

**FILED**  
Superior Court of California  
County of Los Angeles

JUN 10 2014  
Sherri A. Carter, Executive Officer/Clerk  
By *K. Mason* Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF LOS ANGELES

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5 BEATRIZ VERGARA, a minor, by Alicia ) Case No.: BC484642  
Martinez, as her guardian ad litem, et )  
6 al, )  
Plaintiffs, ) TENTATIVE DECISION  
7 )  
vs. )  
8 ) Dept. 58  
STATE OF CALIFORNIA, et al, )  
9 ) Judge Rolf M. Treu  
Defendants )  
10 )  
CALIFORNIA TEACHERS ASSOCIATION, et )  
11 al, )  
Intervenors )  
12

13 In accordance with California Rules of Court 3.1590, this Court now  
14 announces its Tentative Decision.  
15

16 The parties may rest assured that this Court carefully considered each  
17 and every point of contention proffered and the evidence supportive thereof.  
18 The fact that not every party's argument is discussed in detail below should  
19 not be taken to mean such argument was not considered.  
20

21 TENTATIVE DECISION  
22

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

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

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

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

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

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

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

10  
11           Plaintiffs are nine California public school students who, through  
12 their respective *guardians ad litem*, challenge five statutes of the  
13 California Education Code, claiming said statutes violate the equal  
14 protection clause of the California Constitution. The allegedly offending  
15 statutes are: 44929.21(b) ("Permanent Employment Statute"); 44934,  
16 44938(b)(1) and (2) and 44944 (collectively "Dismissal Statutes"); and 44955  
17 ("Last-In-First Out (LIFO)"). Collectively, these statutes will be referred  
18 to as the "Challenged Statutes".

19  
20           Plaintiffs claim that the Challenged Statutes result in grossly  
21 ineffective teachers obtaining and retaining permanent employment, and that  
22 these teachers are disproportionately situated in schools serving  
23 predominately low-income and minority students. Plaintiffs' equal protection  
24 claims assert that the Challenged Statutes violate their fundamental rights  
25 to equality of education by adversely affecting the quality of the education  
26 they are afforded by the state.

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

7  
8 This Court finds that Plaintiffs have met their burden of proof on all  
9 issues presented.

10  
11 **PROCEDURAL HISTORY**

12  
13 This action was filed on May 14, 2012; on August 15, 2012, the  
14 currently operative First Amended Complaint for Declaratory and Injunctive  
15 Relief was filed against defendants 1)State of California; 2) Edmund G.  
16 Brown, Jr., in his official capacity as Governor of California; 3)Tom  
17 Torkalson, in his official capacity as State Superintendent of Public  
18 Instruction; 4)California Department of Education; 5)State Board of Education  
19 (1-5 hereinafter are collectively referred to as "State Defendants"); 6) Los  
20 Angeles Unified School District (LAUSD); 7)Oakland Unified School District  
21 (OUSD); and 8)Alum Rock Union School District (ARUSD).

22  
23 On November 9, 2012, this Court, through written opinion, overruled  
24 demurrers filed by State Defendants and ARUSD. Thereupon, it indicated that  
25 controlling questions of law involving substantial grounds for difference of  
26 opinion existed and that appellate resolution may materially advance  
27 conclusion of litigation, pursuant to California Code of Civil Procedure  
28 166.1, thus inviting appellate review of its rulings on the demurrers. On

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

6  
7 On May 2, 2013, this Court, recognizing the legitimate and immediate  
8 interests in this litigation of the California Teachers Association and the  
9 California Federation of Teachers (collectively "Intervenors"), granted their  
10 respective motions to intervene, thereby allowing them to become fully vested  
11 parties herein and allowing the presentation of the **legal positions** of the  
12 widest-possible range of interested parties.

13  
14 (This Court stresses **legal positions** intentionally. It is not  
15 unmindful of the current intense political debate over issues of education.  
16 However, its **duty and function** as dictated by the Constitution of the United  
17 States, the Constitution of the State of California and the Common Law, is to  
18 avoid considering the political aspects of the case and focus only on the  
19 legal ones. That this Court's decision will and should result in political  
20 discourse is beyond question but such consequence cannot and does not detract  
21 from its obligation to consider only the evidence and law in making its  
22 decision.

23  
24 It is also not this Court's function to consider the wisdom of the  
25 Challenged Statutes. As the Supreme Court of California stated in In re  
26 Marriage Cases (2008) 43 Cal.4th 757 at 780:

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

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

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

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

16 Plaintiffs voluntarily dismissed with prejudice: 1)ARUSD on September  
17 13, 2013; 2)LAUSD on September 18; and 3)OUSD on December 23.

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

25 Trial commenced January 27, 2014. Motions for judgment pursuant to CCP  
26 631.8 made by State Defendants/Intervenors after Plaintiffs rested were  
27 denied March 4. The trial concluded with oral argument on March 27 and with  
28 final written briefs filed on April 10, at which time the matter stood  
submitted to this Court for decision.

1 ANALYSIS

2  
3 Since the Challenged Statutes are alleged to violate the California  
4 Constitution, the pertinent provisions thereof are set forth:

5 Article 1, sec. 7(a): "A person may not be deprived of life,  
6 liberty, or property without due process of law or denied equal  
7 protection of the laws ... ."

8 Article 9, sec. 1: "A general diffusion of knowledge and  
9 intelligence being essential to the preservation of the rights  
10 and liberties of the people, the Legislature shall encourage by  
11 all suitable means the promotion of intellectual, scientific ...  
12 improvement."

13 Article 9, sec. 5: "The Legislature shall provide for a system of  
14 common schools by which a free school shall be kept up and  
15 supported in each district ... ."

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

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

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

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

9  
10 There is also no dispute that there are a significant number of grossly  
11 ineffective teachers currently active in California classrooms. Dr.  
12 Berliner, an expert called by State Defendants, testified that 1-3% of  
13 teachers in California are grossly ineffective. Given that the evidence  
14 showed roughly 275,000 active teachers in this state, the extrapolated number  
15 of grossly ineffective teachers ranges from 2,750 to 8,250. Considering the  
16 effect of grossly ineffective teachers on students, as indicated above, it  
17 therefore cannot be gainsaid that the number of grossly ineffective teachers  
18 has a direct, real, appreciable, and negative impact on a significant number  
19 of California students, now and well into the future for as long as said  
20 teachers hold their positions.

21  
22 Within the framework of the issues presented, this Court must now  
23 determine what test is to be applied in its analysis. It finds that based on  
24 the criteria set in Serrano I and II and Butt, and on the evidence presented  
25 at trial, Plaintiffs have proven, by a preponderance of the evidence, that  
26 the Challenged Statutes impose a real and appreciable impact on students'  
27 fundamental right to equality of education **and** that they impose a  
28 disproportionate burden on poor and minority students. Therefore the



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

6  
7 PERMANENT EMPLOYMENT STATUTE

8  
9 The California "two year" statute is a misnomer to begin with. The  
10 evidence established that the decision not to reelect must be formally  
11 communicated to the teacher on or before March 15 of the second year of the  
12 teacher's employment. This deadline already eliminates 2-3 months of the  
13 "two year" period. In order to meet the March 15 deadline, reelection  
14 recommendations must be placed before the appropriate deciding authority well  
15 in advance of March 15, so that in effect, the decision whether or not to  
16 reelect must be made even earlier. Bizarrely, the beneficial effects of the  
17 induction program for new teachers, which lasts an entire two school years  
18 and runs concurrently with the Permanent Employment Statute, cannot be  
19 evaluated before the time the reelection decision has to be made. Thus, a  
20 teacher reelected in March may not be recommended for credentialing after the  
21 close of the induction program in May, leaving the applicable district with a  
22 non-credentialed teacher with tenure. State Defendants' PMQ Linda Nichols  
23 testified that this would leave the district with a "real problem because now  
24 you are not a credentialed teacher; and therefore, you cannot teach." She  
25 further opined that State Superintendent of Education Tom Torlakson "clearly  
26 believes, you know it would theoretically be great" to have the tenure  
27 decision made after induction was over.

1           There was extensive evidence presented, including some from the  
2 defense, that, given this statutorily-mandated time frame, the Permanent  
3 Employment Statute does not provide nearly enough time for an informed  
4 decision to be made regarding the decision of tenure (critical for both  
5 students and teachers). As a result, teachers are being reelected who would  
6 not have been had more time been provided for the process. Conversely,  
7 startling evidence was presented that in some districts, including LAUSD, the  
8 time constraint results in **non**-reelection based on "any doubt," thus  
9 depriving 1)teachers of an adequate opportunity to establish their  
10 competence, and 2)students of potentially competent teachers. Brigitte  
11 Marshall, OUSD's Associate Superintendent for Human Resources, testified that  
12 these are "high stakes" decisions that must be "well grounded and well  
13 founded."

14  
15           This Court finds that **both** students and teachers are unfairly,  
16 unnecessarily, and for no legally cognizable reason (let alone a **compelling**  
17 one), disadvantaged by the current Permanent Employment Statute. Indeed,  
18 State Defendants' experts Rothstein and Berliner each agreed that 3-5 years  
19 would be a better time frame to make the tenure decision for the mutual  
20 benefit of students and teachers.

21  
22           Evidence was admitted that nation-wide, 32 states have a three year  
23 period, and nine states have four or five. California is one of only five  
24 outlier states with a period of two years or less. Four states have no  
25 tenure system at all.

26  
27           This Court finds that the burden required to be carried under the  
28 strict scrutiny test has not been met by State Defendants/Intervenors, and

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

4  
5 DISMISSAL STATUTES

6  
7 Plaintiffs allege that it is too time consuming and too expensive to go  
8 through the dismissal process as required by the Dismissal Statutes to rid  
9 school districts of grossly ineffective teachers. The evidence presented was  
10 that such time and cost constraints cause districts in many cases to be very  
11 reluctant to even commence dismissal procedures.

12  
13 The evidence this Court heard was that it could take anywhere from two  
14 to almost ten years and cost \$50,000 to \$450,000 or more to bring these cases  
15 to conclusion under the Dismissal Statutes, and that given these facts,  
16 grossly ineffective teachers are being left in the classroom because school  
17 officials do not wish to go through the time and expense to investigate and  
18 prosecute these cases. Indeed, defense witness Dr. Johnson testified that  
19 dismissals are "extremely rare" in California because administrators believe  
20 it to be "impossible" to dismiss a tenured teacher under the current system.  
21 Substantial evidence has been submitted to support this conclusion.

22  
23 This state of affairs is particularly noteworthy in view of the  
24 admitted number of grossly ineffective teachers currently in the system  
25 across the state (2750-8250), and of the evidence that LAUSD alone had 350  
26 grossly ineffective teachers it wished to dismiss at the time of trial  
27 regarding whom the dismissal process had not yet been initiated.

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

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

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

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

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

3  
4 This Court is confident that the independent judiciary of this state is  
5 no less dedicated to the protection of reasonable due process rights of  
6 teachers than it is of protecting the rights of children to constitutionally  
7 mandated equal educational opportunities.

8  
9 State Defendants/Intervenors did not carry their burden that the  
10 procedures dictated by the Dismissal Statutes survive strict scrutiny. There  
11 is no question that teachers should be afforded reasonable due process when  
12 their dismissals are sought. However, based on the evidence before this  
13 Court, it finds the current system required by the Dismissal Statutes to be  
14 so complex, time consuming and expensive as to make an effective, efficient  
15 yet fair dismissal of a grossly ineffective teacher illusory.

16  
17 This Court finds that the burden required to be carried under the  
18 strict scrutiny test has not been met by State Defendants/Intervenors, and  
19 thus finds the Dismissal Statutes unconstitutional under the equal protection  
20 clause of the Constitution of California. This Court enjoins their  
21 enforcement.

22  
23 LIFO

24  
25 This statute contains no exception or waiver based on teacher  
26 effectiveness. The last-hired teacher is the statutorily-mandated first-fired  
27 one when lay-offs occur. No matter how gifted the junior teacher, and no  
28 matter how grossly ineffective the senior teacher, the junior gifted one, who

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

8  
9 Distilled to its basics, the State Defendants'/Intervenors' position  
10 requires them to defend the proposition that the state has a compelling  
11 interest in the *de facto* separation of students from competent teachers, and  
12 a like interest in the *de facto* retention of incompetent ones. The logic of  
13 this position is unfathomable and therefore constitutionally unsupportable.

14  
15 The difficulty in sustaining Defendants'/Intervenors' position may  
16 explain the fact that, as with the Permanent Employment Statute, California's  
17 current statutory LIFO scheme is a distinct minority among other states that  
18 have addressed this issue. 20 states provide that seniority **may** be  
19 considered among other factors; 19 (including District of Columbia) leave the  
20 layoff criteria to district discretion; two states provide that seniority  
21 cannot be considered, and only 10 states, including California, provide that  
22 seniority is the sole factor, or one that must be considered.

23  
24 This Court finds that the burden required to be carried under the  
25 strict scrutiny test has not been met by State Defendants/Intervenors, and  
26 thus finds the LIFO statute unconstitutional under the equal protection  
27 clause of the Constitution of California. This Court enjoins its  
28 enforcement.

1 EFFECT ON LOW INCOME/ MINORITY STUDENTS

2  
3 Substantial evidence presented makes it clear to this Court that the  
4 Challenged Statutes disproportionately affect poor and/or minority students.  
5 As set forth in Exhibit 289, "Evaluating Progress Toward Equitable  
6 Distribution of Effective Educators," California Department of Education,  
7 July 2007:

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

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

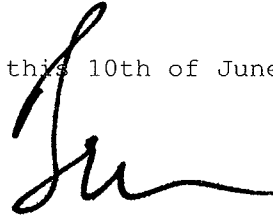
20 CONCLUSION

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

24 In the event a Statement of Decision is requested pursuant to CRC  
25 3.1590(d), Plaintiffs are ordered to prepare a Proposed Statement of Decision  
26 and a Proposed Judgment pursuant to 3.1590(f).

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

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14  
15 Dated this 10th of June, 2014



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19 Treu, J.  
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