STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT
Case Type: Other Civil

Tiffini Flynn Forslund et al.,

Plaintiffs,

v.

State of Minnesota, et al.,

Defendants.

Case No. 62-CV-16-2161

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

I. PLAINTIFFS' EDUCATION CLAUSE CLAIM AGAINST THE SCHOOL DISTRICT DEFENDANTS IGNORES THE PLAIN LANGUAGE OF THAT CLAUSE, WHICH IMPOSES DUTIES SOLELY ON "THE LEGISLATURE."

School districts are improper defendants in a suit under the Education Clause. The Education Clause imposes duties on "the legislature" alone:

> 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 (emphasis added). Because the plain terms of the Education Clause impose duties *only* on the Minnesota Legislature, parties *other than* the State cannot have violated that Clause.

Plaintiffs' Responsive Brief simply asserts that school districts are proper defendants because they supervise and control school staffing decisions. (Br. at 7-8.) This brush-off reflects the common, but fatal, error of failing to first answer the "who" question—who has violated the Education Clause of the Constitution? *Doe v. Piper*, No. CV 15-2639 (JRT/SER), 2016 WL 755619, at *7 (D. Minn. Feb. 25, 2016) ("The fundamental question . . . is the who question: who

has violated the Constitution?" (quoting Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 Stan. L. Rev. 1209, 1210 (2010))). "Some clauses of the Constitution are written in the active voice, with 'Congress' as their only subject; at least if one of these clauses is at issue, then Congress must be the answer to the who question." Rosenkranz, supra, at 1235. In the Education Clause, "the legislature" is the only entity named, so a school district cannot be "the answer to the who question," and therefore cannot be a proper defendant in an Education Clause case.

II. PLAINTIFFS' BRIEF DEMONSTRATES THE IMPORTANCE OF ENFORCING THE "ACTUAL OR IMMINENT INJURY IN FACT" REQUIREMENT AT THE OUTSET OF EVERY CASE.

Plaintiffs concede that an injury-in-fact is necessary for standing, and that the alleged injury must be "(a) concrete and particularized and (b) 'actual or imminent,', not 'conjectural' or 'hypothetical.'" (Br. at 30 (quoting *In re Custody of D.T.R.*, 796 N.W.2d 509, 512 (Minn. 2011)) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).)[1] Yet, on the question of whether the Amended Complaint has actually satisfied that standard, Plaintiffs discourage the Court from looking too closely at what the Amended Complaint does and does not say. For example, on critical points, Plaintiffs' Responsive Brief embellishes what the Amended Complaint actually alleges. Paragraphs 69, 70, 92, and 115 of the Amended Complaint speak only of effects that the Challenged Statutes "frequently" or "rarely" have, but stop short of alleging that such effects actually happened in the schools or districts of any School District

[1] Three pages later Plaintiffs deny that Minnesota has adopted the *Lujan three*-element test for standing. (Br. at 33-34.) Yet the sole case Plaintiffs cite as authority for a *single*-element test for standing, *In re D.T.R.*, recites—without any hint of criticism or disagreement—*Lujan*'s *three*-element test. 796 N.W.2d at 512. It is also easy to find recent Minnesota appellate court decisions applying a redressability dimension to standing. *See, e.g.*, *State ex. rel. Sviggum v. Hanson*, 732 N.W.2d 312, 322 (Minn. App. 2007) ("[J]udicial action is sustainable only when the controversy presents an injury that a court can redress."). Plaintiffs' efforts to evade the second and third elements of the *Lujan* test must fail.

Defendant. Plaintiffs' brief, however, holds those paragraphs out as alleging "that chronically ineffective teachers maintain their jobs *in the schools attended by Plaintiffs' children* as a direct result of how the Defendants administer the Challenged Statutes when making hiring and firing decisions." (Br. at 14 (citing Amended Complaint("AC") ¶¶ 69-70, 92, and 115)) (emphasis added). Plaintiffs also expect the Court to imply from their argument that "the Challenged Statutes (and Defendants' actions to enforce them) burden their children's fundamental right to a uniform and thorough education," (Br. at 30), that the supposed burden on Plaintiff Forslund's 17-year-old daughter K.F. is, in fact, concrete, particularized, and "actual or imminent," (Br. at 31), even in the absence of any allegations that K.F. is currently taught by constitutionally-inadequate AHSD teachers or that her assignment to be taught by constitutionally-inadequate teachers is imminent. Plaintiffs' approach essentially makes K.F.'s "actual or imminent" ineffective teachers hypothetical.

Cutting the Plaintiffs slack when applying the "actual or imminent injury in fact" requirement would render the application of the substantive constitutional tests a sham. That is because it would allow Plaintiffs to defeat some or all of the substantive aspects of the motions by simply sculpting characteristics of hypothetical teachers, and their relationship to K.F. and AHSD, to fit whatever substantive constitutional standard they need to satisfy. If Plaintiffs' actual or imminent teachers are hypothetical, the *actual* skills, experience, and history of K.F.'s *actual* teachers, the *actual* balance of low-income students and students of color in her high school, and the role—*if any*—that the Challenged Statutes actually played in causing them to teach K.F., cannot get in the way of Plaintiffs' ability to tell a bad story. In other words, Plaintiffs cannot ignore the *actual* facts. That kind of expositional latitude is especially useful for

Plaintiffs, because a particularly *bad* story is necessary to state claims under the constitutional provisions that Plaintiffs have invoked. But it is no way to apply the Minnesota Constitution.

III. PLAINTIFFS HAVE FAILED TO SATISFY THE STANDARD FOR A FACIAL ATTACK.

Minnesota appellate courts have repeatedly held—as recently as June 13, 2016—that "in a facial challenge to constitutionality, the challenger bears the heavy burden of proving that the legislation is unconstitutional in all applications." *Golden Valley v. Wiebesick*, -- N.W.2d --, No. A15-1795, 2016 WL 3223237, at *2 (Minn. App. June 13, 2016) (citation and quotation marks omitted); *see also State v. Bernard*, 859 N.W.2d 762, 765 n.2 (Minn. 2015), *aff'd sub nom. Birchfield v. North Dakota*, No. 14-1468, 2016 WL 3434398 (U.S. June 23, 2016); *McCaughtry v. City of Red Wing*, 831 N.W.2d 518, 522 (Minn. 2013); *Minn. Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683, 696 (Minn. 2009). Plaintiffs seek to take many of the teeth out of this standard, by contending that before *Bernard*, in the First Amendment section of *Rew v. Bergstrom*, 845 N.W.2d 764 (Minn. 2014), the Supreme Court essentially overruled, sub silentio, the entire *Ness*/*McCaughtry/Minnesota Voters Alliance* line of cases and replaced that test with an easier one. (Br. at 9.) The apparent basis for that startling development is that Mr. Rew was given a chance to make a facial attack by showing that "a substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." 845 N.W.2d at 778 (citation and quotation marks omitted).

In giving this part of *Rew* such revolutionary effect (notwithstanding the *Bernard* and *Golden Valley* decisions that followed it), Plaintiffs forget that, for decades, facial attacks under the First Amendment (or its Minnesota Constitution's counterpart) have been subject to a different (and lighter) standard. As the U.S. Supreme Court held in *Village of Hoffman Estates v. Flipside, Hoffman Estates Inc.*, 455 U.S. 489, 494-95 (1982), the question of whether a law

reaches a substantial amount of First-Amendment-protected conduct is a proper way to determine whether a law's overbreadth violates the First Amendment, but is not sufficient for determining whether it is unconstitutional under a different constitutional provision. On the non-First Amendment claim (which in *Hoffman Estates* was the void-for-vagueness branch of the due process clause), "the complainant must demonstrate that the law is impermissibly vague in all of its applications." *Id.* at 497. Minnesota's appellate courts follow *Hoffman Estates* on this point. *See, e.g.*, *State v. Enyeart*, 676 N.W.2d 311, 320 (Minn. App. 2004) ("To succeed in a facial challenge to vagueness *outside the context of the First Amendment*, a complainant must demonstrate that the law is impermissibly vague in *all* its applications." (first emphasis added)). The "unconstitutional in all applications" standard applies to all of Plaintiffs' claims.

In any event, Plaintiffs' Amended Complaint fails to allege that the Challenged Statutes are unconstitutional in all applications (or even that a substantial number of its applications are unconstitutional). To the contrary, the Amended Complaint repeatedly recognizes that the vast majority of Minnesota public school teachers are better than others—and are effective. (AC ¶¶ 53, 65, 112.) In response to Defendants' motions, however, Plaintiffs have cranked up their rhetoric, arguing that "as written, the Challenged Statutes will always result in deprivation of students' fundamental right to education." (Br. at 11.) Plaintiffs' explanation of the basis for this remarkable assertion simply demonstrates that they fundamentally misunderstand the difference between statutes that sometimes result in hardships for some citizens, and facially unconstitutional statutes. (*See, e.g.*, Br. at 12 ("Thus, in all circumstances, a Minnesota teacher will be awarded super due process protections prior to a reliable assessment of his long-term effectiveness, at the risk of depriving students of fundamental rights guaranteed by the Education Clause of the Minnesota Constitution.")). An unpleaded, unstated—and absurd—premise of the

Responsive Brief's logic is that all, or substantially all, teachers become *worse* with experience, so that statutes that tie teachers' job security to their experience are the reason why some students have ineffective teachers. Of course, as AHSD predicted in its opening brief, Plaintiffs do not disagree that the following scenarios 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 an ineffective junior teacher; and, (d) the district dismisses an ineffective teacher. (AHSD Op. Br. at 15.) Plaintiffs' facial challenge must therefore fail.

IV. PLAINTIFFS' INABILITY TO SATISFY THE STANDARDS FOR A FACIAL CLAIM ARE FATAL TO THEIR ENTIRE SUIT, BECAUSE THEIR AMENDED COMPLAINT INCLUDES NO "AS APPLIED" CLAIM WITHIN THE PROPER LEGAL MEANING OF THAT TERM.

Not surprisingly, Plaintiffs fall back on the Amended Complaint's use of the phrase "as applied" as a kind of refuge from dismissal. Such arguments rest on the false premise that every claim that fails to satisfy the standards for a facial challenge can survive dismissal as an "as applied" challenge, regardless of whether the defendant-movant ever actually applied that statute to any plaintiff.

Plaintiffs' response ignores two important principles. First, a genuine "as applied" claim must arise from "how the statute was applied in the particular context in which plaintiff acted or proposed to act." *State v. Lowe*, 861 N.E.2d 512, 515 (Ohio 2007) ("In an as-applied challenge, the challenger 'contends *that application* of the *statute in the particular context in which he has acted, or in which he proposes to act*, [is] unconstitutional.'" (emphasis added) (citation omitted)); *see Frye v. City of Kannapolis*, 109 F. Supp. 2d 436, 439 (M.D.N.C. 1999) (same). In this case, the Amended Complaint does not (and cannot) describe any application by AHSD of any of the Challenged Statutes "in the particular context *in which [plaintiff] has acted*" or

plaintiff has *"propose[d] to act*." It simply is not that type of suit, because the Plaintiffs are parents of students and the Challenged Statutes are applied only to teachers.

Second, Plaintiffs also forget that a genuine "as applied" claim seeks relief that is specific to the plaintiff herself. That is because "[t]he remedy for a facial challenge is the broad invalidation of the statute in question, but the remedy for an as-applied challenge *bars its enforcement against a particular plaintiff alone under narrowed circumstances*." *Green Party of Penn. v. Aichele*, 89 F. Supp. 3d 723, 737 (E.D. Pa.) (emphasis added), *aff'd*, 103 F. Supp. 3d 681 (E.D. Pa. 2015). In a genuine "as applied" challenge, the available relief is narrow, obvious and noncontroversial—one defendant's convictions or sentences are overturned, one plaintiff's denied permit applications are granted, and the like. Yet these Plaintiffs' Prayer for Relief seeks no relief at all that is particularized to Plaintiffs. Instead, all of the relief sought—declaring state statutes invalid generally, enjoining their enforcement or implementation generally, and preventing similar laws or policies from being adopted generally—presumes a successful *facial* attack on the Challenged Statutes.

V. PLAINTIFFS' BRIEF FURTHER UNDERMINES THEIR STANDING ARGUMENT, BY DEMONSTRATING HOW TRULY GENERALIZED IS THEIR GRIEVANCE REGARDING THE CHALLENGED STATUTES.

A plaintiff "must articulate a legally cognizable interest that [she] has suffered because of the State's action and that differs from injury to the interests of other citizens generally"—that is, a plaintiff's alleged injury must be "particularized." *Webb Golden Valley, LLC v. State*, 865 N.W.2d 689, 693 (Minn. 2015) (citation and quotation marks omitted). While conceding that standing must be based on a "particularized" injury, (Br. at 30), Plaintiffs' brief makes it even clearer that their challenge to the adoption and enforcement of the Challenged Statutes is a "generalized grievance." If—as they now state—"as written, the Challenged Statutes will always result in deprivation of students' fundamental right to education," (Br. at 11), then the alleged

violation is one that is shared by all parents of public school students, a group broad enough to make Plaintiffs' grievance "generalized." Like the plaintiffs in *Westman v. Comm'r of Public Safety*, No. A13-1703, 2014 WL 4175805 (Minn. App. Aug. 25, 2014), whose alleged injuries were shared by thousands of Minnesotans, Plaintiffs are pursuing generalized—rather than particularized—grievances, and for that reason lack standing for an "as applied" challenge.

Plaintiffs' proffered excuse for not alleging a particularized injury to K.F. (the one student enrolled in AHSD) is "to protect the privacy of Plaintiffs' children and their teachers." (Br. at 31 n.18.) Yet that does not come close to explaining Plaintiffs' failure to allege that K.F. actually has been assigned an ineffective teacher, is currently assigned an ineffective teacher, or will imminently be assigned an ineffective teacher, let alone that she has been deprived of an education that "will fit [her] to discharge intelligently [her] duties as [a] citizen[] of the republic." (Br. at 2.) Nor do privacy concerns explain why—in touting the disparities in AHSD schools—Plaintiffs point to MDE Report Card data and average test scores at two AHSD elementary schools (which they do not allege K.F. attended) instead of K.F.'s own high school, let alone K.F.'s own standardized test scores or academic performance. Plaintiffs' presentation of generalized data unrelated to K.F.'s own academic performance simply underscores that Plaintiffs' grievance is a generalized grievance rather than a particularized one.

CONCLUSION

For the reasons set forth above and in its opening brief, AHSD respectfully requests the Court dismiss Plaintiffs' claims against it.[2]

[2] To avoid repetition, AHSD also incorporates by reference the Rule 12 arguments of its co-defendants.

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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.

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