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PERSPECTIVE

An about-face on teacher tenure

Unions can now rejoice at the expense of our children

By Michele M. Goldsmith

In the *Vergara* lawsuit, nine students who were attending various California public schools courageously brought suit against the state of California and state officials seeking an order declaring five parts of the California Education Code unconstitutional. *Vergara v. California*, 2016 DJDAR 3641 (April 14, 2016).

The *Vergara* plaintiffs alleged that they were unconstitutionally denied equal access to qualified teachers. After hearing testimony from dozens of witnesses over the course of eight weeks, Judge Rolf M. Trey of the Los Angeles County Superior Court found for the students and determined that the statutes — pertaining to tenure, dismissal and layoffs — were unconstitutional because the evidence established that low-income and minority students are disproportionately affected by ineffective teachers.

Last Thursday, the trial court's decision, once heralded by the New York Times as the "decision that hands teachers' unions a major defeat in a landmark case," was reversed.

California's powerful teachers' unions can now rejoice, all at the expense of our children. In reversing the trial court's decision, the 2nd District Court of Appeal shifted the blame from the unconstitutionality of the statutes to the school districts who applied those statutes. The Court of Appeal found multiple reasons why the equal protection standard was not met. Two conclusions, however, are particularly questionable in light of real-world practice.

New York Times

The Vergara plaintiffs, along with their attorneys, outside Los Angeles County Superior Court in 2014.

First, the Court of Appeal faulted the students for how the challenge was made. The Court of Appeal noted that "Plaintiffs elected not to target local administrative decisions and instead opted to challenge the statutes themselves." Pointing out that the plaintiffs declined an implementation challenge, however, is flawed. The plaintiffs are students. Students do not have standing to dismiss a bad teacher. Students cannot challenge the tenure or layoff rights of teachers.

The "local administrative decisions," referred to by the Court of Appeal, could only mean the hearings that are conducted at the Office of Administrative Hearings (OAH), a quasi-judicial entity that is led by an administrative law judge. The ALJ hears teacher dismissal and layoff hearings, alone or with two panel members. Those hearings, however, cannot be brought by a student protesting unequal treatment. Rather, a teacher dismissal hearing is only brought by the governing board of the employing school district after it has made a decision to dismiss the teacher, and the teacher contests that decision. In that instance, it's the school district that has to prove, by a preponderance of the evidence, based only on the pled charges, that the teacher is unfit. There is no mechanism for students to challenge the process at a hearing.

> In *Vergara*, public school students claim that parts of the California Education Code that require just cause for dismissal of tenured teachers are unconstitutional.

Similarly, the OAH provides the ALJs to hear the layoff decisions. Most often, unions contest the seniority layoff list. Students do not have standing to challenge the layoff decision or list. Moreover, in both circumstances, if the employing school district is unhappy with the result, the decision can be contested through a Code of Civil Procedure Section 1094.5 writ of mandate. However, under Section 1094.5, while the trial court judge may exercise her independent judgment, deference goes to the administrative decision unless there is a manifest abuse of discretion.

Second, the Court of Appeal faulted the plaintiffs for failing to establish that the challenged statutes violate the equal protection clause "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." There were two groups of students identified: Group 1 — those students who were inevitably [and randomly] assigned to a grossly ineffective teacher; and Group 2 — poor and minority students who suffered disproportionate harm from being assigned to grossly ineffective teachers.

The Court of Appeal's reasoning regarding Group 2 is unsound. First, but for the existence of these statutes, the administrators would not be engaged in shifting incompetent teachers among schools who disproportionately serve minority students. It is the administrators who are bound by the statutory language. Second, there was more than ample evidence that minority and low-income chil-

dren were disproportionately taught by ineffective teachers — irrespective of the administrators who assigned the teacher to the school. Testimony was provided by dozens of school administrators and superintendents regarding how the statutes impacted low-income and poor students. According to Mark Douglas, assistant superintendent in the Fullerton School District, poorly performing teachers often end up at schools serving poor and minority students because, unlike schools serving more affluent students, students at schools impacted by the ineffective teacher generally have "families who aren't used to the education system ... [and] don't know what to look for in a great teachers. ... And so sometimes they won't complain about a teacher that [is] at [a] low-end school."

A 2007 CDE publication corroborated this testimony stating, "transfers often function as a mechanism for teacher removal. ... Not surprisingly, the poorly performing teachers generally are removed from higher income or higher performing schools and placed in low-income and low-performing schools." A plaintiffs' expert also testified that where tenure decisions are made prematurely and dismissals are difficult to obtain, ineffective teachers will tend to accumulate in schools with the most teacher vacancies, which often are those serving minorities. The evidence further showed that transfers of poorly performing teachers also had a disproportionate impact on such schools because such schools tend to have more vacancies. These facts, however, were insufficient for the Court of Appeal to conclude the "inevitably" that flows from the statutes.

Next Steps

The Court of Appeal was not oblivious to the challenges that are faced by California's public schools. The Court of Appeal, however, blamed the school districts, and their administrators, for their staffing decisions, placement and retention. The Court of Appeal kicked the can to the Legislature.

Therefore, as it now stands, teachers will continue to be probationary for only 18 months. The dismissal process will remain costly and time consuming, so much so that it's easier to leave the ineffective teacher in the classroom. Seniority continues to triumph over merit.

So, what can we do? Continue to lobby for legislative change that improves education for all children in California. The Legislature needs to (1) revisit the issue of teacher tenure and lengthen the time it takes for a teacher to receive seniority; (2) streamline the dismissal process; and (3) permit school districts to consider, at least in part, a teacher's performance when conducting layoffs. While these are not easy issues to resolve, the Legislature must act, particularly, when reform efforts are being blocked by the courts. An appeal to the California Supreme Court, I presume, will be "inevitable."

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