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Tenure Wars: The Litigation Continues

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Teacher tenure issues continue to populate the dockets in courts across the United States.

Teacher tenure is a controversial topic that continues to generate litigation. Parents and advocates of educational reform have filed claims alleging, in part, that school officials violate the rights of students who are not achieving academically largely because of the ineffective instruction the students receive from teachers.

Typically, these suits also claim that conditions in districts where students perform poorly on academic measures are exacerbated by the protection that state tenure laws—in conjunction with union efforts—afford ineffective teachers, thereby making it difficult to dismiss the teachers for incompetence.

Four mothers in Minnesota sued the state and various officials alleging that laws there violate the fundamental rights of their children (Matos 2016). The complaint in *Forslund et al. v. Minnesota* (2016) alleged that granting tenure to teachers in three years is an insufficient time within which to evaluate their effectiveness and that dismissal of poorly performing educators takes too long. The complaint added that the most ineffective teachers are concentrated in schools with the highest poverty levels, thereby causing irreparable harm to their children.

In *North Carolina Association of Educators v. State* (2016), a North Carolina superior court held that a state law that would have stripped tenured teachers of their tenure rights violated the contract clause of the U.S. Constitution. A day earlier, in a case that has already been appealed to the California Supreme Court (Resmovits 2016), an intermediate appellate panel reached the same outcome in *Vergara v. State* (2016).

Let's take a closer look at the cases in North Carolina and California.

North Carolina Association of Educators v. State

In 2013, North Carolina adopted a law enacting two sweeping changes: (1) the law revoked the tenure of "career teachers" (teachers with tenure) as of July 2018, and (2) teachers who had not earned tenure by the start of the 2013–2014 academic year would be ineligible to achieve tenure; instead, they would be eligible for one-, two-, or four-year contracts. Schools could decline to renew their contracts for any reason deemed not "arbitrary, capricious, discriminatory, for personal or political reasons or on any basis prohibited by state or federal law" (N.C.G.S. § 115C-325 (2012)).

Once the changes were signed into law, the North Carolina Association of Educators—along with five tenured teachers and one probationary public school teacher—filed suit challenging its constitutionality on two grounds: (1) the repeal was a "taking of property without just compensation in violation of Article I, Section 19 of the North Carolina Constitution" (p.*5); and (2) the law was an "impairment of contracts in violation of Article I, Section 10 of the United States Constitution" (p.*5).

The plaintiffs claimed that these disputed sections violated both the federal and state constitutions as applied retroactively to revoke career status from teachers who had already earned tenure and as applied prospectively to probationary teachers who, before the repeal, had been on a track leading to eligibility for career status. The plaintiffs sought a permanent injunction to prevent the implementation and enforcement of both provisions.

A state trial court granted the plaintiffs' motion for a permanent injunction barring the revocation of tenure from those who had already achieved career status.

However, the court essentially rejected the challenge with regard to the status of probationary teachers. Then, a split appellate panel in North Carolina, relying on state precedent, upheld the earlier order as to the law on career status while unanimously affirming in favor of the state as to probationary teachers.

On further review, the North Carolina Supreme Court—relying on the contracts clause of the U.S. Constitution—agreed that the retroactive revocation of tenure from career teachers was unconstitutional.

The court held that although the tenure statute did not create a vested contractual obligation on the part of the state, career status was an implied term on which teachers relied. The court noted that the changes in the law resulted in a substantial impairment in teacher contracts and that the state failed to demonstrate that the changes impairing the rights of teachers were reasonable and necessary to serve an important public purpose.

The court also affirmed that teachers lacked vested career status rights at the end of their probationary periods. Instead, the court agreed that the new law contemplated the creation of individual contracts between school boards and teachers but neither granted state benefits to probationary teachers nor created contractual relationships with them.

Vergara v State

Vergara (2014)—filed on behalf of nine students who attended public schools in California—challenged the state's tenure and seniority rules. The plaintiffs alleged that the laws resulted in "grossly ineffective teachers obtaining and retaining permanent employment . . . disproportionately situated in schools serving predominately low-income and minority students" (p. *2). The plaintiffs charged that these laws "violate [students'] fundamental rights to equality of education by adversely affecting the quality of education they are afforded by the state" (p. *2). The plaintiffs also based their claim in part on evidence from "an expert called by State Defendants [who] testified that 1–3% of teachers in California are grossly ineffective" (p. *4).

The trial court in *Vergara* struck down the disputed laws designed to provide procedural safeguards relating to teacher dismissal and seniority as violating the equal protection clause in the California Constitution. The court ruled that as applied largely to poor and minority children, the laws "impose a real and appreciable impact on students' fundamental right to equality of education and that they impose a disproportionate burden on poor and minority students" (p. *4).

On further review, a three-judge appellate court in *Vergara* (2016) unanimously reversed in favor of the state, refusing to interpret the laws as the cause of the inferior levels of education received by the largely minority students. The court essentially decided that problems associated with the tenure process were not so much the "fault" of the statutes as they were of school officials who ultimately placed the ineffective educators in the schools where they taught.

In discussing low student achievement due to poor instruction, the court rejected this criticism as an insufficient basis for a challenge due to the harm caused to educational opportunities for the minority children. Accordingly, the court suggested that the plaintiffs might have had more success had they questioned the ways in which the laws were implemented rather than the provisions themselves with regard to the protections they afford teachers. Not surprisingly, the plaintiffs promise to appeal to the California Supreme Court (Kohli 2016).

Reflections

Considering the highly politicized nature of tenure, coupled with its being a kind of educational third rail for elected officials who do not wish to incur the wrath of teachers and their unions, change is unlikely to occur quickly or without a fair amount of litigation.

As suggested in an earlier column (Russo 2015), two possibilities come to mind when thinking about modifying tenure. The first is to make tenure more difficult to achieve and easier to lose for cause. This approach can be carried out by prospectively extending probationary periods beyond the typical three to four years that it takes to earn tenure in most jurisdictions. Perhaps probationary periods should be expanded so that education leaders can take more time to ensure that they are making the correct personnel decisions. Also, although not wishing to deprive educators of their chosen careers, it may be time to reexamine laws that make it so difficult and time-consuming to dismiss teachers who fail to perform well.

In a related point, states might consider creating renewable term contracts of perhaps five to seven years rather than granting permanent tenure. Borrowing from the world of higher education, clinical faculty members at colleges and universities who offer practical, hands-on experience are often not in tenure-track positions. Instead, clinical faculty members work under renewable term contracts. Adopting term contracts in the preK–12 world would obligate education leaders to devise clearly defined performance standards and indicators, especially with accountability in the forefront.

Needless to say, if school boards enact this second kind of change, they would be wise to include built-in procedural due process protections to ensure that those who are performing well have reasonable assurances of keeping their jobs. Further, perhaps in conjunction with collective bargaining with teachers unions, boards might consider higher salaries for those on term

contracts so as to attract and retain the most qualified individuals in their districts.

The litigation in *North Carolina*, *Vergara*, and perhaps *Forslund*, partially concerned the due process protection afforded poor-performing tenured teachers. Dismissals of tenured teachers for cause are typically time-consuming processes that can drain boards of financial resources for time spent supervising and documenting poor performance as well as legal fees for litigation. A related cost is the effect that poor teachers have on student learning, a matter that may take years to become evident. To this end, it is incumbent on boards to devise better methods of evaluating probationary teachers as they move toward tenure status, even while recognizing that challenges can arise in developing accurate, equitable rubrics to measure how effective teachers can positively improve student learning as a form of value added.

Another matter to be taken into account where teachers unions are present is their role insofar as they ordinarily vigorously defend their members from dismissals for cause. Of course, unions have the duty of fair representation of their members who are subject to dismissal because of their ineffective teaching.

Yet as unions meet their duty of fair representation, a related, difficult, inquiry comes to mind. More specifically, should unions put the needs of children ahead of their less-than-effective members and do what is in the best interest of the teaching profession by counseling ineffective teachers to consider looking for other lines of work for which they may be better suited rather than by fighting to help them retain their jobs? The way in which this question is answered may go a long way toward resolving the status of teacher tenure.

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