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Penalty or Damages? Are There Limits to Liquidated Damages Provisions in Teacher Employment Contracts

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PENALTY OR DAMAGES? ARE THERE LIMITS TO LIQUIDATED DAMAGES PROVISIONS IN TEACHER EMPLOYMENT CONTRACTS

*Ann Blankenship-Knox**

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INTRODUCTION

As the school year comes to a close, school districts must immediately begin assessing their faculty and staff needs for the following year. Teachers looking for new jobs generally prefer not to let go of one position until they have secured a new one. From mid-May to mid-June, a shift occurs where teachers leave jobs in one district to accept jobs in another. This shift requires delicate maneuvering because a teacher generally cannot be under contract in two districts at once.

It is in this context that the superintendent of Georgia’s DeKalb County School District (DCSD) incorporated a \$750 liquidated damages provision into its 2014-2015 teacher contract, arguing that the

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number of teachers moving to other districts was leaving DCSD unprepared to serve its students in the fall.¹ By requiring teachers to accept a new contract nearly two months before the end of the school year, and then threatening teachers with penalties if they requested a release to accept a new school district's offer after May 5th, DCSD put teachers in a difficult position.² Teachers wanting to move to another district could not refuse to sign DCSD's contract by the April 4th deadline without putting their livelihood in jeopardy (i.e. having no job, losing tenure, and losing the ability to collect unemployment due to the fact that they resigned from their job).

However, liquidated damages provisions are not unique to DeKalb County. Surrounding counties in Georgia have similar provisions in their contracts, as do many districts across the country.³ Generally, damages resulting from a breach of contract are determined at the time or following a breach.⁴ Liquidated damages provisions are the "exception to [this] general rule of contract law" as they seek to determine the expected costs of a breach in advance.⁵ These provisions are typically deemed valid when they represent a fair and reasonable attempt to fix appropriate compensation for anticipated damages, particularly in cases where actual damages are difficult to calculate.⁶

With regard to teaching contracts, liquidated damages provisions ranging from a few hundred dollars to several thousand dollars have gone unchallenged and, in some cases, have been upheld by state and federal courts.⁷ Liquidated damages provisions can also help districts recoup damages suffered when a teacher resigns right before a new school year begins or in the middle of the summer. However, in DeKalb County, DCSD enforced the liquidated damages provision

1. DeKalb Cty. Sch. Dist. Bd. of Educ. Work Session 4-5 (Ga. 2014) [hereinafter *Dekalb Cty. Sch. Dist. Work Session*] (statement of Dr. Tekshia M. Ward-Smith, Chief Human Resources Officer for DCSD) (on file with Florida A&M University Law Review). For a video of the full work session, see Dekalb County School District, *Board of Education Work Session – April 1, 2014*, DEKALB SCHS. BROAD. NETWORK (Apr. 1, 2014), <http://ec4.cc/ed49b857>.

2. See Third Amended Complaint at 4, *Bettis et al. v. DeKalb Cty. Sch. Dist.*, No. 14A528776 (Ga. DeKalb Cty. Ct. Sept. 8, 2014).

3. See generally *infra* Part IV for further discussion.

4. Ralph D. Mawdsley, *Liquidated Damages Clauses in Educational Contracts*, 186 ED. L. REP. 587 (2004).

5. *DJ Mfg. Corp. v. United States*, 86 F.3d 1130, 1133 (Fed. Cir. 1996); see also Mawdsley, *supra* note 4, at 587-92 (An advantage of liquidated damages provisions for non-breaching parties is that they may not bear the burden of proving damages) (Furthermore, both parties understand the cost of breaching the contract before such a breach occurs).

6. *DJ Mfg. Corp.*, 86 F.3d at 1133.

7. *Id.*

against teachers who resigned before the end of the school year making any damage to the district minimal at best; thus, DCSD essentially strong-armed teachers into renewing their contracts in early-April.⁸

This Article examines the validity of liquidated damages provisions with regard to teacher contracts and the appropriateness of their use. Part II addresses the law of liquidated damages generally. Part III discusses one Georgia case brought by two teachers against DCSD for enforcement of its liquidated damages provision as an attempt to force the teachers to stay with the District. Part IV summarizes a review of various teacher employment contracts and types of liquidated damages clauses incorporated therein. Part IV concludes with a discussion of various issues that school districts ought to take into consideration to enhance teacher retention and maintain high quality education of its students when including liquidated damages provisions in teacher contracts.

I. THE LAW OF LIQUIDATED DAMAGES AND THEIR VALIDITY

Liquidated damages are a commonly used contract tool in service, manufacturing, and purchase contracts; they also appear in teaching contracts across the country. Generally, courts will find liquidated damages provisions permissible when they represent a fair and reasonable attempt to fix compensation for anticipated damages because such provisions tend to save the parties the time and money of litigating the issue of damages in the event of a breach.⁹ As stated by the United States Supreme Court, such provisions are enforceable as long as “the amount stipulated for is not so extravagant, or disproportionate to the amount of property loss, as to show that compensation was not the object aimed at or as to imply fraud, mistake, circumvention or oppression.”¹⁰ Therefore, a liquidated damages provision must not be intended as a penalty to induce performance.¹¹ Liquidated damages are particularly useful when actual damages are uncertain or

8. See Third Amended Complaint, *supra* note 2, at 4 (DCSD repeatedly referred to the liquidated damages provision as a “penalty” and threatened to report offending teachers to the Professional Services Commission for failure to adhere to the terms of their contracts).

9. *DJ Mfg. Corp.*, 86 F.3d at 1133.

10. *Wise v. United States*, 249 U.S. 361, 365 (1919); see also *United States v. Bethlehem Steel Co.*, 205 U.S. 105, 121 (1907).

11. See *Kothe v. R.C. Taylor Trust*, 280 U.S. 224, 226 (1930) (“Such contracts for liquidated damages, when reasonable in their character, are not to be regarded as penalties and may be enforced between the parties.”); see also *Priebe & Sons v. United States*, 332 U.S. 407, 413 (1947) (noting that the liquidated damages provision was unenforceable because it was included “not to make a fair estimate of damages to be suffered by to serve only as an added spur to performance”).

difficult to estimate or measure and the fact that actual damages are shown to more or less than the contractually agreed upon amount does not render a liquidated damages provision void.¹²

Few challenges to liquidated damages provisions to teachers' contracts make it to state appellate or supreme courts.¹³ With a single exception, courts have upheld liquidated damages provisions in teacher contracts. For example, in *Bowbells Public School District No. 14 v. Walker*,¹⁴ the Supreme Court of North Dakota upheld a liquidated damages provision, noting:

We are not unmindful of the fact that this is a public contract and that it is the public as a whole that suffers when such a contract is breached. In this respect, this case is not unlike those cases in which a governmental body liquidated the amount of damages it may recover for a delay in the performance of a public construction contract. Although the damages suffered by the governmental body itself may be readily ascertainable, the damages sustained by the public are not readily ascertainable, and, on such basis, liquidated damages provisions are generally upheld[.]¹⁵

This sentiment is reflected in subsequent cases in North Dakota and beyond.¹⁶ In these cases, the actual amount of the liquidated damages

12. *Priebe & Sons v. United States*, 332 U.S. 407, 411-12 (1947) (“They serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable . . . [a]nd the fact that the damages suffered are shown to less than the damages contracted for is not fatal. These provisions are to be judged as of the time of making the contract.”).

13. This review does not include trial court rulings because it is not controlling authority in subsequent cases. Furthermore, the author only reviewed state appellate and supreme court cases that were published in the Westlaw database.

14. 231 N.W.2d 173 (1975).

15. *Id.* at 176.

16. *See, e.g.*, *Bd. of Educ. of Talbot Cty., Md. v. Heister*, 896 A.2d 342 (Md. 2006) (holding that liquidated damages provision included in teacher contract providing for forfeiture of accrued but unpaid salary if teacher submitted an untimely resignation was enforceable as the provision reasonable compensated the school system for damages anticipated by an untimely resignation); *Arrowhead Sch. Dist. No. 75, Park County, Montana v. Klyap*, 79 P.3d 250 (Mont. 2003) (holding liquidated damages clause requiring teacher to forfeit 20% of his or her salary enforceable and not unduly oppressive and within the school districts reasonable expectations); *City of Fargo v. Case Dev. Co.*, 401 N.W.2d 529 (N.D. 1987); *Arduini v. Bd. of Educ. of Pontiac Twp. High. Sch., Dist. 90, Livingston Cty.*, 441 N.E.2d 73 (Ill. 1982); *Bottineau Pub. Sch. Dist. No. 1 v. Zimmer*, 231 N.W.2d 178 (N.D. 1975). *Unified Sch. Dist. No. 315, Thomas Cty., Kan. v. DeWerff*, 626 P.2d 1206-10 (Kan. Ct. App. 1981) (quoting *Bowbells*, 231 N.W.2d at 176), stating:

[W]e cannot ignore the interruption to the school system and the resultant debilitating effect such interruption has upon the learning process of students in the school system. The possibility that the replacement teacher who was obtained may be less experienced or less qualified and, thus, a less effective instructor must also be considered in the assessment of damages. It would not be possible at the time of contracting to foresee all these elements of damage that may occur. Even if known, it would be extremely difficulty to evaluate these damages on a monetary basis. These

sought varied, yet each case involved a strikingly similar set of facts: a teacher resigning from his or her position just before the new school year began, leaving very little time for the school district to find a replacement.

In one unique case involving a recruiting contract and a teacher from a foreign country, a state court ruled the liquidated damages provision to be unreasonable and unenforceable. The liquidated damages provision at issue, in *Foreign Academic and Cultural Exchange Services, Incorporated v. Tripton*,¹⁷ provided that, “in the event of a breach, [the recruiting company] would be entitled to an award including, but not limited to, monetary damages in an amount not less than \$36,000.”¹⁸ The plaintiff, a Romanian teacher, was recruited to teach in South Carolina as part of the Mutual Educational Cultural Exchange Program.¹⁹ When she failed to return to Romania in the two years after the contract expired, the recruiting company brought suit for breach of the recruiting contract and sought damages of \$36,000, pursuant to the liquidated damages provision.²⁰ The court ruled that the provision was a penalty and was “unenforceable because \$36,000 [was] plainly disproportionate to any probable damage resulting from respondent’s failure to return home.”²¹ This case is certainly an outlier. The facts are unusual and the damages sought were much greater than other liquidated damages cases. As a result, this case provides guidance only to indicate that there are some limits to when and how liquidated damages provisions may be imposed.

II. THE GEORGIA CASE

While liquidated damages in teacher contracts are generally upheld, there may be limits to when and how they can be used. As evidenced in the cases above, courts do consider issues of fairness and what is in the public’s best interest in evaluating liquidated damages provisions in teacher contracts. If the use of a liquidated damages pro-

losses to the public are no less the proper subject of a liquidated-damage provision than are the losses sustained by the public in the delay-of-performance situations. In either case, the damage to the public is real, although most difficult to evaluate. Such damages are not legally compensable but constitute a public injury which the school district was entitled to consider.

17. 715 S.E.2d 331 (S.C. 2011).

18. *Id.* at 333.

19. *Id.* at 332.

20. *Id.* at 333 (FACES instituted an action against the teacher is that the prior contract included a covenant not to compete and she revised the contract for her to teach another year. However, after marrying she accepted a job with another school district).

21. *Id.* at 334.

vision is deemed in conflict with the public's best interest, a court may step in to correct an injustice. However, the facts would have to be such that implementation of the liquidated damages clause challenged the basic concept of fairness. The facts set out in the case below may meet those standards and provide some guidance as to where the line for implanting liquidated damages is drawn.

Each spring, Georgia's public school districts issue teaching contracts for the following school year. Georgia law requires that school districts notify teachers of the renewal status of their teaching contracts no later than May 15.²² If the teacher elects not to accept the new contract, he or she must notify the local school board in writing no later than June 1.²³ If a teacher abandons an executed contract without prior release from his or her employer after June 1, the teacher is considered to be in violation of Georgia law and Standard 8 of the Georgia Code of Ethics for Educators.²⁴

Typically, school districts seeking to hire new teachers do so at the end of the school year, around May or June, after they have had a chance to assess their hiring needs for the following school year. Therefore, during this time, teachers are moving from one school district to another. Then, vacated positions are quickly filled by new teachers entering the system or veteran teachers changing districts.

After a negative experience that occurred at the start of the 2013-14 school year, DCSD sought to control the number of teachers leaving the district. In a hearing in front of the DeKalb County Board of Education, Dr. Tekshia Ward-Smith, Chief Human Resources Officer for DCSD, explained that approximately 500 teachers requested a release from their contracts going into the 2013-14 school year.²⁵ Of

22. GA. CODE ANN. § 20-2-211(b) (2019) (the law further requires that "[s]uch contracts . . . shall be complete in all terms and conditions of the contract, including the amount of compensation . . . and shall not contain blanks or leave any terms and conditions of the contract open."); *Id.* (if the district fails to notify the teacher of renewal or non-renewal status on or before May 15th of that year, the teacher's employment is automatically renewed for the following school year. For purposes of this paper, the laws and policies (including codes of ethics) in force at the time of the filing of the Complaint (2014) have been used to ensure consistency between the Complaint and the analysis; The language of this legislative provision remains consistent in Georgia law as of January 2020.

23. GA. CODE ANN. § 20-2-211(b) (2019).

24. The Code of Ethics for Educators, GA. COMP. R. & REGS. 505-6-.01(3)(i) (2019) (furthermore, Georgia law prohibits teachers from being under contract with two school districts at the same time).

25. *DeKalb Cty. Sch. Dist. Work Session, supra* note 1, at 4-5 (statement of Dr. Ward-Smith, Chief Human Resources Officer for DCSD) (Dr. Ward-Smith indicated that the increase in requests may have been the result of changes in the payment structure in the 2013-14 contract. Unlike previous contracts that included the teacher's annual salary, the 2013-14 contracts included the teacher's daily rate of pay. With an increased number of

those 500 teachers, 400 were released from their contracts.²⁶ The remaining 100 were not released but instead expected to adhere to the terms of their contracts.²⁷ According to Dr. Ward-Smith, approximately fifty teachers failed to show up on the first day of the 2013-14 school year.²⁸ Consequently, Superintendent Michael Thurmond chose to include a liquidated damages provision into the 2014-15 DCSD teacher contracts.²⁹ Pursuant to the liquidated damages provision in the 2014-15 contracts, teachers who terminated their contracts after May 5th were subject to a \$750 penalty subtracted from their final 2013-14 paycheck and possible sanctions from the Georgia Professional Standards Commission (“PSC”).³⁰ However, there were four circumstances under which DCSD, at its discretion, could release teachers from their contract without imposition of a penalty, which included: promotion, marriage, moving at least fifty miles from DeKalb County, or a severe illness.³¹

Approximately 6,800 DeKalb County teachers were provided contracts for the 2014-15 school year in March,³² well before most school districts were advertising open positions for the following school year. DCSD educators were required to return their signed contracts by April 4th to retain their tenure, six weeks before the June 1st state deadline.³³ Chayka Bettis and Leslie Hein (“Plaintiffs”) were both

furlough days in the district, this made estimating annual pay more difficult); see Transcript of Dr. Tekshia Ward-Smith 30(b)(6) Deposition at 241-42, No. 14A-528776 (Ga. Cty. Ct. Jul. 23, 2015) (on file with Florida A&M Law Review).

26. See *Dekalb Cty. Sch. Dist. Work Session*, *supra* note 1, at 4 (statement of Dr. Ward-Smith, Chief Human Resources Officer for DCSD).

27. *Id.*

28. *Id.* at 4:20-4:21.

29. *Dekalb Cty. Sch. Dist. Work Session*, *supra* note 1, at 15-16 (statement of Michael Thurmond, Superintendent of DCSD) (in his testimony, Superintendent Thurmond made it very clear that the adoption of the liquidated damages provision was his decision, not a decision of the school board).

30. 2014-2015 Employment Contract between Leslie Hein and the DeKalb Cty. Bd. of Educ. (May 6, 2014) (on file with Florida A&M Law Review) (note, however, that the PSC will not sanction a teacher for abandonment of contract after June 1st if s/he gives at least two weeks’ notice and the resignation is due to a personal health problem (or family medical problems that requires the teacher’s full-time care), a documented spousal relocation out of a reasonable commuting distance, or a documented promotion); *Ethics FAQs*, GA. PROF. STANDARDS COMM’N, <http://www.gapsc.com/Ethics/FAQ.aspx#4> (last visited Dec. 29, 2020).

31. Transcript of Dr. Tekshia M. Ward-Smith 30(b)(6) Deposition, *supra* note 25, at 83 (these exceptions were not included in the teacher contracts but in a handout distributed to employees after contract execution. Thus, enforcement of DCSD liquidated damages provision appears to have been completely discretionary).

32. See *Dekalb Cty. Sch. Dist. Work Session*, *supra* note 1, at 3 (statement of Dr. Ward-Smith, Chief Human Resources Officer for DCSD).

33. See Third Amended Complaint, *supra* note 2, at 4.

teachers in DCSD for the 2013-14 school year.³⁴ Both women had signed and returned their teaching contracts for the 2014-15 school year.³⁵

However, prior to the June 1st deadline and due to personal and family reasons, Plaintiffs resigned so that they could accept positions in neighboring districts that better served their family needs.³⁶ Both Plaintiffs discussed their respective situations with their principals, filed the appropriate resignation paperwork,³⁷ and requested a release from their contracts.³⁸ In fact, both Plaintiffs' principals appeared to be understanding and communicated to Plaintiffs that the District would experience no loss as Plaintiff Bettis was told she had saved someone's job by resigning and Plaintiff Hein was informed that the school had secured a replacement the same day.³⁹ Even with zero loss, the DSCD response was well short of understanding.⁴⁰ The DSCD sent Plaintiffs a letter denying their request for release from their 2014-15 contract because the new positions were considered lateral moves.⁴¹ The letter also indicated that the request constituted a breach of contract, which was in violation of the Georgia Code of Ethics and triggered the application of the liquidated damages provision.⁴²

Because of their family needs, Bettis and Hein had no other alternative and left the district. Consequently, DCSD deducted \$750 from their final paychecks for the 2013-2014 school year.⁴³ As a result, Plaintiffs sought legal advice and ultimately filed suit against the Dis-

34. *See id.* at 9-10.

35. *See id.* at 8.

36. *Id.* at 6, 9-10.

37. Bettis on May 8 and Hein on May 15.

38. *Id.*; *see also* Employee Resignation and Leave of Absence Form for Chayka Bettis (May 8, 2014) (on file with Florida A&M Law Review); Employee Resignation and Leave of Absence Form for Leslie Hein (May 15, 2014) (on file with Florida A&M Law Review).

39. *See* Third Amended Complaint, *supra* note 2, at 9.

40. *Id.* at 10.

41. Email from Dr. Tova Jackson, Dir. of Emp't Servs., DeKalb Cty. Sch. Dist., to Chayka Bettis (May 21, 2014, 12:13 PM EST) (sent via Nikki Godson, Division of Human Resources Staff) (on file with Florida A&M Law Review); Email from Dr. Tova Jackson, Dir. of Emp't Servs., DeKalb Cty. Sch. Dist., to Leslie Hein (May 21, 2014, 12:32 PM EST) (sent via Nikki Godson, Division of Human Resources Staff) (on file with Florida A&M Law Review).

42. Email from Dr. Tova Jackson, Dir. of Emp't Servs., DeKalb Cty. Sch. Dist., to Chayka Bettis, *supra* note 41; Email from Dr. Tova Jackson, Dir. of Emp't Servs., DeKalb Cty. Sch. Dist., to Leslie Hein, *supra* note 41.

43. *See* Third Amended Complaint, *supra* note 2, at 8, 10.

strict and its officials for breach of contract and restraint on trade.⁴⁴ DCSD filed a Motion to Dismiss, which ultimately failed.⁴⁵ Below, subpart A analyzes the arguments presented by Plaintiffs and DCSD regarding the breach of contract claim whereas Subpart B will dissect the argument presented by the parties with respect to their restraint on trade claim.

A. Breach of Contract

Defendants moved to dismiss Plaintiffs' breach of contract claim, arguing that the Plaintiffs did not identify "a single contractual obligation that was breached by any of the Defendants."⁴⁶ In response, Plaintiffs claimed Defendants breached the 2013-2014 teaching contracts by withholding \$750 as liquidated damages for the alleged breach of the 2014-2015 teaching contract from their final paycheck for the 2013-2014 school year. Plaintiffs argued that they filled the terms of the 2013-2014 contract and were entitled to compensation therefor; the 2014-2015 contract did not supersede the 2013-2014 contract.⁴⁷ Plaintiffs also contended that the liquidated damages provision in the 2014-2015 teaching contract was unenforceable because the provision was intended solely as a penalty meant to deter teachers from leaving the District.⁴⁸ Thus, because the 2014-2015 contract did not contain a severability clause, Plaintiffs argued that the 2014-2015 contracts were invalid in their entirety.⁴⁹ Essentially, Plaintiffs' breach of contract claims hinged on the assertion that the liquidated damages provision in the 2014-2015 contract was invalid and unenforceable.

Pursuant to Georgia law, "[i]f the parties agree in their contract what the damages for [a] breach shall be, they are said to be liquidated and, unless the agreement violates some principle of law, the parties are bound thereby."⁵⁰ To determine whether a liquidated damages pro-

44. See generally Third Amended Complaint, *supra* note 2; see generally Plaintiffs' Response to Defendants' Motion to Dismiss, *Bettis v. DeKalb Cty. Sch. Dist. No. 14A-528776* (DeKalb Cty. Dec. 8, 2014) (noting Plaintiffs added a cause of action for restraint on trade).

45. Motion to Dismiss, *Bettis v. DeKalb Cty. School Dist., No. 14A-528776* (DeKalb Cty. Ct. Nov. 7, 2014) (however, the case settled before the court could rule on any potential motions for summary judgment.); see Settlement Agreement and Release Between DeKalb Cty. Sch. Dist. and Plaintiffs, Chayka Bettis and Leslie Hein (Jul. 24, 2017) (on file with Florida A&M Law Review).

46. Motion to Dismiss, *supra* note 45, at 10.

47. Plaintiffs' Response to Defendants' Motion to Dismiss, *supra* note 44, at 11.

48. Plaintiffs' Response to Defendants' Motion to Dismiss, *supra* note 44, at 19-20.

49. GA. CODE ANN. § 13-1-8(a) (West 2019); see also Plaintiffs' Response to Defendants' Motion to Dismiss, *supra* note 44, at 11.

50. GA. CODE ANN. § 13-6-7 (2019).

vision is enforceable, Georgia courts, consistent with courts in many other states, look at three factors from *Southeastern Land Fund, Incorporated v Real Estate World, Incorporated*: “First, the injury caused by the breach must be difficult or impossible of accurate estimation; second, the parties must intend to provide for damages rather than for a penalty; and third, the sum stipulated must be a reasonable pre-estimate of the probable loss.”⁵¹ If a liquidated damages provision does not satisfy all three factors, it may be ruled invalid and unenforceable.⁵² In this case, Plaintiffs focused their attacks on the second and third factors of the test.⁵³

1. Penalty

First, Plaintiffs contended that the liquidated damages provision was intended to be a penalty rather than a reimbursement for damages.⁵⁴ Georgia law states that in determining “whether a provision represents liquidated damages or a penalty does not depend upon the label the parties place on the payment, but rather depends on the effect it was intended to have and whether it was reasonable.”⁵⁵ Therefore, while there appeared to be several instances where agents for DCSD, acting in their professional capacity, referred to the liquidated damages provision as a “penalty,”⁵⁶ Georgia courts would look further to determine the intended consequence of the provision.⁵⁷

The intent of DCSD’s liquidated damages provision, as argued by the Plaintiffs, was to deter teachers from breaching their teacher contracts for the following year. Under Georgia law, if a liquidated

51. See, e.g., *Southeastern Land Fund, Inc. v. Real Estate World, Inc.*, 227 S.E.2d 340, 343 (Ga. 1976) (quoting JOHN CALAMARI & JOSEPH PERILLO, *THE LAW OF CONTRACTS* 367 (1970)); see also *Prime Bus. Invs. v. Peacock*, 364 S.E.2d 106, 107 (Ga. Ct. App. 1987); *Miazza v. W. Union Tel. Co.*, 178 S.E. 764, 765 (Ga. Ct. App. 1935) (stating that “where [an] amount plainly has no reasonable relation to any probable actual damage which may follow the breach, [such a provision] will not be enforced for the agreed amount as liquidated damages” but rather “will be construed as mere unenforceable provisions for penalties.”).

52. *Miazza*, 178 S.E. at 765.

53. Plaintiffs’ Response to Defendants’ Motion to Dismiss, *supra* note 44, at 17-19.

54. Plaintiffs’ Response to Defendants’ Motion to Dismiss, *supra* note 44, at 17.

55. See *Miazza*, 178 S.E. at 765; see also *Pierre v. St. Benedict’s Episcopal Day Sch.*, 750 S.E.2d 370, 375 (Ga. Ct. App. 2013); *Turner v. Atlanta Girls’ Sch., Inc.*, 653 S.E.2d 380, 382 (Ga. Ct. App. 2007); *Caincare, Inc. v. Ellison*, 612 S.E.2d 47 (Ga. Ct. App. 2005).

56. In particular, in a hearing with the DeKalb County School Board, DCSD Superintendent Thurmond stated: “[T]he real focus on this is that we want all of our outstanding, highly qualified teachers and certified employees to come back next year.” See *DeKalb Cty. Sch. Dist. Work Session*, *supra* note 1, at 11-12 (statement of Micheal Thurmond, Superintendent of DeKalb County School District).

57. See *Miazza*, 178 S.E. at 765.

damages provision is placed in a contract “for the purpose of deterring one or both of the parties from breaching the contract,” the liquidated damages provision will typically be interpreted to constitute a penalty.⁵⁸ Yet, Georgia law provides little guidance as to what constitutes a sufficient deterrence to be deemed a penalty and not valid liquidated damages. In what appears to be some circular language, the Georgia Court of Appeals attempted to set out when a liquidated damages provision would constitute a penalty. In *Jefferson Randolph Corporation v. Progressive Data Systems*, the Georgia Court of Appeals held a liquidated damages provision would constitute a penalty used to deter a breach of contract if the “liquidated damages are unreasonable and there is no difficulty ascertaining future damages.”⁵⁹ This standard forces the main focus of the analysis on the third factor: the reasonableness of the liquidated damages provision as a pre-estimate of loss.

2. Reasonable Estimation of Loss

The first and third factors of the analysis both focus on the relationship between the liquidated damages and the actual damages. Damages may be difficult to estimate, but the liquidated damages sought also must be a reasonable estimate of the anticipated loss.⁶⁰ Concurrent analysis of these two ideas may prove to be challenging, and even contradictory. The court must consider whether actual damages can be practicably assessed. If it is difficult or impossible to estimate actual damages, a liquidated damages provision may be appropriate.⁶¹ In this case, the Defendants could have argued that actual damages were difficult to calculate because so many employees were involved in the hiring process. As such, bringing in a late hire could require the attention of many employees, from top administrators, such as the principal or superintendent, to human resources personnel. Hiring new employees may be part of their typical job duties, but having to attend to an emergency hiring situation could require attention to be diverted from ongoing projects. An employer is also likely to use additional resources to fill positions at the last minute; thus, it could be difficult to calculate actual damages based on the amount of time spent

58. *Florence Wagon Works v. Salmon*, 68 S.E. 866, 867 (Ga. Ct. App. 1910).

59. *Jefferson Randolph Corp. v. Progressive Data Sys., Inc.*, 553 S.E.2d 304, 308 (Ga. Ct. App. 2001) *vacated in part*, 574 S.E.2d 394 (Ga. Ct. App. 2002).

60. *See Southeastern Land Fund, Inc. v. Real Estate World, Inc.*, 227 S.E.2d 340, 343 (Ga. 1976).

61. *DJ Mfg. Corp. v. United States*, 86 F.3d 1130, 1133 (Fed. Cir. 1996) (“[Liquidated damages clauses] ‘serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable.’”).

on a particular hire by several employees. Other costs associated with new hires may include advertising (e.g., via website, newspaper, or radio) and hosting or attending job fairs.⁶² While these activities are usually done periodically throughout the year, implementing these measures solely to find a replacement for one position may make the cost per new teacher hired more difficult to calculate.

Although the Defendants could have adopted the argument presented above, they could have also used those same factors to prove that the liquidated damages provision was a reasonable estimate of the damages suffered by the District. Based on these factors, the Defendants claimed that the actual cost to replace a teacher who abandoned their contract was approximately \$3,500.⁶³ After calculating their estimated actual cost, the Defendants compared that amount with liquidated damages provisions from neighboring districts, which ranged from \$500 to \$1,250.⁶⁴ DCSD concluded that \$750 would help to off-set the costs associated with filling teaching positions left vacant between contract periods but would not overburden teachers.⁶⁵

If the case had gone to trial, it would have been left to the court to determine if actual damages would be difficult or impossible to calculate. Based on the fact that the Defendants were able to calculate damages of \$3,500, the court would have had a basis to find that the liquidated damages failed on the first prong of the test. However, if the court was to agree actual damages would be far more challenging to assess and prove, the court would move on to the other prongs. In particular, the court would consider if the liquidated damages provision represented a reasonable estimate of damages. In this case, it appears that the liquidated damages represented an arbitrary number in relation to the actual estimate of damages; the fact that it was consistent with neighboring districts was not likely relevant. However, even if it

62. See Transcript of Dr. Tekshia M. Ward-Smith 30(b)(6) Deposition, *supra* note 25, at 41 (“The District’s purpose for inserting the clause was to recoup some of the costs associated with having to do the advertising, the recruitment, the interviewing, the prescreening, the on-boarding, the training, the development, the costs when the individual has breached there contract where we don’t have that individuals, the costs for substitutes to stay in the classrooms.”).

63. *Id.* at 110-12 (“The \$750 is honestly, I would say a drop in the bucket. We looked at the cost to replace a teacher. And, you know, basically all hands that involved in the cost to replace a teacher generally comes out to be about \$3,500. . . . Essentially, we take an average cost of the time spent by administrators, the principal, HR staff, finance staff, public safety staff, school-based staff . . . [and] we took an average cost of their salary.”).

64. See *id.* at 123-24 (“\$750 we felt was our best estimate . . . Fulton was charging \$500. Marietta at the time was \$1,250 . . . but to be fair to the educator we felt that \$750 would be the cost.”).

65. *Id.*

was found to be an arbitrary number, it is much less than the estimated \$3,500 figure. Therefore, the court may have found that by reducing the cost to be borne by the teacher (from \$3,500 to \$750), DCSD made the amount more reasonable especially in light of a teacher's salary.

If the court had concluded that, as a matter of law, the liquidated damages provision met the three factors set out in *Southeastern Land Fund, Incorporated*,⁶⁶ the liquidated damages provision would have survived the breach of contract claim. Regardless, the Plaintiffs could have still prevailed. It is likely that the court would have found that the liquidated damages provision was a penalty rather than damages and that the amount in the provision was not a reasonable pre-estimate of loss.

B. Restraint on Trade

In response to Defendants' Motion to Dismiss, Plaintiffs argued that the liquidated damages provision constituted a restraint on trade in violation of Georgia law.⁶⁷ Section 12-8-2(a)(2) of the Georgia Code dictates that "[a] contract that is against the policy of the law cannot be enforced. Contracts deemed contrary to public policy include but are not limited to . . . [c]ontracts in general restraint of trade, as distinguished from contracts which restrict certain competitive activities[.] . . ."⁶⁸ The Georgia Constitution also addresses restraint of trade, noting that "[t]he General Assembly shall not have the power to authorize any contract or agreement . . . which may have the effect of or which is intended to have the effect of defeating or lessening competition[.] . . ."⁶⁹

While the concept of restraint of trade typically applies to the provision of goods and services to the public, Georgia courts have considered whether provisions in teachers' contracts constituted a restraint on trade.⁷⁰ In *Austin v. Benefield*,⁷¹ the Court of Appeals of Georgia considered the constitutionality of funding provisions in teachers' contracts when the legislature does not have the money to fully fund teacher contracts. The court noted that "[i]t has long been held

66. 227 S.E.2d 340, 343 (Ga. 1976).

67. See generally Plaintiffs' Response to Defendants' Motion to Dismiss, *supra* note 44, at 11-16; see also GA. CODE ANN. § 13-8-2(a)(2) (2019).

68. *Id.*

69. GA. CONST. art. III, § 6, para. V(c) (2019).

70. See *Austin v. Benefield*, 230 S.E.2d 16 (Ga. Ct. App. 1976).

71. *Id.* at 18.

that an onerous contractual provision in restraint of a person's trade or profession is illegal and cannot be enforced."⁷² Though the court did not rule on the restraint of trade cause of action, it did indicate, in dicta, that it may be appropriate in teacher contract cases.⁷³

Georgia courts have recognized the problems associated with restraint on trade since the nineteenth century. In *Rakestraw v. Lanier*, the Georgia Supreme Court observed that:

[I]t is certain that contracts in unreasonable restraint of trade are contrary to public policy, and void, because they tend to injure the parties making them, diminish their means of procuring livelihoods and competency for their families; tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions, and expose them to imposition and oppression; tend to deprive the public of services of men in the employments and capacities in which they may be most useful to the community as well as to themselves; discourage industry and enterprise, and diminish the products of ingenuity and skill; prevent competition, and enhance prices, and expose the public to all the evils of monopoly.⁷⁴

Restraint on trade may render a contract unenforceable, whereas restrictive covenants are permissible as partial restraints of trade and will be upheld if "the restraint imposed is not unreasonable."⁷⁵ Whether the restraint imposed by the provision of the employment contract is reasonable is a question of law for the court,⁷⁶ determined by considering three elements: duration, geographical scope, and scope of activity.⁷⁷

Based on the facts of the case as presented by the parties to this suit, it appears that the circumstances under which the parties entered into the contract may have been the actual restraint on trade rather than the contract provisions themselves. Specifically, DCSD issued contracts to their teachers on March 24, 2014, weeks before other school districts.⁷⁸ By issuing contracts so early, teachers were forced to

72. *Id.* at 19 (the court in *Austin* further noted that if the contract included a severability clause, the illegal provision could be severed from the contract without rendering the entire contract invalid); *Austin*, 230 S.E.2d at 19 (note that the *Austin* court did not rule on the restraint of trade cause of action because the contract's restraint-of-profession provision was not before the court in that case).

73. *Austin*, 230 S.E.2d at 19.

74. *Rakestraw*, 30 S.E.2d at 738.

75. *McAlpin v. Coweta Fayette Surgical Assocs., P.C.*, 458 S.E.2d 499, 501 (Ga. Ct. App. 1995).

76. *Id.*; see also *W.R. Grace & Co. v. Mouyal*, 422 S.E.2d 529, 531 (Ga. 1992).

77. *McAlpin*, *supra*, 458 S.E.2d at 501.

78. See generally Third Amended Complaint, *supra* note 2.

make decisions about the following school year with little or no information regarding other job opportunities. In fact, there were no job opportunities posted in neighboring school districts as of April 1, 2014.⁷⁹

As a result of some funding issues, DCSD paid teachers with similar qualifications and experience much less than neighboring school districts. For example, teachers with a bachelor's degree and ten years of experience made \$12,000 less in DeKalb County than teachers in neighboring Atlanta Public Schools.⁸⁰ Furthermore, DCSD's teachers also made less money than they had previously because of cutbacks and furloughs.⁸¹

Based on the letters sent to teachers, it appears that DCSD used the threat of sanctions to keep teachers from leaving the district. As a result, teachers were forced to either sign the new contract by April 4, 2014, or risk losing their tenure status.⁸² If teachers executed a contract and then asked for release after May 5th, teachers would face DCSD enforcing the liquidated damages provision as well as reporting them to the PSC for abandoning their contract.⁸³ While the facts were somewhat in dispute, it does appear that on one or more occasions DCSD and its representatives told teachers that they could report teachers for abandoning their contract – and potentially face losing their license – even if they resigned before the June 1st as stated in the State guidelines.⁸⁴

C. Settlement Agreement

On July 24, 2017, Plaintiff Bettis and Plaintiff Hein entered into a settlement agreement with DCSD.⁸⁵ In consideration for Plaintiffs waiving all past, present, and future claims against DCSD, Plaintiffs each received reimbursement of the \$750 withheld from their last paycheck for the 2013-14 school year and DCSD paid \$50,000 for

79. Transcript of Dr. Tekshia Ward-Smith 30(b)(6) Deposition, *supra* note 25, at 225-26.

80. See *Dekalb Cty. Sch. Dist. Work Session*, *supra* note 1, at 7 (statement of James McMahon, Vice Chairman of the DeKalb Board of Education).

81. Transcript of Dr. Tekshia Ward-Smith 30(b)(6) Deposition, *supra* note 25, at 228-31.

82. *Id.* at 226.

83. *Id.* at 273-78.

84. Transcript of Dr. Tekshia Ward-Smith 30(b)(6) Deposition, *supra* note 25, at 281-87.

85. Settlement Agreement and Release, *supra* note 45, at 5 (It is important to note that this settlement agreement does not contain a confidentiality provision.).

Plaintiffs' attorney's fees.⁸⁶ DCSD also paid a sum of \$111,000 into a court registry to reimburse all other employees that DCSD enforced the \$750 liquidated damages provision against.⁸⁷ Finally, DCSD removed the liquidated damages provisions from the teacher contracts for the 2017-18 school year.⁸⁸

D. Conclusions about the Georgia Case

In *Bettis*, Plaintiffs waged an uphill battle. Liquidated damages provisions are a common inclusion in teacher contracts in Georgia and in many other states.⁸⁹ However, as with all cases, the outcome depends on the judge and whether he or she is swayed by the agreed-upon facts of that particular case. Even though the case law has left room for interpretation, the facts of *Bettis* painted DCSD in a negative light. From the timing of the contracts to the threats of sanctions, it appears that DCSD was trying to keep its teachers from moving to other districts by any means possible. The Superintendent of the DCSD indicated that the liquidated damages provision was included to protect the District against teachers who resigned in the eleventh hour thereby potentially leaving students without a teacher on their first day of class.⁹⁰ However, applying this provision to teachers who requested a release from their contracts in mid-May was in conflict with the district's stated purpose of the liquidated damages provision since the district had months to fill the vacated teacher positions. Additionally, because hiring for the District generally occurs in May and early June, it is likely that the Plaintiffs' positions might have been filled when the District filled its other open positions. This timing makes any

86. *Id.*

87. *Id.* at 1-2 (the Clerk's Office of the State Court of DeKalb County was charged with mailing out reimbursement forms to the last known address for each qualifying individual. Each individual who received a form was then responsible for filling out the claim submission form and returning it to the court in a timely manner. Pursuant to the agreement, the Clerk of the Court would then send out a \$750 reimbursement check to each qualified individual from whom they received a timely, completed claim form).

88. *Id.* at 2 (in another recent teacher employment case in Georgia, a settlement agreement was reached under which the Griffin Spaulding County School District agreed to reimburse the two plaintiffs for liquidated damages taken from their final paychecks, to remove the liquidated damages provision from their teacher employment contracts for the 2020-21 school year, and to refrain from enforcing the liquidated damages provision from the 2019-20 teacher contracts); *Jones v. Griffin Spaulding Cty. Sch. Dist.*, No. 18V-0461 (Sup. Ct. Spaulding Cty. May 5, 2020) (order to enforce settlement agreement).

89. *See infra* Part II for further discussion.

90. *DeKalb Cty. Sch. Dist. Work Session*, *supra* note 1, at 10-15 (statement of Micheal Thurmond, Superintendent DeKalb County School District).

actual damages suffered by DCSD as a result of Plaintiffs' resignations minimal at best.

The settlement agreement has given DCSD an opportunity to revisit the inclusion of the liquidated damages provision in their teacher contracts. When other districts are offering greater resources and opportunities, a liquidated damages provision may not be enough to dissuade teachers from leaving the school district. Furthermore, based on DCSD's own estimate, the \$750 was only a small part of the estimated cost to replace a teacher. In the future, if DCSD considers adding the liquidated damages provision back into teacher contracts, it must weigh whether the amount earned in liquidated damages is worth the possible damage to teacher morale and trust.

III. OVERVIEW OF STATES' LIQUIDATED DAMAGES PROVISIONS IN TEACHER CONTRACTS

As liquidated damages provisions are common in teacher contracts across the nation, understanding their terms is helpful in identifying how they might be used to support the best interest of both school districts and teachers. In the section below, the author identifies some common trends in liquidated damages clauses from teacher contracts. This article is based on the author's review of teacher contracts publicly available on the internet.⁹¹ This is, by no means, an exhaustive review of liquidated damages provisions in teacher contracts. It is simply meant to be a snapshot of provisions publicly available to identify trends in how districts are using liquidated damages provisions.

A. Calculation of Liquidated Damages

Districts that choose to include liquidated damages provisions in their teacher contracts generally use one of three particular models for determining damages: (1) set a specific dollar amount that appears to have a relationship to calculated damages; (2) set a specific dollar amount that may not have any relationship to specifically calculated damages; or (3) calculate a percentage of the teacher's salary. Of the contracts reviewed, only two – one in Georgia and one in Wisconsin – included a liquidated damage amount so specific as to signal that they

91. For this study, the author reviewed over fifty teachers' contracts from eleven states (Alaska, Arizona, Georgia, Illinois, Iowa, Kansas, Missouri, New Hampshire, North Dakota, South Dakota, Texas, and Wisconsin). The contracts reviewed were for the 2014-15 school year so that the liquidated damages sought would be comparable to those applicable in the Georgia case. North Dakota, South Dakota, and Wisconsin had the highest number of teachers' contracts with liquidated damages provisions available to the public online.

have some relationship to a calculated sum of damages. For example, the liquidated damages provision for Rockdale County Public Schools in Georgia sets the damages for breach of contract at \$2,104.26 and Central Westosha School District in Wisconsin sets the damages for breach after August 1 at \$1,837.⁹²

On the other hand, forty-two of the districts have set specific dollar amounts for breach of contract, ranging from \$100⁹³ to \$4,000.⁹⁴ Because these districts are using flat dollar amounts, there is no obvious relationship to actual damages. It appears that these districts may have engaged in similar practices to DCSD and picked an amount they thought was fair, regardless of actual estimated damages.

Finally, seven school districts calculate liquidated damages based on a percentage of the breaching teacher's salary.⁹⁵ This is the most interesting of the three options because the cost to replace a

92. ROCKDALE COUNTY PUBLIC SCHOOL, TEACHER CONTRACT, 2014-15 (on file with Florida A&M Law Review). CENTRAL WESTOSHA SCHOOL DISTRICT, TEACHER CONTRACT (2014), <https://www.westosha.k12.wi.us/staff/handbook/Professional%20Staff%20Manual%20rev.%2012-10-13.pdf>.

93. GREENFIELD SCHOOL DISTRICT, WISCONSIN, TEACHER CONTRACT (2014), <http://www.greenfield.k12.wi.us/Portals/Greenfield/District/docs/Human%20Resources/2013-2014%20SDoG%20Educator%20Handbook.pdf> (\$100 penalty for breach of contract from June 1-July 1).

94. METLAKATLA SCHOOL DISTRICT, ALASKA, TEACHER CONTRACT (2013), http://www.neaalaska.org/sites/default/files/METLAKATLA_EA_contract_2012_14.PDF. The district has a graduated liquidated damages provision (\$2,000 for breaches before June 1; \$3,000 for breaches from June 1-30; \$4,000 for breaches after June 30). Note that \$4,000 for liquidated damages may be considered reasonable in districts that have a particularly difficult time filling vacant teaching positions. In urban districts with teacher surpluses, a court may find the same liquidated damages provision less reasonable.

95. PARK FOREST HEIGHTS SCHOOL DISTRICT, ILLINOIS, TEACHER CONTRACT, 2012 (on file with the Florida A&M Law Review) (4%); BUTLER COUNTY SPECIAL EDUCATION BOARD OF EDUCATION, KANSAS, TEACHER CONTRACT (2014), <http://www.bcsbc.org/vimages/shared/vnews/stories/514b56161a527/Negotiated%20Agreement%2014-15.pdf> (4% of salary if breach occurs after August 1); McLOUTH UNIFIED SCHOOL DISTRICT, KANSAS, TEACHER CONTRACT (2014) (10% of combined base/supplemental salary if breach occurs after August 1); MINOT PUBLIC SCHOOL DISTRICT, NORTH DAKOTA, TEACHER CONTRACT (2015), <https://drive.google.com/file/d/0BzgnGCHe2h3RRFFNcXZHckxHZHM/view> (1% of salary if breach occurs from June 1-30, 3% of salary if breach occurs from July 1-31; 5% of salary if breach occurs on or after August 1); WEST FARGO PUBLIC SCHOOL DISTRICT, NORTH DAKOTA, TEACHER CONTRACT (2013), <https://www.west-fargo.k12.nd.us/district/departments/humanresources/public/NegotiatedAgreement.pdf> (5% of salary if breach occurs two weeks before the first day of school or anytime thereafter); LITCHVILLE-MARION SCHOOL DISTRICT, NORTH DAKOTA, TEACHER CONTRACT (2013), <http://ndunited.org/data/upfiles/media/Litchville-Marion%202015-2016.pdf> (5% of salary); NORTHLAND PINES SCHOOL DISTRICT, WISCONSIN, TEACHER CONTRACT (2015), <http://www.npsd.k12.wi.us/EmploymentHandbookProfessionalStaff.pdf> (2% of salary if breach occurs from June 16-July 15; 5% of salary if breach occurs from July 16-August 15; 10% of salary if breach occurs after August 16).

teacher would not necessarily have any direct relationship to his or her salary.

Furthermore, a majority of districts used a graduated liquidated damages provision. In other words, the damages for breach of contract increased over time, as the new school year became more imminent. Only fifteen of the fifty school districts had one set amount or rate that applied regardless of when the breach occurred. This supports the argument that damages occur and the likelihood of damages increases as it gets closer to the new school year because the most experienced and highly sought-after teachers have already accepted positions with other school districts earlier in the summer.

B. Timing

Of the districts reviewed, 60% do not attempt to enforce the liquidated damages provisions contained within their teaching contracts for those breaches that occurred prior to June 1. Specifically, two districts in Wisconsin state that liquidated damages should not be enforced against teachers requesting a release from their next contract before the end of the current school year.⁹⁶

On the other hand, 38% enforce the liquidated damages provisions contained within their teaching contracts for breaches occurring before June 1 (or did not specify particular dates of application).⁹⁷ Whereas three school districts (6%) determine the amount of liquidated damages at the time of breach to be assessed at the sole discretion of the school board and calculated damages based on the timing of the breach.⁹⁸

96. This date will change from year to year based on the school schedule. See *Collective Bargaining Agreement*, MADISON TCHRS INC. (2014), http://www.madisonteachers.org/wp-content/uploads/2015/02/Teacher_CBA_2014_15.pdf; *Professional Employee Handbook*, SCH. DIST. OF RHINELANDER, <http://www.rhinelanders.k12.wi.us/district/ProfessionalEmployeeHandbook.pdf> (last updated July 16, 2018).

97. UNIFIED SCHOOL DISTRICT #440, KANSAS, TEACHER CONTRACT (2014), <http://usd440.com/files/4214/2340/6429/NA2015.pdf> (It allows for the collection of liquidated damages from 14 days after the contract execution date. Depending on when the contract is signed, this may be before or after June 1.).

98. KANSAS CITY BOARD OF EDUCATION, KANSAS, TEACHER CONTRACT (2011), http://www.kansasopengov.org/Portals/20/Kansas%20City%20teachers_negotiated_agreement.pdf; MANDAN PUBLIC SCHOOLS, NORTH DAKOTA, TEACHER CONTRACT (2012), <http://www.mandan.k12.nd.us/employees/include/pdf/resourcelinks/TeacherHB.pdf>; MUKWONAGO AREA SCHOOL DISTRICT, WISCONSIN, TEACHER CONTRACT (2012), <http://www.masd.k12.wi.us/district/forms/HBook-PartIIteaching032612.pdf>.

IV. IMPLICATIONS FOR PRACTICE

While liquidated damages provisions have been used in teacher contracts for decades, they have become increasingly popular as of late. In a policy environment where teachers are “continually denigrated by prominent politicians, conservative critics, and the mainstream media,”⁹⁹ school districts and administrators must work with teachers to create collaborative learning and working environments. Each of these stakeholders are working towards the same goal – improving educational experiences for students.

Thus, districts should take measures to ensure that at the start of each school year all classes are led by highly qualified teachers. This can be done without alienating teachers through the imposition of liquidated damages provisions. The litigation against DCSD should serve as a lesson for school districts and school boards moving forward. In particular, districts should be cognizant of how and when to apply liquidated damages, so that they compensate school districts only for damages associated with last-minute resignations and do not penalize teachers.

The increased inclusion of liquidated damages provisions in teacher contracts is not an isolated issue. Over the last decade, there has been a dramatic shift in teacher employment rights, including teacher due process rights and teacher evaluation mechanisms, all under the auspices of accountability.¹⁰⁰ Concurrently, many school districts are facing teacher shortages and challenges with teacher recruitment and retention.¹⁰¹ Additionally, as was the case in Georgia, many states also face inter-district funding disparities that make it even more difficult for low-income districts to attract and retain highly qualified teachers.¹⁰² Administrators and policymakers should consider these issues in making all teacher employment decisions.

99. JOHN SMYTH, BARRY DOWN, & PETER MCINERNEY, ‘HANGING IN WITH KIDS’ IN TOUGH TIMES: ENGAGEMENT IN CONTEXTS OF EDUCATIONAL DISADVANTAGE IN RELATIONAL SCHOOL 172 (2010).

100. Jennifer Thomsen, *A Closer Look: Teacher Evaluations and Tenure Decisions*, EDUC. COMM’N OF THE STATES (May 2014), <https://files.eric.ed.gov/fulltext/ED561923.pdf> (summarizing key trends in tenure decisions); see generally Ann E. Blankenship, *Teacher Tenure: The Times They Are a Changin’*, 1 EDUC. L. & POL’Y REV. 193 (2014).

101. See Thomsen, *supra* note 100.

102. *In Most States, Poorest Districts Get Less Funding*, U.S. NEWS, <https://www.usnews.com/news/best-states/articles/2018-02-27/in-most-states-poorest-school-districts-get-less-funding> (last visited Dec. 28, 2020).

A. Teacher Recruitment and Retention

Recent empirical evidence suggests that low job satisfaction plays a big part in current teacher shortages and high rates of teacher attrition.¹⁰³ This is particularly challenging in urban school districts where students need the most support.¹⁰⁴ Many teachers are forced out of the profession by policies and practices that make them feel undervalued.¹⁰⁵ Furthermore, “though the revolving door in urban schools has most frequently and consistently been turning as new teachers leave, experienced educators are becoming increasingly frustrated with the state of teaching and [are likely to continue] leaving at rapid rates if the situation is not remedied.”¹⁰⁶

Decision-makers at the state and district level must look beyond the needs of students and parents and consider the needs of teachers when crafting and implementing education policy to retain high-quality teachers.¹⁰⁷ Evidence indicates that although teachers would value higher salaries, they rate “[desire] for autonomy in their curriculum, more and better resources, respect for the profession and their time, less bureaucracy and paperwork, and more administrative support” even higher.¹⁰⁸ Therefore, to retain greater numbers of highly qualified teachers, policymakers and district officials must consider the teachers’ perspective when deciding to include a liquidated damages provision in teacher contracts.

DCSD adopted a liquidated damages policy after an unexpectedly high number of teachers requested release from their 2013-2014 teaching contracts.¹⁰⁹ Caught off guard, DCSD granted a majority of the requests but did not adequately address the remaining teachers.

103. Alyssa Hadley Dunn, *The Courage to Leave: Wrestling with the Decision to Leave Teaching in Uncertain Times*, 47 URB. REV. 84, 86 (2015); see also Richard M. Ingersoll, *Is There Really a Teacher Shortage?*, CTR. FOR THE STUDY OF TEACHING AND POL’Y (Sept. 2003), https://repository.upenn.edu/cgi/viewcontent.cgi?article=1133&context=GSe_pubs; Richard Ingersoll & Henry May, *Recruitment, Retention and the Minority Teacher Shortage*, CONSORTIUM FOR POL’Y RES. & EDUC. (Sept. 2011), https://www.cpre.org/sites/default/files/researchreport/1221_minorityteachershortagereportrr69septfinal.pdf.

104. Ingersoll & May, *supra* note 103, at 13.

105. Dunn, *supra* note 103, at 94.

106. Dunn, *supra* note 103, at 101.

107. Dunn, *supra* note 103, at 101.

108. Dunn, *supra* note 103, at 86; see also Doris A. Santoro, *Good Teaching in Difficult Times: Demoralization in the Pursuit of Good Work*, 118 AM. J. OF EDUC. 6 (2011); Marie Byrd-Blake et al., *Morale of Teachers in High Poverty Schools: A Post-NCLB Mixed Methods Analysis*, 42 EDUC. & URB. SOC’Y 450 (2010).

109. See *Dekalb Cty. Sch. Dist. Work Session*, *supra* note 1, at 4 (statement of Dr. Ward-Smith, Chief Human Resources Officer for DCSD).

The District simply denied teachers' requests for release and expected them to report to work on the first day of school.¹¹⁰ It is no surprise that they started the school year with teachers absent from approximately fifty classrooms. As such, DCSD hoped that the inclusion of a liquidated damages provision, threats of PSC sanctions, and an early contract date would keep highly qualified teachers within the district. DCSD enforced the liquidated damages against teachers even when they were requesting release from their contract before the end of the current school year, while the District was still engaged in the process of filling its other vacancies, and months before the new school year began. In light of the foregoing, DCSD essentially tried to trap teachers in their current positions. This goes well beyond the stated intent and function of a liquidated damages provision and creates a hostile and untrusting employment relationship.

If districts opt to include a liquidated damages provision in their teacher contracts, they must consider the date beyond which a teacher's resignation would result in actual damages. Applying liquidated damages so early in the hiring season, particularly when contracts are issued much earlier than other districts, may cause resentment among teachers. Ultimately, this will hurt a districts' ability to retain experienced teachers and hinder the recruitment of new teachers, potentially resulting in high-cost litigation.

B. Funding Disparities

Our schools are more segregated today than they were in the 1960s.¹¹¹ Even though the number of Black and Latino students are increasing, these students are generally educated in highly segregated schools as a result of current housing and employment options.¹¹² This racial and economic segregation produces underfunded school districts, even with higher property tax rates.¹¹³ Experienced and highly qualified teachers often avoid or leave these school districts for districts that pay higher salaries, provide greater benefits, and have fewer chal-

110. *Id.* at 4:20-4:21.

111. Rachel R. Ostrander, *School Funding: Inequality in District Funding and the Disparate Impact on Urban and Migrant School Children*, 2015 B.Y.U. EDUC. & L.J. 271, 272 (2015); see also Gary Orfield & Chungmei Lee, *Historic Reversals, Accelerating Resegregation, and the Need for New Integration Strategies*, CIVIL RTS. PROJECT PROYECTO DERECHOS CIVILES 4 (Aug. 2007), <https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/historic-reversals-accelerating-resegregation-and-the-need-for-new-integration-strategies-1/orfield-historic-reversals-accelerating.pdf>.

112. Ostrander, *supra* note 111, at 272.

113. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1972).

lenges.¹¹⁴ This situation creates a self-perpetuating cycle where “the problem of funding disparity grows, so does th[e] unequal distribution of resources in schools, raising the question of whether children are being adequately educated.”¹¹⁵ Without a more equal distribution of resources and qualified teachers, low-income districts will continue to suffer.

DeKalb County, Georgia is a large county of nearly 800,000 residents.¹¹⁶ Nineteen percent of its population falls below the poverty level, which is above the Georgia state average of 18.2% and DeKalb’s neighboring counties Fulton (17.6%)¹¹⁷ and Gwinnett (13.9%).¹¹⁸ Following the financial crisis of 2008, like many school districts, DCSD had to cut costs where it could. In addition to lower base salaries, DCSD teachers have also been faced with unpaid furlough days, further reducing teachers’ actual take-home pay. Consequently, DCSD has had a hard time retaining its teaching staff. However, as indicated above, a higher salary is not necessarily the top priority for most teachers. Instead, having administrative support and being respected as professionals rank high on teachers’ list of professional needs.¹¹⁹

Given these particular challenges, low-income districts like DCSD may want to consider ways to improve the teaching experience in their districts to retain quality teachers and recruit new teachers. While all districts should work towards positive, respectful working environments, this is especially important in districts that cannot afford to pay top-dollar for teacher salaries. Creating that environment starts with building a collaborative relationship between teachers and administrations, built on trust and respect. Efforts to trap teachers in a particular job or positions by threats of liquidated damages provisions or sanctions will only serve to further alienate teachers from the district administration and the collaborative learning community. Therefore, low-income districts may want to be particularly careful about how and when to implement liquidated damages provisions, be-

114. Linda Darling-Hammond, *Keeping Good Teachers: Why It Matters and What Leaders Can Do*, 60 EDUC. LEADERSHIP 6, (2003); Kacey Guin, *Chronic Teacher Turnover in Urban Elementary Schools*, 12(42) EDUC. POL’Y ANALYSIS ARCHIVES 1 (2004); Eliah Watlington, Robert Shockley, Paul Guglielmino, & Rivka Felsher, *The High Cost of Leaving: An Analysis of the Cost of Teacher Turnover*, 36 J. OF EDUC. FIN. 22 (2010).

115. Ostrander, *supra* note 111, at 272.

116. *DeKalb County Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/dekalbcountygeorgia> (last visited Dec. 29, 2020).

117. *Fulton County Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fultoncountygeorgia> (last visited Dec. 29, 2020).

118. *Gwinnett County Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/gwinnettcountygeorgia> (last visited Dec. 29, 2020).

119. Dunn, *supra* note 103, at 101.

cause they may end up doing more damage to teacher morale without realizing the detriment it could have on the intended goal of teacher retention.

CONCLUSION

While liquidated damages provisions have been an accepted part of government employment contracts for decades, school districts must proceed with caution in how they implement and incorporate them into their respective teacher employment contracts. The body of case law in Georgia and other states focuses on situations in which a teacher resigns just before the beginning of a new school year, putting schools in difficult hiring positions and jeopardizing the potential quality of education received by the students.

However, DCSD implemented liquidated damages provisions in its teacher contracts at an entirely new level by using them as a deterrent for teachers to not leave the district even when they attempted to do so early in the hiring season. While legislation and case law leave some room for legal debate on the legality of the DCSD liquidated damages provision, DCSD's actions appear to conflict with the spirit and purpose of liquidated damages provisions and raise concerns about violations of public policy. DCSD's settlement also leaves open the possibility that there may be circumstances under which enforcement of liquidated damages provisions will be deemed unconscionable.

As such, while liquidated damages provisions may be legally valid if incorporated into teacher contracts, school districts should only incorporate or enforce them when doing so acts as a means for recovering damages in exigent circumstances, which is *never* the case when teachers resign months before the new school year starts. Employing the use of liquidated damages provisions for any other reason goes beyond their legally valid use and only serves to act as a penalty, sanction, or deterrent.