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Vergara reversed: Reform requires funding, not making teachers at-will

Catherine L. Fisk is
Chancellor's Professor of Law
at UC Irvine School of Law.



In *Vergara v. California*, 2016 DJDAR 3641 (April 14, 2016), the California 2nd District Court of Appeal correctly overturned a trial court decision that had invalidated teacher job security provisions of the California Education Code in effect in some form since 1921 that require just cause for dismissal

of tenured teachers and adopt seniority as a criterion in layoffs in cases of budget shortfall or declining enrollment. The Court of Appeal's thoughtful opinion explains why this suit, like several lawsuits across the country that seek to eliminate teacher job security, should fail.

As the Court of Appeal recognized, even if the trial court correctly concluded that between 1 and 3 percent of California teachers are grossly ineffective, there is no evidence that eliminating job security will magically attract better teachers into the profession. Rather, "[a]ny system will have some teachers who are not as effective as others," and the job security statutes do not "cause grossly ineffective teachers to be disproportionately assigned to schools with large low-income and minority populations." Eliminating tenure will not necessarily improve learning, but it will make it harder to recruit and retain talented teachers.

The reality is what the record evidence showed: Many factors cause poorer children to do worse in schools, including their peer group, school facilities, curriculum, enrichment programs, and the students' family and living conditions. The evidence also showed that some schools and school districts attract and retain high quality teachers in high-poverty and minority schools by putting stronger leaders at high-poverty schools, offering training and support to teachers with students who struggle, and by establishing various enrichment programs at such schools that make them a school of choice for poor and minority students who want to go to college.

If making it as easy to fire a teacher as it is to fire fast food worker were the solution to improving schools, students in states with weak protection of teachers - such as Texas, Alabama and Mississippi - would have higher levels of achievement and the racial achievement gap would be less in those states. But the exact opposite is true, even controlling for per-pupil spending. In fact, as a study in the Harvard Educational Review showed, every year the states with the highest student performance are states like Maryland and Massachusetts with robust job protections for teachers.

The fundamental problem with the *Vergara* is it focuses only on some weak teachers remaining on the job, but entirely overlooks what might happen if teaching became a job in which the teacher could be fired at will. Firing a poor teacher will not result in an excellent teacher taking his place if excellent teachers are not applying for jobs in the high-poverty, low-performing schools. Ironically, the one piece of evidence the trial court cited as proof that teacher job security disproportionately harms poor and minority students was that impoverished schools have a "disproportionate number of

Litigation

Firms to receive millions in legal fees from settlement

California-based Pearson Simon & Warshaw LLP and Quinn Emanuel Urquhart & Sullivan LLP were approved for nearly \$254 million in legal fees from last fall's \$1.87B settlement that claimed the nation's largest banks rigged the credit default swaps market.

Obituaries

Richard M. Mosk 1939-2016

Mosk, a former justice for the 2nd District Court of Appeal, died from pancreatic cancer Sunday.

Litigation

Federal judge won't hold insider trading case for Supreme Court decision

A federal judge gave the go-ahead Monday to the government's insider-trading prosecution of a former medical device company CEO and former Baltimore Orioles player Doug DeCinces, though a pending U.S. Supreme Court decision may still affect the standard for establishing guilt in the case.

Suit alleging smartphone data overcharge dismissed

The clock is ticking for a class of plaintiffs seeking monetary damages from Apple Inc. over claims that a defect in the iPhone 5 caused data to stream from their carrier services rather than available WiFi networks.

Oracle, Google headed to trial over Java copyright

A marathon settlement session featuring lawyers for copyright combatants Oracle Corp. and Google Inc. in front of U.S. Magistrate Judge Paul S. Grewal produced only one thing: the assurance of a second trial in the now 6-year-old infringement dispute between the tech giants over Google's use of Oracle's Java programming language in its Android products.

UC Regents settle football death suit for \$4.75M

After a student with sickle cell trait collapsed and died during a strenuous football workout in 2014, the Regents of the University of California agreed to settle a wrongful death suit for \$4.75 million

underqualified, inexperienced, out-of-field, and ineffective teachers." Making it easier for a district or principal to replace a struggling inexperienced teacher with a new inexperienced teacher will not improve the situation of students. Evidence introduced in the *Vergara* trial showed that Oakland Unified School District has a 50 percent annual turnover rate in its teaching staff because of difficult conditions (large classes, few counselors, nurses, or librarians, and children coming to school hungry) and high levels of administrator turnover. Eliminating tenure and protections against unfair dismissal are not going to remedy the problem of turnover, but will exacerbate it.

With low pay and no job security, highly qualified people will not flock to or stay in teaching. Indeed, students have challenged New Mexico's school reforms reducing teacher job protections precisely because it is harder to recruit and retain high quality teachers in districts and schools with higher concentrations of minority and impoverished students. If teaching were an at-will job, the teachers who might be most concerned about losing their jobs would be those whose students fail to improve standardized test scores annually. Teachers might prefer to work in schools in which the out-of-school factors that affect student performance, like family wealth and education and neighborhood stability and safety, are less of a hindrance. The best teachers would have even more incentive to avoid high-poverty schools where students struggle to learn.

The litigation that might actually improve education is not *Vergara* but is, rather, *Robles-Wong v. California*, A134424 (filed Jan. 25, 2012), in which a decision is expected from the California 1st District Court of Appeal by April 27. *Robles-Wong* alleges that the current system of funding California education results in California having the almost the lowest per-pupil funding in the nation. Even before the huge cuts in funding during the 2008-2012 recession, California's per-pupil spending was half of that in Rhode Island and Vermont, and California was 49th in the nation for teacher-student staffing ratio. The drastic underfunding and irrational process for allocating funds disproportionately affects poor and minority students who count on schools to make up for educational deficits elsewhere in their lives. For example, the length of school day or school year likely has a disproportionate adverse effect on poorer students because those from wealthier families are more likely to provide their children educational enrichment programs outside of school. Similarly, smaller classes and more highly trained teachers probably would benefit poorer students more than those from more well off backgrounds. Dire conditions in the poorest schools - where parents can't raise money to fund enrichment programs - means that high-performing teachers have reasons to transfer to high-performing schools or schools in safer neighborhoods.

Everyone agrees about the desirability of improving education for students from poor families and for minority children. But eliminating job security for teachers is not the way to do it.

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and implement a package of reforms to prevent similar deaths in the future, attorneys said.

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