

**STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL**

October 30, 2014

Opinion No. 14-99

Constitutionality of Tennessee Teacher-Employment Statutes

QUESTION

In light of the California decision in *Vergara v. State*,¹ do the current Tennessee statutes, or the statutes in effect prior to July 1, 2011, governing permanent employment, layoffs, and dismissal or suspension of teachers violate students' rights to a free education under the Tennessee Constitution, Art. XI, § 12, or the equal-protection provisions of the Tennessee Constitution, Art. I, § 8; Art. XI, § 8, or the Fourteenth Amendment to the United States Constitution?

OPINION

No. The Tennessee teacher-employment statutes do not violate a student's constitutional right to a free education.

ANALYSIS

In *Vergara*, the plaintiffs, a group of nine public-school students, challenged a set of California statutes relating to the tenure ("Permanent Employment Statute"), dismissal ("Dismissal Statutes"), and layoff ("Last-In-First-Out Statute" or "LIFO Statute") of public-school teachers.² The plaintiffs contended that the statutes violated their constitutional rights by creating a system in which minority and low-income schools had a disproportionately high number of incompetent and ineffective teachers and that this affected the quality of their education. The state court observed that the California Constitution "is the ultimate guarantor of a meaningful, basically equal educational opportunity being afforded to the students of [that] state." *Vergara* at 7. Finding that the statutes imposed "a real and appreciable impact on students' fundamental right to equality of education" and "a disproportionate burden on poor and minority students," the court ruled that the statutes violated the students' rights under the California Constitution. *Id.* at 8, 15.

¹ No. BC484642 (L.A. Cnty., Calif., Super. Ct. June 10, 2014) (memorandum opinion) (hereinafter "*Vergara*"), *appeal pending* (Cal. Ct. App.) (No. B258589). The June 10, 2014 memorandum opinion of the superior court was issued as a "tentative decision," but a final judgment was entered in the case on August 27, 2014.

² See Cal. Ed. Code §§ 44929.21(b), 44934, 44938(b)(1)-(2), 44944, 44955.

The Tennessee Constitution also guarantees “a system of free public schools that affords substantially equal educational opportunities to all students.” *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 140-41 (Tenn. 1993). But the comparable Tennessee statutes differ from those in California in materially significant ways.³ First, the California Permanent Employment Statute provides that employees with the appropriate certification qualifications who have been employed for two consecutive school years become permanent employees if retained by the school district for the third year. The court found that the practical effect of this statute was to require districts to make the decision on whether to retain a teacher for their third year months before the two-year period expired. Noting extensive evidence that “given this statutorily-mandated time frame, the Permanent Employment Statute does not provide nearly enough time for an informed decision to be made regarding the decision of tenure,” the court concluded that students were unfairly and unnecessarily disadvantaged by the Permanent Employment Statute. *Vergara* at 10.

In contrast, Tennessee provides for a five-year probationary period. Tenn. Code Ann. § 49-5-503(3). This is more than double the time provided in California.⁴ Absent proof that school districts are still having to make hurried and uninformed decisions about whether to grant tenure after five years, it is unlikely that a Tennessee court would find this statute unconstitutional.

Second, the California Dismissal Statutes set forth a longer, more complicated procedure for dismissing a teacher than do the comparable Tennessee statutes. The California court pointed to evidence that “it could take anywhere from two to almost ten years and cost \$50,000 to \$450,000 or more to bring these cases to conclusion” and that “given these facts, grossly ineffective teachers are being left in the classroom because school officials do not wish to go through the time and expense to investigate and prosecute these cases.” *Vergara* at 11.⁵ The court found “the current system

³ For purposes of this opinion, it is assumed that the California court engaged in a proper constitutional analysis. Also, many of California’s teacher-employment statutes have recently been amended, see 2014 Calif. Leg. Serv., ch. 55; this opinion considers the versions that were at issue in *Vergara*.

⁴ Indeed, the California court pointed to evidence that “3-5 years would be a better time frame to make the tenure decision for the mutual benefit of students and teachers.” *Vergara* at 10.

⁵ For example, while a permanent employee in California may be dismissed or suspended for “unprofessional conduct” or “unsatisfactory performance,” a dismissal or suspension under either basis requires the school board to give the employee written notice of the unprofessional conduct (45 days’ notice) or unsatisfactory performance (90 days’ notice) before the notice of the action is filed. Cal. Ed. Code §§ 44932(b), 44938. Once the allotted time has passed, the board must then provide the employee with notice of its intent to dismiss or suspend 30 days from the date of service of the notice. Cal. Ed. Code § 44934. This notice must “specify instances of behavior and the acts or omissions constituting the charge so that the teacher will be able to prepare his or her defense. It shall, where applicable, state the statutes and rules which the teacher is alleged to have violated, but it shall also set forth the facts relevant to each occasion of alleged unprofessional conduct or unsatisfactory performance.” *Id.*

required by the Dismissal Statutes to be so complex, time consuming and expensive as to make an effective, efficient yet fair dismissal of a grossly ineffective teacher illusory.” *Id.* at 13.

The Dismissal Statutes stand in stark contrast to their Tennessee counterparts, Tenn. Code Ann. §§ 49-5-511, 49-5-512, in several respects. While it takes the vote of an entire school board in California to issue a suspension, and while suspension can go into effect only after the teacher is given time to correct his or her behavior, a director of schools in Tennessee can suspend a teacher “at any time that may seem necessary.” Tenn. Code Ann. § 49-5-511(a)(3). And Tennessee does not require that the teacher be given time to correct his or her behavior before a suspension or termination is sought. If the conduct warrants termination, the teacher is entitled to notice “specifically stating the offenses that are charged,” but this is less than what is required in California. Tenn. Code Ann. § 49-5-511(a)(4), (5). The teacher has 30 days to request a hearing, which must be held within 30 days following receipt of the hearing request. Tenn. Code Ann. § 49-5-512(a). The hearing officer is then required to submit a decision within 10 days of the hearing. Tenn. Code Ann. § 49-5-512(a)(9). In short, while it still ensures fairness, Tennessee’s process is much faster and no doubt less expensive than what California provides; a court would be unlikely to find it unconstitutional.

Finally, a court is also unlikely to determine that the Tennessee statute governing teacher layoffs is unconstitutional. California’s “Last-In-First-Out” statute prohibits the termination of any permanent employee while “any other employee with less seniority[] is retained to render a service” that the senior employee is qualified to render in the event of a layoff. Cal. Ed. Code § 44955(b). As the California court observed, it “contains no exception or waiver based on teacher effectiveness.” *Vergara* at 13. But the Tennessee statute specifically empowers school boards to dismiss teachers and nonlicensed employees “based on their level of effectiveness determined by [an] evaluation.” Tenn. Code Ann. § 49-5-511(b)(1).

The pre-July 2011 versions of Tenn. Code Ann. §§ 49-5-511 and -512 (pertaining to teacher layoffs and dismissals) did not differ significantly from the current versions, and the prior version of § 49-5-503 (pertaining to tenure) provided for a three-year rather than a five-year probationary period, *see* Tenn. Code Ann. § 49-5-503(3) (2009). In any event, since these statutes no longer govern teacher tenure, suspension, or dismissal in Tennessee, they obviously cannot violate a student’s constitutional rights.

The employee is then entitled to a hearing before the Commission on Professional Competence, and if a hearing is requested, it shall be commenced within 60 days. Cal. Ed. Code § 44944(a)(1).

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