STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

Tiffini Flynn Forslund; Justina Person; Bonnie Dominguez; and Roxanne Draughn,

Plaintiffs,

vs.

State of Minnesota; Mark Dayton, in his official capacity as the Governor of the State of Minnesota; the Minnesota Department of Education; Brenda Cassellius, in her official capacity as the Commissioner of Education; St. Paul Public Schools, Independent School District 625; Anoka-Hennepin School District 11; Duluth Public Schools, Independent School District 709; West St. Paul-Mendota Heights-Eagan Area Schools, Independent School District 197,

Defendants.

Court File No.: 62-CV-16-2161
Case Type: Other Civil
Judge Margaret M. Marrinan

PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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Plaintiffs Tiffini Flynn Forslund, Justina Person, Bonnie Dominguez, and Roxanne Draughn respectfully submit this consolidated memorandum in opposition to Defendants'[1] motions to dismiss the First Amended Complaint ("FAC").[2]

INTRODUCTION

"[E]ducation *is* a fundamental right under the state constitution, not only because of its overall importance to the state but also because of the explicit language used to describe this constitutional mandate." *Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993) (emphasis in original). Minnesota's public school teachers are primarily responsible for delivering the core of this constitutional guarantee—the development of "*every child* to his or her capacity of" academic achievement, citizenship, and vocation. *Id.* at 311 (emphasis added, quotation marks omitted). But despite teachers' role as the most important determinant of students' learning, Minnesota's Tenure, Dismissal, and Last-In-First-Out ("LIFO") laws (collectively, the "Challenged Statutes") afford permanent job security to chronically ineffective teachers at the expense of students' fundamental right to a uniform and thorough education.

Plaintiffs are each mothers of children attending public schools in school districts across the state. They are united by a common thread: Their children have each been deprived of their fundamental right to a uniform and thorough education as a result of being assigned to a chronically ineffective teacher. Plaintiffs allege that Minnesota statutes providing permanent job security to chronically ineffective teachers cannot be squared with their children's fundamental

[1] In place of Defendants' full names, Plaintiffs employ the following abbreviations throughout their opposition memorandum: Governor Mark Dayton (the "Governor"); the Minnesota Department of Education ("MDoE"); Commissioner of Education Brenda Cassellius (the "Commissioner of Education") (collectively, the "State"); St. Paul Public Schools, Independent School District 625 ("SPPS"); Anoka-Hennepin School District 11 ("AHSD"); Duluth Public Schools, Independent School District 709 ("DPS"); and West St. Paul-Mendota Heights-Eagan Area Schools, Independent School District 197 ("WSP") (collectively, the "School District Defendants").

[2] The State submitted a single memorandum supporting its consolidated motion to dismiss Plaintiffs' Complaint; the School District Defendants each submitted separate motions supported by separate memoranda. Consistent with undersigned counsel's letter to the Court of June 30, 2016, Plaintiffs are filing a single memorandum in opposition to all motions to avoid unnecessarily burdening the Court.

constitutional right to a uniform and thorough system of public schools. Plaintiffs further allege that Defendants' enforcement of such laws violates their children's constitutional right to equal protection and due process because Defendants' actions result in chronically ineffective teachers being disproportionately assigned to schools serving low-income students and students of color.

Plaintiffs have presented the Court a justiciable conflict, based on well-established constitutional claims, capable of resolution by an order declaring the Challenged Statutes unconstitutional and enjoining their continued enforcement. Defendants contend otherwise, raising meritless objections and unnecessarily complicating the straightforward application of well-settled law to a novel set of facts. ***First,*** Defendants argue that Minnesota's fundamental right to education is not what the Supreme Court says it is—indeed, that it is toothless—and cannot be invoked to challenge laws that prevent children from obtaining the most basic skills necessary to achieve academic benchmarks, participate as citizens, and compete in the marketplace. Not true. From the beginning, Minnesota has promised children more: The Education Clause guarantees a public school system "whereby *all* may be enabled to acquire an education which will fit them to discharge intelligently their duties as citizens of the republic," *Bd. of Educ. v. Moore*, 17 Minn. 412, 416 (1871), and the fundamental right to education is an individual right that may be invoked to challenge state laws that result in an education system that is "inadequate, lacking in uniformity, and discriminatory as to the children served." *Skeen*, 505 N.W.2d at 311.

Next, Defendants insist that even if Plaintiffs' claims are cognizable, their children have not suffered enough in order to raise them. Again, not so. Plaintiffs allege that their children's fundamental right to education is burdened as a result of the Challenged Statutes and Defendants' actions to enforce them, all that is required to deserve their day in this Court.

Finally, Defendants argue that Plaintiffs' claims amount to non-justiciable "political questions" because the Legislature alone is capable of deciding whether Plaintiffs' children have been afforded their fundamental right to education. Again, Defendants' position is unavailing: It is uniquely and emphatically the duty of the judiciary to assess the constitutionality of state law.

In sum, Defendants insist that there is no set of facts that could possibly be introduced whereby Plaintiffs could prevail in their claims. Defendants' position is audacious and unsustainable. Plaintiffs' allegations establish that their children's constitutional rights under the Education, Equal Protection, and Due Process Clauses of the Minnesota Constitution are violated by Defendants' enforcement and implementation of the Challenged Statutes. Accordingly, Defendants' motions to dismiss must be denied in their entirety.

RELEVANT FACTS AND PROCEDURAL HISTORY

Plaintiffs' children attend public schools under Defendants' jurisdiction and control. Tiffini Flynn Forslund's child, K.F., is African American and attends high school in the Anoka-Hennepin School District. Bonnie Dominguez's child, E.Q., is Native American and attends middle school in the Duluth Public Schools. Roxanne Draughn's child, A.D., is African American and attends elementary school in the St. Paul Public Schools. Justina Person's children, J.C. and D.C., are Caucasian, and currently attend school in the West St. Paul-Mendota Heights-Eagan Area Schools. Previously, J.C. and D.C. attended school in the St. Paul school district, but transferred after being assigned to ineffective teachers. Plaintiffs' children all qualify for free or reduced-price lunch. *See* FAC at ¶¶ 27-30.

Plaintiffs allege that on their face *and* as-applied by Defendants, Minnesota's Continuing Contract Law, Minn. Stat. § 122A.40, and Tenure Act, Minn. Stat. § 122A.41, protect chronically ineffective teachers with the result that Plaintiffs' children have been and will be denied their constitutionally guaranteed fundamental right to a uniform and thorough education.

FAC at ¶¶ 23, 25, 27-30.[3] Specifically, Plaintiffs allege that the Challenged Statutes' Tenure Provisions—which require only a 3-year probationary period before a teacher is awarded tenure—protect chronically ineffective teachers at the expense of students' fundamental right to education because the "3-year probationary period is too short to make an accurate prediction of a teacher's continued effectiveness over the course of his career," and because, in practice, tenure is a "formality" whereby teachers are granted what "amounts to near permanent employment" "without regard for how well [they] actually perform or how much their students learn." FAC at ¶¶ 77, 80, 82. Plaintiffs allege that the Challenged Statutes' Dismissal Provisions—which mandate that districts "navigate[] a byzantine array of due process guarantees" before a chronically ineffective teacher can be dismissed, and invariably "require that the dismissal process be completed during the academic year"—protect chronically ineffective teachers at the expense of students because, at minimum, "students assigned to an ineffective teacher in the midst of the dismissal process are deprived of their rightful uniform and thorough education . . . during the pendency of the dismissal process," and because, in practice, "the difficulty, complexity, cost, and length of time required to remove" a chronically ineffective teacher results in districts taking the path of least resistance, allowing "chronically ineffective teachers [to remain] in place," or seeking alternatives to "dismissal, such as a transfer to another public school." *Id.* at ¶ 83, 90-92. Finally, Plaintiffs allege that the Challenged Statutes' LIFO Provisions—which mandate seniority-based, quality-blind layoffs *unless* the district negotiates an alternative plan—protect chronically ineffective teachers at the expense of students because "years of teaching experience [] is not an accurate predictor of classroom effectiveness" and,

[3] For present purposes, Defendants agree that "'Continuing Contract Rights' under Minn. Stat. § 122A.40 are equivalent to 'tenure rights' under the Teacher Tenure Act, Minn. Stat. § 122A.41." WSP Br. at 2.

thus, "whenever layoffs occur, effective teachers are fired, ineffective teachers are spared, and more students are assigned to ineffective teachers." *Id.* at ¶¶ 100, 102, 109.

In sum, Plaintiffs allege that the Tenure, Dismissal, and LIFO Provisions, on their face and as applied, individually and collectively, violate the Education Clause of the Minnesota Constitution "because they confer all but permanent employment on ineffective teachers" with the result that Plaintiffs' children have been deprived "their rightful uniform and thorough education." *Id.* at ¶ 224; *see id.* at ¶¶ 219-36. And because this deprivation occurs without notice, Plaintiffs allege that these Provisions, on their face and as applied, individually and collectively, violate their children's constitutional right to due process. *Id.* at ¶¶ 276-87. Based on an extensive survey of publicly available teacher and student demographic and performance data from school districts across the state—including the Defendant districts, *see id.* at ¶¶ 114-96—Plaintiffs further allege that the Tenure, Dismissal, and LIFO Provisions, individually and collectively, as applied by Defendants, violate their children's right to equal protection of the law because they result in "an arbitrary subset of children of substantially equal age, aptitude, motivation, and ability, [being deprived] of substantially equal access to a uniform and thorough education," *id.* at ¶ 240; *see generally id.* at ¶¶ 237-48; and because they result in "low-income students and students of color [being] disproportionately deprived of their rightful uniform and thorough education" compared to their more affluent and white peers. *Id.* at ¶¶ 124; *see generally id.* at ¶¶ 249-269.

Plaintiffs seek a declaration that the Tenure, Dismissal, and LIFO Provisions, separately and together, violate their children's rights under the Education, the Equal Protection, and the Due Process Clauses of the Minnesota Constitution. Plaintiffs further seek an injunction preventing Defendants from continuing to enforce the Challenged Statutes and their current

employment practices. *Id.* at p. 74 (Prayer for Relief). Defendants now ask the Court to dismiss Plaintiffs' complaint in its entirety, with prejudice, for failure to state a claim, and for lack of jurisdiction. For reasons to follow, Defendants' motions must be denied.

ARGUMENT

A. LEGAL STANDARD

A motion to dismiss must be denied "if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 603 (Minn. 2014) (discussing Minn. R. Civ. P. 12.02(e)). Stated differently, "a pleading will be dismissed only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." *Id.* at 602 (quotation marks omitted). Only a "minimal" showing is required to survive a motion to dismiss for failure to state a claim, *Noske v. Friedberg*, 670 N.W.2d 740, 742 (Minn. 2003), and in reviewing the sufficiency of a complaint, a district court must accept the facts alleged in the complaint as true and construe all reasonable inferences in the plaintiff's favor. *Gretsch v. Vantium Capital, Inc.*, 846 N.W.2d 424, 429 (Minn. 2014). In addition, the court may consider documents that are referenced in the complaint. *Northern States Power Co. v. Metropolitan Council*, 684 N.W.2d 485, 490-91 (Minn. 2004).

A claim may be dismissed for lack of subject-matter jurisdiction when the court lacks "authority to consider an action or issue a ruling that will decide the issues raised by the pleadings." *Rasmussen v. Sauer*, 597 N.W.2d 328, 330 (Minn. Ct. App. 1999); Minn. R. Civ. P. 12.02(a). District courts have original jurisdiction in all civil cases. Minn. Const. art. VI, § 3; Minn. Stat. § 484.01(1).

B. PRELIMINARY MATTERS

Defendants clutter their briefs with arguments that are either irrelevant or easily dispatched. Plaintiffs pause momentarily to clear the confusion.

First, Plaintiffs allege that the Challenged Statutes violate the Education Clause and the Due Process Clause on their face and as-applied, and that they violate the Equal Protection Clause as-applied. Plaintiffs do *not* allege a facial violation of the Equal Protection Clause. Any arguments seeking dismissal of "Plaintiffs' facial challenge under the Equal Protection Clause" may be disregarded. *E.g.*, AHSD Br. at 18-20

Second, Defendants are at pains to lay responsibility for Plaintiffs' claims at each other's doors, with the State insisting that it cannot be at fault for the constitutional deprivations alleged because "control over employment decisions at Minnesota schools rests with the local school districts," State's Br. at 5, and the School District Defendants responding that they "did not adopt the statutes, ha[ve] no power to repeal them, and cannot disregard them," WSP Br. at 5. However, there is no doubt that each of the Defendants is a proper party to this action. The State is ultimately responsible for enforcing Minnesota law and, in particular, the Challenged Statutes.[4] Thus, the State is properly positioned to defend against Plaintiffs' facial challenges. *See State v. Ness*, 834 N.W.2d 177, 182 (Minn. 2013) (State was the proper party to defend against facial challenge to statute governing issuance of domestic abuse no contact orders). Likewise, the Commissioner and the School District Defendants are the proper parties to defend against Plaintiffs' as-applied challenges because they are the authorities that supervise and

[4] The Governor, as chief executive of the State, is constitutionally required to "take care that the laws be faithfully executed." Minn. Const. art. V, § 3. Similarly, the MDoE is statutorily required to "carry out the provisions of chapters 120A to 129C [of the Minnesota Education Code]," which include the Continuing Contract Law and the Tenure Act. Minn. Stat. § 120A.02(b). The Commissioner is directed to "review all education-related mandates in state law or rule once every four years to determine which mandates fail to adequately promote public education in the state" and to report the same "to the education committees of the legislature." Minn. Stat. § 127A.05(2).

control staffing decisions in the schools and districts serving Plaintiffs' children.[5] Defendants' various assertions that Plaintiffs have failed to "name[] the actual party against whom the requested relief could be ordered" can be ignored. *E.g.*, State's Br. at 17.

Third, contrary to Defendants' claims, the Legislature's 2016 amendments to the Education Code did not "address the very subject" of Plaintiffs' complaint—*i.e.*, whether the Challenged Statutes (and Defendants' actions to enforce them) violate their children's fundamental right to a uniform and thorough education. SPPS Br. at 3. Instead, the changes cited by Defendants address an entirely *different* section of the Education Code, specifically Minn. Stat. § 120B.11. *Id.* The Legislature's 2016 Amendments to the Challenged Statutes—the "subject" of Plaintiffs' complaint—are minimal, and do not touch the Tenure, Dismissal, and LIFO Provisions.[6] *See* 2016 Minnesota Laws, Ch. 189, Art. 24, §§ 6-7.

Fourth, Defendants' criticism that Plaintiffs have failed "to allege the qualities that define an 'effective' versus 'ineffective' teacher," *e.g.*, WSP Br. at 11, and, further, have failed to identify the number of ineffective teachers protected by the Challenged Statutes is misplaced, SPPS Br. at 6. As noted elsewhere by Defendants, state law already provides a framework for teacher assessment.[7] And, of course, Plaintiffs cannot be faulted for lacking information

[5] The Commissioner "exercise[s] general supervision over public schools and public educational agencies in the state," Minn. Stat. § 127A.05(3), and, as indicated above, is required to regularly review the Minnesota Education Code "to determine which mandates fail to adequately promote public education," Minn. Stat. § 127A.05(2). The Tenure Act and the Continuing Contract Law each provide that local school boards shall be responsible for hiring teachers, conferring tenure, and discharging teachers (non-tenured and tenured, alike). *See* Minn. Stat. § 122A.40(3), (7); Minn. Stat. § 122A.41(2)(a), (7).

[6] SPPS references the 2016 amendments in its counter-statement of facts, SPPS Br. at 3, but thereafter makes no effort to argue that Plaintiffs' constitutional challenges are mooted or otherwise affected by the Legislature's actions. "Issues not briefed are waived." *Am. Fed'n of State, Cty. Mun. Employees v. Grand Rapids Pub. Utilities Comm'n*, 645 N.W.2d 470, 474 (Minn. Ct. App. 2002).

[7] As explained by SPPS: "Teacher evaluations 'must be based on professional teaching standards. The evaluation must use data from valid and reliable assessments aligned to state and local academic standards, and must use state and local measures of student growth and literacy. It must use longitudinal data on student outcome measures explicitly aligned with the elements of curriculum for which teachers are responsible. The Legislature has further amplified the requirements for these teacher development and evaluation plans. For example, staff development activities must: 'focus on the school classroom and research-based strategies that improve student learning'; and

regarding the total number of ineffective teachers in their districts when Defendants alone possess this information, it has been requested from Defendants pursuant to the Data Practices Act, and Defendants have, to date, rebuffed such requests. *See* FAC at ¶ 60, n.17.[8] In any event, these are fact questions properly answered after the parties have engaged in discovery.

Finally, Defendants insist that Plaintiffs cannot obtain the injunctive relief they seek because the complaint "does not meet the *Dahlberg* factors standards [sic] for an injunction." WSP Br. at 21. The *Dahlberg* factors apply only to requests for a temporary injunction. *See Dahlberg Bros. v. Ford Motor Co.*, 137 N.W.2d 314, 321 (Minn. 1965) ("The limited issue raised by the appeal is whether the order of the trial court [issuing a temporary injunction pending a final determination of the merits] constitutes a clear abuse of discretion."). Plaintiffs do not seek a temporary injunction, but instead seek permanent injunctive relief *following* a final determination on the merits.

C. PLAINTIFFS' EDUCATION CLAUSE CLAIMS ARE WELL PLEADED AND STATE A CLAIM FOR RELIEF UNDER MINNESOTA LAW

Plaintiffs contend that the Challenged Statutes are unconstitutional under three separate provisions: the Education Clause, the Equal Protection Clause, and the Due Process Clause.

1) Applicable law: The same substantive standard governs Plaintiffs' facial and as-applied challenges.

A party asserting a facial challenge to a statute must allege that the "statute is unconstitutional in a substantial number or all of its applications, as the case may be." *Rew v. Bergstrom*, 845 N.W.2d 764, 778 (Minn. 2014). "Where the harm alleged is hypothetical and may or may not occur, the challenger has not met that burden." *Minn. Voters All. v. City of*

'provide opportunities for teachers to practice and improve their instructional skills over time.'" SPPS Br. at 8-9 (citation various provisions of the Tenure Act).

[8] Among the School District Defendants, only AHSD has responded to Data Practices Act requests. However, the information produced by AHSD does not state how many chronically ineffective teachers it currently employs.

Minneapolis, 766 N.W.2d 683, 696 (Minn. 2009). Conversely, a party alleging an as-applied challenge must show that the statute is unconstitutional as applied to "the specific circumstances presented by [the] case." *Rew*, 845 N.W.2d at 780. "[F]acial and as-applied challenges differ in *the showing* required to invalidate a statute, not in the underlying substantive standard that applies to each type of challenge." *Id.* at 778 (emphasis in original); *see State v. Hensel*, 874 N.W.2d 245, 250 (Minn. Ct. App. 2016) ("As our supreme court explained in *Rew* …, the same substantive test applies regardless of whether a challenge is facial or as-applied.").

"Under general principles of constitutional adjudication, a statute is presumed valid, and the duty is on the challenging party to prove its invalidity." *Skeen v. State*, 505 N.W.2d 299, 312 (Minn. 1993). However, when a state law burdens a fundamental right, it must satisfy strict scrutiny analysis to survive constitutional challenge. *In re Welfare of Child of R.D.L.*, 853 N.W.2d 127, 133 (Minn. 2014). "Once a statute is subject to strict scrutiny, it is not entitled to the usual presumption of validity," *id.* (quotation marks omitted), and the burden shifts to the *State* to show that the law (or its implementation) is narrowly tailored to advance a compelling state interest, *Rew*, 845 N.W.2d at 778.

2) Plaintiffs allege a facial Education Clause challenge against the State.

"[E]ducation *is* a fundamental right under the state constitution, not only because of its overall importance to the state but also because of the explicit language used to describe this constitutional mandate." *Skeen*, 505 N.W.2d at 313 (emphasis in original).[9] Thus, to properly assert their Education Clause claims, Plaintiffs must allege that the Challenged Statutes impinge

[9] The Education Clause of the Minnesota Constitution provides:

> The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools. The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state.

Minn. Const. art. XIII, § 1.

their right to a uniform and thorough education, at which point the burden shifts to Defendants to show that the Challenged Statutes (and their actions to enforce them) are "narrowly tailored to serve a compelling government interest." *R.D.L.*, 853 N.W.2d at 133 (quotation marks omitted); *e.g.*, *Skeen*, 505 N.W.2d at 315 ("[S]trict scrutiny analysis should be applied in determining whether the legislature has met a student's fundamental right to a general and uniform system of public schools").

If proved, Plaintiffs' allegations require the conclusion that the Challenged Statutes burden their children's fundamental right to a uniform and thorough public school system. Plaintiffs allege: (1) teachers are critical to the delivery of students' fundamental right to education, FAC at ¶ 45; (2) chronically ineffective teachers exist and can be identified, *id.* at ¶ 59; (3) chronically ineffective teachers have a measurably negative impact on student learning, *id.* at ¶¶ 51-52; (4) chronically ineffective teachers are currently teaching students in districts under Defendants' supervision and control, *id.* at ¶ 53; and (5) chronically ineffective teachers are protected in their positions as a result of the Challenged Statutes and have deprived Plaintiffs' children of their rightful uniform and thorough education, *id.* at ¶¶ 27-30; *see id.* at ¶¶ 61-62.

Critically, as required to establish a facial challenge, Plaintiffs also allege that the Tenure, Dismissal, and LIFO Provisions are unconstitutional in a "substantial number or all of [their] applications." *Rew*, 845 N.W.2d at 778. In other words, as written, the Challenged Statutes will always result in deprivation of students' fundamental right to education. First, Plaintiffs allege that despite research showing that a teacher's long-term effectiveness cannot be measured until at least the end of his fourth or fifth year of teaching, the Tenure Provisions confer tenure

benefits after only three years in the classroom.[10] Thus, in all circumstances, a Minnesota teacher will be awarded super due process protections prior to a reliable assessment of his long-term effectiveness, at the risk of depriving students of fundamental rights guaranteed by the Education Clause of the Minnesota Constitution. FAC at ¶¶ 17, 80, 222.

Second, Plaintiffs allege that despite research showing that students immediately fall behind their peers when taught by an ineffective teacher, *id.* at ¶ 49, and that the gap grows greater "with each successive school year," *id.* at ¶ 52, the Dismissal Provisions require that dismissal proceedings for ineffective performance commence and conclude during a single academic year, and, further, that a teacher undergoing the termination process be allowed to remain in his position during such proceedings.[11] Thus, in all circumstances, students taught by chronically ineffective teachers will be deprived of their rightful uniform and thorough education for *at least* the pendency of their teachers' dismissal proceedings, which may last a full school year. *Id.* at ¶¶ 90, 228.

Third, Plaintiffs allege that despite seniority being an inaccurate proxy for teacher effectiveness, the LIFO Provisions require as a default rule that district-wide layoffs occur in strict accordance with LIFO. A school district may only avoid this fate by contracting for an

[10] *See* Continuing Contract Law, Minn. Stat. § 122A.40(7) ("A teacher who has completed a [3-year] probationary period in any district, and who has not been discharged or advised of a refusal to renew the teacher's contract under subdivision 5, shall elect to have a continuing contract with such district[.]"); Teacher Tenure Act, Minn. Stat. § 122A.41(4) ("After the completion of [the 3-year] probationary period, without discharge, such teachers as are thereupon reemployed shall continue in service and hold their respective position during good behavior and efficient and competent service and must not be discharged or demoted except for cause after a hearing.").

[11] *See* Continuing Contract Law, Minn. Stat. § 122A.40(7) & (9)(1) ("termination [for inefficiency in teaching] shall take effect at the close of the school year in which the contract is terminated"); *id.* at § 122A.40(9)(1) ("A continuing contract may be terminated, effective at the close of the school year, upon any of the following grounds: (1) inefficiency in teaching . . ., consistent with subdivision 8, paragraph (b)[.]"); *see also* Teacher Tenure Act, Minn. Stat. §§ 122A.41(6)(3) & 10 (a teacher cannot be terminated for "[inefficiency in teaching] except during the school year, and then only upon charges filed at least four months before the close of the school sessions of such school year").

alternative system.[12] Thus, in all circumstances layoffs will proceed according to LIFO, with the result that less-senior effective teachers are fired while more-senior ineffective teachers are spared, *unless* a school district takes an affirmative step to opt out. *See id.* at ¶¶ 100, 109, 234.

Having alleged that in every instance the Tenure, Dismissal and LIFO Provisions impinge students' fundamental right to a uniform and thorough education, the burden shifts to the State to show that they are narrowly tailored to serve a compelling government interest. A strict scrutiny analysis requires the development of evidence and, as such, is beyond the Court's purview at this stage. In any event, Plaintiffs allege that the Defendants cannot carry this "heavy burden of justification." *R.D.L.*, 853 N.W.2d at 133; *see* FAC at ¶ 24.

3) Plaintiffs allege as-applied Education Clause claims against the Commissioner and the School District Defendants.

Plaintiffs have alleged as-applied challenges against the Commissioner and the School District Defendants. The elements of Plaintiffs' as-applied claims are essentially the same as their facial challenge; however, instead of showing that the Challenged Statutes burden their children's fundamental right to education in every instance, Plaintiffs must allege that the Tenure, Dismissal, and LIFO Provisions impinge their children's fundamental rights as administered by the authorities with supervisory control over teacher employment decisions. *See Rew*, 845 N.W.2d at 778. Plaintiffs allege (1) that their children have been taught by chronically ineffective teachers and face a substantial risk of being taught by chronically ineffective teachers in the future, FAC at ¶¶ 27-30; (2) that as a result of having been taught by chronically ineffective teachers, their children have suffered a deprivation of their fundamental right to

[12] *See* Continuing Contract Law, Minn. Stat. § 122A.40(11)(b) ("Teachers who have acquired continuing contract rights shall be placed on unrequested leave of absence in fields in which they are licensed in the inverse order in which they were employed by the school district."); Teacher Tenure Act, Minn. Stat. § 122A.41(14)(a) ("In the event it becomes necessary to discontinue one or more positions, in making such discontinuance, teachers must be discontinued in any department in the inverse order in which they were employed, unless a board and the exclusive representative of teachers in the district negotiate a plan providing otherwise.").

education in the form of real and appreciable academic harm, *id.*; and (3) that chronically ineffective teachers maintain their jobs in the schools attended by Plaintiffs' children as a direct result of how the Defendants administer the Challenged Statutes when making hiring and firing decisions, *see id.* at ¶¶ 69-70, 92, 115.

Having alleged an as-applied challenge, the burden again shifts to Defendants to show that their actions—and, in particular, their decisions that result in the permanent employment of chronically ineffective teachers—are narrowly tailored to achieve a compelling interest. Again, this analysis cannot be conducted without the development of evidence. And again, in any event, Plaintiffs allege that Defendants cannot carry this heavy burden because they cannot proffer a compelling reason to deprive children of their fundamental right to education.

4) Defendants' objections to Plaintiffs' Education Clause claims are based on misinterpretation and misapplication of Minnesota law.

Defendants raise a variety of ham-handed objections to Plaintiffs' Education Clause claims. Equating children's fundamental right to education with a "consenting drunk driver's" interest in keeping his driver's license, *e.g.*, AHSD Br. at 21, Defendants insist: (1) the Education Clause only requires the Legislature to provide "public funding necessary to maintain" a uniform system of public schools, *e.g.*, State's Br. at 19; (2) "strict scrutiny does not apply to the teacher tenure laws," State's Br. at 26; (3) "challenges to the quality of education received by a student [are properly] recast as 'educational malpractice' claims, which are not recognized in Minnesota," DPS Br. at 11; and (4) "[t]he Minnesota Supreme Court has upheld the public policy rationale underlying the [Challenged Statutes] for decades," WSP Br. at 12-13. Finally, Defendants cite intermediate appellate court decisions from other jurisdictions to assert that the "right to a 'system of common schools' does [not] translate into a constitutional right to a

'particular quality' of schools." WSP Br. at 7 (quoting *Campaign for Quality Education v. California*, 246 Cal. App. 4th 896, 909 (Cal. App. 2016)).[13]

Defendants miss the mark. ***First,*** there is simply no comparison between the "sweeping magnitude" of a child's fundamental right to education and a drunk driver's right to a driver's license. *Skeen*, 505 N.W.2d at 313. From the beginning, the Supreme Court has emphasized that the "object" of the Education Clause "is to insure a regular method throughout the state whereby *all* may be enabled to acquire an education which will fit them to discharge intelligently their duties as citizens of the republic." *Moore*, 17 Minn. at 416 (emphasis added). Indeed, "education is perhaps the most important function of state and local governments. … *Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.*" *Skeen*, 505 N.W.2d at 321 (Page, J., concurring in part) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)). At best, it is cynical to compare a child's fundamental right to education to a consenting adult's right to drive.

Second, Defendants' arguments to the effect that children's fundamental right to education is limited in scope to "the public funding necessary to maintain" a "uniform system of public schools" and not to education of a particular quality are based on a misunderstanding of Supreme Court precedent. *E.g.*, State's Br. at 19; *see also* WSP Br. at 14-15. In *Skeen v. State*, a collection of school districts and parents sued the State alleging that Minnesota's "referendum levy" statute, Minn. Stat. § 124A.03 (1992)—which allowed individual school districts to generate supplemental revenues above baseline "foundation revenue"—created such unequal

[13] Strangely, the State also suggests that Plaintiffs' Education Clause claims fail because "[e]ducation is not recognized as a fundamental right under the U.S. Constitution." State's Br. at 23, n.7. The *Skeen* Court flatly rejected this reasoning, explaining that "Minnesota is not limited by the United States Supreme Court and can provide more protection under the state constitution than is afforded under the federal constitution." *Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993); *see also Kahn v. Griffin*, 701 N.W.2d 815, 830 (Minn. 2005) ("[*Skeen*] held that education is a fundamental right under the Minnesota Constitution, even though the United States Supreme Court held that education is not a fundamental right under the U.S. Constitution.").

funding levels among districts that it violated the Education Clause's "uniformity requirement." 505 N.W.2d at 310. The Supreme Court rejected the plaintiffs' challenge, reasoning that "uniformity" was adequately maintained despite the referendum levy statute because "the existing system continue[d] to meet the basic educational needs of all districts." *Id.* at 312. However, in reaching this conclusion, the Supreme Court repeatedly emphasized that the plaintiffs did *not* challenge the "*adequacy* of education in Minnesota," *id.* at 302 (emphasis in original)—indeed, plaintiffs *conceded* that "all schools in the state [were] able to provide an adequate education," *id.* at 310—and that disparities in funding generated by local levies were "relatively small" compared to the "basic revenue" provided by the State to all school districts, *id.*

By contrast, Plaintiffs' Education Clause claims directly challenge the *adequacy* of Minnesota's education system, and *Skeen* clearly provides the foundation for claims that the Challenged Statutes burden children's fundamental right to education by providing job security to chronically ineffective teachers. The *Skeen* Court emphasized that "education *is* a fundamental right under the state constitution, not only because of its overall importance to the state but also because of the explicit language used to describe this constitutional mandate," *id.* at 313, and that when "evaluating a challenge to such a fundamental right, this court must employ the strict scrutiny test." *Id.* at 315. The Court further emphasized that the "fundamental right to a general and uniform *system* of public schools" belongs to, and may be invoked by, the *student*. *Id.* at 315 (emphasis in original). Additionally, the Court demonstrated that the Education Clause's "general and uniform system of public schools" provision *and* its "thorough and efficient system of public schools throughout the state" provision should be read in tandem, explaining that if a state law results in districts being unable to meet "basic educational needs," a claim is cognizable

under "state constitutional provisions which require the state to establish a 'general and uniform system of public schools' which will secure a 'thorough and efficient system of public schools.'" *Id.* at 312.

Finally, and importantly, the *Skeen* Court quoted with favor an opinion of the West Virginia Supreme Court that interpreted West Virginia's constitutional guarantee of "a thorough and efficient system of schools" as follows:

> It develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically.
>
> Legally recognized elements in this definition are development in every child to his or her capacity of (1) literacy; (2) ability to add, subtract, multiply and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work to know his or her options; (5) work-training and advanced academic training as the child may intelligently choose; (6) recreational pursuits; (7) interests in all creative arts, such as music, theatre, literature, and the visual arts; (8) social ethics, both behavioral and abstract, to facilitate compatibility with others in this society.

Id. at 310-11 (quoting *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W. Va. 1979)).

The sum of *Skeen*'s reasoning makes clear that a child's fundamental right to education is *not* simply the right to basic foundation funding. It is an individual right that may be invoked to challenge state laws that result in an education system that is "inadequate, lacking in uniformity, and discriminatory as to the children served." *Id.* at 311 (discussing *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989)). Further, *Skeen* clarifies that the measure of an "adequate" education system properly includes whether it develops "*every child* to his or her capacity of" academic achievement, citizenship, and vocation. *See id.* at 310-11 (emphasis added; quoting *Pauley*, 255 S.E.2d at 877). Plaintiffs expressly allege that the Challenged Statutes (and Defendants' actions to enforce them) force "children into classrooms taught by

ineffective teachers unable to provide students with basic tools to achieve academic benchmarks, compete in the marketplace, and participate in civil society." FAC at ¶ 72. Plaintiffs' claims easily fit within the scope of the Education Clause as interpreted by *Skeen*.

Third, the State's assertion that strict scrutiny does not apply to the Challenged Statutes, and therefore "teacher tenure laws—which must be presumed valid—need only satisfy rational basis review" is an invitation to error. State's Br. at 26. The Supreme Court is clear: "[S]trict scrutiny analysis should be applied in determining whether the legislature has met a student's fundamental right to a general and uniform *system* of public schools." *Skeen*, 505 N.W.2d at 315 (emphasis in original).

Fourth, Defendants' educational malpractice defense is a red herring. An educational malpractice claim is a tort: Its "essence" is that a "*school* failed to provide an 'effective education." *Alsides v. Brown Inst., Ltd.*, 592 N.W.2d 468, 473 (Minn. Ct. App. 1999) (emphasis added). Typically, such claims arise as a result of a plaintiff's dissatisfaction with training received at a post-secondary technical school, trade school, or other educational institution. *See id.*, 592 N.W.2d at 470-71 (recasting plaintiffs' fraud-based tort claims against "for-profit, proprietary trade school" as "educational malpractice" claims); *see generally id.* at 471-73 (discussing cases). Conversely, Plaintiffs' Education Clause claims are firmly rooted in the Minnesota Constitution. Their "essence" is that the Challenged Statutes (and Defendants' actions to enforce them) result in a *system* that is "inadequate, lacking in uniformity, and discriminatory as to the children served" because it protects chronically ineffective teachers at the expense of Plaintiffs' children's fundamental rights. *See Skeen*, 505 N.W.2d at 311. Defendants cannot avoid culpability for the constitutional violations alleged by pinning the blame on individual schools.

Fifth, the Supreme Court's prior discussions of the Challenged Statutes have little to offer the Court in its review of Plaintiffs' claims. In each of the cases identified by Defendants, the Supreme Court considered a district employee's challenge to a school board's adverse employment determination. *See Frye v. ISD No. 625*, 494 N.W.2d 466, 467 (Minn. 1992) (rejecting associate superintendent's claim that he was a "teacher" within the meaning of the Tenure Act); *Perry v. ISD No. 696*, 210 N.W.2d 283, 287 (Minn. 1973) (rejecting school board's claim that a teacher was not entitled to a continuing contract); *McSherry v. City of St. Paul*, 277 N.W. 541, 545 (Minn. 1938) (same); *see also State ex rel. Ging v. Bd. of Ed. of City of Duluth*, 7 N.W.2d 544, 564 (Minn. 1942) (reversing two teachers' discharge for discontinuance of position). More precisely, in each case the Court considered whether a school board violated district employees' statutory rights by declining to extend a continuing contract. Here, the issue is whether Defendants have burdened children's fundamental constitutional rights by enforcing statutes that deprive children of a uniform and thorough public education system. Obviously, "[a] legislative preference cannot limit a constitutional right." *Grussing v. Kvam Implement Co.*, 478 N.W.2d 200, 203 (Minn. Ct. App. 1991) (quotation marks omitted). To paraphrase the same Supreme Court authority cited by Defendants, even if the Challenged Statutes were enacted for the "benefit" of Minnesota's school system, WSP Br. at 12, they cannot be constructed or applied so "as to result in subordinating the paramount rights and welfare of the public at large and of the school children to those of [chronically ineffective] teachers." *See Ging*, 7 N.W.2d at 555.

Sixth, and finally, regardless of what intermediate appellate courts in other jurisdictions have decided regarding the scope of their own Education Clause analogues, the proper source for the interpretation of Minnesota's constitution is the Minnesota Supreme Court, which has clearly

endorsed the view that whether Minnesota's school system "provides an adequate education to all students" includes a qualitative "adequacy" element. *Skeen*, 505 N.W.2d at 315; *see also In re Expulsion of E.J.W. from Indep. Sch. Dist. No. 500*, 632 N.W.2d 775, 781 (Minn. Ct. App. 2001) (simply "[r]eceiving homework assignments" is not an adequate substitute for "participating in the classroom and receiving direct instruction and benefiting from teacher involvement"). In any event, the intermediate authorities cited by Defendants are hardly persuasive in light of high court decisions from around the country affirming that a child's fundamental right to education "means more than access to a classroom." *Serrano v. Priest*, 487 P.2d 1241, 1257 (Cal. 1971); *see Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 227 (R.I. 2010) ("We conclude, consistent with the conclusions of other state courts that have considered similar constitutional guarantees, that … the state constitution embodies a substantive component requiring that the public schools provide their students with an education suitable to give them the opportunity to be responsible citizens able to participate fully in democratic institutions, such as jury service and voting, and to prepare them to progress to institutions of higher education, or to attain productive employment and otherwise to contribute to the state's economy."); *see also id.* at 249-50, & n.55 ("[T]hose state courts that have reached the merits of the issue overwhelmingly have held that there is a floor with respect to the adequacy of the education provided pursuant to their states' education clauses; that education must be in some way "minimally adequate" or "soundly basic." (discussing cases)).

D. PLAINTIFFS' EQUAL PROTECTION CLAUSE CLAIMS ARE WELL PLEADED AND STATE A CLAIM FOR RELIEF UNDER MINNESOTA LAW

"A facially neutral statute can violate equal protection if it is applied in a way that creates an impermissible classification or discriminates in practice." *Dean v. City of Winona*, 843 N.W.2d 249, 258 (Minn. Ct. App. 2014) (citing cases). A disparate impact equal-protection

challenge requires an initial showing that "similarly situated persons have been treated differently." *State v. Cox*, 798 N.W.2d 517, 521 (Minn. 2011) (quotation marks omitted). Once established that a facially-neutral statute "disadvantages some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution," "strict scrutiny will apply, and the state will have to prove that the statute is necessary to a compelling government interest." *Skeen*, 505 N.W.2d at 312.

1) Plaintiffs allege as-applied Equal Protection Clause claims against the Commissioner and School District Defendants.

Plaintiffs allege as-applied disparate impact violations of the Equal Protection Clause on two independent grounds. First, Plaintiffs allege that Defendants' implementation of the Challenged Statutes results in their children being deprived of their fundamental right to education as a result of being assigned to ineffective teachers, while other students of equal age, aptitude, motivation, and ability are assigned effective teachers and obtain their rightful uniform and thorough education. FAC at ¶¶ 237-48. Under this theory, the basis for strict scrutiny is state action that results in deprivation of "a fundamental right explicitly or implicitly protected by the Constitution." *Skeen*, 505 N.W.2d at 312.

Plaintiffs also allege that as a result of Defendants' implementation of the Challenged Statutes, schools serving student populations with larger concentrations of low-income students and students of color are assigned ineffective teachers at a disproportionately higher rate than schools serving more affluent or majority-white student populations. Thus, low-income students and students of color—including Plaintiffs' children—are disproportionately more likely to be deprived of their rightful uniform and thorough education than their affluent or white peers. FAC at ¶¶ 249-69.

2) *Defendants' objections to Plaintiffs' Equal Protection Clause claims ignore Plaintiffs' allegations and misread controlling authority.*

Defendants insist that Plaintiffs' equal protection claims must be dismissed for three reasons. ***First,*** Defendants argue that Plaintiffs cannot assert an equal protection claim on the basis that they have been deprived of their right to a uniform and thorough education because there is no "fundamental right to identical or uniform education or teachers." State's Br. at 23. This argument is no different from Defendants' objections to Plaintiffs' Education Clause claims and should be rejected for the same reasons stated above. In any event, Defendants miss the point: Plaintiffs do not claim a right to "identical or uniform education or teachers"; they claim that their fundamental right to education is burdened by Defendants' protection of chronically ineffective teachers.

Second, Defendants object that Plaintiffs have failed to allege intentional discrimination on their part. *E.g.*, State's Br. at 25. Defendants are wrong. To be sure, "a claim for an equal protection violation based on disparate impact" requires allegations "that the state actor intended to discriminate against the suspect class." *Odunlade*, 823 N.W.2d 638, 648 (Minn. 2012). However, discriminatory intent does not require direct evidence of discrimination: Instead, a finding of discriminatory intent may be based on "disproportionate impact . . . along with the inferences that rationally may be drawn from the totality of the other relevant facts." *Ricketts v. City of Columbia, Mo.*, 36 F.3d 775, 781 (8th Cir. 1994).[14] Further, the disparity complained of may *itself* prove discriminatory intent: "If a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident, and, in the absence of evidence to the contrary, one must conclude that racial or other class-related factors entered into the . . . process." *Castaneda v.*

[14] Equal protection claims under the Minnesota Constitution are reviewed under the same standard "as that applied to claims brought under the federal equal protection clause." *Skeen*, 505 N.W.2d at 312. Accordingly, this section references both state and federal law when discussing the elements of Plaintiffs' equal protection claims.

Partida, 430 U.S. 482, 495 (1977); *see also Santiago v. Miles*, 774 F. Supp. 775, 799 (W.D.N.Y. 1991) ("The 'significance' or 'substantiality' of any numerical disparities must be evaluated in light of the facts of each particular case."). Additionally, historical evidence of "animus"—including instances when facially neutral laws and policies have been applied to the disproportionate disadvantage of suspect classes—may support a reasonable inference that the "disparities [alleged] resulted from intentional discrimination." *Santiago*, 774 F. Supp. at 799.

Here, the Defendants simply ignore Plaintiffs' allegations cataloguing documented instances of bias in the administration of Minnesota's education laws and policies. Such instances include a report first published by the Minnesota Department of Children, Families, and Learning in 1998 which determined that "racism," "poverty," lack of teacher preparation, and schools' inability "to provide effective instruction" contribute "to disproportional special education placement rates" among Native American and African American students. Eighteen years later, according to the MDoE's own website, "bias in assessment practices" persists: "American Indian and African American students [remain] disproportionately represented in special education programs in Minnesota." Ex. A (screenshot of MDoE website, *last visited* July 5, 2016); *see generally* FAC at ¶¶ 197-99. Defendants also ignore Plaintiffs' well-documented allegations of dramatic disparities in educational outcomes between low-income students and their more affluent peers, and students of color and their white peers. *Id.* at ¶¶ 114-96. This statistical evidence, combined with Plaintiffs' documented allegations of disparate treatment under Minnesota's education laws and policies support an inference that despite being neutral on their face, the Challenged Statutes are employed to the disproportionate disadvantage of low-income students and students of color. *Santiago*, 774 F. Supp. at 799 (statistical evidence

combined with "historical background evidence of animus" proved that housing disparities resulted from intentional discrimination (citing cases)).

Third, Defendants insist that Plaintiffs cannot prevail in their disparate impact claims because "socioeconomic status is not a suspect class for purposes of the Equal Protection Clause." State's Br. at 26.[15] But Defendants go too far. Although "socioeconomic status does not constitute a suspect class" when the party invoking protection is an *adult*, *see Odunlade*, 823 N.W.2d at 648, it remains an open question whether socioeconomic status is a suspect classification when the parties seeking protection are *children*, and the precise issue at stake is the unequal distribution of *public education benefits*.

The Supreme Court confronted this issue directly in *Skeen*. Ultimately, the Court determined based on the record in that case—which, to recall, involved allegations by a collection of school districts and parents that the referendum levy statute was unconstitutional because it resulted in minimal funding disparities among districts—that plaintiffs' socioeconomic status did not qualify for suspect classification. Nevertheless, the Court left open the door to such claims in the future, indicating that low-income status *may* be a suspect classification for purposes of a public education-related equal protection claim, provided that the students invoking protection can show (1) substantial disparities in the state's distribution of education benefits, ***or*** (2) "that they have been subject to a history of purposeful unequal treatment," ***or*** (3) "that they have been relegated to a position of political powerlessness." *Skeen*, 505 N.W.2d at 314. This reasoning is entirely consistent with that of other state courts that recognize socioeconomic status as a suspect classification for purposes of evaluating challenges to the uneven delivery of public education benefits. *E.g.*, *Washakie Cty. Sch. Dist. No. One v.*

[15] Unquestionably, race and ethnicity are suspect classes for purposes of an as-applied Equal Protection Clause challenge. *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 n.4 (1976) (citing cases).

Herschler, 606 P.2d 310, 334 (Wyo. 1980) ("A classification on the basis of wealth is considered suspect, especially when applied to fundamental interests [such as public education]."); *Serrano*, 557 at 951 ("[D]iscrimination in educational opportunity on the basis of district wealth involves a suspect classification[.]").

Here, Plaintiffs allege that chronically ineffective teachers are disproportionately assigned to work in schools that serve high percentages of low-income children and, in particular, low-income children of color. Further, Plaintiffs detail instances when low-income students were (and are) subjected to purposeful unequal treatment. Finally, the Court may take notice of evidence in the public record, which shows that past efforts to revise the Challenged Statutes through the political process have been unsuccessful. Ex. B (John Collins, *Dayton vetoes bill that would weaken teacher seniority*, MPR NEWS, May 3, 2012). Having satisfied each of the three criteria set forth in *Skeen*, Plaintiffs' allegations establish that their children deserve the heightened protections afforded to members of a suspect class on the basis of their socioeconomic status. *See Van Dusartz v. Hatfield*, 334 F. Supp. 870, 876 (D. Minn. 1971) (declining to dismiss claim that Minnesota's "educational financing system" violated low-income students' right to equal protection because "when the wealth classification affects the distribution of public education, the constitutional significance is cumulative").

E. PLAINTIFFS' DUE PROCESS CLAUSE CLAIMS ARE WELL PLEADED AND STATE A CLAIM FOR RELIEF UNDER MINNESOTA LAW

A plaintiff seeking relief under the Due Process Clause must allege that state action "has deprived the individual of a protected life, liberty, or property interest" and that the procedures followed by the state prior to the deprivation were not "constitutionally sufficient." *Rew*, 845 N.W.2d at 785. Although "due process is flexible and calls for such procedural protections as the particular situation demands," *Bendorf v. Comm'r of Pub. Safety*, 727 N.W.2d 410, 415 (Minn.

2007) (quotation marks omitted), "[t]he fundamental requirements of due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner," *Rew*, 845 N.W.2d at 786 (quotation marks omitted).

1) Plaintiffs allege facial and as-applied Due Process Clause claims against all Defendants.

Here again, Plaintiffs have plainly exceeded the pleading threshold. "Education is a fundamental right in Minnesota, as well as a property interest protected by the Due Process Clause." *In re Expulsion of N.Y.B.*, 750 N.W.2d 318, 327 (Minn. Ct. App. 2008). For reasons already discussed, Plaintiffs have sufficiently alleged that the Challenged Statutes deprive their children of their fundamental right to education by preventing the removal of chronically ineffective teachers from the classroom. The burden then shifts to the State to show that current procedural protections under the Tenure, Dismissal, and LIFO Provisions satisfy strict scrutiny. *SooHoo v. Johnson*, 731 N.W.2d 815, 821 (Minn. 2007) (explaining that when a statute is being challenged on due process grounds, "[s]trict scrutiny is the appropriate standard of review when fundamental rights are at issue"). Insofar as the Challenged Statutes offer children no notice prior to being assigned to a chronically ineffective teacher, much less a meaningful opportunity to be heard, Plaintiffs allege that the State cannot satisfy its heavy burden of justification.

2) Defendants' objections to Plaintiffs' Due Process Clause claims ignore Plaintiffs' allegations and misread controlling authority.

Defendants argue that Plaintiffs' claims fail because they have not alleged that Defendants acted "intentionally" to violate their children's right to education, *e.g.*, DPS Br. at 12; that in the public education realm, due process only applies when the deprivation results in "total exclusion from the educational process," *e.g.*, State's Br. at 28; and that even if Plaintiffs' alleged deprivation is cognizable, "process is not due under the *Mathews* three-part balancing

test," *e.g.*, State's Br. at 28, n.9.[16] In sum, Defendants assert that Plaintiffs' due process challenge is simply too "novel" and "generalized" to obtain relief. State's Br. at 28; AHSD Br. at 10.

Again, Defendants' protests ring hollow. ***First,*** intent is not an element of Plaintiffs' *facial* due process challenge. Instead, when determining if a statute, as written, deprives individuals of a protected interest without adequate process of law, the Court's analysis is guided solely by the three-factor test elucidated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *See Heddan v. Dirkswager*, 336 N.W.2d 54, 59 (Minn. 1983) (applying *Mathews* test to determine whether, on their face, the prehearing license revocation provisions of Minnesota's implied-consent law violated due process). The *Mathews* test requires development of a factual record and, thus, is beyond the Court's review at this stage.[17]

Second, as it relates to Plaintiffs' as-applied claims, Defendants' intent argument again ignores Plaintiffs' allegations regarding past instances of bias in the administration of Minnesota's education laws and policies. For present purposes, these allegations allow the Court to draw the reasonable inference that the School District Defendants, under the supervision of the Commissioner, have acted intentionally to assign chronically ineffective teachers to already low-performing schools, with the result that Plaintiffs' children are deprived of their rightful uniform and thorough education. *E.g.*, *Utke v. City of Houston*, 422 N.W.2d 303, 306 (Minn. Ct. App. 1988) ("We hold that Utke's case presents a procedural due process claim. Utke alleges that the

[16] Additionally, the State renews its objection that it does "not have any role in district employment decisions, nor in district communication with students" and, as such, cannot be blamed "for denying procedural due process" to Plaintiffs' children. *Id.* at p. 27. Again, the State is confused. As explained, *supra* nn. 4-5, the State must answer to Plaintiffs' facial challenge because it is responsible for enforcing the Challenged Statutes. Likewise, the Commissioner is a proper defendant to Plaintiffs' as-applied due process challenge, because she is statutorily required to "exercise general supervision over public schools and public educational agencies in the state." Minn. Stat. § 127A.05(3).

[17] The *Mathews* analysis requires a balancing of (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *See Rew*, 845 N.W.2d at 786 (quoting *Mathews*, 424 U.S. at 335).

actions of the City and its officials were not only negligent, but also 'willful, intentional, [and] malicious.'"); *see also Chopp v. Indep. Sch. Dist. 706, Virginia*, No. C7-90-2068, 1991 WL 10213, at *3 (Minn. Ct. App. Feb. 5, 1991) ("the unique combination of circumstances" created by school district's failure to inform teacher of a hearing that ultimately "deprived him of his seniority rights" satisfied the "intentional deprivation" requirement).

Third, Defendants are clearly incorrect in their position that Plaintiffs must allege "total exclusion from the educational process" before they may invoke due process protections. A student's right to education is a fundamental right. When state action is challenged on due process grounds and a fundamental right is at issue, the trigger is not whether deprivation is complete; instead it is whether the burden imposed by state action is "unreasonable." *See Woodhall v. State*, 738 N.W.2d 357, 363 (Minn. 2007) ("A statute does not comport with due process when it is arbitrary or unreasonable."); *e.g.*, *SooHoo*, 731 N.W.2d at 821 (Minnesota's nonparental visitation statute violated due process as applied by significantly reducing—but *not* eliminating—visitation hours). More specifically, in the public education context, due process protections are triggered upon a "showing that the education received" as a result of the challenged state action "is significantly different from or inferior to that received" by other students. *See J.K. ex rel. Kaplan v. Minneapolis Pub. Sch. (Special Sch. Dist. No. 1)*, 849 F. Supp. 2d 865, 874 (D. Minn. 2011) (quoting *Buchanan v. City of Bolivar, Tenn.*, 99 F.3d 1352, 1359 (6th Cir. 1996)).

Here, Plaintiffs allege that as a result of the Challenged Statutes and Defendants' reluctance to pursue "overwhelmingly burdensome" dismissal proceedings in all but "the absolute worst possible scenario," *see* FAC at ¶ 69, their children are assigned to "classrooms taught by ineffective teachers unable to provide [them] with basic tools to achieve academic

benchmarks, compete in the marketplace, and participate in civil society." *Id.* at ¶ 72. Quite obviously Plaintiffs' sufficiently allege that the education their children receive as a result of being assigned to chronically ineffective teachers is "significantly different from or inferior to that received" by students assigned to effective teachers. *See Kaplan*, 849 F. Supp. 2d at 874. Thus, the constitutional deprivation suffered by Plaintiffs' children is "unreasonable," and eligible for protection under the Due Process Clause.

In sum, Plaintiffs claims are not "novel" because they track the well-worn standard for due process claims based on state action that results in deprivation of a fundamental right. Nor are their claims impermissibly "generalized": Plaintiffs seek protections against harm visited upon their children by Defendants' retention of chronically ineffective teachers. Defendants' request to dismiss Plaintiffs' due process claims must be denied.

F. PLAINTIFFS' CLAIMS ARE JUSTICIABLE AND THE DEFENDANTS ARE THE PROPER PARTIES TO DEFEND AGAINST THEM

Defendants further insist that dismissal is required under Rule 12.02(a) because Plaintiffs' claims are not justiciable; Plaintiffs lack standing; Plaintiffs' claims are moot; Plaintiffs' claims cannot be adjudicated without the joinder of additional parties; and because Plaintiffs have presented the Court a "political question." Defendants' jurisdictional objections are overwrought.

1) Plaintiffs undeniably allege a justiciable controversy and have standing to seek relief from the violation of their children's constitutional rights.

Plaintiffs seek a declaration that the Challenged Statutes are unconstitutional, and an injunction barring their enforcement. To proceed, Plaintiffs must show a "justiciable controversy." *Kennedy v. Carlson*, 544 N.W.2d 1, 6 (Minn. 1996). A justiciable controversy exists if the claim "(1) involves definite and concrete assertions of right that emanate from a legal source, (2) involves a genuine conflict in tangible interests between parties with adverse

interests, and (3) is capable of specific resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion." *McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 336 (Minn. 2011) (quotation marks omitted). Further, to challenge the constitutionality of a law or state action, Plaintiffs must establish "standing." *City of Minneapolis v. Wurtele*, 291 N.W.2d 386, 393 (Minn. 1980). In Minnesota, standing is conferred when "the plaintiff has suffered some 'injury-in-fact'"—*i.e.*, "an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent,' not 'conjectural' or 'hypothetical.'" *In re Custody of D.T.R.*, 796 N.W.2d 509, 512 (Minn. 2011) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

Plaintiffs have clearly presented the Court a justiciable controversy. Plaintiffs' claims are definite and concrete because Plaintiffs allege that the Challenged Statutes (and Defendants' actions to enforce them) burden their children's fundamental right to a uniform and thorough education, as expressly guaranteed by the Education Clause of the Minnesota Constitution.

Plaintiffs' claims involve a genuine conflict because, by their own admission, Defendants are required to enforce the Challenged Statutes, and it is precisely Defendants' enforcement of the Challenged Statutes that results in the deprivation alleged. *E.g.*, WSP Br. at 3 ("School districts are legally obligated to comply with the provisions of [the Challenged Statutes.]").

Plaintiffs' claims are capable of a specific resolution by this Court because an order declaring the Tenure, Dismissal, and LIFO Provisions unconstitutional and enjoining their enforcement will give district decisionmakers having more "flexibility to avoid awarding near permanent employment to ineffective teachers, and to dismiss ineffective teachers based on ineffective classroom performance." FAC at ¶ 201. Likewise, an order declaring the Challenged Statutes unconstitutional as-applied and enjoining Defendants from adopting practices that result

in chronically ineffective teachers being provided permanent job security will vindicate children's right to education and to equal protection of the law. When "a fundamental constitutional guarantee" is at stake, "courts must discharge their duty to vindicate … constitutional rights." *Mitchell v. Smith*, 817 N.W.2d 742, 748 (Minn. Ct. App. 2012); *see also State v. Andrews*, 165 N.W.2d 528, 534 n.3 (Minn. 1969) (a court "should not hesitate to vindicate [a party's] undoubted constitutional right against any … invidious discrimination").

Finally, Plaintiffs have alleged facts that confer standing. Plaintiffs are united by a single common (and unfortunate) thread: Their children have each suffered "a real and appreciably negative impact" to their educational development as a result of having been assigned to ineffective teachers protected by the Challenged Statutes and Defendants' actions. FAC at ¶¶ 27-30. Further, they are at substantial risk of being assigned to chronically ineffective teachers in the future, particularly because they are among classes of students disproportionately affected by the unequal assignment of chronically ineffective teachers. *See id.*; *see also id.* at ¶¶ 209-10, 217-218. The injury to Plaintiffs' children is concrete because assignment to chronically ineffective teachers impedes their development of basic skills necessary to achieve academic benchmarks, participate as citizens, and compete in the marketplace. FAC at ¶ 53; *see Skeen*, 505 N.W.2d at 310. It is "actual or imminent" because the harm suffered as a result of being assigned to a chronically ineffective teacher is immediate, FAC at ¶¶ 49-52, and Defendants' implementation of the Challenged Statutes necessarily results in the harm alleged, *see id.* at ¶¶ 65-68.[18]

[18] Defendants criticize Plaintiffs for pleading certain allegations in the disjunctive, AHSD Br. at 13, n.5, and for failing to allege facts that establish a "causal link" between the Challenged Statutes, Defendants' actions, and the harm suffered by their children. *E.g.*, SPPS Br. at 25. Again, Defendants' criticism is misplaced. In light of the sensitive nature of Plaintiffs' claims, and in an effort to protect the privacy of Plaintiffs' children and their teachers, Plaintiffs have adopted certain stylistic choices and avoided including certain information in their pleadings (such as the names of the schools their children attend). Still, Plaintiffs have provided each of the Defendants more than enough information to understand the constitutional claims against them. *See Walsh*, 851 N.W.2d at 604-05 ("Minnesota is a notice-pleading state and does not require absolute specificity in pleading, but rather requires only information sufficient to fairly notify the opposing party of the claim against it." (quotation marks omitted)).

Despite Plaintiffs' extensive and detailed complaint, Defendants contend that Plaintiffs have stopped shy of alleging a justiciable claim. Defendants insist that Plaintiffs' children have not suffered direct and personal injuries—and have instead raised "generalized grievances"—because all children share the same interest in being "taught by 'effective' teachers." *E.g.*, DPS Br. at 16. Further, Defendants contend that the harms alleged cannot be remedied because even if the Court declares the Challenged Statutes unconstitutional, collective bargaining agreements and teachers' individual preferences will re-create the same inequities currently in place. SPPS Br. at 19. Defendants also contend that Plaintiffs' children lack standing "because they are not of the class of individuals governed by the [Challenged Statutes]" and cannot adduce facts to establish the three-prong test for conferring standing under *Lujan v. Defenders of Wildlife*. *E.g.*, WSP Br. at 16, 18-20.

Again, Defendants miss the point. ***First,*** a party alleges a "generalized grievance" when she seeks to vindicate an "undifferentiated public interest." *Lujan*, 504 U.S. at 577. Here, Plaintiffs are not seeking to vindicate every child's right to be "taught by 'effective' teachers," DPS Br. at 16; rather Plaintiffs are seeking to vindicate *their* children's fundamental right to a uniform and thorough education system, which is deprived by the Defendants' actions to protect chronically ineffective teachers. In other words, Plaintiffs state direct and personal injuries because they allege that the Challenged Statutes are "invalid," and that their children have "sustained or [are] immediately in danger of sustaining some direct injury as the result of [their] enforcement." *Lujan*, 504 U.S. at 574 (quoting *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)).

However, to the extent the Court agrees with Defendants that Plaintiffs' complaint lends itself to "ambiguity," AHSD Br. at 13, n.5, Plaintiffs respectfully request the opportunity to amend to add specificity regarding Defendants' actions as they relate to the particular circumstances of Plaintiffs' children.

Second, Defendants' insistence that this Court cannot remedy Plaintiffs' injuries is nonsensical. Plaintiffs seek a declaration that the Challenged Statutes are unconstitutional, and an order enjoining *state* action to enforce them. FAC at p. 74. This remedy directly addresses the root of Plaintiffs' claims that their children's fundamental right to education is impinged by a state system that "forc[es] critical employment decisions to be made primarily or exclusively on grounds other than teacher effectiveness," and results in the "continued employment of ineffective teachers in Minnesota's public schools." FAC at ¶¶ 62, 71. If Plaintiffs obtain the remedy they seek, their children's constitutional rights will be vindicated even if, as Defendants contend, individual private preferences and pre-existing contracts remain because the *state*-imposed burden will be removed. *Cf. State v. Wicklund*, 589 N.W.2d 793, 801 (Minn. 1999) ("[T]he protections of our state constitution are triggered only by state action."). In any event, Plaintiffs *allege* that their children's constitutional rights will be vindicated by an order enjoining Defendants' enforcement of the Challenged Statutes, *see* FAC at ¶¶73, which for present purposes is all that is required to confer standing. *Lujan*, 504 U.S. at 561 (explaining that "[a]t the pleading stage, general factual allegations [conferring standing] may suffice").

Third, Defendants' reliance on the *Lujan* analysis is misplaced. *Lujan's* three-part test is expressly directed at the issue of federal jurisdiction to challenge a federal law under the federal constitution. *See Lujan*, 504 U.S. at 561.[19] Here, the issue is state-court jurisdiction to challenge a state law under the state constitution. Contrary to Defendants' claims, Minnesota has not

[19] In *Lujan*, the U.S. Supreme Court explained that under the federal constitution, "the irreducible constitutional minimum of standing contains three elements": (1) "injury in fact"; (2) a sufficient "a causal connection between the injury and the conduct complained of"; and (3) a "likely" chance "that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. 560-61. In that case, the Court determined that the plaintiffs—environmental organizations challenging federal regulations that withdrew protections for endangered species in international habitats—failed to establish an "injury in fact" at the summary judgment stage because it remained entirely speculative whether their "some day intentions" to visit international habitats affected by the regulatory framework would be realized. Thus, there was no proof of "actual or imminent" harm. *Id.* at 564. Obviously, Plaintiffs' injuries stand in a different class.

"adopted" "the *Lujan v. Defenders of Wildlife* test," AHSD Br. at 20, but has instead affirmed that in Minnesota, standing is conferred upon a showing that "the plaintiff has suffered some 'injury-in-fact.'" *D.T.R.*, 796 N.W.2d 512.

Whether Plaintiffs' claims are evaluated under the federal *Lujan* standard or the applicable state standard, Plaintiffs have easily established standing. In addition to "injury-in-fact"—which, as explained, is satisfied—*Lujan* requires Plaintiffs to show "a causal connection between the injury and the conduct complained of," and that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61 (quotation marks and alterations omitted). Plaintiffs have alleged a "causal connection" between their children's injuries and Defendants' conduct because the Defendants enforce the Challenged Statutes and make all staffing decisions in the schools Plaintiffs' children attend. It is Defendants' actions that result in chronically ineffective teachers being granted tenure, and remaining in the classroom thereafter (sometimes at the expense of less-senior effective teachers). Further, it is "likely" and not merely "speculative" that Plaintiffs' children's fundamental right to education will be vindicated by "a favorable decision" of this Court because, again, an order enjoining the Challenged Statutes' continued enforcement—facially *or* as-applied—will enable school leaders to "make teacher employment and dismissal decisions based … [on] students' need for effective teachers." FAC at ¶ 74. This remedy will reduce the risk of harm to Plaintiffs' children even if other factors contributing to the unequal distribution of chronically ineffective teachers remain. Such is all that is required to confer standing. *See Massachusetts v. EPA*, 549 U.S. 497, 526 (2007) (redressability satisfied where the risk of harm "would be reduced to some extent if petitioners received the relief they seek"); *see also Larson v.*

Valente, 456 U.S. 228, 243 n. 15 (1982) (rejecting "draconic interpretation of … redressability" that would require "a favorable decision [to] relieve … *every* injury" (emphasis in original)).

2) Plaintiffs' claims are ripe for adjudication and not moot.

Next, Defendants half-heartedly contend that Plaintiffs' claims are not "ripe," Duluth Br. at 9, and are moot because "the academic school year has ended." State's Br. at 13, n.4. "Ripeness" measures whether a plaintiff's claim is justiciable at the outset of the litigation. *Leiendecker v. Asian Women United of Minnesota*, 731 N.W.2d 836, 841 (Minn. Ct. App. 2007). For all the reasons previously explained, Plaintiffs' claims are ripe for review because Plaintiffs have presented the Court a justiciable controversy. *Id.*

"Mootness" is a related doctrine that measures whether a plaintiff's claim remains justiciable throughout the proceedings: "[T]he requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Guardianship of Tschumy*, 853 N.W.2d at 734 (quotation marks omitted). Mootness is "a flexible discretionary doctrine," however, and will not require dismissal of a case despite changed circumstances when the case "implicates issues that are capable of repetition, yet likely to evade review," ***or*** "is functionally justiciable and is an important public issue of statewide significance that should be decided immediately." *Kahn v. Griffin*, 701 N.W.2d 815, 821-22 (Minn. 2005) (quotation marks omitted). The "capable of repetition, yet evading review" doctrine is satisfied when: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Id.* (quotation marks omitted).

Plaintiffs' claims are not moot. Here, the issues raised clearly satisfy the "capable of repetition, yet evading review" doctrine because (1) Plaintiffs challenge their children's assignment to chronically ineffective teachers, which assignments generally last (at most) one

academic year; and (2) Plaintiffs allege that their children are at risk of being assigned to chronically ineffective teachers each year that they attend public school. An academic year is too short to litigate Plaintiffs' claims, *see Krueth v. Indep. Sch. Dist. No. 38, Red Lake, Minn.*, 496 N.W.2d 829, 833 (Minn. Ct. App. 1993), and Plaintiffs' children are compelled by state law to attend school, *see* Minn. Stat. § 120A.34. Additionally, Plaintiffs have met all elements of justiciability, and their case indisputably raises important public issues of statewide significance. *See Skeen*, 505 N.W.2d at 321 (Page, J., concurring in part) ("Education is perhaps the most important function of state and local governments." (quoting *Brown*, 347 U.S. at 493)).[20]

3) Joinder of all school districts and teachers across Minnesota is not required.

Next, the State insists that the Court lacks jurisdiction to declare the Challenged Statutes unconstitutional on their face because such a declaration "would directly affect, and could adversely impact, the rights of nonparty school districts and teachers," thus requiring "the participation of all [such] parties" under the Uniform Declaratory Judgment Act. State's Br. at 18.[21] Although it is not clear from the State's scant analysis (which amounts to a single paragraph), the State would presumably have Plaintiffs join *all* Minnesota school districts and teachers as defendants before they may proceed on their constitutional claims. This, of course, is not the law.

The State is the proper party to defend the constitutionality of a state law. Minn. Stat. § 8.01; Minn. R. Civ. P. 5A; *cf. Diamond v. Charles*, 476 U.S. 54, 62 (1986) ("[The] State has

[20] SPPS adds an additional wrinkle to the analysis, asserting that "Plaintiff Person rendered [her children's] claims moot by removing J.C. and D.C. from SPPS schools." SPPS Br. at 16. In effect, SPPS seeks to benefit from its own alleged misconduct, which drove Person and her children from the St. Paul school district. FAC at ¶ 28. SPPS cannot get off the hook so easily, particularly because (again) Person has alleged claims that are "functionally justiciable" involving "an important public issue of statewide significance that should be decided immediately." *Kahn*, 701 N.W.2d at 821-22 (quotation marks omitted).

[21] This argument does not apply to Plaintiffs' as-applied challenges because those claims are rooted in teacher hiring and dismissal decisions that result in the constitutional violations alleged. As explained, such decisions are made by the School District Defendants, under the supervision of the Commissioner.

standing to defend the constitutionality of its statute."). This rule is consistent with the Uniform Declaratory Judgment Act, which requires that when a statute "is alleged to be unconstitutional, the attorney general shall … be served with a copy of the proceeding and be entitled to be heard." Minn. Stat. § 555.11. Indeed, the School District Defendants are quick to point out that they are *not* the proper parties to defend against Plaintiffs' facial challenges because they are "mere political subdivision[s]," and cannot "take any action to remedy alleged defects in a state statute." SPPS Br. at 15; *see also* AHSD Br. at 7 ("AHSD did not adopt the statutes, has no power to repeal them, and cannot disregard them."); WSP Br. at 5 (same). Plaintiffs agree. It is nonsensical to require all school districts in the State to defend against Plaintiffs' *facial* challenges when such districts are not positioned to defend such claims.

This leaves the State's suggestion that an amorphous group of "teachers" may be interested in defending the Challenged Statutes. Regardless what group of "teachers"—if any—is interested in defending the job security afforded to chronically ineffective teachers, it will be incumbent upon that group to show that it has sufficient interests at stake—*i.e.*, *standing*—to join this action. *See Diamond v. Charles*, 476 U.S. 54, 66 (1986) (private party doctor's "professional interests" were insufficient to confer standing to *defend* state abortion law against claims for declaratory and injunctive relief because such interests were tantamount to a "desire that the Illinois Abortion Law as written be obeyed").[22]

[22] The best example that the State is incorrect in its interpretation of the Uniform Declaratory Judgment Act's "Parties" provision is *Skeen* itself. There, the plaintiffs consisted of 52 school districts and 10 parents. *Skeen*, 505 N.W.2d at 301. The State—comprising the State of Minnesota, the Commissioner, and the now-defunct State Board of Education—was the only defendant, despite a certainty that the declaratory and injunctive relief sought would significantly impact all school districts and students across the State and, in particular, "the three largest metropolitan school districts, Minneapolis, St. Paul, and Duluth" (because these districts stood to lose the most annual funding if the referendum levy was declared unconstitutional). *See id.* at 302. Even though more than half of all school districts were left out of the litigation—including Minneapolis, St. Paul, and Duluth—the Supreme Court never questioned whether the plaintiffs were entitled to a declaration of their constitutional rights under the Act. *See generally id.*

Plaintiffs aim to vindicate their children's fundamental right to education. The Declaratory Judgment Act is intended precisely for this purpose. Minn. Stat. § 555.02 ("Any person … whose rights … are affected by a statute ... may have determined any question of construction or validity arising under the ... statute ... and obtain a declaration of rights, status, or other legal relations thereunder.").[23] Plaintiffs' claims must be allowed to proceed.

4) The political question doctrine does not apply because Plaintiffs seek an order vindicating their children's fundamental right to education.

"[A] question is political, and not judicial, [when] it is a matter which is to be exercised by the people in their primary political capacity, or [when] it has been specifically delegated to some other department or particular officer of the government, with discretionary power to act." *In re McConaughy*, 119 N.W. 408, 417 (Minn. 1909). The State insists that "claims related to educational quality"—including Plaintiffs' facial challenges[24]—"are non-justiciable" because "[t]he Minnesota Constitution commits matters of education policy, including details regarding the type and quality of educators, to the legislative branch." State Br. at 11.

The State is mistaken on multiple levels. ***First,*** the State misconstrues the nature of Plaintiffs' claims. To repeat: Plaintiffs do not complain of the "policies and methods" that the Legislature has adopted to ensure that children receive a quality education; rather, Plaintiffs

[23] The State's position is even more untenable in light of the Act's other provisions. The Act provides that a declaratory judgment is available whenever a "judgment or decree will terminate the controversy or remove an uncertainty." Minn. Stat. § 555.05. The Act further provides that district courts have the power to declare a party's rights "whether or not further relief is or could be claimed," Minn. Stat. § 555.01, and that its purpose "is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and is to be liberally construed and administered," Minn. Stat § 555.12. In short, the Declaratory Judgment Act's purpose would be subverted entirely if any time a plaintiff sought to challenge the constitutionality of a statute she had to join every party conceivably impacted by a judgment in her favor.

[24] The School District Defendants also seek to invoke the political question doctrine as a defense to Plaintiffs' as-applied claims. *E.g.*, SPPS Br. at 24 ("[I]t is a matter for the Legislature, not the courts, to consider all the possible ramifications of eliminating tenure from the public school system."). This position passes the point of absurdity. Regardless whether the Challenged Statutes themselves are constitutional, the School District Defendants may not apply them in an unconstitutional manner, as alleged by Plaintiffs. Indeed, this is the very essence of an as-applied challenge. *See State ex rel. Childs v. Holman*, 59 N.W. 1006, 1008 (Minn. 1894) (Canty, J., dissenting) ("Conditions may be discovered as applied to which many otherwise constitutional laws are unconstitutional."); *see also Dean*, 843 N.W.2d at 258 (same).

allege that as written, the Tenure, Dismissal, and LIFO Provisions are unconstitutional because they burden children's fundamental right to a "general and uniform," "thorough and efficient" system of public schools in all of their applications. "Authority to determine the constitutionality of laws resides in the judiciary," *Minnesota State Bd. of Health by Lawson v. City of Brainerd*, 241 N.W.2d 624, 633 n.5 (Minn. 1976), and "when an act is repugnant to the constitution it is the court's duty to invalidate that law immediately." *Wegan v. Vill. of Lexington*, 309 N.W.2d 273, 283 (Minn. 1981) (Amdahl, J., concurring specially).

Second, on a related note, the State simply ignores that education is a fundamental right under the Minnesota Constitution. Even if true, as the State contends, that "the Constitution commits to the legislature the discretion to determine the policies and methods through which to achieve" a uniform and thorough system of public schools, State's Br. at 9, the Constitution emphatically does not commit to the Legislature the discretion to violate children's fundamental rights: "The Legislature does not define the constitutional limits of its legislative powers, nor ultimately can it decide them. … While every possible presumption is to be indulged in favor of the validity of a statute, the courts must obey the Constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed." *State v. Fairmont Creamery Co.*, 202 N.W. 714, 719 (Minn. 1925) (quotation marks, alterations, and citations omitted).

Third, by definition, a political question involves issues "delegated to some other department … with discretionary power to act." *McConaughy*, 119 N.W. at 417. *Skeen* is emphatic that the Legislature does *not* act in a discretionary capacity when it fulfills its obligation to provide an *adequate* education system to *all* children: "[T]he Education Clause not only contains language such as 'shall' but in fact places a 'duty' on the legislature to establish a

'general and uniform system' of public schools. This is the only place in the constitution where the phrase 'it is the duty of the legislature' is used." *Skeen*, 505 N.W.2d at 313.

Fourth, in addition to being non-binding, the authorities cited for the State's proposition that "claims related to educational quality are non-justiciable" are inapposite. State's Br. at 10. The State quotes extensively from *Committee for Educational Rights v. Edgar*, where the Illinois Supreme Court upheld Illinois's school funding statutes against a state constitution challenge. 672 N.E.2d 1178 (1996). The case is notable in two respects: First, interpreting its *own* constitution in light of its *own* jurisprudence, the Illinois court rejected the plaintiffs' argument that education is a fundamental right. *Id.* at 1195 ("While education is certainly a vitally important governmental function, it is not a fundamental individual right[.]"). Second, in concluding that "problems of educational quality" should be left to the political branches, the court acknowledged that it adopted a minority view, and that "courts in other jurisdictions have seen fit to define the contours of a constitutionally guaranteed education." *Id.* at 1191 (citing cases). By contrast, in Minnesota "education *is* a fundamental right under the state constitution"; this right necessarily incorporates a qualitative "*adequacy*" element; and when presented with allegations that a state law burdens this right, a court is required to settle the dispute and "strict scrutiny analysis should be applied." *Skeen*, 505 N.W.2d at 302, 313, 315 (emphasis in original). Thus, regardless of the merits of the Illinois Supreme Court's reasoning in *Committee for Educational Rights*, it clearly cannot control this Court's analysis in light of *Skeen*.[25]

[25] The remaining authorities cited by the State are equally inapposite because in each instance the respective state supreme court determined that education was *not* a fundamental right under its state constitution. *See Woonsocket Sch. Comm. v. Chafee*, 89 A.3d 778, 794 (R.I. 2014) ("the Rhode Island Constitution does not provide a fundamental right to education") *Bonner ex rel. Bonner v. Daniels*, 907 N.E.2d 516, 522 (Ind. 2009) (same); *Marrero ex rel. Tabalas v. Com.*, 739 A.2d 110, 112 (Pa. 1999) (same); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 55 (R.I. 1995) (same); *see also Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 402 (Fla. 1996) (declining to decide whether "education is a fundamental right under the Florida Constitution").

Fifth, and finally, the State's reliance on *Minneapolis Board of Education v. Erickson*, 295 N.W. 302 (Minn. 1940), *Associated Schools of ISD 63 v. School District No. 83*, and *Skeen itself* for the proposition that "Plaintiffs' claims raise non-justiciable political questions" is misplaced. As noted, *Skeen* stands for the opposite proposition: Plaintiffs' claims are clearly justiciable because they challenge whether state laws burden their children's fundamental right to education. Neither *Erickson* nor *Associated Schools*—each of which pre-dates *Skeen* by more than fifty years and interprets a prior version of the Education Clause—are inconsistent with this conclusion. In *Erickson*, the Court rejected an Education Clause challenge to a statutory restriction that limited the Minneapolis School Board's ability to raise local taxes in the face of a budget shortfall. *Minneapolis Bd. of Educ.*, 295 N.W. at 304. In *Associated Schools*, the Court upheld a state law that allowed school districts offering secondary education programming to seek tuition reimbursement from districts that did not offer such programming. *Associated Sch. of ISD 63*, 142 N.W. at 327. For present purposes, the significance of each case is that the Supreme Court did not duck behind the political question doctrine, and instead decided the *merits* of the Education Clause claims presented.

In sum, Defendants fail to identify even one case where a court declined to adjudicate a claim that a state law burdened a fundamental constitutional right. Of course, this is hardly surprising: "[W]hen an act is repugnant to the constitution it is the court's duty to invalidate that law immediately. Any other result 'would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory.'" *Wegan*, 309 N.W.2d at 283 (Amdahl, J., concurring specially) (quoting *Marbury v. Madison*, 5 U.S. 137, 178 (1803)).

CONCLUSION

Plaintiffs have clearly alleged claims for relief raising the possibility that they will obtain the relief requested based on the evidence adduced at trial. Accordingly, they have satisfied the pleading standard required under Minnesota law, and Defendants' motions to dismiss must be denied. However, should the Court determine that any or all of Plaintiffs' claims cannot withstand Rule 12.02, Plaintiffs respectfully request the opportunity to amend and re-file.

FISHMAN HAYGOOD, L.L.P.

Dated: July 5, 2016

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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

Tiffini Flynn Forslund; Justina Person; Bonnie Dominguez; and Roxanne Draughn,

Plaintiffs,

vs.

State of Minnesota; Mark Dayton, in his official capacity as the Governor of the State of Minnesota; the Minnesota Department of Education; Brenda Cassellius, in her official capacity as the Commissioner of Education; St. Paul Public Schools, Independent School District 625; Anoka-Hennepin School District 11; Duluth Public Schools, Independent School District 709; West St. Paul-Mendota Heights-Eagan Area Schools, Independent School District 197,

Defendants.

Court File No.: 62-CV-16-2161
Case Type: Other Civil
Judge Margaret M. Marrinan

AFFIDAVIT OF JESSE C. STEWART

STATE OF LOUISIANA)
) SS.
PARISH OF ORLEANS)

JESSE C. STEWART, being duly sworn, deposes and states as follows:

1. I am an attorney with the law firm Fishman Haygood, L.L.P., appearing on behalf of Plaintiffs Tiffini Flynn Forslund, Justina Person, Bonnie Dominguez, and Roxanne Draughn.

2. Attached hereto as Exhibit A is a true and correct copy of a screenshot of a webpage maintained by Defendant Minnesota Department of Education, as this webpage appeared on July 5, 2016.

3. Attached hereto as Exhibit B is a true and correct copy of Jon Collins, *Dayton vetoes bill that would weaken teacher seniority*, MPR News, May 3, 2012.

4. Attached hereto is a copy of the following unpublished case cited within Plaintiffs' Consolidated Opposition Memorandum: *Chopp v. Indep. Sch. Dist. 706, Virginia*, No. C7-90-2068, 1991 WL 10213 (Minn. Ct. App. Feb. 5, 1991).

FURTHER YOUR AFFIANT SAYETH NOT.

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Subscribed and Sworn to before me
this 5th day of July, 2016.

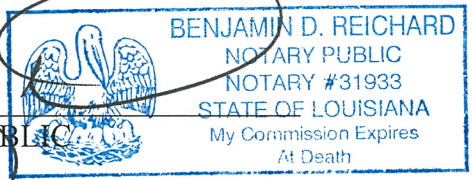

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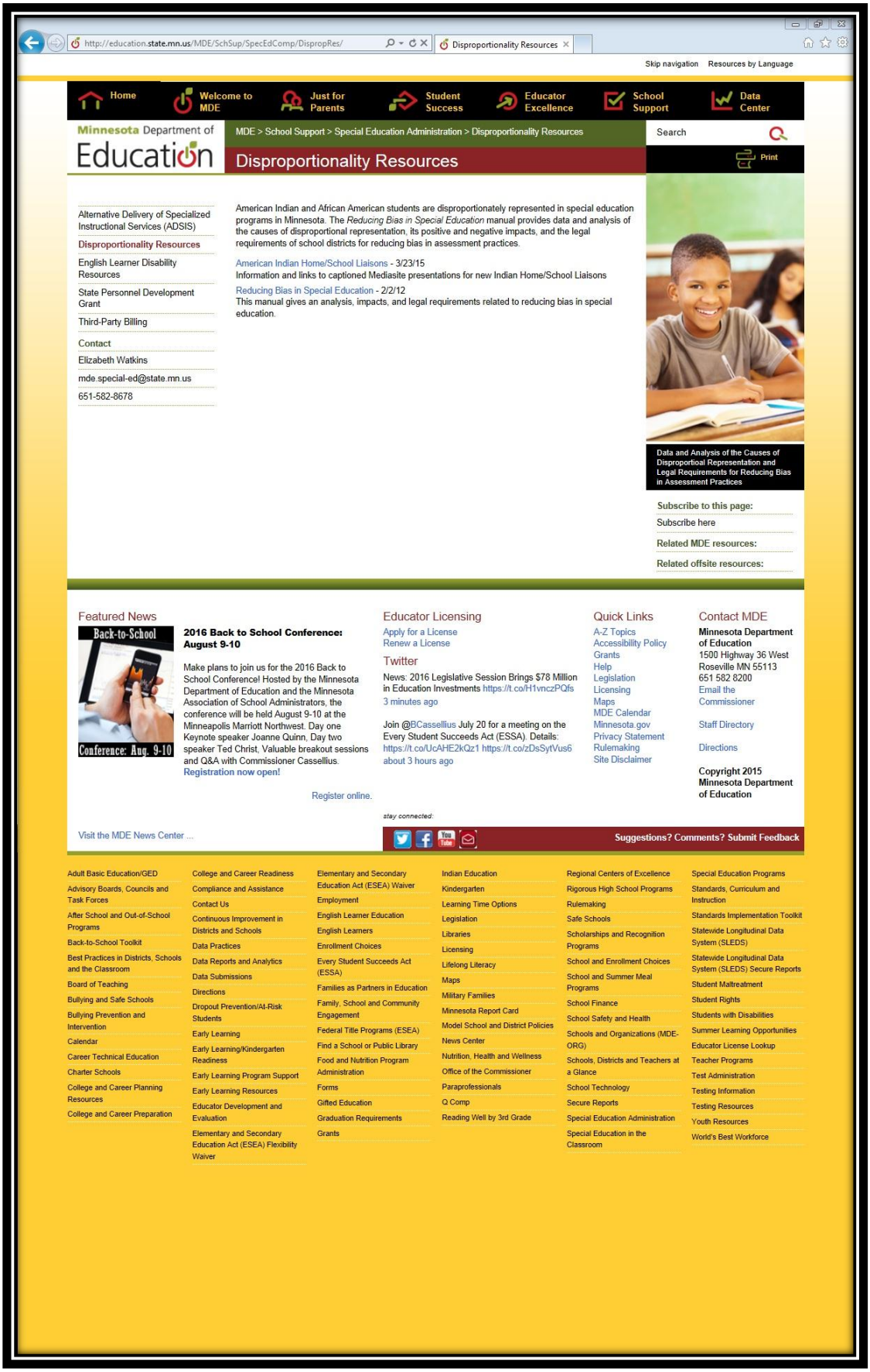
Exhibit A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Rigorous High School Programs
Rulemaking
Safe Schools
Scholarships and Recognition Programs
School and Enrollment Choices
School and Summer Meal Programs
School Finance
School Safety and Health
Schools and Organizations (MDE-ORG)
Schools, Districts and Teachers at a Glance
School Technology
Secure Reports
Special Education Administration
Special Education in the Classroom
Special Education Programs
Standards, Curriculum and Instruction
Standards Implementation Toolkit
Statewide Longitudinal Data System (SLEDS)
Statewide Longitudinal Data System (SLEDS) Secure Reports
Student Maltreatment
Student Rights
Students with Disabilities
Summer Learning Opportunities
Educator License Lookup
Teacher Programs
Test Administration
Testing Information
Testing Resources
Youth Resources
World's Best Workforce

Exhibit B

Dayton vetoes bill that would weaken teacher seniority

Jon Collins · St. Paul, Minn. · May 3, 2012 Education

Mark Dayton *MPR Photo/Tim Pugmire*

Gov. Mark Dayton vetoed a bill Thursday that would have forced school boards and teachers unions to consider teacher performance when making layoff decisions, rather than just seniority.

The bill was described by supporters as a reform of the "last in, first out" system that puts priority on preserving the jobs of senior teachers during layoffs. It passed the State Legislature along largely partisan lines.

Dayton wrote in his veto letter Thursday that the bill was just one of many introduced this legislative session that was "anti-public schools, anti-public school teachers, or anti-collective bargaining rights."

Vallay Varro, executive director for Minnesota Campaign for Achievement Now, said she thought the bill should have been more "apolitical."

"We think that this particular piece of legislation would have prized our best teachers, making sure that in the instances where we have to make a layoff that we are keeping our best talent in the classroom," Varro said.

Education Minnesota President Tom Dooher said in a statement that his organization approved of the veto.

"Instead of tackling the serious challenges facing public education, the Republican majority's top priority for our schools this session has been to further regulate teacher layoffs," Dooher said. "The priority should have been making layoffs unnecessary."

Parents United for Public Schools Executive Director Mary Cecconi said her group supported the legislation, but that they had urged legislators to make it more truly bi-partisan by accepting DFL amendments.

"The bill as it stands is heading in the right direction, but the bill as it stands didn't do enough to really get great teachers in our classrooms," Cecconi said.

The Legislature passed a law in 2011 that created a Teacher Evaluation Working Group that's in the process of coming up with the standards that will be used to measure teacher performance.