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TEACHER TENURE: A LIFE SENTENCE FOR KIDS?

“What does our distressed public school system have in common with our devastated auto industry? Strong labor unions...As our best students pursue private schools and our auto industry surrenders to other nations, we need to start richly rewarding achievement in the workplace instead of protecting mediocrity. Whether installing struts or inspiring students, workers should be praised, paid, disciplined, or dismissed according to their abilities and their results.”

-- Henry Green, former chairman of the math department at Brookdale Community College

In 1986, after school administrators in the El Cajon School District in California spent years documenting the more than 400 reasons for why high school English teacher Juliet Ellory was an unfit teacher, the district finally succeeded in firing her. It cost the district more than \$300,000 and eight years of preparing and litigating the case.

According to the overwhelming evidence against her, Ms. Ellory “hardly ever lectured, gave baffling assignments, belittled students and ignored repeated efforts by the high school principal to get her to improve.”¹ Ellory’s tenure status had protected her from automatic dismissal. Though stories such as this one do not depict the average K-12 teacher, they are sufficiently widespread to provoke criticism and concern about the state of our public schools, as well as skepticism regarding the actual benefits of teacher tenure.

¹ Sigrid Bathen, *Tracing the Roots of Teacher Tenure*, CALIFORNIA JOURNAL, (May 1999), at <http://www.cde.ca.gov/nr/re/hd/yr1999hd05.asp>

In early March, President Obama offered a blunt assessment of how schools in the United States have worsened, and the role teacher quality has played in this decline:

Despite resources that are unmatched anywhere in the world, we've let our grades slip, our schools crumble, our teacher quality fall short, and other nations outpace us...It's time to expect more from our students. It's time to reward good teachers, stop making excuses for bad ones...If a teacher is given a chance or two or three but still does not improve, there's no excuse for that person to continue teaching. I reject a system that rewards failure and protects a person from his consequences. The stakes are too high. We can afford nothing but the best when it comes to our children's teachers and the schools where they teach.²

This paper will examine the origins of teacher tenure, discuss the positive and negative aspects of the tenure system as applied to K-12 teachers, and explore some of the innovative ways that a handful of states and school districts are attempting to provide alternatives to a tenure system. I will argue that tenure for K-12 teachers no longer serves its original purpose of protecting educators' academic freedom. Rather, its current principal function is what was once an unintended and undesirable consequence: to protect ineffective teachers' jobs by making it virtually impossible for school districts to dismiss them. I will also posit that the tenure system is only *part* of the problem and that school administrators also bear some of the responsibility, as it is their hiring and firing decisions that allow for ineffective teachers to enter into and remain in the classroom.

HISTORY OF TENURE

Tenure at the university level was born out of recognition that academic freedom was necessary in order for educators to explore unchartered paths of inquiry and

² Nicholas Kristof, *Obama Takes on the Teacher Unions*, NY TIMES, March 10, 2009 at <http://kristof.blogs.nytimes.com/2009/03/10/obama-takes-on-the-teacher-unions/?pagemode=print>

challenge their students' knowledge and critical thinking skills. Without job security, academics might be inclined to "play it safe" rather than investigate the areas about which they are most passionate, and to report their honest conclusions. At the K-12 level, however, the tenure movement mirrored other labor struggles of the 19th century.³ While steel and auto workers fought against unsafe working conditions, teachers sought protection from parents and administrators who attempted to dictate lesson plans and teaching methods.⁴ In 1885, the National Education Association (NEA) proposed that civil service protections that had been granted to employees in other fields be extended to public school teachers in the form of tenure.⁵ In 1887, thousand of teachers from across the country met in Chicago for the first-ever teaching conference of the NEA, which is now widely known as one of the country's most powerful teaching unions.⁶ For years, the issue of teacher tenure was a hot-button issue for politicians and finally, in 1909, the first teacher tenure law was passed in New Jersey.⁷

The arguments in favor of and against tenure surrounding the original legislative debates are the same arguments that persist today. Those in favor of tenure tout it as a way of attracting and retaining more qualified and effective teachers; increasing the efficiency of schools; making the profession more attractive because of the job security tenure provides; and eliminating political favoritism in the hiring and firing processes. Those who oppose tenure have continuously expressed a concern that tenure presents serious roadblocks in the dismissal of ineffective, low-performing teachers.

³ M.J. Stephey, *A Brief History of Tenure*, TIME, November 17, 2008, at <http://www.time.com/time/nation/article/0,8599,1859505,00.html>

⁴ *Id.*

⁵ Thomas A. Kersten, *Teacher Tenure: Illinois School Board Presidents' Perspectives and Suggestions for Improvement*, PLANNING AND CHANGING, 234, 236, Vol. 37, No. 3&4, 2006.

⁶ *Supra* note 3.

⁷ *Supra* note 5 at 236.

Tenure laws guarantee public school teachers due process protections during the dismissal or non-renewal of contract process. Their primary purpose is to shield competent teachers from arbitrary firing for reasons such as their personal beliefs or personality conflicts with school administrators. Tenure is intended to ensure that a teacher's contract is only terminated for cause; that is, "for failure to maintain some clearly defined standard that serves an educational purpose."⁸ While it makes sense for teachers to be protected from arbitrary dismissal, when examining the tenure issue, one is forced to ask why public school teachers deserve more protection than the employees in other industries.

In the distant past, the answer to that question lay in the original purpose of tenure: granting educators academic freedom, or just freedom in general. There was a time, after all, when a female teacher who dared to marry or wander out into the street at night could be fired from her teaching post.⁹ The arbitrary and abusive firing practices that limited teachers' (particularly female teachers') rights were properly halted by implementing the tenure system, which required that teachers' dismissals be linked to their violation of a clearly defined standard serving an educational purpose. Today, however, not only are those abusive practices practically obsolete, but the notion of academic freedom for K-12 teachers has also been severely curtailed by programs such as No Child Left Behind, which call for rigid testing requirements and guide the content of a school's curriculum.

Those who oppose tenure assert that, because the need for such protections is long gone, tenure is simply an outdated, misused tool that allows ineffective teachers to

⁸ Teacher Tenure, ERIC DIGEST, at <http://www.ericdigests.org/pre-925/tenure.htm>

⁹ *Supra* note 1.

remain in the profession. This may be true to some extent, but it is also critical to ask just how it was possible for these ineffective teachers to be granted tenure in the first place. One may wonder what kind of procedures could be in place at schools to ensure that only qualified, effective teachers receive tenure protections. Generally, school administrators are required to evaluate teachers a certain number of times per year and subsequently base their contract renewal decisions on those evaluations. In reality, however, teacher observations are rushed and sometimes non-existent, due to the heavy workload of school administrators. This, in turn, leads to evaluations that may not reflect the reality of the teacher's effectiveness in the classroom, allowing for tenure to commence automatically for any teacher who stays put long enough.

Another criticism of the K-12 tenure track is that it is far less rigorous than that of the university system. Gaining tenure for college professors is based on their contributions in their field and their published research. The probationary periods before reaching tenure status can be as long as ten years.¹⁰ By contrast, the tenure track for K-12 teachers in many states is only two years and does not require that the teacher meet any particular standards or attain any specific professional goals. It is widely understood that “nearly all teachers who stick around long enough, receive tenure.”¹¹

It is difficult to find any rationale for providing tenure so early in a teacher's career. In fact, the only purported reason for having tenure at the K-12 level today is to insulate teachers from the whims of the community and school administrators, who may be inclined to fire a teacher for unpopular religious or political views. However, given

¹⁰ *Supra* note 3.

¹¹ Marcus A. Winters, *Challenging Tenure in D.C.*, THE WASHINGTON TIMES, November 5, 2008 at <http://www.manhattan-institute.org/html/miarticle.htm?id=3397>

that every American professional is protected by law against unfair employment practices, one might ask why tenure is necessary for teachers at this level.

TENURE IN ILLINOIS

Illinois' first tenure law was enacted in 1941 and permitted teachers to enter the tenure track after only two years of teaching.¹² Since then, it has undergone numerous revisions incited, for the most part, by one common concern: how to rid schools of ineffective teachers.¹³ A report submitted to the Illinois State Board of Education around 1985 revealed that, on average, only three tenured teachers had been dismissed per year for the previous nine years.¹⁴ While this remarkably low number may have reflected the success of the education system rather than a failure of the tenure system, it nonetheless caught the attention of legislators who were already aware of the general public dissatisfaction with Illinois schools.

The Illinois legislature responded by modifying the tenure law to expand the teacher remediation process, which was intended to make it easier for schools to dismiss ineffective teachers.¹⁵ In practice, however, because school boards were still required by law to provide extensive documentation of poor teaching performance, the change in the law was more superficial than substantive.¹⁶ By 1997, the pressure to modify the tenure system in Illinois urged the legislature to act once again. This time, the tenure law was revised to require that teachers work within a district for four years before they could be eligible for tenure. This change gave administrators and school boards more time to observe teacher performance before receiving tenure, but it did nothing to ease the burden

¹² *Supra* note 5 at 238.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

of school boards when they seek to dismiss an ineffective teacher. Reflective of how complicated terminating a tenured teacher is in Illinois are the startling facts that only two of 95,500 tenured teachers are dismissed every year, and only seven percent of the approximately 900 school districts have even endeavored to terminate a tenured teacher since the 1985 legislation.¹⁷

Illinois is not the only state struggling with teacher tenure issues. Connecticut, New York, and Michigan have abolished tenure from their statutes, though they have maintained the due process rights granted by the tenure system.¹⁸ In Toledo, Ohio and surrounding cities, mentoring programs have been established whereby high performing teachers are assigned to less effective teachers in the hopes that this will improve teacher performance.¹⁹ Other states, like Florida and California, are currently attempting to pass legislation that would increase the number of years before teachers can receive tenure from two to five.²⁰

These measures may successfully ameliorate some of the trouble with tenure; however, just as Illinois has seen, it is more likely that they will simply prevent some teachers from receiving tenure while schools continue to struggle to dismiss underperforming teachers who already have tenure. Interestingly, the American Federation of Teachers (AFT) and the NEA assert that tenure is not responsible for ineffective teachers; rather, inadequate evaluation practices of administrators are at fault.²¹ “Fire all incompetent teachers – that makes a good sound bite,” said George

¹⁷ *Id.* at 239.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Sylvia Lim, *Florida Lawmakers Challenge Teacher Tenure*, BRADENTONHERALD.COM, April 19, 2009 at <http://www.bradenton.com/education/story/1374924.html>

²¹ *Supra* note 5 at 239.

Parker, president of the Washington Teachers' Union. "But remember that not only teachers are to blame for the problems in this district... You can't fire your way into a successful schools system."²²

Echoing that sentiment, the President of the Illinois Education Association (IEA) said that the inability of schools to fire bad teachers is actually just an "urban myth" and that the reason so few teachers are dismissed in Illinois is because so few need to be.²³ Arguably, that is an idealistic interpretation of the situation rather than a realistic one; however, there certainly is something to be said for the idea that school administrators do have the responsibility to hire capable teachers and ensure that they become and remain effective in the classroom. Oregon's decision to abolish tenure and replace it with two-year renewable contracts and rehabilitation programs for underperforming teachers²⁴ may be the only way to really guarantee that classrooms are staffed with effective, high-performing educators. The two-year contract serves the dual purpose of allowing teachers to feel secure in their positions for a period of time, while also motivating them to continue to be effective in the classroom.

While tenure may be an outmoded, unnecessary protection afforded to K-12 teachers, it should not be used as a scapegoat for every ill in the educational system in the United States. By eliminating tenure, we would not be fixing problems such as classroom size, violence in schools, lack of parent involvement, or under-funded school programs. Those who support tenure are correct in asserting that school administrators should do more to prevent poor performing teachers from receiving tenure in the first

²² *Id.*

²³ *Id.*

²⁴ *Supra* note 3.

place. More frequent and rigorous teacher evaluations, as well as improved communication among administrators and teachers may be a good start.

ALTERNATIVES TO TENURE

Michelle Rhee, chancellor of Washington D.C. public schools, believes that tenure benefits those who go into teaching for the wrong reasons, such as longer summer vacations, but it harms children who are stuck with incompetent teachers who are virtually impossible to fire.²⁵ Although Rhee clearly opposes tenure, she has not suggested abolishing it outright; rather, she proposes a two-tier system whereby teachers on one track would experience substantial salary increases in exchange for giving up a few seniority rights.²⁶ The second option is a bit riskier, but it would entail an enormous pay increase if the teacher survives the first year of the new contract.²⁷ Teachers who choose the latter plan could earn as much as \$131,000 as well as performance bonuses.²⁸

Rhee bases her proposal on research that indicates that teacher quality is closely linked to student performance and success. Thus the teacher pay system, which only looks to length of tenure and credentials – neither of which is linked to student success – is inherently flawed. Rhee believes that, if teacher quality were properly rewarded, student achievement would naturally benefit.

Rhee's proposal has not yet been voted upon by the Washington Teachers' Union (WTU); however, an August poll carried out by the WTU indicated that teachers opposed the proposal three to one.²⁹ One opposing teacher is Kerry Sylvia, an award-winning

²⁵ Sam Dillon, *A School Chief Takes on Tenure, Stirring a Fight*, NY TIMES, November 13, 2008 at http://www.nytimes.com/2008/11/13/education/13tenure.html?_r=1&scp=1&sq=teacher%20tenure&st=cse

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

world history teacher.³⁰ Although she already works long hours to improve her high school and the success of her students, Ms. Sylvia explains that, without tenure, she would feel vulnerable and unable to continue speaking out against school policies and initiatives with which she does not agree.³¹ “Don’t ask me to give up tenure, not even for a moment.”³²

By contrast, other teachers in Washington D.C. express excitement about the possibility of dramatically increasing their salaries. Maggie Slye, for example, a literary coach in a D.C. elementary school said, “Isn’t it funny? I don’t even know if I have tenure. To me, tenure is not a motivator; I motivate myself. It just doesn’t mean a lot to me.”³³ Under Rhee’s plan, Slye’s salary would increase from \$61,000 to \$90,000.³⁴

Rhee is not the only educator who is experimenting with the idea of a merit pay system for teachers. The Equity Project (TEP) Charter School, which is slated to open in Manhattan next fall, will be paying its teachers a starting salary of \$125,000, plus an initial annual bonus of up to \$25,000.³⁵ To be hired at TEP, teachers must prove to have “expert subject-area knowledge,” a portfolio illustrating their successes in prior schools, and a score above 90 percent on the verbal section of a graduate school entrance test.³⁶ This school is the first of its kind in the United States and all eyes will be on its progress, which may shed some light on the question of whether increased teacher salaries will have an impact on student and school success.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ Paul Tough, *The Two Tier Teacher Contract*, NY TIMES, December 14, 2008 at <http://www.nytimes.com/2008/12/14/magazine/14Ideas-section4B-t-001.html?scp=7&sq=teacher%20tenure&st=cse>

³⁶ *Id.*

CONCLUSION

Perhaps by significantly increasing teachers' salaries, more qualified teachers will be attracted to the profession. Those who would like to teach but feel they cannot afford to because of the typically low salaries would have the opportunity to pursue a teaching career without sacrificing the lifestyle they desire. Higher teaching salaries would bring more prestige to the profession, as well as more competition, which would afford school districts the luxury of choosing their teachers from a larger pool of qualified applicants. Furthermore, by eliminating tenure, or at least making it more difficult to obtain, teachers might be more motivated to maintain a high level of professionalism throughout their career. Given the benefits that students could potentially reap from these changes, it is difficult to argue against such a system.

What is most important is that the debate surrounding tenure be focused on the real issue at hand: how to provide our children with the best education possible. Schools, curriculums and teaching should be about the students, not about the adults who are paid to educate them. In resolving this issue, it is critical to acknowledge the differences between the teachers' and school leaders' positions, and pursue an approach that will help to close existing gaps. As Chancellor Rhee pointed out, "Tenure is the holy grail of teacher unions but has no educational value for kids; it only benefits adults....Students cannot wait for accountable teachers while adults argue."³⁷

³⁷ *Supra* note 25.