Teacher Tenure Reform: It’s Here, For Better or Worse

Written By: Nimmi Cleve
Loyola University Chicago School of Law
I. Introduction

Those in the teaching profession enjoy a job perk most likely envied by those in other professions: tenure. But why should teachers be the only ones, outside of federal judges, to have job protection? In the rest of the American working world, people are at-will employees, meaning they can be released from their position at any time for any reason, except an illegal reason.¹ What is so unique about a teacher that affords her the right to due process before she can be terminated? And why is it, arguably, so easy for a teacher to attain tenure and be permanently safeguarded from unemployment? Teacher tenure is currently the topic of hot debate across the country. Proponents say that tenure is rightly earned through a long “prove yourself” period, protects teachers from arbitrary, unsubstantiated dismissal via due process, and does not require overwhelming steps to be taken so as to fire a tenured teacher. But critics say that tenure simply protects bad teachers from being fired and is a lifetime guarantee of employment. They believe that tenure allows teachers to slide by doing the bare minimum at the expense of students’ education. This Note argues that many of the proponents’ arguments for tenure have no merit.

Ever since the passage of No Child Left Behind in 2001, America has been especially focused on a reform movement to improve the quality of the U.S. public education system. In January, during his State of the Union Address, President Obama expressed his thoughts on the importance of good quality teachers. He said schools should be given the resources to keep and reward good teachers along with the flexibility to teach with creativity and to "replace teachers who just aren't helping kids learn."² The importance of teacher quality is widely recognized as one of the most critical components of successful education and so policies that aim to improve teacher performance are at the center of the reform effort. As such, tenure laws are being overhauled in several states in a way that ties tenure to teacher

performance/effectiveness. Everything from how teachers attain tenure, to when teachers should attain tenure, to whether teachers should even be allowed to attain tenure is under scrutiny.

The analysis by the National Council on Teacher Quality (NCTQ), a research and policy group that seeks to improve the quality of teaching, documents the shift in laws. In 2009, only four states required the consideration of any evidence of teacher performance/effectiveness as part of tenure decisions; the remaining forty-six states permitted districts to award tenure virtually automatically. In the 2011 annual report, the NCTQ stated that while the vast majority of states still awarded tenure virtually automatically, the landscape is clearly changing. Eight states, in 2011, required that teacher performance/effectiveness be the central criterion in deciding whether a teacher is awarded tenure.

Currently, several states are forging ahead with tenure reform. Illinois, Louisiana and New Jersey are just a few states that have recently either introduced a bill regarding tenure reform or successfully passed new tenure laws. Each of these states has touched upon the various aspects of tenure that are typically criticized including the number of years and the criteria involved to attain it. This Note argues, however, that despite reform efforts, no state has gotten it quite right as of yet. Illinois has gotten close to a sound tenure-attainment policy with its newly passed law, but this Note argues that a proper, comprehensive tenure law should incorporate ways in which a teacher can lose tenure and also include ways to regain it. While it may not be a reality to eliminate tenure all together, it should be granted with the expectation of on-going accountability and a teacher must demonstrate that she is continually deserving of tenure.

I. What Is Tenure?

As alluded to above, the answer to this question is different depending on who is asked. But to be fair and to put it simply, tenure means that a teacher gains permanent employment status after successfully completing a probationary period and may not be fired or disciplined without just cause and

---

5 Id.
due process. Teacher tenure in elementary and secondary school has been an educational tradition since the early twentieth century, when New Jersey passed a law to protect teachers from the whims of autocratic principals and administrators. Until then, teachers could be fired for speaking up, questioning educational practices, or merely because an administrator wished to give the job to someone else for political reasons or nepotism. Other states soon followed New Jersey’s lead. Today, every state has a tenure law, although many use other descriptors to describe the policy such as “fair dismissal procedures, continuing contract or service, permanent status, career status, and post-probationary status.”

Tenure policies differ across states so it is not possible to completely generalize about the design elements. All 50 states, however, mandate probationary periods before teachers are eligible to receive tenure, the length of which is determined by state law. The majority of states mandate periods of three years; the remaining states range from one year to five. Idaho is the only state to have recently eliminated the possibility of tenure for new teachers. According to Idaho law, as of January 2011, “no new employment contract between a school district and certified employee shall result in the vesting of tenure, continued expectations of employment or property rights in an employment relationship.”

Prior to the recent tenure reforms, during each year of their probationary period, most teachers received one or two formal evaluations by principals or other building-level administrators. The evaluations were not part of a formal tenure-granting process, however, after a teacher finished her probationary period, tenure was the default. At most, school leaders considered whether a teacher should be deemed ineligible for tenure. If this was the case, a principal could release the teacher after her last probationary year without stating a reason. This is still the process used in several states. But in states

---

10 Id.
like Illinois, Louisiana, and New Jersey, the tenure-granting process is becoming more complex as discussed below.

Notwithstanding tenure reforms, it remains that for a teacher who attains tenure, a right of due process attaches immediately in the event that his or her employment contract is terminated. This permits the teacher a right to be heard before a state board and argue his or her case against the school district attempting to fire the teacher, which may be difficult and very costly for the school district. State laws or collective bargaining agreements typically include three requirements regarding due process: teachers’ right to “notice” of the reasons for dismissal, a hearing, and rights to appeal. Most states specify just causes such as “incompetence” or “inadequate performance” as grounds for dismissal, although these terms are typically not defined and lead to widely different interpretations during the dismissal process.

II. Arguments In Favor Of Tenure Are Weak

Given the above explanation of tenure, proponents will say it is rightfully earned because teachers must endure a long probationary period. The National Education Association (NEA) went so far as to call it a “marathon process” to attain tenure. In a September, 2010 article, the NEA compared a teacher who is a probationary employee for three or more years to a newly hired employee outside the field of education who may be considered probationary for only six months. The NEA stated that at anytime during a teacher’s probationary period, a teacher may be dismissed for any reason whatsoever. The NEA was trying to argue the point that a teacher must suffer through a much longer time period than a non-education employee during which she has no job security. This argument would hold water if the non-education employee received a form of job security after his much shorter probationary period. What makes the NEA’s argument invalid, of course, is that the non-education employee never gets job security.

---

12 Permuth and Egley, supra note 6.
13 Id.
15 Id.
16 Id.
As an employee at-will, he can be fired for any reason whatsoever at any time during his employment with the company.

Hand in hand with the claim that teachers have to survive such a long probationary period, proponents argue that this period is a valid timeframe for administrators to evaluate a teacher in order to determine whether the district should grant her tenure.\textsuperscript{17} The flaw here is that a new teacher, often straight out of college, is enthusiastic, creative and rearing to go. She is likely to perform at very high levels, earn top marks on her evaluations during her first few years in the profession and thus be granted tenure. This, however, is not the time to do so – or at least not the only time to do so. Teachers gradually plateau after about three to five years on the job.\textsuperscript{18} As one study puts it, “there is little evidence that improvement continues after the first three years.”\textsuperscript{19} If a school district is going to grant tenure based on positive evaluations during this initial period on the job, it should consider re-evaluating a teacher at some point later to determine if tenure is still rightfully being earned.

Another argument that proponents put forth is that tenure does not guarantee lifetime employment for a teacher. If a teacher is deserving of termination, tenure does not preclude this action and school districts do not need to overcome extreme hurdles when trying to fire such a teacher. Only part of this argument is true. School districts are certainly able to fire a tenured teacher for just cause. But the process to do so is so overwhelmingly arduous and costly that it definitely presents an obstacle. Because tenure laws are different in every state, comparisons on the time and expense involved in disciplining or firing teachers are difficult.

In New York, for example, the process can take six to eighteen months and can run into hundreds of thousands of dollars, including the teachers' pay and fees for lawyers, stenographers and arbitrators.\textsuperscript{20}

In 2007, the cost to fire one incompetent tenured teacher was roughly $250,000, according to the New

\textsuperscript{17} \textit{Id.}
\textsuperscript{19} \textit{Id.}
York Education Department (NYED). The NYED reported that of 55,000 teachers on staff, only ten were fired in 2007. In Illinois, between 2001 and 2007, school districts spent an average of $219,000 in legal fees for teacher dismissal cases. School attorneys warn school administrators to plan on spending at least $100,000 when pursuing such a case. Those administrators are thinking they could hire three new teachers for the cost of trying to fire one bad one. Between 1987 and 2005, ninety-three percent of Illinois school districts never attempted to fire anyone with tenure, according to the Illinois State Board of Education records. So while it may be true that tenure doesn’t guarantee a teacher a job for life, historical data shows that the financial repercussions of attempting to fire a tenured teacher are so gargantuan that they are enough to dissuade a school district from taking the very costly steps to do so.

What is the one argument that proponents of tenure possibly have stacked in their favor? The answer to this also answers the question posed at the beginning of this Note: What is so unique about a teacher that affords her the right to due process before she can be terminated? Tenure mandates that due process be followed before a teacher can be dismissed. The reason for this, according to teachers, is to protect them against personal vendettas and personality conflicts. Administrators are not perfect people and not all of them act without bias or in purely democratic fashion. Effective teachers who are benefitting students and raising student achievement should not be removed from the classroom because of political disagreements with an administrator or because the sibling of a local, influential figure wants a job. Overzealous parents who think that a teacher is out to fail their child and also happen to donate substantial amounts to the school should not be able to play a part in an administrator’s teacher termination decision. But these “unique-to-teaching” situations sometimes do happen and with tenure, teachers are protected from arbitrary, unsubstantiated dismissal.

21 Id.
23 Id.
24 Id.
25 Id.
26 Permuth and Egley, supra note 12
Despite the many weak arguments proponents make in favor of tenure, it is a program that is presumably going to exist in some fashion in state school systems across the country. As mentioned above, Idaho is the only state that has passed a law to phase out tenure. But opponents to this idea have gathered enough signatures to put a referendum that would overturn this law on the upcoming November ballot so the ultimate fate of tenure in Idaho is yet to be determined. Given the likelihood that tenure will be a permanent feature of the educational landscape, it is wise to construct tenure laws that are realistic, fair and rigorous.

III. Recent Tenure Reform Analysis

As mentioned above, several states are undergoing tenure reform. Illinois and Louisiana have recently passed laws that make the attainment process more rigorous and involved. New Jersey has proposed a bill that will also dramatically change the means by which teachers are granted tenure.

a. Tenure Reform In Illinois

On June 13, 2011, Governor Pat Quinn signed into law Senate Bill 7 (SB 7), a sweeping measure that will transform education in Illinois by linking teacher tenure to performance. One of the most critical laws passed in the last Illinois legislative session, the Performance Evaluation Reform Act (PERA), will require teachers’ evaluations to include student growth and performance as a significant factor. SB 7 takes the next logical step to acknowledge effective teachers by incorporating performance in personnel decisions so as to best ensure the most effective teachers are and remain in Illinois classrooms.

---

30 Id.
SB 7 will make teacher performance a primary criterion in layoffs and tenure.\(^{31}\) In terms of layoffs, when a district needs to release teachers due to economic reasons, the order of layoffs will no longer be based solely on seniority.\(^{32}\) The district will now look at multiple factors: first qualifications and certifications will be determined, and then performance evaluations will be used with seniority playing a tie breaker role.\(^{33}\)

Regarding tenure, SB 7 deliberately does not abolish the longstanding concept but rather employs the four ratings that were established under PERA: excellent, proficient, needs improvement and unsatisfactory.\(^{34}\) SB 7 ensures that performance evaluations dictate tenure decisions by requiring two “proficient” or “excellent” performance evaluation ratings during the last three years of the four-year probationary period for attainment of tenure (with a “proficient” or “excellent” in the last year).\(^{35}\) SB 7 also rewards performance with “accelerated tenure” where new teachers who earn three “excellent” performance reviews in their first three years will earn tenure at the three-year mark.\(^{36}\)

Prior to SB 7, if a teacher left a school district, he or she lost her tenure and had to start over with a probationary period in the new district. SB 7 allows for tenure portability. Tenured teachers with a track record of “proficient” and “excellent” ratings may earn tenure in two years if they move to a new district and earn two “excellent” performance ratings in each of their first two years in that new district.\(^ {37}\)

**b. Tenure Reform In Louisiana**

On April 18, 2012, Governor Bobby Jindal signed House Bill 974 (HB 974) into law, a bill that restructures teacher tenure in the state of Louisiana beginning with the 2012 - 2013 school year.\(^ {38}\) The

---

\(^{31}\) Id.
\(^{32}\) Id.
\(^{33}\) Id.
\(^{34}\) Chicago Teachers Union, Senate Bill 7: A Summary, http://www.ctunet.com/legislative/sb7 (last visited April 7, 2012).
\(^{35}\) States Weaken Tenure Rights For Teachers, supra note 27
\(^{36}\) Id.
\(^{37}\) Id.
general premise of HB 974 is that tenure should be much harder to achieve. Employment decisions, meaning hiring, evaluations that determine tenure status, and layoff plans, would shift from school boards to superintendents and principals. The evaluations will include reviews by principals and performance measures by a teacher's students. Teachers are rated: highly effective, effective or ineffective.

Under this new law, seniority will end as a consideration in any instances of layoffs, with the new rules tying reduction-of-force decisions to the teacher evaluation system. Teachers hired after July 1, 2012 will have to be rated "highly effective" under the evaluation system for five out of six years in order to acquire tenure. The terms were amended from Governor Jindal's initial proposal: five straight years of "highly effective" status. Any teacher, including those who already have tenure, will lose the protected status upon being rated "ineffective." Teachers can reacquire tenure under the same five-out-of-six-year "highly effective" standard applied to new hires. Receiving an “ineffective” rating will also give superintendents the power to fire tenured teachers immediately without a dismissal hearing, although they will have the right to appeal. Under current law, a dismissal hearing is held before the local school board, by providing written charges that could include incompetence, poor performance or willful neglect of duty. HB 974 Bill will set the first appeal hearing before a three-person panel including the superintendent, the fired teacher's principal, and another teacher of the fired employee's choice. After this, a teacher may appeal to state court.

---

40 Id.
41 Id.
42 Id.
43 Id.
44 Id.
45 Id.
46 Id.
47 Id.
48 Id.
49 Id.
50 Id.
c. Tenure Reform In New Jersey

On February 6, 2012, State Senator Teresa Ruiz introduced a bill to overhaul teacher tenure by using a rating system based on annual evaluations.\(^{51}\) Senator Ruiz’s proposal would ensure teachers are evaluated once a year, and given one of four ratings: highly effective, effective, partially effective or ineffective.\(^{52}\) For new teachers, gaining tenure would take a minimum of four years: a one-year mentorship, followed by three consecutive years of being rated “effective” or “highly effective.”\(^{53}\) The current system allows teachers to gain tenure after three years and one day.\(^{54}\)

Teachers could also lose tenure if they are given ratings of either “partially effective” or “ineffective” in two consecutive years.\(^{55}\) When teachers receive one of the two lower ratings, they would be provided with mentorship and professional development opportunities.\(^{56}\) Once a teacher has lost tenure, she can gain it back by being rated “highly effective” or “effective” two years in a row.\(^{57}\)

d. Analysis Of Tenure Reform In Illinois, Louisiana And New Jersey

Illinois SB 7 provides a decent model for tenure attainment. It can, however, be improved to be fairer and hold teachers a bit more accountable. After all, proponents stress that tenure protects good teachers so only good teachers should be granted tenure. Under the SB 7 tenure model, a teacher that earns the following ratings in her first four years, respectively, is granted tenure: needs improvement, proficient, unsatisfactory, proficient. In year three, or rather in the half of the probationary period closest to attaining tenure, this teacher was rated “unsatisfactory.” Teachers should not be given tenure when they were so recently given the lowest rating of performance.


\(^{52}\) Id.

\(^{53}\) Id.

\(^{54}\) Id.


\(^{56}\) DeMarco, supra note 51

\(^{57}\) Id.
Instead, in order to attain tenure, a teacher should achieve a rating of “proficient” or “excellent” in two of the last three years of the probationary period, but neither of the last two ratings may be “unsatisfactory.” If a teacher satisfies this requirement, but in the fourth year receives a “needs improvement” rating, she should be allowed one more year to attain a “proficient” or “excellent” rating to achieve tenure. For example, consider a teacher who earns the following ratings in her first four years: needs improvement, proficient, excellent, needs improvement. Under SB 7, since she did not receive either a “proficient” or “excellent” rating in year four, she would not attain tenure. This teacher, however, showed marked improvement in her first three years, to the point of achieving an excellent rating. There may be any number of reasons for why she faltered in her fourth year. But given her success throughout the first three years, it seems fair to allow her a one-year extension to earn a “proficient” or “excellent” rating and attain tenure.

The Louisiana tenure model under HB 974 is way too strict and unrealistic. As discussed above, tenure should be granted to protect good teachers. But the way HB 974 is written, teachers would have to be practically perfect in order to attain tenure. The law requires that new teachers must achieve the highest performance rating for five out of their first six years. Arguably, a first-year teacher is not necessarily going to be “highly effective.” As such, she must earn a “highly effective” rating starting her second year and maintain that rating for the subsequent four years in order to attain tenure. As much as Governor Jindal wants to improve education in his state, this is possibly too high of a standard to meet.

Additionally, the part of HB 974 that allows a superintendent to dismiss a tenured teacher after just one ineffective rating is too strict of a policy. Especially when there are only three ratings a teacher can achieve: highly effective, effective and ineffective. There should be a fourth rating of “partially effective” as it is quite possible for a teacher to not be fully effective, but also not be completely ineffective. Under HB 974, if a teacher comes shy of meeting the criteria to rate “effective,” she not only loses tenure but also can lose her job all together. This is not a fair policy.

The proposed New Jersey tenure bill is the only one of the three models that addresses how a teacher can gain tenure back once it is lost. This is an aspect that all tenure laws should incorporate. The
New Jersey bill, however, does require new teachers to achieve an “effective” or “highly effective” rating in the latter three years of the four-year probationary period. This is certainly not as demanding as the Louisiana law, but perhaps the suggestion to the Illinois model of needing positive performance ratings in two of the last three years of the probationary period, with neither of the last two rating being “ineffective,” is more realistic. Especially since a new teacher will still be learning the ropes of what it means to be an effective, proficient teacher after her first year.

IV. Tenure Solution – The Best Of All Worlds

The state reform efforts discussed above are certainly steps in the right direction as they aim to tie tenure with teacher performance/evaluation. Conceivably, the best tenure law encompasses parts of all three states’ laws with a few additional aspects, including a potential indefinite probationary period for those teachers who may try to game the system. This feature of a tenure law would keep those teachers from attaining tenure and then slacking off in their teaching duties only to do whatever it takes to attain tenure again and then repeating the cycle. For example, the following would be some of the main tenets of the ideal tenure law:

- Tenure will be linked heavily to teacher performance/evaluation. A teacher will be given one of four ratings: highly effective, effective, partially effective and ineffective

- A teacher must achieve a rating of “highly effective” or “effective” in two of the last three years of a four-year probationary period, but neither of the last two ratings may be “ineffective.” If a teacher satisfies this requirement, but in the fourth year receives a “partially effective” rating, she should be allowed one more year to attain an “effective” or “highly effective” rating to achieve tenure.

- Seniority will end as a consideration in any instances of layoffs, with the new rules tying reduction-of-force decisions to the teacher evaluation system.

- A teacher can lose tenure if she is given ratings of either “partially effective” or “ineffective” in two consecutive years.

- If tenure is lost, a teacher will be provided mentorship and professional development.

- In order to regain tenure, a teacher must be rated “highly effective” or “effective” for two consecutive years.

- If a teacher loses tenure twice via the method indicated above, she may no longer be eligible for tenure and will be considered on a probationary period indefinitely, subject to termination after any given school year.
Teacher tenure is a long-standing perk in the American education system as well as a program that is seemingly here to stay. But given the goal for American children to achieve better educational outcomes and the need for effective teachers to allow children to do so, tenure laws need to be crafted in a way that ensures success in reaching this goal.