Filed in Second Judicial District Court
7/11/2016 3:23:22 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 REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

I. PLAINTIFFS HAVE FAILED TO IDENTIFY A JUSTICIABLE CONTROVERSY.

In Plaintiffs' feeble attempt to address the critical question of justiciability in just two pages, they fail to address all elements of this essential doctrine. Justiciability is necessary for the Court to have 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).

Filed in Second Judicial District Court
7/11/2016 3:23:22 PM
Ramsey County, MN

A. Plaintiffs do not have "definite and concrete" assertion of right because Plaintiffs do not have a Constitutional right to be taught by effective teachers.

Plaintiffs assert that they have "clearly presented" a justiciable controversy because they have alleged a burden on a constitutional right. Pl. Br. 30. But in making this claim and brushing off the Defendants' arguments with two sentences, Plaintiffs fail to address the underlying question of whether they have a Constitutional right to effective teachers. Despite Plaintiffs' continued insistence, they do not.

The Education Clause solely imposes duties upon the legislature. *See* Minn. Const. art XII, § 1. It does not impose any direct duties on school districts. Although Plaintiffs are quick to assert that the State is a proper party (Pl. Br. 36) and all school districts are not proper parties (Pl. Br. 37), they fail to identify why any individual school district has a fixed duty to provide an education consistent with the Education Clause to any individual Plaintiff. The legislature, not school districts, is the party to whom the Education Clause is directed.

Even if the Education Clause confers an individual right to a certain quality of education, Plaintiffs have failed to plead a violation of any such right. As Plaintiffs explain, *Skeen* cites a West Virginia case describing a "thorough and efficient system." Pl. Br. 17; *Skeen v. State*, 505 N.W.2d 299, 310-11 (Minn. 1993). Contrary to Plaintiffs' assertions, however, this case does not stand for a constitutional right to educating each child to her capacity of "academic achievement." Pl. Br. 17. *Skeen* sets a much lower bar in defining this "thorough and efficient system, which includes:

> development in every child to his or her capacity of (1) literacy; (2) ability to add, subtract, multiply and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work to know his or her options; (5) work-training and advanced academic training as the child may intelligently choose; (6) recreational pursuits;

Filed in Second Judicial District Court
7/11/2016 3:23:22 PM
Ramsey County, MN

> (7) interests in all creative arts, such as music, theatre, literature, and the visual arts; (8) social ethics, both behavioral and abstract, to facilitate compatibility with others in this society.

Skeen, 505 N.W.2d at 310-11, *quoting Pauley v. Kelly*, 255 S.E.2d 859, 877 (W. Va. 1979). Notably, this definition does not include Plaintiffs' identified benchmark metrics such as MCA scores administered to fourth graders as the measure of whether any such Constitutional duty has been fulfilled. In fact, these elements seem to suggest that any such duty may be fulfilled throughout the course of a student's educational career, rather than at arbitrary snapshots. For example, it does not require that a kindergartener have knowledge of government or a fifth grader be able to "intelligently choose life work." In fact, the academic expectations set a relatively low bar for the results of the complete system of education, which in Minnesota is offered in public schools through twelfth grade. Nowhere in Plaintiffs' lengthy Amended Complaint do they assert that any of their children have not or will not attain literacy or the ability to add, subtract, multiply and divide numbers by the time they complete their public education, thus they have failed to identify any violation of a definite and concrete legal right. Even if the Court accepts *Skeen* as identifying components of a thorough and efficient system, it does not include the "high quality" requirement Plaintiffs claim.[1]

Because Plaintiffs have failed to identify a Constitutional right at issue in this litigation or, in the alternative, have failed to allege any violation of such right, there is no justiciable claim before the Court.

[1] Of course, the State has established certain benchmarks to measure whether student academic work is above, at, or below grade level standards and many school districts strive to exceed the minimum requirements. These statutory and administrative goals are supererogatory to any *Constitutional* duty.

Filed in Second Judicial District Court
7/11/2016 3:23:22 PM
Ramsey County, MN

B. There is no "genuine or present controversy" between Plaintiffs and the School District Defendants.

Plaintiffs assert that a "genuine or present controversy" exists because the School District Defendants are required to enforce the laws and Plaintiffs claim the enforcement of the laws results in deprivation of a constitutional right. But Plaintiffs misidentify the party with whom the controversy exists. The School District Defendants have no authority to challenge, modify, or ignore the Challenged Statutes because the School Districts only have the powers that the legislature has granted them. *See Perry v. Indep. Sch. Dist. No. 696*, 210 N.W.2d 283, 286 (1973). There may be a controversy between Plaintiffs and the legislature, but Plaintiffs have failed to identify one between Plaintiffs and the School Districts, as is necessary to state a justiciable controversy between these parties.

C. Plaintiffs' complaint is not capable of specific resolution and instead requests a ruling on the hypothetical possibility that Plaintiffs' children might be assigned "ineffective" teachers.

Plaintiffs have pleaded that E.Q. (the only student who attends school in ISD 709) might or might not have been assigned one or more ineffective teachers in the past, and might or might not be assigned one or more ineffective teachers in the future.[2] Am. Cmplt. ¶ 29. The inadequacy of resolution on these hypothetical facts is clear whether the court looks to remedy past or future hypothetical damages.

If, hypothetically, E.Q. had an ineffective teacher in the past (although there is no pleading to this effect), Plaintiffs have not requested *any* retroactive relief that would correct for this past harm. Thus any past claims based on E.Q. having has an ineffective teacher in the past

[2] Plaintiffs' response to this argument provides further support that the School District Defendants are not proper parties to this litigation. Plaintiffs acknowledge that the remedy they seek is to enjoin "*state* action." Pl. Br. 33 (emphasis in original).

Filed in Second Judicial District Court
7/11/2016 3:23:22 PM
Ramsey County, MN

are not capable of specific resolution in this matter because Plaintiffs fail to identify a remedy through this declaratory judgment proceeding.

The parties do not, and cannot, know if E.Q. will have an ineffective teacher at some time in the future. This argument necessarily requires that the Court speculate as to what might happen to E.Q. If, hypothetically, E.Q. is assigned an ineffective teacher in the future, the remedy requested does not solve this potential future harm. Plaintiffs ask the Court to declare the Challenged Statutes unconstitutional and issue a permanent injunction enjoining the School Districts from enacting similar provisions by contract "*at any time in the future*." Am. Cmplt. § VII, Prayer for Relief (emphasis added). Since Plaintiffs allege that a teacher's effectiveness cannot be measured immediately, their proposed resolution would still allow potentially ineffective teachers to be in the classroom for the time period *before* they can be deemed ineffective. Additionally, this proposed resolution assumes that people who will someday be labeled "effective" teachers choose to work as teachers once tenure protections are no longer available.

II. PLAINTIFFS HAVE FAILED TO PLEAD A VALID CLAIM AGAINST THE SCHOOL DISTRICT DEFENDANTS.

Plaintiffs purported interest in privacy, which is not justified by Minnesota law,[3] does not excuse their failure to plead sufficient facts to support a claim for relief. *See* Pl. Br. 31, n. 18. While Plaintiffs also claim the absence of relevant information is a "stylistic" choice, this decision has resulted in a pleading that fails to state a claim. Plaintiffs know, or could easily find out: which schools their children attend, which teachers have taught their children, and their

[3] Minnesota General Rule of Practice 11.01 prohibits the use of certain "restricted identifiers" in court pleadings. Defendants have not alleged that Plaintiffs needed to include social security numbers, financial account numbers, or other restricted information. Instead, Defendants have simply asserted that the Amended Complaint fails to allege information which, accepted as true, entitles the Plaintiffs to relief.

Filed in Second Judicial District Court
7/11/2016 3:23:22 PM
Ramsey County, MN

childrens' MCA test scores. But rather than looking at this readily available information to identify any concrete harm, Plaintiffs choose simply to use boilerplate to claim individual students might have in the past and might in the future suffer harm.

Plaintiffs are correct that Minnesota is a notice-pleading state. Pl. Br. 31, n. 18. But contrary to their allegations, the Amended Complaint does not give the Defendants enough information to understand the claims against them. ISD 709 does not know, and cannot determine from the Amended Complaint, *which* of E.Q.'s past teachers are alleged to be ineffective, or which teachers who might in the future be assigned to teach E.Q. are alleged to be ineffective.

Moreover, in their haste to amend the Complaint to include the School District Defendants, Plaintiffs failed to include allegations that the School District Defendants actually took, are about to take, failed to take, or are about to fail to take any actions that caused or will cause harm to Plaintiffs' children. There is simply no allegation any where in the Amended Complaint regarding actions taken by individual school districts rather than general allegations about how school districts operate in the aggregate. Rather than allege, in the case of ISD 709, that the District intentionally assigned specific, identifiable ineffective teachers to teach E.Q., Plaintiffs broadly allege that it might have happened. At the absolute, most basic level of pleading, Plaintiffs have failed to state a claim upon which relief can be granted.[4]

Plaintiffs allege that because they have pleaded a Constitutional claim, Minnesota's rejection of educational malpractice torts does not apply. But Plaintiffs ignore that educational

[4] Plaintiffs note that their Amended Complaint is "extensive and detailed." Pl. Br. 32. Defendants are also surprised that in 75 pages and nearly 300 paragraphs, the Amended Complaint fails to accomplish the basic requirement of stating sufficient facts which establish a claim for relief. This omission speaks to the Plaintiffs' apparent broader purpose of striking down statewide laws rather than seeking individual remedies for their own children. *See, e.g.,* AHSD Opening Br. 21-22 (arguing generalized grievances are insufficient to confer standing).

Filed in Second Judicial District Court
7/11/2016 3:23:22 PM
Ramsey County, MN

malpractice is rarely, if ever, pleaded as a tort claim for educational malpractice. Rather, Courts examine the claims as a whole and, when appropriate, re-cast the claim as one for malpractice. *See Zinter v. Univ. of Minn.*, 799 N.W.2d 243, 246-47 (Minn. App. 2011) (affirming lower court decision that breach of contract and promissory estoppel claims against public university were "essentially claims for educational malpractice"); *see also Smith v. Argosy Educ. Grp., Inc.*, No. A08-0222, 2008 WL 4977598 at *1-*2 (Minn. App. Nov. 25, 2008) (affirming dismissal of contract claim as attempted educational malpractice claim where it would require "a discussion of [the school's] education judgment or procedures).

Plaintiffs misunderstand the structure of Minnesota's independent school districts by asserting that "Defendants cannot avoid culpability for the constitutional violations alleged by pinning the blame on individual schools." Pl. Br. 18. The distinction between a public school and a public school district for the purpose of legal action is meaningless because a public school is not an individual entity subject to suit. *See* Minn. Stat. § 123B.25, subd. 1 (authorizing legal actions to be brought against school districts); § 123B.02, subd. 1 (A school board "must have the general charge of the business of the district, the school houses, and of the interests of the schools thereof."). That *Alsides* referred to "schools" because the defendant in that case was a school that was its own corporate entity does not silently authorize such action against public school districts. The plain holding of *Alsides* is that claims for educational malpractice, i.e. "claims that would require the court to engage in a 'comprehensive review of a myriad of education and pedagogical factors, as well as administrative policies,'" are not recognized in Minnesota. *Alsides v. Brown Inst. Ltd.*, 592 N.W.2d 468, 473 (Minn. App. 1999), *quoting Andrev. Pace Univ.*, 655 N.Y.S.2d 777, 779 (N.Y. App. Term 1996). Even Plaintiffs acknowledge that the "essence" of an educational malpractice claim is that a "school failed to

Filed in Second Judicial District Court
7/11/2016 3:23:22 PM
Ramsey County, MN

provide an effective education." Pl. Br. 18 (citation and quotation omitted). The allegations in the Amended Complaint fit precisely within this definition because they challenge the quality of education the Plaintiffs' children receive.

But even if the Court does not recast the claims as educational malpractice tort claims, the public policy concerns that form the basis for appellate courts' rejection of such claims apply in this case. In fact, the public policy concerns are amplified by the Plaintiff's proposed radical reinterpretation of the Education Clause that would make the quality of a student's education a constitutional claim. Joining numerous other jurisdictions that rejected educational malpractice claims, the *Alsides* court identified the core public policy concerns as:

> (1) the lack of a satisfactory standard of care by which to evaluate an educator; (2) the inherent uncertainties about causation and the nature of damages in light of such intervening factors as a student's attitude, motivation, temperament, past experience, and home environment; (3) the potential for a flood of litigation against schools; and (4) the possibility that such claims will "embroil the courts into overseeing the day-to-day operations of schools."

Alsides, 592 N.W.2d at 472 (citations omitted). Each of these public policy concerns remains significant if the Court recognizes a Constitutional cause of action against individual school districts based on a student's dissatisfaction with the education received. Notably, the concern that courts will become "embroil[ed]… into overseeing the day-to-day operations of schools" is part of the Plaintiffs' requested relief as Plaintiffs ask the Court to retain jurisdiction until "the Court has determined that Defendants have properly and fully complied with its Orders." Am. Cmplt. § VII, ¶ 6. ISD 709 alone has over 1,000 teachers in fourteen schools for whom the Court would be required to review effectiveness (once the Court identified a metric for doing so). At the same time, courts around the State would see an explosion of litigation from students who received unsatisfactory grades claiming a violation of their Constitutional rights. It is hard to

Filed in Second Judicial District Court
7/11/2016 3:23:22 PM
Ramsey County, MN

imagine that court review of teacher quality is what the drafters of the Minnesota Constitution envisioned when they adopted the Education Clause and assigned duties to the legislature.

Plaintiffs have failed to plead a legally cognizable claim against the School District Defendants and Plaintiffs' claims must be dismissed.

III. PLAINTIFFS DO NOT HAVE DUE PROCESS RIGHTS TO BE NOTIFIED AND HAVE AN OPPORTUNITY TO BE HEARD BEFORE BEING TAUGHT BY AN "INEFFECTIVE" TEACHER.

Plaintiffs allege that they are unconstitutionally deprived of liberty or property without due process if they do not receive notice that their student "is, will be or has been taught by an ineffective teacher" plus the opportunity to challenge a school district's decision to continue to employ or grant tenure to an ineffective teacher, (Am. Complt. ¶¶ 273-275; 279-281), as well as notice of any quality-blind layoffs of effective junior teachers and non-layoffs of ineffective senior teachers and a mechanism to challenge the result (Am. Cmplt. ¶¶ 285-86). If motions were decided based on audacity the Plaintiffs would win handily on this particular set of claims, because the very thing that Plaintiffs claim parents and students are constitutionally entitled to receive has never existed in any state. Fortunately, audacity counts for nothing. Plaintiffs' responsive brief fails to plug one or more of the holes in their procedural-due-process claim that were identified in Defendants' opening briefs, so the procedural due process claims must be dismissed.

A failure to have provided parents or students with such notice and opportunities to challenge these school district staffing decisions is not a constitutional violation if it does not result in a *deprivation* of a *property* interest in the proper sense of those terms, and Plaintiffs do

Filed in Second Judicial District Court
7/11/2016 3:23:22 PM
Ramsey County, MN

not argue otherwise.[5] By borrowing just enough words from court cases to create a misleading impression of precedent for their theory, Plaintiffs hope to convince the court to embrace a very *improper* sense of the terms "deprivation" and "property interest."

Plaintiffs argue that a deprivation of a constitutionally-protected property interest occurs every time "the education received as a result of the challenged state action 'is significantly different from or inferior to that received' by other students." (Pl. Br. 28, quoting *J.K. ex rel. Kaplan v. Minneapolis Pub. Sch. (Special Sch. Dist. No. 1),* 849 F. Supp. 2d 865, 874 (D. Minn. 2011)). The *Kaplan* decision said nothing of the sort. The plaintiff in that case tried—and failed— to convince the court that a transfer from Southwest High School to a different school "deprives him of his property interest, under Minnesota law, in a public education." *Id.* at 871. In rejecting that claim with gusto, the court acknowledged that "changing high schools will be a substantial hardship" for the student, but explained:

> But to argue that attending a high school other than Southwest would deprive J.K. of a public education—that is, of any public education—**is tantamount to arguing that all of the high-school students in the District who are not attending Southwest are themselves not receiving a public education**. The argument is **meritless**.

Id. (emphasis added). Far from providing precedent for the notion that a deprivation of a property interest occurs when a state action causes the education received to be significantly different or inferior to that received by other students, as Plaintiffs argue, the holding of *Kaplan* instead demonstrates that the impact on the Plaintiffs needs to be so extreme that they are "not receiving a public education." *Id.* Plaintiffs have alleged many extreme things, but not that.

Nothing in *Kaplan* holds or states that a deprivation of a property interest occurs if state action causes the education received to be significantly different or inferior to that received by

[5] Plaintiffs' Response clarifies that they do *not* claim that they have been deprived of a *liberty* interest. (Pl. Br. 26.)

Filed in Second Judicial District Court
7/11/2016 3:23:22 PM
Ramsey County, MN

other students. What Plaintiffs have done is carefully cull words from *Kaplan's* description of a Sixth Circuit decision in which no deprivation of a property interest occurred, and then flipped it in order to make the argument that the facts *absent* from that case would be sufficient if alleged or implied in this one. *Compare Kaplan,* 849 F. Supp. 2d at 874, *with* Pl. Br. 28. The Sixth Circuit, in particular, would have little patience for Plaintiffs' legal theory. As that court explained in *Blau v. Fort Thomas Public School District*:

> **While parents may have a fundamental right to decide whether to send their child to a public school, they do not have a fundamental right generally to direct how a public school teaches their child.** Whether it is the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, **the individuals hired to teach at the school**, the extra curricular activities offered at the school, or, as here, a dress code, these issues of public education are generally "committed to the control of state and local authorities."

Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 396 (6th Cir. 2005) (quoting *Goss v. Lopez,* 419 U.S. 565, 578 (1975)); *See also Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 (9th Cir. 2005) ("We endorse and adopt the Sixth Circuit's view"), *opinion amended in irrelevant respects on denial of reh'g sub nom.*, 447 F.3d 1187 (9th Cir. 2006).

Plaintiffs rip from its context the court's statement in *In re Expulsion of N.Y.B.* that "[e]ducation is a fundamental right in Minnesota, as well as a property interest protected by the Due Process Clause of the United States Constitution." 750 N.W.2d 318, 327 (Minn. App. 2008), (citations omitted) quoted in part at Pl. Br. 26. As the title of the case reflects, *N.Y.B.* involved a student's expulsion for an entire calendar year pursuant to Minnesota's statutory process for expulsion. *Id.* at 328. The sole case cited as authority for the quoted excerpt was *Goss v. Lopez,* 419 U.S. 565 (1975), which held that (in a state that mandated local authorities to provide a free local education to all residents between 5 and 21 years old) a ten-day suspension constituted a deprivation. *Id.* at 573-74. *N.Y.B.* and *Goss* do not begin to suggest that allowing a student to

Filed in Second Judicial District Court
7/11/2016 3:23:22 PM
Ramsey County, MN

attend class but allowing ineffective teachers to teach her is a deprivation of "education" in the constitutional sense. As the *Kaplan* case should have reminded Plaintiffs,[6] that requires (among other things) a conclusion that Minnesota law grants students *an entitlement* to the thing allegedly deprived—in this case, effectiveness from every teacher.

Regardless of whether the court accepts Plaintiffs' theory that being assigned an ineffective teacher is a deprivation of a constitutionally-protected property right, Plaintiffs' due process claim fails for two additional, separate reasons.

Plaintiffs fail to cite a single case in response to arguments by the School District Defendants that the rule in *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 446 (1915), as followed in Minnesota in cases such as *Hylen v. Owens*, 251 N.W.2d 858, 861 (Minn. 1977), bars their due process claims. (ISD 709 Opening Br. at 12-13; WSP Opening Br. at 8; AHSD Opening Br. at 10-11.) The *Bi-Metallic* rule bars procedural due process claims challenging a rule that "'applies to more than a few people,'" *Hylen*, 251 N.W.2d at 861 (quoting *Bi-Metallic*, 239 U.S. at 445), or regarding consequences that are not limited to a small number of persons who are "exceptionally affected, in each case upon individual grounds[.]" *Bi-Metallic, id.*, at 446. At most, Plaintiffs simply allege that they "seek protections against harm visited upon their children by Defendants' retention of chronically ineffective teachers." (Br. 29).[7] What Plaintiffs forget is that the actions that their procedural due process counts treat as the relevant "deprivations" of property—ineffective teachers on the faculty, ineffective teachers with tenure, and ineffective teachers protected from discipline and layoffs (Am. Cmplt. ¶¶ 270-287) –

[6] *Kaplan*, 849 F. Supp.2d at 871, 872.
[7] As explained in the opening brief, Plaintiffs Amended Complaint does not, in fact, allege that Plaintiffs "seek protections against harm visited upon their children by Defendants' retention of chronically ineffective teachers," but alleges that Plaintiffs' children are have been assigned to, and/or are at substantial risk of being assigned to, an ineffective teacher. (WSP Opening Br. at 2)

Filed in Second Judicial District Court
7/11/2016 3:23:22 PM
Ramsey County, MN

are alleged to have been caused by the mere existence and "enforcement" of certain statutes of statewide application, rather than by any particular or special act or omission by any of the School District Defendants (Am. Cmplt. ¶¶ 16-20, 22, 23). This alone entitles the School Districts to dismissal of the procedural due process claims.

If that were not enough, the failure of Plaintiffs to allege that the alleged deprivations were *intentional* is also fatal to their claims. Instead of solving this problem by pointing out any allegation in their Amended Complaint of *intentional* district conduct to cause ineffective teachers to teach (or potentially teach) Plaintiffs,[8] they instead ask the Court to accept "Plaintiffs' allegations regarding past instances of bias in the administration of Minnesota's education laws and policies." (Br. 27). The fatal flaw is that Plaintiffs did not plead that the alleged procedural due process violations were intentional ones. The flaw is not whether, if the Plaintiffs alleged intentional conduct, that they could not try to prove it through "instances of bias in the administration of Minnesota's education laws and policies." Nothing in Plaintiffs Amended Complaint asserts intentional conduct by any School District Defendant. As for the two cases (one published, one not) cited by Plaintiffs on this point, neither begins to refute the School District Defendants' arguments about the necessity of directing Plaintiffs' procedural due process claims at allegedly *intentional* conduct.

[8] Indeed, they cannot identify any allegation of intentional conduct as no such allegation exists in the lengthy Amended Complaint.

Filed in Second Judicial District Court
7/11/2016 3:23:22 PM
Ramsey County, MN

CONCLUSION

For all the foregoing reasons and those identified in ISD 709's initial brief, as well as the briefs of the other Defendants, Plaintiffs' claims against ISD 709 should be dismissed with prejudice.

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

Dated: July 11, 2016

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