

# Alert

## Court Determines California Teacher Tenure Laws Are Unconstitutional

June 27, 2014

On June 10, 2014, Judge Rolf M. Treu of the Superior Court of California for the County of Los Angeles issued an opinion in *Vergara v. California*,<sup>1</sup> striking down provisions of the California Education Code as unconstitutional. The sections of the California Education Code in question concerned teacher tenure (the so-called “Permanent Employment Statute”), dismissal (the “Dismissal Statutes”) and layoffs (known as “Last-In-First-Out” (LIFO)).<sup>2</sup> The court held that these statutes violate the equal protection clause of the California Constitution because they prevent students from accessing their fundamental rights to equal education by adversely affecting the quality of the education they are afforded. The statutes were held to “cause the potential and/or unreasonable exposure of grossly ineffective teachers to all California students but with particular detriment to minority and/or low income students.” *Vergara* at 4.

Although the *Vergara* decision involves a California court interpreting California law with respect to public schools, it is instructive beyond that jurisdiction because the court began its decision by echoing the U.S. Supreme Court’s landmark holding in *Brown v. Board of Education*, 347 U.S. 483 (1954), that education facilities separated by race are inherently unequal and deny students equal protection under the 14<sup>th</sup> Amendment to the U.S. Constitution. Judge Treu focused on *Brown* in finding that the California statutes resulted in “grossly ineffective teachers obtaining and retaining permanent employment.” *Vergara* at 3. Relying on *Brown*, together with various California higher court decisions, Judge Treu found the cases “held that unconstitutional laws and policies would not be permitted to compromise a student’s fundamental right to equality of the educational experience.” *Id.* at 3.

*Vergara* holds unconstitutional those laws which would deprive students of the equal opportunity to quality education. Both parties in *Vergara* agreed that “competent teachers are a critical, if not the most important, component of success of a child’s in-school educational experience. All sides also agreed that grossly ineffective teachers substantially undermine the ability of that child to succeed in school.” *Id.* at 7.

The court held that the plaintiffs, nine public school students, “prove[d] by preponderance of the evidence, that the statutes impose a real and appreciable impact on students’ fundamental right to

---

<sup>1</sup> Tentative Decision, *Vergara v. State of California* (Cal. Super. Ct. June 10, 2014) (Case No. BC484642).

<sup>2</sup> The statutes found unconstitutional are: California Education Code Section 44929.21(b) (Permanent Employment Statute); California Education Code Sections 44934, 44938(b)(1) and (2) and 44944 (collectively, the Dismissal Statutes); and California Education Code Section 44955 (LIFO).

equality of education and that they impose a disproportionate burden on poor and minority students.” *Id.* at 8. As a result, the statutes were examined with “strict scrutiny.” The State of California thus had the burden to establish a *compelling* interest justifying that the distinctions drawn by the statutes were *necessary* to further their purpose.

The 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.” *Id.* at 10. As to the Dismissal Statutes, the court found that the law epitomized the issue of “*uber* due process” and bemoaned the process as “tortuous.” *Id.* at 12–13. Although the court agreed that teachers should be afforded reasonable due process, it found the current statutes “so complex, time consuming and expensive as to make an effective, efficient yet fair dismissal of a grossly ineffective teacher illusory.” *Id.* at 13. Finally, regarding the LIFO statute, the court stated that the state’s logic in defending the law was “unfathomable and therefore constitutionally unsupportable.” *Id.* at 14. The court found LIFO flawed because it contained

no exception or waiver based on teacher effectiveness. The last-hired teacher is the statutorily-mandated first-fired one when lay-offs occur. No matter how gifted the junior teacher, and no matter how grossly ineffective the senior teacher, the junior gifted one, who all parties agree is creating a positive atmosphere for his/her students, is separated from them and a senior grossly ineffective one who all parties agree is harming the students entrusted to her/him is left in place. The result is classroom disruption on two fronts, a lose-lose situation.

*Id.* at 13–14.

The judge cited studies showing that “a single year in a classroom with a grossly ineffective teacher costs students \$1.4 million in lifetime earnings per classroom.” *Id.* at 8. Students in Los Angeles County who were “taught by a teacher in the bottom 5% of competence lose 9.54 months of learning in a single year compared to students with average teachers.” *Id.* The court found substantial evidence that the “churning (aka Dance of the Lemons) of teachers caused by the lack of effective dismissal statutes and LIFO affected high-poverty and minority students disproportionately.” *Id.* at 15.

Because *Vergara* originates from California’s first-level trial court, an appeal is likely. Much uncertainty remains as to how the decision will fare pending any appeal. U.S. Secretary of Education Arnie Duncan called the decision a “mandate” to fix the problems in public education and called on states to “build a new framework.” Although the court’s decision reaches only California public schools, the *Vergara* case may be the first of many court and legislative challenges to tenure.

Authored by [Mark E. Brossman](#), [Scott A. Gold](#) and [Donna Lazarus](#).

SRZ summer associate Lucy Zhang (not admitted) assisted in the preparation of this *Alert*.

If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

This information has been prepared by Schulte Roth & Zabel LLP ("SRZ") for general informational purposes only. It does not constitute legal advice, and is presented without any representation or warranty as to its accuracy, completeness or timeliness. Transmission or receipt of this information does not create an attorney-client relationship with SRZ. Electronic mail or other communications with SRZ cannot be guaranteed to be confidential and will not (without SRZ agreement) create an attorney-client relationship with SRZ. Parties seeking advice should consult with legal counsel familiar with their particular circumstances. The contents of these materials may constitute attorney advertising under the regulations of various jurisdictions.

## **Schulte Roth&Zabel**

New York | Washington DC | London

**[www.srz.com](http://www.srz.com)**