

# PENNSYLVANIA'S ACT 46: AIMED AT IMPROVING EDUCATION OR PUNISHING EDUCATORS?

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## I. INTRODUCTION

America's urban public school systems are in turmoil. There is no doubt that many, if not most of our urban public schools need some sort of revamping. Students in metropolitan public school systems are not achieving at the levels of students in suburban districts nationwide and a number of state and local governments have taken it upon themselves to try to do something about it.<sup>1</sup> Across the country, states have been attempting to implement legislation designed to improve student achievement and management of urban school districts. Education reform has taken a number of forms in the past decade, but lately, the most popular "reforms" include state takeovers and moves toward privatization of urban school systems, as well as proposals for vouchers and tax credits.<sup>2</sup> These seem to be the most prevalent measures aimed at improving school performance.<sup>3</sup>

However, it would be impossible for states to impose these sorts of changes absent subsequent implications for the workforce that educates students in these schools. Often, "education reform" tactics have a negative impact upon educators.<sup>4</sup> Unfortunately, state legislators often appear quick to blame educators for the subpar performance of students in these schools, and pass laws that hamper employees' ability to bargain collectively.<sup>5</sup> Many education employees have lost rights, while others are fighting to maintain rights that they have had for decades.<sup>6</sup>

Pennsylvania's government is no stranger to education reform. Like

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1. See David J. Strom & Stephanie S. Baxter, *Labor Relations From the Statehouse to the Schoolhouse: How Legislatures and Courts Shaped Labor Relations for Public Education Employees During the Last Decade*, 30 J.L. & EDUC. 275, 275 (2001).

2. *Id.* (discussing privatization, proposals for vouchers, and tax credits).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

legislatures in many other states, the Pennsylvania General Assembly recently decided to introduce some statutory changes aimed at public education. In 1998, the Pennsylvania Legislature passed an extraordinary statute known as Act 46, and in 2001, they added to the legislation with Act 83.<sup>7</sup> Together, these pieces of legislation give the state the power to take over public schools.<sup>8</sup> However, not all public schools are placed at equal risk by Act 46. Only Philadelphia schools currently qualify as school districts of the “first class.”<sup>9</sup> Therefore, only Philadelphia schools can be taken over in the manner proposed by Act 46.

The Act allows the Secretary of Education to declare the system in “distress,” and upon making that declaration, to displace the Board of Directors of the school system and impose a five-member “School Reform Commission” to take over the duties of the Board.<sup>10</sup> Additionally, the Act eliminates teachers’ right to strike, and prohibits them from negotiating a number of issues for collective bargaining purposes.<sup>11</sup> In December 2001, Governor Schweiker triggered Act 46 and placed the Philadelphia District School System under state control, making the Philadelphia school system the largest ever to be taken over by a state.<sup>12</sup>

This comment will address two major issues. First, it will look at the development of collective bargaining rights for public educators in the Commonwealth of Pennsylvania, and at the possible impact Act 46 may have on the Philadelphia Federation of Teachers (PFT), in particular, on its future ability to bargain collectively for its members. Second, this comment will explore the potential effects of the implementation of Act 46 on the Philadelphia public schools, namely, the potential for widespread privatization of the schools in the district, and what such potential could mean for the teachers’ union.

## II. COLLECTIVE BARGAINING FOR PUBLIC EDUCATORS IN PENNSYLVANIA

Before 1970, public employees in Pennsylvania did not have

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7. 1998 Pa. Legis. Serv. 46 (West) (codified at PA. STAT. ANN. tit. 24, § 6-696 (West 2003)); 2001 Pa. Legis. Serv. 83 (West) (codified at PA. STAT. ANN. tit. 24, § 6-696 (West 2003)).

8. *See generally* § 6-696.

9. *See* § 6-696(a) (restricting applicability of provisions to school districts of the first class).

10. § 6-696(a).

11. § 6-696(l) (“During the time the school district of the first class is under the direction of the School Reform Commission, all school employees shall be prohibited from engaging in any strike . . . .”); § 6-696(k) (prohibited bargaining issues).

12. *See* Michael Rubinkam, *School Takeover Sets Up Large-Scale Experiment*, CHATTANOOGA TIMES, Dec. 23, 2001, at A1 (“The Philadelphia school district on Saturday became the largest ever taken over by a state government . . . .”).

collective bargaining rights.<sup>13</sup> Teacher strikes, as well as strikes by other public employees, were illegal and rare.<sup>14</sup> However, as teachers became more dissatisfied with wages, campaigns to organize teachers became more widespread, and teacher shortages grew, teacher strikes, though illegal, began to increase.<sup>15</sup>

In an effort to improve labor relations, Pennsylvania passed Act 195, which conferred on most public employees the right to organize, the ability to bargain collectively, and the permission, under certain circumstances, to strike.<sup>16</sup> Unfortunately, Act 195 did not have the desired effect. Labor relations did not improve between public employers and employees, and employee strikes actually increased.<sup>17</sup> In Pennsylvania, public education employees engaged in the majority of strikes.<sup>18</sup> As a matter of fact, between 1970 and 1988, one of every five public school strikes in the United States occurred in the Commonwealth of Pennsylvania.<sup>19</sup> These strikes were not minimal in effect, but impacted large numbers of students.<sup>20</sup> It did not take long after the passage of Act 195 for the legislature to recognize that it “had opened a Pandora’s Box by giving teachers the right to strike.”<sup>21</sup>

Once state actors realized that the legislation was not having its

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13. See Kathleen S. Herbert, *Balancing Teachers’ Collective Bargaining Rights With the Interests of School Districts, Students and Taxpayers: Current Legislation Strikes Out*, 99 DICK. L. REV. 57, 57 (1994).

14. *Id.*

15. *Id.*

16. See Public Employee Relations Act, Pub. L. No. 195, 1970 PA. LAWS 563 (West) (codified as amended at PA. STAT. ANN. tit. 43, §§ 1101.101-.2301 (West 2003)). Strikes by guards and court employees are prohibited. See § 1101.1001.

If a strike by public employees occurs after the collective bargaining processes set forth sections 801 and 802 of Article VIII of this act have been completely utilized and exhausted, it shall not be prohibited unless or until such a strike creates a clear and present danger or threat to the health, safety or welfare of the public.

§ 1101.1003 (emphasis added).

17. See Charles W. Baird, *Pennsylvania’s Act 195: Twenty Years of Folly*, 10 GOV’T UNION REVIEW 1, 21 (1989).

18. *Id.*

19. *Id.* See also Dale Mezzacappa et al., *School District, Philadelphia Teachers Differ on Negotiations*, PHILA. INQ., Oct. 29, 2000, at A1 (“The last [Philadelphia] teachers’ walkout, in 1981, lasted 50 days, fueled middle-class flight from the city, and won little for teachers.”).

20. See Mezzacappa et al., *supra* note 19; *Teachers on Strike*, WASH. POST, Sept. 5, 1986, at A11 (“Classes for almost 118,000 students in 33 public school districts across seven states were canceled or imperiled as more than 7,200 teachers were on strike. Pennsylvania was the hardest hit, with walkouts in 14 districts by 3,400 teachers leaving 53,000 students without regular instruction.”).

21. Herbert, *supra* note 13, at 59.

intended effect, they began to reevaluate Act 195.<sup>22</sup> While the legislature grappled with whether to continue to allow legal teacher strikes, the judiciary attempted to “reconcile the 180-day school year requirement with the teachers’ right to strike in the absence of a ‘clear and present danger to the health, safety and welfare of the public.’”<sup>23</sup> In 1992, twenty-two years after the passage of Act 195, the legislature finally responded to the pressure from various stakeholders (including parents, taxpayers, and school boards) by passing Act 88 as a compromise.<sup>24</sup> The legislature’s primary purpose for enacting Act 88 was to reduce the number and length of teacher strikes.<sup>25</sup>

In 1998, Pennsylvania passed Act 46.<sup>26</sup> Buried in the recesses of an appropriations bill, Act 46 confers unprecedented power upon the Secretary of Education to declare a school district of the “first class”<sup>27</sup> distressed, and subsequently allows the removal of power from the existing board of school directors and a grant of power to a School Reform Commission (SRC), consisting of five members, four of whom the Governor appoints.<sup>28</sup>

In 2001, the legislature passed Act 83, which designates terms for the five members of the SRC and indicates that its members cannot be removed, except by the Governor.<sup>29</sup> This legislation, when triggered, illegalizes teacher strikes for a district controlled by the SRC.<sup>30</sup> If teachers strike illegally under the statute, they are subject to lose their certification.<sup>31</sup>

Seemingly, this legislation brings the status of collective bargaining for teachers, at least those in Philadelphia, almost full circle. Without the weapon of a potential strike, the teeth of the teachers union are dulled if not extracted entirely. Perhaps, given the potential for loss of certification, illegalization of strikes under the statute is even more onerous than prior to its passage.

#### A. *Discussion of Act 195*

Before Act 195 was enacted in 1970, teachers (as well as other public employees) did not have the right to strike, or even the right to engage in

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22. *Id.*

23. Baird, *supra* note 17.

24. *Id.*

25. *Id.*

26. PA. STAT. ANN. tit. 24, § 6-696 (West 2003).

27. *See* tit. 24, § 2-202.

28. *See* tit. 24, § 6-696.

29. *See* § 6-696.

30. *Id.* § 6-696(l) (“During the time the school district of the first class is under the direction of the School Reform Commission, all school employees shall be prohibited from engaging in any strike . . .”).

31. § 6-696(l).

collective bargaining with their employers.<sup>32</sup> Nevertheless, even without the protection of the law, employees were striking.<sup>33</sup> These illegal strikes and tense employee relations prompted the state legislature to enumerate unambiguous statutory policies.<sup>34</sup> The legislature viewed the passage of Act 195, which provides a set of procedures to follow in the face of an impasse during negotiations, as a means to guide and control the strikes and other labor activities that were already taking place.<sup>35</sup>

Under Act 195, impasse resolution is to begin with mediation.<sup>36</sup> Parties may voluntarily submit themselves to mediation whenever they reach what they determine is a stalemate in negotiations.<sup>37</sup> However, they are required to resort to mediation if negotiations have not resulted in an agreement after twenty-one days.<sup>38</sup> Mediation continues until the parties reach an agreement, but for no longer than twenty days.<sup>39</sup> If the parties have not reached an agreement within twenty days, the Bureau of Mediation is required to notify the Pennsylvania Labor Relations Board, who then has the power to carry out the duties authorized by Act 195, which include appointing a fact-finding panel.<sup>40</sup> Fact-finding panels then issue non-binding reports of recommendations that the parties may choose to accept or reject.<sup>41</sup> Even if the parties reject the recommendations, however, the fact-finding panel must publish its findings and recommendations.<sup>42</sup>

Once all of these processes have been exhausted, if the parties have still failed to reach a satisfactory agreement, employees may decide to strike as long as the strike does not cause a "clear and present danger or threat to the health, safety, or welfare of the public."<sup>43</sup> In order to balance the employees' right to strike, if the employer feels that the strike oversteps the bounds allowed by Act 195, the employer may seek equitable relief, including an injunction from the courts, sending employees back to work.<sup>44</sup>

Although Act 195 legalized strikes by public employees, the broad language of the statute, indicating that a strike by a public employee "shall not be prohibited unless or until such a strike creates a clear and present danger to the health, safety or welfare of the public," created interpretation

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32. See Herbert, *supra* note 13, at 57.

33. *Id.* at 61.

34. *Id.*

35. *Id.*

36. See PA. STAT. ANN. tit. 43, § 1101.804 (West 2003)

37. See Herbert, *supra* note 13, at 62.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 62-63.

44. *Id.* at 63.

problems for the courts.<sup>45</sup> Though the “clear and present danger” standard was not a foreign concept and had been utilized by the Supreme Court as it applied to government interference with First Amendment rights, the courts of the Commonwealth had never been faced with the interpretation of such a standard as it applied to employee strikes.<sup>46</sup> Therefore, the courts wrestled with its application and came up with somewhat inconsistent results.<sup>47</sup>

By the late 1980s, it became apparent that the courts would use the requisite 180 days of instruction as a guide in determining whether a strike would present a “clear and present danger.”<sup>48</sup> If a strike was deemed likely to interfere with the ability of a school district to provide 180 days of instruction, the court would likely determine that the danger to society was clear and present.<sup>49</sup> Nevertheless, the court was “mindful not to legislate judicially a 180 day limit to the teachers’ right to strike,” and stated, “that if the legislature wanted to impose such a limitation, it could promulgate further legislation.”<sup>50</sup> Eventually, the legislature did just that by enacting Act 88, limiting the teachers’ right to strike where the strike interfered with the 180-day mandate.<sup>51</sup>

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45. *Id.*

46. *Id.*

47. *See* *Armstrong Educ. Ass’n v. Armstrong Sch. Dist.*, 291 A.2d 120 (Pa. Commw. Ct. 1972) (holding that even though a twelve-day strike met the clear and present prongs of the clear and present danger test, it posed no real danger or threat to the public); *Phila. Fed’n of Teachers v. Ross*, 301 A.2d 405 (Pa. Commw. Ct. 1973) (upholding an injunction imposed by a trial court after only four days of a teacher strike, stating that the strike was a clear and present danger to the health, safety, or welfare of the public).

48. Herbert, *supra* note 13, at 65.

49. *Id.* at 66.

50. *See* *Jersey Shore Area Sch. Dist. v. Jersey Shore Educ. Assoc.*, 548 A.2d 1202, 1207 n.9 (Pa. 1988). The court stated:

We resist the facile temptation to legislate judicially a 180-day limit to the teachers’ right to strike. We leave it to the legislature, well aware of the requisites of the Public School Code when it enacted PERA, to decide whether such a limit should be imposed. Until that time, we shall consider the length of the instructional calendar and the loss of state funding as but one factor in the proper issuance of an injunction.

*Id.*

51. *See* Public School Code, Pub. L. No. 88, 1992 Pa. Laws 403 (codified as amended at PA. STAT. ANN. tit. 24, §§ 11-1101-A to 11-1172-A (West 2003)). *See also* PA. STAT. ANN. tit. 24, § 11-1161-A (West 2003) (“When an employee organization is on strike for an extended period that would not permit the school entity to provide the period of instruction required . . . the Secretary of Education may initiate . . . appropriate injunctive proceedings providing for the required period of instruction.”).

*B. Discussion of Act 88*

Though problematic in some respects, Act 195 offered public employees some of the same protections with regard to employment as their counterparts in the private arena. With the enactment of Act 195, public employers were forced to actively engage in negotiations around matters important to their employees. Regrettably, the Act did not provide a panacea for labor relations, and further steps were required to support improved work relations.

Contrary to hopes, Act 195 did not result in a reduction in teacher strikes or even a perceived improvement in labor relations amongst public employers and employees, as legislators had hoped.<sup>52</sup> Instead, Pennsylvania became known as the “strike capital of the nation.”<sup>53</sup> The legislation seems to have backfired. Therefore, in response to concerns of parents, teachers, and school board organizations, the legislature passed Act 88 in 1992 as a compromise designed to help limit the duration and number of teacher strikes in the Commonwealth.<sup>54</sup> Legislators believed that by passing legislation that included a strict timetable for negotiations and mediation, strikes might be forestalled.<sup>55</sup> Instead of prohibiting strikes entirely, lawmakers effectively legislated additional limits on workers’ ability to strike lawfully.

Act 88 provides mandatory, as opposed to directive, timelines regarding negotiations between public employers and employees.<sup>56</sup> Under the statute, parties are permitted to negotiate for a *reasonable* period of time. If at any time negotiations stall and an impasse occurs, the parties may voluntarily submit to mediation. However, under the provisions of the Act, the parties are given a specified period of time (forty-five days) to engage in negotiations. If they are unable to reach an agreement within that time period, the parties must submit to mandatory mediation by a third party, which must continue until the parties reach an agreement or an impasse.<sup>57</sup> If the parties are unable to reach an agreement under mediation, they, or the Pennsylvania Labor Relations Board, are allowed to impose fact-finding.<sup>58</sup>

Though Act 88 does not require that the parties be forced to accept the findings and recommendations of the fact-finding panel, their

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52. Herbert, *supra* note 13, at 70.

53. *Id.*; Baird, *supra* note 17.

54. Herbert, *supra* note 13, at 70.

55. *Id.*

56. *Id.* at 72.

57. *Id.* An impasse is assumed if the parties have not reached an agreement within forty-five days after mediation begins. See PA. STAT. ANN. tit. 24, § 11-1121-A, 11-1121-A(a) (West 2003).

58. See § 11-1121-A(a).

recommendations cannot be ignored because they can later become the basis for eventual “best-offer” arbitration.<sup>59</sup> Either party may request voluntary best-offer arbitration under the provisions of Act 88.<sup>60</sup> If requested, the other party has ten days to decide whether or not to accept the arbitration.<sup>61</sup> During these ten days, the statute prohibits strikes and lockouts.<sup>62</sup> Parties may submit themselves to best-offer arbitration at almost any time, except during fact-finding or mandatory best-offer arbitration.<sup>63</sup>

Pursuant to Act 88, mandatory final best-offer arbitration is imposed upon the parties if a strike or lockout will result in an inability to schedule completion of the mandated 180 instructional days prior to the last day of the scheduled school year or June 15th, whichever is later.<sup>64</sup> However, because Act 88 represents a compromise between the invested parties (namely, employers and employees), though final best-offer arbitration is mandatory under the prescribed circumstances, neither party is required to accept the decisions of the arbitrator.<sup>65</sup> Nevertheless, if either party rejects the arbitrator’s decision, the employer may employ strikebreakers in order to complete the 180 days of required instruction.<sup>66</sup>

Act 88 takes additional steps to limit the number and duration of strikes. There are provisions that regulate strikes and lockouts. If teachers strike and return to work voluntarily, they are only allowed one additional strike during the course of the school year.<sup>67</sup> Additionally, Act 88 imposes cooling-off periods at various times during negotiations.<sup>68</sup> During fact-finding and upon agreement by the parties to submit to arbitration, all strikes and lockouts must cease.<sup>69</sup> Strikes and lockouts are also proscribed during the ten-day response period during which a party must accept or reject a request for arbitration, during final best-offer arbitration, and upon an arbitrator’s final and binding decision.<sup>70</sup> Additionally, the Act prohibits selective strikes, requires forty-eight hours notice before the initiation of any strike action, and limits the number of strikes that teachers can engage in to two during the school year.<sup>71</sup> Also, if the 180-day rule is jeopardized, the Secretary of Education has the power, under the Act, to seek injunctive

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59. See Herbert, *supra* note 13, at 72.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 73.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 74.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*



relief from the courts.<sup>72</sup>

The provisions of Act 88 were designed by legislators hoping to limit the propensity to engage in strikes and facilitate agreement between parties engaged in labor negotiations.<sup>73</sup> Still, early indications show that employers and employees have met with difficulty in implementing Act 88.<sup>74</sup>

Though strikes decreased in 1993, only time will tell if Act 88 is truly an effective tool for aiding successful contract negotiations. Nevertheless, legislators viewed the enactment of Act 88 as a means to control, guide, and hopefully encourage successful negotiations. It was not meant to constrict the bargaining powers of either employers or employees, but instead was drafted simply to facilitate fair and efficient bargaining.

### C. Discussion of Act 46

In contrast to the two legislative acts previously discussed, Act 46 was drafted and enacted during a period of turmoil and discord between then-Philadelphia School Superintendent David Hornbeck and the Pennsylvania General Assembly.<sup>75</sup> Hornbeck threatened to “close the Philadelphia Public Schools prematurely during the 1998-1999 school year if the school district did not receive additional funding from the state to keep the schools open.”<sup>76</sup> The Pennsylvania General Assembly passed Act 46 in April 1998, supposedly to encourage improvements in abysmal reading and math scores in Philadelphia and ten smaller districts in the state.<sup>77</sup> However, the Philadelphia Federation of Teachers (PFT) believes that the Republican legislature passed the Act in an effort to “bust the power of the teachers union” in Philadelphia, a strongly Democratic city.<sup>78</sup>

Within the middle of Act 46, the legislature inserted language regarding “distressed” school districts.<sup>79</sup> Under the Act, the Secretary of Education may declare any district in the Commonwealth to be “under distress,” provided that it meets certain requirements.<sup>80</sup> However, pursuant to Act 46, the Secretary may declare a district of the *first class*<sup>81</sup> distressed

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72. *Id.*

73. *Id.*

74. *Id.*

75. See *School Board Rejects Teacher's Union Proposal to Open Schools on Time; PFT Files Challenge to School Takeover Law in Pennsylvania Supreme Court*, PR NEWSWIRE, Aug. 30, 2000.

76. *Id.*

77. See Francis X. Clines, *Philadelphia's Troubled Schools Reopen as a Showdown With Teachers Nears*, N.Y. TIMES, Sept. 10, 2000, at A18.

78. *Id.*

79. See PA. STAT. ANN. tit. 24, § 6-691 to 6-695 (West 2003).

80. § 6-691.

81. § 6-696; PA. STAT. ANN. tit. 24, § 2-202 (West 2003) (“Each school district having

if it meets any of the conditions that other districts are subject to, as well as an additional list of conditions.<sup>82</sup>

Currently, the Philadelphia School District is the only district of the first class in the Commonwealth. Therefore, it is the only district subject to that portion of the Act that pertains to “district[s] of the first class.”<sup>83</sup> A district of the first class that the Secretary of Education labels as a district in distress is subject to a completely different set of rules and consequences than districts of all other classes.<sup>84</sup>

Under Section 6-696, a school district of the first class labeled “distressed” will be placed under the control of a “School Reform Commission” (SRC) consisting of five members.<sup>85</sup> During their term, the Governor “upon proof may only remove these members from their positions by clear and convincing evidence of malfeasance or misfeasance in the office.”<sup>86</sup> Once appointed, the SRC itself may be dissolved only by a declaration by the Secretary of Education and only upon a recommendation of a majority of its members.<sup>87</sup> These provisions set the stage for the rest of the legislation, which greatly narrows the bargaining ability of education

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a population of one million (1,000,000) or more, shall be a school district of the first class.”).

82. Tit 24, § 6-691(c) states in pertinent part:

In addition to the circumstances to determine financial distress under subsection (a), the Secretary of Education may declare a school district of the first class to be distressed if the Secretary of Education determines that:

- (1) the school district of the first class failed to adopt or to comply with a valid budget to operate the school district for a minimum instructional school year under section 1501;
- (2) the school district of the first class failed to allocate or transfer revenues to ensure that funds are sufficient to provide a minimum instructional school year under section 1501;
- (3) the city of the first class failed to transfer revenues to the school district consistent with the current budget; or
- (4) the school district of the first class has failed or will fail to provide for an educational program in compliance with the provisions of this act, regulations of the State Board of Education or standards of the Secretary of Education.

§ 6-691(c).

83. § 6-691(c).

84. See § 6-693 (rules for districts of classes other than first class).

85. Pursuant to Section 6-693(a), four of the five members of the School Reform Commission are appointed by the Governor, while one is appointed by the Mayor of the “coterminous” school district.

86. § 6-696(b)(2).

87. See § 6-696(n) (“The Secretary of Education, only upon the recommendation of a majority of the School Reform Commission, may issue a declaration to dissolve the School Reform Commission.”).

employees in the District of Philadelphia.

Though there are a number of provisions within Section 6-696 that effectively restrict the bargaining ability of education employees, those that most widely implicate negotiations appear in Section 6-696, Subsections (k) through (l). First, the statute restricts the subjects of bargaining between the SRC and teachers.<sup>88</sup> This section effectively mandates that teachers will be unable to force bargaining around a number of important subjects, such as staffing patterns, time, and the potential impact of outside educational contractors on employees.<sup>89</sup>

Next, the statute requires that any collective bargaining agreement that is negotiated after the declaration of distress include a school day and school year for professional employees equal to or in excess of the state average.<sup>90</sup> Though this requirement does not seem overly onerous on its own, the statute goes on to state that there can be no increase in

88. Section 6-696(k) provides in pertinent part:

(2) No distressed school district of the first class shall be required to engage in collective bargaining negotiations or enter into memoranda of understanding or other agreements regarding any of the following issues:

(i) Contracts with third parties for the provision of goods and services, including educational services or *the potential impact of such contracts on employees.*

(ii) Decisions related to reductions in force.

(iii) Staffing patterns and assignments, class schedules, academic calendar, places of instruction, pupil assessment and teacher preparation time.

(iv) The use, continuation or expansion of programs designated by the School Reform Commission as pilot or experimental programs.

(v) The approval or designation of a school as a charter or magnet school.

(vi) The use of technology to provide instructional or other services.

PA. STAT. ANN. tit. 24, § 6-696(k) (emphasis added).

89. See § 6-696(k).

90. The section continues:

(3) A collective bargaining agreement for professional employees entered into after the expiration of the agreement in effect on the date of the declaration of distress shall provide for the following:

(i) A school day for professional employees that is equal to or exceeds the State average . . . .

(ii) The number of instructional days shall be equal to or exceed the State average number of instructional days.

(iii) The School Reform Commission *shall not increase* compensation for employees solely to fulfill the requirements under subparagraphs (i) and (ii).

§ 6-696(k) (emphasis added).

compensation strictly to fulfill those requirements.<sup>91</sup>

Finally, and perhaps most significantly, once the district is classified as distressed, strikes by *all* school employees are *prohibited* as long as the district is under the control of the SRC.<sup>92</sup> Even more striking is the fact that any employee who violates the no-strike clause may sacrifice his/her certification at the discretion of the Secretary of Education.<sup>93</sup>

Together, the above listed restrictions on collective bargaining are bound to have a significant impact on the ability of Philadelphia teachers to bargain for agreements that are satisfactory for both employers and employees in the education context. Teachers did not threaten to shut down schools early due to a lack of available funding,<sup>94</sup> but through reactionary legislation, they may be forced to pay for that threat through limitations on bargaining rights that they had enjoyed since the enactment of Act 195.<sup>95</sup>

### III. THE IMPACT OF TRIGGERING ACT 46 (ALSO KNOWN AS “THE PHILADELPHIA TAKEOVER LAW”)

Philadelphia has a proud history of public education.<sup>96</sup> The idea of widespread free education has been around in the city since the 1600s.<sup>97</sup> However, Philadelphia’s public schools, like many other urban school systems, have been riddled with problems for a number of years now.<sup>98</sup> In 1998, fed up with a lack of adequate funding assistance from the state, David Hornbeck (then superintendent of Philadelphia city schools) threatened to shut down the city schools midyear due to a lack of operating money.<sup>99</sup> This action was perhaps the most powerful catalyst to the enactment of Act 46. Following Hornbeck’s threat, the General Assembly passed Act 46 (which would have been triggered had Hornbeck followed through with his threat), which would have forced teachers to finish the school year, but also would have resulted in Hornbeck losing his position as superintendent.<sup>100</sup>

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91. § 6-696(k)(3)(iii).

92. *See* § 6-696(l).

93. *See* § 6-696(l) (“The secretary of Education may suspend the certificate of any employee who violates this subsection.”).

94. *See* Clines, *supra* note 77.

95. *See* PA. STAT. ANN. tit. 43, §§ 1101.101-.2301 (West 2003).

96. *See* William C. Kashatus, *Public Education in Private Hands*, N.Y. TIMES, Feb. 2, 2002, at A19.

97. *Id.*

98. *Id.*

99. *Id.*

100. Section 6-691 sets forth the circumstances that allow a school district to be classified as distressed. The section states in pertinent part:

Though Hornbeck did not close city schools before the end of the instructional year, Philadelphia schools faced another crisis when teachers threatened to strike in September 2000 due to an impasse during contract negotiations.<sup>101</sup> Teachers wanted, among other things, a contract that would provide for smaller class sizes, stronger early-childhood education, a new reading program, and better school security.<sup>102</sup> On the other hand, Philadelphia Mayor John Street, along with the school district, proposed provisions that would extend both the school day and the school year, increase co-pays for health insurance, and most offensive to the union, institute a pay scale based on teacher performance rather than tenure.<sup>103</sup>

As a result of these proposals, it was no surprise that Act 46 reappeared. Mayor Street reminded teachers of the implications of the Act as part of his attempts to convince the union and its members not to advance any ideas of a strike.<sup>104</sup> In an unprecedented alliance between the Democratic Street and the Republican governor, Tom Ridge, Street threatened to enlist the help of the governor to trigger Act 46 if the teachers followed through with their strike plans.<sup>105</sup> But the teachers did not walk out, and there was no need to enlist Governor Ridge to trigger the Act.

In the end, it was neither a threat by the superintendent, nor a threatened teacher's strike that finally led to a state takeover of Philadelphia city schools under the Act. Instead, a multi-million dollar budget deficit, low test scores, chronic teacher shortages, and dilapidated buildings prompted Governor Mark Schweiker to trigger Act 46 and turn control of Philadelphia schools over to the state through the SRC.<sup>106</sup> Facing strong opposition from "teachers, minority leaders, the school board, City Council, and parent and community groups," Governor Schweiker and Mayor Street jointly announced that the takeover would go into effect as of

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(c) [T]he Secretary of Education may declare a school district of the *first class* to be distressed if the Secretary of Education determines that:

(1) the school district of the first class failed to adopt or to comply with a valid budget to operate the school district for a minimum instructional school year . . . .

Tit. 24, § 6-691(c) (emphasis added).

101. *Philadelphia Teachers Vote Unanimously to Strike; Sixth-Largest District: Classes are Scheduled to Begin on Thursday*, TELEGRAPH HERALD, Sept. 6, 2000, at A2.

102. *Id.*

103. *Id.*

104. *See Mezzacappa et al, supra note 19.*

105. *See PA: With Teacher Strike Looming, Ridge, Philly Mayor Discuss State Takeover*, BULLETIN'S FRONTRUNNER, Oct. 26, 2000. *See also PA: Ridge, Street Form Alliance to Avert Philly Teacher's Strike*, BULLETIN'S FRONTRUNNER, Sept. 8, 2000.

106. *See Michael Rubinkam, School Takeover Sets up Large-Scale Experiment*, CHATTANOOGA TIMES, Dec. 23, 2001, at A1.

Sunday, December 23, 2001.<sup>107</sup> Unlike the alliance that had formed between Governor Tom Ridge and Mayor John Street during the potential teacher strike, Street and Schweiker disagreed on the direction that city schools should take. In fact, the mayor agreed not to oppose Schweiker's plan only after the governor agreed to allow Mayor Street to appoint two members of the SRC (instead of the requisite one) and to provide \$75 million to help close the city schools' deficit.<sup>108</sup>

The takeover has major implications for the school system as well as its employees. Because it is the largest such takeover in the history of public education, many other states will be watching to see how the system fares under the state's control.<sup>109</sup> In the interim, teachers and other professionals employed by the school system could be in jeopardy of losing a host of bargaining rights, as well as venerable protections such as tenure.<sup>110</sup>

#### A. *The Act's Potential Impact on Philadelphia Teachers*

The state takeover of Philadelphia city schools will obviously have an effect on Philadelphia teachers' ability to bargain collectively for contract rights.<sup>111</sup> However, a question remains as to how much of a practical impact the legislation ultimately will have on teachers.

While the system is under the control of the SRC, teachers are prohibited from striking in order to secure contract rights.<sup>112</sup> Although a strike was recently threatened, teachers have not resorted to such an extreme measure in over twenty years.<sup>113</sup> Therefore, the loss of such a privilege may not be as significant as it appears at first blush. Perhaps of more import is the fact that, while classified as a "distressed district," the subjects that are *permissible* at the bargaining table during discussions of a new teachers' contract are significantly narrowed.<sup>114</sup> The district will not be forced to bargain with teachers over "staffing patterns and assignments, class schedules, academic calendar, places of instruction, pupil assessment

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107. *Id.*

108. See *Philly Mayor OK's State Takeover of Schools*, DESERET NEWS, Dec. 22, 2001, at A2.

109. See Rubinkam, *supra* note 106. See also *Citizens Vow to Fight Edison Schools and Privatization of Philadelphia's Public Schools*, PR NEWSWIRE, Dec. 5, 2001 ("What is happening in Philadelphia is an unprecedented test case for privatization for the whole country . . .").

110. See PA. STAT. ANN. tit. 24, §6-696 (West 2003).

111. See *supra* notes 88-93 and accompanying text.

112. See §6-696(l).

113. See Mezzacappa et. al., *supra* note 19 ("The last [Philadelphia] teachers' walkout, in 1981, lasted 50 days, fueled middle-class flight from the city, and won little for teachers.").

114. See *supra* note 88 and accompanying text.

and teacher preparation time.”<sup>115</sup> This could have severe implications for teachers.

For example, teachers could be faced with a significantly lengthened school year, less preparation time, and larger classes, all without the opportunity to bargain for any compensation for these impositions. These are some of the things that concerned educators most during the last contract renegotiation.<sup>116</sup> Also, the district would not be required to discuss “decisions related to reduction in force.”<sup>117</sup> This allowance for the district, coupled with the fact that, under Act 86, the SRC may make decisions to suspend professional employees without regard to tenure protection<sup>118</sup> has potentially dire consequences for the professional security of educators.

In a situation involving layoffs, for instance, teachers who have years of experience could be suspended before new hires. This tactic could save the system a significant amount of money because new teachers do not receive as high a salary as their more experienced co-workers; however, it effectively strips teachers of a major aspect of job security. Act 46 also provides mandatory inclusions for any contract negotiated while the system is under distress.<sup>119</sup> These inclusions provide for a longer school day as well as a longer school year without any guaranteed compensation, and indicate yet another manner in which the legislation helps bind the hands of the union with regard to negotiating for teachers.<sup>120</sup>

In spite of all of these restrictions on bargaining, it remains to be seen how the SRC will utilize the provisions of Act 46. Only if the district remains in distress after the termination of the current teachers' contract will the bargaining provisions set forth in section 6-696 be utilized. Nevertheless, the takeover could have other implications for teachers' working conditions.

### *B. Overall Potential Impact on the Philadelphia School System*

Perhaps the largest implication of triggering Act 46 on the daily operations of the Philadelphia city school system is the potential for widespread privatization of the schools. The state has made clear that they have no desire to take on the responsibility of managing a large urban

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115. *Id.*

116. *See supra* notes 99-101 and accompanying text.

117. *See* PA. STAT. ANN. tit. 24, § 6-696(k)(2)(ii) (West 2003).

118. Section 6-696 gives the School Reform Commission the power “[t]o suspend professional employees without regard to the provisions of section 1125.1.” §6-696(h)(7). Section 1125.1 provides teachers with tenure protection; that is, if necessary, professional employees are to be suspended according to inverse order of seniority. *See* tit. 24, § 11-1125.1.

119. § 6-696(k)(3).

120. § 6-696(k)(3).

school district on their own.<sup>121</sup> However, Section 6-696 allows the SRC to contract out the management of a distressed school district (of the first class) to private, for-profit corporations.<sup>122</sup> Seemingly, this is exactly the sort of takeover that the governor had in mind when he triggered Act 46 in December, 2001.<sup>123</sup> Edison Schools, a for-profit, private management company, plays a large managerial role in the operations of Philadelphia schools.<sup>124</sup> However, management companies in general, and Edison Schools in particular, have track records that are sketchy at best.<sup>125</sup> Though a private management company definitely stands to benefit from the school takeover,<sup>126</sup> it is not at all clear that teachers, or the system itself, have anything to gain.<sup>127</sup>

Though education management companies like Edison promise to cut costs, increase student performance, and improve school operations overall, there is no compelling evidence that they will be able to achieve these lofty aspirations.<sup>128</sup> To date, public schools managed by Edison Schools, Inc. have failed to demonstrate significant increases in academic performance.<sup>129</sup> In a number of independently conducted studies, Edison students have been shown to perform less well or only as well as students in control groups being educated in regular public schools.<sup>130</sup>

The privatization of Philadelphia schools has sparked outrage in a community that has grown accustomed to having the last word in the operation of its schools. Community groups, parents, and teachers have been incensed at the idea of Edison taking over, especially in light of the fact that Edison itself was hired to conduct the study to determine the state of the school system.<sup>131</sup> Outrage aside, widespread privatization might have major implications for the future of education employees in

121. See *Ridge, Street Form Alliance to Avert Philly Teacher's Strike*, BULLETIN'S FRONTRUNNER, Sept. 8, 2000.

122. See tit. 24, § 6-696.

123. See Maida C. Odom, *Philadelphia Schools Facing Lesson in Privatization State, Company Face Huge Task*, BOSTON GLOBE, Dec. 23, 2001, at A3 ("At the end of the day, the state's first move when they took over was to go hire a company.").

124. See generally *id.*

125. See F. Howard Nelson & Nancy Van Meter, *What Does Private Management Offer Public Education?*, 11 STAN. L. & POL'Y REV. 271 (2000).

126. Early negotiations with Edison would have provided the company with a \$100 million contract. See Rubinkam, *supra* note 106.

127. The state paid Edison \$2.7 million dollars to conduct a study of the Philadelphia school district while Edison was bidding to run the system, which also promises to be a very lucrative endeavor. See Dave Lindorff, *Private Schooling: Edison Inc. Bids to Take Over Philadelphia Education*, IN THESE TIMES, Feb. 18, 2002, at 8.

128. Nelson & Van Meter, *supra* note 126, at 271.

129. *Id.* at 281.

130. *Id.* See also *SRC Notified on Edison's Poor Record of Performance*, PR NEWSWIRE, Feb. 4, 2002.

131. See Lindorff, *supra* note 128.



Philadelphia. It is not yet clear how the Edison takeover will ultimately impact the employment contracts of current teachers, something that will likely not be fully evident until the teachers' current contract expires.

### C. *Battling Act 46*

A number of suits have been filed challenging Act 46. Most recently, the Philadelphia City Council and several city residents filed suit against Governor Mark Schweiker, alleging, among other things, a violation of due process.<sup>132</sup> There are, in fact, legitimate questions regarding the constitutional validity of the Act. The most glaring question, perhaps, is whether the legislature can enact a law that applies solely to Philadelphia without providing an adequate explanation or basis. The plaintiffs in the action against the governor believe that it cannot.<sup>133</sup>

The complaint states that “[d]efendants have acted through discriminatory laws aimed at Philadelphia that violated the federal constitutional rights of Philadelphia residents and voters, parents and children.”<sup>134</sup> Plaintiffs go on to allege several problems with Act 46.

First, they claim that because Philadelphia is a home rule district, only the district has the right to set the term, number, and qualifications of Board of Education members, and approve nomination methods.<sup>135</sup>

Next, they complain that the Pennsylvania legislature set forth Sections 6-691 through 6-695 to apply to school districts in distress over fifty years ago.<sup>136</sup> These sections applied equally to all school districts, and were designed to assist districts that were having *financial* problems.<sup>137</sup> The criteria for “distress” were uniform prior to the enactment of Act 46. Act 46, on the other hand, creates separate criteria for distress, which applies only to Philadelphia and are so vague as to be “void on their face.”<sup>138</sup>

Finally, the plaintiffs claim that giving the chief executive officer power to enter into contracts with for-profit entities for the purpose of operating schools effectively repeals the Philadelphia Home Rule Charter in violation of the Pennsylvania Constitution.<sup>139</sup> Though prior attempts to fight Act 46 in court have been unsuccessful, the plaintiffs are hopeful that the Eastern District Court will be influenced by a recent decision of a

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132. See Laurie Stewart, *City Sues Governor for School Takeover*, LEGAL INTELLIGENCER, Feb. 28, 2002, at 1.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

Commonwealth Court, holding that a takeover of Harrisburg schools was unconstitutional because it relied on a law that qualified as “special legislation,” legislation prohibited under the Pennsylvania Constitution.<sup>140</sup>

#### IV. CONCLUSION

Public employees, like educators, have not always had the same ability to bargain collectively that their counterparts in the private-sector have enjoyed. Nevertheless, they have enjoyed the right to bargain as a unit, at least in Pennsylvania, since the enactment of the Public Employees Relations Act in 1970. However, the inclusion of a right to strike in that legislation has led to a great deal of confusion, litigation, and molding of the doctrine. Teachers, perhaps, have been historically most likely to utilize a strike as a bargaining tool in the face of stalled contract negotiations. As a result, both the judiciary and the legislature have worked diligently to create a middle ground that allows education employees to strike as a last resort provided that the work stoppage does not create a “clear and present danger” to the public good. Legislation such as Act 88 has provided some framework for the right to strike in Pennsylvania. It seems that the legislature, however, took a giant leap in enacting Act 46, a piece of legislation that hampers the collective bargaining rights of education workers, but only those in Philadelphia.

Perhaps if the General Assembly had decided to narrow bargaining rights for all public workers across the board, its behavior would have been more palatable. Even if it had come forth with a rational basis to narrow the bargaining ability of educational employees, its behavior may have been understandable.

Instead, Act 46, quite purposefully it seems, applies only to Philadelphia educators, and only they are subject to lose ground under the legislation. It appears that the legislature singled out Philadelphia (as the result of the behavior of the then superintendent) and decided to punish educational professionals for the sad state of Philadelphia public schools.

Surely, Philadelphia teachers cannot be expected to willingly submit to the impositions of Act 46. As stated above, there is litigation pending to have the Act overturned on the grounds that it is unconstitutional. The future of the Philadelphia schools as well as that of Act 46 as written is murky. Possibly, a decision from the court will help clarify how far the legislature can go before being reigned in.

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140. *See Harrisburg Sch. Dist. v. Zogby*, 789 A.2d 797 (Pa. Commw. Ct. 2002).