

# REBALANCING TEACHER TENURE

## A POST-*VERGARA* GUIDE FOR POLICYMAKERS

Education policy often requires balancing the professional interests of adult employees with the educational needs and rights of students. Nearly everyone agrees, for example, that children deserve an education that prepares them for success in college and life, and that teachers should be afforded reasonable job protections. Yet these values and interests sometimes conflict.

The recent verdict in *Vergara v. California*, which found California’s teacher tenure laws unconstitutional, affirmed what many education leaders and policymakers have known for years: The balance of laws and regulations has swung so far toward job protection for teachers that students are suffering. Consistently ineffective teachers remain in the classroom year after year because laws make it virtually impossible to replace them.

Of course, improving schools will take much more than simply replacing a subset of teachers who do not represent the majority of the profession, and we believe everyone should be focused on developing and retaining the very *best* teachers, too. But consider the fact that, of California’s

275,000 teachers (a majority of whom are tenured), fewer than a half dozen are dismissed for performance each year. The numbers are very similar in other large states like New York, Illinois and New Jersey.

Why is this the case? In most states, the due process protections afforded to teachers facing dismissal far exceed the protections extended to other employees. Tenured teachers have the right to a lengthy and legalistic hearing process that can drag on for months—including pre-hearing discovery of evidence, pre- and post-hearing legal briefs, and a requirement for districts to demonstrate exceptional efforts to remediate the teacher’s low performance, before dismissal is even a possibility.

CURRENT TENURE POLICIES	BALANCED TENURE POLICIES
1. Tenure awarded prematurely, often within two years	1. Teachers eligible for tenure after five years
2. Tenure awarded by default	2. Tenure awarded for sustained strong performance
3. Tenure is irrevocable, regardless of performance	3. Ineffective teachers can lose tenure
4. Appeals can overturn good-faith professional judgment	4. Appeals can contest process and bad faith, not judgment about performance
5. Appeals hearings are full-blown trials that can last years	5. Hearings limited to one day; appeals process limited to 90 days
6. Arbitrators have incentives to draw out hearings and offer split decisions	6. Independent, salaried arbitrators (such as administrative law judges)
7. Fines instead of dismissal for egregious misconduct	7. Zero tolerance for abuse or sexual misconduct
8. Teachers lose their license after dismissal	8. Teachers who are replaced may apply to other schools, except in cases of egregious misconduct

A single tenure case in California can cost a school district \$400,000. In New York, the dismissal process for a tenured teacher often lasts longer than the trial of the executives behind Enron. It's this "über due process," as Judge Treu described it in the *Vergara* decision, that turns policies with good intentions into policies that guarantee lifetime employment to chronically ineffective teachers. Even the teachers union's expert in the *Vergara* case estimated that there were several thousand grossly ineffective teachers, protected by current tenure policies, in California's classrooms alone.

Teachers we survey across the country tell us over and over again that there are ineffective teachers in their schools, and that it's important that schools be able to replace teachers who can't help students learn.<sup>1</sup> Whenever a consistently ineffective teacher is allowed to remain on the job, students—hundreds or even thousands over the course of a teacher's career—suffer the consequences. For many of those students, that one year with an ineffective teacher

could mean the difference between graduating from college and dropping out of high school.

Only a relatively small percentage of teachers perform this poorly, and this poor performance is not the only problem facing our nation's schools—not by a long shot. We believe, however, that this is an important problem that has an impact on students and on the profession, and is the direct result of unbalanced tenure and dismissal policies that prevent even abusive teachers from being replaced.

In order for policymakers, education leaders and school principals to put the focus back where it should be—on helping hard-working teachers improve and keeping high performers—we must address these difficult issues. That starts with more balanced teacher tenure policies. Finding the right balance would not only help millions of students across the country; it would strengthen the teaching profession by finally putting to rest the legitimate concerns that it tolerates poor performance—concerns shared by teachers themselves.

## EIGHT ELEMENTS OF A BALANCED TEACHER TENURE SYSTEM

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**What exactly does a balanced teacher tenure system look like? How can we ensure that teachers are protected against arbitrary or malicious firings, while also protecting students against poor instruction that can derail their life prospects? These are difficult questions, but they are worth pursuing.**

Many people frame changes to teacher tenure as a choice between two extremes: keeping existing laws and regulations—with all their flaws—exactly as they are, or doing away with tenure entirely.

We believe that's a false choice. School systems can achieve a more reasonable balance between job protections for teachers and the educational rights of students with some adjustments to current laws. Essentially, school systems need to reset their perspective on due process to the one used in virtually every other profession: protections against egregious actions, such as dismissal based on political beliefs or legal conduct outside of work. Due process should not be a means for second-guessing school leaders' professional judgment about a teacher's job performance—which is its primary function now.

*Below, we propose eight specific changes to laws and regulations (and collective bargaining agreements, where applicable) that will create a more balanced system.*

### 1. LENGTHEN THE TRYOUT PERIOD

In many school systems, teachers can earn tenure after just two or three years in the classroom, and sometimes even sooner. **Lengthening the tryout period to five years would raise the bar on tenure and give teachers more time to prove themselves worthy of receiving long-term employment protections.** We believe that the early years of teachers' careers are vital for assessing their potential, and decisions to retain teachers or deny them continued employment can and should be made earlier—but the decision to award tenure is not the same as renewing a contract from one year to the next, and it shouldn't be treated as such. Because research shows that five years of performance represent a fairly close reflection of teachers' long-term performance, tenure should be awarded only after that point.

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<sup>1</sup> In the surveys we conducted for *The Widget Effect* (2009), almost half of all teachers who responded said that there was a tenured teacher at their school who should be dismissed for poor performance but had not been. Nearly 70 percent agreed that dismissing poor performers is an important part of maintaining a strong instructional team.

## 2. LINK TENURE TO STRONG PERFORMANCE

Today, the only performance requirement for earning tenure is not being fired. In most districts, any teacher who remains on the payroll for a given amount of time is automatically tenured. This is a mistake that results in untold numbers of poorly performing teachers receiving job protections that last a lifetime—even though nobody actively decided they should receive tenure. **Teachers should earn tenure only after showing that they can consistently help their students make significant academic progress.** For example, in districts with evaluation systems that meaningfully differentiate classroom performance, teachers might be eligible for tenure after earning three annual evaluation ratings of “effective” or higher over a four-year period. In districts where few, if any, teachers are found to be less than effective, evidence of student academic growth as reflected on state or other aligned assessments should be carefully considered. In every case, however, tenure should result from a careful review of a teacher’s performance against a clear standard. It should never be awarded by default.

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## 3. MAKE TENURE REVOCABLE

If tenure is not meant to protect ineffective teachers, then ineffective teachers should lose it. Today, in nearly every state, once teachers are awarded tenure, they can’t lose it, no matter how they perform later in their careers. **Teachers who earn poor annual evaluation ratings for two years in a row should not be allowed to keep tenure,** allowing each school the discretion to retain the teacher or not. If performance improves, tenure can be regained. Some principals will choose to invest heavily in remediating the performance of weaker teachers; others will prefer to replace them. Those decisions should be made at the school level, not through one-size-fits-all state laws.

## 4. FOCUS HEARINGS ON STUDENTS’ INTERESTS

Typically, state law applies a “just cause” standard to teacher dismissal which, at face value, means that the district has to prove that it had reasonable, good faith grounds for the dismissal. In practice, districts have been held to a much higher standard, having to prove that the tenured teacher is incompetent and irreversibly so. This standard ends up protecting teachers with a consistently ineffective performance record because an arbitrator sees the potential for improvement. Were the same standard used to gain a conviction in a criminal court, prosecutors would have to prove not just that a defendant is guilty, but that he or she will commit the crime again. Such a standard is an injustice for students.

**The proper standard would, first, limit the arbitrator’s scope of inquiry to whether there was a significant violation of the disciplinary process or bad faith.** Arbitrators should not be second-guessing the good faith professional judgments of principals and superintendents. **Second, the standard should explicitly make the best interests of students the number one factor in the outcome.** For example, if an arbitrator finds that school administrators have made a procedural error in the disciplinary process (such as conducting a post-observation conference within five days instead of two), the arbitrator should weigh the severity of the violation against the potential harm that would come to students if the dismissal were rejected and the teacher ordered back into the classroom. Furthermore, superintendents should take appropriate action against principals who violate the process through bad intent or carelessness.

## 5. MAKE HEARINGS MORE EFFICIENT

Today, hearings to appeal teacher dismissals resemble full-blown trials, complete with formal charges, discovery, and weeks or even months of testimony. This process is so expensive and burdensome that most districts are almost never able to replace tenured teachers for poor performance. Laws and regulations should strive for a fair but much more efficient appeals process. Teachers should be entitled to the same due process that employees in most other professions receive: an explanation of the decision and a hearing before someone who has the authority to reverse it. **These hearings should last no more than one day, and the entire appeals process should last no more than 90 days.**

## 6. HIRE INDEPENDENT ARBITRATORS

In many school systems, arbitrators are usually hired just to preside over appeals hearings for teacher dismissals, and they can earn more than \$1,500 per day—a huge cost when hearings can drag on for months (and an incentive to delay). More troubling is that arbitrators often need to be approved by both the school district and the local teachers union—which gives them a personal financial interest in not alienating either side. This leads to “split” decisions, such as supporting a finding that a teacher is ineffective but stopping short of dismissal. **School systems could save money and make hearings fairer by turning to permanent hearing officers such as administrative law judges**, who are paid the same salary regardless of which way they rule.

## 7. STOP TOLERATING ABUSE AND SEXUAL MISCONDUCT

Believe it or not, teachers who are found guilty of physically or verbally abusing students or making sexually inappropriate comments in class are often allowed to keep their jobs after paying a fine or serving a suspension. **Laws should be crystal clear that there will be no second chances when it comes to such egregious misconduct.** In those cases, arbitrators should have no discretion on the penalty if they sustain the charges. Student safety should be paramount.

## 8. LOWER THE PROFESSIONAL STAKES FOR STRUGGLING TEACHERS

In other professions, washing out with a particular employer does not mean the end of a career. In teaching, however, a formal dismissal of a tenured teacher for performance reasons could mean the revocation of the teacher’s license or, at a minimum, an employment record rendering the teacher unemployable. With the stakes so high, unions tend to fight dismissal tooth and nail and arbitrators generally give poor performers the benefit of the doubt, resulting in abysmally low performance standards for the profession. **Except in cases of egregious misconduct like abuse or harassment, dismissal shouldn’t involve a risk of license revocation.** After all, a teacher who may not perform well in one school setting might do better elsewhere. Lowering the stakes will allow principals to enforce high standards for teachers without being concerned about ending the careers of teachers who might perform well in other circumstances.

### About TNTP

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TNTP is a national non-profit organization working to end educational inequality by ensuring that all students get excellent teachers. Founded by teachers and inspired by the power of great teaching to change lives, we help schools, districts and states grow great teachers, manage their teaching talent strategically, and build systems that prioritize effective teaching in every classroom. Since 1997, we have recruited or trained nearly 50,000 teachers for high-need schools, catalyzed large-scale reform through acclaimed studies such as *The Widget Effect* (2009) and *The Irreplaceables* (2012), pioneered next-generation teacher evaluation and development systems, and launched one of the nation’s premiere awards for excellent teaching, the Fishman Prize for Superlative Classroom Practice. Today TNTP is active in more than 25 cities. [www.tntp.org](http://www.tntp.org)