

## Vergara v. California: Part Two: Is Tenure in Connecticut At Risk?

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### Education Law Notes

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As discussed in a prior post, the recent decision in the case of Vergara v. State of California, et al., will, if upheld on appeal, eviscerate California's public school teacher tenure law. Given that 46 states have some form of teacher tenure, Vergara has unleashed a sonic clash between keening prophecies of pedagogical collapse and exultant predictions of American educational primacy. A paradigm once seen as unassailable now appears vulnerable, and according to *The New York Times*, similar suits are being contemplated in a number of states, including Connecticut.

#### **How, then, would such a lawsuit fare in Connecticut?**

There are certainly similarities between the California and Connecticut tenure statutes. Both provide public school teachers with what is essentially automatic tenure. Furthermore, both states provide teachers with a heightened form of due process that to date has proven so Sisyphean that districts avoid initiating termination proceedings against all but the most egregious examples of what the Vergara court called "grossly ineffective teachers." Finally, both states contemplate the supplantation of less experienced teachers by senior teachers whose positions have been eliminated.

Connecticut's Constitution and case law also comport with the legal bases upon which Vergara is predicated. For example, both the California and Connecticut Constitutions expressly invest individuals with the right to equal protection of the laws, and both require the provision of free public schools. In fact, the Connecticut Supreme Court has recognized a confluence of those constitutional obligations, writing: "It is now well established that, under the constitution of Connecticut, the state must 'provide a substantially equal opportunity to its youth in its free public elementary and secondary schools.'" [Connecticut Coalition for Justice in Education Funding, Inc. v. Rell, 295 Conn. 240, 242 (Conn. 2010)]. Additionally, the court has recognized a "qualitative component" to the state's constitutional obligation to provide equal educational opportunities, a finding that is consistent with the core of the Vergara decision.

The congruence between California's and Connecticut's tenure provisions, however, is not complete, and while the dissimilarities are primarily a matter of degree, they are nonetheless noteworthy. For example, California requires teachers to work only two complete years before attaining tenure, an unusually short period in which to assess a teacher's competency, particularly since districts have only until March 15 of a teacher's second year of employment to provide written notice that it is denying tenure. The Vergara court

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deemed this rather perfunctory timeframe unconstitutional because it often forced school districts to make improvident decisions regarding teacher competence, thereby arbitrarily dooming students to a "grossly ineffective teacher" or, in the alternative, depriving them of a gifted one.

In contrast, Connecticut teachers must work in the same district for forty continuous months, or the equivalent of *four school years*, in order to attain tenure, and districts have until May 1 of the teacher's fourth year to notify the teacher of nonrenewal. This difference in the states' pre-tenure periods could prove significant, for in the course of criticizing California's two-year timeframe, the Vergara court noted with approval that 32 other states have a three-year pre-tenure period, and nine states require four or five years, perhaps implicitly suggesting a pre-tenure period such as Connecticut's would have passed constitutional muster.

Another potential distinction between the two states, at least going forward, lies in their respective termination processes. In deeming California's "Dismissal Statutes" unconstitutional, the court cited a "tortuous" and "illusory" hearing process that many districts believed so "impossible" to win that it effectively precluded the removal of incompetent teachers. Like California, Connecticut tenured teachers who are facing termination enjoy a form of due process that exceeds that which is afforded many other public employees. Connecticut, however, has legislated changes to the termination process that are scheduled to take effect on July 1, 2014 and that, at least theoretically, are designed to significantly reduce costs and dramatically streamline the hearing process, thereby making the prospect of a hearing less daunting for districts. For example, the current tripartite panel that has typically presided over these hearings will be replaced by a sole hearing officer, and, in cases in which the proposed termination is based upon incompetence or ineffectiveness, evidence will be limited to a total of twelve hours, with each side having no more than six hours to make its case.

The final aspect of California's tenure process that Vergara found unconstitutional was the "LIFO" -- or last in, first out -- statute, which required in any layoff the discharge of junior teachers prior to senior teachers, regardless of their respective abilities and regardless of whether the junior teacher also has tenure. Connecticut law tracks this provision somewhat closely, except that it limits the teachers who can be displaced only to those who have not yet attained tenure. Whether this sufficiently distinguishes Connecticut's dismissal statute from California's is arguable, but it is also important to recognize that in the absence of a statutory mandate, it is not uncommon for districts and teacher unions to negotiate collective bargaining agreements in which seniority is not the dispositive factor when there are no non-tenured teachers that can be displaced and a district has to choose between tenured teachers to lay off.

The viability of a Vergara lawsuit in Connecticut, then, is not clear cut. The constitutional, statutory and case-law foundations for such a claim are present, but so too are variables that could be enough to distinguish Connecticut's statutory framework from California's. The unknown factor is whether potential plaintiffs could establish that low-income or minority students in Connecticut, like their peers in California, disproportionality shouldered the burden of incompetent or inefficient teachers, or whether such a showing would be deemed

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necessary.

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