⁴¹ His mother was understandably disappointed that her child’s teacher did not want to be there and had vocalized it.⁴²

The principals also face problems. Under a forced placement system, many teachers who lose their jobs are simply assigned to other schools in their district, giving principals no chance to interview and approve new members of their staff.⁴³ The process of forced placement occurs because the majority of state laws require districts to pay their teachers regardless of whether the district employs the teacher that year.⁴⁴ Forced placement tends to lead to more senior teachers obtaining the assignments, because districts are required to consider and hire the teachers with greatest seniority first.⁴⁵ These decisions do not contemplate a teacher’s skills or suitability for a particular school during the hiring decisions.⁴⁶ Although some districts grant principals and teachers various opportunities to reach an agreement, in the area of laid-off

40. See Mitchell, *supra* note 37. Even more compelling, forty-nine DPS teachers were direct-placed twice in the past three years. See *id.* The analysis was conducted by Education News Colorado. See *id.* This problem stretches beyond Colorado. In Boston, Massachusetts in 2012, 370 teachers were placed in schools by the administrative process with little to no involvement of the schools’ principals or schools’ hiring committees. See *BPS-BTU Contract: Teacher Transfers and Reassignments*, BOSTON MUNICIPAL RESEARCH BUREAU (March 20, 2012), <http://www.bmr.org/content/upload/sr122.pdf>.

41. See Mitchell, *supra* note 8.

42. *Id.*

43. EXEC. OFFICE OF THE PRESIDENT, *TEACHER JOBS AT RISK 1* (Oct. 2011), http://whitehouse.gov/sites/default/files/uploads/teacher_jobs_at_risk_report.pdf.

44. *Id.* States that operate under the forced placement as of 2013 include: Alabama, Alaska, California, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. See *Ending Forced Placement*, STUDENTS FIRST (2013), <http://reportcard.studentsfirst.org/policy-discussion?objective=Ending+Forced+Placement>.

45. *Bumping HR: Giving Principals More Say Over Staffing*, *supra* note 17, at 7.

46. *Id.* at 8.

teachers, neither the principals nor teachers have a voice in where the teacher is placed.⁴⁷

Moreover, the forced placement system has the effect of keeping weak teachers in the system. Principals frequently use the “excess” process to remove weak teachers from their schools rather than pursuing dismissal procedures, leading to a result known as the “dance of the lemons.”⁴⁸ The excess process displaces, rather than terminates, teachers when a school’s budget is cut.⁴⁹ Principals “excess” teachers when the school reduces the size of its faculty, experiences an unexpected drop in enrollment, or is being phased out, to name some examples.⁵⁰ Moreover, because of the seniority rules, districts will place teachers in another school without the consent of that school’s principal or the teacher being assigned to teach there.⁵¹ In Colorado, teachers’ union leaders have voiced concerns that they think some principals prefer to move unskilled teachers along rather than to work to improve them.⁵² While the Colorado Revised Statutes codify the laws creating the forced placement system, the Colorado Supreme Court has upheld the school board’s sole hiring authority,

47. *Id.* at 8. A parent of a public school student in Colorado, and member of the group Stand for Children, said, “[f]orced or direct placement is not good for our poorest-performing schools nor is it good for higher-performing schools.” Mitchell, *supra* note 8.

48. *See, e.g.*, Stephen Sawchuk, *‘Mutual Consent’ for Teacher Placement Gains Traction*, EDUC. WEEK, July 14, 2010, at 4; *see also Bumping HR: Giving Principals More Say Over Staffing*, *supra* note 17, at 4. In Colorado, superintendent of Jefferson County Schools Cindy Stevenson said that in eight years, she has tried to dismiss five teachers for poor performance of misconduct, and all but two got their jobs back through the due process system. Meyers, *supra* note 16.

49. *See* DEP’T OF EDUC. AND EARLY CHILDHOOD DEV., HUMAN RESOURCES: MANAGEMENT OF EXCESS TEACHING SERVICES 2 (Dec. 1, 2012), http://www.education.vic.gov.au/hrweb/Documents/Management_of_excess_school_staff.pdf.

50. *See id.*

51. *Base Staffing Decisions on Teachers’ Impact*, STUDENTSFIRST (2013), <http://www.studentsfirst.org/policy-agenda/entry/staffing-decisions-based-on-teachers-impact>.

52. *See* Mitchell, *supra* note 37. The president of the Denver Classroom Teachers Association, Henry Roman, said “I don’t think principals will acknowledge that. . . . I think that happens a lot.” *Id.* In New York City, which adopted mutual consent in 2005, principals complained they were forced to hire teachers who were not a good fit for their school, or even worse, that these teachers were poor performers who were being passed from school to school. *See* TIMOTHY DALY, DAVID KEELING, RACHEL GRAINGER & ADELE GRUNDIES, *THE NEW TEACHER PROJECT, MUTUAL BENEFITS, NEW YORK CITY’S SHIFT TO MUTUAL CONSENT IN TEACHER HIRING 2* (2008).

thereby perpetuating the forced placement system.⁵³

B. The Colorado Supreme Court's Interpretation Before S.B. 191 and the Evolutions that Encouraged the Passage of S.B. 191

Colorado's early judicial opinions on hiring power interpreted that authority as residing solely with the school districts.⁵⁴ The seminal case is *Big Sandy School District v. Carroll*.⁵⁵ In *Big Sandy*, the school board members of Big Sandy School District authorized the superintendent to contact and employ a combination principal and teacher for its high school.⁵⁶ The board provided a salary limit within which the superintendent could fix the salary; otherwise, there were no limitations placed on the superintendent's choice.⁵⁷ Additionally, the board provided the superintendent with a signed employment contract form, leaving the name of the contracting party blank to be filled in by the superintendent upon choosing an applicant.⁵⁸ The superintendent hired the plaintiff—to be the principal and a teacher—but subsequently fired him on the first day of school.⁵⁹ The plaintiff sued for breach of contract, and the Colorado Supreme Court held that there was no valid contract because “the power to employ teachers is exclusively vested by the legislature in the school board, and not in any other body or official.”⁶⁰ Thus, the court deemed school boards to be the sole hiring proprietor of teachers in their districts.

The Colorado Supreme Court based its conclusion on section 123-10-19 of the Colorado Revised Statutes.⁶¹ The court explained that a municipal or quasi-municipal corporation, such as a school district, may delegate to subordinate officers and boards only “powers and functions which are ministerial or

53. See COLO. REV. STAT. § 22-32-109(1)(f)(I) (2013); see also *infra* Part I.B.

54. See *Big Sandy Sch. Dist. No. 100-J v. Carroll*, 433 P.2d 325, 328 (Colo. 1967), *overruled on other grounds by* *Normandy Estates Metro. Recreation Dist. v. Normandy Estates Ltd.*, 553 P.2d 386, 389 (Colo. 1976).

55. *Id.*

56. *Id.* at 326.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 328.

61. *Id.*

administrative in nature . . . [decisions] which leave[] little or nothing to the judgment or discretion of the subordinate.”⁶² When a power is legislative or judicial in nature—one that involves judgment and discretion on the part of the municipal body—and has been vested in the body by statute, the power “may *not* be delegated unless such has been expressly authorized by the legislature.”⁶³ This doctrine of non-delegability is based on the premise that the general public has elected the school board officials and thus, those officials should remain accountable for the effectiveness of their teachers.⁶⁴ Since this decision in 1967, Colorado courts have continued to rely on *Big Sandy* for the idea that school boards have the sole power to hire teachers, even though the law they relied on has since been repealed.⁶⁵

In 1964, section 22-32-109 of the Colorado Revised Statutes replaced section 123-10-19, which was the statute the Colorado Supreme Court in *Big Sandy* relied upon.⁶⁶ The current statute gives a school board the power “[t]o employ all personnel required to maintain the operations and carry out the educational program of the district.”⁶⁷ This provision remains in effect today, as demonstrated by the court’s opinion in *Holdridge v. Board of Education of Keenesburg*.⁶⁸ In *Holdridge*, the Colorado Court of Appeals cited section 22-32-109 of the Colorado Revised Statutes to hold that “school

62. *Id.*

63. *Id.* (emphasis in original).

64. *See* Fremont Re-1 Sch. Dist. v. Jacobs, 737 P.2d 816, 819 (Colo. 1987).

65. *See, e.g.,* Saye v. St. Vrain Valley Sch. Dist., 650 F.Supp. 716, 721 n.2 (D. Colo. 1986) (holding that *Big Sandy* is still good law because COLO. REV. STAT. § 22-32-109 sets forth “essentially the same policy considerations”); Willis v. Widefield Sch. Dist. No. 3, 603 P.2d 962, 963 (Colo. App. 1979) (relying on *Big Sandy* to determine that school boards cannot delegate their hiring authority).

66. COLO. REV. STAT. § 123-10-21(1) (1953) was repealed by 1964 Colo. Sess. Laws 590. COLO. REV. STAT. § 123-10-19 (1963) appears as the identical law in § 123-10-21 (1953) in the General Assembly. For further exemplification, *see* Comparative Table COLO. REV. STAT. 1953 to COLO. REV. STAT. 1963, Vol. 8.

67. COLO. REV. STAT. § 22-32-109(1)(f)(I) (2013). The older version, § 123-10-19, declared that “(1) Every school board, unless otherwise especially provided by law, shall have the power, and it shall be their duty: (2) To employ or discharge teachers . . .” It was more direct and targeted about the school board’s duty than the current version. Compare the language of “responsible for” as used in the current version, with “shall be their duty,” the language used in the older version. The current language permits more flexibility in how the school board hires teachers, i.e., delegating the power to others.

68. *See* COLO. REV. STAT. § 22-32-109 (2013); *Holdridge v. Bd. of Educ.*, 879 P.2d 448, 450 (Colo. App. 1994).

districts are responsible for employing all personnel necessary to its education program.”⁶⁹ The court of appeals also relied on *Big Sandy* to support its holding, indicating that the case had not fallen with the repeal of section 123-10-19 of the Colorado Revised Statutes, but that its proposition survived.⁷⁰ However, the *Holdridge* court acknowledged that the case law was trending toward allowing school boards merely to “ratify” a hiring decision that someone else made.⁷¹ This step indicated the beginning of Colorado permitting school boards to delegate hiring power.

In 1987, the Colorado Supreme Court again addressed the issue of who may hire teachers under Colorado law in *Fremont v. Jacobs*, which addressed whether discharging a bus driver constituted an administrative function subject to delegation by the school board.⁷² In its analysis, the Court confronted the question of hiring teachers by comparing their duties to the bus driver’s duties.⁷³ While the Court adopted *Big Sandy*’s main principle that school boards have the authority to hire teachers, this was not without some doctrinal changes. The Court echoed the language of *Big Sandy* that the legislative or judicial powers of quasi-municipal corporations, such as schools, are not delegable.⁷⁴ However, the Court openly acknowledged the changed times and circumstances in which school boards found themselves.⁷⁵ The Court said,

As a practical matter, school districts require a significant degree of administrative flexibility in order to function smoothly. . . . As school organizations have grown in size and their functions have become more diverse and complex, the need for *administrative delegation has become all the more imperative*. . . . As a result, the trend in this area of the law has been to allow greater flexibility and away from the insistence on detailed and definite standards.⁷⁶

The Court focused on the increasing complexities of school

69. *Holdridge*, 879 P.2d at 450.

70. *Id.*

71. *Id.*

72. *Fremont Re-1 Sch. Dist. v. Jacobs*, 737 P.2d 816, 818 (Colo. 1987).

73. *Id.*

74. *Id.* at 818–19.

75. *Id.* at 819.

76. *Id.* (emphasis added).

board functions, but concluded that hiring teachers remains a non-delegable power of the school board.⁷⁷ However, it laid the foundation for a future court or statute to allow for this delegation of hiring power by acknowledging that delegation is becoming an increasingly important tool for school boards to use in effectively running a district.

Until 2010, Colorado law on hiring practices in education followed the scheme laid down in *Big Sandy*: school boards had sole authority to hire teachers. Although the hiring statute—relied upon in *Big Sandy*—was repealed in 1964, the law that replaced it provided softer, but similar, language.⁷⁸ In 1987, *Fremont* set the scene for a change of law in the area of hiring practices in education.⁷⁹ S.B. 191 embodies this change, which delegates some hiring power to principals, not school boards. This Comment now considers the events that led to S.B. 191's birth and how it actually works.⁸⁰

II. BACKGROUND ON S.B. 191

In 2010, Colorado participated in the nationwide Race to the Top Competition, a competitive funding program to encourage and reward states for creating innovative education and reform policies with a focus on improving student achievement.⁸¹ The competition provided \$4.35 billion to the winning states.⁸² Much to the disappointment of the state, the Department of Education did not select Colorado as a winner for either funding phase.⁸³ Of the seven areas in which states could score points, Colorado received its lowest score—76 percent of the 138 possible points—in the category of “Great Teachers and Leaders,” which looks at educator preparation, development, and distribution.⁸⁴

77. *Id.* at 820–21.

78. *See* COLO. REV. STAT. § 22-32-109(1)(f)(I) (2013).

79. *See Fremont Re-1*, 737 P.2d at 816.

80. *See infra* Part II.

81. U.S. DEP'T OF EDUC., RACE TO THE TOP PROGRAM EXECUTIVE SUMMARY 2 (Nov. 2009), available at <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf>.

82. *Id.*

83. *Investing in Colorado's Future*, COLORADO.GOV, <http://www.colorado.gov/cs/Satellite/OIT-2/OIT2/1240228834570> (last visited July 17, 2013).

84. Nancy Mitchell, *Analysis: Colorado's Lost Points in Race to the Top*, EDNEWS COLORADO (Aug. 26, 2010), <http://www.ednewscolorado.org/2010/08/26/7613-analysis-colorados-lost-points-in-race-to-the-top>.

Partially in response to Colorado's failure to win Race to the Top funding,⁸⁵ the Colorado Legislature passed S.B. 191 in May 2010, which establishes new requirements for evaluating teachers and principals. Bill author Senator Johnston focused on the idea that a student's academic achievement depends on principal and teacher effectiveness.⁸⁶ The purpose of S.B. 191 is to improve student achievement through recruiting, training, and retaining great teachers and principals.⁸⁷ To accomplish this goal, S.B. 191 changes how teachers earn and lose nonprobationary status by implementing a demonstrated effectiveness standard and not an automatic three-year standard, effectively putting an end to forced placement.⁸⁸ S.B. 191 requires that reductions-in-force (when a school must lay off teachers due to budget cuts, downsizing, closing, etc.) are based on effectiveness, not seniority.⁸⁹ The Governor's Council for Educator Effectiveness (Council),⁹⁰ a group created by the bill, developed a two-part definition for effectiveness.⁹¹ Teacher evaluations are split into parts, with 50 percent measured by student growth and 50 percent measured by Professional Quality Standards.⁹² The Council divides the Professional

85. See Meyers, *supra* note 16.

86. A study conducted by the Association for Supervision and Curriculum Development found that almost 60 percent of a student's academic achievement depends on principal and teacher effectiveness. See NEW LEADERS FOR NEW SCHOOLS, PRINCIPAL EFFECTIVENESS: A NEW PRINCIPALSHIP TO DRIVE STUDENT ACHIEVEMENT, TEACHER EFFECTIVENESS, AND SCHOOL TURNAROUNDS, 12 (2009), available at http://www.schoolsmovingup.net/cs/smu/download/rs/24121/principal_effectiveness_nlns.pdf (citing R.J. MARZANO, T. WATERS, & B. McNULTY, ALEXANDRIA, VA: ASSOCIATION FOR SUPERVISION AND CURRICULUM DEVELOPMENT, SCHOOL LEADERSHIP THAT WORKS: FROM RESEARCH TO RESULTS (2005)).

87. See S.B. 10-191: *Great Teachers and Leaders*, *supra* note 14.

88. See S.B. 10-191, *supra* note 6; COLO. REV. STAT. § 22-9-102 (2013) (describing the purpose behind the new effectiveness standards); *Id.* § 22-9-105.5(2)(c)(I)–(III) (describing the new standard).

89. See S.B. 10-191, 67th Gen. Assemb., 2d Reg. Sess. (2010).

90. The Council is comprised of the Commissioner of Education or his appointee, the Executive Director of the Department of Higher Education, four teachers, two public school administrators, one local school district superintendent, two members of local school boards, one charter school administrator or teacher, one parent of a public school student, a current student or recent graduate of a Colorado public school, and one at-large member with expertise in education policy. See COLO. REV. STAT. § 22-9-105.5(2)(b)(I)–(IX).

91. State Council for Educator Effectiveness, *Report and Recommendations*, 18 (Apr. 13, 2011), available at http://www.cde.state.co.us/EducatorEffectiveness/downloads/Report%20&%20appendices/SCEE_Final_Report.pdf.

92. *Id.*

Quality Standards into sub-categories: know content, establish environment, facilitate learning, reflect on practice, and demonstrate leadership.⁹³ It defines teacher “effectiveness” as:

[H]av[ing]the knowledge, skills, and commitments needed to provide excellent and equitable learning opportunities and growth for all students. [The teachers] strive to support growth and development, close achievement gaps and to prepare diverse student populations for postsecondary and workforce success. Effective Teachers facilitate mastery of content and skill development, and employ and adjust evidence-based strategies and approaches for students who are not achieving mastery and students who need acceleration. They also develop in students the skills, interests and abilities necessary to be lifelong learners, as well as for democratic and civic participation. Effective Teachers communicate high expectations to students and their families and utilize diverse strategies to engage them in a mutually supportive teaching and learning environment. Because effective Teachers understand that the work of ensuring meaningful learning opportunities for all students cannot happen in isolation, they engage in collaboration, continuous reflection, on-going learning and leadership within the profession.⁹⁴

Earning an “effective” status requires teachers to have the knowledge, skills, and commitments that they need to provide excellent learning opportunities for their students and to encourage collaboration, reflection, and leadership.⁹⁵ Those in the General Assembly who passed this bill anticipate that the “bill will help Colorado regain its place as a national leader on education policy.”⁹⁶

The following parts explain S.B. 191 in detail. Part II.A begins with an overview of S.B. 191 and four of its five main

93. *Id.* at 82.

94. *Rules for Administration of a Statewide System to Evaluate the Effectiveness of Licensed Personnel Employed by School Districts and Boards of Cooperative Services*, COLO. DEP’T OF EDUC., 3.01 at 8 (last visited July 29, 2013), available at <http://www.cde.state.co.us/sites/default/files/documents/educatoreffectiveness/downloads/rulemaking/1ccr301-87evaluationofficensedpersonnel%28includingappealsrules%294.27.12.pdf>

95. *Id.*

96. See *S.B. 10-191: Great Teachers and Leaders*, *supra* note 14.

components. Although this Comment focuses on the mutual consent provision of the bill, each component notably facilitates the bill's goal of achieving educators who are more effective. Part II.B then delves more deeply into the practice of mutual consent.

A. *Main Components of S.B. 191*

S.B. 191 has five main components: (1) defining effectiveness, (2) teacher evaluations, (3) principal evaluations, (4) definitional changes to “probationary teacher,” and (5) mutual consent.⁹⁷ Each component of S.B. 191 contributes to a better understanding of mutual consent and the goals behind the policy.

The bill sets out a timeline for implementation of the various provisions.⁹⁸ Beginning with the 2012–2013 school year, the Council piloted its new performance evaluation systems.⁹⁹ The 2013–2014 school year will launch the implementation of the performance system statewide.¹⁰⁰ In the 2014–2015 school year, the performance systems will be finalized on a statewide basis.¹⁰¹

The first component of the bill redefines the measures of effectiveness and, in turn, the methods of evaluating teachers.¹⁰² Measuring effectiveness is important because “[r]esearch consistently shows effective teaching is the single most important factor in school that advances student

97. *See infra* Part II.B for the discussion on mutual consent.

98. S.B. 191 § 5; COLO. REV. STAT. § 22-9-105.5(3)(a)–(j) (2013).

99. COLO. REV. STAT. § 22-9-104(2)(c) (granting the Council the duty to promulgate rules for the development and implementation of the evaluation systems); *id.* § 22-9-105.5(10)(a)(III) (piloting the evaluation system in the 2012–2013 school year). The Council provides recommendations for pilot-testing, including training on the use of the evaluation system; evaluation results that “ensure consistency and fairness”; “rubrics and tools that are deemed fair, transparent, rigorous, and valid”; evaluations that are conducted “using sufficient time frequency, at least annually, to gather sufficient data” to base ratings on; “adequate training and collaborative time” to ensure that teachers have the time and resources to “respond to student academic growth data”; and student data to “ensure the correlation between student academic growth and outcomes with educator effectiveness ratings.” *Id.* § 22-9-105.5(3)(e)(I)–(VI).

100. *Id.* § 22-9-105.5(10)(a)(IV)(A).

101. *Id.* § 22-9-105.5(10)(a)(V)(A) (finalizing new performance evaluation system based on the quality standards defined by Council statewide).

102. *See supra* Part II.

learning.”¹⁰³ There are two primary reasons for evaluations: (1) to “[e]valuate the level of performance based on the effectiveness of licensed personnel,” and (2) to “[p]rovide a basis for making decisions in the areas of hiring, compensation, promotion, assignment, professional development, earning and retaining nonprobationary status, dismissal, and nonrenewal of contract.”¹⁰⁴

The second component of the bill requires that teachers’ effectiveness rating be tied to their students’ academic growth.¹⁰⁵ The Council is charged with designing the evaluation system,¹⁰⁶ with the explicit requirement that at least 50 percent of a teacher’s evaluation be determined by the academic growth of his or her students.¹⁰⁷ The move to tie assessments of teachers’ performance to student achievement marks a shift in thinking about teacher quality, and Colorado is not the only state to have changed its policy to reflect this thinking. In 2009, thirty-five states did not require teacher evaluations to include measures of student learning.¹⁰⁸ By 2011, only twenty-seven states did not require teacher evaluations.¹⁰⁹ The other twenty-three states required teacher evaluations to include objective evidence of student learning in the form of student growth or value-added data.¹¹⁰ Even more notably, seventeen states, including Colorado, have actually adopted legislation or regulations that require student achievement or student growth to significantly inform teacher

103. Kerrie Dallman, *Voices: Rubber Hits Road on S.B. 191*, EDNEWS VOICES (Nov. 2, 2012), <http://www.ednewscolorado.org/voices/voices-rubber-hits-road-on-sb-191>.

104. COLO. REV. STAT. § 22-9-102(b)(IV)–(V).

105. *Id.* § 22-9-105.5(3)(a).

106. *Id.*

107. *Id.* § 22-9-105.5(3)(a) (requiring that the quality standards “include measures of student longitudinal academic growth” and may include “interim assessment results or evidence of student work, provided that all are rigorous and comparable across classrooms and aligned with state model content standards and performance standards”). For more information on teacher evaluations, see *id.* § 22-9-103(5) (creating a teacher development plan between teacher and his principal outlining “the steps to be taken to improve the teacher’s effectiveness,” which may include mentorship programs, use of effective teachers as leaders or coaches, and appropriate professional development activities).

108. Nat’l Council on Teacher Quality, *State of the States, Trends and Early Lessons on Teacher Evaluations and Effectiveness Policies*, ii (Oct. 2011), available at http://www.nctq.org/p/publications/docs/nctq_stateOfTheStates.pdf.

109. *Id.*

110. *Id.*

evaluations.¹¹¹

The third component of the bill requires that at least 50 percent of the evaluation of principals be based on the “academic growth of the students enrolled in the principal’s school” as measured by the Colorado Growth Model¹¹² and the State’s school performance ranking. Other factors to evaluate principals include “the number and percentage” of teachers in the school who are “rated effective or highly effective” and the “number and percentage who are rated as ineffective but are improving in effectiveness.”¹¹³ The intent of tying principals’ evaluations to the growth of their students and effectiveness of their teachers is to create an incentive for the principals to work towards student achievement in their schools and to support the teachers who need it.¹¹⁴ This component ties into the need for mutual consent because in order for principals to be fairly evaluated by the effectiveness of their teachers, principals must have a significant role in choosing the teachers in their schools.

Finally, the fourth component of the bill redefines the terms “probationary” and “nonprobationary” and makes changes to reductions-in-force.¹¹⁵ The bill defines a “probationary teacher” as one who has not yet completed three

111. *Id.* The other states are Arizona, Delaware, the District of Columbia, Florida, Idaho, Illinois, Indiana, Louisiana, Maryland, Michigan, Minnesota, Nevada, New York, Ohio, Oklahoma, Rhode Island, and Tennessee. *Id.* The trend is occurring in response to emerging studies that show that the criteria previously relied on—teacher credentials, majors, degrees, and licensing—are not associated with positive gains in the classroom. See, e.g., Donald Boyd et al., *How Changes in Entry Requirements Alter the Teacher Workforce and Affect Student Achievement*, Education Finance and Policy 1, 2 (2006), available at <http://www.nber.org/papers/w11844>; Thomas J. Kane et al., *What Does Certification Tell Us About Teacher Effectiveness? Evidence from New York City*, 27 ECON. OF EDUC. REV. 615 (2008), available at <http://www.nber.org/papers/w12155>.

112. S.B. 191 § 7; COLO. REV. STAT. § 22-9-106(7)(a)–(c) (2010). Student performance is measured by compiling data on the growth, or decline, in the Colorado Student Assessment Program. See *What is the Colorado Growth Model?*, EDNEWS PARENT (Aug. 10, 2010), <http://www.ednewsparent.org/teaching-learning/194-what-is-the-colorado-growth-model>.

113. S.B. 191, § 7; COLO. REV. STAT. § 22-9-106(7)(a)–(c) (2010); for more information on principal evaluations see S.B. 191 § 2; 22-9-103(3.5) (2010) (creating a principal development plan between principal and his district administration that “outlines the steps to be taken to improve the principal’s effectiveness,” including professional development opportunities).

114. See S.B. 10-191: *Great Teachers & Leaders*, *supra* note 14.

115. S.B. 191, § 10; COLO. REV. STAT. § 22-63-103 (2010); *id.* § 11, 22-63-202(2)(c.5)(II)(A).

consecutive years of demonstrated effectiveness, as defined by the Council, or a nonprobationary teacher who has two consecutive years of demonstrated ineffectiveness and returns to probationary status.¹¹⁶ The bill also changes what happens to a teacher after a reduction-in-force.¹¹⁷ Any active, nonprobationary teacher who was deemed effective and has not secured a position through school-based hiring (mutual consent) will join the priority-hiring pool, which will give the teacher preference in the interview process over non-priority teachers.¹¹⁸ If a nonprobationary teacher is unable to secure an assignment within twelve months or two hiring cycles, whichever is longer, the school district will place that teacher on unpaid leave until she is able to secure an assignment.¹¹⁹

B. The Fifth Component: Mutual Consent

The final component of the bill, and focus of this Comment, is the mutual consent provision. The intent behind mutual-consent hiring is a process that ensures a newly hired teacher has the qualifications, experience, and demonstrated effectiveness that will be a successful match with the school.¹²⁰ The law states that “each employment contract . . . shall contain a provision stating that a teacher may be assigned to a particular school *only with the consent* of the hiring principal and with input from at least two teachers employed at the school.”¹²¹ It seemingly puts an end to forced placement of teachers into schools.¹²² Instead of school board appointments, vacant teaching positions are filled by an agreement between the hired teacher and the principal.¹²³ Mutual consent is more or less an open market for hiring teachers, reflecting a scheme similar to the hiring process used by most private companies.¹²⁴ In its report on mutual consent, the National

116. S.B. 191, § 10; COLO. REV. STAT. § 22-63-103(7).

117. S.B. 191 § 11; COLO. REV. STAT. § 22-63-202 (2)(c.5)(II)(A).

118. *Id.*

119. COLO. REV. STAT. § 22-63-202(2)(c.5)(IV).

120. See COLORADO LEGACY FOUNDATION, *supra* note 39, at 4.

121. COLO. REV. STAT. § 22-63-202(2)(c.5)(I) (emphasis added).

122. *Id.*

123. *Id.*

124. *Id.* Of course, this depends on the size of the school. It is more likely that smaller schools already consult with the principal when making hiring decisions, whereas it is more likely that larger schools employ forced placement hiring

Council on Teacher Quality said, “[h]iring authority is essential to well-run businesses,” and the same is true for schools.¹²⁵ A principal cannot build a cohesive school with common values and ethics if she does not have a true voice in the hiring process.¹²⁶ In addition, mutual consent has the strong potential to eliminate the problem of the “dance of the lemons.”¹²⁷

A growing number of districts have ended forced placement, thereby giving full control to principals and schools.¹²⁸ The first large, urban area to abolish forced placement and implement mutual consent was New York City in 2005.¹²⁹ Since then, a number of other districts have adopted mutual consent or some variation, including districts in Baltimore, Chicago, and Washington D.C.¹³⁰

Under S.B. 191, the current principal must consent to the hiring of a new teacher before that teacher is hired.¹³¹ The law addresses the potential problem encountered by New York City of indefinitely paying for unemployed, nonprobationary teachers by altering teachers’ contracts to pay for only two hiring cycles or twelve months of paid unemployment before the principal places teachers on unpaid leave.¹³²

Mutual consent, along with the other components of the bill that tie teacher and principal evaluations to their students’ performance and cause teachers’ jobs to depend on student performance, dramatically changes the landscape of hiring and firing in the education system.¹³³ School boards can no longer

techniques.

125. THE NAT’L COUNCIL ON TEACHING QUALITY, *supra* note 17, at 9.

126. *Id.*

127. *See supra* Part I.A. The “dance of the lemons” is eliminated because teachers can no longer be forced into schools where the principal does not want them.

128. THE NAT’L COUNCIL ON TEACHING QUALITY, *supra* note 17, at 9.

129. *Id.*

130. *Id.*

131. S.B. 191, § 11; COLO. REV. STAT. § 22-63-202(2)(c.5)(I) (2010).

132. COLO. REV. STAT. § 22-63-202(2)(c.5)(IV).

133. Senator Johnston encountered serious opposition to S.B. 191. However, the extremely controversial proposition to eliminate teacher tenure and to tie a teacher’s effectiveness rating to his students’ test scores overshadowed the other parts of the bill. *See Meyers, supra* note 16. “The aspect of Johnston’s bill that has sparked a stormy backlash from the state’s largest teachers’ union is how it affects teacher tenure.” *Id.* When it was introduced into the Colorado Legislature on April, 5, 2010, it was first heard in the Senate Education Committee where it had two days of public testimony. *See Stand for Children, The Passage of Colorado’s Senate Bill 191: Game Changing Teacher and Principal Effectiveness Legislation Summary and Analysis* at 2 [hereinafter Stand for Children],

arbitrarily place teachers into schools, which suggests that teachers will promote the institutional practices and values of the school, leading to more effective teaching overall. The mutual consent provision went into effect immediately following the passage of the bill, although conflict has arisen over the enactment of the provision.¹³⁴

III. ANALYSIS OF MUTUAL CONSENT PROVISION

S.B. 191 leaves teacher-hiring authority in an ambiguous place. The bill states: “Each employment contract . . . shall contain a provision stating that a teacher may be assigned to a particular school *only with the consent* of the hiring principal and with input from at least two teachers employed at the school.”¹³⁵ It is undisputed that, at a minimum, mutual consent gives principals the authority to reject or veto a teacher that the school board contemplates hiring.¹³⁶ But whether it does more than that is a question requiring closer analysis of the

http://stand.org/sites/default/files/National/Case%20Study_THE%20PASSAGE%20OF%20COLORADO.pdf (last visited November 1, 2012). Teachers, principals, the National Education Association (a teachers’ union which staunchly opposed the bill), superintendents, and education-related individuals and groups spoke at the hearing. Despite the abundance of education experts, none of them raised the issue of mutual consent and school board power. See Senate Committee on Education, *Bill Summary for SB10-191*, April 22, 2010 [hereinafter *Bill Summary*], <http://www.leg.state.co.us/Clics/clics2010a/commsumm.nsf/b4a3962433b52fa787256e5f00670a71/d55fed9d090a6b1c8725770c0058a046?OpenDocument>. Instead, testimony focused primarily on: teachers’ concerns about losing their jobs and not receiving pay after the allotted time; the accuracy of student achievement tests; concerns that S.B. 191 gives principals too much power; concerns that teachers’ evaluations being tied to 50 percent of student achievement is excessive in light of potentially inaccurate results; the potential loss of due process for teachers; and the costs of implementation. See *id.* Despite these concerns, the bill passed the Senate on April 30, 2010, by a vote of 21-14. See *Bill Summary*; Stand for Children, at 3. S.B. 191 was introduced into the House of Representatives on May 3, 2010, only nine days before the end of the session. See *Bill Summary*; Stand for Children, at 3. On May 12, 2010, the last day of the Colorado legislative session, S.B. 191 passed the House on a 36-29 vote. See Stand for Children, at 3. And on May 20, 2010, Governor Bill Ritter, Jr. signed the bill into law. See *Bill Summary*.

134. See *Struggling with Mutual Consent*, EDNEWS COLORADO (May 17, 2011), <http://www.ednewscolorado.org/news/education-news/struggling-with-mutual-consent#mike>. Senator Johnston said, “[i]t was very clear that the mutual consent provision was effective immediately.” *Id.*

135. S.B. 191, § 11; COLO. REV. STAT. § 22-63-202(2)(c.5)(I) (emphasis added).

136. *Id.* The language by itself defines the minimum implications of the mutual consent provision, clearly stating that a principal has the right to turn down a teacher applicant.

text, consideration of the prior existing law on the issue of hiring,¹³⁷ the legislative intent behind the new law,¹³⁸ and the policy implications of different interpretations.

This Comment proposes three ways that the mutual consent provisions of S.B. 191 could operate with the hiring statute. Part III examines each of these interpretations, focusing on each interpretations' validity and whether it should govern how courts and school leaders interpret the provisions. Part III.A examines one possible interpretation: that school boards maintain the authority and duty to hire teachers, with the new caveat that principals have the power to veto a school board's choice. Part III.B proposes an alternative interpretation, which asserts that the two laws cannot co-exist, and S.B. 191 must implicitly repeal its predecessor. Part III.C suggests a third interpretation, which posits that the two laws can exist together. Under the third interpretation, school boards delegate the power to hire teachers to the principals but remain involved by facilitating the hiring process and supporting teachers and principals in finding good matches. Since *Big Sandy's* time, the public education system has become more complex, requiring school boards to delegate additional duties and more power.

A. Interpretation 1: School Boards Hire Teachers and Principals Have Veto Power

S.B. 191's mutual consent provision could be interpreted narrowly to give principals only the power to veto teachers that the school districts would otherwise place in their schools, but no further power or role in the hiring process. S.B. 191 states "a teacher may be assigned to a particular school *only with the consent* of the hiring principal."¹³⁹ Nothing directly gives the principal any power other than to withhold consent to hiring a candidate.¹⁴⁰ Under this model, school boards would remain in charge of each step in the process, and the principal would be, for all practical purposes, left with no hiring authority. If it desired, the school board could prevent the principal from even sitting in on interviews with applicants.

137. See *supra* Part II.

138. See *infra* Part III.C.

139. S.B. 191, § 11; COLO. REV. STAT. § 22-63-202(2)(c.5)(I) (emphasis added).

140. See *id.*

This interpretation is marginally supported by the fact that the mutual consent provision, requiring the principal to consent to the teacher-applicant, is embedded in the employment contract.¹⁴¹ Because school boards unilaterally create employment contracts, the only requisite change, according to the text, would be a clause in the contract that principals must consent to the teacher-applicant prior to hiring said teacher. While this understanding supports the notion that school boards remain in control and principals only have a veto power, it does not reflect the purpose behind the mutual consent provision.

This interpretation is at odds with the law's ideological goals. Although a veto power would allow principals to keep out teachers who they believe are a bad fit for their school, that is not sufficient to achieve the desired intent of the mutual consent provision. If the school board continues to be the entity that investigates and interviews potential hires, the principal will not know the candidate well and will make less-informed decisions regarding her consent than if she conducted the process herself, or was at least involved in it. Thus, a principal who merely has the power to veto teachers hired by the school board would serve only a nominal role in the hiring process. The only resulting change is that the law would endow principals with the power to veto the school board's appointment.

A singular statutory provision cannot be examined inside a vacuum; it should be considered in the context of the whole statute.¹⁴² To determine the legislative purpose, a court looks first at the plain meaning of the text. If a statute is ambiguous, a court goes on to consider the indicia of legislative intent, including the purpose of the act, the legislative history, and the consequences of a particular construction.¹⁴³

In this case, the text of the mutual consent provision is ambiguous. The plain meaning of the word "consent" is unclear

141. *Id.*

142. WILLIAM D. POPKIN, A DICTIONARY OF STATUTORY INTERPRETATION 281 (Carolina Academic Press, 2007). This canon is supported by many legal judges, including New York Chancellor James Kent, Chief Justice John Marshall, and Massachusetts Chief Justice Shaw. *Id.* The Colorado Supreme Court stated: "Our primary task in construing a statute is to ascertain and give effect to the legislative purpose underlying it." *City of Westminster v. Dogan Const. Co., Inc.*, 930 P.2d 585, 590 (Colo. 1997).

143. *See* POPKIN, *supra* note 142.

because the statute does not provide a definition of “consent” for the context.¹⁴⁴ Alone, “consent” could imply varying levels of power, and the bill does not address the other hiring statute at all, leaving it unclear what the drafters intended their relationship to be. However, the text surrounding the word helps to explain its intended meaning, and the subsequent language indicates that principals will wield more hiring authority than mere veto-power.¹⁴⁵ In describing the application and hiring process for nonprobationary teachers after they have been let go from their current school, S.B. 191 states that the principal of a different school, after receiving such teacher’s application, may “recommend[] appointment”¹⁴⁶ of the teacher “to a vacant position”¹⁴⁷ and the teacher is then “transferred to that position.”¹⁴⁸ The principal is not only consenting to the teacher’s placement but is the one recommending the teacher in the first place. As a recommender, the principal likely is reviewing the application, conducting the interview, and then making appropriate recommendations. A “vetoer,” in contrast, would not be involved in the application review or interviews but merely would say “yes” or “no” after the board completed the majority of the hiring process. Thus, this surrounding language sheds light on the power vested in the word “consent.”

Moreover, an interpretation giving principals minimal hiring authority would undermine the spirit of the law and ignore the legislative intent behind the inclusion of the mutual consent provision. The Colorado Supreme Court declared that the “intent of the legislature” is the most common form of statutory interpretation.¹⁴⁹ The legislators’ intent is primary because our legal jurisprudence assumes that we have an obligation to construe statutes so that they carry out the will of the lawmakers, as mandated by the principles of separation of

144. See S.B. 191, § 11; COLO. REV. STAT. § 22-63-202(2)(c.5)(I) and surrounding text.

145. See *infra* Part III.C.

146. S.B. 191, §11; COLO. REV. STAT. § 22-63-202(2)(c.5)(II)(B).

147. *Id.*

148. *Id.* For further analysis of this text, see *infra* Part III.C.

149. See, e.g., *Shelter Mut. Ins. Co. v. Mid-Century Ins. Co.*, 246 P.3d 651, 661 (Colo. 2011); *Department of Transp. v. Gypsum Ranch Co.*, 244 P.3d 127, 131 (Colo. 2010); NORMAL J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 45:5 (7th ed. 2012).

powers.¹⁵⁰ Sources of legislative intent include the language of the statute itself, the policy behind the statute, and the legislative history.¹⁵¹ In the case of S.B. 191, the idea behind mutual consent is to give principals the ability to fill positions within their schools in order to build and sustain the type of learning environment they deem the most effective for their students.¹⁵² Tom Boasberg, the superintendent of the Denver School District, said “[s]chools are incredibly mission-driven organizations, and each has its own unique culture . . . It’s really important that all of the members of the team at the school buys into that vision.”¹⁵³ This driving idea suggests that the drafters of S.B. 191 intended that the mutual consent provision would empower principals to choose whom to interview, to conduct the interviews, and then to select from that pool a teacher to fill the vacancies. The reasoning behind the mutual consent provision, as the text states, is that “for the fair evaluation of a principal based on the demonstrated effectiveness of his or her teachers, *the principal needs the ability to select* teachers who have demonstrated effectiveness.”¹⁵⁴ If the General Assembly expected the principal to “select” his teachers, the members would anticipate the principal to play a significant role in the hiring process.

The legislature clearly intended the mutual consent provision to effect change in the hiring process. It seeks to create a cohesive environment where the teacher and the school are a good match.¹⁵⁵ Senator Johnston, the author of the

150. See, e.g., Richard J. Scislowksi, *Jenkins v. James B. Day & Co.: A New Defense of State Tort Law Against Federal Preemption—Is It Legitimate?*, 28 AKRON L. REV. 373, 386 (1995); Singer, *supra* note 149.

151. See, e.g., *People v. Merrill*, 816 P.2d 958 (Colo. Ct. App. 1991); Singer, *supra* note 149. However, there are critics of the statutory construction of legislative intent. Critic Justice Holmes favored an approach that asks only what the statute means. See, e.g., Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899). Even under this approach, “consent” considers greater hiring power for principals as evidenced by subsequent provisions of the bill. See *infra* Part III.C.

152. See NAT’L COUNCIL ON TEACHER QUALITY, *supra* note 17, at 9; COLO. LEGACY FOUND., *supra* note 39, at 4.

153. EDUCATION WEEK, *‘Mutual Consent’ Teacher Placement Gains Ground*, July 6, 2010, http://www.edweek.org/ew/articles/2010/07/01/36placement_ep.h29.html?tkn=UVRFvxTfwyqTV03m9gDwAh71UoFWKAfn7jEL.

154. S.B. 191, § 11; COLO. REV. STAT. § 22-63-202(2)(c.5)(I) (emphasis added).

155. COLO. DEP’T OF EDUC., EDUCATOR EFFECTIVENESS, SENATE BILL 10-191—MUTUAL CONSENT, available at <http://www.cde.state.co.us/EducatorEffectiveness/SB-Consent.asp>.

bill, stated, “We know that teachers and principals in the schools are the single most important variable[;] . . . you need to have people who are 100 percent into changing that system. You can’t do that with direct placements.”¹⁵⁶ The mutual consent provision is designed to solve the problem that forced placement creates for principals who are trying to “build and sustain a cadre of education professionals at their schools.”¹⁵⁷ It aims to ensure that principals and their schools hire only teachers that are the right fit for their program—teachers with diverse ideas and teaching styles that will complement one another.¹⁵⁸ With this goal in mind, the first interpretation would defeat the statute’s purpose of providing for major principal input and would not conform to other language in S.B. 191.

B. Interpretation 2: S.B. 191 Implicitly Repeals the Hiring Statute

An alternative way to understand the mutual consent provision of S.B. 191 is that it repeals the existing law on hiring practices in Colorado. Under this scenario, not only would school boards have no degree of authority in teacher hiring, they would no longer be involved at all, an impractical scenario. The principal, and her support staff, would be exclusively in charge of hiring new teachers.

Based on the text of the statute, the provision does not intend to remove school boards completely. The board still has a role in adopting hiring policies¹⁵⁹ and supporting principals in the hiring process. For instance, when a school no longer

156. Jeremy P. Meyer, *Denver Teachers Won’t be Forced into Most Troubled Schools Anymore*, DEN. POST, Feb. 6, 2010, http://www.denverpost.com/ci_14345676.

157. SCOTT LABAND, DEMOCRATS FOR EDUC. REFORM, CREATING A WINNING LEGISLATIVE CAMPAIGN: THE COLORADO STORY 5, available at http://www.dfer.org/CO_Case_Study.pdf.

158. See *S.B. 10-191: Great Teachers & Leaders*, supra note 14. It is important that we consider the policies behind the laws. Judge Learned Hand, one of the premier judges of the twentieth century, once said: “As nearly as we can, we must put ourselves in the place of those who uttered the words, and try to divine how they would have dealt with the unforeseen situation; and, although their words are by far the most decisive evidence of what they would have done, they are by no means final.” POPKIN, supra note 142, at 312 (2007) (quoting *Guiseppe v. Walling*, 144 F.2d 608, 624 (2d Cir. 1944)).

159. S.B. 191, §11; COLO. REV. STAT. § 22-63-202(2)(c.5)(II)(B).

needs a nonprobationary teacher's services, the school board and the human resources office will provide the teacher with a list of vacant positions at other schools and assist the teacher in submitting applications to those principals.¹⁶⁰ This demonstrates that school boards are still in communication with each school's hiring needs and facilitate the hiring process. Thus, based on a plain reading of the text of the statute, the mutual consent provision cannot strip *all* hiring power away from the school boards. It is possible, based on the language, that the principal has the sole power to make hiring decisions, irrespective of the school board. However, the text does not answer the question of how much power the law allocates to the principal, and there is a powerful canon of construction that urges us not to adopt this interpretation.

This statutory canon of construction states that there should be no implied repeal of a statute. The United States Supreme Court has stated that "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest."¹⁶¹ In this case, S.B. 191 does not explicitly repeal the existing law, it does not mention the hiring statute, and does not use language that clearly or manifestly shows legislative intent to strip the school board of any role whatsoever.¹⁶² Thus, there cannot be an implied repeal unless the Colorado General Assembly amends S.B. 191 to do so.

Moreover, the language in S.B. 191 stating that the mutual consent provision will be contained in the employment contract supports the notion that school boards retain an active role in

160. *Id.*

161. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (internal quotation marks omitted). The court has gone on to say it will not infer a statutory repeal unless the later statute contradicts the original statute or unless such a construction is necessary to give the later statute any meaning at all. *Traynor v. Turnage*, 485 U.S. 535 (1988); *see also Posada v. Nat'l City Bank*, 296 U.S. 497, 503 (1936) ("the intention of the legislature to repeal must be clear and manifest."). The Colorado Supreme Court also endorses this idea. *See, e.g., Prop. Tax. Adm'r v. Prod. Geophysical Servs.*, 860 P.2d 514, 518 (Colo. 1993) (stating that the intent to repeal by implication "must appear clearly, manifestly, and with cogent force"); *City of Florence v. Pepper*, 145 P.3d 654, 657 (Colo. 2006) (explaining "[a] statutory construction that effects a repeal by implication is not favored unless unavoidable.").

162. "Therefore, each employment contract . . . shall contain a provision stating that a teacher may be assigned to a particular school only with the consent of the hiring principal and with input from at least two teachers." COLO. REV. STAT. § 22-63-202(2)(c.5)(I) (2012).

the hiring process.¹⁶³ The boards will continue to draft and offer employment contracts, which is an important role in the hiring process. Both the employment contracts coming from the school boards and the statutory construction of “no implied repeal” strongly undercut this interpretation.

C. Interpretation 3: The Laws Are Co-Extensive

The last way to interpret the mutual consent provision of S.B. 191 and the hiring statute is that S.B. 191 empowers principals to take a leadership role in the hiring process, but the hiring statute allows school boards to continue playing a role, albeit a smaller one than before. Under this interpretation, S.B. 191 serves to restrict the power of the school board in the hiring process without completely eliminating that power. It gives principals more of a role in the hiring process, such as interviewing candidates, but still gives school boards the power to draft and offer contracts.

The text of S.B. 191 supports this interpretation, even though it does not define “consent” explicitly. Section 22-63-202(2)(c.5)(II)(B) of the Colorado Revised Statutes lays the framework for the new role of school boards in hiring decisions.¹⁶⁴ When a teacher is terminated because of a drop in enrollment or turnaround, the department of human resources for the school district

shall immediately provide the nonprobationary teacher with a list of all vacant positions for which he or she is qualified. . . . An application for a vacancy shall be made to the principal of a listed school, with a copy of the application provided by the nonprobationary teacher to the school district. When a principal *recommends* appointment of a nonprobationary teacher applicant to a vacant position, the nonprobationary teacher shall be transferred to that position.¹⁶⁵

The drafters, in establishing implementation policies for the mutual consent provision, used the word “recommends” to

163. *Id.* § 22-63-202(2)(c.5)(I).

164. *Id.* § 22-63-202(2)(c.5)(II)(B).

165. *Id.* (emphasis added) (requirement to develop policies for Board adoption addressing displacement and mutual consent provisions).

describe the principal's role in hiring teachers. "Recommends" connotes much more than the mere power to veto a potential candidate. Rather, it implies active participation in the decision-making process, perhaps even the chief role.

By providing a framework implementing mutual consent into the hiring process, the drafters indicated an intention that the principals would play a leading role. The introductory portion of the mutual consent provision in S.B. 191 further supports this notion. It states:

The general assembly finds that, for the fair evaluation of a principal based on the demonstrated effectiveness of his or her teachers, the principal needs the ability to select teachers who have demonstrated effectiveness and have demonstrated qualifications and teaching experience that *support the instructional practices of his or her school*. Therefore, each employment contract . . . shall contain a provision stating that a teacher may be assigned to a particular school only with the consent of the hiring principal and with input from at least two teachers employed at the school and chosen by the faculty of teachers at the school to represent them in the *hiring process*.¹⁶⁶

This portion of S.B. 191 describes the rationale behind the mutual consent provision and explains, albeit in vague terms, how the legislature intends it to operate. The drafters believed that in order for principals to be fairly evaluated by the teachers' effectiveness in their schools, principals must be able to select their own teachers.¹⁶⁷ Principals must have the ability to staff their schools with teachers they believe will contribute to the general effectiveness of the learning environment and "support the instructional practices of his or her school."¹⁶⁸ Staffing teachers that the principal believes will support the instructional practices of her school ultimately requires the principal to have intimate knowledge of the teacher's unique values and teaching practices. To have such intimate knowledge, the principal must be involved in the hiring process of the teacher. Moreover, no one knows the instructional

166. *Id.* § 22-63-202(2)(c.5)(I) (emphasis added) (mutual consent provisions).

167. *Id.*

168. *Id.*

practices of the school better than the principal, including the school board. School boards oversee multiple schools, and its members are not engaged in the day-to-day activities of schools, nor do they spend their days at one particular school.¹⁶⁹ Rather, school board members focus on establishing policies for school administrators to follow.¹⁷⁰ Therefore, school boards are not in the prime position to know which teachers would fit the school's instructional practices. Rather, the principals are in the best position to make the decision. Thus, implementation policies for the mutual consent provision written into S.B. 191 support the idea that principals will take the lead in hiring teachers for vacant positions.

The New Teacher Project, a national organization that provides to schools best practices and advice on interpreting legal policies, supports this interpretation in its report on the mutual consent provision of S.B. 191.¹⁷¹ The report provides a basic framework for the new hiring process. First, principals and teachers must "actively seek the teachers to fill their vacancies that best meet their school's needs."¹⁷² They can do this by posting vacancies in a timely manner, playing an active role in recruiting candidates, clarifying the skills most needed for success in their schools, and finally, making rigorous selection decisions.¹⁷³ The school board's role shifts dramatically as well. Its primary job is to facilitate good matches between teachers and schools.¹⁷⁴ The board should communicate expectations during the process for teachers and schools, provide the schools with accurate data on the pool of available candidates, and information necessary to process school selection decisions in an efficient manner.¹⁷⁵ In its guide to school boards, administrators, teachers, and human resource departments (among others), the New Teacher Project unequivocally rejects the traditional model, which the veto

169. Carter Ward & Arthur Griffin, *Five Characteristics of an effective school board*, CTR. FOR PUB. EDUC., <http://www.centerforpubliceducation.org> (last visited June 2, 2013).

170. *Id.* School boards make policies for school administrators, allocate resources, watch the return on investments, use data, and engage their communities. *Id.*

171. *See* COLO. LEGACY FOUND., *supra* note 39, at 12.

172. *Id.* at 4.

173. *Id.* at 4–5.

174. *Id.* at 5.

175. *Id.*

interpretation would incorporate, in which principals could only interview candidates at the discretion of the school board.¹⁷⁶ While “consent” cannot refer to a stand-alone decision, it suggests more authority than simple acquiescence to another’s decision.

In addition, the industry definition of mutual consent encompasses this broader interpretation of giving principals authority over the entire hiring process. For example, New York City reformed its school staffing provisions in 2005, replacing forced placement with mutual consent.¹⁷⁷ Under the new employment contracts, school districts no longer centrally assign teachers.¹⁷⁸ Instead, these teachers interview with principals, and the principals select from the applicant pool.¹⁷⁹ The Chicago Public Schools adopted mutual-consent hiring in 1995.¹⁸⁰ Milwaukee adopted a combination hiring system, whereby, before July 7, all teachers are hired through a school-based interview process.¹⁸¹ In addition, in Washington D.C., the district uses mutual consent.¹⁸² It puts hiring decision directly into the hands of principals and teachers instead of a central office.¹⁸³

The Colorado Supreme Court in *Fremont* recognized that our increasingly complex society requires more from school boards and thus compels them to delegate more of their functions and powers.¹⁸⁴ “The School Board can select reasonable means to carry out its duties and responsibilities

176. *Id.*

177. See DALY ET. AL, *supra* note 52, at 1.

178. *Id.*

179. *Id.* at 2.

180. See COLO. LEGACY FOUND., *supra* note 39.

181. See THE NEW TEACHER PROJECT, HIRING, ASSIGNMENT, AND TRANSFER IN MILWAUKEE PUBLIC SCHOOLS 7 (2007), available at <http://dlj51l9p3qzy9.cloudfront.net/handle/10207/bitstreams/96323.pdf>. The system is a combination of mutual consent and forced placement. For voluntary transfers, teachers interview with school interview teams. If they are not selected, they remain at their current school. *Id.* at 8. When there is a reduction in enrollment, teachers again interview. If they are not selected by interview teams, they will be slotted into vacancies by Human Resources. *Id.* If a teacher believes she is incompatible with the assigned school, that teacher may complete an incompatibility form and will be reassigned at the earliest opportunity. *Id.*

182. See THE NEW TEACHER PROJECT, KEEPING IRREPLACEABLES IN D.C. PUBLIC SCHOOLS 6 (2012), available at http://tntp.org/assets/documents/TNTP_DCirreplaceables_2012.pdf.

183. *Id.*

184. *Fremont Re-1 Sch. Dist. v. Jacobs*, 737 P.2d 816, 819 (Colo. 1987).

incidental to the sound development of employer-employee relations, as long as the means selected are not prohibited by law or against public policy.”¹⁸⁵ Although *Fremont* followed in the footsteps of the previous cases that started with *Big Sandy* when it decided a school board’s power to hire was still not delegable, *Fremont*’s conclusion was mere dicta, and its significance is lessened by the court’s recognition that school boards must increasingly delegate their powers and functions.¹⁸⁶ More than two decades after *Fremont*, the education system has only become more complicated.¹⁸⁷ School board members have more responsibilities and are even busier than in the *Fremont* era with ever-increasing compliance issues and various responsibilities. Thus, it follows that the board members must be able to delegate even more powers.

Recent case law, such as *Fremont*, suggests that the strict construction of this non-delegable hiring power given to school boards by statute is less rigid than previously interpreted. While express statutory support for a public administrative body to delegate its powers and functions may be present, it is not necessary for such delegation to be legal.¹⁸⁸ An omission by the legislature does not necessarily indicate a denial of delegation.¹⁸⁹ “If there is a reasonable basis to imply the power to delegate the authority of the administrative agency, such an implication can be made, and the power to delegate may be implied.”¹⁹⁰ *Fremont* provided the basis for that reasoning.

IV. PUBLIC POLICY AND THE CO-EXTENSIVE PROPOSAL

The third interpretation best explains the ambiguity between the old and new laws; S.B. 191 supplements the prior law rather than replacing it. *Big Sandy* rested on a provision of the Colorado statute that the legislature subsequently

185. *Id.* (quoting *Littleton Educ. Ass’n v. Arapahoe County Sch. Dist.*, 553 P.2d 793, 797 (1976)).

186. *See* Part 1.B for the facts and holding.

187. *The Law and its Influence on Public School Districts: An Overview*, THE CENTER FOR PUBLIC EDUCATION, <http://www.centerforpubliceducation.org/Main-Menu/Public-education/The-law-and-its-influence-on-public-school-districts-An-overview> (last visited June 2, 2013).

188. 73 C.J.S. Public Administrative Law and Procedure § 119 (2013).

189. *Id.* *See also Fremont*, 737 P.2d at 819.

190. 73 C.J.S. Public Administration Law and Procedure § 119 (2013).

repealed.¹⁹¹ While the spirit of *Big Sandy* has lived on beyond the statutory provision on which it relied, the fact that the legislature repealed the statute and multiple decades have passed allow us to take a second look at the statutes and case law covering the hiring of teachers.

There are three main reasons why the third interpretation is the most reasonable. First, restricting school boards' authority is legally permissible.¹⁹² Second, school boards will still be held accountable for teachers. Finally, public policy favors hiring power vested in principals.

A. The Co-Extensive Interpretation is Legally Permissible

First, a restriction on the school board's authority to hire teachers is legally permissible.

Principals are the most reasonable recipients of the hiring power. If the school boards delegate the hiring power, it should be to the officials who have the most thorough understanding of the position and what qualifications are necessary to fill it and be successful. Principals work in the trenches alongside the teachers they would hire, putting them in the best position to vet the candidates and choose the ones most qualified. Moreover, principals have strong incentives to hire the most qualified teachers because their own evaluations are tied to the effectiveness of their teachers. Principals will invest the most time and energy into selecting teachers who will support their students and whose teaching practices and values are a good match for the school. Thus, such a delegation of the school boards' power to principals makes logical sense.

Such delegation to the principals satisfies the legislative intent without interfering with the policy rationales for school boards' hiring. The legislative intent behind the mutual consent provision of S.B. 191 seeks in part to prevent principals from taking on a teacher they do not think fits their programs.¹⁹³ Antonio Esquibel, the principal of Abraham Lincoln High School in Denver, said, he "want[s] to be able to select and be able to interview those candidates [who] possess those qualities" that can help his students, 91 percent of whom

191. See COLO. REV. STAT. § 123-10-19 (repealed 1963).

192. See *supra* Part III.C.

193. See NAT'L COUNCIL ON TEACHER QUALITY, *supra* note 17.

are poor and 80 percent of whom are English language learners (students for whom English is a second language).¹⁹⁴ If the goal of mutual consent is to allow principals to choose employees that will support the institutional values of the school, it makes sense for principals to be involved earlier in the hiring process rather than solely through a veto option at the end.

B. The Co-Extensive Interpretation Maintains School Board Accountability

Second, if principals adopt some of the hiring authority from school boards, the public can still hold the boards accountable. The court in *Fremont* emphasized this salutary purpose behind *Big Sandy*'s holding that school boards cannot delegate hiring power.¹⁹⁵ The limits on delegation "assure[] the public that school board members—who are subject to public election—must take responsibility for significant policy decisions associated with management of the school district."¹⁹⁶ Principals are at-will employees and will be responsible for hiring teachers. If the public, or school board, is unhappy with the teachers selected, the school board can replace the principal. While this new layer, created by the mutual consent provision, insulates the school boards more than previously, the school board officials are still publicly accountable for teachers' performance.

Critics of S.B. 191 fear that giving principals so much power in the hiring process will open the door to cronyism.¹⁹⁷ The thought is that principals could demonstrate favoritism to those they favor by hiring them, rather than hiring individuals who are the most suited for the job.¹⁹⁸ The American Federation of Teachers, one of the largest national teachers' unions, has been a prominent and vocal opponent of mutual consent.¹⁹⁹ Rob Weil, the director of field programs for the 1.4 million-member union, asserted that "[a]t a minimum, it's a return to the old industrial model, top-down management of

194. Mitchell, *supra* note 8.

195. *Fremont Re-1 Sch. Dist. v. Jacobs*, 737 P.2d 816, 819 (Colo. 1987).

196. *Id.*

197. See SAWCHUK, *supra* note 48.

198. *Id.*

199. *Id.*

schools that didn't work then and isn't going to work now."²⁰⁰ The Union fears that hiring will revert to the nepotism that characterized hiring before collective bargaining for teachers in the sixties and seventies.²⁰¹

While such a possibility could be an infrequent consequence of mutual consent, there are a number of safeguards built into S.B. 191 that prevent this sort of nepotism from re-emerging in the teacher hiring process. First, the Act requires that at least two teachers, chosen by the school faculty to represent them, provide input to the principal in the hiring process.²⁰² This caveat ensures that the principal is not acting completely alone and must account for other voices in the school on what type of candidates they feel would make a good addition. It prevents principals from hiring someone with no credentials or qualifications.

Second, a principal's career is tied to the performance of his school. His evaluation is statutorily determined by at least 50 percent of the academic growth of his students,²⁰³ the number of teachers in the school who are rated as effective or highly effective,²⁰⁴ and the number of teachers in the school who are rated as ineffective but improving in effectiveness.²⁰⁵ Thus, a principal is held accountable for whom he hires by the successful—or unsuccessful—performance of such teachers. It provides him with a personal interest in his teachers' success and will deter him from hiring unqualified applicants.

C. The Co-Extensive Interpretation Achieves the Policy Goals Behind the Mutual Consent Provision

Finally, the co-extensive interpretation aligns most with the policy hopes and concerns behind the bill. The National Council on Teacher Quality recommends more authority be vested in principals because “[h]iring authority is essential to well-run businesses, and, in the case of schools, giving principals the authority to accept, turn down or look for alternative candidates is key to building cohesive school

200. *Id.*

201. *Id.*

202. COLO. REV. STAT. § 22-63-202(2)(c.5)(I) (2013).

203. *Id.* § 22-9-106(7).

204. *Id.* § 22-9-106(7)(b).

205. *Id.* § 22-9-106(7)(c).

faculties that will, ultimately, be effective teams.”²⁰⁶

The primary and most important goal of S.B. 191 is to staff schools with effective teachers and effective principals.²⁰⁷ Teacher and principal quality affect nearly 60 percent of variance within the school in student achievement.²⁰⁸ Principals account for one-quarter, and teachers for one-third, of the school’s total impact on student achievement.²⁰⁹ Research shows that a child taught by a highly effective teacher may experience as much as one additional year’s worth of academic growth, as compared to a child taught by one of the least effective teachers.²¹⁰ New Leaders for New Schools developed leadership actions it deems essential for driving breakthrough student-learning gains.²¹¹ There are five categories of principal work, and one of them is “building and managing a high-quality staff aligned to the school’s vision of success for every student.”²¹² One major component of this is teacher hiring.²¹³ Principals should seek out candidates who connect with and have interest in their students, have a record of demonstrated effectiveness through measurable student gains, and have essential personal attributes, such as teamwork, leadership, and a willingness to constantly learn and improve.²¹⁴ These criteria are part of the rigorous selection process principals run. In its policy recommendations, the report states: “all principals require authority to manage school-level capital in order to increase teacher effectiveness and student achievement.”²¹⁵ Principals are in the best position to know who the most effective teachers will be in their school; they are certainly more capable than the school board, a centrally located office potentially overseeing dozens of schools.

206. NAT’L COUNCIL ON TEACHER QUALITY, *supra* note 17, at 9.

207. Sen. Mike Johnston, *SB 10-191: Great Teachers & Leaders*, MIKEJOHNSTON.ORG (2010) <http://www.mikejohnston.org/issues/sb-10-191/> (video explaining S.B. 10-191).

208. NEW LEADERS FOR NEW SCHOOLS, *supra* note 86, at 12.

209. *Id.*

210. *Id.* at 21.

211. *Id.* at 17–18.

212. *Id.* at 17.

213. *Id.* at 21.

214. *Id.*

215. *Id.* at 33.

CONCLUSION

S.B. 191 is an important and necessary step in improving education and ensuring that all students receive a good education. The mutual consent provision is one major piece in achieving the goal of staffing schools with effective teachers and effective principals. While tension exists between the current hiring laws in section 22-32-109 of the Colorado Revised Statutes and mutual consent in S.B. 191, the two laws can be read together to strengthen the overall hiring process. Over the last few decades, the statutory law and case law have been moving towards relaxing strict rules on non-delegation for public administrative bodies. S.B. 191 is merely another step in that direction. School boards will remain involved in the hiring process by facilitating the process for teachers and principals to find each other and by overseeing the process. However, the final authority should now rest with the principals, the leaders of the schools, and those best positioned to determine qualified candidates for their particular institutions.