Filed in Second Judicial District Court
6/16/2016 2:36:07 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,

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
Judge Margaret M. Marrinan

DEFENDANT INDEPENDENT SCHOOL DISTRICT NO. 709'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

INTRODUCTION

Plaintiffs bring this action against the State of Minnesota ("State") and four school districts (the "Districts"), including Independent School District No. 709, Duluth, ("ISD 709") as a challenge to Minnesota's teacher tenure and continuing contract laws, teacher dismissal procedures, and a last in-first out presumption created by statute. Plaintiffs allege that these laws have resulted in or may result in their children being taught by "ineffective teachers," allegedly in violation of the Education Clause of the Minnesota Constitution. Plaintiffs do not allege that ISD 709 took any unconstitutional actions against them; rather, they claim that as a result of these statutes the entire education system in the state results in minority and lower-income

Filed in Second Judicial District Court
6/16/2016 2:36:07 PM
Ramsey County, MN

students being more likely to have ineffective teachers. The prospective remedies Plaintiffs seek demonstrate that this matter is not about these Plaintiffs and these Districts, but rather an attempt to use the judicial system to enact policy changes. ISD 709 brings this motion to dismiss pursuant to Minnesota Rule of Civil Procedure 12.02(a) and (e) because Plaintiffs have failed to state a claim upon which relief can be granted against ISD 709 and have failed to plead a justiciable controversy.[1]

FACTS

For the purposes of this motion, the Court must accept as true the factual allegations set forth in the Amended Complaint. Therefore, solely for the purpose of the argument on this motion, ISD 709 will also assume the allegations in the Amended Complaint are true. To avoid unnecessary duplication with the briefs of Anoka-Hennepin School District, West St. Paul-Mendota Heights-Eagan Public Schools, and St. Paul Public Schools, all facts will not be reiterated herein. The facts that directly relate to claims against ISD 709 are brief and summarized below.

Plaintiff Bonnie Dominguez resides in ISD 709 and is the parent of E.Q. E.Q. is thirteen years old and attends an unidentified school in the District. E.Q. is Native American and qualifies for free or reduced price lunch. Am. Cmplt. ¶ 29. Plaintiffs also identify other facts relating to two elementary schools in ISD 709, but do not make any claim specifically related to those facts. There is no allegation that E.Q. attends or attended either of these schools.

STANDARD OF REVIEW

When a complaint fails to state claims for which relief may be granted, as is the case in this matter, the Court must dismiss the complaint. *Herbert v. City of Fifty Lakes*, 744 N.W.2d

[1] All Defendants have sought motions to dismiss. To the extent applicable, ISD 709 adopts the arguments of all other Defendants as if they were fully incorporated herein.

Filed in Second Judicial District Court
6/16/2016 2:36:07 PM
Ramsey County, MN

226 (Minn. 2008); *see also* Minn. R. Civ. P. 12.02(e). Such a dismissal is appropriate where the facts in the pleading do not support granting the relief that a plaintiff demands. *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010). Here, there are dispositive issues of law that prevent Plaintiffs from succeeding on their claims.

This Court must accept the factual allegations in the Amended Complaint as true and construe the Amended Complaint and draw all inferences and assumptions in favor of the nonmoving party. *Hoffman v. N. States Power Co.*, 764 N.W.2d 34, 45 (Minn. 2009). This Court may determine legal conclusions flowing from the facts alleged and admitted in the Complaint when ruling on the instant motion. *Nationwide Corp. v. Nw. Nat. Life Ins. Co.*, 251 Minn. 255, 87 N.W.2d 671, 681 (Minn. 1958).

ARGUMENT

At the most basic level of pleading, Plaintiffs have failed to allege that ISD 709 has taken any action or has failed to act in a manner that caused harm to Plaintiffs. There is no allegation that ISD 709 has injured, or is about to injure, any Plaintiff. All claims against ISD 709 should be dismissed because Plaintiffs have failed to establish that the Court has jurisdiction over this action between Plaintiffs and ISD 709 and Plaintiffs have failed to state a claim upon which relief can be granted against ISD 709.

I. PLAINTIFFS DO NOT HAVE STANDING AND HAVE FAILED TO PRESENT A JUSTICIABLE CONTROVERSY AND THIS COURT THEREFORE LACKS JURISDICTION.

A. Plaintiffs lack standing to challenge the Constitutionality of the relevant statutes.

Standing is necessary before a party may seek relief from a court. *State by Humphrey v. Phillip Morris, Inc.*, 551 N.W.2d 490, 493 (Minn. 1996). A plaintiff can acquire standing either by suffering some "injury-in-fact" or a legislative enactment granting standing. *Id.* To satisfy

Filed in Second Judicial District Court
6/16/2016 2:36:07 PM
Ramsey County, MN

the "injury-in-fact" requirement, Plaintiffs must show that they have suffered, or are about to suffer, "actual, concrete injuries caused by the challenged conduct." *All. for Metro. Stability v. Metro Council*, 671 N.W.2d 905, 913 (Minn. App. 2003). Plaintiffs have not claimed any "actual, concrete injuries," rather, they have merely alleged that their children may have had in the past, or may in the future have, a teacher the Plaintiffs deem "ineffective."

B. Plaintiffs have not alleged a justiciable controversy with respect to ISD 709.

This Court should dismiss all claims against ISD 709 because Plaintiffs fail to present a justiciable controversy involving ISD 709. A declaratory judgment or an injunction cannot be awarded based on the "remote contingency" that ISD 709, or any other school district, might potentially engage in unconstitutional conduct in the future.

A declaratory judgment action must be based on an actual controversy. *Seiz v. Citizens Pure Ice Co.*, 207 Minn. 277, 281, 290 N.W. 802, 804 (Minn. 1940). The reason for this requirement is that Minnesota courts do not issue advisory opinions. *Id.* Allegations that involve issues that have "no existence other than in the realm of future possibility are purely hypothetical and are not justiciable." *Lee v. Delmont*, 228 Minn. 101, 110, 36 N.W.2d 530, 537 (Minn. 1949). The existence of a justiciable controversy is essential to a court's jurisdiction. *Cincinnati Ins. Co. v. Franck*, 621 N.W.2d 270, 273 (Minn. App. 2001), *citing St. Paul Area Chamber of Commerce v. Marzitelli*, 258 N.W.2d 585, 587 (Minn. 1977).

The standard for justiciability has been articulated by Minnesota courts in a variety of ways, but the general rule is that a court will not inject itself into a dispute that involves events that may (or may not) occur at some point in the future. In *Seiz*, the Minnesota Supreme Court outlined the following standard:

> [A] controversy must be justiciable in the sense that it involves definite and concrete assertions of right and the contest thereof touching the legal relations of

Filed in Second Judicial District Court
6/16/2016 2:36:07 PM
Ramsey County, MN

> parties having adverse interests in the matter with respect to which the declaration is sought, and must admit of specific relief by a decree or judgment of a specific character as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Seiz, 207 Minn. at 281, 290 N.W. at 804. An essential element of justiciability is the existence of a "genuine conflict in the tangible interests of opposing litigants." *State ex rel. Smith v. Haveland*, 223 Minn. 89, 92, 25 N.W.2d 474, 477 (Minn. 1946). In other words, the following requirements must be met:

> Complainant must prove his possession of a legal interest or right which is capable of and in need of protection from the claims, demands, or objections emanating from a source competent legally to place such legal interest or right in jeopardy.

Id.

Stated another way, a declaratory judgment action is only justiciable if it "(a) involves definite and concrete assertions of right that emanate from a legal source, (b) involves a genuine conflict in tangible interests between parties with adverse interests, and (c) is capable of specific resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion." *Franck*, 621 N.W.2d at 273.

As set forth below, Plaintiffs fail to meet the justiciability requirements as they relate to their claims against ISD 709.

i. There is No "Definite and Concrete" Assertion of Right because Plaintiffs do not have a Right to "Effective" Teachers.

The underlying assertion in the Amended Complaint is that Plaintiffs' children have a right to "effective" teachers which derives from the Education Clause of the Minnesota Constitution. The "Education Clause" states:

> 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

Filed in Second Judicial District Court
6/16/2016 2:36:07 PM
Ramsey County, MN

> taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state.

Minn. Const. Art. 13, Sec. 1. Notably, it refers to a *system* of public schools, not an individual right to education of a certain type or by a certain class of teachers. In summarizing Minnesota and other jurisdictions' interpretations of the Education Clause, the Minnesota Supreme Court stated that the "definitions all focus on the broad purposes of an education system and emphasize that such a standardized system be established throughout the state." *Skeen v. State*, 505 N.W.2d 299, 311 (Minn. 1993). Although education has been identified as a fundamental right, the right only includes a "a general and uniform system of education." *Id*. at 315.

Minnesota courts have not reviewed the question of whether the Minnesota Constitution guarantees a right to "effective" teachers or a certain quality of education. Where Minnesota has not addressed the issue, the Minnesota Supreme Court has relied on other jurisdictions with similar constitutional provisions. *See generally, Skeen* (citing cases from Oregon, Wisconsin, Idaho, West Virginia, Montana, Washington, Kentucky, New Jersey, Texas, and Wyoming on a question involving school funding pursuant to the Education Clause). The California Court of Appeals recently concluded that California's education clause which requires a "system of common schools" does not create a right to a "quality" education. *Campaign for Quality Ed. v. California*, 246 Cal.App.4th 896, 909 (Cal. App. 2016). Similar to California's provision, the Minnesota Education Clause does "not require or prescribe any standard of educational achievement that must be attained from the system of common schools." *Id*. (citation omitted).

Although Minnesota recognizes a fundamental right to a system of education, Plaintiffs do not have a "clear and definite right" to "effective" teachers. Without a valid claim to a right, the claims are not justiciable and the Court lacks jurisdiction to review them.

Filed in Second Judicial District Court
6/16/2016 2:36:07 PM
Ramsey County, MN

ii. There is No "Genuine or Present Controversy" between Plaintiffs and ISD 709.

Plaintiffs allege that any harm they might have suffered, or might suffer in the future, is caused by the Challenged Statutes. *See, generally,* Am. Cmplt. ¶¶ 219-290. Plaintiffs also acknowledge that ISD 709 is required to comply with the Challenged Statutes. *See id.* ¶ 74 ("The Challenged Statutes prevent school leaders from meaningfully considering their students' need for effective teachers when making teacher employment and dismissal decisions.") The District does not dispute that it is bound by state laws. As a statutory body, the District, through its school board, has only those powers granted to it by statute. *Perry v. Indep. Sch. Dist. No. 696,* 210 N.W.2d 283, 286 (1973). Since there is no disagreement between Plaintiffs and ISD 709, there is no genuine or present controversy for the Court to decide between these parties.

iii. Plaintiff's Complaint is Not Capable of Specific Resolution and instead Requests a Ruling on Hypothetical Facts.

With respect to ISD 709, Plaintiffs assert that E.Q. "has been assigned to, and/or is at substantial risk of being assigned to, an ineffective teacher." Am. Cmplt. ¶ 210. Importantly, Plaintiffs have not sought any remedy for any alleged past conduct, and are seeking only declaratory judgment and a permanent injunction preventing future actions. *See* Am. Cmplt. Prayer for Relief.

As the parties challenging the constitutionality of a statute, Plaintiffs "must show that [the statutes] affect [their] rights in an unconstitutional manner and not merely the rights of others." *Minn. Ass'n of Pub. Sch. v. Hanson*, 178 N.W.2d 846, 850 (Minn. 1970). Plaintiffs cannot merely allege harm "in some indefinite way in common with people generally." *Id.* Since Plaintiffs did not plead that they actually have been harmed or are about to be harmed, their hypothetical experience is in common with all students, not uniquely the Plaintiffs.

Filed in Second Judicial District Court
6/16/2016 2:36:07 PM
Ramsey County, MN

Plaintiffs have presented only a remote possibility of any rights being damaged in the future. For all Plaintiffs except Bonnie Dominguez, they would need to transfer their children into ISD 709—a particularly remote possibility given the distance from their current metro-area residences. Their children might, or might not, be taught by an ineffective teacher in ISD 709. That teacher might, or might not, have been granted tenure.[2] That teacher might, or might not, have been proposed for dismissal but for the current laws. That teacher might, or might not, have been retained over a less senior, more effective teacher. Even accepting as true Plaintiffs' allegations that their children are *more* likely to have an ineffective teacher than children of other races or financial backgrounds, they have not stated that such a risk is imminent, or any more imminent for them as compared to the general population of Minnesota schoolchildren.

For decades, Minnesota courts have "declined to determine rights in anticipation of an event which can happen only in the future." *Seiz,* 290 N.W. 802 at 805. The Minnesota Supreme Court's decision in the case of *Kennedy v. Carlson* is instructive. Specifically, the dispute involved the funding system for Minnesota's public defenders. *Kennedy v. Carlson*, 544 N.W.2d 1, 3 (Minn. 1996). In the case, the Chief Public Defender for Minnesota's Fourth Judicial District argued that a statutory funding system for public defenders violated indigent clients' constitutional right to effective assistance of counsel and sought declaratory judgment ruling it unconstitutional. *Id.* The Chief Public Defender claimed that the statutory funding mechanism resulted in an office that was underfunded, understaffed, and unable to properly represent clients. *Id.* at 4. However, his claim was rejected because the Minnesota Supreme Court found his concerns alleged only hypothetical injuries because he could not point to a specific client who had been harmed or was about to be harmed as a result of the funding

[2] As a city of the first class, ISD 709 is subject to the Teacher Tenure Act rather than the continuing contract laws.

Filed in Second Judicial District Court
6/16/2016 2:36:07 PM
Ramsey County, MN

statutes. *Id.* at 8. Similarly here, even accepting Plaintiffs' pleading as true, they cannot identify a single student who has been harmed or is about to be harmed by the statute. The harms are too speculative to present a justiciable controversy.

Under the standards set forth in Minnesota, Plaintiffs have failed to identify a recognized right, failed to show any genuine conflict with ISD 709 that is ripe for adjudication, and failed to present more than hypothetical facts. A justiciable controversy is a necessary prerequisite for jurisdiction, and Plaintiffs have not asserted sufficient facts to establish that such a controversy exists.

II. PLAINTIFFS HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AGAINST ISD 709 BECAUSE THE AMENDED COMPLAINT DOES NOT ALLEGE THAT ISD 709 VIOLATED THE CONSTITUTIONAL RIGHTS OF A PLAINTIFF.

It is insufficient for Plaintiffs to join ISD 709 merely because the State alleged it was an indispensable party. Plaintiffs must allege a cognizable claim that ISD 709 violated the constitutional rights of one or more Plaintiffs.

Plaintiffs have failed to allege sufficient facts which, if proven true, would justify relief against ISD 709. Only thirteen of the nearly 300 paragraphs in the Amended Complaint relate to ISD 709. Using the same boilerplate for each Plaintiff, the Amended Complaint asserts that E.Q., the only student who attends ISD 709, "has been assigned to, **and/or** is at substantial risk of being assigned to" an "ineffective teacher." *See* Am. Cmplt. ¶ 29 (emphasis added). Plaintiffs have not alleged that E.Q. has actually had, or is about to have, an "ineffective" teacher. The "or" is critical because it demonstrates that Plaintiffs have not stated that E.Q. has actually been harmed, it may be that there is only the possibility of harm.

Although the Amended Complaint makes general references to how school districts might act, there is no allegation that ISD 709 has caused, or is about to cause, harm to any

Filed in Second Judicial District Court
6/16/2016 2:36:07 PM
Ramsey County, MN

Plaintiff. Each of the counts cites *state laws* as the basis for the alleged Constitutional violations. *See* Am. Cmplt. ¶¶ 219-236. There is no allegation that ISD 709 itself has taken any unconstitutional actions. In fact, Plaintiffs acknowledge that ISD 709 is subject to these laws and "force[d]" to take action consistent with the statutes. *See, e.g.*, Am. Cmplt. ¶¶ 16, 17. ISD 709 cannot disregard the statutes, nor can it repeal them. Thus, any constitutional harm that derives from the statutes themselves is not attributable to ISD 709.

Courts are particularly hesitant to second-guess decisions regarding the day-to-day operations of schools. The Supreme Court has cautioned that "[c]ourts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). Plaintiff's tortured reading of the Education Clause does not support such a direct implication of constitutional values that would necessitate court intervention in ISD 709's personnel decisions.

A. Plaintiffs do not have a property right in "effective" teachers, and therefore are not entitled to due process procedures.

The only potential constitutional claim against ISD 709 is the alleged violation of due process rights. For Plaintiffs' due process claims to succeed, Plaintiffs must show that they have a constitutionally protected liberty or property interest. *In re Ind. 35W Bridge Litig*, 806 N.W.2d 820, 829 (Minn. 2011). It is well established that property interests are not "created by the constitution." *Washington v. Indep. Sch. Dist. No. 625, St. Paul Pub Sch.*, 590 N.W.2d 655, 659 (Minn. App. 1999). When a plaintiff claims a protected interest, she must have more than a "unilateral hope," she must have a "legitimate claim of entitlement to it." *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989) (citations omitted).

Filed in Second Judicial District Court
6/16/2016 2:36:07 PM
Ramsey County, MN

There is no law recognizing a property right to be taught only by an "effective teacher," whatever that may be defined as. In fact, other such challenges to the quality of education received by a student have been recast as "educational malpractice" claims, which are not recognized in Minnesota. *See Alsides v. Brown Institute, Ltd.*, 592 N.W.2d 468, 472 (Minn. App. 1999) (stating "[t]he majority of courts that have addressed the issue have rejected claims that attack the general quality of education provided to students"). Courts decline to review such claims for a number of public policy reasons, including that a court would be required to "review a myriad of educational and pedagogical factors" related to "complex educational determinations." *Id., quoting Andre v. Pace Univ.*, 170 Misc.2d 895, 655 N.Y.S.2d 777, 780 (N.Y. App. 1996). In other words, courts do not review educational decisions made by school district administrators in the exercise of their professional duties. If Plaintiffs do not have a right to challenge the quality of education through tort law, it is difficult to imagine how they would have a constitutional claim. After *Alsides*, the only tort claims that can be made against an educational institution are those alleging a failure to perform a specific promise made to the student. Courts reject claims that require an examination "into the nuances of educational processes or theories." *Alsides*, 592 N.W.2d at 473.

The concerns about educational malpractice are particularly present here, where Plaintiffs have identified no clear standard for identifying an "effective" or "ineffective" teacher. Test scores, which Plaintiffs have used to compare schools, do not address potential "intervening factors [such] as a student's attitude, motivation, temperament, past experience, and home environment." *Alsides*, 592 N.W.2d at 472. Additionally, because students have different learning styles, an effective teacher for one child may be an ineffective teacher for another child. Permitting Plaintiffs to proceed on their claims would open the door to any student having a

Filed in Second Judicial District Court
6/16/2016 2:36:07 PM
Ramsey County, MN

constitutional claim any time a parent disagreed with a teacher's instructional methods. *See id.* (cautioning that recognition of educational malpractice would have "the potential for a flood of litigation against schools").

B. Even if Plaintiffs had a property or liberty interest, they are not entitled to notice and an opportunity to be heard regarding personnel decisions.

Without the existence of a property or liberty interest, Plaintiffs are not due notice and an opportunity to be heard. But even if Plaintiffs had a property or liberty interest, they would not be entitled to contest a school district's decision to grant tenure or lay off a less senior teacher because the resulting consequences would affect a wide range of individuals. "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*, 251 N.W.2d 858, 861 (Minn. 1977), *quoting Bi-Metallic Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915). In *Hylen*, the Minnesota Supreme Court held that in an eminent domain action created by legislation, an affected property owner was not entitled to due process because the legislation affected all members of a county and did not operate to an individual landowner's "special detriment." *Id*. In the case of an individual teacher, there could be hundreds of students affected by such a decision and therefore it would be impracticable to provide each an opportunity to be heard on the proposed decision.[3] Thus, in the unlikely event the Plaintiffs have a constitutional right to an "effective" teacher, that right does not require due process protections.

Finally, there is no allegation that ISD 709 intentionally violated any Plaintiffs' rights by assigning a child to an "ineffective" teacher. Due process protections do not extend to "a negligent act of an official causing unintended... injury to life, liberty, or property." *Daniels v.*

[3] Additionally, providing notice to students would violate the Minnesota Government Data Practices Act in many circumstances. Minnesota Statutes Section 13.43 identifies certain data on public employees as public, and the rest is presumptively non-public.

Filed in Second Judicial District Court
6/16/2016 2:36:07 PM
Ramsey County, MN

Williams, 474 U.S. 317, 328 (1986). Rather than alleging an intentional act, Plaintiffs plead that students are "arbitrarily" assigned to ineffective teachers. *See, e.g.*, Am. Cmplt. ¶ 18. There is no allegation that ISD 709 intentionally engaged in any unconstitutional act.

II. PLAINTIFFS HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AGAINST ISD 709 BECAUSE THEY HAVE NOT PLEADED FACTS WHICH SUPPORT A FACIAL CONSTITUTIONAL CHALLENGE.

Plaintiffs face a substantial uphill battle in this case. They bear the heavy burden of proving "beyond a reasonable doubt" that the challenged statutes violate the Minnesota Constitution. *Scott v. Minneapolis Police Relief Ass'n, Inc.*, 615 N.W.2d 66, 73 (Minn. 2000); *see also State v. Henning*, 666 N.W.2d 379, 382 (Minn. 2003). When a court reviews a constitutional challenge to a statute, "[e]very presumption is invoked in favor of the constitutionality of a statute." *Miller Brewing Co. v. State*, 284 N.W.2d 353, 356 (Minn. 1979), *citing Reed v. Bjornson*, 253 N.W. 102 (1934). Declaring a statute unconstitutional is only used "when absolutely necessary and with extreme caution." *Id.*, *citing Schwartz v. Talmo*, 205 N.W.2d 318, 323 (1973) (superseded by statute on other grounds). ISD 709 is entitled to dismissal because even if all facts in the Amended Complaint are presumed true, Plaintiffs fall woefully short of meeting this extremely high standard.

For a facial challenge to succeed, Plaintiffs must be able to show that the statutes are unconstitutional in all of their applications. *McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 339 (Minn. 2011), *quoting Black's Law Dictionary* 261 (9th ed. 2009). As the party challenging the statutes, Plaintiffs "bear[] 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)(citation omitted).

Filed in Second Judicial District Court
6/16/2016 2:36:07 PM
Ramsey County, MN

A. Plaintiffs have failed to assert a valid facial challenge as to the Education Clause.

There are plainly scenarios, even under Plaintiffs' vague theory of teacher effectiveness, in which the statutes are exercised in a constitutional manner, i.e. that an effective teacher (however defined) remains in the classroom or an ineffective teacher is removed. For example, the Teacher Tenure Act allows a district to grant tenure to an effective teacher or deny tenure to an ineffective teacher. Pursuant to the LIFO statute, a district could lay off an ineffective less-experienced teacher. And pursuant to the dismissal provisions, a district can dismiss an ineffective teacher. All of these scenarios satisfy the Plaintiffs' alleged constitutional rights. There need only be one case in which any of the above occurs in order to deny a facial challenge.

Furthermore, Plaintiffs acknowledge that under the current laws, some students are taught by effective teachers. The Amended Complaint states that E.Q. might have an ineffective teacher "at the same time that students in other classrooms in the same school are assigned to effective teachers." Am. Cmplt. ¶210. Since Plaintiffs have acknowledged that the current system provides constitutionally sufficient education for at least some students, Plaintiffs have not met their burden to show that the statutes are unconstitutional in every application.

B. Plaintiffs have failed to assert a valid facial challenge as to the Equal Protection Clause.

A facial equal protection challenge can only succeed where a statute creates classes and treats the classes differently. *In re McCannel*, 301 N.W.2d 910, 916 (Minn. 1980). With respect to students, none of the challenged statutes do so.

Filed in Second Judicial District Court
6/16/2016 2:36:07 PM
Ramsey County, MN

III. PLAINTIFFS HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AGAINST ISD 709 BECAUSE THERE IS NO ADEQUATE AS APPLIED CHALLENGE.

Even when accepted as true, the facts pled in the Amended Complaint do not support an "as applied" challenge to any Plaintiff. The only Plaintiff with any connection to ISD 709 is Bonnie Dominguez, whose child is a student in the district. At 13 years old, her child is a middle school student. This means that the statistics related to ISD 709 which consider test scores for fourth graders and are discussed with reference to 2015 figures do not apply to E.Q. Am. Cmplt. ¶¶132-138. The staffing profiles for elementary school teachers in 2015 is also not relevant to E.Q.'s middle school experience. Am. Cmplt. ¶180-183. Even if E.Q. was a fourth grader for one of the years identified on the graphs, Plaintiffs have not pleaded that E.Q. actually attended one of those schools or identified E.Q.'s test scores related to those of the student's peers.

Moreover, an "as applied" challenge must be brought against a defendant who has applied the statute against the Plaintiffs. ISD 709 has not applied any of the challenged statutes against E.Q. or any other Plaintiff. Nothing in the Amended Complaint alleges that ISD 709 actually applied one of the challenged statutes to a Plaintiff's detriment.

Plaintiffs have also failed to allege a justiciable controversy with respect to their "as-applied" challenges. Plaintiffs must establish three elements to have standing: (1) their claimed harm(s) are "personal, actual or imminent," (2) the harm(s) are traceable to Defendants, and (3) the harms are likely to be remedied by the court. *Riehm v. Comm'r of Pub. Safety*, 745 N.W.2d 869, 873 (Minn. App. 2008), *citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Standing is "substantially more difficult to establish" when the plaintiff is not the "object of the [challenged] government action or inaction. *Lujan*, 504 U.S. 562.

Filed in Second Judicial District Court
6/16/2016 2:36:07 PM
Ramsey County, MN

A. Plaintiffs do not have a personal, actual, or imminent harm.

The Plaintiffs have not alleged any actual harm unique to themselves. Their interest in having their children taught by "effective" teachers is the same as the interest of every other parent. This claim is comparable to other types of generalized grievances which have been rejected by Minnesota courts. *See, e.g., Conant v. Robins, Kaplan, Miller & Ciresi, L.L.P.*, 603 N.W.2d 143, 149 (Minn. App. 1999) (holding taxpayers did not have standing to challenge attorney fees paid to State's outside counsel in litigation); *Westman v. Comm'r of Pub. Safety*, No. A13-1703, 2014 WL 4175805 at *5 (Minn. App. Aug. 25, 2014) (holding implied consent petitioner did not have standing to challenge constitutionality of the implied consent statute without a direct injury); *Olson v. State*, 742 N.W.2d 681, 684 (Minn. App. 2007) (holding taxpayers did not have standing to challenge tax exemptions on behalf of the public). Plaintiffs' requests for relief are for all students, not a personal remedy for their own child.

B. Plaintiffs have not identified a harm that is traceable to ISD 709.

Plaintiffs have the burden of pleading facts showing that ISD 709 caused them harm or the risk of harm. *Clapper v. Amnesty Int'l USA*, 133 S.Ct. 1138, 1150 n.5 (2013), *citing Lujan*. Standing must not "rest on speculation about the decisions of independent actors." *Id.* Plaintiffs' theory of harm clearly relies on speculation about the decisions of independent actors. It assumes that a third-party ineffective teacher will choose to teach one of the courses E.Q. chooses to take, and that, without the challenged statutes, a third-party effective teacher would have chosen to teach that course. It assumes that, if the challenged statutes are invalidated, hypothetical individuals who could become effective teachers would apply to ISD 709 to replace the ineffective teachers. This theory requires speculation as to how third-party teachers will act in the future, a party that is not before the court.

Filed in Second Judicial District Court
6/16/2016 2:36:07 PM
Ramsey County, MN

Further, Plaintiffs have failed to plead that ISD 709 has actually taken any actions that would lead to a risk of harm. Plaintiffs place the entire blame for the harm on the challenged statutes. Plaintiffs have not shown that any harm is traceable to ISD 709 and they therefore lack standing.

C. The risk of ineffective teachers is not likely to be remedied by the Court.

Even if the challenged statutes were declared unconstitutional, ISD 709 would not be able to immediately terminate all "ineffective" teachers, so there would still be a risk that E.Q. would have an "ineffective" teacher. Teachers are subject to a Collective Bargaining Agreement that requires adherence to certain processes before termination. ISD 709 could not merely terminate all ineffective teachers immediately. Moreover, to find a remedy, the Court would necessarily have to delve into nuances of educational processes to determine whether a teacher was "effective" or not.

CONCLUSION

For all of the foregoing reasons, Plaintiffs' claims against ISD 709 should be dismissed with prejudice.

RUPP, ANDERSON, SQUIRES & WALDSPURGER, P.A.

Dated: June 16, 2016

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