STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

Tiffini Flynn Forslund, et al., Plaintiffs, v. 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 REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS**

INTRODUCTION

Defendant West St. Paul-Mendota Heights-Eagan Public Schools, Independent School District No. 197 ("ISD 197") submits the following arguments in response to Plaintiffs' Consolidated Opposition to Defendants' Motions to Dismiss ("Br.").

I. BASED UPON THE LANGUAGE OF MINN. CONST. ART. XIII, § 1, DEFENDANT SCHOOL DISTRICTS ARE NOT PROPER DEFENDANTS PURSUANT TO THE PLAINTIFFS' EDUCATION CLAUSE CLAIM.

School districts are improper defendants in a suit asserting a violation of the Education Clause because the Education Clause imposes duties solely on the Legislature. Article XIII, § 1 of the Minnesota Constitution provides:

> The ability of a republican form of government depending mainly on 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 uniform and thorough system of public schools throughout the state.

Minn. Const. art. XIII, § 1 (emphasis added). Because the language of the Education Clause imposes duties on the Minnesota Legislature alone, 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 simplistic approach constitutes a fatal error of failing to first answer the question of "who" has violated the Education Clause of the Constitution? *Doe v. Piper*, Civil No. 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. A HIGHER STANDARD FOR A FACIAL CHALLENGE EXISTS IN THIS CASE AND PLAINTIFFS HAVE FAILED TO SATISFY THE STANDARD.

The Minnesota's 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); *State v. Bernard*, 859 N.W.2d 762, 766 n.2 (Minn. 2015), *aff'd sub nom. Birchfield v. N. 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' position is that a lower, less stringent standard exists arguing that *Rew v. Bergstrom*,

845 N.W.2d 764 (Minn. 2014), replaced the more stringent test for a facial challenge of constitutionality test with an easier one utilized in analysis of First Amendment cases.

Even though the *Bernard* and *Golden Valley* decisions that followed *Rew* continue the use of the more stringent standard for non-First Amendment cases, Plaintiffs seems to overlook that facial attacks under the First Amendment (or its Minnesota Constitution's counterpart) are subject to a less stringent standard. In *Village of Hoffman Estates v. Flipside, Hoffman Estates Inc.*, 455 U.S. 489, 494-495 (1982), the Court ruled that 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 such an analysis is not sufficient for determining whether it is unconstitutional under a different constitutional provision (which in *Hoffman Estates* was the void-for-vagueness branch of the due process clause). The Court stated:

> A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process. To succeed, however, the complainant must demonstrate that the law is impermissibly vague in all of its applications.

Hoffman Estates, 455 U.S. at 497. Minnesota's appellate courts utilize the same approach. *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.")(emphasis added). As a result, the "unconstitutional in all applications" standard applies to all of Plaintiffs' claims.

Plaintiffs' Amended Complaint does not allege that the Challenged Statutes are unconstitutional in all applications. The Amended Complaint recognizes that the vast majority of Minnesota public school teachers are better than others and are effective teachers. (Amended Complaint ("AC") §§ 53, 65, 112.) In their responsive memo of law however, Plaintiffs' state that "as written, the Challenged Statutes will always result in deprivation of students' fundamental

right to education." (Br. 11.) If that is truly the case, that the Challenged Statutes will always result in deprivation of a fundamental right of education, then Plaintiffs are essentially arguing that as a result of the Challenged Statutes 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.

III. PLAINTIFFS' "AS APPLIED" CLAIMS FAIL BECAUSE THEY DO NOT ALLEGE A PARTICULARIZED HARM.

Not only do Plaintiffs' facial claims fail but their "as applied" claims fail to meet the necessary standard.

Plaintiffs ignore two important principles in their "as applied" analysis. 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); *Frye v. City of Kannapolis*, 109 F.Supp.2d 436, 439 (M.D.N.C. 1999) (same). In this case, the Plaintiffs' Amended Complaint does not describe any application by ISD 197 of any of the Challenged Statutes "in the particular context *in which plaintiff* (in this case students) *acted or proposed to act*." The Challenged Statutes apply to the employment of teachers. Because the Plaintiffs in this case are students and Challenged Statutes do not apply to students but only to teachers, Plaintiffs' "as applied" claims fail.

Second, Plaintiffs also forget that a genuine "as applied" claim seeks relief that is specific to the plaintiff him or 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*

Pennsylvania v. Aichele, 89 F.Supp.3d 723, 737-38 (E.D. Pa.), *aff'd*, 103 F.Supp.3d 681 (E.D. Pa. 2015) (emphasis added). In a genuine as-applied challenge, the available relief is narrow, obvious and specific to the party challenging the statute. Yet in their Prayer for Relief contained in Plaintiffs' Amended Complaint, there is no relief sought at all that is particularized to Plaintiffs. Instead, the only relief sought is a declaration that the Challenged Statutes are invalid generally, enjoining their enforcement or implementation generally, and preventing similar laws or policies from being adopted generally. The Plaintiffs' Prayer for Relief reads more like a facial attack, which, as indicated above also does not pass muster.

IV. PLAINTIFFS LACK STANDING BECAUSE THEIR AMENDED COMPLAINT ALLEGES ONLY A GENERALIZED 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). Plaintiffs concede that standing must be based on a "particularized" injury. (Br. 30.) Plaintiffs' Responsive Brief however, clearly asserts that their challenge to the adoption and enforcement of the Challenged Statutes is a "generalized grievance" by stating "as written, the Challenged Statutes will always result in deprivation of students' fundamental right to education". (Br. 11.) As a result, the violation alleged by Plaintiffs is one that is shared by all parents of public school students, a group broad enough to make their grievance "generalized."

In the Amended Complaint, Plaintiffs point to MDE report card data and average test scores at two ISD 197 elementary schools, which they do not allege J.C. or D.C. attend. In addition, Plaintiffs do not make any assertions about J.C.'s or D.C.'s own standardized test scores or academic performance. Plaintiffs instead present generalized data unrelated to J.C.'s and D.C.'s

own academic performance which further shows that Plaintiffs' grievance is a generalized grievance rather than a particularized one.

V. DESPITE THEIR ARGUMENTS TO THE CONTRARY, PLAINTIFFS' PROCEDURAL DUE PROCESS CLAIMS FAIL FOR A NUMBER OF REASONS.

Plaintiffs alleged 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, (AC ¶¶ 273-281), 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 (AC ¶¶ 285-86). Plaintiffs' responsive brief fails to overcome deficiencies in their procedural due process claims that were identified in Defendants' opening briefs.

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. Scrutiny of Plaintiffs' citation to at least one case demonstrates that neither ISD 197 nor any of the other Defendant school districts have deprived Plaintiffs of a property interest.

Plaintiffs cite *J.K. ex rel. Kaplan v. Minneapolis Pub. Sch. (Special Sch. Dist. No. 1),* 849 F.Supp.2d 865 (D. Minn. 2011), to support their argument 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." (Br. 28, quoting *Kaplan* at 871.) While *Kaplan* does contain the above quote, the court uses the quote as a means of distinguishing a constitutional violation from the facts in *Kaplan* which provides

greater support for Defendants' contention that a procedural due process claim in this case does not exist.

In *Kaplan*, the plaintiff failed to convince the court that an involuntary transfer from Minneapolis Southwest High School to a different high school in the district "deprives him of his property interest, under Minnesota law, in a public education." *Id.* at 871. The court rejected the claim acknowledging 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. Even if Southwest is the best public high school in the District (as J.K. contends), that does not mean that the students attending the other District high schools—say, the second- or third-best high schools in the District—are not receiving an adequate public education.

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, *Kaplan* instead demonstrates that the impact on the Plaintiffs needs to be so extreme that they are "not receiving a public education." *Id.* Nothing in *Kaplan* holds or states that a deprivation of a property interest occurs if state action causes the public education received to be significantly different or inferior to that received by other students.

The Sixth Circuit has taken a similar approach. 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) (emphasis in original) (quoting *Goss*, 419 U.S. at 578); *see also Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 (9th Cir. 2005) (quoting *Blau* and stating "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 also misstate the context of 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 Br. 26. Unlike the present case, *N.Y.B.* involved a student's expulsion (for an entire calendar year). *Id.* at 328. The sole case cited as authority for the quoted excerpt in *N.Y.B.* 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 support the notion that allowing a student to attend class even with an ineffective teacher is a deprivation of "education" in the constitutional sense.

Even if 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 additional reasons.

Plaintiffs cannot overcome the school district Defendants' arguments 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. (DPS 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[.]" *Id.* at 446.

Plaintiffs simply allege that they "seek protections against harm visited upon their children by Defendants' retention of chronically ineffective teachers." (Br. 29.) What Plaintiffs have pled as the relevant "deprivation" supporting their procedural due process claims are that ineffective teachers on the faculty, ineffective teachers with tenure, and ineffective teachers protected from discipline and layoffs, (AC ¶¶ 270-287), have been caused by the existence and "enforcement" of the Challenged Statutes' statewide application, rather than by any particular or special act or omission by any of the school district Defendants. (AC ¶¶ 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 are *intentional* is also fatal. Instead of pointing out any allegation in their Amended Complaint of *intentional* district conduct to cause ineffective teachers to teach (or potentially teach) Plaintiffs, 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 flaw is that Plaintiffs did not plead that the alleged procedural due process violations were intentional. Instead had the Plaintiffs done the opposite and alleged an intentional deprivation, they could have, at some point, attempted to prove intent through "instances of bias in the administration of Minnesota's education laws and policies."

As for the two cases cited by Plaintiffs to support their argument regarding intent, neither refutes the school district Defendants' arguments about the necessity of Plaintiffs' procedural due process claims alleging *intentional* conduct. Neither case cited by Plaintiffs contains a finding that

intentional conduct exists when a defendant *follows* the law. Instead, in *Utke*, 422 N.W. 2d 303 (Minn. Ct. App. 1988), intentional conduct was found due to the defendants' *failure* to follow the provisions of the Minnesota Veterans' Preference Act, Minn. Stat. § 197.46. In *Chopp*, 1991 WL 10213 (Minn. Ct. App. 1991), the school district's conduct constituted a *failure* to provide a hearing prior to the deprivation of seniority.

CONCLUSION

For the reasons set forth above and in its opening brief, ISD 197 respectfully requests the Court to dismiss Plaintiffs' claims against it.

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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