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Has Teacher Tenure's Time Passed?

By Charles J. Russo, J.D., Ed.D.

The *Vergara* decision made national headlines and sparked emotional debates about tenure.

A recent trial court order (*Vergara v. State of California* 2014), which Governor Jerry Brown has already appealed (Nagourney 2014), has sent shock waves through the ranks of teachers and their unions because it threatens what is perhaps educators' most cherished prize: tenure.

In *Vergara*, the court invalidated five statutes addressing tenure, procedural safeguards relating to teacher dismissal, and seniority as violating the equal protection clause in the California constitution. The court ruled that the challenged laws “impose a real and appreciable impact on students' fundamental right to equality of education and that they impose a disproportionate burden on poor and minority students” (p. *4).

Whether *Vergara* is about to serve as a bellwether signaling that teacher tenure is an idea whose time has passed or is an aberration in the fight over improving the quality of education for all children remains to be seen. Certainly, though, *Vergara* is the first chapter in a saga that will play itself out in coming years in California and then perhaps beyond.

As an initial matter, it is important to clarify that tenure does not guarantee lifetime employment. Rather, tenure ensures that pursuant to the Fourteenth Amendment, individuals who have earned it cannot be deprived of “life, liberty, or property, without due process of law” (Section 1). Consistent with the Supreme Court's holding in *Cleveland Board of Education v. Loudermill* (1985), educators with tenure are entitled to procedural due process before it can be revoked and their jobs terminated, because they have substantive property rights in their ongoing employment.

History of Tenure

In 1982, the New Jersey Supreme Court acknowledged that in 1909 the state was the first to award tenure to K–12 educators (*Spiewak v. Board of Education of Rutherford* 1982), a practice that developed in higher education during the latter part of the 19th century. Subsequently, most jurisdictions have enacted legislation granting school boards the authority to confer tenure—sometimes referred to as continuing contract status—on teachers and other employees. Some jurisdictions also extend tenure rights to administrators.

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Courts have long upheld the constitutionality of tenure laws, agreeing that those statutes must be applied liberally in favor of educators because their purpose is to afford “protection [for] competent and qualified teachers in the security of their positions” (*Sherwood National Education Association v. Sherwood–Cass R–VIII School District* 2005, pp. 459–60). Moreover, tenure laws are designed to ensure teachers measures of protection from unjust dismissals.

Tenure statutes typically specify that school boards can confer such status on employees only by taking affirmative actions. Consequently, most courts are unwilling to grant tenure by default. Moreover, tenure statutes generally cover only those positions explicitly identified by law and so are inapplicable to supplementary positions, such as coaching.

As noted in *Vergara*, laws usually require teachers to work full-time for statutorily mandated periods, typically three or four

years, before becoming eligible for tenure. Amid questions about educators who serve as substitute teachers, the judiciary has reached mixed results, as most courts are reluctant to permit such short-term service to count as part of probationary periods prior to gaining tenure.

Vergara v. State of California

Before reviewing the facts in *Vergara*, the trial court cited *Brown v. Board of Education, Topeka* (1954) for the proposition that “education is perhaps the most important function of state and local governments,” adding that where a state “has undertaken to provide it, it is a right which must be made available to all on an equal basis” (p. *1, citing *Brown* at p. 493). The court also examined two seminal school finance cases from California, *Serrano v. Priest I* (1971) and *Serrano v. Priest II* (1976) along with *Butt v. State* (1992)—disputes that recognized education as a fundamental right under state law.

The claim challenged five statutes, grouped under three headings: those addressing permanent employment (tenure), dismissal, and last in, first out or seniority.

The court noted that those cases agreed that the state, through local school boards, cannot allow unconstitutional laws or policies to compromise students’ fundamental right to receive equal educational opportunities, regardless of where they live. In other words, the court explained that students in poor districts must be offered educational opportunities that are equal to those available to their peers who reside in communities that are more economically advantaged.

Skipping over the dispute’s detailed pretrial procedural history,

suffice it to say that *Vergara* was filed by the guardians *ad litem*, those representing the interests of minors in litigation, on behalf of nine students who attended public schools in California. The claim challenged five statutes, grouped under three headings: those addressing permanent employment (tenure), dismissal, and last in, first out or seniority.

The plaintiffs in *Vergara* alleged that the tenure laws resulted in “grossly ineffective teachers obtaining and retaining permanent employment . . . disproportionately situated in schools serving predominately low-income and minority students” (p. *2). Relying on equal protection, the plaintiffs charged that those laws “violate [students’] fundamental rights to equality of education by adversely affecting the quality of education they are afforded by the state” (p. *2).

Based in part on the fact that “an expert called by State Defendants testified that 1–3% of teachers in California are grossly ineffective” (*Vergara*, p. *4), coupled with criteria established in *Serrano v. Priest I* and *II* plus *Butt v. State*, the court found that because the situation “shocks the conscience” (p. 84), the plaintiffs proved their claims. The court then briefly reviewed each of the three disputed statutes.

Tenure Statute

The court enjoined the enforcement of the statutory probationary time frame, which requires officials to decide whether to retain teachers by March 15 of their second year of employment. The court was convinced that the relatively short window fails to provide education leaders with sufficient time to adequately rate the performance of teachers. Also, the court commented that defense experts testified that a three-year period would have been more mutually beneficial to teachers and students.

Buttressing its rationale, the court pointed out that “32 states have a

three-year period, and nine states have four or five. California is one of only five outlier states with a period of two years or less. Four states have no tenure system at all” (*Vergara*, p. *5).

Dismissal Statutes

The court observed that when school boards in California seek to dismiss grossly ineffective teachers pursuant to the three challenged statutes, the process takes between 2 and 10 years at costs ranging from \$50,000 to more than \$450,000 because of the large amount of statutory procedural due process to which they are entitled. That fact led the court to question why teachers have greater due process rights than other school employees—a process criticized by both the plaintiffs and the state. In addition, the court cited evidence that teachers do not want grossly ineffective colleagues in classrooms.

Insofar as state officials were unable to explain why teachers are entitled to higher levels of procedural due process protection than other school employees, the court reasoned that the disputed laws violated the right of students to equal protection under the California constitution. Because state officials failed to provide a compelling justification for why grossly ineffective teachers, in particular, should be treated differently from other school employees, the court thus invalidated the statutes as unconstitutional.

Seniority

The court acknowledged that under the disputed laws, in the event that layoffs occurred, teachers were furloughed on the basis of “last in, first out” without regard to their effectiveness, making California 1 of only 10 states in which seniority is the sole criterion for retaining educators.

Remarking that no matter how good junior teachers might be, they were likely to lose their jobs in favor of colleagues who were grossly ineffective based solely on seniority, the



court held that the law violated the rights of students to equal protection because state officials were unable to provide a compelling reason why such a system remained in place.

Rounding out its analysis, the court reiterated that the disputed statutes disproportionately affected poor and minority students because those children were subjected to inadequate educational opportunities by being taught by grossly ineffective teachers. The court went on to conclude that the laws were unconstitutional.

Reflections

A preliminary matter that must be kept in mind in addressing the legal status of tenure is that teachers with tenure have Fourteenth Amendment substantive due process rights protecting their employment. In light of the vested property interests of school employees with tenure, legislatures and courts cannot interfere with their existing contracts unless educators agree to modifications on district-by-district bases—an unlikely proposition because boards would unlikely be willing to place themselves at competitive disadvantages by not offering tenure if it is available in neighboring communities. As such, changes in the near future are most likely to be limited

to individuals who have yet to attain tenure and will be phased in over time.

Discussions about tenure pit two legitimate interests against each other. On the one hand, no one wishes to deny educators their livelihoods. On the other hand, it is equally as untenable to deprive students of equal educational opportunities in the form of being taught by qualified teachers by retaining grossly ineffective educators at the expense of demonstrably more effective, less-seasoned colleagues.

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In weighing the competing interests of students and educators, it is hard not to see the need to reform the way in which tenure is granted, and perhaps revoked, in order to improve school operations and ultimately student learning. More specifically, insofar as schools are designed to educate children rather than simply to provide jobs for adults, particularly those who are not performing well, it makes sound financial sense to ensure both so that children are better served. In

fact, the cost of providing remedial services for students who have been exposed to poorly performing teachers can wreak havoc on school board budgets.

At the same time, it is important to ensure that the majority of teachers who provide exemplary service are recognized as performing well and are not unfairly grouped with their ineffective colleagues. Consequently, as education leaders debate the status of tenure, they may wish to think about the following range of related options. Of course, considering the highly politically charged nature of tenure, coupled with the fact that it is a kind of educational third rail for elected officials, it is unlikely that change will occur either quickly or without a fair amount of conflict.

One possibility is to make tenure more difficult to achieve and easier to lose for cause. To that end, jurisdictions may want to consider extending probationary periods beyond the typical three to four years that it takes to earn tenure in most jurisdictions. Considering the long-term financial investment that school boards make in conferring tenure on teachers, it makes sense for education leaders to take their time to ensure that they are making the correct decisions.

In a closely related option, jurisdictions might wish to consider creating renewable term contracts for five- to seven-year periods rather than granting permanent tenure. In adopting such a novel approach to conferring tenure, legislators and education leaders would have to work closely together to devise clearly defined performance standards and indicators, especially now during a time when accountability is in the forefront.

Needless to say, changes in the status of educator tenure would have to include built-in due process procedures to ensure that teachers and other school employees who are performing well can have reasonable

assurances of keeping their jobs without having to worry unduly about political fallout in their districts.

As reflected in *Vergara*, dismissing tenured teachers who are not performing well can certainly be problematic on many levels. For instance, seeking to dismiss poorly performing teachers, a typically time-consuming process, can drain district financial resources with regard to time spent supervising and documenting their behavior as well as to funds spent on attorney fees. As noted earlier, a related financial cost concerns the effect that poor teachers have on student learning, a harm that may require more immediate attention or that may take years to become evident.

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A closely related dynamic relates to seniority. Because teacher assignments are typically based on seniority within their districts, a topic often subject to collective bargaining in school systems and jurisdictions with unions, making changes in how educators are credited with past experience could have significant repercussions leading to labor strife. The potential for controversy is exacerbated because teacher unions provide a great deal of support for politicians who support their positions and so may be resistant to legislative change.

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Unions are generally opposed to the use of any kind of merit-based system with regard to teacher employment. Yet even in conceding

that challenges can arise in developing accurate, equitable rubrics to measure how effective teachers can positively improve student learning as a form of value added, perhaps some form of performance-based evaluations should be considered in tenure decisions. In the quest to improve student learning, that is a practice that may be worth trying in seeking to identify the best possible teachers.

Conclusion

It remains to be seen whether *Vergara* ushers in a new era for teacher tenure. Yet regardless of the ultimate outcome of *Vergara* on appeal, this case serves as a useful vehicle for school business officials, their boards, and other education leaders to address the future of tenure and to work to reward teachers who can best help prepare students to face the future as productive citizens.

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