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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

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

Plaintiffs,

vs.

State of Minnesota; et al,

Defendants.

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

DEFENDANT WEST ST. PAUL – MENDOTA HEIGHTS – EAGAN PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT 197'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Defendant West St. Paul – Mendota Heights – Eagan Public Schools, ISD No. 197 ("ISD 197") brings this motion to dismiss pursuant to Minn. R. Civ. P. 12.02 (a) and (e) due to lack of subject matter jurisdiction and Plaintiffs' failure to state a claim upon which relief can be granted.

PLAINTIFFS' ALLEGATIONS

Plaintiffs' Amended Complaint ("AC") alleges that provisions of the Minnesota Continuing Contract Law, Minn. Stat. § 122A.40 and Teacher Tenure Act, Minn. Stat. § 122A.41 ("Challenged Statutes"), *see* AC ¶ 75 n.19, are unconstitutional pursuant to the Education Clause of the Minnesota Constitution, Minn. Const. Art. XIII § 1 and the Due Process and Equal Protection clauses, Minn. Const. Art. I, § 2, and Minn. Const. Art. I, §§ 2 and 7, of the Minnesota Constitution. The Amended Complaint alleges that the provisions of the Continuing Contract Law and the Teacher Tenure Act governing teacher probation, tenure/continuing contract rights, teacher dismissal, and teacher lay-off procedures cause a disproportionate number of ineffective teachers

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to be concentrated in schools that serve minority and low-income students thereby causing damage to Plaintiffs. Plaintiffs seek only declaratory and injunctive relief (AC Section VII).

For purposes of the Amended Complaint as it applies to ISD 197, Plaintiff Justina Person has two children J.C. and D.C. who attend an unidentified school in ISD 197. J.C. and D.C. are Caucasian and qualify for free and reduced lunch. Plaintiffs allege that the statutory requirements of 122A.40 and 122A.41 are unconstitutional because they have caused, will cause, or risk causing Plaintiffs to be taught by one or more "ineffective" teachers (AC ¶ 28). When Plaintiffs' Amended Complaint is whittled down to its bare essence it alleges simply that the existence of the statutes results in the retention of ineffective teachers to the exclusion of effective teachers resulting in some undefined damage to Plaintiffs.

APPLICATION OF CHALLENGED STATUTES TO ISD 197

ISD 197 is subject to the Continuing Contract Law, Minn. Stat. § 122A.40 which applies to all cities not in the first class. The Teacher Tenure Act, Minn. Stat. § 122A.41 applies to cities of the first class such as Minneapolis, St. Paul, Duluth and Rochester which have more than 100,000 residents. Minn. Stat. § 410.01.

"Continuing Contract Rights" under Minn. Stat. § 122A.40 are equivalent to "tenure rights" under the Teacher Tenure Act, Minn. Stat. § 122A.41. *Montplaisir v. Independent School District No. 23,* 779 N.W.2d 880, 881, n. 1 (Minn. Ct. App. 2010).

Continuing Contract Rights are codified at Minn. Stat. § 122A.40, subds. 5 and 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 refusal to renew under 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.

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Teacher dismissal is codified at Minn. Stat. § 122A.40, subds. 7(a), 8(b)(12), 9, 13-17. (AC ¶¶ 83, 88.) 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. Minn. Stat. § 122A.40, subds. 9 (at the end of the year), 13 (immediately). A tenured teacher may be dismissed for performance issues for failing to teach, Minn. Stat. § 122A.40, subd. 13(a)(3), inefficiency in teaching or school management, *id.*, subd. 9(1), or neglect of duty, *id.*, subd. 9(2), 13(5) (willful neglect of duty). The statute also prescribes dismissal procedures for continuing contract teachers. Minn. Stat. § 122A.40, subds. 7, 13-17.

Teacher lay-off procedures are codified at Minn. Stat. § 122A.40, subds. 10-11. (AC ¶ 99.) Under these procedures, when a district places teachers on unrequested leaves of absence—for example, due to lack of pupils or for financial limitations—the layoffs must occur in reverse seniority order, to which Plaintiffs refer as "LIFO". Minn. Stat. § 122A.40, subd. 11.

School districts are legally obligated to comply with the provisions of either Minn. Stat. § 122A.40 or 122A.41, whichever applies. Failure to follow the processes contained in the Minn. Stat. § 122A.40 will make terminations or layoffs ineffective. *Perry v. Indep. Sch. Dist. No. 696*, 297 Minn. 197, 202, 210 N.W.2d 283, 287 (1973). That said, "tenure was not intended to create a system which would deprive school boards of their assigned role effectively to administer and operate the public school system." *Frye v. Indep. Sch. Dist. No. 625*, 494 N.W.2d 466, 467 (Minn. 1992). The Teacher Continuing Contract Statute is not to be construed therefore, to impair the right of a school board to determine policy in the administration of school affairs, or to transfer

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from school boards to teachers and courts the management, supervision and control of school systems. *Id.* at 467-468.

LEGAL ARGUMENTS

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 reviewing the constitutionality of a statue, the presumption is that the statute being challenged is constitutional. Minn. Stat. § 645.17 (3) provides:

> In ascertaining the intention of the legislature the courts may be guided by the following presumptions: …
>
> (3) the legislature does not intend to violate the Constitution of the United States or of this state;… *Id.*
>
> "Every law is presumed to be constitutional in the first instance. An act will not be declared unconstitutional unless its invalidity appears clearly or unless it is shown beyond a reasonable doubt that it violates some constitutional provision. The power of the court to declare a law unconstitutional is to be exercised only when absolutely necessary in the particular case and then with great caution."
>
> *Dimke v. Finke*, 209 Minn. 29, 32, 295 N.W. 75, 78 (Minn. 1940) (emphasis added).
>
> "Laws are presumed to be constitutionally valid. Minn. Stat. § 645.17(3) (2002); *Associated Builders & Contractors v. Ventura*, 610 N.W.2d 293, 298 (Minn.2000). The presumption of constitutional validity governs the adjudication of constitutional challenges until disproved beyond a reasonable doubt. *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10, 13

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> (Minn.1986). Courts have a duty to uphold legislative enactments as reasonably certain when possible, and should 'resort to all acceptable rules of construction to discover a competent and efficient expression of the legislative will.' *State v. Suess*, 236 Minn. 174, 180, 52 N.W.2d 409, 414 (1952). The courts' power to declare a statute unconstitutional should be exercised 'with extreme caution and only when absolutely necessary.' *State v. Fingal*, 666 N.W.2d 420, 423 (Minn.App.2003), *review denied* (Minn. Oct. 21, 2003)."

State v. Enyeart, 676 N.W.2d 311 (Minn. Ct. App. 2004), *review denied* (Minn. May 18, 2004), *cert. denied* 543 U.S. 927 (2004) (emphasis added).

II. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM BECAUSE THE AMENDED COMPLAINT DOES NOT ALLEGE THAT ISD 197 VIOLATED PLAINTIFFS' CONSTITUTIONAL RIGHTS

When making claims against multiple defendants, 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) (individual government officials cannot be held liable for constitutional claims "unless they themselves" acted unconstitutionally) (citation and quotation marks omitted); *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 the question must be whether the conduct of the particular defendants was unconstitutional). Thus, to state a constitutional claim against ISD 197, the Amended Complaint must allege facts that ISD 197 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.

A. The Amended Complaint Does Not Allege that ISD 197 Committed Any Act or Breached Any Duty that Violates the Constitutional Rights of Any Plaintiff.

The Amended Complaint does not allege that ISD 197 violated any particular Plaintiff's constitutional rights. Instead, Amended Complaint blames Minnesota statutes, including provisions governing teacher tenure, dismissal, and reduction-in-force processes. (*See* AC ¶¶ 219-290). ISD 197 did not adopt the statutes, has no power to repeal them, and cannot disregard them.

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See Perry, 297 Minn. 197, 202, 210 N.W.2d 283, 287. 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.)

The Amended Complaint describes school districts behaving "in general" or "on average" in a certain way. Such a description does not constitute an allegation that ISD 197 is actually behaving that way toward any Plaintiff, or is about to behave that way toward any Plaintiff. This, deficiency in Plaintiffs' pleading, demonstrates a failure by the Plaintiffs to plead facts that ISD 197 violated (or is about to violate) any of the constitutional rights upon which the suit rests.

B. Plaintiffs Do Not Have a Constitutional Right to an Effective Teacher.

"[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, Plaintiffs must prove (1) that the Plaintiffs' interest which is allegedly interfered with is a constitutionally protected property interest, and (2) the procedures used were not constitutionally sufficient. *Id.* Few property rights are entitled to due process protection. *Id.* at 830.

Plaintiffs do not allege facts demonstrating that a protected property interest exists in having an effective teacher. "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). "[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 Litigation*, 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 an effective teacher, because state law has not given students "a legitimate claim of entitlement to" it. *Washington*, 590 N.W.2d at 659.

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While in certain instances students have a protected property interest in continued enrollment in school, such a right is not so broad as to include being taught by an effective teacher. In *Goss v Lopez*, 419 U.S. 565 (1975), 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* at 567, s*ee also In re Expulsion of I.A.L.*, 674 N.W.2d 741, 744 (Minn. Ct. App. 2004) (Wright, J.) (citing *Goss*, 419 U.S. at 574).

In *Goss*, the constitutionally protected property-right in receiving a public education arose because an Ohio statute provided that all students between ages 6 through 21 were unconditionally entitled to a free public education. *Id.* 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 what it called "de minimis" deprivations of education which are not protectable property interests. *Id.* at 576. In *Campaign for Quality Education v. California*, 246 Cal. App. 4th 896, 909 (Cal. App. 2016), which is nearly identical to the present case, the court found that a right to a "system of common schools" does translate in to a constitutional right to a "particular quality" of schools.

Plaintiffs also do not have a *liberty*-interest that raises a right to 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 decision-maker that if the regulations' substantive predicates are present, a particular outcome must follow, in order to create a liberty interest." *Id.* at 463. The Continuing Contract Statute does not contain explicitly mandatory language that so limits the discretion of school officials that, where substantive

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predicates specified in state law are present, a student is therefore entitled as a matter of state law to be taught only by an effective teacher. As a result, no liberty interest exists.

Additionally, ISD 197's actions of giving tenure to an ineffective teacher, failing to dismiss or lay off 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'* 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." *United States v. Florida E. Coast Ry. Co.,* 410 U.S. 224, 245 (1973) (quoting *Bi-Metallic Investment Co. v. State Board 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-Metallic,* 239 U.S. at 445). The Minnesota Supreme Court, in applying *Hylen,* 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. Properties Inc. v. Alexander*, 433 N.W.2d 886, 891 (Minn. App. 1988) (quoting *Greenman,* 225 Minn. at 409, 96 N.W.2d at 682), then 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.

Another reason Plaintiffs' constitutional challenge must fail is that the Amended Complaint does not allege that ISD 197 *intentionally* assigned an ineffective teacher to any plaintiff, which is

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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.) Plaintiffs do not allege ISD 197 intends or intended to deprive any Plaintiff of a protected property or liberty interest through teacher assignment.

III. PLAINTIFFS' FACIAL CLAIMS MUST BE DISMISSED BECAUSE THEY ARE NON-JUSTICIABLE AND NOT SUBJECT TO FACIAL CHALLENGES

A. Plaintiffs' Facial Claims Fail Because They are Non-Justiciable.

"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.'" *McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 337 (Minn. 2011) ("*McCaughtry I*") (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 will be 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).

The Amended Complaint says nothing about enforcement or application of the Challenged Statutes by ISD 197 against any Plaintiff, or any imminent threat of enforcement or application of the Challenged Statutes by ISD 197. Instead, the Amended Complaint complains about circumstances allegedly present "in general" (AC ¶ 19) or "on average" (AC ¶ 139) in Minnesota

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schools for "many children" (AC ¶ 24) or "some students" (AC ¶ 112), which are allegedly a consequence of the Challenged Statutes, without ever making any allegation that those laws are being enforced or applied by ISD 197 against any of the Plaintiffs.

Plaintiffs provide minimal facts regarding ISD 197, and those minimal facts merely confirm the irrelevance of ISD 197 as a defendant in this case. The only plaintiff with an alleged connection to ISD 197 is Justina Person. Ms. Person's children J.C. and D.C. are students in ISD 197 (AC ¶ 28) and according to the Amended Complaint "have been assigned to an ineffective teacher who impedes their equal access to the opportunity to receive a uniform and thorough education, and J.C. and D.C. lacks notice of and opportunity to challenge the same." (*Id.*)

Other than these general allegations, the Plaintiff does not allege facts describing how ISD 197 has violated J.C.'s and D.C.'s constitutional rights. For example, the Amended Complaint presents Minnesota Comprehensive Assessment (MCA) data for two ISD 197 schools, Moreland Arts & Health Science Magnet and Mendota Elementary. (AC ¶¶ 145-146 & figs. 13-14). There are no allegations that J.C. or D.C. attends or attended either school. The Amended Complaint makes no factual allegations about anything that is currently happening to either J.C. or D.C. such as the grades they have received or are receiving, their test scores or what may be about to happen to them, as required by *McCaughtry I* and *Lee*. At most, the Amended Complaint alleges that J.C. and D.C., as it alleges with every other Plaintiff, using boilerplate allegations that they "*have been assigned*" to an ineffective teacher (AC ¶ 28). Such an allegation is substantively different than alleging *anything* in the present tense about what is currently happening to J.C. and D.C., or alleging that something unconstitutional is *about to happen* to them. There is no reasonable inference that can be drawn from the allegations regarding J.C. and D.C. (*See* AC ¶ 28).

B. Plaintiff's Facial Claims Fail Because There May be Situations Where the Continuing Contract Statute Might be Applied Constitutionally.

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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)(emphasis in original)).

As the Minnesota Supreme Court 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 that "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* 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)).

To sustain a facial challenge, Plaintiffs must allege that there can be no constitutional application of the Challenged Statutes. Plaintiffs' Amended Complaint fails to allege the qualities that define an "effective" versus "ineffective" teacher, including when and how effectiveness/ineffectiveness is measured. Even under Plaintiffs' view of the Minnesota education system, Plaintiffs would have to agree that the following scenarios, among others, are *constitutional* applications of the Challenged Statutes: (a) an effective teacher is granted tenure;

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(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.

C. The Continuing Contract Statute/Teacher Tenure Act Have Previously Been Reviewed and Upheld.

The Minnesota Supreme Court has upheld the public policy rationale underlying the Continuing Contract Statute (and Teacher Tenure Act) for decades. In *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) the Supreme Court in discussing the Teacher Tenure Act stated, "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."

The Court has observed that the teacher tenure law is "wise legislation, promotive of the best interests, not only of the teachers affected, but of the schools as well." *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). *See also Perry v. Indep. Sch. Dist. No. 696*, 297 Minn. 197, 202-03, 210 N.W.2d 283, 287 (1973) ("We have often recognized that the purpose of the teacher tenure legislation is to protect the educational interests of the state by preventing arbitrary demotions and discharges of teachers which are unrelated to their ability.")

According to the Supreme Court, these laws were enacted for the benefit and advantage of Minnesota's school system:

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> 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. It established *merit* as the essential basis for the *right* of permanent employment.

McSherry v. City of St. Paul, 202 Minn. 102, 108, 277 N.W. 541, 544 (1938).

D. Continuing Contract Statute Does Not Violate the Education Clause of the Minnesota Constitution.

In regard to Plaintiffs' claims of violation of the Education Clause[1], the Amended Complaint does not allege that any of the Challenged Statutes cause *all* Minnesota students to be deprived of "a general and uniform system of public schools," or of a "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.

[1] The Education Clause provides as follows:

> **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.

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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 Education Clause cannot be reconciled with the manner in which the Minnesota Supreme Court explained the Education Clause's meaning in *Skeen v. State*, 505 N.W.2d 299, 310-12 (Minn. 1993). In *Skeen* the court stated that 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. Furthermore, "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, so that the same grade or class of public schools may be enjoyed by all localities similarly situated, and having the requisite conditions for that particular class or grade." *Id.* (quoting *Curryer v. Merrill,* 25 Minn. 1, 6 (1878)(emphasis added)). "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, the Amended Complaint, does not allow the court to conclude that the Continuing Contract Statute (or Teacher Tenure Act) is being applied in a fashion that violates the Education Clause as interpreted by the Supreme Court in *Skeen*. The Challenged Statutes are instrumental in providing a uniform system for the probation, tenure, termination and/or layoff of teachers in all school districts throughout Minnesota.

Moreover, Plaintiffs' argument that the Challenged Statutes violate the Education Clause because the *system* is not "thorough" misses the mark. "Thorough" as it is used in the Education Clause refers to the legislature's duty to "make . . . provisions for"—i.e. providing financing for—

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the State's public schools system. (Minn. Const. Art. XIII § 1; *Skeen*, 505 N.W.2d at 310-11)**.** In this case, Plaintiffs do not challenge the education finance system so the requirement that the Legislature create a thorough system of schools is not implicated.

E. Plaintiffs Facial Challenge Under the Equal Protection Clause Must Also Be Dismissed.[2]

In regard to Plaintiffs' Equal Protection Clause claims, the absence of a valid facial claim is even more obvious. "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 910, 916 (Minn. 1980); *see also Dean v. Winona*, 843 N.W.2d 249, 258 (Minn. App. 2014). The necessity, in a facial equal-protection challenge, that the statute expressly identify classes that are 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. In fact, equal protection claims are "routinely" rejected 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. Ct. App. 2014), *review granted* (Apr. 29, 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)).

[2]Counts 4 through 9 appear to state only an "as applied" Equal Protection challenge to Challenged Statutes; however, the Preliminary Statement at page 2 could be read to allege an Equal Protection "on their face" challenge.

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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, Plaintiffs are not similarly situated in any relevant respect to either class of persons, junior teachers or senior teachers, who are treated differently under the Continuing Contract Statute. Plaintiffs are neither junior teachers nor senior teachers and do not allege to be a member of either class.

The Continuing Contract Statute (and the Teacher Tenure Act) treats junior teachers differently than senior teachers. Such differential treatment is not however, what Plaintiffs allege violates equal protection. Rather, Plaintiffs' position is that the effect of the differential treatment of junior and senior teachers in turn results in differential treatment between different groups of students. While it is an interesting argument, but it does not constitute a *facial* attack under the equal protection clause of Minnesota's Constitution.

Plaintiffs do not claim that senior teachers are inherently ineffective or that junior teachers are inherently effective. They recognize that some Minnesota public school teachers are better than others – and are effective. (AC ¶¶ 65, 112.) A close analysis leads to the conclusion that Plaintiffs are not claiming that the Challenged Statutes are incapable of being applied in a constitutional fashion. Instead, Plaintiffs rely on how they believe the Continuing Contract Statute (and the Teacher Tenure Act) operate in practice. That prevents it from constituting a facial attack as defined by Minnesota's appellate courts.

F. Plaintiffs Lack Standing in Regard to Their Equal Protection Claim.

Plaintiffs lack standing to bring an equal protection challenge to the Challenged Statutes because they are not of the class of individuals governed by the Continuing Contract Statute. In *Paulson v. Lapa, Inc.* 450 N.W.2d 374 (Minn. Ct. App. 1990), *review denied* (March 22, 1990),

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the plaintiff, a bar owner/liquor vendor, brought a constitutional challenge to the Minnesota Dram Shop Act, Minn. Stat. § 380A.801 on the basis of equal protection. The court dismissed the liquor vendor's challenge holding that the bar owner/liquor vendor did not have standing to challenge the Dram Shop Act on equal protection grounds. In denying the challenge the court stated:

> "It is an elementary doctrine of constitutional law that one who invokes the power of the court to declare a statute unconstitutional must be able to show not only that the statute is invalid but that the person has sustained or is in immediate danger of sustaining some direct injury resulting from its enforcement and not merely that the person suffers in some indefinite way in common with people generally…Appellant is a liquor vendor. [Appellant] must therefore, establish that enforcement of the statute in question will result in direct injury to appellant as a *liquor vendor*. Appellant's arguments in its brief concerning denial of equal protection to intoxicated persons and/or their dependents as a result of 'the inequity of the … statute' do not present a justiciable controversy. Appellant lacks standing to raise this issue on behalf of these individuals."

Paulson at 380 (emphasis added). *See also Gruessing v. Kvam Implement Company,* 478 N.W.2d 200, 204 (Minn. Ct. App. 1991)(where court found no standing in equal protection case stating that the "injury in fact" test requires more than an injury to a cognizable interest but instead requires the party seeking review to be him/herself among the injured).

The Amended Complaint does not allege that Plaintiffs have suffered a direct injury arising from ISD 197's application of the Continuing Contract Statute. Instead the Amended Complaint alleges only that the Plaintiffs are suffering in some indefinite way in common with other students generally through the application of Continuing Contract Statute to teachers in ISD 197. The Amended Complaint states that "as direct result of the Challenged Statutes, J.C. and D.C. remain at substantial risk of being assigned to ineffective teachers." (AC ¶ 28). Such vague allegations of damage as alleged in Plaintiffs' equal protection challenge does not rise to the level of a justiciable claim.

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IV. PLAINTIFFS' AS-APPLIED CLAIMS MUST BE DISMISSED BECAUSE THE AMENDED COMPLAINT DOES NOT ALLEGE ISD 197 APPLIED THE LAW IN AN UNCONSTITUTIONAL MANNER

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 ISD 197; (2) that this harm is traceable to ISD 197's challenged actions; and (3) likely to be remedied by this court. *Riehm,* 745 N.W.2d at 873 (citing *Lujan,* 504 U.S. 555, 560-61 (1992)); "[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 the test in *Riehm*. 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. *Conant v. Robins, 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); *Minnesota Break the Bonds Campaign v. Minnesota 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 funded invested by the State Board of Investment, and by group members more directly affected by settlements of Israel in occupied territories); *Westman v. Comm'r of Pub. Safety*, No. A13-1703, 2014 WL 4175805, at *5 (Minn. Ct. App. Aug. 25, 2014) (a consenting drunk driver's

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challenge to the constitutionality of Minnesota's implied-consent statute); *Olson v. State*, 742 N.W.2d 681, 684 (Minn. App. 2007) (challenge to the Minnesota state Job Opportunity Industry Building Zones Program (JOBZ) and the Biotechnology and Health Sciences Industry Zone Program (BHSIZ), brought by a citizen and partnership who argued that the programs' tax exemption incentives would result in an increase in tax burden on them.).

Second, what the Amended Complaint describes as "a substantial risk of being assigned to an ineffective teacher," (AC at ¶ 28), 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 classes to which J.C. and D.C. are assigned and that, but for the Continuing Contract Statute, a hypothetical third-party *effective* teacher would be available, licensed, ready and willing to teach. That premise depends on the choices of hypothetical effective and ineffective teachers, J.C. and D.C.'s classmates, and others "not before the court."

Furthermore, 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 ISD 197, but have instead placed all blame for it on the Challenged Statutes themselves.

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Third, there is little chance that presence of ineffective teachers will be likely remedied by the court. ISD 197 is party to a collective bargaining that limits its right to summarily terminate "ineffective" teachers. In addition, in deciding whom to terminate as "ineffective" and under what standard, the court would have to become involved in a forum that courts normally leave to school administrators. *See Schaffer v. Weast*, 546 U.S. 49, 59 (2005), (Application of Individuals with Disabilities in Education Act ("IDEA"), 20 U.S.C. § 1400 *et. seq.*, relies upon the expertise of school districts to meet the goals the statute); *Epperson v. Arkansas*, 393 U.S. 97,104 (1968)("[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."); *Eason v. Indep. School Dist. No. 11,* 598 N.W.2d 414, 419 (Minn. Ct. App. 1999) (court reluctant to substitute its supervision for school's judgment in student suspension cases).

V. EDUCATIONAL MALPRACTICE IS NOT A COGNIZABLE CLAIM IN MINNESOTA

Plaintiffs' real challenge to the Continuing Contract Statute is that Plaintiffs have received or will receive an inadequate education, in other words they have been subject to malpractice. It is well settled that such a claim is not cognizable under Minnesota law because Minnesota does not recognize claims for educational malpractice. *See Alsides v. Brown Institute, Ltd.*, 592 N.W.2d 468, 471, 472 (Minn. Ct. App. 1999) (where court reinterpreted complaint as pleading an education malpractice claim, where complaint alleged "that the education they received was inadequate and the instructors were not competent" and court concluded that Minnesota does not recognize such a claim). An allegation that an instructor was not competent is indistinguishable from Plaintiffs' allegations in this case, that certain teachers are ineffective.

Plaintiffs seek relief on the basis that the Plaintiff's minor children have been taught by or may someday be taught by ineffective teachers. Moreover, the Amended Complaint does not even

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allege whether Plaintiffs' minor children have been taught by ineffective teachers. The Amended Complaint does not provide a working definition of what constitutes an "ineffective" teacher. 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 employed yet another definition of "effective" based on classroom observations, student surveys, and achievement data.

Educational malpractice claims have been rejected for several reasons including the courts' reluctance to become involved in overseeing the day-to-day operation of the schools and the potential flood of litigation that could arise if such claim is recognized. *Alsides* at 472. It is difficult to believe that if Plaintiffs do not have the right to challenge the quality of education through tort law that the right to challenge the quality of education would arise via a constitutional claim.

VI. PLAINTIFFS' PRAYER FOR RELIEF FAILS TO MEET THE STANDARD FOR INJUNCTIVE RELIEF

Plaintiffs' demand for injunctive relief, does not meet the *Dahlberg* factors standards for an injunction. In order for a party seeking injunctive relief to prevail it must meet the following standards:

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> (1) The nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief.
> (2) The harm to be suffered by plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial.
> (3) The likelihood one party or the other will prevail on the merits * * *.
> (4) The * * * consideration of public policy expressed in the statutes, State and Federal.
> (5) The administrative burdens involved in judicial supervision and enforcement of the temporary decree.

Dahlberg Bros. Inc. v. Ford Motor Co., 272 Minn. 264, 274-75, 137 N.W.2d 314, 321-22 (1965).

Plaintiffs' request for an injunction fails to meet at least three of the *Dahlberg* factors. As described throughout this Memorandum of Law, it is unlikely that Plaintiffs will prevail on the merits. The public policy favoring the two Challenged Statutes has been affirmed by the Minnesota Supreme Court. *See Frye v. Indep. Sch. Dist. No. 625*, 494 N.W.2d 466 (Minn. 1992); *State ex rel. Ging v. Bd. of Ed. of City of Duluth*, 213 Minn. 550, 568, 7 N.W.2d 544, 554-55 (1942); *Perry v. Indep. Sch. Dist. No. 696*, 297 Minn. 197, 210 N.W.2d 283 (1973).

In addition to failing on the factors of likelihood of success on the merits and public policy considerations, granting Plaintiffs' request for an injunction could open the floodgates for other students seeking their own challenge or review of an alleged ineffective teacher thereby imposing an immense administrative burden on the courts. *See Shakopee Mdewakaton Sioux Community v. Minnesota Campaign Finance and Public Disclosure Board*, 586 N.W.2d 406 (Minn. Ct. App. 1998) (court affirmed denial of injunction in part ruling that while administrative burden in enforcing injunction in regard to parties would not cause a burden, an administrative burden could result when other tribes similarly situated to appellant seek their own injunction).

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Overseeing or second guessing a school district's judgment in exercising its statutory duties has also been determined to create an administrative burden on the courts. In *Eason v. Indep. School Dist. No. 11*, 598 N.W.2d 414 (Minn. Ct. App. 1999), the court considered the request for injunctive relief related to the suspension of a student. In analyzing the burden placed upon the court to enforce the injunction, the court found that even though an injunction may not require any court supervision, "the preservation of judicial resources argues against substituting judicial supervision for a school's judgment in suspension cases." *Id.* at 419. A similar burden exists in this case. Pursuant to the Continuing Contract Statute, ISD 197 is given the authority, within the parameters of the statute to grant tenure or non-renew probationary teachers, terminate teachers or lay teachers off. By seeking an injunction, Plaintiffs seek to impose judicial supervision over a school district's judgment in conducting its duties under the Continuing Contract Statute. What Plaintiffs are requesting is nothing less than asking the courts to review every tenure, termination or layoff decision made by every school district in the state.

CONCLUSION

For the reasons stated above, Plaintiffs' claims against ISD 197 should be dismissed with prejudice.

Dated: June 16, 2016

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ACKNOWLEDGMENT

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/James K. Martin