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# Moving Forward While Looking Back: How Can VAM Lawsuits Guide Teacher Evaluation Policy in the Age of ESSA?

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**Abstract:** The Every Student Succeeds Act (ESSA) appears to offer states and districts discretion to develop teacher evaluation policies, including those that may use Value Added Models (VAMs). While scholars are discussing this flexibility, limited attention has been paid to the potential role of the law in connection with the future use of VAMs in evaluation policy. While VAMs may be declining in use, several states require or permit them, making the continued assessment relevant. Moreover, given that VAMs were at the center of numerous high-profile lawsuits, assessing litigation outcomes in the context of ESSA is a useful exercise, particularly for jurisdictions that may use (or contemplate their use) of VAMs. Toward this end, this paper applies legal research methods and a law and policy framework to review lawsuits concerning VAMs to distill key principles for state and local policymakers.

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**Avanzando mientras mira hacia atrás: ¿Cómo pueden las demandas VAM guiar la política de evaluación de maestros en la era de ESSA?**

**Resumen:** La Every Student Succeeds Act (ESSA, por sus siglas en inglés) parece ofrecer a los estados y distritos discreción para desarrollar políticas de evaluación docente, incluidas las que pueden usar modelos de valor agregado (VAM). Mientras los académicos discuten esta flexibilidad, se ha prestado atención limitada al papel potencial de la ley en relación con el uso futuro de VAM en la política de evaluación. Si bien los VAM pueden estar disminuyendo en uso, varios estados los requieren o permiten, lo que hace que la evaluación continua sea relevante. Además, dado que los VAM estaban en el centro de numerosas demandas de alto perfil, evaluar los resultados de litigios en el contexto de ESSA es un ejercicio útil, particularmente para las jurisdicciones que pueden usar (o contemplar su uso) de VAM. Con este fin, este documento aplica métodos de investigación legal y un marco de leyes y políticas para revisar demandas relacionadas con VAM para destilar principios clave para los responsables de políticas estatales y locales.
**Palabras clave:** derecho; evaluación docente; accountability; modelos de valor agregado

**Avançando enquanto olha para trás: Como os processos do VAM podem orientar as políticas de avaliação de professores na era da ESSA**

**Resumo:** A Every Student Succeeds Act (ESSA) parece oferecer discrição aos estados e distritos para desenvolver políticas de avaliação de professores, incluindo aquelas que podem usar modelos de valor agregado (VAMs). Enquanto os estudiosos discutem essa flexibilidade, pouca atenção foi dada ao possível papel da lei em conexão com o uso futuro de VAMs na política de avaliação. Embora os VAMs possam estar em declínio, vários estados os exigem ou permitem, tornando relevante a avaliação contínua. Além disso, como os VAMs estavam no centro de vários processos de alto nível, avaliar resultados de litígios no contexto da ESSA é um exercício útil, principalmente para jurisdições que podem usar (ou considerar seu uso) de VAMs. Para esse fim, este artigo aplica métodos legais de pesquisa e uma estrutura de leis e políticas para revisar ações judiciais relativas a VAMs para destilar princípios-chave para formuladores de políticas estaduais e locais.
**Palavras-chave:** Direito; avaliação de professores; accountability; modelos de valor agregado

## Introduction

In 2015, Congress reauthorized the Elementary and Secondary Education Act (ESEA, 1965) through the Every Student Succeeds Act (ESSA, 2015). ESSA appears to loosen federal control over education policy, including teacher evaluation (Close, Amrein-Beardsley, & Collins, 2018), representing a shift away from federal control under the No Child Left Behind Act (NCLB, 2001) and the Race to the Top which (passed as part of the American Recovery and Reinvestment Act) (RttT, 2009), which effectively required the use of Value Added Models (VAMs). In contrast, ESSA grants states flexibility regarding the use (or non-use) of student test scores through VAMs to evaluate teachers and make adverse employment decisions (Paige, Amrein-Beardsley, & Close, 2019). VAMs are complicated statistical metrics used to estimate the contributions of teachers to student test growth (Close et al., 2018). Since ESSA's passage, scholars and policymakers are considering evaluation methods in a context of decreased federal oversight (See, e.g., Weiss & McGuinn, 2016). This has centered on such things as the role of principals (Donaldson & Woulfin, 2018), observation techniques (Cohen & Goldhaber, 2016), among others. But for some exceptions (See, e.g., (Paige, Amrein-Beardsley, & Close, 2019; Close et al., 2018) underexplored are lessons from litigation concerning the use of VAMs that may still apply even under ESSA.

This is a striking omission. While VAMs may be declining,[1] their use in high-stakes evaluation does, in fact, continue. Numerous states still require their use (29%) and many others allow their use, subject to local discretion (Close et al., 2019). It is unknown precisely to what extent local school districts continue to use these controversial models where they may do so. However, given the enormous amount of resources and emphasis placed on VAMs in the last decade, it is reasonable to believe that many school districts and officials may entertain their continued use. Thus, it is worthwhile to continue to assess how VAMs impact efforts to improve teacher quality, especially for jurisdictions that may employ them.

The law can provide considerable guidance on this point. The law frames the reach and limits of educational policy choices available to administrators, policymakers, and educators (Mead, 2009). Understanding the law reduces legal liability and improves practice (Schimmel & Militello, 2007), something scholars refer to as "legal literacy" (Decker, Ober, & Schimmel, 2018). Educators grounded in settled legal principles help protect the constitutional and statutory rights of teachers, students, parents. In the case of VAMs, their use has been at the center of numerous high-profile legal disputes between teachers, administrators, and departments of education.

Accordingly, this paper investigates the following question: In what ways, if any, can VAM related litigation inform education stakeholders' decisions and development of evaluation policy in the context of ESSA which appears to give them considerable discretion to use, or not use, VAMs? This paper proceeds as follows. First, it outlines its methods and conceptual framework. Second, it assesses the various federal and state cases that challenged VAMs and resulted in published decisions.[2] Third, the paper places the results of those cases within a law and policy conceptual framework to produce guidance and consideration that may be helpful going forward.

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[1] That may be a reasonable inference because the federal requirements under Race to the Top that required their use are no longer present and many states have removed such requirements from their evaluation statutes. However, to this author's knowledge, no large scale assessment of the application of VAMs has been done since the passage of ESSA that would capture the number of school districts that continue to use VAMs under their discretion.

[2] Numerous cases emerged in the courts involving challenges to VAMs, and not all were adjudicated. Various reasons could explain this, such as settlement before a trial or ruling.

This paper adds to the discussion of the law and VAMs, and teacher evaluation policy, in several ways. To date, the literature has limited, if any, attention extending the legal issues associated with VAMs within ESSA. In addition, this paper highlights at least one legal issue that has remained unaddressed in the limited "VAM-law literature": complications arising when proprietary interests of private companies conflict with the procedural due process rights of teachers. This reflects one consequence of increased private interests in public education, a subject robustly discussed in other contexts (See, e.g., Mead & Eckes, 2018). The paper also extends a law and policy framework (Mead, 2009) to a particular area of educational policy, teacher evaluation, demonstrating its application and potential for application in other substantive law and policy areas. Based on this framework and case assessment, a series of considerations is generated for policymakers contemplating or currently using VAMs under their discretion from ESSA.

## Methods and Conceptual Framework

This paper employs legal research methods to assess reported federal and state decisions where VAMs were challenged. Legal research employs mixed methods, and is its own unique process. Russo (2015) characterizes this "as a form of historical-legal research that is neither qualitative nor quantitative" (Russo, 2015, p. 6). Legal inquiry involves examination of primary sources in the form of cases, statutes, or regulations – all sources of law. Assessment of primary sources allows for researchers to examine court or legislative reasoning in reaching a particular outcome (Mead & Lewis, 2016). Secondary sources can also be considered and these include prior scholarship, such as law reviews or treatises (Mead & Lewis, 2016). These provide context and reflect extant research.

Legal scholarship employs "finding tools" (Jacobstein, Mersky, & Dunn, 1998, pp. 10-11; Leal et al., 1996) to mine sources. Such tools are available using databases, such as Westlaw and Lexis (Mead & Lewis, 2016), which are similar to databases social scientists use to access relevant research (e.g., ProQuest). Sources can be identified and coded based on legal theories, fact patterns, or results. In this project, both Westlaw and Lexis were combed to ensure inclusion of all decided cases involving VAMs as well as secondary sources, such as law reviews.

Legal research plays a vital role in disentangling the complicated relationship between law and educational policy (Mead, 2009). That close attention should be paid to this relationship makes sense when we consider that the roots of public education begin with the seeds of the law. Indeed, public school systems exist because of state statutes and court decisions that have shaped major educational policy issues. As but one example, the Supreme Court decision of *Parents Involved v. Seattle Schools* (2007) has a close relationship to educational policies that attempt to achieve diversity in public schools. Of course, there are others resulting in lasting scholarly debate and policy consequence, notably *Brown v. Board of Education* (1954).

Mead's conceptual model (2009) frames issues of law and policy and can provide guidance for education decisionmakers. Education law[3] and educational policy are distinct, but related. The law bounds practice and policy. It sets limits, for example, about the extent to which a policy or practice might be considered "legal" and, therefore, permissible (Mead, 2009, p. 287) or prohibited. The relationship between law and policy can be filtered through a series of questions (Mead, 2009), an exercise that can prove particularly useful for educational decision-makers. These are: (1) "must we?" enact this policy because the law requires it, or (2) "may we?" enact this policy because the law

[3] Law is defined to include laws made by legislatures, courts, and state and local regulatory agencies. In this paper, the focus is on law created through cases, or judge-made law.

permits us to, and, if so, (3) "should we?" enact this policy. "Must we?" issues require action of school officials, leaving no discretion. For instance, school administrators *must* offer a "free appropriate public education" to all students with disabilities under the Individuals with Disabilities Education Act (IDEA) (2004).

But affirmatively answered "may we" questions lead to important "should we" questions. These issues necessarily elevate a policymakers' discretion and, consequently, require a considered approach to understand consequences of a policy. Put another way, they demand a high-level of capacity, expertise, and attention to local needs. For example, a state legislature *may* pass laws permitting the use of vouchers for private education that ultimately are applied to tuition for religious schools, according the Supreme Court (*Zelman v. Simmons-Harris*, 2002), but that legislature ought to consider the consequences of that decision in policy terms. For example, would enacting a voucher program dilute resources from existing public schools and, therefore, require more resources from the legislature? Likewise, at the more local level, a school board *may* require a dress code for students attending public schools without running afoul of the First Amendment. But it should consider the complicated question as to whether dress codes actually achieve the desired result (e.g., reduced violence, improved learning environment) (Mahling, 1996) and, even so, would that result be replicated in their local context.

Continued use of VAMs must be viewed with particular care to the "may we" and "should we?" levels of analyses. Because most state-defendants succeeded in dismissing challenges to the use of VAMs, as noted below, at first blush it appears their continued use might enjoy some degree of protection from legal liability (i.e., they *may* be used). However, the use of VAMs is cabined by certain court decisions, especially those few that favored the plaintiffs. It is not unfettered. Results from these cases must play an important role when, and if, educational stakeholders are considering if they should, in fact, adopt VAMs for evaluative purposes. Toward this end, the project collects the published decisions in which VAMs were in teacher evaluation for purposes of making high-stakes decisions. Cases were coded based on a number of variables: the jurisdiction of the court (federal or state); the legal theories advanced by the plaintiffs (e.g., procedural due process, state law claim); and the court's ruling on the legal theory (either in favor of state-defendants or plaintiff).

## Data: VAM Cases

This section presents the reported cases where plaintiff-teachers or unions objected to the use of value added models for evaluation and/or high-stakes employment decisions. Importantly, it does not include cases where courts did not produce a reported decision. Courts rendered decisions in both federal and state jurisdictions, at the lower and appellate levels, and along various theories.[4] These cases are briefly discussed below and summarized in Table 1.

### Federal Cases

**Equal protection claims.** In total, five (5) decisions involved claims that sounded in equal protection (*Cook v. Stewart,*[5] 2014; *Cook v. Bennett,* 2015; *Houston Federation v. Houston Independent School District*, 2017; *Trout v. Knox County Board of Education*, 2015; *Wagner v. Haslam*, 2016) in federal courts. No plaintiff-teacher prevailed on their equal protection claim. An claim sounding in the Equal

[4] By way of background, and at the risk of simplifying, courts in the United States exist in both the federal and state level. At each of these, there are generally three levels of courts: trial, appellate level, and a Supreme Court (the highest appellate level).

[5] *Cook v. Bennett* (2015) and *Cook v. Stewart* (2014) are two separate decisions arising under the same set of facts. The former is an appeal of the latter.

Protection Clause, alleges that the law in question intentionally discriminated against them because of a persons' membership in a protected class, like race (*Brown v. Board of Education*, 1954) or that they are intentionally being treated differently from other similarly situated persons (*Gibson v. Texas Department of Insurance,* 2012). As a practical matter, a court determination rests heavily on the standard the court choices to address its analysis. In that regard, there are generally three levels of scrutiny a court will review a law if challenged under equal protection grounds: rational basis, intermediate scrutiny, or strict scrutiny.

The level of scrutiny applied depends on the particular classification of the person or group challenging a law. If the plaintiffs are a "protected class," that law must pass a test of strict scrutiny. However, if a protected class is not identified, then the court applies a much lower standard of review, the rational basis test. Most laws survive constitutional scrutiny under a rational basis test. Importantly, under a rational basis test, a state law may survive scrutiny even if a court determines the law may not be a wise policy choice (*Cook v. Bennett*, 2015, p. 1301).

All five claims asserting equal protection claims were assessed under the low bar of a rational basis test. *Cook v. Bennett* (2015) is representative. In *Cook* (2015), plaintiffs contested the use of VAM scores to evaluate a group of teachers who did not teach the students in the particular subject used to produce the VAM score (e.g., an art teacher being evaluated based on a student's progress on math standardized tests). In this case, teachers of non-tested subjects suggested that it was irrational to apply VAMs to them. The court's analysis assessed the VAMs under a rational basis review, i.e., whether there was a rational relationship between the legitimate state interest sought (improved student performance) and the means chosen to pursue that interest by the state (an evaluation system that used VAM scores to evaluate teachers, including those that may not have taught the VAM-tested subjects). The *Cook* (2015) court concluded that a rational relationship existed and, therefore, there was no Equal Protection Clause violation. Wrote the court: state officials could have "reasonably believed that a teacher can improve student performance through his or her presence in a school." (*Cook,* 2015, p. 1301). The lower district court that heard the matter first also held that the use of VAMs in this manner did not violated the Equal Protection Clause (*Cook,* 2014).

Other cases concerning challenges based on equal protection grounds similarly were rejected under this rational basis review (See, e.g., *Houston Federation v. Houston Independent School District,* 2017; *Leff v. Clark County School District,* 2016; *Trout v. Knox*, 2016; *Wagner v. Haslam,* 2015). In *Houston* (2017), the court found that, although the validity of VAMs was questionable, their use could be construed as a rational means to rate teachers (*Houston*, 2017, pp. 1181-1182.). The *Houston* court cited the logic of both *Cook* decisions (2014, 2015), *Trout* (2016), and *Wagner* (2015) cases, all of which reached similar conclusions on the issue.

To be sure, courts were sympathetic to plaintiffs' complaints regarding fairness, especially as it relates to evaluating a teacher's performance based on student test scores in subjects in which they did not teach. For instance, the district court in *Wagner* commented that "it seems very unfair" to continue to utilize VAMs (2015, p. 64). Likewise, in *Cook*, the district court judge concluded that "the unfairness of the evaluation system as implemented is not lost on this Court," despite ruling that it was not a violation of the Equal Protection Clause (2014, p. 1215).

**Substantive due process.** Five (5) reported cases raised objections to the use of VAMs on federal constitutional substantive due process grounds. The Fifth and Fourteenth Amendments protect against government deprivation of "life, liberty, and property" without due process of law (U.S. Constitution, art. V and XIV). Like equal protection cases, a court must determine which test to apply when assessing the constitutionality of a claim under the Substantive Due Process Clause. Some rights are considered *fundamental* and, therefore, courts will demand that the state's action pass

a "strict scrutiny" test, discussed above. Fundamental rights include things such as: the right to vote, the right to marry (See, e.g., *Obergefell v. Hodges*, 2015). Strict scrutiny is a high bar for the government to meet.

However, if something is not a fundamental right, but still a protected right, (e.g., the right to a license), the state's action need only satisfy a rational basis test. Essentially the same rational basis test discussed above in the context of an equal protection analysis applies to non-fundamental right claims under the substantive due process (See, e.g., *Trout v. Knox County Board of Education,* 2015, p. 502). It is important to note that if a court assesses a claim under rational basis review, it will likely rule in favor of the government, as it did in all the substantive due process claims here. As the *Wagner* (2015) court explained:

> "[W]here rational basis applies….the U.S. Constitution allows state legislators and policymakers to make both excellent decisions and terrible decisions, provided that the decisions are based on some conceivable modicum of rationality…" (693).

Plaintiffs in VAM cases were unsuccessful in their federal substantive due process claims and each court applied rational basis to reach its conclusion. In *Houston Federation of Teachers v. Houston Independent School District* (2017), plaintiffs alleged that the linking of a teacher's evaluation to a VAM was not rational because of the statistical infirmities of VAMs (e.g., potential bias or validity concerns) (*Houston*, 2017, p. 1180), a common complaint found in other cases. The *Houston* court, echoing other courts on this very issue (e.g., *Cook v. Stewart,* 2015; *Wagner v. Haslam,* 2015), concluded that the use of VAMs was rationally related to the interest of improving student achievement (p. 1181). Here again, too, it noted that the low bar of rational basis was critical in finding for the defendants. Wrote the court: "[T]he loose constitutional standard of rationality allows governments to use blunt tools which may produce only marginal results."(*Houston,* 2017, p. 1181).

**Procedural due process.** Three (3) decisions involved claims of violation of the Fourteenth Amendment's procedural due process requirements. Of the three, plaintiffs succeeded in two (2), *Houston,* 2017) and *Leff* (2016). However, *Leff* (2016) involved tangentially the issue of VAMs and its treatment here is limited.[6] By way of background, procedural due process requires that the government must provide "notice" and a meaningful "hearing" (*Mathews v. Eldridge*, 1976, p. 333) before it deprives an individual of a protected right or liberty. In the context of property rights, the essence of procedural due process is to prevent mistaken or unfair deprivation (*Fuentes v. Shevin*, 1972). In the context of terminating a tenured teacher, for instance, that teacher is typically provided a notice of termination and a hearing before a school board to contest that decisions (*Cleveland v. Loudermill*, 1985).

In *Trout v. Knox Board of Education,* (2016), the plaintiff-teachers did not succeed on a procedural due process claim. By way of background, these plaintiffs received a poor evaluation and were denied a bonus based on that evaluation, which employed VAMs. The *Trout* court dismissed the claims because they could not demonstrate a *recognized* property interest in either an evaluation or bonus, thus, they were not entitled to any procedural protections as a constitutional matter. In other words, teachers and others may have not have a property right recognized *under the Constitution* as it relates to bonuses, or an evaluation.

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[6] The issue in *Leff* was whether the state could effectively take away tenure of teachers if those teachers received poor evaluations under an evaluation system that relied heavily on VAMs. Thus, the issue related more to how a state could treat or manage tenure status of teachers.

However, *Houston* (2017) represents an important decision because plaintiffs succeeded on their procedural due process claim. Here, under Texas law, teachers facing an adverse employment determination, such as termination, have a statutory right to a hearing to contest the underlying basis for that termination (Texas Education Code, §§ 21-255-21.256, 2015). As part of this process and to prepare for a hearing, the Houston teachers sought access to the algorithms employed to calculate VAM scores to verify the accuracy of those scores. However, the company that designed the algorithms objected and, consequently, teachers did not gain access to the data. The court found that without the ability to verify the VAM scores, teachers were denied procedural due process (*Houston*, 2017, p. 1177).

**State Claims**

**State constitution.** Three (3) cases raised claims arising under respective state constitutions. All three cases resulted in dismissal in favor of the defendants and no state constitutional objections to the use of value added models were upheld by the courts on grounds they violated the state constitution. These varied in terms of what provision of a state constitution formed the grounds of the case.

For example, in *Louisiana Federation v. State* (2015), the plaintiffs argued that the legislation calling for the use of value added measures violated that state's requirement that bills be related to one particular topic (the "single object requirement"). The bill that created the law had numerous components beyond requiring new performance provisions, including changing salary schedules, among others. In essence, the plaintiffs contended that the bill that required the use of value added models contained too many unrelated provisions. The court sided with the state-defendants, however, broadly construing the bill as intending to improve elementary and secondary education and its various provisions related to that object (*Louisiana,* 2015, p. 851).

Similarly, at issue in *Robinson v. Stewart* (2014) was a statute requiring "student learning growth" as measured by student standardized test scores (p. 591) and that the Department of Education (a part of the executive branch) implement this evaluation policy. The plaintiffs alleged that the statute unconstitutionally delegated powers to the executive branch that should otherwise be in the legislative branch. The Florida state court of appeals disagreed. The court noted that the plaintiffs could not demonstrate "beyond a reasonable doubt" (the applicable standard) that the legislature had given "unfettered discretion" to the state executive agency, the Department of Education (*Robinson,* 2014, p. 593). Moreover, the legislature can properly delegate highly technical matters (e.g., the implementation of a detailed evaluation plan) to the Department of Education (*Robinson,* 2014, p. 593).

**State statutes/state law.** Several cases (5) involved theories arising under state law and these include: *Lederman v. King*, 2016 ; *Stapleton v. Skandera*, 2015; *Trout v. Knox*, 2016; *Washington Teachers Association v. District of Columbia Schools*, 2013; *Washington Teachers Association. v. District of Columbia Schools*, 2019). *Lederman* (2016) found in favor of the plaintiffs and the cases of *Washington Teachers Association,* (2013, 2019) resulted in a partial ruling in favor of the plaintiffs.

Plaintiffs unsuccessfully challenged the authority of state agencies to enact VAM-based evaluation policies. In *Stapleton v. Skandera* (2015) the issue presented was whether rules developed by the state secretary of education implementing teacher evaluation (which included the use of value added models) were permissible under state law. In that case, the New Mexico secretary of education developed rules for teacher evaluation that included the use of VAMs. Plaintiffs contended that the secretary had shifted the power of public policy making to her executive office and away from the legislature. The court disagreed with plaintiffs and noted that the legislative direction to the secretary was to create evaluation regulations that were "uniform statewide" and the

"particulars" were up to the secretary (*Skandera,* 2015, p. 1195). In *Trout* (2016), the federal court declined to exercise jurisdiction over the state law claim and those were dismissed without prejudice, thus, no substantive ruling can be analyzed.

Two (2) cases arising out of Washington, D.C. presented issues of collective bargaining rights in relation to the use of VAMs.[7] In *Washington* (2013), the issue presented was whether a lower court had jurisdiction to stop (or stay) a grievance arbitration in which the union challenged the school district's final evaluation ratings based on VAM scores. In this case, the court of appeals ruled in favor of the district and also found that an arbitrator cannot rescind the final judgment or rating (*Washington,* 2013, p. 458). However, and although not the central issue before the court, the ruling did determine that a grievance contesting whether the school district followed evaluation procedures could proceed.

In a later case in Washington D.C. Public Schools, the issue presented was whether a court or an arbitrator has the initial responsibility to determine whether a "class action grievance" is arbitrable (i.e., that the parties agreed that disputes on the matter would be resolved by an arbitrator). Here, the trial court stayed the class action grievance, holding that its "scope was too broad" presumably because it involved numerous specific issues with over 180 teachers involved (*Washington*, 2019, p. 1144). While the court of appeals agreed with the lower court it dismissed *without prejudice*. For practical purposes, this meant that the union could seek arbitration so long as the scope of its complaint was narrowed. Thus, while the teachers technically lost the case, on the issue at hand, the court did provide an opening for the union to seek arbitration under certain conditions.

Finally, in the case of *Lederman v. King,* (2016), a teacher challenged her evaluation ratings based on VAM on the grounds that they offended a state statute that prohibited arbitrary and capricious decision by state actors. In this case, the teacher submitted numerous affidavits as expert testimony. The court concluded that this demonstrated the use of VAMs was, in fact, arbitrary and irrational. For example, experts testified that VAM rating system was not peer reviewed, and contradicted parents' opinions of the teacher and principal, among others (*Lederman,* 2016, p. 893-895). In contrast, the state did not refute these points, leaving the court to conclude that the teacher's growth score was "indisputably arbitrary and capricious" (*Lederman*, 2016, p. 898).

Table 1
*Reported VAM Decisions, Legal Theories and Outcomes*

| Federal Cases | Theory & Outcome (Plaintiff-Teacher = $\boldsymbol{\pi}$) (Defendant-State = Δ) |
|---|---|
| *Cook v. Bennett* (2015) | Substantive Due Process (Δ), Equal Protection (Δ) |
| *Cook v. Stewart* (2014) | Substantive Due Process (Δ), Equal Protection (Δ) |
| *Wagner v. Haslam* (2015) | Substantive Due Process (Δ), Equal Protection (Δ) |
| *Leff v. Clark County School District* (2016) | Procedural Due Process ($\boldsymbol{\pi}$), Contracts Clause (Δ) |
| *Trout v. Knox* (2016) | Substantive Due Process (Δ), Procedural Due Process (Δ), Equal Protection (Δ). |
| *Houston Federation v. Houston School District* (2017) | Substantive Due Process (Δ), Procedural Due Process ($\boldsymbol{\pi}$), Equal Protection (Δ) |

[7] This is included as a state statute case because collective bargaining rights and laws arise as a matter of state statute and, for purposes of this analysis, the District of Columbia is presented as a state in the union.

Table 1 cont.
*Reported VAM Decisions, Legal Theories and Outcomes*

| State cases | |
|---|---|
| *Washington Teachers Association v. District of Columbia* (2013) | District of Columbia statutes governing arbitration (Δ). |
| *Louisiana Federation v. State* (2014) | State constitution (Δ) |
| *Robinson v. Stewart* (2015) | State constitution (Δ) |
| *Stapleton v. Skandera* (2015) | State statute (Δ) |
| *Lederman v. King* (2016) | State statute (***π***) |
| *Trout v. Knox* (2016) | State constitution (Δ); Breach of contract (Δ); (however, state claims dismissed *without* prejudice by federal court) |
| *Washington Teachers Association v. District of Columbia* (2019) | District of Columbia statute governing arbitration (Δ). |

## Discussion and Analysis

This section applies Mead's framework to discuss the current and potential the use of VAMs in light of the decided cases, noted above.

### Applying Law And Policy Framework

**Answering the "May We?" question.** Based on the cases noted here, states or local school districts *may* use VAMs as a means to evaluate and make important decisions regarding teacher employment (some must, too, as a matter of state law), subject to some parameters. This section discusses those parameters. As a preliminary matter, the use of VAMs in high-stakes employment decisions has a low risk of running afoul of the Fourteenth Amendment's Substantive Due Process Clause. Indeed, in all cases that addressed this issue, the courts concluded that use of VAMs bore a rational relationship to improving student achievement, even when teachers were rated based on student VAM scores of students they did not teach. While each case is different, the Substantive Due Process Clause does not appear to pose an obstacle or limitation on a reasonable use of VAMs for high-stakes decision.

The use of VAMs, however, may be bound by procedural due process, depending on the facts of a particular situation. Indeed, one case stands out that qualifies the use of VAMs in high stakes employment, the case of *Houston* (2017). The procedural due process issues in *Houston* (2017) arose when the proprietary rights of the entity that created the VAM conflicted with the teachers' rights to a fair process to contest a proposed termination. To avoid a *Houston* (2017) problem, a school district must be assured that any private entity it engages with to provide VAM ratings will release its proprietary formulas. Given the costs and resources a company likely will have devoted to developing its formula, these assurances are unlikely.

To some extent, and depending on variations of state law, the *Lederman* (2016) case signals some of the boundaries of the use of VAMs, as well. Importantly, in *Lederman* (2016) the court found that the state's use of VAMs violated a state statute that prohibited state actors from making "arbitrary or irrational" decisions. The *Lederman* (2016) court heard testimony, in the form of affidavits, from several scholars and practitioners who highlighted the statistical issues that the plaintiff contended made the use of VAMs irrational. The court found these persuasive, even in the face of competing testimony from state education officials. Thus, the high-stakes use of VAMs may

be limited in instances where state or local officials cannot amount sufficient statistical evidence to rebut expert testimony that raises questions regarding the statistical integrity of VAMs. Indeed, the court noted that plaintiffs' expert testimony contesting the rationality of VAMs was "overwhelming" (*Lederman,* 2016, p. 897).

Likewise, both the Washington, D.C., cases (2013, 2019) signal that unions may have collective bargaining provisions that could complicate the use of VAMs. In those cases, both affirmed the fact that plaintiffs could contend that the procedures associated with evaluation teachers were not followed. For example, if a bargaining agreement supplied for a specific amount of observations, or other evaluative means, and an administrator failed to follow those, the evaluation process could be contested. This may not challenge the VAM rating directly, of course. But it could be used to challenge or frustrate a district's use of an evaluation policy, something that unions will do if they feel a process is unfair (Paige, 2013).

**Answering the "Should We?" question.** Having outlined the parameters of the application of VAMs above, and concluding that districts may use them for high-stakes employment decisions subject to some exceptions highlighted in the cases, Mead's framework guides us next to examining the issue with the question: should they be used? These are inherently policy judgments and, as such, raise a host of considerations that must be addressed by education decisionmakers. In the case of the use of VAMs under ESSA, many of these may be made at the local level. This section begins that process by outlining some of the practical considerations that must be assessed in their decision-making policy. The sections makes no judgment as to the statistical merits of the use of VAMs, but cabins its focus to the salient areas that are likely to be addressed in this analysis. It poses a series of issues and questions that are raised and ought to be considered.

Education policymakers at whatever level must consider capacity and resource issues that are highlighted under the cases above. The *Houston* (2016) case, for example, suggests that to avoid viable procedural due process complaints from teachers, a district must have access and control over any proprietary information used by a third-party entity to calculate VAMs. This may not be a possibility and, if so, would likely come at a considerable cost. In the alternative, a district would have to have the capacity to devise and apply these complex formulas. The resources and capacity required to do this are considerable. The development and application of VAMs requires a high-level of statistical expertise not usually present in school districts or educational leaders and that is typically quite expensive.

Similarly, education stakeholders contemplating continued use of VAMs (and those where VAMs are mandated) must consider legal costs that would undoubtedly be incurred. The *Houston* case is representative in this regard. In that case, the district was required to cover the costs of the plaintiffs' legal fees (as well as their own) (AFT, 2017). This *Lederman* (2016) case suggests that a while a district could potentially have defeated a challenge to their use of VAMs with better evidence, districts and policymakers should know that the costs of defending a suit in a "battle of the experts" could be quite high.

In addition, there may be a multitude of various state-specific statutes or laws that exist that could expose a district to a lawsuit. For example, the teacher-plaintiff in *Lederman* (2016) brought a claim under a state statute that prohibits school officials from taking "arbitrary or capricious" actions. The *Houston* (2017) case also cited a state statute that requires a teacher have access to the underlying information that might lead to a potential discharge. It is possible that analogous statutes in other states exist and might give rise to similar claims. Moreover, the *Houston* (2016) decision

occurred in federal court and, therefore, elements of that case may be persuasive authority for federal courts that cover other jurisdictions.[8]

The potential unintended consequences of using VAMs at the local level must be considered. Quite apart from the debate concerning the statistical merits of VAMs, their use has raised the ire of many educators and their unions. The number of lawsuits and the extent to which teachers challenged their use on various legal grounds suggests that they have contributed to a certain level of acrimony between school officials and their staff. While this author recognizes that some disagreement over policy is inevitable, it is does appear that the use of VAMs has engendered a considerable degree of dispute (with teachers frequently citing fairness as a motivating factor) that is quite extraordinary. Indeed, while courts have been reluctant to strike down the use of VAMs on "fairness" grounds as a constitutional matter, they have not refrained from criticizing their use as a practical matter. These concerns must be considered, and are made more relevant in light of calls for more collaborative approaches to evaluation, especially in high-stakes decisions (Paige, 2013).

Finally, the consequences of the use of VAMs as they relate to improving teacher quality are not established. To be sure, some scholars have presented VAMs as something of a panacea, but those claims have been called into question (Rothstein, 2016). This much is certain: there is no shortage of debate and dispute of the efficacy of VAMs. Moreover, it is not generally disputed that VAMs do not inform teachers as to what specific practices are working in improving student achievement, thus they do little to unearth the "black box" of good teaching methods. A conversation about the statistical debate surrounding VAM's efficacy is beyond the scope of this paper. However, local leaders cannot avoid the fact that this contentious debate does exist, no matter which side they may come down on.

## Conclusion

ESSA appears to give many state and local policymakers considerable discretion over evaluation policy, including as it relates to any continued use of VAMs. While their use appears to have declined, they are still required by some states and the freedom of ESSA permits some local districts to continue their use. Court decisions on these matters have set certain parameters around their use. In effect, they answer the law and policy question posed by Mead as to "may we?" and, adding an additional question: if we may, under what conditions? But the "may we" analysis under the law also raises the significant question of "should we?" And, as noted here, the decided cases – even those where the state was successful – introduce questions that must be considered. This paper does not represent it has the answers to those questions. But, in keeping with the spirit of the discretion now thrust on state and local leaders through ESSA (2015), these questions (and perhaps many more) must be assessed preferably before taking action on high-stakes matters.

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[8] The federal court system has numerous component parts that cover different regions of the country. A federal district court decision like *Houston* would not bind a federal court in California, for example, because they interpret the law as it relates to their jurisdiction. However, such decisions would be persuasive authority, meaning federal courts would consider and give some weight to a decision in a sister district court.

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