

To School District Clients and Friends

FROM John W. Borkowski
Joel D. Buckman

DATE July 18, 2014

SUBJECT *Vergara v. California*, No. BC484642, (Cal. Sup. Ct. June 10, 2014)

On June 10, 2014, a California trial court struck down on state constitutional grounds five statutes granting teachers employment protections. *Vergara v. Cal.*, No. BC484642, (Cal. Sup. Ct. June 10, 2014) (tentative decision). The protections included eligibility for tenure after two years, extensive due process requirements for terminations, and a last in, first out (“LIFO”) layoff policy. California’s teacher unions had intervened to defend these provisions. The controversial decision has captured the attention of the press and the U.S. Secretary of Education and may produce copycat lawsuits around the country.

I. The Decision

Nine California school children through *guardians ad litem* and with financial support from Students Matter¹ challenged California statutes granting certain employment protections to teachers in the Superior Court of Los Angeles. According to plaintiffs, the protections resulted in “grossly ineffective teachers obtaining and retaining permanent employment” with a disproportionate number situated in schools serving “predominately low-income and minority students.” *Vergara* at 3. The retention of grossly ineffective teachers allegedly interfered with students’ “fundamental rights to equality of education.” *Id.* at 3.

In a 16-page opinion, a California trial court judge agreed that the employment protections violated the State’s constitutional guarantee of equal educational opportunity. The California Constitution guarantees a “meaningful, basically equal educational opportunity.” *Id.* at 7. The Court concluded that when a statute imposes a “real and appreciable impact” on students’ fundamental right to equality of education, it must survive strict scrutiny. *Id.* at 8–9.

The Court found that strict scrutiny applied because the challenged statutes had such an impact. More specifically, it found: (1) “grossly ineffective teachers” substantially undermine the ability of a child to succeed; (2) California had between approximately 2,750 and 8,250 grossly ineffective teachers; and (3) such teachers disproportionately served poor and minority students. *Id.* at 7–8.

¹ Students Matter is a national non-profit organization “dedicated to sponsoring impact litigation to promote access to quality public education.” <http://studentsmatter.org/our-team/>. Silicon Valley entrepreneur David F. Welch founded Students Matter.

The Court implicitly found a connection between the statutory labor protections and the ongoing employment of “grossly ineffective teachers.”

To survive strict scrutiny, a statute must be necessary to achieve a compelling government interest. In the Court’s view, each statute failed this test.

- *Two-year tenure rule.* The Court found that the rule resulted in the making of tenure decisions on the basis of just one full year of teaching (because the decision had to be communicated before the end of the second year). In some cases this resulted in the granting of tenure to incompetent teachers and the denial of tenure for borderline, but competent teachers (because some districts denied tenure if they had any doubt). The Court concluded that the state had no “legally cognizable reason (let alone a compelling one)” for the two-year tenure rule. *Id.* at 10.
- *Dismissal procedural protections.* The Court found that the procedural protections resulted in a process that could take between two and ten years at a cost of between \$50,000 and \$450,000 or more to terminate a teacher. An expert witness testified that dismissals are therefore “extremely rare” in California because administrators believe it impossible to terminate a tenured teacher. The Los Angeles Unified School District had 350 grossly ineffective teachers it wished to terminate but had not initiated termination proceedings. *Id.* at 11. The Court concluded that the State did not have a compelling interest in providing “*uber due process*” to teachers. *Id.* at 12.
- *LIFO.* The Court found that LIFO could result in retention of grossly ineffective teachers and dismissal of competent teachers. The Court held that it is “unfathomable” to think that the State has a compelling interest in the “*de facto* separation of students from competent teachers . . . and retention of incompetent ones.” *Id.* at 14.

II. Analysis

Some have criticized the legal reasoning in *Vergara* as unsound. Some of the Court’s findings and analysis do seem somewhat conclusory. For example, the Court did not define the key term “grossly ineffective teachers” and did not make detailed findings as to the connection between the employment protections and the retention of such teachers. Nor did the Court make detailed findings as to whether elimination of the protections would have any effect on the continued presence of such teachers in California schools. More fundamentally, as the Court acknowledged, prior California precedents have focused on application of strict scrutiny in the context of equality, whereas this decision is mainly focused on quality.

Others, including U.S. Secretary of Education Arne Duncan, have hailed *Vergara* as a clarion call.² And it does appear that the basic analytical structure is sound: In a state with a robust constitutional

² According to Secretary Duncan: “This decision presents an opportunity for a progressive state with a tradition of innovation to build a new framework for the teaching profession that protects students’ rights to equal educational opportunities while providing teachers the support, respect and rewarding careers they deserve. My hope is that today’s decision moves from the courtroom toward a collaborative process in California that is fair, thoughtful, practical and swift. Every state, every school district needs to have that

right to an education, certain teacher protections could be indefensible if they in fact undermined students' access to an adequate education.

In light of this decision and the flurry of activity that it has prompted, school districts and states should consider evaluating existing teacher protections and state constitutional provisions to determine whether they are susceptible to similar claims.

If you have questions about the *Vergara* decision or about educational adequacy claims more generally, please feel free to contact John W. Borkowski (john.borkowski@hoganlovells.com and (574) 239-7010) or Joel D. Buckman (joel.buckman@hoganlovells.com and (202-637-6408)).

kind of conversation." Statement from U.S. Secretary of Education Arne Duncan Regarding the Decision in *Vergara v. California*, <http://www.ed.gov/news/press-releases/statement-us-secretary-education-arne-duncan-regarding-decision-vergara-v-califo>.