SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

BEATRIZ VERGARA, a minor, by Alicia Martinez, as her guardian ad litem, *et al*, Plaintiffs, vs. STATE OF CALIFORNIA, et al, Defendants CALIFORNIA TEACHERS ASSOCIATION, *et al*, Intervenors	Case No.: BC484642 TENTATIVE DECISION Dept. 58 Judge Rolf M. Treu

In accordance with California Rules of Court 3.1590, this Court now announces its Tentative Decision.

The parties may rest assured that this Court carefully considered each and every point of contention proffered and the evidence supportive thereof. The fact that not every party's argument is discussed in detail below should not be taken to mean such argument was not considered.

TENTATIVE DECISION

Sixty years ago, in Brown v. Board of Education (1954) 347 U.S. 483, the United States Supreme Court held that public education facilities separated by race were inherently unequal, and that students subjected to such conditions were denied the equal protection of the laws under the 14th Amendment to the United States Constitution. In coming to its conclusion, the Court significantly noted:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful than any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a **right** which must be made available to all **on equal terms.**
> Id. at 493 (Emphasis added).

In Serrano v. Priest (1971) 5 Cal.3d 584 (hereinafter Serrano I) and Serrano v. Priest (1976) 18 Cal.3d 728 (hereinafter Serrano II), the California Supreme Court held education to be a "fundamental interest" and found the then-existing school financing system to be a violation of the equal protection clause of the California Constitution, holding that:

> Under the strict standard applied in such (suspect classifications or fundamental interests) cases, the state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose.
> Serrano II, at 761 (quoting Serrano I, at 597 (Original emphasis)).

In Butt v. State of California (1992) 4 Cal.4th 668, the California Supreme Court held that a school district's six-week-premature closing of schools due to revenue shortfall deprived the affected students of their fundamental right to basic equality in public education, noting:

> It therefore appears well settled that the California Constitution makes public education uniquely a fundamental concern of the State and prohibits maintenance and operation of the public school system in a way which denies **basic educational equality** to the students of particular districts. The State itself bears the ultimate authority **and** responsibility to ensure that its district-based system of common schools provides **basic equality of educational opportunity.**
> Id. at 685 (Emphasis added).

What Brown, Serrano I and II, and Butt held was that unconstitutional laws and policies would not be permitted to compromise a student's fundamental right to equality of the educational experience. Proscribed were: 1) Brown: racially based segregation of schools; 2) Serrano I and II: funding disparity; and 3) Butt: school term length disparity. While these cases addressed the issue of a lack of **equality** of education based on the discrete facts raised therein, here this Court is directly faced with issues that compel it to apply these constitutional principles to the **quality** of the educational experience.

Plaintiffs are nine California public school students who, through their respective *guardians ad litem,* challenge five statutes of the California Education Code, claiming said statutes violate the equal protection clause of the California Constitution. The allegedly offending statutes are: 44929.21(b) ("Permanent Employment Statute"); 44934, 44938(b)(1) and (2) and 44944 (collectively "Dismissal Statutes"); and 44955 ("Last-In-First Out (LIFO)"). Collectively, these statutes will be referred to as the "Challenged Statutes".

Plaintiffs claim that the Challenged Statutes result in grossly ineffective teachers obtaining and retaining permanent employment, and that these teachers are disproportionately situated in schools serving predominately low-income and minority students. Plaintiffs' equal protection claims assert that the Challenged Statutes violate their fundamental rights to equality of education by adversely affecting the quality of the education they are afforded by the state.

This Court is asked to directly assess how the Challenged Statutes affect the educational experience. It must decide whether the Challenged Statutes cause the potential and/or unreasonable exposure of grossly ineffective teachers to all California students in general and to minority and/or low income students in particular, in violation of the equal protection clause of the California Constitution.

This Court finds that Plaintiffs have met their burden of proof on all issues presented.

PROCEDURAL HISTORY

This action was filed on May 14, 2012; on August 15, 2012, the currently operative First Amended Complaint for Declaratory and Injunctive Relief was filed against defendants 1)State of California; 2) Edmund G. Brown, Jr., in his official capacity as Governor of California; 3)Tom Torkalson, in his official capacity as State Superintendent of Public Instruction; 4)California Department of Education; 5)State Board of Education (1-5 hereinafter are collectively referred to as "State Defendants"); 6) Los Angeles Unified School District (LAUSD); 7)Oakland Unified School District (OUSD); and 8)Alum Rock Union School District (ARUSD).

On November 9, 2012, this Court, through written opinion, overruled demurrers filed by State Defendants and ARUSD. Thereupon, it indicated that controlling questions of law involving substantial grounds for difference of opinion existed and that appellate resolution may materially advance conclusion of litigation, pursuant to California Code of Civil Procedure 166.1, thus inviting appellate review of its rulings on the demurrers. On

December 10, 2012, Defendants filed a petition for writ of mandate with the Court of Appeal, which issued a stay of all proceedings in this Court on December 18. On January 29, 2013, the Court of Appeal denied the relief requested by Defendants, returning the matter to this Court for further proceedings.

On May 2, 2013, this Court, recognizing the legitimate and immediate interests in this litigation of the California Teachers Association and the California Federation of Teachers (collectively "Intervenors"), granted their respective motions to intervene, thereby allowing them to become fully vested parties herein and allowing the presentation of the **legal positions** of the widest-possible range of interested parties.

(This Court stresses **legal positions** intentionally. It is not unmindful of the current intense political debate over issues of education. However, its **duty and function** as dictated by the Constitution of the United States, the Constitution of the State of California and the Common Law, is to avoid considering the political aspects of the case and focus only on the legal ones. That this Court's decision will and should result in political discourse is beyond question but such consequence cannot and does not detract from its obligation to consider only the evidence and law in making its decision.

It is also not this Court's function to consider the wisdom of the Challenged Statutes. As the Supreme Court of California stated in In re Marriage Cases (2008) 43 Cal.4th 757 at 780:

> It is also important to understand at the outset that our task in this proceeding is not to decide whether we believe, *as a matter of policy*, that the officially recognized relationship of a same-

> sex couple should be designated a marriage rather than a domestic partnership (or some other term), but instead only to determine whether the difference in the official names of the relationships *violates the California Constitution*. (Original emphasis).

While judges of this country and state do not leave their personal opinions at the courthouse door every morning, it is incumbent upon them not to let such opinions color their view of the cases before them that day. The Supreme Court goes on:

> Whatever our views as individuals with regard to this question as a matter of policy, we recognize as judges and as a court our responsibility to limit our consideration of the question to a determination of the constitutional validity of the current legislative provisions. In re Marriage Cases, at 780.)

Plaintiffs voluntarily dismissed with prejudice: 1)ARUSD on September 13, 2013; 2)LAUSD on September 18; and 3)OUSD on December 23.

On December 13, 2013, by written opinion, this Court denied State Defendants'/Intervenors' motions for Summary Judgment/Summary Adjudication. Moving parties sought reversal of this ruling from the Court of Appeal through petition for writ of mandate/prohibition and request for stay of proceedings. This relief was summarily denied by the Court of Appeal on January 14, 2014, thus returning the matter to this Court for further proceedings, including trial.

Trial commenced January 27, 2014. Motions for judgment pursuant to CCP 631.8 made by State Defendants/Intervenors after Plaintiffs rested were denied March 4. The trial concluded with oral argument on March 27 and with final written briefs filed on April 10, at which time the matter stood submitted to this Court for decision.

ANALYSIS

Since the Challenged Statutes are alleged to violate the California Constitution, the pertinent provisions thereof are set forth:

> Article 1, sec. 7(a): "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws … ."
>
> Article 9, sec. 1: "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific … improvement."
>
> Article 9, sec. 5: "The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district … ."

In Serrano I and II and Butt, *supra*, an overarching theme is paradigmatized: the Constitution of California is the ultimate guarantor of a meaningful, basically equal educational opportunity being afforded to the students of this state.

State Defendants' exhibit 1005, "California Standards for the Teaching Profession" (CSTP)(2009) in its opening sentence declares: "A growing body of research confirms that the **quality of teaching** is what matters most for the students' development and learning in schools." (Emphasis added).

All sides to this litigation agree that competent teachers are a critical, if not the most important, component of **success** of a child's in-school educational experience. All sides also agree that grossly ineffective teachers substantially **undermine** the ability of that child to succeed in school.

Evidence has been elicited in this trial of the specific effect of grossly ineffective teachers on students. The evidence is compelling. Indeed, it shocks the conscience. Based on a massive study, Dr. Chetty testified that a single year in a classroom with a grossly ineffective teacher costs students $1.4 million in lifetime earnings per classroom. Based on a 4 year study, Dr. Kane testified that students in LAUSD who are taught by a teacher in the bottom 5% of competence lose 9.54 months of learning in a single year compared to students with average teachers.

There is also no dispute that there are a significant number of grossly ineffective teachers currently active in California classrooms. Dr. Berliner, an expert called by State Defendants, testified that 1-3% of teachers in California are grossly ineffective. Given that the evidence showed roughly 275,000 active teachers in this state, the extrapolated number of grossly ineffective teachers ranges from 2,750 to 8,250. Considering the effect of grossly ineffective teachers on students, as indicated above, it therefore cannot be gainsaid that the number of grossly ineffective teachers has a direct, real, appreciable, and negative impact on a significant number of California students, now and well into the future for as long as said teachers hold their positions.

Within the framework of the issues presented, this Court must now determine what test is to be applied in its analysis. It finds that based on the criteria set in Serrano I and II and Butt, and on the evidence presented at trial, Plaintiffs have proven, by a preponderance of the evidence, that the Challenged Statutes 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. Therefore the

Challenged Statutes will be examined with "strict scrutiny", and State Defendants/Intervenors must "bear[] the burden of establishing not only that [the State] has a *compelling* interest which justifies [the Challenged Statutes] but that the distinctions drawn by the law[s] are *necessary* to further [their] purpose." Serrano I, 5 Cal.3d at 597 (Original emphasis).

PERMANENT EMPLOYMENT STATUTE

The California "two year" statute is a misnomer to begin with. The evidence established that the decision not to reelect must be formally communicated to the teacher on or before March 15 of the second year of the teacher's employment. This deadline already eliminates 2-3 months of the "two year" period. In order to meet the March 15 deadline, reelection recommendations must be placed before the appropriate deciding authority well in advance of March 15, so that in effect, the decision whether or not to reelect must be made even earlier. Bizarrely, the beneficial effects of the induction program for new teachers, which lasts an entire two school years and runs concurrently with the Permanent Employment Statute, cannot be evaluated before the time the reelection decision has to be made. Thus, a teacher reelected in March may not be recommended for credentialing after the close of the induction program in May, leaving the applicable district with a non-credentialed teacher with tenure. State Defendants' PMQ Linda Nichols testified that this would leave the district with a "real problem because now you are not a credentialed teacher; and therefore, you cannot teach." She further opined that State Superintendent of Education Tom Torlakson "clearly believes, you know it would theoretically be great" to have the tenure decision made after induction was over.

There was extensive evidence presented, including some from the defense, 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 (critical for both students and teachers). As a result, teachers are being reelected who would not have been had more time been provided for the process. Conversely, startling evidence was presented that in some districts, including LAUSD, the time constraint results in **non**-reelection based on "any doubt," thus depriving 1)teachers of an adequate opportunity to establish their competence, and 2)students of potentially competent teachers. Brigitte Marshall, OUSD's Associate Superintendent for Human Resources, testified that these are "high stakes" decisions that must be "well grounded and well founded."

This Court finds that **both** students and teachers are unfairly, unnecessarily, and for no legally cognizable reason (let alone a **compelling** one), disadvantaged by the current Permanent Employment Statute. Indeed, State Defendants' experts Rothstein and Berliner each agreed that 3-5 years would be a better time frame to make the tenure decision for the mutual benefit of students and teachers.

Evidence was admitted that nation-wide, 32 states have a three year period, and nine states have four or five. California is one of only five outlier states with a period of two years or less. Four states have no tenure system at all.

This Court finds that the burden required to be carried under the strict scrutiny test has not been met by State Defendants/Intervenors, and

thus finds the Permanent Employment statute unconstitutional under the equal protection clause of the Constitution of California. This Court enjoins its enforcement.

DISMISSAL STATUTES

Plaintiffs allege that it is too time consuming and too expensive to go through the dismissal process as required by the Dismissal Statutes to rid school districts of grossly ineffective teachers. The evidence presented was that such time and cost constraints cause districts in many cases to be very reluctant to even commence dismissal procedures.

The evidence this Court heard was 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 under the Dismissal Statutes, 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. Indeed, defense witness Dr. Johnson testified that dismissals are "extremely rare" in California because administrators believe it to be "impossible" to dismiss a tenured teacher under the current system. Substantial evidence has been submitted to support this conclusion.

This state of affairs is particularly noteworthy in view of the admitted number of grossly ineffective teachers currently in the system across the state (2750-8250), and of the evidence that LAUSD alone had 350 grossly ineffective teachers it wished to dismiss at the time of trial regarding whom the dismissal process had not yet been initiated.

State Defendants/Intervenors raise the entirely legitimate issue of due process. However, given the evidence above stated, the Dismissal Statutes present the issue of *über* due process. Evidence was presented that classified employees, fully endowed with due process rights guaranteed under Skelly v. State Personnel Board (1975) 15 Cal.3d 194, had their discipline cases resolved with much less time and expense than those of teachers. Skelly holds that a position, such as that of a classified or certified employee of a school district, is a property right, and when such employee is threatened with disciplinary action, due process attaches. However, that due process requires a balancing test under Skelly as discussed at pages 212-214 of the opinion. After this analysis, Skelly holds at page 215:

> [D]ue process does mandate that the employee be accorded certain procedural rights before the discipline becomes effective. As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefore, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority imposing discipline.

Following the hearing of the administrative agency, of course, the employee has the right of a further multi-stage appellate review process by the independent courts of this state to assess whether the factual determinations are supported by substantial evidence.

The question then arises: does a school district classified employee have a lesser property interest in his/her continued employment than a teacher, a certified employee? To ask the question is to answer it. This Court heard no evidence that a classified employee's dismissal process (i.e., a Skelly hearing) violated due process. Why, then, the need for the current tortuous process required by the Dismissal Statutes for teacher dismissals, which has been decried by both plaintiff and defense witnesses? This is

particularly pertinent in light of evidence before the Court that teachers themselves do not want grossly ineffective colleagues in the classroom.

This Court is confident that the independent judiciary of this state is no less dedicated to the protection of reasonable due process rights of teachers than it is of protecting the rights of children to constitutionally mandated equal educational opportunities.

State Defendants/Intervenors did not carry their burden that the procedures dictated by the Dismissal Statutes survive strict scrutiny. There is no question that teachers should be afforded reasonable due process when their dismissals are sought. However, based on the evidence before this Court, it finds the current system 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.

This Court finds that the burden required to be carried under the strict scrutiny test has not been met by State Defendants/Intervenors, and thus finds the Dismissal Statutes unconstitutional under the equal protection clause of the Constitution of California. This Court enjoins their enforcement.

LIFO

This statute contains no exception or waiver based on teacher effectiveness. The last-hired teacher is the statutorily-mandated first-fired one when lay-offs occur. No matter how gifted the junior teacher, and no matter how grossly ineffective the senior teacher, the junior gifted one, who

all parties agree is creating a positive atmosphere for his/her students, is separated from them and a senior grossly ineffective one who all parties agree is harming the students entrusted to her/him is left in place. The result is classroom disruption on two fronts, a lose-lose situation. Contrast this to the junior/efficient teacher remaining and a senior/incompetent teacher being removed, a win-win situation, and the point is clear.

Distilled to its basics, the State Defendants'/Intervenors' position requires them to defend the propostion that the state has a compelling interest in the *de facto* separation of students from competent teachers, and a like interest in the *de facto* retention of incompetent ones. The logic of this position is unfathomable and therefore constitutionally unsupportable.

The difficulty in sustaining Defendants'/Intervenors' position may explain the fact that, as with the Permanent Employment Statute, California's current statutory LIFO scheme is a distinct minority among other states that have addressed this issue. 20 states provide that seniority **may** be considered among other factors; 19 (including District of Columbia) leave the layoff criteria to district discretion; two states provide that seniority cannot be considered, and only 10 states, including California, provide that seniority is the sole factor, or one that must be considered.

This Court finds that the burden required to be carried under the strict scrutiny test has not been met by State Defendants/Intervenors, and thus finds the LIFO statute unconstitutional under the equal protection clause of the Constitution of California. This Court enjoins its enforcement.

EFFECT ON LOW INCOME/ MINORITY STUDENTS

Substantial evidence presented makes it clear to this Court that the Challenged Statutes disproportionately affect poor and/or minority students. As set forth in Exhibit 289, "Evaluating Progress Toward Equitable Distribution of Effective Educators," California Department of Education, July 2007:

> Unfortunately, the most vulnerable students, those attending high-poverty, low-performing schools, are far more likely than their wealthier peers to attend schools having a disproportionate number of underqualified, inexperienced, out-of-field, and ineffective teachers and administrators. Because minority children disproportionately attend such schools, minority students bear the brunt of staffing inequalities.

The evidence was also clear that the churning (aka "Dance of the Lemons) of teachers caused by the lack of effective dismissal statutes and LIFO affect high-poverty and minority students disproportionately. This in turn, greatly affects the stability of the learning process to the detriment of such students.

CONCLUSION

All Challenged Statutes are found unconstitutional for the reasons set forth hereinabove. All injunctions issued are ordered stayed pending appellate review.

In the event a Statement of Decision is requested pursuant to CRC 3.1590(d), Plaintiffs are ordered to prepare a Proposed Statement of Decision and a Proposed Judgment pursuant to 3.1590(f).

Alexander Hamilton wrote in Federalist Paper 78: "For I agree there is no liberty, if the power of judging be not separated from the legislative and executive powers." Under California's separation of powers framework, it is not the function of this Court to dictate or even to advise the legislature as to how to replace the Challenged Statutes. All this Court may do is apply constitutional principles of law to the Challenged Statutes as it has done here, and trust the legislature to fulfill its mandated duty to enact legislation on the issues herein discussed that passes constitutional muster, thus providing each child in this state with a basically equal opportunity to achieve a quality education.

Dated this 10th of June, 2014

Treu, J.