Filed in Second Judicial District Court
7/11/2016 3:06:48 PM
Ramsey County, MN

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

DEFENDANT ST. PAUL PUBLIC SCHOOLS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Their hands deep in the cookie jar, Plaintiffs deny that they are suing over a generalized grievance with longstanding, state-wide policy. Of the over 800,000 students in the state, the number represented in this case may be counted on one hand. Plaintiffs' pithy and dismissive rhetoric aside, the actual allegations in the Amended Complaint are nothing but an attempt by a handful of parents to get a court to do what the Legislature would not do.[1] Plaintiffs: (1) allege data comparisons between schools in Minneapolis, SPPS, and AHSD that Plaintiffs' children *do not attend*; (2) attack the LIFO statute with *no* allegation that lay-offs are pending or imminent at any of the defendant school districts; (3) proffer data indicating that less than 1.6 percent of teachers in the state are ineffective for reasons that might be addressed with discipline; and (4) do not seek any

[1] *See* http://www.startribune.com/suit-says-minnesota-protects-bad-teachers-at-expense-of-students/375609941/ ("Forslund said she decided to join the lawsuit after watching the Legislature fail to pass laws that prioritize effective teaching over experience."). This is one of two articles linked on the website of Plaintiffs' counsel about this lawsuit. *See also* http://www.nytimes.com/2016/04/14/us/teacher-tenure-is-challenged-again-in-a-minnesota-lawsuit.html?_r=0; http://www.fishmanhaygood.com/fishman-haygood-serves-as-lead-counsel-in-constitutional-challenge-to-teacher-tenure-and-dismissal-laws/.

Filed in Second Judicial District Court
7/11/2016 3:06:48 PM
Ramsey County, MN

relief for their as-applied claims. This is no lawsuit by an injured party seeking redress; this is a policy dispute about state law.

ARGUMENT

I. Plaintiffs' "Preliminary Matters" Hide Fatal Flaws Rather Than Merely Clarify Undisputed Points.

In the "Preliminary Matters" section of their brief (pp. 7-9), Plaintiffs attempt to distract the Court from fatal flaws in the pleading. Plaintiffs state that they do not make a facial challenge to the Tenure Act under the Equal Protection Clause. That is a welcome clarification. But their dismissive arguments about who are proper defendants and about the absence of allegations regarding the number of ineffective teachers are a rhetorical mask for a substantive void.

A. Plaintiffs' purportedly "as-applied" claims must be reviewed as facial claims.

Plaintiffs claim that the district and state defendants are pointing fingers at each other to avoid responsibility.[2] They argue that "the Commissioner and the School District Defendants are the proper parties to defend against Plaintiffs' as-applied challenges because they are the authorities that supervise and control staffing decisions in the schools and districts serving Plaintiffs' children." (Plntffs' Opp. Memo., pp. 7-8.) This one sentence reveals a fatal flaw in their claims against the School Districts. First, to the extent "staffing decisions" means decisions to hire and fire, it is undisputed that the School Districts are bound to obey the Challenged Statutes; they have no authority to "supervise and control" whether to obey the Challenged Statutes. Plaintiffs offer no allegation or argument describing the constitutional manner in which the School District Defendants should apply the Challenged Statutes but do not. Such allegations would be at cross-purposes for Plaintiffs because their objective—the only relief they seek—is the annihilation of the statutory

[2] In truth, the confusion arises from the fact that Plaintiffs do not have a judicial but a legislative agenda. When plaintiffs are injured and frame their allegations to prove and remedy *only* their own injuries, they typically have little difficulty identifying the proper defendants.

Filed in Second Judicial District Court
7/11/2016 3:06:48 PM
Ramsey County, MN

teacher tenure system.[3] That relief, of course, is beyond the School Districts' power to effect, with or without a court order.

Second, to the extent "staffing decisions" means decisions to assign specific teachers to specific schools, the Challenged Statutes are irrelevant—they dictate nothing about such decisions. The relief sought, striking down the Challenges Statutes, has no effect on the School Districts' teaching assignments. The only inference Plaintiffs draw from the Challenged Statutes is the mere existence in the statewide system of a tiny minority of ineffective teachers.[4] But this, again, is about hiring and firing and the School Districts must obey the statutes. Regardless, nothing about the Challenged Statutes dictates how or where the School District Defendants assign any teachers.

At bottom, the "as-applied" label Plaintiffs attach to their claims is mistaken. They argue that "*as written,* the Challenged Statutes will always result in the deprivation of students' fundamental right to education." *Id.* (emphasis added). That is not the reasoning of an as-applied case. The relief they seek—the statewide elimination of the statutory tenure system—demonstrates emphatically that Plaintiffs make only facial claims. An as-applied challenge must only contend that a law's "application to a *particular person* under *particular circumstances* deprived that person of a constitutional right." *United States v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010) (emphasis added). In an as-applied challenge, courts consider particularized facts in order to issue a "narrowly tailored and circumscribed remedy." *Justice v. Hosemann*, 771 F.3d 285, 292 (5th Cir. 2014), *cert. denied*, 136 S. Ct. 1514 (2016); *see also Eide v. Sarasota Cty.*, 908 F.2d 716, 722 (11th Cir. 1990)

---

[3] And what would be the purpose of a two-tiered public school system where three or four districts are barred from applying the tenure system while hundreds of other districts are required to apply it?

[4] Nor could Plaintiffs prove that eliminating the tenure system will lower the net percentage of ineffective teachers in the state's public schools. Tenure is not a one way street, with only negative consequences; Plaintiffs ignore the positive effects of the law. *See McSherry v. City of St. Paul,* 277 N.W. 541, 543-44 (Minn. 1938) (describing the benefits of the tenure system for "the benefit and advantage of the school system"; noting that annual contracts "had not resulted in the elimination of poor, incompetent, and inefficient teachers.").

Filed in Second Judicial District Court
7/11/2016 3:06:48 PM
Ramsey County, MN

(distinguishing the remedy for a facial challenge, i.e., "the striking down of the regulation," from the remedy for an as-applied challenge, i.e., "an injunction preventing the unconstitutional application of the regulation to plaintiff's property and/or damages resulting from the unconstitutional application."); *see also Green Party of Pennsylvania v. Aichele*, 89 F. Supp. 3d 723, 737-38 (E.D. Pa.), *aff'd*, 103 F. Supp. 3d 681 (E.D. Pa. 2015) ("The 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.").

When the requested relief reaches beyond the particular circumstances of the plaintiffs, they must satisfy the standards for a facial challenge to the extent of that reach. *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010). As the Supreme Court has explained in *Reed*, the label plaintiffs assign to the claim does not matter: "The label is not what matters. The important point is that plaintiffs' claim and the relief that would follow...*reach beyond the particular circumstances of these plaintiffs*. They must therefore satisfy our standards for a facial challenge to the extent of that reach." *Id.*(emphasis added)*; see also AFMSE Council 79 v. Scott,* 717 F.3d 851, 862 (11th Cir. 2013) ("We look to the scope of the relief requested to determine whether a challenge is facial or as-applied in nature."); *Discount Tobacco City & Lottery, Inc. v. U.S.,* 674 F.3d 509, 522 (6th Cir. 2012) ("In this case, Plaintiffs label their claims as both facial and as-applied challenges to the Act, but because the 'plaintiffs' claim and the relief that would follow ... reach beyond the particular circumstances of these plaintiffs,' the claims that are raised are properly reviewed as facial challenges to the Act." (quoting *Reed,* 561 U.S. at 194)).

In this case, the claims are properly reviewed as facial challenges to the Challenged Statutes because the relief sought reaches beyond the particular circumstances of the Plaintiffs. Plaintiffs do not allege that *these particular* School District Defendants have taken a constitutional statute and

Filed in Second Judicial District Court
7/11/2016 3:06:48 PM
Ramsey County, MN

applied it differently than the hundreds of other public school districts apply it. Plaintiffs do not seek a narrow remedy for particular circumstances, one that would result in the constitutional application of the Challenged Statutes as to these five students.[5] To the contrary, Plaintiffs claim that this court must eliminate the tenure rights of over 50,000 teachers *who do not teach at SPPS* to reduce the scant risk that A.D. might receive an ineffective teacher. Because the only relief sought in the Amended Complaint is the complete invalidation of a statutory regime, it is a facial challenge. *See Reed*, 561 U.S. at 194.

Plaintiffs lack standing to sue the School District Defendants because facial claims are not redressable as against these defendants. *See Garcia-Mendoza v. 2003 Chevy Tahoe,* 852 N.W.2d 659, 663 (Minn. 2014). Plaintiffs have agreed that the school districts are not the proper parties to defend against facial challenges to the statutes. (Plntffs.' Opp. Memo., p. 37). Therefore, while the School District Defendants (along with the hundreds of other districts) may have relevant evidence and *witnesses*, they are not proper *parties* and must be dismissed.

B. Plaintiffs fail to appreciate that they have the burden to allege facts that establish standing.

Plaintiffs note the significant arguments Defendants have raised concerning the Plaintiffs' failure to allege the qualities that define an "ineffective teacher" and have failed to identify the number of ineffective teachers allegedly protected by the Challenged Statutes. (Plntffs.' Opp. Memo., p. 8.) Plaintiffs decline to take on the challenge these points raise to their standing to sue, and instead blithely assert that these points are misplaced. Plaintiffs' response is perfectly understandable if their objection to the Challenged Statutes is philosophical. But it is wholly inadequate if they wish to establish standing to pursue a judicial remedy.

[5] The allegations about the application of the Challenged Statutes serve to construct Plaintiffs' (flawed) argument that the statutes *cannot be* constitutionally applied.

Filed in Second Judicial District Court
7/11/2016 3:06:48 PM
Ramsey County, MN

Plaintiffs fail to appreciate that they have the burden to establish standing. The fact that Plaintiffs have not made any allegations about the number of ineffective teachers at SPPS demonstrates that they have a generalized grievance, not an injury-in-fact to a specific student. With no allegations about the number of ineffective teachers, and given that bad teachers admittedly represent a very small minority of teachers in a state with a very good education system, Plaintiffs cannot establish the requisite likelihood that their individual students face an imminent risk of receiving an ineffective teacher.

Further, Plaintiffs rebuff the argument that they have failed to define what makes an ineffective teacher by citing to the statutory framework described in SPPS' brief. That is welcome news, but also peculiar because that framework comes directly from the Tenure Act that Plaintiffs claim is unconstitutional. If the Tenure Act has an adequate framework for teacher assessment, what is the constitutional defect in the Act that (contrary to every term in the statute) permits chronically ineffective teachers to keep their jobs? Presumably Plaintiffs do not concede that the Act is constitutional after all, so we are left with the rudderless pleading in the Amended Complaint. The Court and Defendants are left to speculate about what Plaintiffs believe should be the standard and, thus, what might be accomplished by striking down the statute.

II. Plaintiffs Fail to Address Fatal Defects in their Claim of Standing.

Though Plaintiffs seek to avoid it, Minnesota standing law is well established and consistent with federal standards. To demonstrate standing, "the plaintiff must show": (1) a concrete and particularized injury-in-fact; (2) that is fairly traceable to the challenged action of the defendant; and (3) likely to be redressed by a favorable judicial decision. *Garcia-Mendoza,* 852 N.W.2d at 663 (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014))

Filed in Second Judicial District Court
7/11/2016 3:06:48 PM
Ramsey County, MN

(emphasis added). Plaintiffs' factual allegations fail to establish any of these three essential elements.

Plaintiffs claim that they have satisfied the injury-in-fact element of standing by alleging that their children have sustained or are in immediate danger of sustaining injury as a result of the Challenged Statutes. (Plntffs. Opp. Memo., p. 32.) This argument finds no support in the facts alleged in the Amended Complaint. The statewide survey Plaintiffs cite indicates that there is less than a two percent chance A.D. would receive an ineffective teacher.[6] Focusing not on the state, but on A.D.'s particular school, the facts alleged demonstrate that his school has highly qualified and experienced teachers, and students at his school perform at and above district averages on the MCAs. Further, by alleging facts about Minneapolis and SPPS schools that A.D. does not attend, Plaintiffs assert a generalized grievance. They do not allege facts that separate A.D.'s particular experience from the general experience of every student in schools that he does not attend. Thus, Plaintiffs have failed to allege a non-speculative claim that A.D. has a concrete injury, i.e., faces an imminent risk[7] of being assigned an ineffective teacher.

Plaintiffs argue that Defendants' insistence that this Court cannot remedy A.D.'s injuries is "nonsensical." (Plntffs.' Opp. Memo., p. 33.) But having ignored the traceability and redressability elements of standing, Plaintiffs cannot expect to recognize the sense in this argument. To avoid repetition, SPPS refers the Court to the *unrebutted* traceability and redressability arguments set forth in its opening brief. (*See* SPPS' Brief, pp. 18-25.)

---

[6] As noted in SPPS' opening brief, for these purposes, "ineffective" must mean a teacher that would be discharged but for the Tenure Act.

[7] Plaintiffs seek only prospective relief, so only future risks are relevant.

Filed in Second Judicial District Court
7/11/2016 3:06:48 PM
Ramsey County, MN

III. Plaintiffs' Equal Protection Claims Fail as a Matter of Law.

An equal protection violation based on disparate impact requires allegations "that the state actor intended to discriminate against the suspect class." *Odunlade v. City of Minneapolis*, 823 N.W.2d 638, 648 (Minn. 2012). Plaintiffs do not dispute this requirement. (Plaintiffs' Br. at 22.) Instead, Plaintiffs suggest that the alleged disparities themselves, along with reference to a few alleged "instances of bias" in the past, satisfy their obligation to allege intentional discrimination on the part of SPPS or any other school district. (*Id.* at 22-23.) This argument plainly fails.

A showing of disparate impact, "standing alone, does not establish a violation of equal protection." *Rack Room Shoes v. U.S.*, 718 F.3d 1370, 1376 (Fed. Cir. 2013). Rather, proof of discriminatory intent or purpose "is required to show a violation of the Equal Protection Clause." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (emphasis added). "Even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose." *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979); *see also In re Contest of Gen. Election Held on Nov. 4, 2008, for Purpose of Electing a U.S. Senator from State of Minnesota*, 767 N.W.2d 453, 463 (Minn. 2009) (quoting *Snowden v. Hughes*, 321 U.S. 1, 8 (1944)).

Plaintiffs attempt to rely on disparate impact statistics to generate an inference of intent. But statistics are accepted as proof of intent to discriminate in only "limited contexts," such as the "selection of the jury venire." *McCleskey v. Kemp*, 481 U.S. 279, 293-94, 1 (1987). Otherwise, the statistical disparity must be a "stark pattern" to be accepted as the sole proof of discrimination. *Id.* (declining to accept statistics that murderers of white persons were more than four times as likely to receive the death penalty as murderers of black persons as sufficient evidence that decisionmakers

Filed in Second Judicial District Court
7/11/2016 3:06:48 PM
Ramsey County, MN

acted with a discriminatory purpose in imposing the death penalty on the plaintiff). Only when evidence of a disparate impact is "so stark and unexplainable on other grounds" does the disparity, on its own, justify an inference of discriminatory purpose. *Gallagher v. Magner*, 619 F.3d 823, 833 (8th Cir. 2010).

The cases cited by Plaintiffs to support their argument are unavailing. In *Ricketts*, the court considered an allegation that a city had a discriminatory custom of treating domestic abuse less seriously than nondomestic abuse cases—a custom that resulted in discrimination against women, who were most often victims of domestic abuse. *Ricketts v. City of Columbia, Mo.*, 36 F.3d 775, 778 (8th Cir. 1994). The court emphasized that the disparate impact must be traced to a discriminatory purpose, and noted that such a purpose requires more than an "awareness of the consequences." *Id.* at 781 (citing *Feeney*, 442 U.S. at 279). The court did note that, rarely, a discriminatory impact itself could signal that the classification was not neutral – but only if the impact was "unexplainable on neutral grounds." *Id.* But "[w]hen there is a rational, neutral explanation for the adverse impact and the law or custom disadvantages both men and women, then an inference of discriminatory purpose is not permitted." *Id.* Under that standard, the court concluded that the statistical disparity alone did not establish intent. *Id.* The court looked to the plaintiffs' other evidence of intent, including evidence of a historic tolerance of domestic abuse in society, and concluded that these facts "do not combine to create a submissible inference of a discriminatory animus." *Id.* at 282. Thus, the plaintiffs had "failed to present evidence of an equal protection violation." *Id.*

Plaintiffs' other cited cases are similarly unconvincing. In *Castaneda*, the Supreme Court considered a claim of disproportionate jury selection: the county was 79.1% Mexican-American, but the average percentage of Spanish-surnamed grand jurors was only 39%. *Castaneda v. Partida*, 430

Filed in Second Judicial District Court
7/11/2016 3:06:48 PM
Ramsey County, MN

U.S. 482, 486-87 (1977). This is, of course, that limited context—jury selection—in which the Supreme Court has considered statistics as evidence of intent. In setting forth the test for showing an equal protection violation in that context, the Court noted the "rule of exclusion"—a comparison of "the proportion of the group in the total population to the proportion called to serve as grand jurors"—as a method of making a prima facie case of discriminatory purpose in jury selection. *Id.* at 494-95. But even there, the Court did not rely on that information alone; it noted that "the selection procedure is not racially neutral with respect to Mexican-Americans" because the Spanish surnames were easily identifiable. *Id.* at 495.

The *Santiago* case involved a claim of discrimination against black and Hispanic prison inmates with respect to housing, employment, and discipline. *Santiago v. Miles*, 774 F.Supp. 775, 777 (W.D.N.Y. 1991). The court noted that "[a]lthough disparate impact alone is not sufficient to raise a *prima facie* case . . . [e]vidence of such an impact may provide the 'starting point' for any examination and analysis of discriminatory motive." *Id.* at 797-798. But "[i]f statistics are to be considered as the sole basis for inferring discriminatory motive, the disparity between the compared groups must be so large and significant that such disparity could not be caused by chance." *Id.* at 798. However, the court declined to rely on statistical evidence alone to support a finding of discriminatory intent, because the plaintiffs had "adduced substantial additional evidence supporting such a determination," including more than 20 witnesses who testified to "scores of incidents from which a clear pattern of racial animus emerges." *Id.* at 800.

In none of the above cases did the courts rely exclusively on a disparate impact to establish a discriminatory motive. Plaintiffs' allegations that low-income students and students of color are disproportionately assigned ineffective teachers do not, on their own, provide evidence of intent to discriminate in the districts' application of the Tenure Act. Such a discrepancy is not "unexplainable

Filed in Second Judicial District Court
7/11/2016 3:06:48 PM
Ramsey County, MN

on other grounds." *Id.* First, the Tenure Act dictates nothing about teacher assignments. Unlike the facts of *Castaneda* or *Santiago*, there is no causal connection between the Tenure Act and the alleged disparate impact. The Tenure Act does *not* govern teacher assignments. Plaintiffs' allegations cannot possibly show intent to apply the statute in a discriminatory way, because the assignment of teachers is simply *not an application of the statute*. Second, as argued in SPPS' initial brief, a multitude of neutral factors contribute to teaching assignments which could affect teacher distribution, including staffing needs, teacher preferences, and other circumstances or criteria which may be established by collective bargaining agreements. (SPPS Br., p. 19). And a number of factors outside the classroom contribute to the outcome measures cited in the pleading. (SPPS Br., pp. 5, 17-18.)

Plaintiffs also provide some sparse allegations of historical "instances of bias" to support their claim of discriminatory intent. Only one, a reference to a 1984 consent decree requiring improved instructional opportunities for Latino and Hispanic students, relates to SPPS. This allegation, from 32 years ago, does not support an inference of a history of intentional discrimination, and certainly does not relate in any way to SPPS's application of the Tenure Act. Facts about the achievement gap similarly do not speak to intent on the part of SPPS or the other district defendants. (*See* SPPS Br., pp. 17-18 (identifying multiple causes unrelated to teacher assignments).) "When faced with a claim that application of a statute renders it unconstitutional, a court must analyze the statute as applied to the particular case, i.e., *how it operates in practice against the particular litigant and under the facts of the instant case*, not hypothetical facts in other situations." *Wal-Mart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 987, 996-97 (E.D. Cal. 2006) (emphasis added). As in *Ricketts*, these allegations "do not combine to create a submissible

Filed in Second Judicial District Court
7/11/2016 3:06:48 PM
Ramsey County, MN

inference of a discriminatory animus" with respect to the specific defendants in this case. 36 F.3d at 282.

In sum, Plaintiffs have pled no facts which could plausibly show that SPPS intentionally discriminated against a suspect class through its compliance with the Tenure Act.

CONCLUSION

Plaintiffs' claims against SPPS must be dismissed for lack of subject matter jurisdiction. Alternatively, SPPS is entitled to dismissal because the Amended Complaint fails to state a claim against SPPS on which relief may be granted.

Dated: July 11, 2016

KENNEDY& GRAVEN, CHARTERED

By: _____

Peter G. Mikhail (#249907)
Maggie R. Wallner (#193458)
200 South Sixth Street, Suite 470
Minneapolis, MN 55402
Telephone: (612) 337-9300

Attorneys for Defendant St. Paul Public Schools, Independent School District 625