

Beatriz Vergara, et al.
v.
State of California, et al.

Case No. BC484642

Superior Court of the County of L.A.

March 27, 2014

GIBSON DUNN

Fundamental Right to Education

**All students in California deserve
an equal chance to succeed**



The Challenged Statutes Are Unconstitutional

Permanent Employment Statute:
FAR TOO LITTLE TIME



Grossly ineffective teachers get permanent employment

Dismissal Statutes:
FAR TOO COSTLY AND
TIME-CONSUMING



Districts are stuck with grossly ineffective teachers year after year

LIFO Statute:
QUALITY BLIND LAYOFFS



Forces districts to fire top teachers and retain ineffective teachers

A horizontal line with a downward-pointing hook in the center, grouping the three outcome boxes above it.

Places California public school students at risk of severe harm, especially California's poor and minority students

The Challenged Statutes Are Unconstitutional

“In my opinion, these three statutes that we've been discussing create a **false and a flawed baseline** ... We have to spend considerable energy working around, over and through as opposed to simply saying, you know what, our energy should be focused on teaching and improving the lives of children. And **these laws are simply flawed**. They must be changed.”

—Jonathan Raymond, Sacramento City Unified School District, 2/4 Tr. at 975:21-977:3

“It is my opinion and it is my experience that **[these] statute[s] do[] not provide for the timely dismissal of teachers who are incompetent**, who are unable to teach, and that is fundamentally what protects the quality of public schools ... having highly competent and highly effective teachers in front of students every single day.”

—Dr. John Deasy, Los Angeles Unified School District, 1/28 Tr. at 219:5-13

“Our job is to ensure that there are effective teachers in classrooms, and if, in fact, teachers are not meeting the needs of students, we have to – **we have to do everything we can** to make sure that we get teachers that are there to meet the needs of kids. The statutes themselves, though, make it unlikely that we would be successful ...”

—Dr. Anthony Smith, Oakland Unified School District, 3/24 Tr. at 4467:26-4468:4

Fundamental Right to Education



Education is “essential to the preservation of the rights and liberties of the people.”

–*California Constitution, Article 9, Section 1*

“A person may not be... denied equal protection of the laws.”

–*California Constitution, Article 1, Section 7*

Fundamental Right to Education

California schoolchildren have a constitutional right to “substantially equal opportunities for learning.”

–*Serrano v. Priest* (Cal. 1976)

“The State itself has broad responsibility to ensure basic educational equality.”

–*Butt v. California* (Cal. 1992)

Even Defendants' Evidence Proves Our Case

Intervenors' expert witness: “**Grossly ineffective teachers harm students.**”

—Dr. Susan Moore Johnson, 2/18 Tr. at 2174:27–2175:4

Permanent Employment Statute

State Defendants' expert witness: “[A] probationary period of **three or even five years** would be better than two years to make the tenure decision.”

—Dr. David Berliner, 3/18 Tr. at 3890:23–3891:5

Dismissal Statutes

Intervenors' expert witness: Dismissal is so “**expensive**” and “**time-consuming**” that “administrators believe it is **impossible** to dismiss a tenured teacher.”

—Dr. Susan Moore Johnson, 2/18 Tr. at 2189:3–16

LIFO Statute

CDE Report: “[A] significant **state problem** [is] [the] extensive layoffs of excellent teachers who may be lost to the profession if they cannot soon return.”

—Pls' Ex. 327 (CDE Report) at PO327-16

Disparate Impact

CDE Admission: 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 ineffective teachers.**”

—Lynda Nichols, 3/19 Tr. at 3983:13–22

Defendants' Arguments: Everything BUT The Challenged Statutes

Teacher salaries

Collaboration

Principals

Out-of-school factors

Mismanagement

PAR

Resignations

Credentialing

Misassignments

Working conditions

Settlements

School funding

**Defendants never *actually* defend
the Challenged Statutes**

I. The California Constitution Protects Educational Equality

II. The Evidence Proves That the Challenged Statutes Are Unconstitutional

- a. Teachers Are Critical To Educational Equality
- b. The Challenged Statutes Harm Students Statewide
- c. Disparate Harm On Poor And Minority Students
- d. The Challenged Statutes Fail Strict Scrutiny

Fundamental Right to Education

Several components are essential for educational equality:

- *Serrano*: **funding**
- *Butt*: **time in school**
- *Vergara*: **teachers**

“[D]ifferences in dollars...produce differences in pupil achievement” in part because money allows school districts to employ a “higher quality staff.”

–*Serrano v. Priest* (Cal. 1976)

Strict Scrutiny

Strict scrutiny applies for **two** reasons:

1. The statutes have “a **real and appreciable impact** on ... the exercise of [a] fundamental right.”

—*Fair Political Practices Com. v. Super. Ct.* (Cal. 1979)

2. “The statutes **disproportionately burden** poor and minority students.”

—*Serrano v. Priest* (Cal. 1976)

Real And Appreciable Impact

The Challenged Statutes impose a “real and appreciable impact” on students’ fundamental right to equal educational opportunity

A “real and appreciable impact” will be found, and heightened scrutiny applied, unless a law has “only minimal, if any, effect on the fundamental right.”

—*Hawn v. County of Ventura* (Cal. Ct. App. 1977)

Under the “real and appreciable **impact**” standard, strict causation is not required because “[i]t is the unequal **effect** flowing from the [law] that gives rise to the equal protection issue.”

—*Gould v. Grubb* (Cal. 1975)

Disproportionate Burden

Plaintiffs need not demonstrate intentional or purposeful discrimination because their claims are premised on the fundamental right to education

When the fundamental right to equal educational opportunity is at stake, disparate impact is unconstitutional even where it is “merely de facto.”

—*Serrano v. Priest* (Cal. 1971)

“[U]nder California principles...the absence of purposeful conduct by the State [does] not prevent a finding that [] State [laws] [have] produced unconstitutional results.”

—*Butt v. Cal.* (Cal. 1992)

The Challenged Statutes Fail Strict Scrutiny

Under the strict scrutiny standard, 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 v. Priest* (Cal. 1971)

“The availability of ... alternatives—or the failure of the legislative body to consider such alternatives—**will be fatal**” to the law in question.

—*Connerly v. State Personnel Bd.* (Cal. Ct. App. 2001)

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Overview of the Evidence

Plaintiffs introduced evidence from thirty witnesses and deponents, including:

- Superintendents
- Human resources and labor officials
- Principals
- Teachers
- Plaintiffs and parents
- Expert witnesses
- California Department of Education

Overview of the Evidence

Plaintiffs' witnesses and deponents testified about their experiences in **28 districts**, including:

Los Angeles Unified School District	San Diego Unified School District
Long Beach Unified School District	San Francisco Unified School District
Sacramento City Unified School District	Oakland Unified School District
Kern Union High School District	Mount Diablo Unified School District
Chino Valley Unified School District	Bakersfield City School District
Pomona Unified School District	Compton Unified School District
Pasadena Unified School District	Simi Valley Unified School District
Baldwin Park Unified School District	Tracy Unified School District
West Covina Unified School District	Fullerton Elementary School District
Evergreen School District	Alum Rock Union Elementary School District
Santa Monica Malibu Unified School District	Arcadia Unified School District
Lincoln Unified School District	Berryessa Union Elementary School District
San Gabriel Unified School District	Monrovia Unified School District
Oakley Union Elementary School District	Emery Unified School District

These districts comprise 22+ percent of students statewide

Overview of the Evidence

As in *Serrano*, Plaintiffs have proven that the Challenged Statutes:

- Produce “substantial disparities in the quality and extent of availability of educational opportunities;”
- Make the “quality of a child’s education depend[ent] upon the resources of his school district and ultimately upon the pocketbook of his parents;” and
- Are “not necessary to the attainment of any compelling state interest.”

I. The California Constitution Protects Educational Equality

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Teachers Are a Critical Component of The Right to Educational Equality

Plaintiffs' evidence proved the following:

- Teacher effectiveness—the ability of a teacher to *actually* achieve student learning—can be assessed and measured;
- There are ineffective and grossly ineffective teachers in California school districts—*and they can be identified*;
- The disparity between effective and ineffective teachers in California is substantial—larger than elsewhere in the country;
- Students taught by grossly ineffective teachers fall far behind their peers in school; and
- Grossly ineffective teachers cause substantial harm that impairs a student's entire life.

Teachers Matter



Dr. John E. Deasy
Superintendent
of LAUSD

“The mission of the District is to assure that students learn. That is the only reason we open our doors in the morning. Students come to us and we make the promise that they will graduate college and be workforce ready. In order to do that, the **most important factor** is a **teacher**, a highly effective teacher.”

–1/28 Tr. at 238:14-20

Teachers Matter



Beatriz Vergara
Plaintiff

“I want to go to college and be something—well, I want to be a nurse, and I think a teacher is supposed to motivate you and encourage you and to keep you going to school. They’re the ones that—like if you have a bad teacher, you’re not going to want to go to school.”

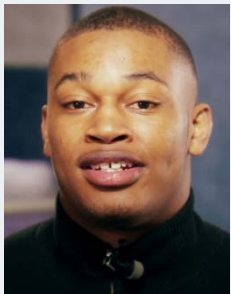
–2/11 Tr. at 1676:23–28



Elizabeth Vergara
Plaintiff

“My sixth grade teacher, English teacher. He inspired me to read. I never like—I didn’t like to read. Like I saw a book and I’d be like, ooh, no, I don’t want to read, and he is the one that told me, you know, you need to—like reading is important to you, it’s really important, like you are going to need it in your life, it’s good for your imagination, you could imagine anything you want. He was a really good teacher.”

–2/11 Tr. at 1693:7–15



Brandon Debose, Jr.
Plaintiff

“Education is long-lasting. It’s support that you can use to fall back on if you need it, if you really desire to live a good life, you know, have an education, then that will ultimately help you. You can get into college. It will help you go into the career that you want and something that’s really important ...”

–2/10 Tr. at 1642:26–1643:3

Teachers Matter



Beatriz Vergara
Plaintiff

VIDEO

“I want to go to college and be something—well, I want to be a nurse, and I think a teacher is supposed to motivate you and encourage you and to keep you going to school. They’re the ones that—like if you have a bad teacher, you’re not going to want to go to school.”

–2/11 Tr. at 1676:23–28

Teachers Matter



Dr. Raj Chetty

- Professor of Economics, Harvard University
- 2012 "Genius Grant" recipient
- 2013 John Bates Clark Medal

Measuring the Impacts of Teachers

- School district records of **2.5 million** children
- 18 million test scores
- Tracked outcomes of students up to **20 years** later using tax records to obtain data on earnings, college attendance, and teenage birth rates

Teachers Matter



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VIDEO

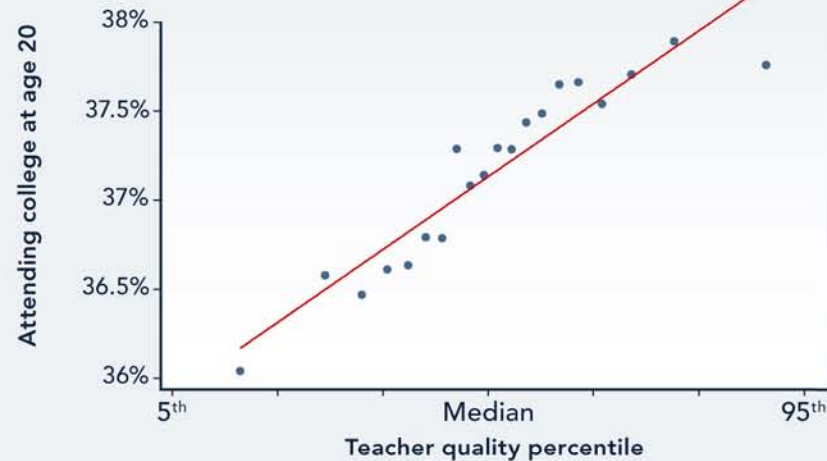
“[T]eacher effectiveness has a **profound** effect on students’ long-term success as measured by a variety of indicators, such as probabilities of attending **college**, **earnings**, **teenage pregnancy rates**, the **neighborhoods** where children live as adults and so forth. And so having a highly effective teacher significantly improves children’s outcomes and having a highly ineffective teacher, conversely, does substantial harm.”

–1/30 Tr. at 510:4–12

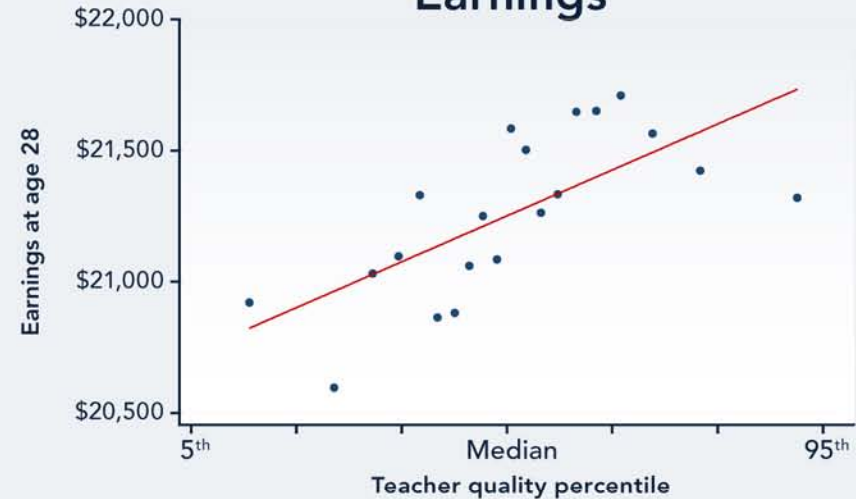
Teachers Matter

Impact of teacher effectiveness on:

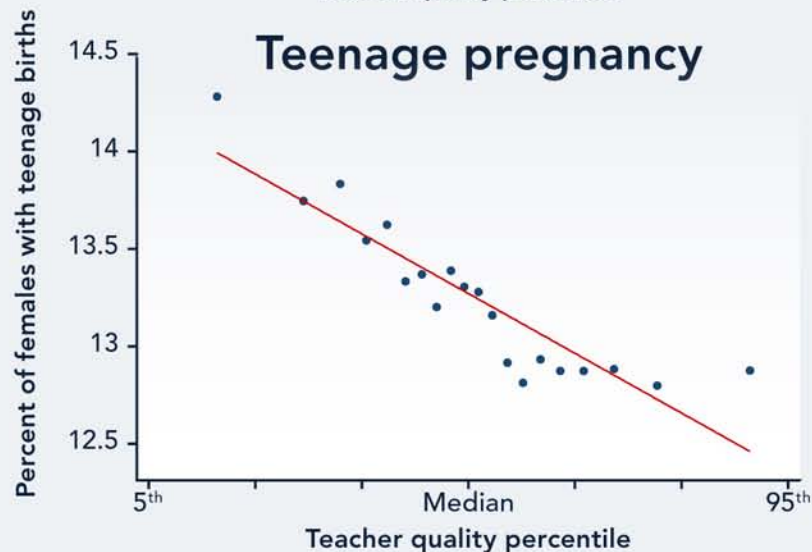
College attendance



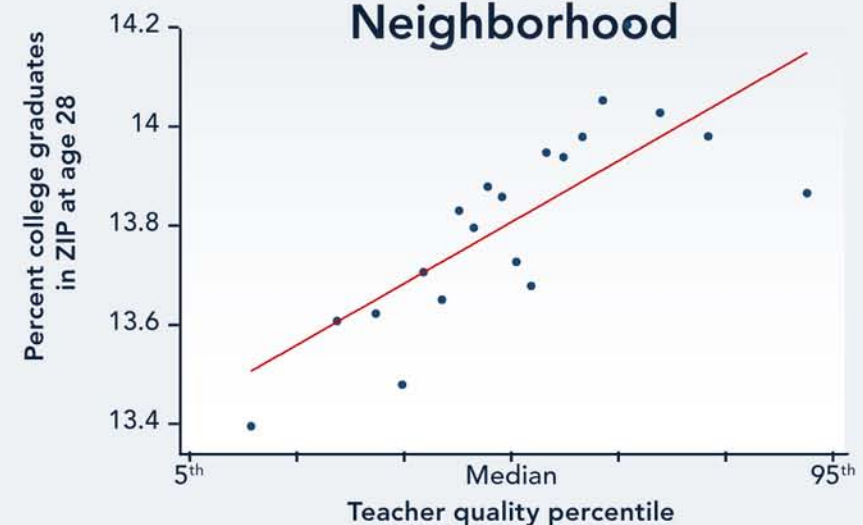
Earnings



Teenage pregnancy

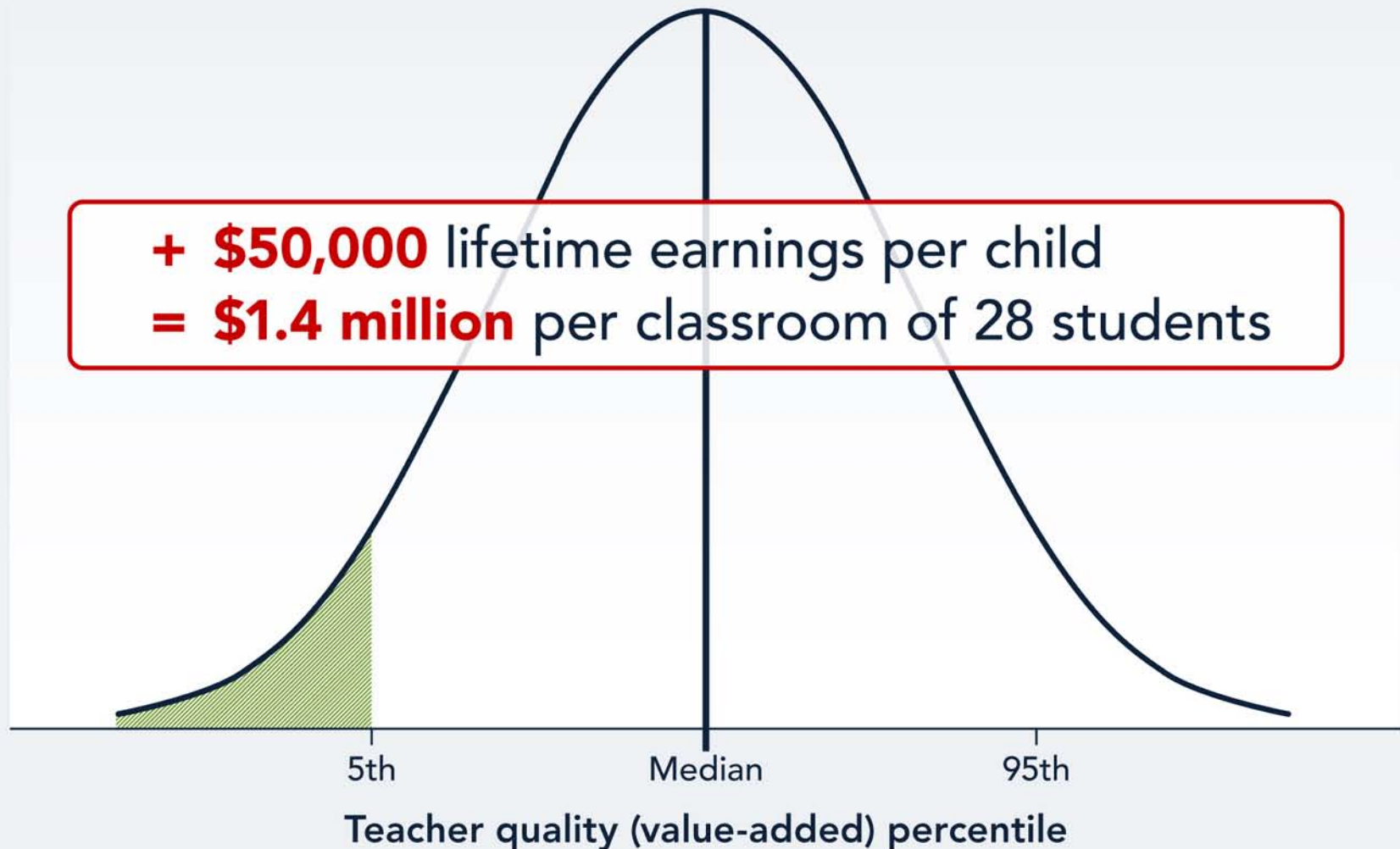


Neighborhood



Teachers Matter

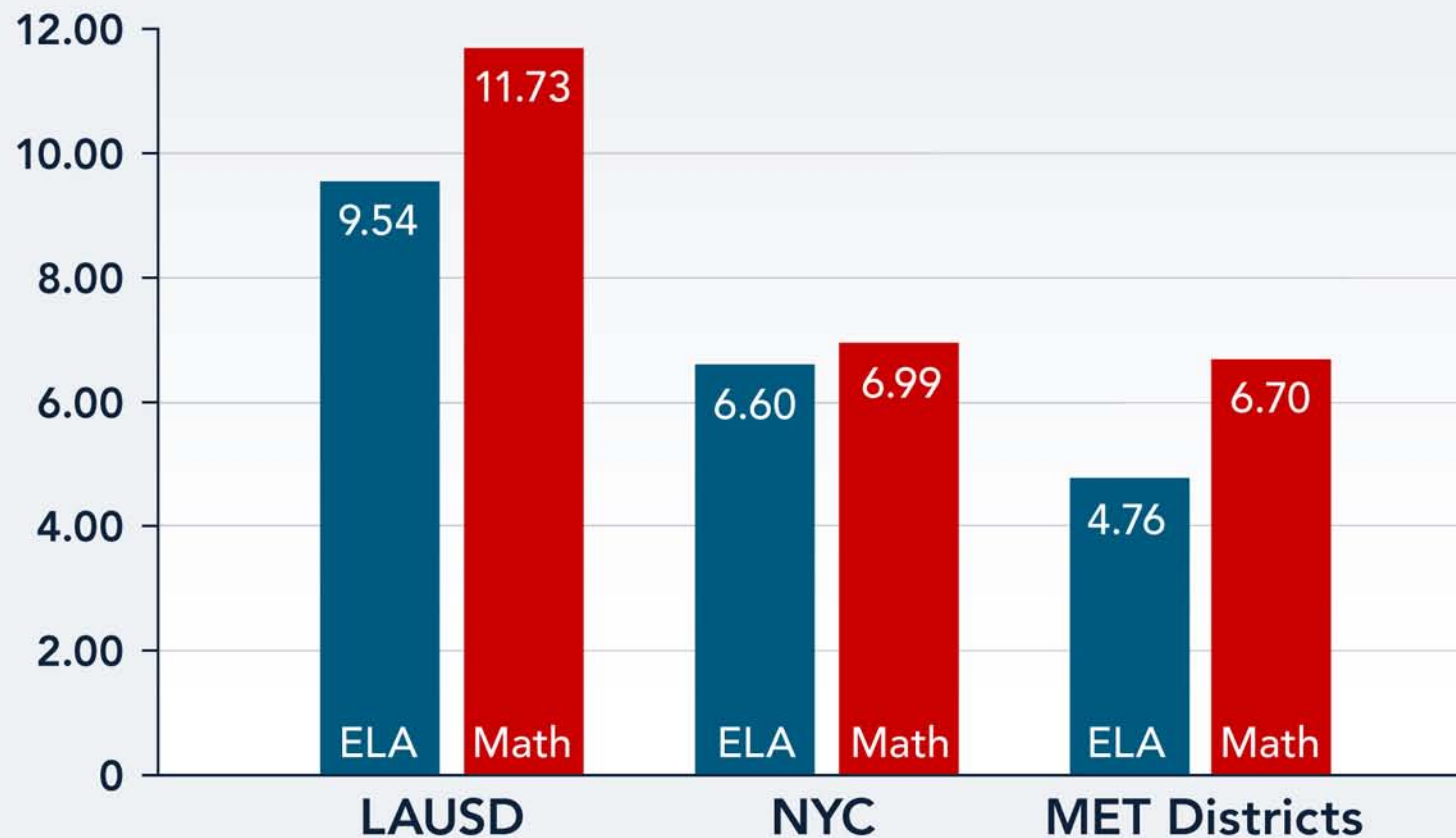
Replacing the bottom 5% of teachers with average teachers would have profound benefits for students



Teachers Matter

Teacher effectiveness in LAUSD

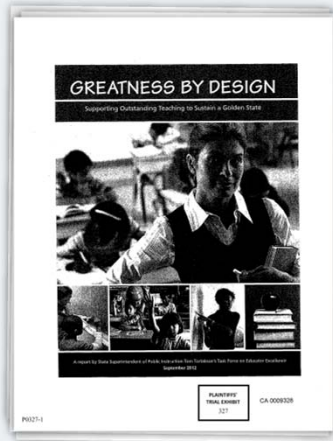
Months of learning lost when assigned to a 5th percentile vs. median teacher



MET Districts: Charlotte-Mecklenburg, Dallas, Denver, Hillsborough County, Memphis, New York City

Note: We assumed normality to estimate the effectiveness of the 5th percentile teacher. Following Hill et. al. (2008), we converted to "months of learning" using the average achievement gain on nationally normed tests, .42 s.d. in math and .31 s.d. in ELA.

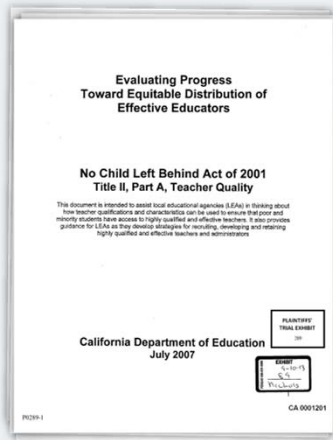
Defense Acknowledges That Teachers Matter



Pls.' Ex. 327
CA Dept. of Ed. Publication

“The academic success of California’s diverse students is inextricably tied to the quality and commitment of our educator workforce.”

—Pls.’ Ex. 327 at P0327-6



Pls.' Ex. 289
CA Dept. of Ed. Report

“[T]eacher quality is the single most important school-related factor in student success. Ample research supports this principle.”

—Pls.’ Ex. 289 at P0289-3

Teacher Effectiveness Is Measurable



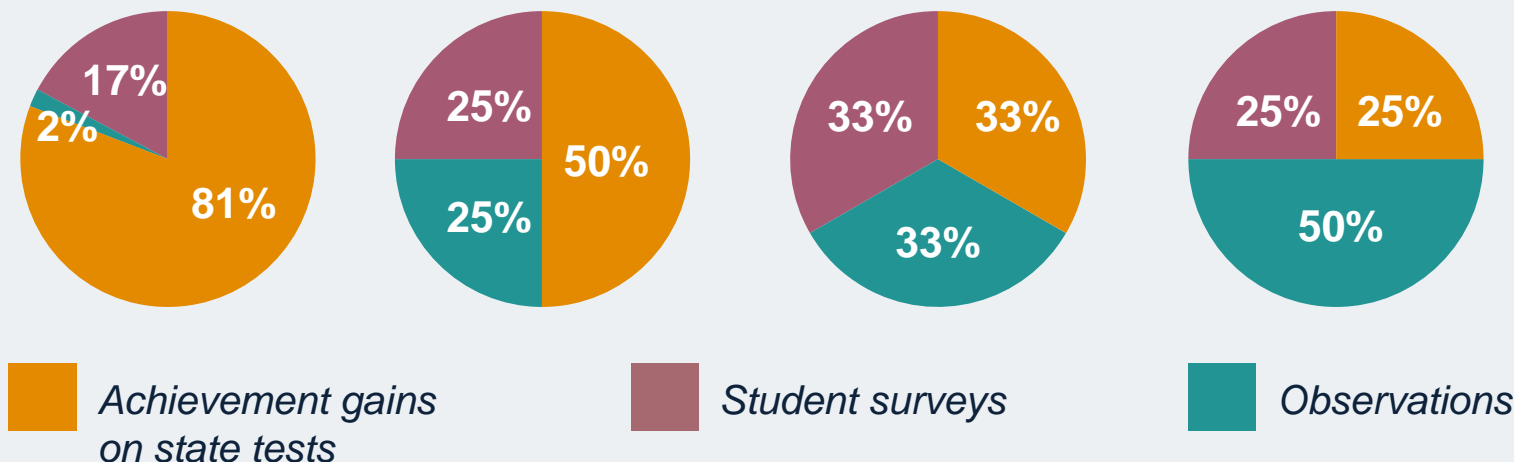
Dr. Thomas Kane
Plaintiffs' Expert Witness

Gates Foundation: “Measures of Effective Teaching Project”

- “[I]t is possible to implement **systematic** and **replicable** measures of teacher effectiveness ...”
- The MET Project was “able to identify effective teachers ... by combining evidence, their student achievement gains ... by observing in their classrooms and by administering these student surveys.”

–2/6 Tr. at 1248:19–23, 1275:4–12

School districts can use multiple measures to identify effective and ineffective teachers, *including but not limited to* standardized tests



–2/6 Tr. at 1268:14–1271:17

Teacher Effectiveness Is Measurable

Sacramento

There are objective ways to measure teaching impact on student learning by “looking at student work through the use of **rubrics**, looking at assessment **data**, both formative and summative assessment data.”

—Jonathan Raymond, 2/3 Tr. at 896:6–897:4

Los Angeles

LAUSD uses “**myriad** ... sources to make judgments on a teacher’s overall effectiveness,” including Academic Growth Over Time, an “algorithm [that] measures student learning gains” and accounts for “other factors so that those students’ learning gains ... can be attributed to the teacher.”

—Dr. John Deasy,
1/27 Tr. at 117:11–12, 118:23–119:6

Teacher Effectiveness Is Measurable

Value-added methodology and standardized tests provide tools for measuring aspects of teacher effectiveness:

Value-Added Methodology

Dr. Jesse Rothstein:

“Value added studies allow us to put a number on things that are not inherently numeric.”

–3/7 Tr. at 2852:16–21

Dr. Kenneth Futernick :

“[G]ains in student achievement are one of the measures that should be used [when] determining teacher effectiveness.”

–3/19 Tr. at 4063:14–21

Standardized Tests

Dr. Susan Moore Johnson:

“Student test scores should be used in assessing teacher effectiveness to confirm other means of assessing a teacher’s performance.”

–2/18 Tr. at 2178:8–18

Dr. Linda Darling-Hammond:

“One indicator of whether a given teacher is effective is the accomplishment of his or her students, including how well they do on tests.”

–3/20 Tr. at 4253:6–14

Teacher Effectiveness Is Measurable

Even the Defense's own expert witnesses use and rely on value-added models and standardized tests:

Dr. David Berliner: Used the Arizona SAT 9 standardized test to examine the relationship between national board certification and teacher effectiveness.

–3/18 Tr. at 3879:28–3880:28

Dr. Jesse Rothstein: Used value-added studies in “Teacher Quality Policy When Supply Matters.”

–3/7 Tr. at 2852:27–2853:21

Dr. Susan Moore Johnson: Relied on “a very important study” that tracked the “value-add data” of teachers as basis for her opinion regarding whether the teacher effectiveness plateaus after a certain number of years.

–2/18 Tr. at 2165:15–2167:10

Defendants and Intervenor Acknowledge Ineffective Teachers

RFA responses:

“[D]efendant admits that some CALIFORNIA SCHOOL DISTRICTS currently employ INEFFECTIVE teachers.”

–State Ed. Defendants

Source: Pls.’ Ex. 319 at No. 3

“California public school districts currently employ teachers who are ineffective...”

–CTA and CFT

Source: Pls.’ Ex. 318 at No. 3

The Defense Acknowledges That Ineffective Teachers Harm Students

Dr. Susan Moore Johnson: Agrees that “[g]rossly ineffective teachers harm students.”

–2/18 Tr. at 2174:27–2175:4

Pls.’ Ex. 289 (CDE Publication): “Students who are assigned to a succession of ineffective teachers have significantly lower achievement and gains in achievement than do those who are assigned to a succession of highly effective teachers.”

–Pls.’ Ex. 289 at P0289-16

Pls.’ Ex. 236 (CDE Power Point): Agrees that the “difference between an effective and non-effective teacher can be one full level of achievement in a single school year.”

–Pls.’ Ex. 236 at P0236-1

The Defense's Arguments Fall Short

Defense: Factors other than teachers impact student achievement

**BUT: Whatever the impact of other factors,
there can be no dispute about the importance of teachers**

“[E]very one of our kids deserves and needs an effective teacher, and every kid in California does. There are conditions outside of schools that make it more or less difficult ... [T]he life and experience inside the school has to be first, foremost, and always about the exchange between the teacher and the student and creating the conditions for an effective teacher to be working deeply with children. That’s our job ...”

—Dr. Anthony Smith, 3/25 Tr. at 4479:19–27

Q: “[Y]ou agree that teachers are the **most important school level factor** affecting student learning?”

A: “I’m convinced by that research, yes.”

—Dr. Susan Moore Johnson, 2/18 Tr. at 2173:12–18

“Research conducted for more than two decades has unequivocally demonstrated that when it comes to academic success, **teacher quality is what matters most!**”

—Pls.’ Ex. 289 (CDE Report) at P0289-9

The Defense's Arguments Fall Short

Defense: Teachers only impact in-school academic success and their effects fade out over time

BUT: The evidence shows that teachers actually impact long-term student outcomes

“[I]t’s not merely that that teacher is effective at teaching to the test ... [T]hat teacher has **longer term impacts** on outcomes we ultimately care about from education, like attending college, like earnings, like teenage pregnancy.”

–Dr. Raj Chetty, 1/30 Tr. at 510:28–511:14

“Teachers have **long-term effects** on not only student achievement but student earnings as well.”

–Dr. Thomas Kane, 2/6 Tr. at 1259:25–1260:1

Effective teachers are “linked to earnings, participation in democracy, the ability to access the social and economic constructs of our society ... It has an **enormous impact** on students.”

–Dr. John Deasy, 1/27 Tr. at 116:14-117:6

The Defense's Arguments Fall Short

Defense: All teachers are at least minimally effective because they must obtain a teaching credential

BUT: Credentials do not ensure effectiveness

“[A] credential only enables [an] individual to get in a classroom ... [I]t has nothing to do with whether or not they are effective or ineffective.”

—Jonathan Raymond, 2/3 Tr. at 900:25–901:7

“Credentials don’t guarantee that someone will be effective no more than a license to practice law or practice medicine guarantees that one will be an effective lawyer or physician.”

—Dr. Kenneth Futernick, 3/19 Tr. at 4034:3–6

Holding a teaching credential “does not guarantee that a teacher will be effective.”

—Dr. Linda Darling-Hammond, 3/20 Tr. at 4260:12–15

The Defense's Arguments Fall Short

Defense: Teachers are not ineffective; they are just misassigned

**BUT: Teacher misassignments
do not cause the harm at issue in this action**

A misassigned teacher can be effective at achieving student learning gains, while a properly assigned teacher can be ineffective at achieving student learning gains.

—Dr. Kenneth Futernick, 3/19 Tr. at 4059:26–4060:4

Commission on Teacher Credentialing data related to teacher misassignments is “**all over the ballpark.**”

—Roxann Purdue, 3/17 Tr. at 3760:21–3761:2

No Child Left Behind Act requirements “ha[ve] helped California to clean up teacher misassignments in [the] state.”

—Lynda Nichols, 3/19 Tr. at 3961:21–3962:22

The Defense's Arguments Fall Short

Defense: Only a small number of teachers are grossly ineffective

BUT: Students taught by grossly ineffective teachers receive an education far below statewide standards

A single grossly ineffective teacher reduces the lifetime earning capacity of a single classroom by **\$1.4 million**.

–Dr. Raj Chetty, 1/30 Tr. at 529:5–13

“Each case” of unaddressed teacher incompetence harms “**hundreds** of students.”

–Dr. Linda Darling-Hammond 3/20 Tr. at 4240:1–9

Dr. David Berliner: It is reasonable to estimate that approximately “**1 to 3 percent**” of teachers “consistently have strong negative effects on student outcomes no matter what classroom and school compositions they deal with ...”

–Dr. David Berliner, 3/18 Tr. at 3884:25–3885:4

The Bottom Line

275,000 teachers in California
x 3% grossly ineffective (per Dr. David Berliner)
= **8,250 grossly ineffective teachers**

8,250 grossly ineffective teachers
x 25 students (per teacher)
= **206,250 students harmed every year**

8,250 grossly ineffective teachers
x \$1.4 million (per classroom)
= **\$11.6 billion lifetime earnings lost per year**

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The Permanent Employment Statute

Permanent employment

Forces school districts to make premature tenure decisions before teacher effectiveness can be properly evaluated

–Cal. Education Code section 44929.21(b)

Dismissal

Prevents school districts from dismissing ineffective teachers who harm students

–Cal. Education Code sections 44934, 44938(b)(1) & (2), 44944

Seniority-based layoffs

Forces school districts to make layoff decisions that ignore teacher quality and the best interests of students

–Cal. Education Code section 44955

“Two Years” to Tenure

≤ 16

~~24~~ months



In practice, superintendents and principals have
less than 16 months to make a decision

Permanent Employment in 16 Months

Plaintiffs' evidence proved the following:

- The Permanent Employment Statute provides inadequate time for administrators to make **well-informed decisions** regarding permanent employment for *all* of their probationary teachers;
- The Permanent Employment Statute limits the amount of classroom evaluation data, student and parent input, and student academic data available to administrators;
- **Net result:** Grossly ineffective teachers obtain permanent employment;
- A longer probationary period would result in substantially **fewer errors**

16 Months Is Not Enough Time



Mark Douglas

Fullerton Asst. Superintendent

“[T]hat is not a sufficient enough time to grant a teacher tenure ... It can be as much as a **crapshoot** ... whether that [teacher] is going to develop into the person you want.”

–2/5 Tr. at 1112:3–21, 1115:24–26



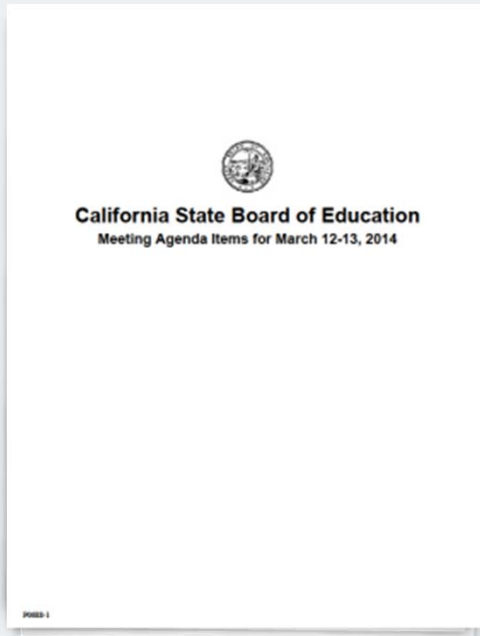
Dr. John E. Deasy

Superintendent of LAUSD

“There is **no way that this is a sufficient amount of time** to make in my opinion that incredibly important judgment ... [Y]ou don’t even have, in my opinion, a reasonable period of time to show growth ...”

–1/27 Tr. at 133:28–134:24

16 Months Is Not Enough Time



Pls.' Exhibit 688
California State Board of
Education Meeting Agenda for
March 12-13, 2014

The San Jose Unified School District and the San Jose Teachers' Association recently submitted a joint request to the State Board of Education "to enable ... the granting of a third year of probationary status as deemed necessary."

—Pls.' Ex. 688 at P0688-9

16 Months Is Not Enough Time



Dr. Thomas Kane
Plaintiffs' Expert Witness

If even *one* more year is added ...

“First of all, [you] would see...at least one...additional year[] of student achievement gains ...

Second ... teachers improve their effectiveness from their first to their second to their third year of teaching on average. And so if I only see one year, I'd have a limited opportunity to see a growth ...

Third ... it becomes easier to see who the effective and the ineffective teachers are as time passes ...”

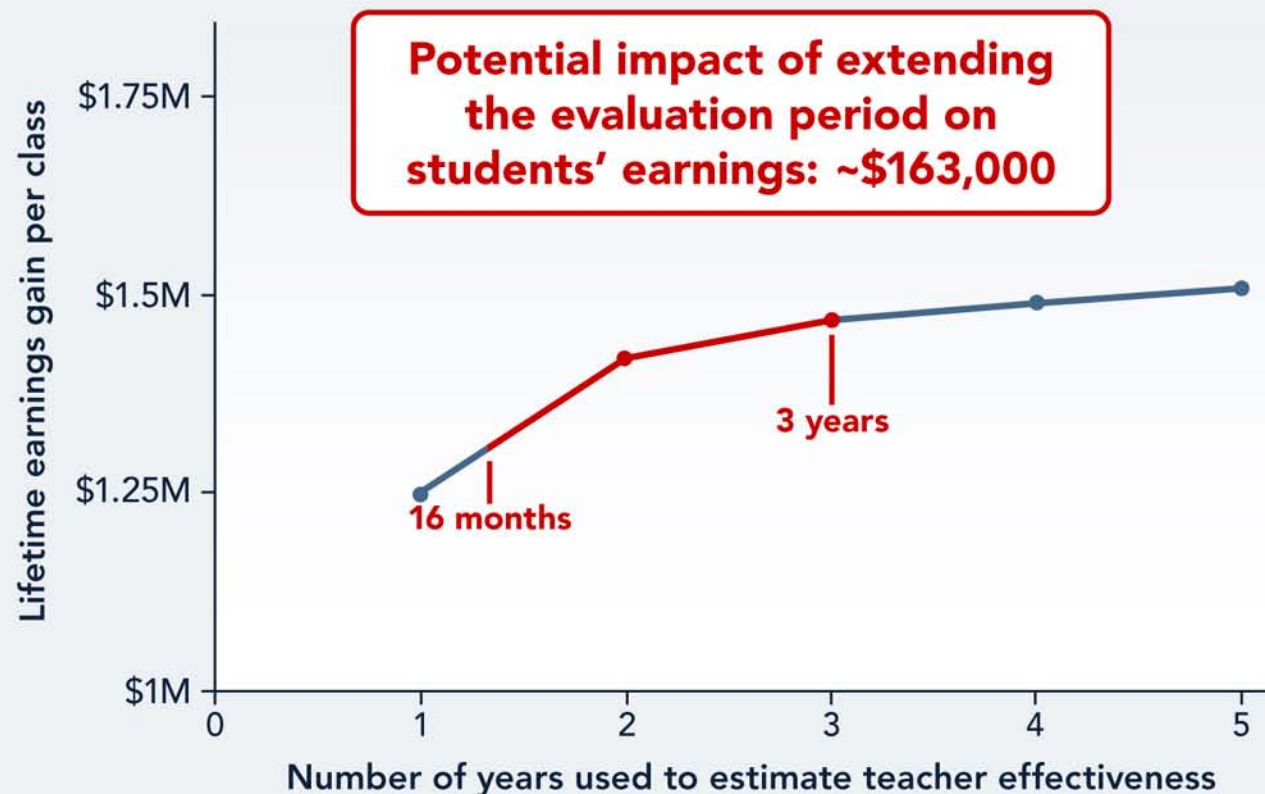
–2/6 Tr. at 1299:26–1301:7

Permanent Employment Statute Harms Students



Dr. Raj Chetty

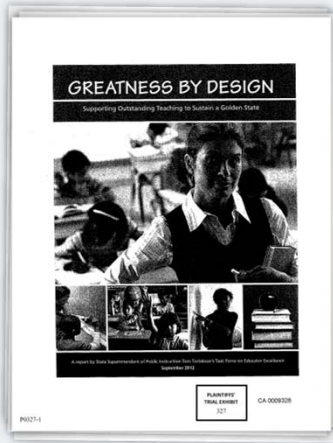
Plaintiffs' Expert Witness



"[T]he amount that students learn and the gain they would achieve... would be **\$163,000** larger if you were to use 3 years of data to estimate teacher effectiveness instead of 16 months."

-1/30 Tr. at 566:7-567:3

Defense Acknowledges The Problem



Pls.' Ex. 327
CA Dept. of Ed. Publication

“Meanwhile, districts are **forced** to make decisions about the granting of tenure...while candidates are still receiving support.... Ideally, a decision about permanent employment should occur **after** the completion of the [two-year] induction program.”

–Pls.' Ex. 327 at P0327-46, P0327-51



Teachers can actually “receive notice that they are being reelected to a tenured teaching position” and “then subsequently fail to successfully complete the Induction Program” necessary to obtain a clear credential.

–Terri Clark, 3/12 Tr. at 3350:18–26

Defense Acknowledges The Problem



Lynda Nichols
CDE Employee

A teacher “should have the **full two-year** benefit of induction” prior to the date by which a tenure decision should be made.

–3/19 Tr. at 3973:20–3974:8



Dr. Jesse Rothstein
Intervenors' Expert Witness

Agrees that the “optimal amount of time” to make a teacher tenure decision is **three years**, with a boundary maximum of **five years**.

–3/6 Tr. at 2803:3–2804:2

Defense Acknowledges The Problem



Dr. David Berliner
State Defendants'
Expert Witness

VIDEO

Q: In fact, you believe that a probationary period of **three or even five years** would be better than two years to make the tenure decision; right?”

A: I personally believe that.

Q: In your new book “Fifty Myths and Lies That Threaten America’s Public Schools,” you state that teachers should be afforded the protections of due process, quote, after a **three- to five-year** probationary period, end quote; right?

A: That is my opinion.

–3/18 Tr. at 3890:23–3891:5

The Defense's Arguments Fall Short

Defense: Districts can simply deny tenure any time they have doubts about a teacher

BUT: Districts have doubts about *most* teachers after only 16 months

“[A]t that point I still have doubts about all of my second-year teachers because they are still very much in the steep learning part of the curve and it always feels like a big risk.”

—Larissa Adam, 1/30 Tr. at 652:1–18

Administrators who deny tenure when they have doubts still reelect grossly ineffective teachers due to the time limitations imposed by the Permanent Employment Statute.

—Bill Kappenhagen, 2/4 Tr. at 1046:5–1047:23

“[Y]ou don't make such a weighty decision on either a single piece of evidence or just a doubt. You need evidence and you need to be able to show that there is a track record of improvement ... [T]he statute provides ridiculously short period of time to do that in.”

—Dr. John Deasy, 1/28 Tr. at 270:15–271:3

The Defense's Arguments Fall Short

Defense: Districts can avoid problems by “improving” their hiring practices

BUT: “Improved” hiring practices cannot change the amount of time and data available to districts

“[J]ust simply not enough time. And no matter what we do, we can't create more time in which to make that important determination.”

—Jonathan Raymond, 2/4 Tr. at 976:5–10

“[I]t is very hard to know who the effective and ineffective teachers are going to be at the moment that you recruit them ... [H]uge differences ... emerge later, but it's hard to know who those teachers are going to be at the moment you recruit them.

—Dr. Thomas Kane, 2/6 Tr.1266:25–1267:2

“If you only restrict yourself to effectively using one year of test score classroom observation data ... you are going to get significantly less reliable estimates than if you have more data ... [Y]ou are going to end up hurting students ...”

—Dr. Raj Chetty, 1/30 Tr. at 562:3–23

The Defense's Arguments Fall Short

Defense: Principals can spend as much time as they want during the probationary period evaluating teachers

BUT: Principals have limited time and resources

“[P]rincipals have multiple tasks that they’re doing. They cannot sit and coach one teacher all day long. We don’t have the resources to send in expert teachers to teacher brand-new teachers.”

—Mark Douglas, 2/5 Tr. at 1114:26-1115:2

“[Principals] have the day-to-day operations of a school interacting with parents, with students with other issues that may come up. So in my opinion, a site administrator is going to put their time and their effort in only so many places.”

—Jonathan Raymond, 2/3 Tr. at 903:3–8

The Dismissal Statutes

Permanent employment

Forces school districts to make premature tenure decisions before teacher effectiveness can be properly evaluated

–Cal. Education Code section 44929.21(b)

Dismissal

Prevents school districts from dismissing ineffective teachers who harm students

–Cal. Education Code sections 44934, 44938(b)(1) & (2), 44944

Seniority-based layoffs

Forces school districts to make layoff decisions that ignore teacher quality and the best interests of students

–Cal. Education Code section 44955

Dismissal: Lengthy, Costly, Burdensome



The Dismissal Statutes

Plaintiffs' evidence proved the following:

- It takes **years** to dismiss grossly ineffective teachers for unsatisfactory performance;
- The costs associated with dismissal are very high, often **hundreds of thousands of dollars**;
- The Commission on Professional Competence does not rule in favor of dismissal unless the district can show that teacher is **“incapable of remediation;”**
- Given the difficulty of the dismissal process, California districts rarely seek dismissal except in the **most extreme cases**; and
- California districts **would seek to dismiss more** ineffective and grossly ineffective teachers if the process took less time, money, and documentation

The Dismissal Process Prevents Dismissal



Frank Fekete, Esq.

“[T]he procedural **complexities**, the time frame required within the statute, the **resources** of **time**, **opportunity costs**, and **attorney’s fees**, and the **evidentiary burden** required, all result in districts being extremely reluctant ... to use this process to fire grossly ineffective teachers.”

–2/19 Tr. at 2326:14–20



Larissa Adam
Principal in Oakland

“I viewed [dismissal] as not a realistic option ... [I]n the cases where it was successful, it took at least **five years** and **thousands and thousands of dollars** ...”

–1/30 Tr. at 641:04–641:21

Dismissal: Lengthy, Costly, Burdensome

Some dismissal
“cases have taken
slightly less than
ten years.”

—Dr. John Deasy,
1/27 Tr. at 159:5–8

LAUSD has
never completed a
performance-based
teacher dismissal
hearing in **less than
two years.**

—Vivian Ekchian,
3/21 Tr. at 4325:10–20

“[T]o build a record...
[it] takes **months
and months
and months,**
sometimes **years.**”

—Jonathan Raymond,
2/4 Tr. at 922:10–22



Troy Christmas
Labor Relations,
Oakland Unified School District

“[T]he time in and of itself impacts success. We have kids who would have been great witnesses when we first identified ineffective teaching who are no longer with us. They have graduated. They have left. They have moved from the District. That is true of teachers. That is true of administrators.”

—1/31 Tr. at 728:19–729:6

**Teacher typically remains in the classroom
and continues to receive full salary**

Dismissal: Lengthy, Costly, Burdensome

Los Angeles

Spends in excess of
\$250,000 to \$450,000
per performance-based
dismissal

—Dr. John Deasy,
1/29 Tr. at 412:26–413:3, 416:24–417:3

Oakland

Typically spends
approximately
\$50,000 to \$400,000
per dismissal action

—Troy Christmas, 1/31 Tr. at 731:1–20

Fullerton

It costs approximately
\$250,000
per dismissal action

—Mark Douglas,
2/5 Tr. at 1104:11–17, 1229:21–1230:8

Sacramento

Dismissal costs
**“hundreds and hundreds and
thousands, perhaps millions”**

—Jonathan Raymond,
2/4 Tr. at 928:16–929:4

Dismissal: Lengthy, Costly, Burdensome



Troy Christmas
Labor Relations,
Oakland Unified School District

- In practice, the CPC requires districts to meet an **“incapable of remediation”** standard.
- For example, the CPC sometimes refuses to order the dismissal of a teacher even though the CPC decision contains “an acknowledgement of the poor performance of the teacher, acknowledgment of the ineffectiveness of the teaching, [and] an acknowledgement of efforts at remediation.”

–Troy Christmas, 1/31 Tr. at 721:15–26, 722:3–16



Frank Fekete, Esq.

- To dismiss, a district and teacher must reach a point where **“nothing more can possibly be done”** to remediate the teacher.
- As a result, districts sometimes must “send teachers through a PAR Program more than once” to show that they cannot be remediated.

–Frank Fekete, 2/19 Tr. at 2337:23–2341:12

Dismissal: Lengthy, Costly, Burdensome

Examples of dismissal cases in Plaintiffs' districts:

Colleen Kolter (LAUSD) (2007)

- Authorized dismissal for failure to follow recommended course of study, failure to plan lessons adequately, and failure to provide students with directed lessons
- Took **3+ years** from date of first observed deficiency to dismiss

Gloria Hsi (LAUSD) (2013)

- Authorized dismissal for poor classroom management, disorganized lessons, and allowing students to engage in disruptive and violent behaviors
- Took 2 separate CPC decisions and **10 years** from date of first observed deficiency to dismiss

Deborah Payne-Kelley (Oakland) (2011)

- Did **not** authorize dismissal, even though the CPC found that the teacher's "interactions with her colleagues and students were often difficult and problematic," that she "did not consistently create lesson plans," that she "did not implement assigned curricula," and that she "missed or refused to participate in meetings."
- **6 years** elapsed between first observed deficiencies and issuance of CPC decision

Source: Pls.' Ex. 20 at P0020-1949 to 1970, P0020-1875 to 1891, P0020-2525 to 2541, and P0020-157 to 174

Dismissal: Lengthy, Costly, Burdensome

Dismissal is no easier in Defense witnesses' "well run" districts:

Ken Zamvil (Vallejo City) (2008)

- Permanent teacher represented by Ernest Tuttle, III
- CPC authorized dismissal for, inter alia, excessive absences, unpreparedness, disorganization, failure to maintain files, and failure to instruct students professionally
- Took **5+ years** to dismiss from date of first observed deficiency

Linda Strong (Riverside) (2010)

- Permanent teacher in Susan Mills' school district
- CPC authorized dismissal for failure to develop lesson plans; teacher was prone to "procrastination, forgetfulness, inefficiency, blaming others for her shortcomings, and an unwillingness or inability to meet reasonable performance standards ..."
- Took nearly **4 years** to dismiss from date of first deficiency notification

Mary Crum (Long Beach) (2005)

- Permanent teacher in Joe Boyd's school district
- CPC found that teacher gave "confusing" directions to students, kept "inconsistent, confusing, and difficult" records, let her classroom devolve "in chaos," and "yelled at students..."
- CPC found that teacher "received 60 hours of [PAR] training;" her deficiencies were "not remediable."
- Took **3+ years** to dismiss from date on which district notified her of deficiencies

Source: Pls.' Ex. 20 at P0020-547 to 562, P0020-1094 to 1134, and P0020-1708 to 1721

The Dismissal Process Prevents Dismissal

Out of 275,000 teachers statewide:



14.7 CPC decisions (0.005%)
per year on average

Source: Frank Fekete, 2/19 Tr. at 2357:24–2360:28; Lynda Nichols, 3/18 Tr. at 3907:19–22

The Dismissal Process Prevents Dismissal

Out of 275,000 teachers statewide:



**2.2 teachers dismissed for unsatisfactory performance (0.0008%)
per year on average**

Source: Frank Fekete, 2/19 Tr. at 2357:24–2360:28; Lynda Nichols, 3/18 Tr. at 3907:19–22

The Dismissal Process Prevents Dismissal

Los Angeles

- LAUSD would dismiss **350+ more** ineffective teachers if the process were streamlined.
- LAUSD “**would be both more successful ... and would attempt to dismiss other[]**” grossly ineffective teachers.

–Dr. John Deasy, 1/28 Tr. at 216:1-8; Vivian Ekchian, 3/ 21 Tr. at 4322:13-22

Fullerton

Would attempt to dismiss “**all**” of its grossly ineffective teachers if dismissal cost less and took less time.

–Mark Douglas, 2/5 Tr. at 1110:27–1111:15

Oakland

“[W]ould have sought to dismiss more tenured teachers whose performance was unsatisfactory using the dismissal statutes if the process required fewer resources.”

–Dr. Anthony Smith, 3/25 Tr. at 4467:18–4468:18

Sacramento

Would have dismissed “**at least two dozen**” grossly ineffective teachers, but for the challenges associated with the Dismissal Statutes.

–Jonathan Raymond, 2/4 Tr. at 932:15–932:21

Defense Acknowledges The Problem



Dr. Robert Fraisse
Former Superintendent of
Laguna Beach

Agrees that it should be “**easier** to fire bad teachers” by, e.g., “guaranteeing them work for only a set period of time”

–3/5 Tr. at 2580:10–2581:1



Dr. David Berliner
State Defendants'
Expert Witness

Q: “You support the dismissal of bad teachers because bad teachers hurt children’s life chances; right?”

A: “Yes.”

–3/18 Tr. at 3864:24–27

Defense Acknowledges The Problem

Q: Dismissing teachers with tenure is ordinarily a very expensive and time-consuming process which very few districts actually—excuse me, actively pursue; correct?

A: That's true ...

Q: Dismissals are extremely rare in most districts because administrators believe it is impossible to dismiss a tenured teacher; right?

A: Yes.

—Dr. Susan Moore Johnson, 2/18 Tr. at 2189:3–16

Discovery propounded under the Dismissal Statutes is a “waste of money.”

—Ernest Tuttle, III, 3/10 Tr. at 2929:5–9

The Defense's Arguments Fall Short

Defense: Districts can “remove” grossly ineffective teachers with “work arounds” like settlements and resignations

BUT: Some grossly ineffective teachers refuse to resign or settle ...

Sacramento City Unified was **unable** “to remove all grossly ineffective teachers for poor performance” because “[t]here were simply more than [the district was] either able to transfer, get to retire, and [the district has] a number still that are on improvement plans.”

–Jonathan Raymond, 2/3 Tr. at 911:3–28

“For a variety of different reasons we would not be able to settle, but principally among them, the cost of settling might be too high. We might have a teacher who basically tells their counsel **I'm not interested in settling**, you know, we're going to go the whole way.”

–Troy Christmas, 1/31 Tr. at 727:18–728:1

Ernest Tuttle, III agrees that “a dismissal hearing may be the only way a district can remove a poorly performing teacher who **refuses to resign** after failing to improve” if a “teacher has permanent status and doesn't retire and doesn't resign.”

–Ernest Tuttle, III, 3/10 Tr. at 2932:7–14

The Defense's Arguments Fall Short

Defense: Districts can “remove” grossly ineffective teachers with “work arounds” like settlements and resignations

... and “work arounds” are still costly and time-consuming

LAUSD paid more than **\$5 million** in settlement payments in a 5 year span.

–Vivian Ekchian, 3/21 Tr. at 4307:21–4308:14

“It is the **lesser of evils** to pay money to not have someone who is ineffective working with students, to not be working with those students ...”

–Troy Christmas, 2/3 Tr. at 872:20–873:9

“They are simply workarounds. They are simply ways that we can minimize what I would call the damage that ineffective and grossly ineffective teachers impart on students. **They take a lot of time. They take energy**, but they are simply that, they are workarounds.”

–Jonathan Raymond, 2/4 Tr. at 929:5–16

The Defense's Arguments Fall Short

Defense: Dismissal is unnecessary because districts can remediate teachers instead

BUT: Not all grossly ineffective teachers are able or willing to remediate with assistance ...

Dr. Fraisse: “[N]ot every teacher who was recommended to PAR for intervention ultimately emerges as an effective teacher” because “some teachers are unable to meet the requirements of their PAR Improvement Plans.”

–Dr. Robert Fraisse, 3/5 Tr. at 2587:2–16

Some teachers “believe[] that they can stick around till retirement without remediating.”

–Troy Christmas, 1/31 Tr. at 735:8–23

Dr. Johnson agrees that “even a well run PAR program must contemplate that some poorly performing teachers may still have to be dismissed...under state law.”

–Dr. Susan Moore Johnson, 2/18 at 2205:12–18

The Defense's Arguments Fall Short

Defense: Dismissal is unnecessary because districts can remediate teachers instead

... and even the “best” PAR programs are expensive and limited in scope

San Juan Unified School District

- ~ 2 teachers complete PAR per year
- District employs 2,000+ certificated staff

–Shannan Brown, 3/14 Tr. at 3430:14-20

Hart Union High School District

- < 2 teachers complete PAR per year
- District employs 1,000+ teachers

–James Webb, 3/19 Tr. at 4092:28–4093:2, 4094:23–4095:1

PAR programs cost between \$250,000 and \$2 million annually

–Dr. Susan Moore Johnson, 2/18 Tr. at 2210:19–2211:6

The Defense's Arguments Fall Short

Defense: Any harm is the result of local mismanagement

BUT: This argument fails for several reasons:

1. There is no **evidence** that any of the districts represented by Plaintiffs' witnesses are mismanaged;
2. Children cannot control whether they live in a "mismanaged" school district;
3. Even so-called "well-managed" school districts still face enormous burdens when they *actually* need to go through the dismissal process;
4. State Defendants admitted that alleged local mismanagement does not eliminate the *independent* harms being caused by the Challenged Statutes. (3/19 Tr. at 4008:5-4009:4.)

For all of these reasons, the California Supreme Court has already *rejected* the "local mismanagement" argument

The Defense's Arguments Fall Short

Even if certain “well-managed school districts” could save some of their students from the harms imposed by the Challenged Statutes, the laws would still be facially unconstitutional

Even if “local mismanagement causes one district’s services to fall seriously below prevailing statewide standards,” strict scrutiny still applies because “the California Constitution guarantees ‘basic’ equality in public education, regardless of district residence.”

–*Butt v. Cal.* (Cal. 1992)

“Management and control of the public schools is a matter of state, not local, care and supervision.”

–*Butt v. Cal.* (Cal. 1992)

“California constitutional principles require State assistance to correct basic ‘interdistrict’ disparities ... even when the discriminatory effect was not produced by the purposeful conduct of the State or its agents.”

–*Butt v. Cal.* (Cal. 1992)

LIFO Statute

Permanent employment

Forces school districts to make premature tenure decisions before teacher effectiveness can be properly evaluated

–Cal. Education Code section 44929.21(b)

Dismissal

Prevents school districts from dismissing ineffective teachers who harm students

–Cal. Education Code sections 44934, 44938(b)(1) & (2), 44944

Seniority-based layoffs

Forces school districts to make layoff decisions that ignore teacher quality and the best interests of students

–Cal. Education Code section 44955

Plaintiffs' evidence proved the following:

- Seniority-based layoffs deprive students of bright, enthusiastic teachers in favor of ineffective teachers with more seniority;
- Seniority-based layoffs dissuade high-achievers from entering the teaching profession; and
- Conducting layoffs on the basis of seniority, without considering effectiveness, imposes significant and measurable harm on students.

LIFO: Firing Effective Teachers

Jonathan Raymond, 2/3 Tr. at 917:22–27

Q: “[W]hen you did reductions in force pursuant to the LIFO Statute ... did the district ever have to lay off teachers who were effective in achieving gains in student learning?”

A: “Yes.”

Mark Douglas, 2/5 Tr. at 1120:6–1121:7

Q: “During these seniority-based layoffs, has Fullerton ever had to ultimately lay off effective teachers?”

A: “Oh, yes.”

Dr. John Deasy, 1/28 Tr. at 237:16–19

Q: “During layoffs in LAUSD, has LAUSD ever had to lay off teachers who were effective in achieving gains in student learning?”

A: “It would be my judgment, yes.”

Troy Christmas, 2/3 Tr. at 775:26–776:2

Q: “[H]as the district ... laid off teachers who were effective in achieving learning gains using the reverse seniority provisions of LIFO?”

A: “Yes.”

LIFO: Retaining Grossly Ineffective Teachers

Jonathan Raymond, 2/4 Tr. at 929:22-26

Q: “Did the Sacramento City Unified School District ever retain any poorly performing, grossly ineffective teachers when conducting layoffs due to LIFO’s reverse seniority?”

A: “Yes.”

Mark Douglas, 2/5 Tr. at 1121:8–11

Q: “During these seniority-based layoffs, has Fullerton ever had to ultimately retain grossly ineffective teachers?”

A: “Yes.”

Dr. John Deasy, 1/28 Tr. at 237:24–28

Q: “During reductions in force pursuant to the LIFO statute, has LAUSD ever ended up retaining teachers who were not successful in achieving student learning gains?”

A: “Yes.”

Troy Christmas, 2/3 Tr. at 776:3-777:8

Q: “And using those same reverse seniority provisions of LIFO, has the District ever retained teachers who were grossly ineffective ...?”

A: “Yes.”

LIFO Layoffs Harm Students



Jonathan Raymond
Former Superintendent
of Sacramento City
Unified School District

VIDEO

“In my first day as superintendent, I went into a school, and I observed a teacher, an amazing teacher, a first-grade teacher. I mean, the energy and the connection that she had with children on just the first day remarkable. And when my family moved out to Sacramento in December of 2009, and my wife and I decided which school we were going to send our children to, you know, you couldn’t believe our excitement when we found out that the first-grade teacher that I had observed had an opening in her classroom for my son Joey. And so that spring when we did our layoffs, you know, you can imagine what it felt like to know that this teacher, who in my opinion after being in hundreds of schools and observing thousands of teachers, is probably one of the top five best teachers I have ever seen in my career anywhere in the country. And to know that she was laid off not because of her ability to engage and motivate children to push to love them, to collaborate with her employees, her work ethic, but because of her start date and to have to explain to my son’s mother, you know, that as superintendent there was nothing I could do about that, and to explain to my son, my six-year-old son, you know, when he asked me, daddy, why is Miss Nim being laid off, she’s a great teacher, and I have to explain to him because I’m following the law, you know, that doesn’t feel real good ... [A] system that treats its best teachers this way ... a system that ultimately doesn’t serve children and its families ... [in] my humble opinion is broken.”

–2/3 Tr. at 919:12–920:24

Laying Off the “Teacher of the Year”



Bhavini Bhakta
Teacher, Arcadia
Unified School District
2009 Golden Apple Teacher
of the Year Recipient

“[S]eniority date mattered way more than how much I did for kids or what principals would say about me or what parents would say about me. And my love for it, [] none of it mattered, nothing ... **And all that mattered was my hire date** and after happening for that many years, you know, you just think that, you know, **I’m not even a person**, I’m not even doing anything, it’s just my hire date that matters, **I am a number** and not a person, and **that’s not easy.**”

–2/4 Tr. at 1000:6–27



Christine McLaughlin
Pasadena Unified School
District Teacher of the Year

Has received **four** layoff notices since 2008.

–3/5 Tr. at 2610:14–24

LIFO Layoffs Harm Students



Dr. Raj Chetty

Plaintiffs' Expert Witness

- Professor of Economics, Harvard University
- 2012 "Genius Grant" recipient
- 2013 John Bates Clark Medal

The LIFO Statute “reduces student learning relative to a feasible alternative policy and it dismisses highly effective teachers who you absolutely would want to keep in the school system, and that **impedes student learning** as measured by test scores. And, more importantly, in my view, it **has measurable important long-term impacts** on students in terms of earnings, as well as college attendance rates and myriad other outcomes.”

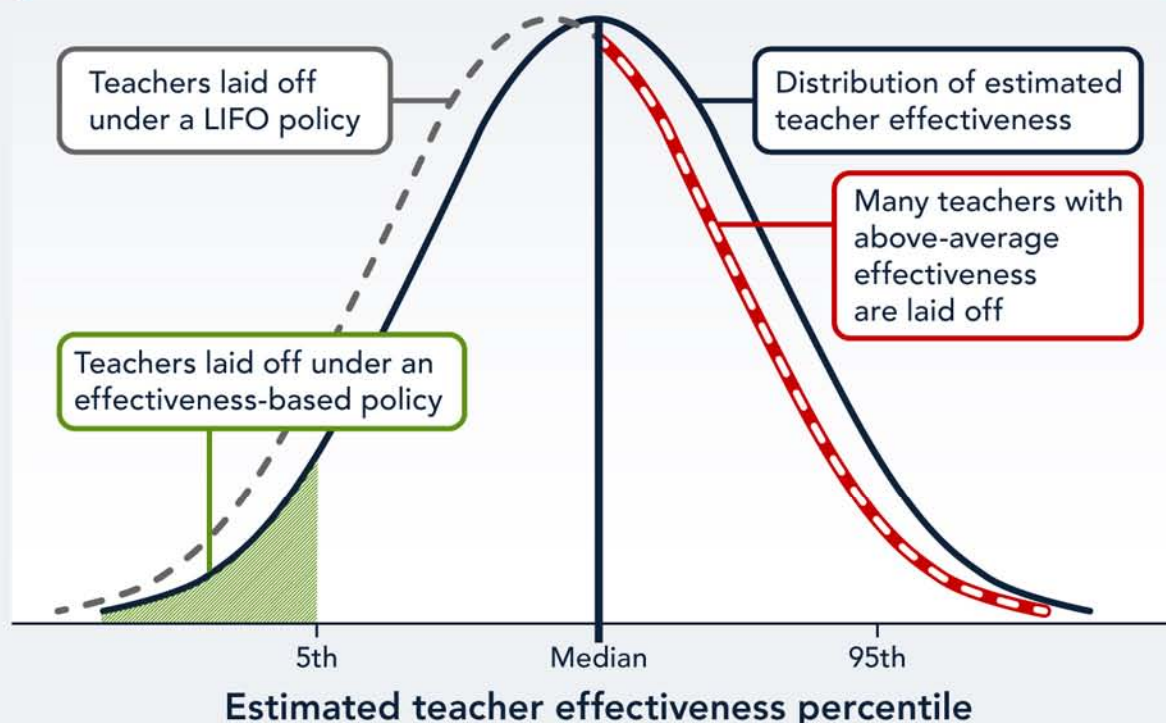
–1/30 Tr. at 579:8–21

LIFO Layoffs Harm Students



Dr. Raj Chetty
Plaintiffs' Expert Witness

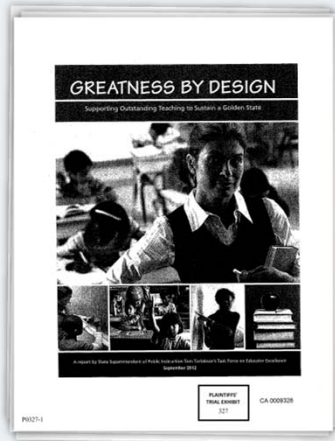
Impact on students: \$2.1 million per teacher



"[P]er teacher laid off, students would gain **\$2.1 million** over their lifetime if you used effectiveness-based layoffs instead of experienced-based layoffs."

-1/30 Tr. at 569:23-570:1

Defense Acknowledges The Problem



Pls.' Ex. 327
CA Dept. of Ed. Publication

“[A] significant state problem [is] extensive layoffs of **excellent** teachers who may be lost to the profession if they cannot soon return.”

—Pls.' Ex. 327 at P0327-16



Dr. David Berliner
State Defendants'
Expert Witness

Q: “[I]f you had a better diagnostic instrument for measuring teacher effectiveness than a teacher's seniority, you would recommend using that instrument over the current Layoff policy; correct?”

A: “If I had a better instrument, I would use it **always**...[T]he better the instrument to use to make decisions about teachers' competence, the better off everyone is.”

—Dr. David Berliner, 3/18 Tr. at 3871:11–27

The Defense's Arguments Fall Short

Defense: Teachers laid off under seniority-based layoff system are less effective—on average—than teachers who are retained

BUT: That comparison assumes that the only alternative is random selection. In fact, there are feasible alternatives that consider effectiveness.

“[T]he right question is not ... how effective are the teachers that are laid off versus the workforce as a whole. The right question is how effective are the teachers laid off under one criterion versus a different criterion.”

—Dr. Dan Goldhaber, 2/13 Tr. at 1874:12–1875:7

“**48 percent** of the teachers who are laid off under a LIFO policy are **more effective** than the average teacher in the L.A. School District. So 48 percent of the time you are laying off someone who’s actually better than average when you use a LIFO policy.”

—Dr. Raj Chetty, 1/30 Tr. at 574:25–575:12

The average teacher retained under an effectiveness-based layoff system achieves “**nine months**” more in student learning compared to the average teacher laid off under an effectiveness-based layoff system.

—Dr. Arun Ramanathan, 2/14 Tr. at 2079:10–18

The Defense's Arguments Fall Short

Defense: Districts can use the (d)(1) skipping criterion to avoid laying off some effective teachers

BUT: Subsection (d)(1) only permits districts to skip on the basis of training and credential, not effectiveness

The ability of a district to skip under LIFO Statute subsection (d)(1), the “special training clause,” depends on whether the teacher has “this credential and that credential,” not effectiveness.

–Dr. John Deasy, 1/28 Tr. at 240:15–241:27

A teacher’s credential status “has not been [found to be] related to teacher’s subsequent effectiveness.”

–Dr. Thomas Kane, 2/6 Tr. at 1267:16–20

Skipping under the LIFO Statute is not a “credible alternative” for districts to use to save all of their effective teachers.

–Dr. Arun Ramanathan, 2/14 Tr. at 2066:27–2067:11

The Defense's Arguments Fall Short

Defense: Districts can use the (d)(2) skipping criterion to safeguard students' equal protection rights

BUT: Subsection (d)(2) is so ambiguous that districts cannot—and do not—assume the risk of invoking it

In *Reed*, an affiliate of Intervenor argued that “subsection (d)(2) ... was intended to permit school districts to accommodate constitutional concerns regarding the race and ethnicity of teachers, not to address minimal educational standards for students.”

—Petition for Writ of Supersedeas, *Reed v. UTLA* (2011)

LAUSD's efforts to use (d)(2) were overturned and a full-blown trial on the merits was ordered to determine whether the exception justifies violating a teacher's statutory “seniority rights.”

—*Reed v. UTLA* (Cal. Ct. App. 2012)

Skipping under (d)(2) is so impractical that districts do not ask the CDE about it.

—Lynda Nichols, 3/19 Tr. at 3979:23-3981:4

Fullerton “couldn't define clearly” what criterion would satisfy (d)(2) and was unable to risk “throw[ing] the entire hearing off.”

—Mark Douglas, 2/5 Tr. at 1219:14-1220:4

The Defense's Arguments Fall Short

Defense: "Well-run" districts can sometimes avoid layoffs

BUT: Allegedly "well-run" districts conduct layoffs too

The "San Diego Unified School District has not always been able to avoid layoffs."

—Richard Barrera, 3/10 Tr. at 2995:27–2996:2

Despite "Riverside Unified's best efforts, layoffs have occurred in the district in recent years."

—Susan Mills, 3/11 Tr. at 3102:24–3103:6

The "La Habra City Elementary School District has laid off teachers in the last five years."

—Danette Brown, 3/11 Tr. at 3181:19–25

The Defense's Arguments Fall Short

Defense: There is no certainty that layoffs will occur in the future

BUT: Districts have already announced 2014-2015 layoffs

“[L]ayoff notices **have been announced** in certain California school districts this year.”

–Jeannie Oropeza, 3/17 Tr. at 3685:8–11

Layoffs in California are “extremely likely” because of “demographic trends” and the fact that one or more districts “**have already started** to announce” layoffs.

–Dr. Arun Ramanathan, 2/14 Tr. at 1976:27–1977:12

“California has not been good to schools in terms of providing good evidence of what your next year’s budget is going to be.”

–Dr. Robert Fraisse, 3/5 Tr. at 2541:22–25

I. The California Constitution Protects Educational Equality

II. The Evidence Proves That the Challenged Statutes Are Unconstitutional

- a. Teachers Are Critical To Educational Equality
- b. The Challenged Statutes Harm Students Statewide
- c. Disparate Harm On Poor And Minority Students
- d. The Challenged Statutes Fail Strict Scrutiny

Disparate Impact on Poor and Minority Students

Plaintiffs' evidence has proven that the Challenged Statutes impose disproportionate harm on poor and minority students:

Make a bad situation worse:

Poor and minority students are more vulnerable to the harms of ineffective teachers, who districts cannot dismiss

Accumulation problem:

As more effective teachers transfer to more affluent schools, ineffective teachers are left behind rather than being dismissed

"Dance of the lemons":

Dismissal is not a viable option, so ineffective teachers get transferred to poor and minority schools where there are more vacancies

Increased churn:

Teachers in high-need areas have less seniority on average and are more likely to be fired under LIFO-based layoff system

Inability to close achievement gap

Challenged Statutes Make a Bad Situation Worse



Kareem Weaver
Principal in Oakland

“There is a margin of error issue with students with low-income, lots of risk factors ... **I liken it to standing on a razor's edge.** The fewer these risk factors you [have], the wider your base is, but for many students, especially kids of color ... especially kids who have low socioeconomic status, **education can either prop them up or it can blow them down ...**”

–2/7 Tr. at 1456:16–28



Bill Kappenhagen
Principal in San Francisco

“[W]hen a student from a low-income family has an ineffective teacher, it actually puts them—it **puts their life trajectory on hold or even backwards...** [L]ower income families' students don't have the available resources that other or more affluent families have, they don't have an opportunity to be nearly as resilient when they have an ineffective teacher, especially when they have a grossly ineffective teacher.”

–2/4 Tr. at 1040:19–1041:8

Challenged Statutes Make a Bad Situation Worse



Kareem Weaver
Principal in Oakland

“There is a margin of error issue with students with low-income, lots of risk factors ... **I liken it to standing on a razor's edge.** The fewer these risk factors you [have], the wider your base is, but for many students, especially kids of color ... especially kids who have low socioeconomic status, **education can either prop them up or it can blow them down ...**”

–2/7 Tr. at 1456:16–28



Bill Kappenhagen
Principal in San Francisco

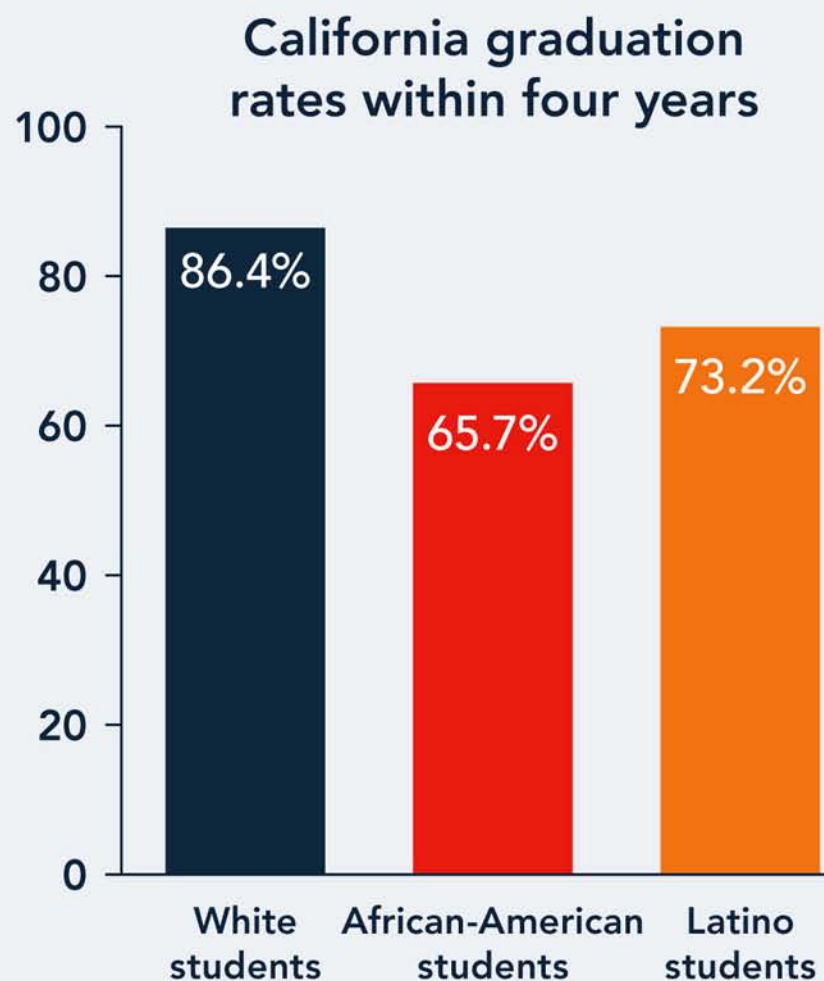
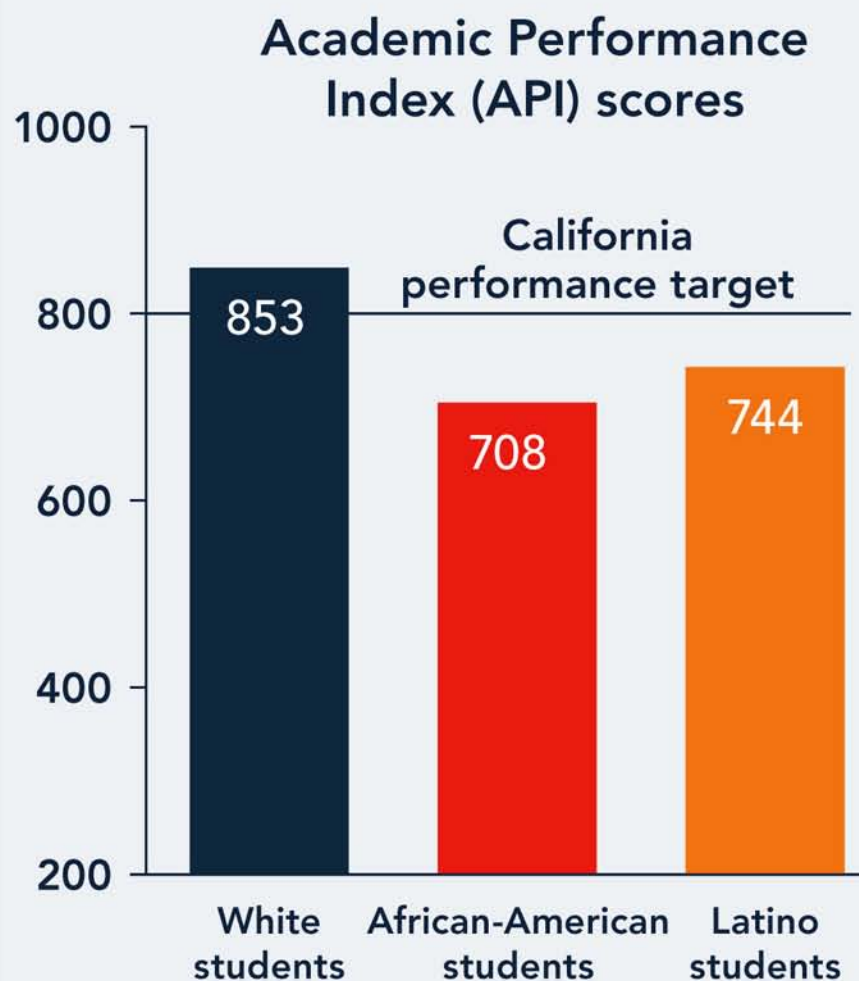
“[W]hen a student from a low-income family has an ineffective teacher, it actually puts them—it **puts their life trajectory on hold or even backwards...** [L]ower income families' students don't have the available resources that other or more affluent families have, they don't have an opportunity to be nearly as resilient when they have an ineffective teacher, especially when they have a grossly ineffective teacher.”

VIDEO

–2/4 Tr. at 1040:19–1041:8

Challenged Statutes Make a Bad Situation Worse

Significant achievement gaps



—Dr. Arun Ramanathan, 2/13 Tr. at 1929:18–1930:14 (graduation rates), 1933:14–23 (API)

“Lemons” Transfer to and Accumulate In Poor and Minority Schools



Dr. Thomas Kane
Plaintiffs' Expert Witness

- The California education system “function[s] like a **lemon accumulation machine**.”
- Moreover, “less-effective teachers tend to be shifted into those schools where there are more vacancies. And those are the schools where there are disproportionate numbers of African-American and Latino students.”

–2/6 Tr. at 1330:20–1331:22



Larissa Adam
Principal in Oakland

- “[H]ill schools get fewer priority placement teachers and the main reason for that is that the hill schools tend to have a more stable teaching population and therefore fewer vacancies.”
- “[T]eacher turnover tends to be higher in our flat land schools. And, therefore, because of more teacher turnover, there are more vacancies, and because there are more vacancies, then you get more priority placement teachers.”

–1/30 Tr. at 653:19–654:01

“Lemons” Transfer to and Accumulate In Poor and Minority Schools



Mark Douglas
Fullerton Asst.
Superintendent

- Principals “use [the] **dance of the lemons**” to “mov[e] people of less skill, poor performance ... to other schools ... [T]his case quite often happens to the south of town,” which serves “predominately low-income students.”
- “[F]amilies who aren’t used to the education system, are learning the education system, don’t know what to look for in a great teacher and they give their children to the school district as an honor to raise them and to educate them and so sometimes they **won’t complain** about a teacher ...”

–2/5 Tr. at 1124:20–25, 1127:15–21, 1128:4–1129:7

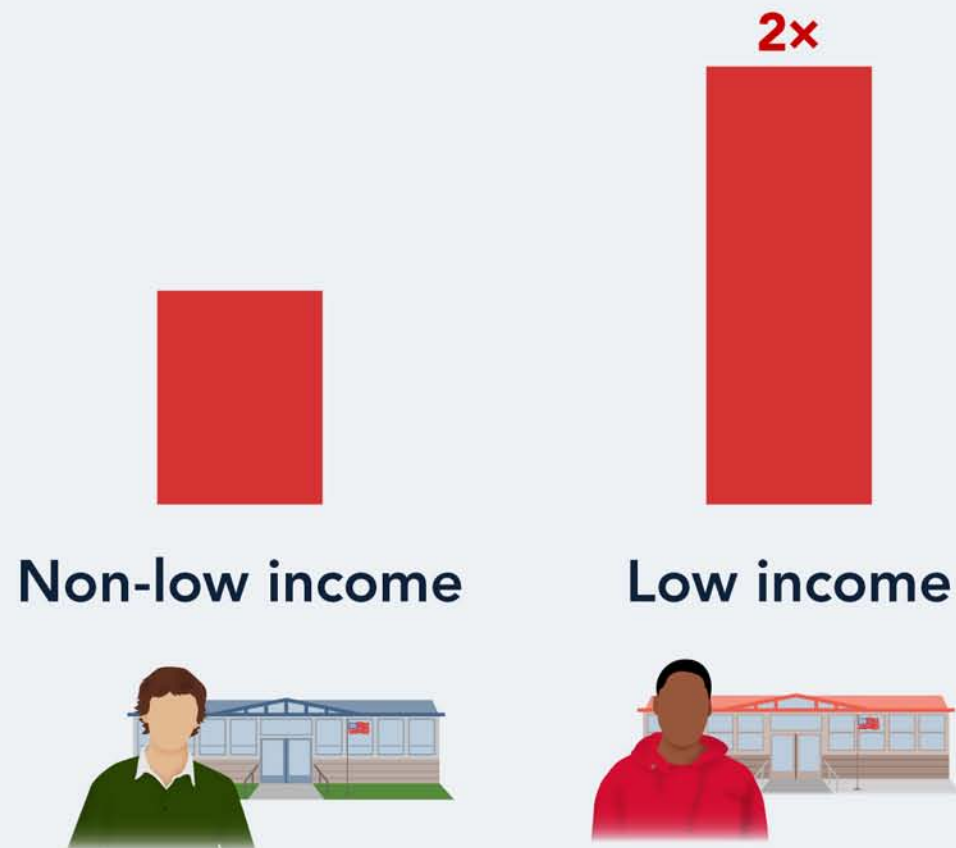
Poor and Minority Students Are More Likely to be Taught by Ineffective Teachers



Dr. Arun Ramanathan

- Executive Director, Education Trust—West
- Former Chief Student Services Officer, San Diego Unified School District
- Study: *Learning Denied*

LAUSD Study: **Ineffective** English Language Arts teachers



Poor and Minority Students Are More Likely to be Taught by Ineffective Teachers



Dr. Arun Ramanathan

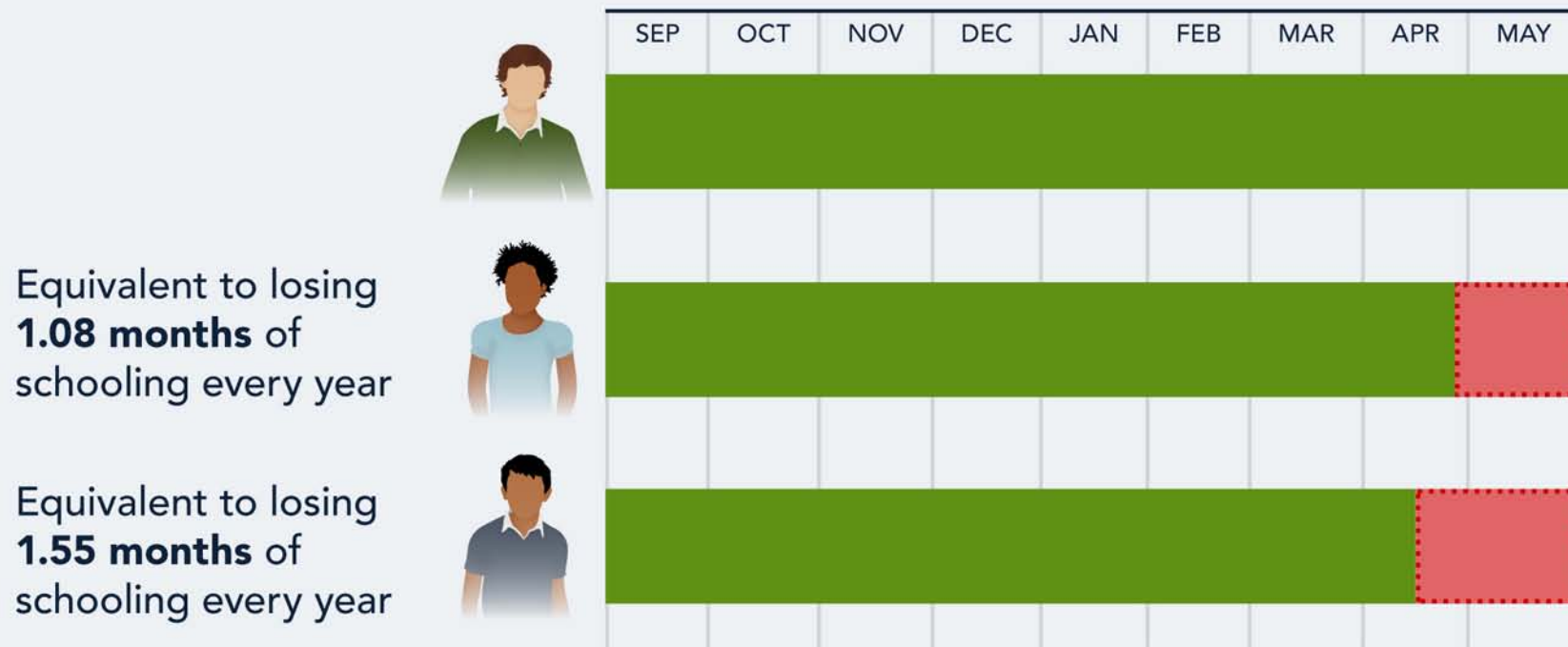
- Executive Director, Education Trust—West
- Former Chief Student Services Officer, San Diego Unified School District
- Study: *Learning Denied*

LAUSD Study: **Ineffective** math teachers



Poor and Minority Students Are More Likely to be Taught by Ineffective Teachers

Black students in LAUSD are **43% more likely** than white students to be taught by a teacher in the bottom 5%



Hispanic students in LAUSD are **68% more likely** than white students to be taught by a teacher in the bottom 5%

—Dr. Thomas Kane, 2/6 Tr. at 1326:3–1328:10

Defense Acknowledges Poor and Minority Students Are More Likely to be Taught By Ineffective Teachers



Lynda Nichols
CDE Employee

Wrote that “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 ineffective teachers.”

–3/19 Tr. at 3983:13–22



Dr. Susan Moore Johnson
Intervenor's Expert Witness

Based on her knowledge about schools, agrees that “low-income students have a disproportionate number of ineffective teachers compared to high-income students.”

–2/18 Tr. at 2197:5–10



Dr. Linda Darling-Hammond
Intervenor's Expert Witness

Stated that “effective teachers are the most unequally distributed educational resource in the United States.”

–3/20 Tr. at 4263:12–18

LIFO Statute: Increased Churn



Dr. Dan Goldhaber

“African-American students and minorities in general and high-poverty students tend to be served by teachers who are more junior.”

–2/11 Tr. at 1799:18–1800:4



Dr. Raj Chetty

“[I]t’s been well-documented that there are more inexperienced teachers, more rookie teachers, for instance, in schools that have a high fraction of minority and low-income students.”

–1/30 Tr. at 584:15–585:27



Jonathan Raymond

The disproportionately large number of layoffs in Sacramento City Unified School District’s high-poverty, high-minority schools caused “**constant churn** of the faculty and staff from year to year with **no synergy** and **no real concept of a collected efficacy** amongst adults trying to teach children that are often significantly behind their peers.”

–2/4 Tr. at 938:10–939:6

***Reed v. California:* Some high-needs LAUSD schools lose 60% or more of their teachers under a LIFO-based layoff system**

LIFO Statute: Skipping Does Not Protect High Needs Students



Dr. Arun Ramanathan

- Executive Director, Education Trust—West
- Former Chief Student Services Officer, San Diego Unified School District
- Study: *Learning Denied*

LAUSD (*Reed*): Court of Appeal overturned consent decree to protect teachers at high-need schools using LIFO Statute (d)(2) exception.

Sacramento (*Acquisto*): Superior Court overturned ALJ decision authorizing district to protect teachers at high-need schools.

San Francisco: ALJ found that district could not skip teachers in high-need Superintendent's Zone.

- Dr. Arun Ramanathan, 2/13 Tr. at 1965:14-1971:15

Defense Acknowledges Poor and Minority Students Are More Likely to be Taught By Inexperienced Teachers



Dr. David Berliner

State Defendants' Expert Witness

Agrees that “novice teachers tend[] to work at schools that serve the poor.”

–3/18 Tr. at 3873:27–3874:2

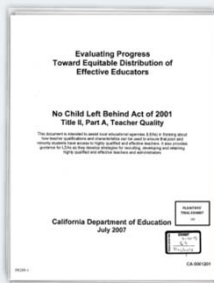


Dr. Susan Moore Johnson

Intervenors' Expert Witness

Agrees that “high-poverty schools tend to have high proportions of inexperienced teachers.”

–2/18 Tr. at 2193:20–28



Pls.' Ex. 289 (CDE Report)

“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 ... inexperienced ... teachers ... Because minority children disproportionately attend such schools, minority students bear the brunt of staffing inequities.”

–Pls.' Ex. 289 at P0289-5

The Defense's Arguments Fall Short

Defense: Districts can induce—or even force—effective teachers to teach in low-income, high-minority schools

BUT: Low-income, high-minority schools require teachers who want and choose to teach there

Dr. Smith testified that administrators cannot “in all instances avoid a concentration of grossly ineffective teachers at low-income minority schools.”

—Dr. Anthony Smith, 3/24 Tr. at 4478:16–19

Although LAUSD has attempted to require teachers to transfer schools, it “has been aggressively grieved in the past,” meaning that “a grievance has been filed when [LAUSD] force[d] a teacher to go where a teacher [did] not wish to go.”

—Dr. John Deasy, 1/29 Tr. at 385:5–23

LIFO layoffs produce a “terrible situation” because teachers are “bumped or placed into []school[s]” and they “don’t want to be there.”

—Dr. Arun Ramanathan, 2/14 Tr. at 2081:3–11

The Defense's Arguments Fall Short

Defense: Inequality is independent of the Challenged Statutes

BUT: The Court must consider the practical impact of the Challenged Statutes on poor and minority students

Courts “must unsympathetically examine any action of a public body which has the **effect** of depriving children of the opportunity to obtain an education.”

—*Serrano v. Priest* (Cal. 1971)

“It is the unequal **effect** flowing from [a][challenged law] that gives rise to [an] equal protection” claim.

—*Gould v. Grubb* (Cal. 1975)

“[T]here is a mechanical relationship between premature tenure decisions, difficult dismissal decisions, and the accumulation of ineffective teachers” in poor and minority schools.

—Dr. Thomas Kane, 2/6 Tr. at 1334:9–27

I. The California Constitution Protects Educational Equality

II. The Evidence Proves That the Challenged Statutes Are Unconstitutional

- a. Teachers Are Critical To Educational Equality
- b. The Challenged Statutes Harm Students Statewide
- c. Disparate Harm On Poor And Minority Students
- d. The Challenged Statutes Fail Strict Scrutiny

The Challenged Statutes Fail Strict Scrutiny

Under the strict scrutiny standard, 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 v. Priest* (Cal. 1971)

The Challenged Statutes Fail Strict Scrutiny

In order to establish that a law is “necessary,” the state must prove that it is the “least restrictive means possible” to achieve its compelling interest.

—*Bd. of Supervisors v. Local Agency Formation Com.* (Cal. 1992)

“[T]he availability of ... alternatives—or the failure of the legislative body to consider such alternatives—will be fatal” to the law in question.

—*Connerly v. State Personnel Bd.* (Cal. Ct. App. 2001)

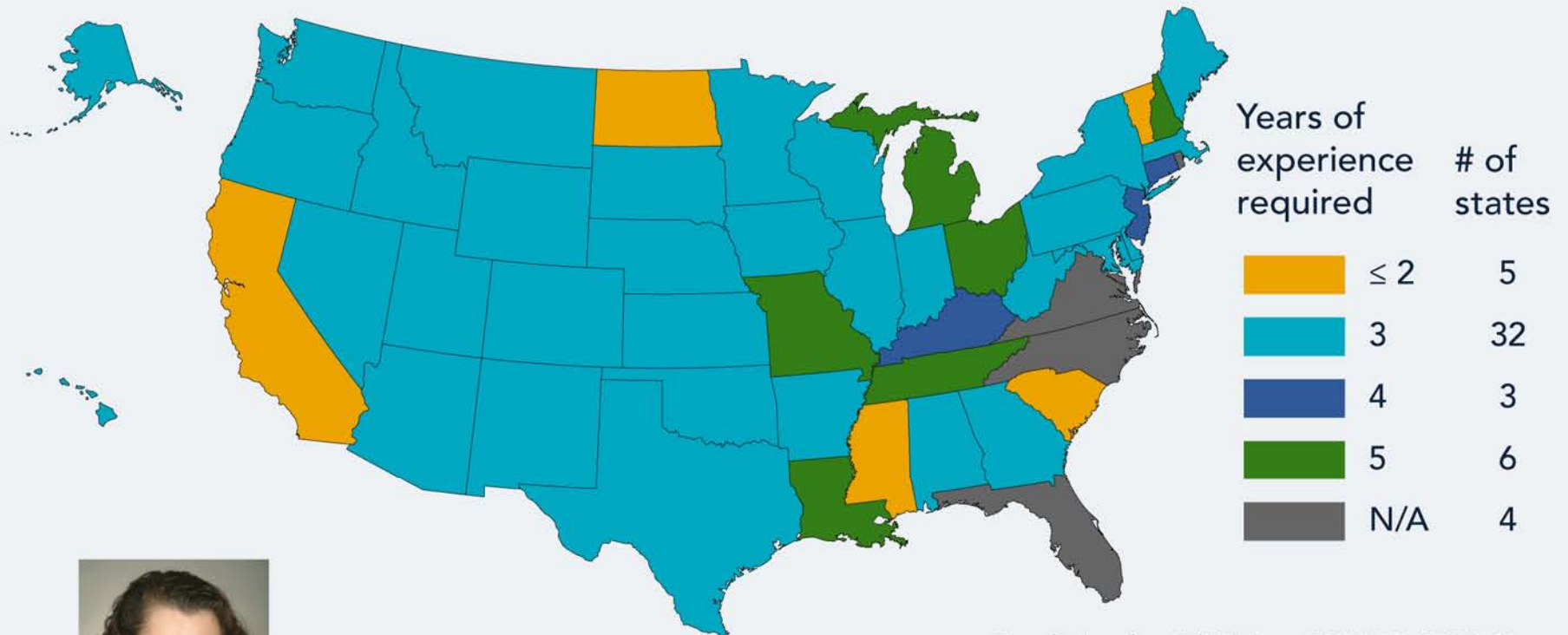
Permanent Employment Statute: Alleged State Interests

The Defense contends that the Permanent Employment Statute:

- Provides “ample opportunity” to evaluate new teachers’ abilities;
- Allows new teachers “sufficient time” to gain professional expertise;
- Ensures that districts do not “procrastinate” in notifying ineffective teachers of non-reelection; and
- Provides teachers with an incentive to enter the profession

–Intervenors’ Responses and Objections to Beatriz Vergara’s
First Set of Special Interrogatories Nos. 3 and 6; Dr. Jesse Rothstein, 3/6 Tr. at 2688:15–2689:2

Permanent Employment Statute: Feasible Alternatives



Sandi Jacobs
Plaintiffs' Expert Witness

—Sandi Jacobs, 2/19 Tr. at 2265:25–2266:10

“California is among a very small group of states that requires a probationary period of less than three years.”

—2/19 Tr. at 2265:19–22

Permanent Employment Statute: Not Necessary to Serve Any Interests



Dr. Jesse Rothstein
Intervenors' Expert Witness

Agrees that “the current two-year probationary period is **not** the only way that California can serve **all** of the interests that are purportedly served by the two-year probationary period.”

–3/7 Tr. at 2831:9–13



Dr. Linda Darling-Hammond
Intervenors' Expert Witness

Testified in her deposition that “a tenure[] period [of] **three** years would [] serve [the] **exact same** interest” purportedly served by the Permanent Employment Statute.

–3/20 Tr. at 4224:28–4226:13

Dismissal Statutes: Alleged State Interests

The Defense Contends that the Dismissal Statutes:

- Avoid cost to the public school system;
- Encourage “satisfactory job performance;” and
- Prevent terminations based on misunderstandings or arbitrary, unfair, discriminatory, retaliatory, or unlawful reasons

–Intervenors’ Responses and Objections to
Beatriz Vergara’s First Set of Special Interrogatories Nos. 6–8

Dismissal Statutes: Far More Than Due Process

Protections for all State employees

FEHA	Written notice of proposed action	Copy of charges/materials	Right to respond ahead of termination	Basic evidentiary hearing	5 days to prepare response	Hearing before impartial observer	Limited discovery rights
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Protections for teachers

FEHA	Written notice of proposed action	Copy of charges/materials	Right to respond ahead of termination	+	+	+	+
				Full evidentiary hearing	60 days to prepare response	Hearing before peers	Full discovery rights
+	+	+	+	+	+	+	+
90 days to "correct and cure"	Written findings of fact	No evidence over 4 years old	Entitlement to attorney's fees	Written notice of specific behavior	Notice cannot be given 5/15-9/15	Right to appeal to Superior Court	Right to appeal to Court of Appeal

—*Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194 and Cal. Educ. Code sections 44934; 44938, subdivisions (b)(1) and (2); and 44944

Dismissal Statutes: Feasible Alternatives

Oakland

The “time and burden associated with separating from a **classified employee** is typically **significantly less** than separating” from a permanent teacher.

–Troy Christmas, 2/3 Tr. at 878:3–16

Sacramento

“[T]he **Skelly process** does offer fair due process.”

–Jonathan Raymond, 2/4 Tr. at 936:2–25

Los Angeles

Spends only **\$3,400** to dismiss **classified employees** compared to \$250,000–\$450,000 for tenured teachers.

–Vivian Ekchian, 3/21 Tr. at 4327:10–21
Dr. John Deasy, 1/29 Tr. at 412:26–413:3

Fullerton

Once a **classified employee** has been notified of his or her performance deficiency, it takes **“not much more than a month, month and a half”** to complete the entire dismissal.

–Mark Douglas, 2/5 Tr. at 1221:8–1222:9,
1222:24–28

Dismissal Statutes: Not Necessary to Serve Any Interests



Dr. Linda Darling-Hammond
Intervenors' Expert Witness

Admits that there may “be other ways to serve the interest of preserving competence teachers than the process contained in the current Dismissal Statutes.”

–3/20 Tr. at 4261:9-15

LIFO Statute: Alleged State Interests

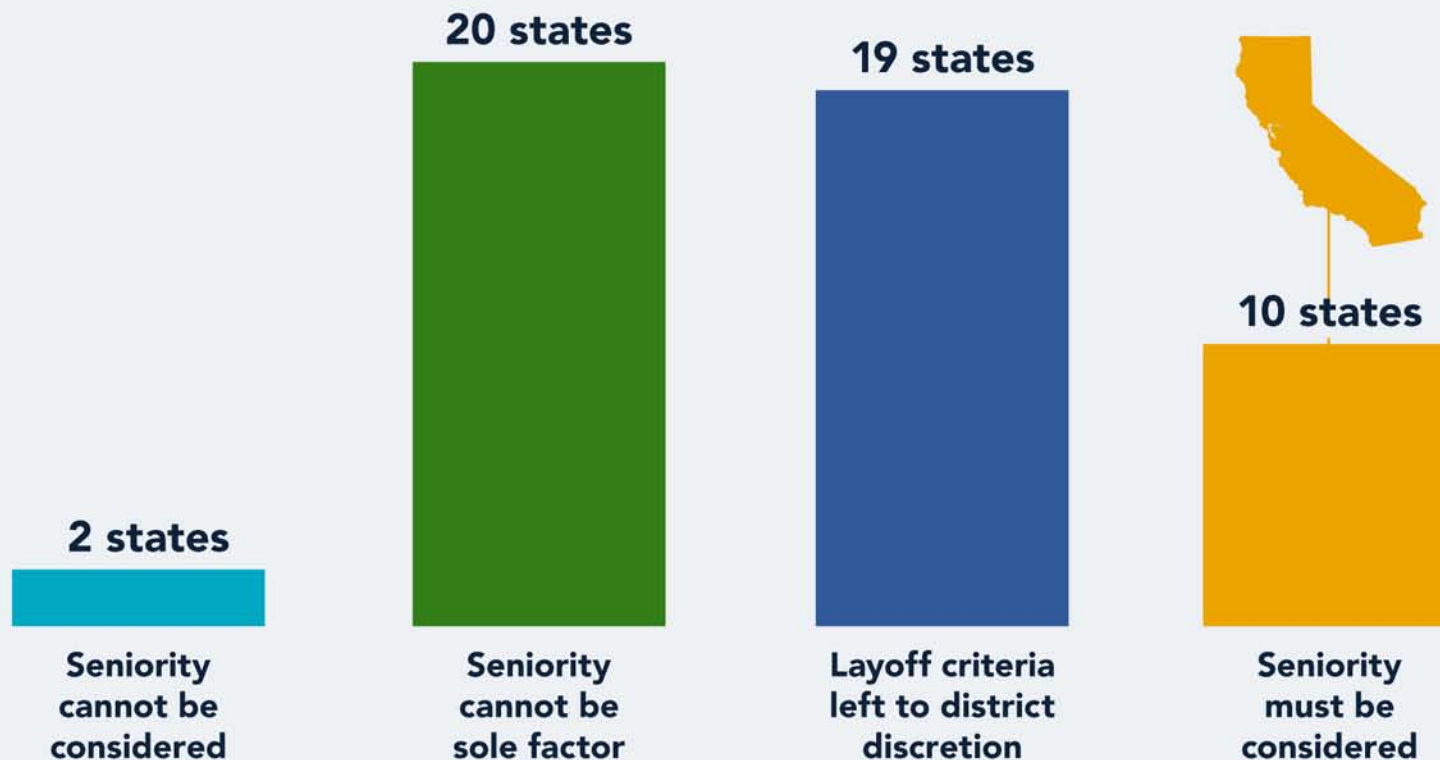
The Defense Contends that the LIFO Statute:

- Gives districts “flexibility” to skip junior teachers when necessary;
- Assists districts in recruiting and retaining excellent teachers by making public school teaching more attractive as a profession;
- Assists districts in retaining teachers who—collectively and on average—are more effective than teachers who are laid off;
- Promotes “collaboration” between teachers; and
- Provides an objective standard that is “understood”

–Intervenors’ Responses and Objections to
Beatriz Vergara’s First Set of Special Interrogatories Nos. 3, 10

LIFO Statute: Feasible Alternatives

What role does seniority play in layoff decisions?



LIFO Statute: Not Necessary to Serve Any Interests



Dr. Jesse Rothstein
Intervenors' Expert Witness

It is “possible” that the LIFO Statute “might actually **deter** prospective teachers from joining the teaching profession.”

–3/7 Tr. at 2840:22–2841:2



Dr. Linda Darling-Hammond
Intervenors' Expert Witness

Testified in her deposition that an effectiveness-based layoff system would “continue to serve” **all** of the interests purportedly served by the LIFO Statute.

–3/20 Tr. at 4243:8–4244:5

The Challenged Statutes Are Unconstitutional

Permanent Employment Statute:
FAR TOO LITTLE TIME



Grossly ineffective teachers get permanent employment

Dismissal Statutes:
FAR TOO COSTLY AND
TIME-CONSUMING



Districts are stuck with grossly ineffective teachers year after year

LIFO Statute:
QUALITY BLIND LAYOFFS



Forces districts to fire top teachers and retain ineffective teachers



Places California public school students at risk of severe harm, especially California's poor and minority students

Fundamental Right to Education

Several components are essential for educational equality:

- *Serrano*: **funding**
- *Butt*: **time in school**
- *Vergara*: **teachers**

"[D]ifferences in dollars...produce differences in pupil achievement" in part because money allows school districts to employ a "higher quality staff."

–*Serrano v. Priest* (Cal. 1976)

The Challenged Statutes Are Unconstitutional



Dr. Anthony Smith
Former Superintendent
of the Oakland Unified
School District

VIDEO

“I think it’s deeply unfair first and foremost to children, and then I think it’s unfair to families and communities, and I think ultimately it’s unfair to the State of California that we are organized in ways that value and protect roughly 300,000 jobs at the expense and opportunity for roughly 6 million children ... I think that that fundamentally undermines all of our right in this State to expect quality education ...”

–3/24 Tr. at 4477:17–4478:2

Vergara v. California

**All students in California deserve
an equal chance to succeed**

