Filed in Second Judicial District Court
6/16/2016 3:22:14 PM
Ramsey County, MN

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT
Case Type: Other Civil

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

Plaintiffs,

v.

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.

Case No. 62-CV-16-2161
Hon. Margaret M. Marrinan

DEFENDANT ANOKA-HENNEPIN SCHOOL DISTRICT, INDEPENDENT SCHOOL DISTRICT NO. 11'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

INTRODUCTION

Plaintiffs' Amended Complaint reads more like a legislative white-paper than "a short and plain statement of the claim showing that *the pleader is entitled to relief*," Minn. R. Civ. P. 8.01 (emphasis added), particularly "relief" against the school-district defendants like Anoka-Hennepin School District, Independent School District No. 11 ("AHSD"). Like a legislative white-paper, it reads like it is intended to persuade policymakers to amend or repeal state statutes, and not to state facts reflecting that AHSD or any other school-district defendant has actually violated (or is about to violate) any legal right of any of the Plaintiffs. Indeed, the most fundamental thing in a cognizable lawsuit—allegations of unconstitutional or otherwise unlawful

Filed in Second Judicial District Court
6/16/2016 3:22:14 PM
Ramsey County, MN

things that each of the named defendants actually did to one or more of the named Plaintiffs—are difficult, if not impossible, to find in the Amended Complaint.

The Amended Complaint does attack state statutes governing how teachers obtain tenure, how they are dismissed, and how they are laid off (the "Challenged Statutes"). Plaintiffs do so because the statutes allegedly "prevent district administrators and school leaders from making employment decisions about teachers based on classroom effectiveness." (Am. Compl. ("AC") ¶ 16.) Further, Plaintiffs allege, although the problems affect students "statewide," the problem is "far worse for students in schools serving predominantly low-income students and students of color because such schools employ a disproportionate share of ineffective teachers." (AC ¶¶ 18_19.)

But, school districts like AHSD did not enact (or even advocate for) the Challenged Statutes. Plaintiffs do not allege that AHSD engaged in discrimination against them. In fact, the Amended Complaint stops short of alleging that any of the Plaintiffs or their children is presently being taught by an ineffective teacher assigned by AHSD, or that such an AHSD-assigned ineffective teacher is about to teach any of the Plaintiffs or their children.[1]

Even if every fact alleged in the 75-page Amended Complaint is taken as true, there is no justiciable controversy between Plaintiffs and AHSD. AHSD is not a proper party to this lawsuit because Plaintiffs have not alleged an injury—in fact or imminent—traceable to AHSD's conduct; Plaintiffs' allegations are too generalized to be justiciable; and Plaintiffs have not alleged essential elements of a claim for deprivation of liberty or property without due process. Put another way, no constitutional right actually possessed by the Plaintiffs requires AHSD to act

[1] When they filed and served their initial complaint, Plaintiffs apparently recognized that the school districts were neither necessary nor proper parties, because the districts were not included among the defendants.

Filed in Second Judicial District Court
6/16/2016 3:22:14 PM
Ramsey County, MN

differently toward any of the Plaintiffs, so the Amended Complaint fails to state a claim upon which relief may be granted against AHSD. Moreover, to the extent Plaintiffs challenge the quality of education they have received, Minnesota does not recognize educational malpractice claims.

Although AHSD embraces the goal of closing the achievement gap, this suit against AHSD is not the vehicle to pursue that goal.

THE CHALLENGED STATUTES

Plaintiffs challenge as unconstitutional three statutory provisions of the Continuing Contract Law and Teacher Tenure Act (*see* AC ¶ 75 n.19): teacher tenure, teacher dismissal, and teacher layoff procedures.[2] "Continuing contract rights" under Minn. Stat. § 122A.40 (formerly § 125.12) are equivalent to "tenure rights" under the Teacher Tenure Act, Minn. Stat. § 122A.41 (formerly § 125.17). *Jurkovich v. Indep. Sch. Dist. No. 708, Tower-Soudan*, 478 N.W.2d 232, 233 n.1 (Minn. App. 1991).[3] Since the inception of teacher tenure laws in 1927, they have been subject to continual revision by the legislature. *See* Christine Ver Ploeg, *Terminating Public School Teachers for Cause Under Minnesota Law*, 31 Wm. Mitchell L. Rev. 303, 306 (2004); *see also* St. Paul Public Schools' Mem. in Supp. of Mot. to Dismiss at 3-4 (2016 legislation).

Teacher tenure is codified at Minn. Stat. § 122A.40, subds. 5 & 7. Teachers are probationary for the first three consecutive years of teaching in a single district in Minnesota. *Id.*, subd. 5. Unless terminated during the probationary period, or advised of nonrenewal under

[2] AHSD is subject to the Continuing Contract Law. *See* Minn. Stat. §§ 122A.40, subd. 18 (Continuing Contract Law applies to all cities not in the first class), 122A.41, subd. 2(a) (Teacher Tenure Act applies to first class cities), 410.01 (first class cities have more than 100,000 residents). This memorandum therefore focuses on the Continuing Contract Law.

[3] Since the two terms identify the same legal concept, courts sometimes use them interchangeably. *Jurkovich*, 478 N.W.2d at 233 n.1 (citation omitted).

Filed in Second Judicial District Court
6/16/2016 3:22:14 PM
Ramsey County, MN

Subdivision 5, a teacher who has completed the probationary period in any district "shall elect to have a continuing contract with such district." *Id.*, subd. 7.

Teacher dismissal is codified at Minn. Stat. § 122A.40, subds. 5-7, 9, 13-17. Dismissal procedures differ for probationary versus tenured teachers. A probationary teacher's annual contract may be non-renewed "as the school board shall see fit"; alternatively, a probationary teacher may be discharged immediately "for cause" following a hearing held upon due notice. *Id.*, subd. 5(a). A tenured teacher may be discharged only for one of the statute's enumerated reasons. *Id.*, subds. 9 (at the end of the year), 13 (immediately). A tenured teacher may be dismissed for performance issues for failing to teach, *id.*, subd. 13(a)(3), inefficiency in teaching or school management, *id.*, subd. 9(1), or neglect of duty, *id.*, subd. 9(2), 13(5). The statute also prescribes dismissal procedures. *Id.*, subds. 5, 7, 9, 13-17.

Teacher layoff procedures are codified at Minn. Stat. § 122A.40, subds. 10-11. The Amended Complaint refers to these procedures as last-in-first-out, or "LIFO." (*See* AC ¶ 99.) Under the default procedure in Subdivision 11, when a district places teachers on unrequested leaves of absence—for example, due to lack of pupils—junior teachers (i.e., who have been employed by the district for the least amount of time) must be placed on leave before senior teachers. Minn. Stat. § 122A.40, subds. 10-11. But, a district may negotiate a different procedure, through collective bargaining. *Id.*, subd. 10.

A school board must strictly comply with these provisions, and an attempt to discharge a teacher contrary to the statutory procedures is deemed ineffective. *Perry v. Indep. Sch. Dist. No. 696*, 297 Minn. 197, 202, 210 N.W.2d 283, 287 (1973) (citing *Hueman v. Indep. Sch. Dist. No. 77*, 243 Minn. 190, 67 N.W.2d 38 (1954); *Downing v. Indep. Sch. Dist. No. 9*, 207 Minn. 292, 291 N.W. 613 (1940)).

Filed in Second Judicial District Court
6/16/2016 3:22:14 PM
Ramsey County, MN

PLAINTIFFS' ALLEGATIONS

Plaintiffs seek declaratory and injunctive relief, alleging these three statutory schemes are unconstitutional under the following Minnesota Constitution provisions: Education Clause (Art. XIII, § 1), Due Process Clause (Art. I, § 7), and Equal Protection Clause (Art. I, § 2). (AC ¶ 25.) Although this lawsuit attacks statutes that bear directly on teacher employment (including teacher contracts and due process rights), and bear only indirectly on students, Plaintiffs allege these statutory schemes are unconstitutional because they have caused, or will cause, or risk causing Plaintiffs to be taught by one or more "ineffective" teachers. Plaintiffs allege "chronically ineffective teachers" are retained due to the enforcement of the Challenged Statutes and "attendant policies, contracts, and practices." Citing a political survey administered to teachers,[4] Plaintiffs allege 17% of teachers are "ineffective" and a disproportionate number of ineffective teachers are concentrated in schools that serve minority and low-income students. (AC ¶¶ 19, 59.) Plaintiffs cite school-level test score data to argue students in certain elementary schools are taught by *less* effective or *ineffective* teachers. (*See, e.g.*, AC ¶¶ 139-44) (data regarding AHSD's Evergreen Park Elementary and Andover Elementary). Plaintiffs do not allege what percentage of "ineffective" teachers are tenured as opposed to non-tenured teachers.

Plaintiffs seek only declaratory and injunctive relief, including an order enjoining Defendants from implementing "at any time in the future" a system of teacher employment that "is substantially similar to the framework implemented by the Challenged Statutes." (AC at p. 74.) Plaintiffs also ask this Court to retain continuing jurisdiction over the matter until the Court determines Defendants "have fully and properly complied with [the Court's] Orders." (*Id.*)

[4] *See* St. Paul Public School's Mem. in Supp. of Mot. to Dismiss at 5-7.

Filed in Second Judicial District Court
6/16/2016 3:22:14 PM
Ramsey County, MN

LEGAL ARGUMENT

I. STANDARD

A civil complaint must be dismissed if it fails to state a claim upon which relief can be granted. Minn. R. Civ. P. 12.02(e). "A claim is sufficient against a motion to dismiss for failure to state a claim 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).

Likewise, a civil complaint must be dismissed if the court lacks jurisdiction over the subject matter of the complaint. Minn. R. Civ. P. 12.02(a).

When the constitutionality of a statute is at issue, the court presumes that the statute is constitutional and the court's power to declare a statute unconstitutional should be exercised with extreme caution. *State v. Behl*, 564 N.W.2d 560, 566 (Minn. 1997). The challenger of the constitutional validity of a statute must meet the very heavy burden of demonstrating beyond a reasonable doubt that the statute is constitutional. *Id.*; *see also Assoc. Builders & Contractors v. Ventura*, 610 N.W.2d 293, 299 (Minn. 2000) (same).

II. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM AGAINST AHSD BECAUSE IT DOES NOT ALLEGE THAT AHSD COMMITTED ANY ACT OR BREACHED ANY DUTY THAT VIOLATED THE CONSTITUTIONAL RIGHTS OF ANY PLAINTIFF AND BECAUSE THE PROCEDURAL DUE PROCESS CLAIMS ARE INVALID AS A MATTER OF LAW.

When analyzing claims against multiple defendants, a court must analyze each defendant separately. In other words, a complaint must state a cognizable claim against a specific defendant to survive a motion to dismiss that defendant. *See, e.g.*, *Wood v. Moss*, 134 S. Ct. 2056, 2070 (2014) (requiring a defendant-by-defendant approach to liability for constitutional tort); *see also Doran v. Eckold*, 409 F.3d 958, 965 (8th Cir. 2005) (rejecting the district court's "analysis of the police conduct in gross" because liability must be assessed on a defendant-by-defendant basis).

Filed in Second Judicial District Court
6/16/2016 3:22:14 PM
Ramsey County, MN

Thus, to state a constitutional claim against AHSD, the Amended Complaint must allege facts that, taken as true, allege that AHSD (in particular) is violating (or, for injunctive relief, is about to violate) a specific constitutional right of more than one of the named Plaintiffs. The Amended Complaint fails this basic standard, and therefore all claims against AHSD should be dismissed.

A. The Amended Complaint Does Not Allege that AHSD Committed Any Act or Breached Any Duty that Violated the Constitutional Rights of Any Plaintiff.

The Amended Complaint makes no specific allegations that AHSD violated any particular Plaintiff's constitutional rights. Instead, the lengthy Amended Complaint blames the statutes: "***The Challenged Statutes*** have a real and appreciably negative impact on K.F.'s fundamental right to a uniform and thorough education . . . ." (*See* AC ¶ 27; *see id.* ¶¶ 219-90 (emphasis added)). AHSD did not adopt the statutes, has no power to repeal them, and cannot disregard them. Plaintiffs acknowledge that the statutes "force" districts to act in certain respects Plaintiffs find objectionable and "prevent" districts from taking other actions Plaintiffs find desirable. (*See, e.g.*, AC ¶¶ 16, 17, 22, 69, 74, 115.)

Although the Amended Complaint alleges, in the abstract, that the challenged statutes cause school districts throughout Minnesota to behave "in general" or "on average" in a certain way, that does not constitute an allegation that AHSD is actually behaving that way toward any Plaintiff, or is about to behave that way toward any Plaintiff. This, by itself, constitutes a fatal defect, because it embodies a failure to have pled facts reflecting that AHSD violated (or is about to violate) any of the constitutional rights upon which the suit rests.

B. Plaintiffs' Procedural Due Process Claims have Numerous Incurable Flaws.

The closest the Amended Complaint ever comes to alleging that AHSD committed an act or breached a duty toward any Plaintiff, concerns Plaintiffs' procedural due process counts. In those counts, Plaintiffs' allege that each Plaintiff had a procedural-due-process right to receive

Filed in Second Judicial District Court
6/16/2016 3:22:14 PM
Ramsey County, MN

notice and a hearing "that she is, will be, or has been taught by an ineffective teacher," (AC ¶¶ 273, 279), a mechanism "by which a [Plaintiff] may challenge her school's decision to grant tenure to [or continue to employ] an ineffective teacher," (AC ¶¶ 274, 280), and a mechanism by which they would receive notice of the quality-blind layoffs of effective junior teachers and non-layoffs of ineffective senior teachers, (AC ¶¶ 285-86). For example, under Plaintiffs' view of Due Process, every time that there is an "ineffective" teacher this year who is expected to remain on staff and teach next year, parents are constitutionally entitled to receive notice of this fact and an "opportunity to challenge a school district's decision to retain" that teacher. (AC ¶ 281).

Still, those Counts (the first of two Count 10s, 11, and 12) simply attack certain state law provisions (the Tenure Provisions, Dismissal Provisions, and LIFO Provisions) without alleging that AHSD had any constitutional duty to any particular Plaintiff to provide such notice, hearing, or other opportunity to challenge the application of those laws. Specifically, the Amended Complaint does not allege AHSD had a duty to provide notice to a particular Plaintiff as to a particular "ineffective" teacher or group of teachers, although it does allege that a child of a Plaintiff attending a high school in the district failed to receive such notice. (AC ¶ 218).

But even if Plaintiffs had included an allegation that the AHSD is responsible because Plaintiffs aren't notified and provided hearings when teachers continue to teach, it would fall short of an actionable procedural due process claim for numerous alternative reasons.

"[T]he due process protection provided under the Minnesota Constitution is identical to the due process guaranteed under the U.S. Constitution." *In re Individual 35W Bridge Litig*., 806 N.W.2d 820, 829 (Minn. 2011). To prevail on this claim, Plaintiffs must prove (1) that the interest allegedly interfered with is a constitutionally protected property interest, and (2) the

Filed in Second Judicial District Court
6/16/2016 3:22:14 PM
Ramsey County, MN

procedures used were not constitutionally sufficient. *Id.* Few property rights are entitled to due process protection. *Id.* at 830.

First, the Amended Complaint rests on the mistaken legal premise that students and their parents possess a protected property interest under the Due Process Clause of the Minnesota Constitution in having only teachers of a certain quality. (AC ¶¶ 271-73, 277-79, 283-85.) "Property interests are not created by the constitution." *Washington v. Indep. Sch. Dist. No. 625, St. Paul Pub. Schs.*, 590 N.W.2d 655, 659 (Minn. App. 1999). Thus, the Education Clause does not create a property interest. *Id.* Instead, "a protectable property right is a right that is created and defined by 'existing rules or understandings that stem from an independent source, such as state law, rules or understandings that support claims of entitlement to certain benefits.'" *In re Individual 35W Bridge Litig.*, 806 N.W.2d at 830 (quoting *Snyder v. City of Minneapolis*, 441 N.W.2d 781, 791 (Minn. 1989)). Plaintiffs have no property right to be taught only by a teacher of a certain quality, because no "independent source" of law has given students "a legitimate claim of entitlement to" it. *In re Individual 35W Bridge Litig.*, 806 N.W.2d at 830.

Although in certain instances students have a protected property interest in continued enrollment, the right is not as broad as Plaintiffs allege. In *Goss*, the U.S. Supreme Court concluded students have a protectable property interest in receiving a public education where the school suspended the students for up to ten days without a hearing. *Goss v. Lopez*, 419 U.S. 565, 567 (1975); s*ee also In re Expulsion of I.A.L.*, 674 N.W.2d 741, 744 (Minn. App. 2004) (Wright, J.) (citing *Goss*, 419 U.S. at 574). That property right arose in *Goss* because an Ohio statute provided that all students ages 6 through 21 were unconditionally entitled to a free public education. *Goss*, 419 U.S. at 573. The Court in *Goss* did not establish a property right to education of a particular quality—just the right to attend school. Indeed, the Court carved out

Filed in Second Judicial District Court
6/16/2016 3:22:14 PM
Ramsey County, MN

what it called "de minimis" deprivations of education which are not protectable property interests. *Id.* at 576.

Plaintiffs would fare no better under the *liberty*-interest branch of procedural due process. "[T]he most common manner in which a State creates a liberty interest is by establishing 'substantive predicates' to govern official decision-making and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met." *Kentucky Dep't of Corr. v. Thompson,* 490 U.S. 454, 462 (1989) (citations omitted). Such state-law requirements must "contain 'explicitly mandatory language,' i.e., specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow, in order to create a liberty interest." *Id.* at 463 (quoting *Hewitt v. Helms,* 459 U.S. 460, 472 (1983)). Plaintiffs have no liberty interest in being taught by a teacher of a certain quality because state law does not contain explicitly mandatory language that so limits the discretion of school officials that, where substantive predicates specified in state law are present, a student is therefore entitled as a matter of state law to be taught only by teacher of a certain quality.

Second, giving tenure to an ineffective teacher, failing to dismiss or layoff an ineffective teacher, or laying off an effective junior teacher, are too generalized to constitute a deprivation of *any particular student or discrete set of students'* property or liberty interests. The consequences of these decisions are not limited to a small number of persons who are "exceptionally affected, in each case upon individual grounds," as is required to state an actionable due process claim. *United States v. Florida E. Coast Ry. Co.*, 410 U.S. 224, 245 (1973) (quoting *Bi-Metallic Investment Co. v. State Bd. of Equalization,* 239 U.S. 441, 446 (1915)). "Where a rule of conduct applies to more than a few people, it is impracticable that every one should have a direct voice in its adoption." *Hylen v. Owens*, 312 Minn. 309, 312-13, 251 N.W.2d 858, 861 (1977) (quoting *Bi-*

Filed in Second Judicial District Court
6/16/2016 3:22:14 PM
Ramsey County, MN

Metallic, 239 U.S. at 445). Applying the same principle, the Minnesota Supreme Court has held that "[a]ll questions relating to exercise of the eminent domain power, which are political in their nature and rest in the exclusive control and discretion of the legislature, may be determined without notice to the owner of the property to be affected." *Hous. & Redevelopment Auth. of City of St. Paul v. Greenman*, 255 Minn. 396, 409, 96 N.W.2d 673, 682 (1959). If the owner of a piece of property in the path of a proposed pipeline "has no constitutional right to notice of the proceedings in which it is decided to construct the improvement and its location is fixed," *M.T. Props. Inc. v. Alexander*, 433 N.W.2d 886, 891 (Minn. App. 1988) (quoting *Greenman*, 225 Minn. at 409, 96 N.W.2d at 682), a student can have no constitutional right to notice of proceedings in which it is decided that a particular teacher will or will not be retained.

Third, Plaintiffs do not allege that AHSD *intentionally* assigned to any Plaintiff an ineffective teacher, which is an essential element to a cognizable due process claim. "[T]he Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property." *Daniels v. Williams*, 474 U.S. 327, 328 (1986). Indeed, Plaintiffs allege the opposite—that students may be "arbitrarily assigned to an ineffective teacher whose position is protected by the Challenged Statutes." (AC ¶ 18.) And the Plaintiffs do not allege AHSD intends to deprive any Plaintiff of a protected liberty or property interest.

III. IN THE ALTERNATIVE, PLAINTIFFS' FACIAL CLAIMS AGAINST AHSD MUST BE DISMISSED BECAUSE THE CLAIMS ARE NON-JUSTICIABLE AND THEY OTHERWISE FAIL UNDER THE LEGAL PRINCIPLES GOVERNING FACIAL CHALLENGES.

A. Plaintiffs' Facial Challenges Are Non-Justiciable.

First, Plaintiffs' facial claims fail because they are non-justiciable. Although it can be somewhat easier to establish standing for a justiciable facial challenge, *McCaughtry v. City of*

Filed in Second Judicial District Court
6/16/2016 3:22:14 PM
Ramsey County, MN

Red Wing, 808 N.W.2d 331, 339-40 (Minn. 2011) ("*McCaughtry I*"), Plaintiffs' facial claim against AHSD fails to satisfy even these standards.

"To establish a justiciable controversy in a declaratory judgment action challenging the constitutionality of a law, a plaintiff must show 'a direct and imminent injury which results from the alleged unconstitutional provision.'" *Id.* at 337 (quoting *Kennedy v. Carlson*, 544 N.W.2d 1, 6 (Minn. 1996)). "A party challenging the constitutionality of a law must show that the law 'is, or is about to be, applied to his disadvantage.'" *Id.* at 338 (quoting *Lee v. Delmont*, 228 Minn. 101, 110-11, 36 N.W.2d 530, 537 (1949)). This pleading standard is met "'where the impact of the regulation is direct and immediate and [plaintiffs] allege an actual, well-founded fear that the law will be enforced against them.'" *Id.* at 340 (quoting *Gray v. City of Valley Park*, 567 F.3d 976, 984 (8th Cir. 2009)). Conversely, "[a]n injury that is merely possible or hypothetical 'is not enough' to establish justiciability." *Id.* at 338 (quoting *Kennedy*, 544 N.W.2d at 6). In *McCaughtry I*, the Supreme Court concluded that the issues were not hypothetical or abstract because "[t]he City has actually begun enforcing the [challenged statute] against appellants." *Id.* at 340.

Plaintiffs' Amended Complaint says nothing about enforcement or application of the challenged statutes by AHSD against any Plaintiff, or any imminent threat of enforcement or application of the challenged statutes by AHSD. At most, the Amended Complaint complains about circumstances allegedly present "in general" (AC ¶ 19) or "on average" (AC ¶ 139) in Minnesota schools for "many children" (AC ¶ 24) or "some students" (AC ¶ 112), which it alleges are a consequence of the Challenged Statutes.

Plaintiffs allege few facts regarding AHSD, and those minimal facts merely confirm the irrelevance of AHSD and the only AHSD Plaintiff, compared to the vast general factual

Filed in Second Judicial District Court
6/16/2016 3:22:14 PM
Ramsey County, MN

allegations. Only one Plaintiff—Tiffini Forslund—is alleged to have a connection to AHSD. Forslund's daughter K.F., "age 17," is "a student in" AHSD. (AC ¶ 27). According to the Amended Complaint, "K.F. has been assigned to, and/or[5] is at substantial risk of being assigned to, an ineffective teacher who impedes K.F.'s equal access to the opportunity to receive a uniform and thorough education, and K.F. lacks notice of and opportunity to challenge the same." (*Id.*) But other than these general allegations, the Amended Complaint does not allege facts regarding how AHSD has violated K.F.'s constitutional rights—or the constitutional rights of any other Plaintiff for that matter. For example, although the Amended Complaint presents Minnesota Comprehensive Assessment (MCA) data, the data is for two AHSD *elementary* schools. (AC ¶¶ 139-140 & figs. 10-12.) Likewise, the Amended Complaint presents data regarding teachers' average years of experience via-a-vis percentage of students qualifying for free or reduced lunch (FRL), but that data also is for two AHSD elementary schools. There are no allegations that K.F. attends or attended either school, and the only reasonable inference from the allegation that K.F. is 17 years old is that she does *not* attend elementary school. (*See* AC ¶ 27.)

Further, regarding the "documented instances of systematic disparate treatment in the Minnesota Public Schools" in paragraph 198, all but one specifically refers to districts *other than* AHSD, and the exception merely refers generally to special education programs in Minnesota—but K.F. is not alleged to be a special education student.

[5] The use of "and/or" is "a device to conceal rather than express meaning." *Moran v. Shern*, 208 N.W.2d 348, 352 n.4 (Wis. 1973) (citation and quotation marks omitted). It is "devoid of meaning," *Am. Gen. Ins. Co. v. Webster*, 118 S.W.2d 1082, 1084 (Tex. App. 1938), and "lends itself as much to ambiguity as to brevity," *Ex parte Bell*, 122 P.2d 22, 29 (Cal. 1942). "[I]t cannot intelligibly be used to fix the occurrence of past events." *Id.*; *see also R & R Marine, Inc. v. Max Access, Inc.*, 377 S.W.3d 780, 785 (Tex. App. 2012) (expressing disapproval of the use of "and/or" (citing *Webster*, 118 S.W.2d 1082)).

Filed in Second Judicial District Court
6/16/2016 3:22:14 PM
Ramsey County, MN

More generally, the Amended Complaint does not make any factual allegations about anything that is currently happening to K.F. or that is about to happen to her, as *McCaughtry I* and *Lee* require even for a facial challenge. At most, the Amended Complaint includes for K.F., as with every Plaintiff, boilerplate allegations that "K.F. *has been assigned*" (in the past tense) to an ineffective teacher, "and/***or*** is at substantial risk of being assigned to, an ineffective teacher" (AC ¶ 27) (emphasis added), that—on information and belief—quality-blind layoffs in the recent past "have had the effect of depriving K.F. of the opportunity to learn from effective teachers," and a reference to "the substantially inferior education delivered to K.F. by ineffective teachers." (AC ¶ 218.) That is substantively different than alleging *anything* in the present tense about what is currently happening to K.F., or alleging that something unconstitutional is *about to happen* to her.

B. Plaintiffs' Facial Challenge Also Fails Because The Amended Complaint Fails to Plead that the Statutes Always Operate Unconstitutionally.

Second, even if Plaintiffs' claims were justiciable (they are not), the Amended Complaint fails the pleading standard for a facial constitutional challenge. To sufficiently plead a facial challenge, the complaint must allege "that a law '**always** operates unconstitutionally.'" *McCaughtry I*, 808 N.W.2d at 339 (quoting Black's Law Dictionary 261 (9th ed. 2009)). As the Minnesota Supreme Court then reaffirmed in *McCaughtry II*, "'in a facial challenge to constitutionality, the challenger bears the heavy burden of proving that the legislation is unconstitutional in all applications.'" *McCaughtry v. City of Red Wing*, 831 N.W.2d 518, 522 (Minn. 2013) ("*McCaughtry II*") (quoting *Minn. Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683, 696 (Minn. 2009)). In *McCaughtry II*, the Minnesota Supreme Court recognized that the definition of a facial challenge under the Minnesota Constitution is the legal equivalent of the principle articulated by the U.S. Supreme Court in *United States v. Salerno*, which held

Filed in Second Judicial District Court
6/16/2016 3:22:14 PM
Ramsey County, MN

that, with certain narrow exceptions not present here, in a facial challenge "the challenger must establish that no set of circumstances exists under which the Act would be valid." 481 U.S. 739, 745 (1987); *McCaughtry II*, 831 N.W.2d at 522. "Thus, if [the court identifies] a single situation in which the [challenged law] might be applied constitutionally, [the] facial challenge fails." *McCaughtry II*, 831 N.W.2d at 522. Facial challenges are disfavored in part because "facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Id.* (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51 (2008)).

Here, to sustain a facial challenge, Plaintiffs must allege that there can be no constitutional application of the challenged statutes. Notably Plaintiffs fail to allege the qualities that define an "effective" versus "ineffective" teacher (including when that is measured and whether the characteristic is immutable),[6] but, even under Plaintiffs' view of the Minnesota education system, Plaintiffs would have to agree that the following scenarios, among others, would be *constitutional* applications of the Challenged Statutes: (a) an effective teacher is granted tenure; (b) an ineffective teacher is denied tenure; (c) a district lays off its most junior teacher, who is ineffective; and, (d) the district dismisses a teacher, who is ineffective.[7]

[6] Plaintiffs allege generally that there are "objective measures of teacher effectiveness," (AC ¶ 55), but do not identify what those measures are. The Amended Complaint cites a Minnesota Campaign for Achievement Now (MinnCAN) teacher survey, which defined ineffective as "unable to advance student learning such that, on average, students demonstrate at least one year of academic learning during a school year." (AC ¶ 59.) But, Plaintiffs do not adopt that definition and appear to rely on varying definitions throughout the Amended Complaint.

[7] Plaintiffs' "evidence" suggests tenured teachers are, on average, more effective than non-tenured teachers. (AC ¶¶ 119-21, citing Alejandra Matos, "Minneapolis' worst teachers are in the poorest schools, data show," Star Tribune, Jan. 28, 2015). The primary challenge with lower performing schools is not that they have a large number of *tenured* ineffective teachers, but that they have a large number of inexperienced teachers, who, on average, are less effective. (Matos ¶¶ 2, 5, 16-18.) Moreover, although Plaintiffs blame Minneapolis Public Schools for not

Filed in Second Judicial District Court
6/16/2016 3:22:14 PM
Ramsey County, MN

It bears noting here that the Minnesota Supreme Court has touted the public policy rationale underlying the Challenged Statutes for decades:

> Plainly, the legislative purposes sought were stability, certainty, and permanency of employment on the part of those who had shown by educational attainment and by probationary trial their fitness for the teaching profession. By statutory direction and limitation there is provided means of prevention of *arbitrary* demotions or discharges by school authorities. The history behind the act justifies the view that the vicissitudes to which teachers had in the past been subjected were to be done away with or at least minimized. It was enacted for the *benefit and advantage of the school system* by providing such machinery as would tend to minimize the part that malice, political or partisan trends, or caprice might play.

McSherry v. City of St. Paul, 202 Minn. 102, 108, 277 N.W. 541, 544 (1938). More recently, the Supreme Court observed that "teachers, whose primary task is to impart knowledge to students through personal interaction, are given the security of tenure to assure their academic freedom and to protect them from arbitrary demotions and discharges that are unrelated to their ability to perform their prescribed duties." *Frye v. Indep. Sch. Dist. No. 625*, 494 N.W.2d 466, 467 (Minn. 1992), *as amended on denial of reh'g* (Feb. 3, 1993) (citing *Downing v. Ind. Sch. Dist. No. 9*, 207 Minn. 292, 291 N.W. 613 (1940); *Perry v. Indep. Sch. Dist. No. 696*, 210 N.W.2d 283 (Minn. 1973)).[8]

C. Plaintiffs' Facial Challenge Under the Education Clause Must Fail

Regarding Plaintiffs' Education Clause[9] claims, the Amended Complaint does not allege that any of the Challenged Statutes cause *all* Minnesota students to be deprived of "a general and

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dismissing more tenured teachers for ineffectiveness, the district apparently dismisses numerous probationary teachers for ineffectiveness. (AC ¶ 60; Matos ¶ 7.)

[8] *See also State ex rel. Ging v. Bd. of Ed. of City of Duluth*, 213 Minn. 550, 568, 7 N.W.2d 544, 554-55 (1942), *overruled on other grounds by Foesch v. Indep. Sch. Dist. No. 646*, 300 Minn. 478, 223 N.W.2d 371 (1974) (the teacher tenure law is "'wise legislation, promotive of the best interests, not only of the teachers affected, but of the schools as well'") (quoting *Oxman v. Indep. Sch. Dist. of Duluth*, 178 Minn. 422, 426, 227 N.W. 351, 352 (1929))).

[9] The Education Clause provides as follows:

Filed in Second Judicial District Court
6/16/2016 3:22:14 PM
Ramsey County, MN

uniform system of public schools," or of "thorough and efficient system of public schools throughout the state." Minn. Const. Art. XIII, § 1. Although Plaintiffs blame the Challenged Statutes for the alleged number of ineffective teachers in Minnesota's public schools, and for their alleged disproportionate assignment to certain public schools that serve relatively more low-income students and students of color, Plaintiffs stop far short of alleging that every student is taught by an ineffective teacher, whether because of one or more of those statutes or for other reasons.

To the extent that Plaintiffs allege that the statutes will violate the Education Clause until *all* students receive equal opportunities to be taught by effective teachers, or until *every* student is taught by an effective teacher, that interpretation of the Clause is irreconcilable with the way that the Minnesota Supreme Court explained its meaning in *Skeen v. State*, 505 N.W.2d 299, 310-12 (Minn. 1993). The phrase "general and uniform" "should be broadly interpreted." *Id.* at 310. "'[U]niform' merely applies to the general system, not to specific funding disparities." *Id.* "Construing 'uniform' as meaning 'identical' (or 'nearly identical') would be inconsistent with a plain reading of the Education Clause . . . ." *Id.* at 311. And, the principle of uniformity is not violated, if the *system* which is adopted is made to have a general and uniform application to the entire state. *Id.* "Thus, these definitions all focus on the broad purposes of an education system and emphasize that such a standardized system be established throughout the state." *Id.* at 311. Put another way, Plaintiffs' Amended Complaint, with all well-pleaded facts taken as true, does

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> **Uniform system of public schools.** 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.

Filed in Second Judicial District Court
6/16/2016 3:22:14 PM
Ramsey County, MN

not allow the court to conclude that any of the Challenged Statutes are incapable of being applied in a fashion that satisfies the Education Clause as interpreted by the Supreme Court in *Skeen.* And if all Minnesota schools are not constitutionally required to be of the same quality, then certainly all teachers in all classrooms within a given district are not constitutionally required to be of the same quality.

Moreover, Plaintiffs' argument that the Challenged Statutes violate the Education Clause because their education is allegedly not "thorough" misses the mark. "Thorough" in that Clause refers to the legislature's duty to "make . . . provisions for"—i.e., providing financing for—the State's public schools system. Minn. Const. Art. XIII, § 1; *Skeen*, 505 N.W.2d at 310-11**.** Plaintiffs do not challenge the education finance system so the requirement that the Legislature create a thorough system of schools is not implicated.

D. Plaintiffs' Facial Challenge Under the Equal Protection Clause Must Also Be Dismissed.

Plaintiffs do not purport to allege a facial challenge under the Equal Protection Clause; instead, Counts 4 through 9 purport to state only an "as applied" Equal Protection challenge. (AC ¶¶ 237-62.) However, to the extent the Court reads the Amended Complaint broadly, and construes it as alleging a facial challenge under the Equal Protection Clause, AHSD addresses that claim out of an abundance of caution.[10]

"By definition, a facial challenge to a statute on equal protection grounds asserts that at least two classes are created by the statute, that the classes are treated differently under the statute, and that the difference in treatment cannot be justified." *In re McCannel*, 301 N.W.2d

[10] *See* AC at p. 2 ("Plaintiffs ask this Court to declare the Challenged Statutes unconstitutional on their face and as-applied . . . ."); ¶ 26 (same); ¶ 58 (the Challenged Statutes, "both facially and applied," negatively impact public education in Minnesota)).

Filed in Second Judicial District Court
6/16/2016 3:22:14 PM
Ramsey County, MN

910, 916 (Minn. 1980); *see also Dean v. Winona*, 843 N.W.2d 249, 258 (Minn. App. 2014), *appeal dismissed*, 868 N.W.2d 1 (Minn. 2015) (concluding claims were moot). The necessity, to a facial equal-protection-clause challenge, that the statute expressly identify classes that were to be treated differently, was noted in *Dean*, when the Court of Appeals contrasted the facially-neutral ordinance under challenge to the laws challenged successfully in *State v. Russell*, 477 N.W.2d 886, 887, 889 (Minn. 1991), *Weir v. ACCRA Care, Inc.*, 828 N.W.2d 470, 476 (Minn. App. 2013), and *Healthstar Home Health, Inc. v. Jesson*, 827 N.W.2d 444, 447, 449, 453 (Minn. App. 2012), all of which identified two or more classes that were singled out for dissimilar treatment. *Dean*, 843 N.W.2d at 259. Indeed, the court "'routinely'" rejects equal-protection claims when a party cannot establish that he or she is similarly situated to those whom they contend are being treated differently. *In re Guardianship of Durand*, 845 N.W.2d 821, 825 (Minn. App. 2014), *aff'd sub nom. In re Guardianship, Conservatorship of Durand*, 859 N.W.2d 780 (Minn. 2015) (quoting *Schatz v. Interfaith Care Ctr.*, 811 N.W.2d 643, 656 (Minn. 2012)). The threshold question "is whether the claimant is treated differently from others to whom the claimant is similarly situated in all relevant respects." *State v. Johnson*, 813 N.W.2d 1, 12 (Minn. 2012). Here, the only classes that are treated differently under the Challenged Statutes are senior versus junior teachers. But, Plaintiffs are not similarly situated in any relevant respect to either senior or junior teachers and they do not allege to be.

And although the Challenged Statutes treat junior teachers differently than senior teachers, that differential treatment is not what Plaintiffs allege violates equal protection. To the contrary, Plaintiffs complain that the laws compel equal treatment of all senior teachers for tenure and dismissal (regardless of merit), and compel equal treatment of all junior teachers in the layoff setting (regardless of merit). They attack not the justification for the different

Filed in Second Judicial District Court
6/16/2016 3:22:14 PM
Ramsey County, MN

treatment of junior and senior teachers, but the justification for the *failure* to treat effective and ineffective teachers differently, for purposes of retention, dismissal and layoffs. That is an interesting argument, but it does not constitute a *facial* attack under the Equal Protection Clause.

Moreover, Plaintiffs do not claim that senior teachers are inherently ineffective or that junior teachers are inherently effective. They recognize that the vast majority of Minnesota public school teachers are better than others – and are effective. (AC ¶¶ 53, 65, 112.) Thus, they do not truly make a claim that the Challenged Statutes are incapable of being applied in a constitutional fashion—but instead rely on how they believe they operate in practice. That prevents it from constituting a facial attack as defined by Minnesota's appellate courts.

IV. PLAINTIFFS' AS-APPLIED CLAIMS AGAINST AHSD MUST BE DISMISSED BECAUSE THE AMENDED COMPLAINT DOES NOT ALLEGE AHSD APPLIED THE LAW IN AN UNCONSTITUTIONAL MANNER AND THE CLAIMS FAIL THE STANDING AND RIPENESS TESTS UNDER *LUJAN.*

An as-applied challenge can only be brought against a defendant who has applied the challenged statute with respect to the Plaintiffs; AHSD did not. What Plaintiffs are really complaining about is circumstances that exist "in general" or "on average" for some but not all students as a supposed consequence of the way that the Challenged Statutes require public school teachers to be hired, tenured, retained, and chosen for layoffs. Thus, there is too little to keep AHSD in the case.

In the alternative, Plaintiffs have failed to bring a justiciable as-applied challenge because the standing and ripeness requirements for such a challenge are not satisfied here. Under the *Lujan v. Defenders of Wildlife* test, as adopted in Minnesota in *Riehm v. Comm'r .of Pub. Safety*, 745 N.W.2d 869 (Minn. App. 2008), Plaintiffs need to allege facts demonstrating that (1) they will suffer a direct and personal harm resulting from the alleged denial of their constitutional rights by AHSD; (2) that this harm is traceable to AHSD's challenged actions; and (3) likely to

Filed in Second Judicial District Court
6/16/2016 3:22:14 PM
Ramsey County, MN

be remedied by this court. *Riehm*, 745 N.W.2d at 873 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)); *see also Thole v. Comm'r of Public Safety*, 831 N.W.2d 17, 21 (Minn. App. 2013) ("'Appellant must show that his claimed harm is personal, actual, or imminent; traceable to respondent's challenged actions; and likely to be remedied by this court.'" (quoting *Riehm*, 745 N.W.2d at 873)). "[W]hen the plaintiff is not [herself] the object of the government action or inaction [she] challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan*, 504 U.S. at 562.

Plaintiffs fall short of satisfying this test for multiple reasons. First, their interest in having effective public school teachers retained and ineffective public school teachers replaced is not sufficiently personal to them to differentiate it from a generalized grievance. This argument is comparable to claims treated as generalized grievances by Minnesota appellate courts. *See Westman v. Comm'r of Pub. Safety*, No. A13-1703, 2014 WL 4175805, at *5 (Minn. App. Aug. 25, 2014) (a consenting drunk driver's challenge to the constitutionality of Minnesota's implied-consent statute); *Minn. Break the Bonds Campaign v. Minn. State Bd. of Inv.*, No. A12-0945, 2012 WL 5476166, at *2 (Minn. App. Nov. 13, 2012) (challenge to the Minnesota Board of Investment's purchase of bonds of the nation of Israel, brought by Minnesota citizens who are beneficiaries of financial plans that have funds invested by the State Board of Investment, and by group members more directly affected by settlements of Israel in occupied territories); *Olson v. State*, 742 N.W.2d 681, 684 (Minn. App. 2007) (challenge to the Minnesota state Job Opportunity Industry Building Zones Program and the Biotechnology and Health Sciences Industry Zone Program, brought by a citizen and partnership who argued that the programs' tax exemption incentives would result in an increase in tax burden on them); *Conant v. Robins,*

Filed in Second Judicial District Court
6/16/2016 3:22:14 PM
Ramsey County, MN

Kaplan, Miller & Ciresi, L.L.P., 603 N.W.2d 143, 149 (Minn. App. 1999) (taxpayers challenge to the fees received by the State's outside counsel from the settlement of tobacco litigation).

Second, what the Amended Complaint describes as "a substantial risk of being assigned to an ineffective teacher," (AC at ¶ 27), is insufficient. As the U.S. Supreme Court recently stated when interpreting the *Lujan* test, "plaintiffs bear the burden of pleading and proving concrete facts showing that the defendant's actual action has caused the substantial risk of harm. Plaintiffs cannot rely on speculation about "'the unfettered choices made by independent actors not before the court.'" *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1150 n.5 (2013) (quoting *Lujan*, 504 U.S. at 562). Plaintiffs' theory of substantial harm relies on speculation about "'the unfettered choices made by independent actors not before the court,'" because it assumes that a hypothetical third-party *ineffective* teacher will agree to teach one or more courses K.F. chooses to take, and that—but for the Challenged Statutes—a hypothetical third-party *effective* teacher would be licensed, available, and willing to teach the courses that K.F. wishes to take when she wishes to take them, and that there would be space left in that teacher's classroom when K.F. registers for that course. That premise depends on the choices of hypothetical effective and ineffective teachers, K.F.'s classmates, and others "not before the court." Further, although the Challenged Statutes address hiring and firing, District-level collective-bargaining agreements affect teacher placement. For example, Article XVI of the Anoka-Hennepin teacher contract, between the District and Anoka-Hennepin Education Minnesota, prescribes the process of posting positions and intra-District transfers, including applicants' priority levels when the District fills openings.[11] Therefore, Plaintiffs' premise also depends on the placement of a

[11] The Anoka-Hennepin teacher contract, effective until June 30, 2017, is available at http://www.anoka.k12.mn.us/Page/33684 (last visited June 13, 2016).

Filed in Second Judicial District Court
6/16/2016 3:22:14 PM
Ramsey County, MN

hypothetical effective teacher at a particular school, which placements are subject to a collectively-bargained-for contract.

Third, the Amended Complaint does not allege that *the District's* actual action has caused the substantial risk of harm. Plaintiffs have not even attempted to allege that this "substantial risk" is traceable to AHSD, but have instead placed all blame for it on the statutes themselves. (*See, e.g.,* AC ¶ 27 ("***The Challenged Statutes*** have a real and appreciably negative impact on K.F.'s fundamental right to a uniform and thorough education . . . ." (emphasis added)).

Fourth, that risk is not likely to be remedied by this Court, because Plaintiffs allege that K.F. is a 17-year-old (which likely means that she is going into her senior year of high school in the fall of 2016). Even if the Court were to preliminarily enjoin one or more of the challenged statutes before she graduates, that would not avoid the risk that K.F. must study under an ineffective teacher, because collectively-bargained rights presently restrict the ability of AHSD to abruptly fire teachers for ineffectiveness. (*See* AC ¶ 61) (alleging ineffective teachers are retained in part because contracts are "enforce[d]"). There would necessarily need to be a step, prior to removal, for a determination of whether any particular teacher is *in fact* ineffective (however that's determined), and even if this lawsuit does result in the removal of an ineffective teacher of K.F. before she graduates, it is speculative at best that a replacement would be found who meets the Plaintiffs' standard for effectiveness, particularly because Plaintiffs exclusively seek statewide relief of the kind that could radically change the dynamics for hiring and placing teachers.

Plaintiffs' Prayer for Relief in their Amended Complaint suggests that they want the school districts in the case so that they can not only obtain a declaratory judgment that the Challenged Statutes are unconstitutional, but also enjoin the "enforcement, application, or

Filed in Second Judicial District Court
6/16/2016 3:22:14 PM
Ramsey County, MN

implementation of" the Challenged Statutes, *and* the implementation "at any time in the future, by law, by policy, or by contract, any system of teacher employment, retention and dismissal that is substantially similar to the framework implemented by the Challenged Statutes . . . ." (AC, p. 74.) As a matter of law, such aspirations do not provide a basis to keep AHSD in the suit.

First, even in the school desegregation context (where the power of courts to remedy an unconstitutional regime was at its peak), the U.S. Supreme Court made it clear that "'judicial powers may be exercised only on the basis of a constitutional violation,'" and that this principle precludes a court from issuing injunctive relief against defendants not shown "by their own conduct in the administration of the school system to have denied those rights." *Rizzo v. Goode*, 423 U.S. 362, 377 (1976) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)). If Plaintiffs' approach were permissible, then hundreds if not thousands of public officials could be named as defendants in a suit challenging the constitutionality of one or more laws, on no better ground than a plaintiff's wish to not only strike down the statute but to fully prevent its future implementation (by anyone, against anyone). To state the obvious, if Plaintiffs succeeded in their efforts to strike down the Challenged Statutes as unconstitutional, the District would abide whether or not it was a Defendant in this case.

Second, for purposes of evaluating redressability, the Court must disregard Plaintiffs' request to enjoin hypothetical future laws, policies and contracts that are "substantially similar to the framework of" the Challenged Statutes. Plaintiffs' proposed "two-step," in which a challenge to existing statutes serves as the hook to not only enjoin implementation of those statutes that are actually adjudicated as unconstitutional, but also any law, policy or contract that might be adopted to fill the resulting vacuum if it is deemed "substantially similar" to the "framework" of the Challenged Statutes (even if not itself unconstitutional), is plainly beyond the jurisdiction of

Filed in Second Judicial District Court
6/16/2016 3:22:14 PM
Ramsey County, MN

any court. "The question of the reasonableness and validity thereof with respect to plaintiffs' property may be raised and determined in proper proceedings subsequent to its enactment when enforcement is attempted.'" *Binder v. Vill. of Golden Valley*, 260 Minn. 418, 422, 110 N.W.2d 306, 309 (1961) (quoting *Sullivan v. City of East Grand Forks*, 131 Minn. 424, 426, 155 N.W. 397, 398 (1915)). The possibility that a school district might adopt or approve something in the aftermath of an adjudication of the constitutionality of the Challenged Statutes that itself may become a proper subject of a future constitutional challenge, does not justify the district's inclusion in a suit before any such new law, policy or contract even exists.

V. EDUCATIONAL MALPRACTICE IS NOT A COGNIZABLE CLAIM IN MINNESOTA.

If Plaintiffs' real challenge is that Plaintiffs have received or will receive an inadequate education, that claim is not cognizable under Minnesota law because Minnesota does not recognize claims for educational malpractice. In *Alsides v. Brown Institute, Ltd.*, the Court of Appeals "f[ound] persuasive the analysis of those courts that have rejected, on public policy grounds, claims for educational malpractice; claims that would require the court to engage in a 'comprehensive review of a myriad of educational and pedagogical factors, as well as administrative policies.'" 592 N.W.2d 468, 471, 472 (Minn. App. 1999) (quoting *Andre v. Pace Univ.*, 655 N.Y.S.2d 777, 779 (App. Term 1996)) (reinterpreting complaint as pleading an educational malpractice claim, where complaint alleged "that the education they received was inadequate and the instructors were not competent" and declining to recognize such a claim). The allegations rejected by the court in *Alsides* are indistinguishable from Plaintiffs' allegation here, that certain teachers are ineffective.

In *Melby v. Hellie*, the plaintiffs alleged that the Education Clause's "general and uniform" provision required general and uniform access and quality. 249 Minn. 17, 80 N.W.2d

Filed in Second Judicial District Court
6/16/2016 3:22:14 PM
Ramsey County, MN

849 (1957). Plaintiffs argued that a district's refusal to accept nonresident students deprived those students of their constitutional right to receive an education equal to that available to resident students. The Minnesota Supreme Court rejected that claim, holding that nonresident children have no absolute right of attendance in a district other than their own. 249 Minn. at 21, 80 N.W.2d at 852.

The Amended Complaint's inconsistent use of the terms "effective" versus "ineffective" exemplifies why the judiciary has declined to wade into issues of educational malpractice. Plaintiffs seek relief on the basis that the Plaintiffs' minor children have been taught by or may someday be taught by ineffective teachers (and they cannot even identify whether they have been). But what does ineffective mean and who should determine that? The Plaintiffs' own pleading employs definitions that reflect opposing schools of thought: is effectiveness measured based on inputs (e.g., teacher qualifications, experience), or outputs (e.g., test scores, student surveys, graduation rates)? Sometimes Plaintiffs seem to suggest effectiveness has to do with opportunities or inputs. (*See* AC Opening Paragraph & ¶¶ 7, 20 (opportunity gap), 12 (if provided with a "uniform and thorough" education, children are "capable" of achieving academic benchmarks), 1, 3, 67 (quality public education), 51 (strong foundation).) But other times Plaintiffs seem to suggest effectiveness has to do with outputs, such as student learning, (AC ¶ 16), student success, (AC ¶ 46), or whether the achievement gap is closed (AC ¶ 12). Plaintiffs' first illustration of the alleged disproportionate effect the Challenged Statutes have on low-income students and students of color is a comparison between Bethune Elementary and Hiawatha Elementary—schools in Minneapolis Public Schools. That illustration employs yet another definition of "effective" based on classroom observations, student surveys, and

Filed in Second Judicial District Court
6/16/2016 3:22:14 PM
Ramsey County, MN

achievement data. In short, Plaintiffs want to constitutionalize teacher effectiveness when Plaintiffs themselves do not even define the term or use the term consistently.

CONCLUSION

For the reasons stated above, Plaintiffs' claims against AHSD should be dismissed with prejudice.

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GREENE ESPEL PLLP

s/ Jeanette M. Bazis
Jeanette M. Bazis, Reg. No. 255646
John M. Baker, Reg. No. 174403
Janine W. Kimble, Reg. No. 392032
222 S. Ninth Street, Suite 2200
Minneapolis, MN 55402
JBazis@greeneespel.com
JBaker@greeneespel.com
JKimble@greeneespel.com
(612) 373-0830

and

ANOKA-HENNEPIN SCHOOL DISTRICT
Paul H. Cady, Reg. No. 189406
General Counsel
2727 North Ferry Street
Anoka, MN 55303
Paul.Cady@anoka.k12.mn.us
(763) 506-1089

Attorneys for *Defendant Anoka-Hennepin School District, Independent School District No. 11*

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The undersigned hereby acknowledges that costs, disbursements and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. § 549.211, subdivision 2, to the party against whom the allegations in this pleading are asserted.

s/ Jeanette M. Bazis
Jeanette M. Bazis