



VERGARA V. CALIFORNIA: EDUCATIONAL EQUALITY IN CALIFORNIA

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Photo Credit: Adolfo Guzman-Lopez | KPCC

On August 22, 2016, the California Supreme Court declined to hear an appeal by the plaintiffs of *Vergara v. California*. This marked the end of the line for the nine children who had brought this suit. Four years earlier, Beatriz Vergara, Elizabeth Vergara, Brandon DeBose, Jr., Clara Grace Campbell, Kate Elliott, Herschel Liss, Julia Macias, Daniella Martinez, and Raylene Monterroza sued the State of California, Governor Jerry Brown, State Superintendent of Public Instruction Tom Torkelson, the California Department of Education, and the State Board of Education. The Los Angeles Unified School District, Oakland Unified School District, and Alum Rock School District were initially also named as defendants, but the plaintiffs soon decided to drop them from the lawsuit. The California Teachers Association and the California

Federation of Teachers voluntarily intervened to join the lawsuit as defendants.

The nine *Vergara* plaintiffs, from seven cities in California, challenged five statutes of the California Education Code, claiming those statutes violated the equal protection clause of the California Constitution. They were assisted by Students Matter, a national nonprofit that promotes access to quality public education. The challenged statutes govern how California teachers are granted tenure, the procedures for dismissing teachers, and the procedures for teacher layoffs. The plaintiffs' equal protection claims assert that the challenged statutes lead to the hiring and retention of what they call "grossly ineffective teachers" and that being assigned to a grossly ineffective teacher adversely affects the quality of their education

and causes them significant harm. Moreover, this harm falls disproportionately on minority and low-income students. They argued that this violates their fundamental right to equal education under the California Constitution.

The case went to trial before Judge Rolf M. Treu on January 27, 2104, and the students won their case at trial. That decision, however, was overturned by the Court of Appeals. The students then appealed to the California Supreme Court, but it declined to hear their case. Two justices of the California Supreme Court, however, wrote opinions dissenting from the decision not to take the appeal, arguing that the appeals court erred in its decision to overturn the trial court. This article examines the substantive issues in *Vergara*. It draws on the opinions issued by all three courts: the trial court, the Court of Appeals, and the opinions of two justices of the California Supreme Court dissenting from that court's decision not to hear this case.

The trial court based the judicial framework for its analysis on four important cases. First, it cited the landmark case *Brown v. Board of Education*, decided by the Supreme Court in 1954, for the holding that public education facilities separated by race were inherently unequal, and that students subjected to such conditions were denied the equal protection of the laws under the Fourteenth Amendment to the United States Constitution. It said public education is a right which must be made available to all on equal terms. Next, the trial court cited the two cases of *Serrano v. Priest*, decided by the California Supreme Court in 1971 and 1976, which held education to be a fundamental interest and found the then-existing school finance system to be a violation of the equal protection clause of the California Constitution. Finally, the trial court cited *Butt v. State of California*, decided by the California Supreme Court in 1992, for the holding that the state has responsibility to

ensure that its district-based system of common schools provides basic equality of educational opportunity. The trial court noted that the cases cited focused on the issue of the lack of *equality* of educational opportunity. The trial court applied those constitutional principles to the issue of the *quality* of the educational experience which is at the heart of *Vergara*.

The plaintiffs presented numerous witnesses to testify that effective teachers are vital to a child's education and can have a profound impact on a child. Harvard economist Raj Chetty presented results from a massive study showing that "a single year in a classroom with a grossly ineffective teacher costs students \$1.4 million in lifetime earnings per classroom." Harvard Graduate School's Thomas Kane presented the results of a four-year study showing that students assigned to teachers in the lowest 5th percentile of effectiveness lost between 9.5 and 11 months of learning in comparison to students of an average teacher.

Vergara focused on the quality of the educational experience.

The defendants presented evidence arguing against the centrality of the classroom teacher to students' educational outcomes. David Berliner, an educational psychologist and professor from Arizona State University, testified that in-school effects on children's achievement are generally "overrated" when compared to out-of-school effects. Berliner opined that student test scores were more likely to be influenced

PROBATIONARY PERIOD BEFORE TENURE FOR K-12 TEACHERS

Two Years	Three Years		Four Years	Five Years
California	Arkansas	Nevada	Connecticut	Louisiana
Mississippi	Alabama	New Mexico	Illinois	Michigan
South Carolina	Alaska	Oklahoma	Kentucky	Missouri
Vermont	Arizona	Oregon	New Jersey	New Hampshire
	Colorado	Pennsylvania	New York	Ohio
	Georgia	Rhode Island		Tennessee
	Hawaii	South Dakota		
	Indiana	Texas		
	Iowa	Utah		
	Maine	Virginia		
	Maryland	Washington		
	Massachusetts	West Virginia		
	Minnesota	Wyoming		
	Montana			

Note: No policy for the District of Columbia and North Dakota. Florida, Kansas, North Carolina, and Wisconsin do not offer tenure.

Source: NCTQ 2017 Yearbook: Probationary Period National Results, National Council on Teacher Quality

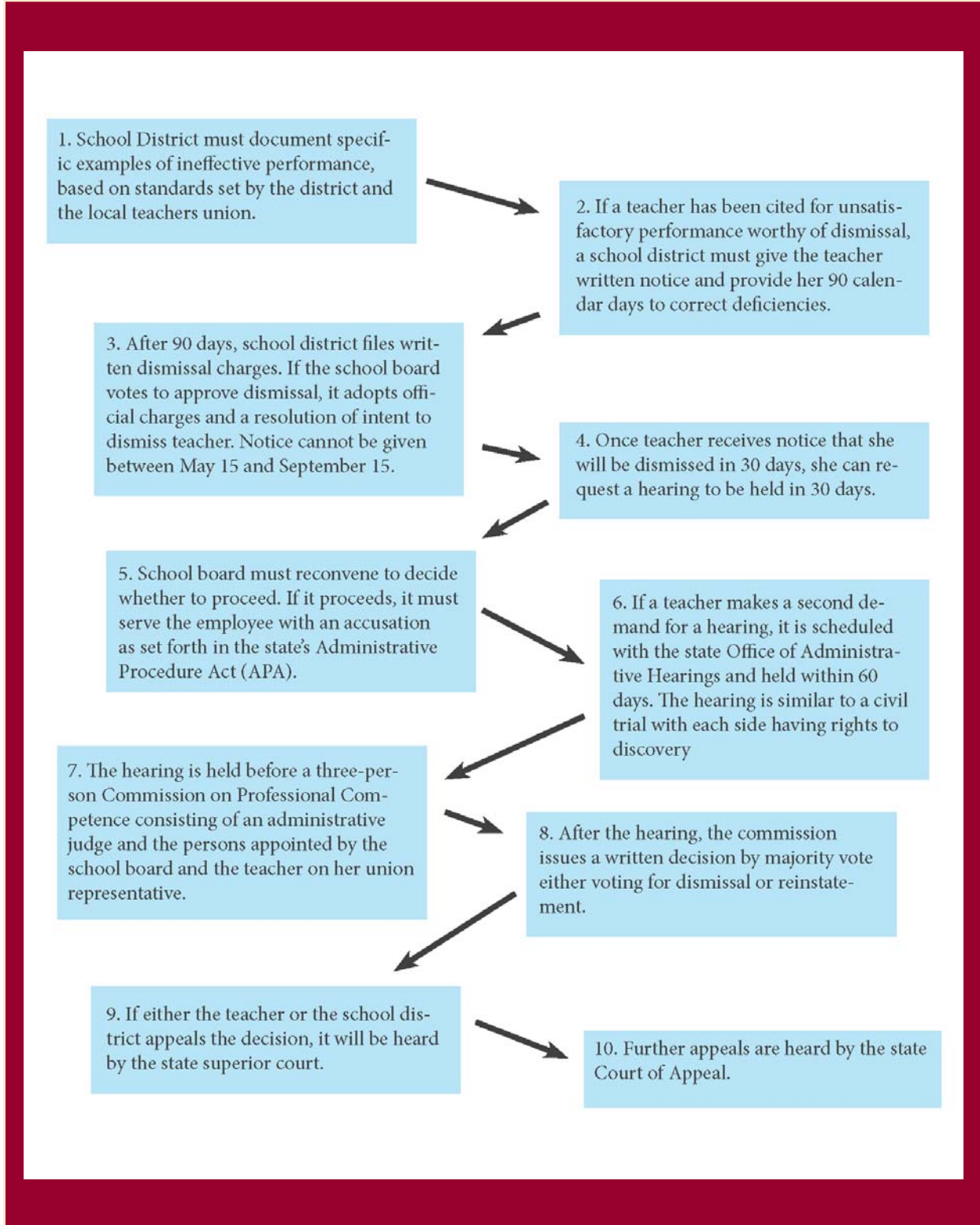
by “peer-group composition of the group tested, including students’ social class and their parents’ educational level.” Berliner estimated that teachers account for approximately “10 percent of variation in aggregate scores, with the remaining 90 percent attributable to other factors.” Thus the defendants argued that student performance is not a direct reflection of teacher performance.

The trial court found the evidence of the specific effect of grossly ineffective teachers on students to be compelling and noted, moreover, that “it shocks the conscience.” It found that the plaintiffs had proven that the challenged statutes “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.” It therefore examined the challenged statutes under a strict scrutiny standard.

The first statute challenged in the case is the Permanent Employment Statute, governing how teachers are granted tenure. For districts with more than 250 students, the statute requires that a probationary teacher becomes a “permanent employee of the district” after finishing “two complete consecutive school years in a position or positions requiring certification.” Further, a district must notify a probationary teacher, on or before March 15 of the teacher’s second year, whether he or she will be reelected (granted tenure) as a permanent employee. The trial court noted that districts must make a recommendation on tenure well in

HOW TEACHERS ARE DISMISSED IN CALIFORNIA



Source: Teacher Layoff and Dismissals in California State Law, The Education Trust-West, April 2011



Student plaintiffs outside the Superior Court of Los Angeles on the opening day of *Vergara v. California*. Photo Credit: Monica Almeida | *The New York Times*

advance of the March 15 notification deadline and thus are forced to make that decision on much less than two years of work.

John Deasy, the superintendent of the Los Angeles Unified School District at that time, testified that there is no way the time provided by the statute is sufficient. Deasy testified that when LAUSD moved from a “passive” tenure system to an “affirmative” one, requiring a more thorough review of the probationary teacher’s teaching abilities, the rate of tenure dropped from being virtually automatic to 50 percent. Mark Douglas, an assistant superintendent in Fullerton School District, stated that most teachers do not hit full stride until three to five years of teaching.

The defense called its own witnesses such as Susan Mills, an assistant superintendent from Riverside Unified School District, who testified that the statutory period was sufficient time to make a the decision on whether to make a teacher a permanent employee.

Lynda Nichols, a former teacher, testified that her status as a permanent employee, provided

job protections that “insulated her from potential retribution by parents and the local school board.” She cited an example of parents opposed to some subjects including Islam and Catholicism in her curriculum. The job security provided by the tenure statute allowed her to broaden the horizons of her students without fear of dismissal. The defense also argued that because a relatively short probationary period forced districts to make reelection decisions quickly, it shortened that time that ineffective teachers remain in the classroom.

The second set of three statutes challenged by the *Vergara* plaintiffs govern how a tenured teacher is dismissed. Justice Liu, in his opinion dissenting from the California Supreme Court’s order declining to hear this case, outlined the arduous process.

“At the time of the trial, the laws required a district to first give a teacher a written statement of specific instances of unsatisfactory behavior, allow the teacher 90 days to improve, and then provide a written statement of charges and intent to dismiss. The teacher then had 30 days to request a hearing, which had to begin

within 60 days of the request. The hearing was conducted by a three-member panel comprised of an administrative law judge, one teacher selected by the district, and one teacher selected by the teacher subject to the hearing. The panel had to issue a written decision, and the decision was subject to judicial review. If the district lost, it had to pay the hearing expenses and the teacher's attorney's fee. If the district won, the parties split the hearing expenses and paid their own attorney's fees."

According to the plaintiffs, the dismissal statutes effectively prevent school administrators from dismissing teachers for poor performance, as they make the process unduly long and costly to the school districts. The trial court found that "it could take anywhere from two to almost ten years and cost \$50,000 to \$450,000 or more to bring these cases to conclusion under the dismissal statutes, and that given these facts, grossly ineffective teachers are being left in the classroom because school officials do not wish to go through the time and expense to investigate and prosecute these cases." The plaintiffs noted that in the past decade, Los Angeles Unified School District (LAUSD) spent \$3.5 million trying to dismiss seven of the district's teachers for poor classroom performance. In addition, this process lasted for an average of five years per teacher, and the average cost of the process to LAUSD was \$500,000 per teacher. These proceedings are rarely initiated for reasons of ineffective teaching. Rather, 80 percent of dismissals within LAUSD are due to illegal conduct, not teaching performance.

The defendants strenuously fought to defend the dismissal statutes. They presented multiple school administrators to testify that, under the dismissal statutory scheme, they are able to remove poorly performing teachers. Robert Fraisse, former superintendent of Laguna Beach Unified School District, testified that he was able to use various methods for resolving

dismissals without following the formal dismissal process. These included informing poorly performing teachers of serious concerns, which often led the teacher to resign; paying compensation in return for a resignation; and working with teachers' associations to counsel suspect teachers to resign. Circumventing the formal dismissal process most frequently results in settlement, retirement, or remediation rather than a costly hearing. Between May 2007 and April 2013, LAUSD negotiated 191 settlements to resolve dismissal cases informally. These negotiations cost the school district a total of \$5 million in payouts, approximately \$26,000 per teacher.

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In addition to the permanent employment and dismissal statutes, the plaintiffs challenged California's Last-In-First-Out (LIFO) statute governing teacher layoffs. The LIFO statute establishes a seniority-based layoff system using seniority as the sole factor to be considered in laying off teachers. The statute mandates that "the services of no permanent employee may be terminated while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render." Permanent teachers must be terminated in "the inverse of the order in which they were employed." There are limited exemptions in cases where the

district has a specific need for a teacher with special training or as necessary to comply with constitutional requirements, but a permanent teacher generally cannot be terminated unless all teachers with less seniority go first.

The plaintiffs’ witnesses testified that the seniority system often results in highly effected teachers being terminated while grossly ineffective teachers keep their jobs. Professor Chetty used data on LAUSD test scores and teacher assignments to calculate that 48 percent of teachers terminated during reductions-in-force were more effective than the average

teacher in the district, while approximately 5 percent of the teachers terminated were above the 95th percentile in terms of effectiveness.

The defense witnesses argued in favor of the LIFO statute. Jesse Rothstein, a professor of economics and public policy at the University of California, Berkeley, testified to the advantages of the seniority-based system when compared to a performance-based one. It is easier and less costly to administer, it allows teachers to focus on teaching rather than test scores, and it is not subject to dubious evaluations of effectiveness. Susan Moore Johnson, from Harvard Graduate

CONSIDERATION OF SENIORITY IN LAYOFF DECISION

No State does not permit seniority to be considered.	Partial Seniority considered among other factors.	Yes State requires seniority as sole factor.	Full Districts have full discretion.
Colorado	Arizona	California	Alabama
Georgia	Florida	Hawaii	Alaska
Illinois	Idaho	Kentucky	Arkansas
Indiana	Maine	Minnesota	Connecticut
Louisiana	Massachusetts	New Jersey	Delaware
Michigan	Missouri	New York	District of Columbia
Nevada	New Hampshire	Oregon	Iowa
Texas	Ohio	West Virginia	Kansas
Utah	Oklahoma	Wisconsin	Maryland
	Pennsylvania		Mississippi
	Rhode Island		Montana
	Tennessee		Nebraska
	Virginia		New Mexico
	Washington		North Carolina
			North Dakota
			South Carolina
			South Dakota
			Vermont
			Wyoming

Source: NCTQ 2017 Yearbook: Layoffs National Results, National Council on Teacher Quality



LAUSD board during a public hearing.

Photo Credit: Antonie Boessenkool | *Los Angeles Daily News*

School of Education, testified that even districts which allow for performance-based layoffs opt to use seniority instead, because ranking for effectiveness is difficult and contentious.

The trial court sided with the plaintiffs and struck down five statutes governing permanent employment, dismissal, and layoffs. The trial court found that the time frame mandated by the Permanent Employment Statute does not provide nearly enough time for an informed decision on granting tenure. “As a result, teachers are being reelected who would not have been had more time been provided for the process.” The trial court found that “both students and teachers are unfairly, unnecessarily, and for no legally cognizable reason (let alone a compelling one), disadvantaged by the current Permanent Employment Statute” and thus found the statute unconstitutional under the equal protection clause of the California Constitution.

The trial court similarly struck down the three statutes governing teacher dismissal. It acknowledged that providing teachers with due

process before dismissal was a legitimate and even compelling interest but concluded that the dismissal statutes worked to give teachers “über due process” that leads to the retention of grossly ineffective teachers. It found “the current system required by the [d]ismissal [s] tatutes to be so complex, time consuming and expensive as to make an effective, efficient yet fair dismissal of a grossly ineffective teacher illusory” and found the dismissal statues unconstitutional under the equal protection clause of the Constitution of California.

The trial court also struck down the LIFO statute. It noted that the statute has no exception or waiver based on teacher effectiveness and thus no way to avoid a lose/lose situation where a competent junior teacher may be removed from a classroom and replaced by a more senior ineffective teacher. “Distilled to its basics, the State Defendants’/Intervenors’ position requires them to defend the proposition that the state has a compelling interest in the de facto separation of students from competent teachers, and a like interest in the de facto

retention of the incompetent ones. The logic of this position is unfathomable and therefore constitutionally unsupportable.” The trial court found the LIFO statute unconstitutional under the equal protection clause of the Constitution of California.

The *Vergara* children’s victory was, however, short-lived. The defendants successfully appealed and had the trial court ruling overturned. Writing for Court of Appeals for the Second District, Judge Boren wrote:

“We reverse the trial court’s decision. Plaintiffs failed to establish that the challenged statutes violate equal protection, primarily because they did not show that the statutes inevitably cause a certain group of students to receive an education inferior to the education received by other students. Although the statutes may lead to the hiring and retention of more ineffective teachers than a hypothetical alternative system would, the statutes do not address the assignment of teachers; instead, administrators—not the statutes—ultimately determine where teachers within a district are assigned to teach. Critically, plaintiffs failed to show that the statutes themselves make any certain group of students more likely to be taught by ineffective teachers than any other group of students.”

The appellate court found that the challenged statutes do not solely cause poor and minority students to receive an unequal, deficient education. It was persuaded by evidence in the trial record demonstrating that staffing decision, including teaching assignments, are made by administrators, and that the process is guided by teacher preference, district policies,

and collective bargaining agreements. “In sum, the evidence presented at trial highlighted likely drawbacks to the current tenure, dismissal, and layoff statutes, but it did not demonstrate a facial constitutional violation. The evidence also revealed deplorable staffing decisions being made by some local administrators that have a deleterious impact on poor and minority students in California’s public schools. The evidence did not show that the challenged statutes inevitably caused this impact.”

The *Vergara* plaintiffs appealed their case to the California Supreme Court, which declined to hear their case. Two justices, however, Liu and Cuellar, dissented from the decision to deny review. Both wrote opinions finding error in the Court of Appeal’s equal protection analysis. Justice Liu wrote “As the state’s highest court, we owe the plaintiffs in this case, as well as school children throughout California, our transparent and reasoned judgment on whether the challenged statutes deprive a significant subset of students of their fundamental right to education and violate the constitutional guarantee of equal protection of the laws.”

The challenged statutes ultimately hinder the quality of education for low-income and minority students, given that they do not have equal access to quality instructors, giving them a less equal education than wealthier peers. From the testimony of both the defendants and plaintiffs, it is evident that educational disparities are profound. *Vergara v. California* may not have been successful in tracking these disparities back to the challenged statutes, but it did shed light on the trials and tribulations faced by children from less affluent backgrounds. ♦