

Script Doctors

A compelling play on the wrong stage?

by JOSHUA DUNN and MARTHA DERTHICK

Much school-reform litigation has followed a formulaic narrative for the past 25 years: advocates put forward a forlorn group of students as plaintiffs and argue that because of insufficient funding, they are being deprived of an adequate education. A lawsuit in California is rewriting that script.

Instead of school finance, the plaintiffs are attacking California's teacher-tenure laws, which they say protect the pedagogically incompetent. Asking the courts to promote real reform rather than simply demand more money is a refreshing change. While we doubt that the courts are the right stage for telling this story, because of California's dysfunctional politics and the stranglehold unions have on the legislature, they might be the only available venue.

The case, *Vergara v. California*, was brought by an organization, Students Matter, on behalf of nine students, in 2012. Students Matter was founded by a Silicon Valley entrepreneur, David Welch, in 2011. Eschewing legislative lobbying and referendum petitions as routes to policy reform, Students Matter turned to the illustrious litigators Ted Olson and Theodore Boutrous, who were then challenging California's ban on same-sex marriage as a violation of the 14th Amendment's equal protection clause.

Relying on the granddaddy of all state school-finance cases, California's own *Serrano v. Priest*, they argued during a two-month trial in 2014 that "where 'substantial disparities in the quality and extent of availability of educational opportunities' persist, the State has a duty to intervene and ensure 'equality of treatment to all the pupils in the state.'" To buttress their case, they presented shocking evidence of instructional malpractice, such as English teachers who spelled magician and truth "magition" and "thruh." If California's constitution requires equal spending, as *Serrano* held, the plaintiffs contended it should also require an equal right not to be subjected to such illiterates. According to Students Matter, three sets of law and policy that protect teacher tenure expose some students to these "grossly ineffective teachers" and thus create "arbitrary and unjustifiable inequality."

The first of the three is California's permanent employment law, which forces schools to grant tenure within 18 months. Students Matter alleged that such a short period is insufficient to determine whether a teacher will be effective. The second, California's dismissal policies, makes it all but impossible to fire bad teachers. Students Matter alleged that over the past 10 years only 91 teachers have been fired in the entire state. The third, California's last-in, first-out policy, requires school officials to lay off younger, arguably better teachers and

retain underperforming ones just because they have seniority. Crucially, Students Matter also contended that the incompetent teachers protected by these policies are "disproportionately assigned to schools serving predominantly minority and economically disadvantaged students," contributing to the violation of the California Constitution's equal protection clause.

The state and the state teachers unions, the California Teachers Association (CTA) and California Federation of Teachers (CFT), which were allowed to intervene, disagreed. In particular, the unions, which have long participated in suits that demand increased spending, argued that the statutes are neutral on their face, not designed or applied with the purpose of hurting low-income or minority students, and at most have only "an indirect, unintended, and attenuated impact" on students' education. The plaintiffs, the unions say, have presented an entirely novel interpretation of equal protection and raised policy questions that should be for the "Legislature to decide."

In June, trial court judge Rolf Treu ruled in favor of Students Matter but issued a stay pending the defendants' appeal. While we sympathize with Students Matter on policy grounds, should California's supreme court ultimately accept the group's legal rationale, which hinges on disparate-impact analysis, the floodgates could open for litigation calling for even greater judicial control over California's schools. Anyone could challenge any law, however neutral in design, with a claim that it is somehow related to an unequal outcome. The absence of a limiting principle raises the possibility that a random 4th grader in Barstow could sue to have his teacher fired because he thinks she is ineffective. Thus, we hope that the legislature will be spurred to revise these laws and thereby void the need for a final and binding precedent by California's supreme court that would induce more litigation.

Regardless of the final outcome in California, teachers unions can expect similar lawsuits across the country. Just three weeks after Treu's ruling, an education advocacy group in New York filed a lawsuit contending that the state's teacher tenure laws violate the state constitution's education clause.

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