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Vergara and the complexities of teacher employment policies

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Teaching quality is a crucial factor in student success, contributing to students' short- and long-term learning opportunities. High-quality teaching not only contributes to the improvement of student test scores and graduation rates but also gives students a "strong foundation from which to advance and achieve" in the future.¹ Long term, students may have better chances of college and career success and to earn higher incomes, giving them greater ability to save for retirement and reside in higher income neighborhoods, according to evidence in a recent lawsuit.²

As states continue to grapple with choosing the best policies for ensuring high teaching quality, the use of tenure, dismissal and seniority policies remains a contentious topic. Understanding the debates playing out in *Vergara v. California* and similar lawsuits can help prepare state policymakers and education leaders for similar discussions in their states.

This Education Commission of the States policy analysis uses the *Vergara* case as a means to examine the complexities of teacher employment policies and how they may impact student and teacher rights. The report closes with recommendations for policies that offer meaningful alternatives to the all-or-nothing approaches of retaining or eliminating teacher employment protection policies entirely.

While *Vergara* focuses on eliminating certain job protections for teachers to ensure that ineffective teachers can be removed, other policy options exist for improving teaching quality. Retaining current tenure laws or eliminating protections altogether represent two extremes.

KEY TAKEAWAYS

By far the most popular probationary period prior to receiving tenure is three years, which is the policy in 32 states.

Ten states explicitly prohibit the use of seniority in layoff decisions while 11 states require seniority to be the primary factor in those decisions.

The debates playing out in the *Vergara* case can help prepare state leaders for similar discussion in their states.



With their sights set on the aspirations of high-quality teaching and better student outcomes, nine students and the non-profit Students Matter [hereinafter, “students”] recently challenged California’s teacher employment policies for creating an environment in which students face an arbitrary risk of being assigned to ineffective teachers. This lawsuit, known as *Vergara*, and its copycat cases are part of a larger trend to hold states and districts accountable for ensuring that the most effective teachers remain in the classroom and the least effective are dismissed, thereby positively impacting student performance.

Supporters of the case argue that the best way to accomplish this equilibrium is to change the ways that teachers are retained in and dismissed from their positions – a question that often comes down to tenure, dismissal and seniority policies. Opponents of the case counter that inequitable funding and student poverty, among other factors, are the real cause of poor student performance.

Teacher employment protection policies

Tenure and dismissal policies provide teachers with certain job protections before they can be dismissed. These job protections come in the form of due process rights, which can be found in state law and typically include: 1) written notification of dismissal with specific reasons for the dismissal and 2) the right to a hearing before a neutral authority, along with additional protections under state or school board policies. Seniority – or last-in, first-out – policies typically require that probationary or less-senior teachers will be dismissed before tenured or more-senior teachers when layoffs are necessary.

Supporters of these policies view them as critical job protections that defend teachers against dismissals for arbitrary reasons, such as refusing to change a student’s grade or blowing the whistle on inappropriate conduct.³ Opponents argue that teachers attain tenure before their efficacy can be fully determined, and tenured teachers are costly and difficult to dismiss when ineffective. Opponents maintain that these policies keep ineffective teachers in the classroom and prevent equal access to a quality education.

This politically charged debate is often framed as a question of equity, as research indicates that low-income and minority neighborhoods are more likely to house not just less experienced teachers but less-effective teachers in their schools.⁴ Some studies assert that more affluent schools also tend to attract more-senior teachers, which can lead to high-need schools losing the greatest number of teachers during seniority-based layoffs.⁵

A primer on the litigation

Who

In *Vergara*, nine California students challenged five state laws that make up California’s teacher retention and dismissal policies.⁶ The students attended public schools in four different school districts.⁷ The *Vergara* case is backed by Silicon Valley entrepreneur David Welch through his nonprofit Students Matter.

What

The students in *Vergara* asserted that California’s employment statutes keep “grossly ineffective” teachers employed in schools, and these teachers are disproportionately located in schools predominantly serving low-income and minority students. The students argued that ineffective teachers result in access to a lower quality of education than do effective teachers. This result violates students’ fundamental right to equality of education for all, according to the argument accepted by the California trial court.

Vergara and emerging copycat cases in New York take issue with similar provisions of state law: tenure, dismissal procedures and seniority-based layoff policies. In *Vergara*, the trial court found that all three teacher employment policies are unconstitutional under

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

– *Brown v. Board of Education* (1954), cited by Judge Treu in *Vergara v. California*

the Constitution of California. The decision is currently on appeal, and any legal effect the decision could have on California's teacher policies has been paused until the appeal can be heard by a higher state court.⁸

While *Vergara* waits for the appeal to proceed, legal minds disagree as to the strength of the trial court's reasoning and its ability to withstand the challenge of an appeal.⁹ Nevertheless, the California legislature is considering major overhauls of the states' teacher employment policies. Some argue that recent changes to the teacher dismissal process through Assembly Bill 215 may have resolved some of the issues in *Vergara*.¹⁰

Two similar cases have been brought in New York by former CNN anchor Campbell Brown's organization Partnerships for Educational Justice and Mona Davids, the founder and president of the New York City Parents Union. These cases were consolidated under the name *Davids v. New York*, which is set to progress in late summer 2015.

Tenure (permanent employment)

Teachers typically complete a probationary period of two to five years prior to being awarded the job protections provided by tenure. Tenure does not mean that teachers are employed for life regardless of conduct; rather, tenure's intended purpose is to protect teachers from arbitrary dismissals.

Tenure in *Vergara*

California's permanent employment statute essentially requires the local school board to determine whether teachers employed for two consecutive years will be retained as a tenured teacher.¹¹ The teacher must be notified on or before March 15 of the second consecutive school year as to whether the teacher's contract will or will not be renewed. If renewed, that teacher becomes a permanent employee, which can have the practical effect of requiring tenure decisions to be made after observing a teacher for only 18 months.¹² However, districts can choose not to renew a probationary teacher's contract for any reason.

Citing research that shows "it is not possible to determine a teacher's long-term effectiveness" within three years, the *Vergara* students' complaint took issue with the short time span within which tenure may be granted.¹³ The trial court agreed with the students, finding that by depriving "teachers of an adequate opportunity to establish their competence" and "students of potentially competent teachers," the law disadvantages both groups and is unconstitutional.¹⁴

In both *Vergara* and the emerging New York copycat case, tenure opponents argued that: 1) tenure is often granted before teacher competence and effectiveness can be ascertained,¹⁵ 2) similarly, that the process for attaining tenure is practically automatic and is granted to the vast majority of teachers¹⁶ and 3) dismissing tenured teachers is too costly and time-consuming, which is explored further below. Tenure supporters argue that a shorter probationary period prevents administrative delay and procrastination and requires principals to dismiss ineffective teachers relatively quickly.

Why tenure exists

The most common argument for tenure is that it protects teachers from arbitrary dismissals that may result from political, social and economic pressures. For example, states may feel economic pressure to hire less expensive, newer teachers. Tenure may also provide an incentive to join and remain in teaching profession. By rewarding long-term teachers with the additional job protections of tenure, states incentivize teachers to remain in the profession, which helps keep more experienced teachers in the classroom.

Additionally, teachers' unions often contend that tenure protects students more than teachers. They argue that teachers need extra protection from arbitrary dismissal because of their unique position at the crux of students, parents and administrators. Teachers may need to advocate on behalf of their students or take positions unpopular with parents or administrators.

Some research indicates that teachers increasingly view tenure as a meaningful career step rather than a mere formality.¹⁷ Recent research in New York City suggests that tenure policy reforms have led to less effective teachers voluntarily leaving the profession.¹⁸ The state's teacher tenure and evaluation system is currently being reformed.¹⁹

National landscape

According to the National Council on Teacher Quality, California is one of only four states that allow tenure to be awarded after two years. By far the most popular probationary period length is three years, which is the policy in 32 states.²⁰

Three states have essentially eliminated tenure.²¹ Florida replaced tenure with annual contracts for all teachers in 2011. In Kansas, a 2014 bill eliminated due process for teachers, effectively abolishing tenure for future and probationary teachers. A 2013 law that exchanged teacher tenure for multi-year contracts in North Carolina is currently the subject of litigation.²²

California legislators considered a bill in the 2015 session that would have allowed tenure to be rescinded after consecutive poor performance on teacher evaluations,²³ which is already established policy in at least seven states.²⁴

Dismissal and seniority (last-in, first-out)

Dismissal and seniority in *Vergara*

California's dismissal statutes provide certain due process protections to tenured teachers before they can be dismissed.²⁵ The *Vergara* students' complaint described the California teacher dismissal process as "labyrinthine," adding that the Los Angeles Unified School District (LAUSD) spent \$3.5 million over the past decade in efforts to dismiss seven employees for inadequate classroom performance.²⁶ At an average of \$500,000 and five years per dismissed employee, the court agreed with students that the cost in time and resources to dismiss a teacher has a chilling effect on districts' willingness to even begin the dismissal process. Moreover, when due process protections already exist for other public employees, the court questioned why teachers are entitled to a kind of "uber due process." Taken together, the court asserted, the dismissal statutes are an unnecessary barrier to removing ineffective teachers.

In their brief for the *Vergara* appeal, California teachers unions argue that many districts, including LAUSD, routinely and successfully dismiss teachers under current laws. Additionally, many of these dismissal proceedings are resolved prior to reaching a formal hearing stage.

Like many seniority policies, California's seniority statute requires that when district-wide layoffs are necessary because of declining enrollment or other changes in circumstances, a probationary or less-senior teacher will be dismissed before a permanent or more-senior teacher. Additionally, teachers are assigned and reassigned to positions based on seniority.²⁷

The result of seniority, the *Vergara* students' complaint explained, is that teacher layoffs are quality-blind, potentially removing highly effective junior teachers. The students' complaint cited a study of layoffs in California in 2009, during which "nearly 2,000 [English] teachers and more than 1,500 math teachers in the lowest quartile of teacher performance kept their jobs, while 20 percent of the [English] and math teachers laid off were in the top quartile of teacher performance."²⁸

Not only do seniority-based dismissal policies have the potential to remove educators regardless of effectiveness, they may also disproportionately impact schools with large low-income and minority student populations. This disproportionate impact may occur because novice teachers are more likely to be found in these schools and more-senior teachers are less likely to transfer to these schools. While researchers differ as to whether more experienced teachers are more effective, the *Vergara* trial judge cited "substantial evidence" presented at trial that the seniority statutes "disproportionately affect poor and/or minority students."²⁹

Why seniority exists

Proponents argue that seniority policies:

- ◆ Provide a way to objectively and efficiently select teachers when layoffs are necessary.³⁰
 - This strategy may keep more experienced teachers in schools while avoiding reliance on often controversial performance evaluation methods.³¹ The Value-Added Method, for example, has been criticized for being insufficiently reliable and stable to accurately assess teacher performance year to year, among other criticisms.³²
- ◆ Prevent layoff decisions based solely on political, social or economic pressures, similar to tenure policies.

- For example, because more experienced teachers often earn higher salaries, districts can retain more-junior teachers for the same price as fewer senior teachers.
- New York State United Teachers and others contend that seniority policies protect teachers from “abuses by those who would use ‘layoffs’ as another way to fire those who advocate too fiercely for their students or are at the top of the pay scale.”³³

However, opponents argue that seniority policies may lead to:

- ◆ Larger class sizes because, for cost-saving purposes, more novice teachers with lower salaries must be let go to meet desired savings than would be required of veteran teachers with higher salaries.³⁴
- ◆ The arbitrary removal of effective-yet-more-novice teachers, especially in schools with large low-income and minority student populations.
 - In recent years, districts have placed “greater emphasis on the recruitment and retention of effective teachers,” so newer teachers may also be some of the most effective.³⁵

National landscape of dismissal and seniority policies

As of May 2014, 10 states explicitly prohibit the use of seniority in layoff decisions while 11 states require seniority to be the primary factor in those decisions.³⁶ Minnesota and California are considering bills to minimize the influence of seniority in layoff decisions.³⁷

Several states, including California, have taken steps to expedite the dismissal process and reduce the time and expense associated with dismissal.³⁸ For example, Connecticut limits the amount of time that may be given to dismissal hearings related to incompetence or ineffectiveness by allotting only 12 hours for both sides to present evidence and testimony.³⁹ In 2011, Oklahoma passed a measure that eliminated the ability to appeal a board’s dismissal decision, making that decision the final one.⁴⁰ Similarly, in Florida, where the legislature has essentially eliminated tenure, the board’s dismissal decision is also considered final.⁴¹

Policy possibilities: Recommendations for policymakers

While *Vergara* focuses on eliminating certain job protections for teachers to ensure that ineffective teachers can be removed, other policy options exist for improving teaching quality. Retaining current tenure laws or eliminating protections altogether represent two extremes. There may be a middle ground that states want to consider. For example, basing tenure decisions in part on legitimate teacher performance measures may provide a compromise between the two extremes. Additionally, ensuring that teachers are highly supported and trained can have a positive impact on educational quality.

To promote highly effective teachers in every classroom, ensure that:

- ◆ Teacher training and credentialing are rigorous.
- ◆ New and struggling teachers have the support and opportunity needed to improve.⁴³
 - Promote a network of mentorships, support and professional development among teachers and administrators.⁴⁴
 - Require schools to show evidence of providing adequate support.
 - Promote teacher data literacy so that teachers can use data effectively.⁴⁵
- ◆ The probationary period prior to tenure is sufficient to make an informed tenure decision and to make tenure a meaningful professional attainment.

While 16 states require teacher performance on evaluations to be considered in tenure decisions, a number of teachers have sued their states for using flawed and arbitrary evaluation systems, including in Florida.⁴⁶ Policymakers should ensure that performance evaluation systems are rigorous, legitimate and effectively supported.

In a survey of California teachers, Teach Plus found that “by wide margins, California teachers strongly support the concept of tenure.” Teachers believe that tenure improves teaching quality and protects teachers from arbitrary dismissals. However, more than two-thirds of those teachers also stated that they had worked with a poorly performing teacher whose tenure seemed to prevent their dismissal.⁴²

Teacher Support System Examples

- ◆ Cincinnati Public Schools' nationally recognized **Teacher Evaluation System (TES)** provides support and professional development to new and experienced teachers.
- ◆ The Montgomery County Public Schools' Peer Assistance and Review Program, which provides teacher support and evaluation, has garnered positive results and is the only way that local teachers can be dismissed based on performance.

When considering performance as a factor in tenure and dismissal decisions, ensure that:

- ◆ The evaluations system has buy-in from teachers and administrators to legitimize compensation and dismissal decisions based on evaluations.
- ◆ The evaluation system uses multiple measures of teacher performance.⁴⁷
- ◆ The evaluators have adequate training and support.
- ◆ The evaluators are held accountable.

If teacher job protections are removed, consider whether:

- ◆ Other extant job protection policies will adequately protect teachers from arbitrary dismissal.
- ◆ Effective teachers should be rewarded by additional job protections.
- ◆ Other job benefits will attract high-quality teacher candidates to the profession.

To create a more efficient dismissal process, consider policies that:

- ◆ Limit the length of hearings and number of appeals.
- ◆ Improve the training for dismissal panel participants; ensure that all participants are trained in the qualities of effective teaching.
- ◆ Increase the number of participants available for dismissal panels to expedite the process.

An American Institutes for Research (AIR) survey of national and state teachers of the year suggests that performance evaluations are less important to teacher improvement than other supports, such as mentorships.⁴⁸ A recent National Center for Education Statistics (NCES) study found that teachers with mentors are more likely to remain in the profession than those without a mentor.⁴⁹

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