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TEACHER TENURE CHALLENGED: THE CALIFORNIA CASE

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Overview

Teacher tenure remains a source of controversy both in the popular media and professional literature. Past commentaries in this series have been devoted to issues of local school system tenure policy and practice. In state legislatures and in local school board meetings teacher tenure is a hot topic of discussion. In communities across this country, especially as student statewide academic test scores and accreditation ratings for individual schools (elementary, middle, and secondary) are published in local newspapers, parent groups and tax payer organizations are demanding that incompetent (poorly performing, ineffective) teachers be quickly identified and summarily removed from public school classrooms. In their view removing “poorly performing and ineffective teachers” from classrooms will improve instruction and boost student learning—especially in lower performing schools.

Tenure Status. As my late coauthor Bill Boshier and I observed, public school teachers have relied on achieving tenure as a means of job security. With historical roots in property law, the intent of tenure is not to guarantee permanent employment. Once a successful probationary period is served and tenure is achieved, a teacher is protected from unlawful, arbitrary, and capricious board actions and the employing board must follow orderly procedures (enumerated in state statute) if and when cause for dismissal is established. (Vacca and Boshier, 2012) As Russo reminds us, “[i]n tenure or continuing contract arrangements, since employees have acquired substantive due process rights, they are entitled to procedural safeguards before they can be dismissed from employment.” (Russo, 2004) In states where collective bargaining agreements exist, the need to establish *cause* for dismissal and to follow mandated *procedural requirements* further strengthen teacher tenure guarantees.

The Balance. In 2016, while local school boards maintain legal authority under state law to make all employment decisions, tenure (or continuing contract in some states) restricts the legal authority of local public school boards to terminate the employment of a tenured teacher absent a showing of *cause* (supported by documentation) and only after following a specific set of *procedures*. At the same time school board employment policies and procedures must be consistent with state law and must be balanced against the rights of employees as guaranteed by state and federal antidiscrimination statutes (e.g., Civil Rights Act of 1967, Title VII; Education Amendments of 1972, Title IX; Americans with Disabilities Act; and others). In addition courts have consistently extended and applied constitutional protections (Fourteenth Amendment due process and equal protection) in cases involving tenured teachers. See, e.g., Board of Regents v. Roth (1972), Perry v. Sindermann (1972), and their progeny.

The 2016-2017 school year has just started and once again the debate involving teacher tenure has surfaced in the news. The situation rekindling the debate involves a high profile case out of the State of California. The California Teachers Association, *et al.*, are Interveners and Appellants in the case. Because of the issues raised (linking tenure status, seniority, lay-offs, and dismissal to student learning) and the court’s detailed review of trial court evidence, discussion, and rationale, the California decision is the subject of this month’s commentary.

Vergara, et al. v. State of California, et al. (2016)

Facts

Plaintiffs filed suit in Superior Court, Los Angeles County, against the State of California and several state officials seeking a court order declaring five sections of the California Education Code

unconstitutional. The challenged provisions covered K-12 public school teacher tenure, dismissal, and the role of seniority in laying off teachers. In essence plaintiff students claimed, among other things, that the named statutes created an oversupply of “grossly ineffective” teachers inevitably having a negative effect on minority students “right to education.” Minority students, they said, were being provided with an education that was not basically equivalent to that being provided to more affluent and/or white peers. The Superior Court judge ruled in their favor. Defendants appealed the ruling.

California Court of Appeals Review of Trial Court Evidence

The appellate court first restated plaintiff students’ contentions that:

- (1) the tenure statutes forced school districts to decide whether new, probationary teachers should be granted tenure before the teachers’ effectiveness could be determined,
- (2) the dismissal statute made it nearly impossible to dismiss poorly performing teachers, and
- (3) the reduction-in-force statute required school districts, in the event of layoffs, to terminate teachers based on seniority, regardless of their teaching effectiveness.

Two groups of students, alleging they were denied equal protection under the California Constitution by the challenged statutes, made up the plaintiff side in the case. Group 1 was a subset of the general student population. These plaintiffs claimed their “fundamental right to education” under the California Constitution was adversely impacted due to being assigned to “grossly ineffective teachers.” They claimed that they were disadvantaged because they received a lesser education than students not assigned to “grossly ineffective teachers.” Group 2 was made up of minority and economically disadvantaged students. They alleged that the schools predominantly serving them have more than their proportionate share of “grossly ineffective teachers” making assignment to such a teacher more likely for a poor and/or minority student.

The appellate court then quoted specific language from the California Constitution (Cal. Const., art. IX, sec. 5) requiring “[t]he legislature [to] provide a system of common schools.” Pursuant to that command, said the Court, the State is obligated to provide a “free public education.” The management and control of the public schools is a state matter, and local school districts, as agents of the state are responsible for implementation of educational programs and activities. The Legislature grants each school district the power to hire, assign, and dismiss teachers, fix compensation, accept resignations and transfer teachers.

The Court of Appeals next reviewed the language and requirements of the State’s tenure, dismissal, and reduction-in-force statutes. For example, requirements that:

- (1) a certified teacher serve a two complete consecutive year probationary period;
- (2) a probationary teacher must receive written notice on or before March 15 of the second consecutive year whether or not he/she will be reelected as a permanent employee;
- (3) written notice be given to a permanent certified teacher if the school district intends to dismiss him/her for unsatisfactory performance (specifying instances);
- (4) a certified teacher be given a 90 day period to attempt to correct his/her deficient behavior and overcome the grounds for dismissal; and

- (5) following the 90 days, if unsatisfactory performance has not been corrected, the district must file a written statement of the charges and give the teacher final written notice of the district's intention to dismiss him/her. A teacher has another 30 days to request a hearing on the charges. The hearing would be conducted by a three member panel.

Regarding reductions-in-force, the statute in question contains exceptions to the seniority policy. For example, an exception to seniority exists where a junior certified teacher has special training and experience that senior certified teachers do not possess.

The Court of Appeals then undertook a thorough and detailed review of trial testimony leading up to the lower court's decision. A brief summary of the evidence presented at trial follows.

Expert witnesses gave testimony regarding the impact of effective and ineffective teachers on student learning, assessment, and measurement of teaching effectiveness. The appellate court review also included the conclusions of expert witnesses that, while a host of factors including child poverty and safety affect student achievement, teachers nevertheless have a highly important and significant impact on student learning. Other expert witnesses questioned the short duration of the probationary period. In their opinion a period of three to five years might be superior to the current timeline. Evidence also was reviewed regarding the length of time and expenses associated with the teacher dismissal process, and how few ineffective teachers were dismissed statewide.

The appellate court reviewed plaintiff witness testimony claiming that ineffective teachers are often transferred into and concentrated in schools that predominantly serve minority and low income children. Witnesses testified - that ineffective teachers are often "shuffled around from school to school" often landing in schools serving poor and minority students; that "transfers often functioned as a mechanism for teacher removal;" that poorly performing teachers generally are removed from higher-income or higher-performing schools and placed in lower-income and lower-performing schools.

Plaintiffs also presented evidence that schools in school districts serving low income and minority students have higher proportions of inexperienced teachers and experience more layoffs— due to seniority-based reduction-in-force statutes. And, that teacher assignment decisions are often influenced by collective bargaining agreements.

Other experts testified at trial that in-school effects on student learning are generally overstated when compared to out-of-school effects. And that using student test scores as an indicator of teacher effectiveness is flawed.

Several witnesses called by defendants testified that the tenure and dismissal statutes actually protect teachers and provide job security. That the probationary period provides sufficient time to make reelection decisions. That the tenure system is not "passive." That a large number of poorly performing teachers resign rather than go through the formal dismissal process. And, while societal conditions pose challenges to the assignment of teachers, some school districts attempt to assign strong teachers to the highest need schools in an effort to encourage highly effective teachers to migrate to those schools.

Trial Court Decision

Based on the evidence presented the trial court judge determined that plaintiff met their burden of proof on all issues presented. That the challenged statutes place a “real and appreciable impact on students right to equality of education” and “impose a disproportionate burden on poor and minority students.” The trial judge also determined that defendants failed to meet their burden of the strict scrutiny standard.

Appellate Court Discussion and Rationale

Citing California case law on point, the appellate court established that the extent of its *de novo* review requires an analysis of factual determination based on evidence presented at trial. The trial court’s findings of fact are reviewed for substantive evidence. Moreover, “as with any legislative act, statutes related to education are provided a presumption of constitutionality. Any doubts are resolved in favor of a finding of validity.” And, said the Court, “[p]olicy judgments underlying are left to the Legislature; the judiciary does not pass judgment on the wisdom of legislation. Courts do not sit as super-legislatures to determine the wisdom, desirability, or propriety of statutes.” Following a discussion of equal protection, class actions, and the difference between rational basis and strict scrutiny reviews, the appellate court narrowed the scope of the review by establishing that it would determine whether plaintiffs had demonstrated that the challenged statutes cause a certain class of students to suffer an equal protection violation.

Regarding Group 1, described by plaintiffs as an “unlucky subset” of the general student population that is denied the fundamental right to basic educational equality because of being assigned to grossly ineffective teachers, the Court of Appeals said the trial court failed to ask the key question. The trial court should have asked if Group 1 represents a sufficiently identifiable group for purposes of an equal protection action. In the opinion of the appellate court “the unlucky student subset is not an identifiable class of persons sufficient to maintain an equal protection challenge.”

Regarding Group 2, the trial court found that poor and minority students suffered disproportionate harm from being assigned grossly ineffective teachers. Under California law both race and wealth are considered suspect classifications. However, in this case, said the appellate court, the trial court bypassed an initial required question. Did the challenged statutes cause low income and minority students to be “disproportionately assigned to grossly ineffective teachers?”

A statute is facially unconstitutional when the violation flows “inevitably from the statute” and not from the “actions of people implementing it.” In this case, said the appellate court, the challenged statutes by their text “do not inevitably cause poor and minority students to receive an unequally deficient education.” And, “the challenged statutes do not differentiate by any distinguishing characteristic, including race or wealth.”

In the appellate court’s view, trial court evidence firmly demonstrated that staffing decisions, including teacher assignments, are made by administrators, and the process is guided by teacher preference, district policies, and collective bargaining agreements. This evidence, said the Court, is consistent with the process set forth in the California Education Code. Also, the trial court evidence shows that the challenged statutes do not in any way instruct administrators regarding which teachers to assign to which schools.

Regarding expert witness testimony, the Court makes it clear that it is not required to defer to expert opinion regarding the ultimate issue in this case, particularly when the issue “is a mixed question of law and fact.” In any event, “these opinions do not sustain plaintiffs’ burden.”

In sum, said the appellate court, while evidence presented at trial likely demonstrates drawbacks to the current tenure, dismissal, and layoff statutes, “it did not demonstrate a facial constitutional violation.” While 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 public schools...[p]laintiffs elected not to target local administrative decisions and instead opted to challenge the statutes themselves. This was a heavy burden and one plaintiffs did not carry.

Appellate Court Decision

The trial court decision is not affirmed. The judgement of the trial court is reversed and the matter is remanded with directions to enter judgment in favor of defendants on all causes of action.

Recently, the California Supreme Court denied review in the case.

Policy Implications

As stated at the beginning of this commentary, public school teacher tenure continues as a controversial subject. While defenders of tenure emphasize its importance as a major protection for teachers (job security), those who call for revoking tenure statutes claim that tenure is a barrier to the flexibility of administrators to assign and reassign senior staff to grade levels and schools where effective classroom teachers are needed. They also claim that tenure statutes (especially the procedural mandates) make it impossible for school districts to dismiss incompetent and ineffective teachers.

While Vergara (2016) is but one case from one state jurisdiction, it is nonetheless instructive. What is of particular importance to local school system policy-makers is the California Court of Appeals detailed review of the trial court evidence—especially its discussion of expert witness testimony. In addition to emphasizing the need to implement the mandates of state tenure statutes in local school system policy and procedure, the appellate court focused on specific aspects of the tenure process and these are:

1. the length and critical nature of a probationary period leading up to a tenure decision;
2. the importance of evaluation, assessment, and measurement of teacher job performance;
3. the early identification of deficiencies in teacher job performance;
4. the communication of those identified deficiencies to the individual teacher involved;
5. the establishment of a specified period of time for possible remediation of identified deficiencies,
6. the possible relationship and impact of a host of outside out-of-school factors (e.g., child poverty) on student classroom learning and achievement;
7. the inclusion and use of student test scores as a major criterion in assessing teacher effectiveness;
8. the key role played by school administrators in the assignment of classroom teachers to individual schools;
9. the possible assignment of effective teachers from “highly performing schools” to “poorly performing schools;” and
10. the inclusion of, and weight given to, seniority as a factor in making teacher assignments and in making reduction-in-force decisions.

Final Comment

In predicting the future of public school teacher tenure, the following statements taken directly from the California Court of Appeals opinion regarding judicial review are important to restate. “As with any legislative act, statutes related to education are provided a presumption of constitutionality...and any doubts are resolved in favor of a finding of validity.” “Policy judgments underlying are left to the Legislature; the judiciary does not pass judgment on the wisdom of legislation. Courts do not sit as super-legislatures to determine the wisdom, desirability, or propriety of statutes.”

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Note: The views expressed in this commentary are those of the author.