**NO. A17-0033**

State of Minnesota

# In Court of Appeals

Tiffini Flynn Forslund, et al.,

*Plaintiffs-Appellants,*

v.

State of Minnesota, et al.,

*Defendants-Respondents.*

## APPELLANTS' BRIEF


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## REQUEST FOR ORAL ARGUMENT

This appeal raises timely questions regarding children's fundamental right to an adequate education, as guaranteed by Article XIII, section 1 of the Minnesota Constitution (the "Education Clause"). A major question presented is whether students' fundamental right to an adequate education is violated by state laws affording ironclad job security to chronically ineffective teachers. No prior opinion of this Court is dispositive on that issue. However, the Minnesota Supreme Court's decision in *Skeen v. State*, 505 N.W.2d 299 (Minn. 1993), holds that students' fundamental right to an adequate education includes the right to an education that meets all state standards for all students. Chronically ineffective teachers jeopardize this guarantee because, by definition, they are unable to prepare students to attain state academic benchmarks. Thus, laws that protect the employment of chronically ineffective teachers burden children's fundamental right to an adequate education, and must satisfy strict scrutiny to survive.

Given the importance and complexity of this and other questions presented, Appellants believe oral argument will be helpful to the Court's consideration of this appeal.

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## LEGAL ISSUES

I. Did the district court err when it determined that Plaintiffs lack standing to seek a declaration that Minnesota's teacher tenure, discharge, and last-in-first-out laws (collectively, the "Challenged Statutes" or "tenure laws"), as codified in the Continuing Contract Law, Minn. Stat. § 122A.40, and the Tenure Act, Minn. Stat. § 122A.41, unconstitutionally burden their children's fundamental right to an education system that provides an adequate education to all students?

The district court dismissed Plaintiffs' complaint determining that Plaintiffs lack standing because they cannot establish an injury traceable to the State.

*Authority:*

*McCaughtry v. City of Red Wing*, 808 N.W.2d 331 (Minn. 2011);

*Minn. Fifth Cong. Dist. Indep.-Republican Party v. State ex rel. Spannaus*, 295 N.W.2d 650 (Minn. 1980);

*Rice Lake Contracting Corp. v. Rust Env't & Infrastructure, Inc.*, 549 N.W.2d 96 (Minn. Ct. App. 1996).

II. Did the district court err when it determined that Plaintiffs' claims are not justiciable under the political question doctrine?

The district court dismissed Plaintiffs' complaint determining that Plaintiffs' constitutional claims relate to the wisdom of legislative policy and are therefore immune from judicial review.

*Authority:*

*In re McConaughy*, 119 N.W. 408 (Minn. 1909);

*State v. Fairmont Creamery Co.*, 202 N.W. 714 (Minn. 1925);

*Baker v. Carr*, 369 U.S. 186 (1962).

III. Did the district court err when it dismissed Plaintiffs' Education Clause claim, with prejudice, upon a determination that no set of facts, if proved, would establish that the Challenged Statutes unconstitutionally burden children's fundamental right to an education system that provides an adequate education to all students?

The district court dismissed Plaintiffs' complaint determining that Plaintiffs cannot establish that Minnesota's education system is inadequate in violation of the Education Clause, and, further, that Plaintiffs cannot establish that the Challenged Statutes are unconstitutional in all applications as required for a facial challenge.

*Authority:*

*Skeen v. State*, 505 N.W.2d 299 (Minn. 1993);

*Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 605 (Minn. 2014);

*Elzie v. Comm'r of Pub. Safety*, 298 N.W.2d 29 (Minn. 1980).

IV. Did the district court err when it dismissed Plaintiffs' Equal Protection Clause claim, with prejudice, upon a determination that that no set of facts, if proved, would establish that the Challenged Statutes unconstitutionally burden children's right to equal protection under law by creating an unjustifiable distinction between students that are assigned to ineffective teachers whose continued employment is protected by law (thus burdening such students' fundamental right to an adequate education) and students that are taught by effective teachers (and whose fundamental right to an adequate education is therefore not burdened by operation of law)?

The district court dismissed Plaintiffs' complaint determining that Plaintiffs cannot establish that the Challenged Statutes violate the Equal Protection Clause because Plaintiffs' allegations are outside the scope of students' fundamental right to an adequate education; the Challenged Statutes do not substantially interfere with students' fundamental right to an adequate education; and, in any event, the Challenged Statutes satisfy rational basis review.

*Authority:*

*Skeen v. State*, 505 N.W.2d 299 (Minn. 1993);

*Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 605 (Minn. 2014);

*Elzie v. Comm'r of Pub. Safety*, 298 N.W.2d 29 (Minn. 1980).

V. Did the district court err when it dismissed Plaintiffs' complaint without first granting Plaintiffs leave to amend?

The court dismissed Plaintiffs' complaint outright, with prejudice, and without addressing Plaintiffs' express request for an opportunity to amend.

*Authority:*

*Dean v. City of Winona*, 868 N.W.2d 1 (Minn. 2015);

*Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 605 (Minn. 2014);

*Elzie v. Comm'r of Pub. Safety*, 298 N.W.2d 29 (Minn. 1980).

*In this case, the available evidence suggests that the right of the people of Minnesota to an education is sui generis and that there is a fundamental right, under the Education Clause, to a "general and uniform system of education" which provides an adequate education to all students in Minnesota.*

- *Skeen v. State*, 505 N.W.2d 299, 315 (Minn. 1993)

## PRELIMINARY STATEMENT

The Education Clause, Minn. Const. art. XIII, § 1, is unique among guarantees in the Minnesota Constitution: It "is the only place in the constitution where the phrase 'it is the duty of the legislature' is used." *Skeen*, 505 N.W.2d at 313. Thus, from its earliest days the Supreme Court has ranked "the proper education of all its citizens" among the State's "vital[] concerns." *Curryer v. Merrill*, 25 Minn. 1, 5 (Minn. 1878). More recently, the Supreme Court has held that, under the Education Clause, it is the State's constitutional duty to maintain a "general and uniform system of education" that provides "an adequate education to all students in Minnesota." *Skeen*, 505 N.W.2d at 315. This duty, in turn, creates a "fundamental right" to an "adequate education" enforceable against the State by any student in Minnesota. *Id.*

In this case, Plaintiffs-Appellants ("Plaintiffs")—mothers of children attending public schools in districts across Minnesota—allege that the State is failing its constitutional duty to provide an adequate education to all students (including their own), and that laws providing ironclad job security to chronically ineffective teachers are a cause of this failure. Nevertheless—and notwithstanding their children's fundamental right to an education system that "provides an adequate education to all students"—the district court dismissed Plaintiffs' complaint outright, with prejudice, and without heeding Plaintiffs' request to amend. The court determined (1) that Plaintiffs cannot

establish an injury traceable to the State (and therefore lack standing); (2) that Plaintiffs' concerns relate to the "wisdom" of legislative policy (and thus present a nonjusticiable political question); and (3) that Plaintiffs' claims fail because their allegations do not fall within the "scope" of protections afforded by the "fundamental right to education."

The district court erred at each step. First, Plaintiffs' claims are justiciable and Plaintiffs have standing to pursue them. Plaintiffs allege that a statutory scheme of universal application burdens their children's constitutional right to an adequate education. Specifically, Plaintiffs allege that state law provides ironclad job security to chronically ineffective teachers that, by the State's *own* metrics, cannot prepare students to attain required academic benchmarks. Plaintiffs allege that the Challenged Statutes necessarily result in such teachers occupying classrooms well beyond when students' academic progress stalls, thus presenting a fatal conflict between the State's legislated preference for providing job security to ineffective teachers, and students' constitutional right to an adequate education. A legislative preference cannot limit a constitutional right, *Grussing v. Kvam Implement Co.*, 478 N.W.2d 200, 203 (Minn. Ct. App. 1991), and Plaintiffs seek merely a declaration that the Challenged Statutes are unconstitutional. For purposes of justiciability and standing, there is no analytical difference between Plaintiffs' claims and those presented in *Skeen v. State*, where parents sought a declaration that statutes violated their children's constitutional rights under the Education Clause by creating disparities in education funding among wealthy and poor districts. The *Skeen* Court never questioned that the plaintiffs' constitutional claims were justiciable, or that parents had standing to raise them. *Skeen* compels the same conclusion here.

Likewise, this case presents a controversy for the courts to decide. Plaintiffs are not brandishing the Education Clause as a sword to claim an entitlement to "effective" teachers, or to challenge metrics by which teacher "effectiveness" is measured. Instead, Plaintiffs wield the Education Clause as a shield for protection against laws that burden students' fundamental right to an adequate education. Plaintiffs request only a judgment declaring the Challenged Statutes unconstitutional. In law, rule, and policy the State has defined the measure of teacher effectiveness, thus providing the metrics to assess Plaintiffs' claims. Moreover, the Supreme Court has already stated that tenure laws cannot "subordinat[e] the paramount rights … of the school children to those of the individual teachers." *See State v. Bd. of Ed. of Duluth*, 7 N.W.2d 544, 555 (Minn. 1942), *overruled on other grounds by Foesch v. Indep. Sch. Dist. No. 646*, 223 N.W.2d 371, 375 (Minn. 1974). In short, Plaintiffs allege a classic conflict between constitutional right and legislative preference. Here again, there is no discernable difference between the contours of Plaintiffs' claims, and those at issue in *Skeen*. It is the judiciary's time-honored duty to assess the merits of this action. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

Finally, Plaintiffs' claims fall squarely within the scope of the Education Clause. Plaintiffs allege that the Challenged Statutes provide ironclad job security to chronically ineffective teachers, which results in chronically ineffective teachers occupying classrooms for years on end, depriving children (including their own) of their rightful opportunity to obtain an adequate education. Plaintiffs allege that these Statutes work to the benefit of ineffective teachers, and to the detriment of students. The Education Clause, however, establishes public schools for the benefit of students, *not* teachers.

Having identified a State-created impediment to the State's constitutionally-imposed duty to provide an adequate education to all students, Plaintiffs unquestionably allege a burden on their children's fundamental right to education, thus requiring the State to show that the Challenged Statutes satisfy strict scrutiny. *Skeen*, 505 N.W.2d at 315.

The district court's judgment must be reversed, and Plaintiffs' claims must be allowed to proceed. At minimum, Plaintiffs must be given an opportunity to amend.

## STATEMENT OF THE CASE

### I. FACTUAL ALLEGATIONS

#### A. Plaintiffs allege that the State is failing its constitutional duty to maintain an education system that provides an adequate education for all students.

The Education Clause requires the State to maintain a "'general and uniform system of education' which provides an adequate education to all students in Minnesota." *Id.* Plaintiffs allege that in direct contradiction of this constitutional mandate a substantial share of Minnesota students do not receive an adequate education. For example, Plaintiffs allege that one-third of all fourth-graders cannot meet academic proficiency standards; that a majority of students graduating high school are unprepared to succeed in college; and that significant achievement gaps exist across race, ethnicity, and economic status. Amended Complaint ("AC") (May 2, 2016), ¶¶ 6-15; 159-63. Plaintiffs allege that their children are among those not being provided an adequate education. *See id.* ¶¶ 27-30.

#### B. Plaintiffs allege that ineffective teachers cannot provide students an adequate education.

Plaintiffs allege that teachers are a key determinant of student learning and that teacher quality affects student success more than any other in-school factor. *Id.* ¶¶ 45-48.

Plaintiffs allege that *effective* teachers ensure academic growth and proficiency, and provide students the foundation from which to advance and achieve; conversely, students assigned to *ineffective* teachers suffer significantly diminished academic performance, fall further behind grade-level each successive school year, are less likely to complete school, more likely to be teenage parents, and will earn substantially lower wages over the course of their careers than students taught by effective teachers. *Id.* ¶¶ 49-52.

**C. Plaintiffs allege that the State's school system employs ineffective teachers.**

The Minnesota Department of Education ("DoE") does not publish teacher performance results. Nonetheless, Plaintiffs allege it is common knowledge that the State's school system employs ineffective teachers unable to prepare students to "achieve academic benchmarks." *Id.* ¶ 53; *see id.* ¶¶ 63-64, 119. Plaintiffs allege that as many as seventeen percent of teachers are "ineffective"—i.e., unable "to advance student learning such that, on average, students demonstrate at least one year of academic learning during a school year"—and that ineffective teachers are frequently clustered in schools serving the largest populations of low-income students and students of color. *Id.* ¶¶ 59, 119.

**D. Plaintiffs allege that state law requires and provides measures of teacher "effectiveness."**

Minnesota law requires school districts to "develop, improve, and support qualified teachers and effective teaching practices." Minn. Stat. §§ 122A.40, subd. 8(b); 122A.41, subd. (5)(b). Teacher evaluations occur once every three years, are based on state standards for student development and academic growth, and "must use state and local measures of student growth and literacy … to determine 35 percent of teacher

evaluation results." *Id.* §§ 122A.40, subds. 8(b)(3)(incorporating Minn. R. 8710.2000, Standards of Effective Practice for Teachers), (9); 122A.41, subds. 5(b)(3), (9) (same). Teachers are graded on a DoE rubric that rates teachers "Exemplary," "Effective," "Development Needed," or "Unsatisfactory." In its Implementation Handbook, the DoE instructs that an "effective" teacher demonstrates "strong performance at a rigorous level," and "consistently meets performance standards," which include the ability to "ensure the continuous intellectual, social, and physical development of the student" (among other things).[1] Minn. R. 8710.2000, subp. 9; *see generally id.*

**E. Plaintiffs allege that the Challenged Statutes provide ironclad job security to chronically ineffective teachers.**

Plaintiffs allege that despite knowing that effective teachers are critical to providing an adequate education to all students, the State enforces laws—the Challenged Statues—that prevent discharge of chronically ineffective teachers. AC ¶ 96. These laws of universal application afford ironclad job security to chronically ineffective teachers, requiring that *every* time a school principal seeks to discharge an ineffective teacher she must overcome time-, labor-, and cost-prohibitive hurdles. *Id.* ¶¶ 69-113. These include,

Upon a determination that a tenured teacher[2] is ineffective:

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[1] The DoE's teacher evaluation rubric and Implementation Handbook are each available at http://education.state.mn.us/MDE/dse/edev/mod/ (last visited Mar. 23, 2017).

[2] A teacher obtains tenure after just a 3-year probationary period. Minn. Stat. §§ 122A.40, subd. 5(e); 122A.41, subd. 2(d). Despite the protections conferred by tenure, Plaintiffs allege that the tenure process is a formality, and that tenure is granted without regard for classroom performance. AC ¶¶ 77-79. Plaintiffs further allege that "a minimum of 4- to 5-years' classroom experience is required in order to accurately predict a teacher's ongoing effectiveness." *Id.* ¶ 80. Thus, even if principals incorporate evidence of classroom effectiveness into teacher tenure decisions, the 3-year probationary period is

- Written notice of specific deficiencies constituting ineffective performance;
- "Reasonable time" to remedy such deficiencies; *and*
- "Support to improve through a teacher improvement process that includes established goals and timelines."

Upon a determination that a chronically ineffective teacher's performance has not improved and that discharge proceedings are warranted:

- Discharge proceedings may only commence during certain limited periods of the school year;
- Written notice of the basis of discharge;
- Written notice of the right to a closed-door school board hearing *or* arbitration; *and*
- Notice of the right to be represented by an attorney throughout discharge proceedings.

Upon the chronically ineffective teacher's election of a school board hearing:

- Compulsory process for witnesses and the production of records;
- Provision of a court reporter at the school board's expense;
- Proof of grounds for discharge by substantial and competent evidence;
- Discharge only by a majority vote of the school board;
- Following a vote to dismiss, a written decision with findings of fact based upon competent evidence;
- Judicial review of the board's decision; *and*
- Back-pay upon reversal of the board's discharge decision.

Upon the chronically ineffective teacher's election of arbitration:

- Costs and fees of arbitration shared equally by the school board;
- Proof of grounds for discharge by a preponderance of the evidence, *and*
- The arbitrator's decision is binding.

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too short to determine whether a teacher is effective, much less whether he will remain effective over his lifetime in the classroom. *Id.*

Finally, even upon discharge, the chronically ineffective teacher may remain in the classroom until the close of the school year. *See* Minn. Stat. §§ 122A.40; 122A.41. Plaintiffs allege that for the duration of these protracted proceedings, students suffer the harms that result from being assigned to an ineffective teacher. AC ¶ 90.

### F. Plaintiffs allege that the Challenged Statutes burden students' fundamental constitutional right to an adequate education.

Plaintiffs allege that due to the time, complexity, and cost required by these "*super* due process" hurdles, discharge of chronically ineffective teachers is exceedingly rare. *Id.* ¶¶ 69-71, 88. Plaintiffs further allege that even when the discharge process is commenced against an ineffective teacher, it "frequently results in an outcome other than dismissal, such as a transfer." *Id.* ¶ 92. Plaintiffs further allege that even when principals pursue discharge to completion, chronically ineffective teachers still occupy classrooms for *at least* the pendency of the discharge proceedings—which may last the entire school year—because discharge proceedings cannot occur except during the school year, and the law does not require removing a chronically ineffective teacher from the classroom during such proceedings. *Id.* ¶¶ 87-91. Thus, Plaintiffs allege, in every instance the result for students is the same: Chronically ineffective teachers—that by the State's definition cannot prepare students "to achieve academic benchmarks"—occupy classrooms "long after they have demonstrated themselves to be ineffective." *Id.* ¶¶ 17, 53, 89-91. Plaintiffs allege that "continued employment of ineffective teachers in Minnesota's public schools is the natural consequence" of the Challenged Statutes, and that these laws "inevitably … conflict" with their children's fundamental right to an adequate education. *Id.* ¶¶ 71-72.

### G. Plaintiffs allege that their children are harmed by the Challenged Statutes.

Plaintiffs are mothers of children who attend (and have attended) public schools across Minnesota. *Id.* ¶¶ 27-30. Plaintiffs allege that their children have suffered harm as a result of being assigned to chronically ineffective teachers protected by law, and face an increased risk of being assigned to chronically ineffective teachers because they attend schools employing a disproportionate share of such teachers. *Id.*; *id.* ¶¶ 209-10, 217-18.

## II. PROCEDURAL HISTORY

Plaintiffs filed their declaratory judgment action on April 13, 2016, naming the State, the DoE, the Governor, and the Commissioner of Education as defendants (collectively, the "State"), and seeking a declaration that the Challenged Statutes violate their children's fundamental right, under the Education Clause, to an adequate education. *Id.* ¶¶ 32-35, 219-36, 288-90. Plaintiffs' further allege that these laws violate Minnesota's Equal Protection Clause by creating two classes of students in practice: A class whose fundamental right to an adequate education is burdened as a result of being assigned to chronically ineffective teachers whose employment is protected under law; and a second class whose fundamental right to an adequate education is not burdened because they are assigned to effective teachers. *Id.* ¶¶ 237-48.[3] Plaintiffs seek a permanent injunction barring continued enforcement of these laws. *Id.* p. 74 (Prayer for Relief).

On May 2, 2016, before the State submitted its response, Plaintiffs amended their complaint to add as-applied claims against the school districts where their children attend

[3] Plaintiffs also alleged an equal protection-suspect class claim and a due process claim. AC ¶¶ 249-87. Plaintiffs do ***not*** appeal the court's dismissal of these claims.

school. Plaintiffs alleged that policies adopted by these districts in response to the Challenged Statutes result in violations of the same constitutional provisions above.[4]

All Defendants moved to dismiss Plaintiffs' complaint for lack of jurisdiction and failure to state a claim. Plaintiffs opposed Defendants' motions, answering all objections and requesting leave to amend should the district court agree that Plaintiffs' allegations require additional specificity. The district court heard argument on July 14, 2016; thereafter, upon the court's request, the parties submitted proposed findings of fact, conclusions of law, and orders addressing Defendants' motions.

On October 26, 2016, the district court granted Defendants' motions in their entirety. Pertinent to this appeal—which challenges the court's judgment as it relates to the State only—the district court made three rulings. First, it determined that Plaintiffs lack standing to pursue a declaratory judgment because the State does not make individual teacher retention decisions, and thus Plaintiffs cannot allege a "specific harm" attributable to the State. Memorandum Supporting Findings of Fact, Conclusions of Law, Order for Judgment ("Op."), 22-23 (Oct. 26, 2016). Next, the court ruled that the Challenged Statutes are immune to judicial review because Plaintiffs' concerns relate to the "wisdom" of legislative policy and "the appropriate avenue to address that policy is through the legislative process." *Id.* 27. Finally, the court ruled that Plaintiffs' Education Clause claim fails because Plaintiffs cannot allege that the State's education system is constitutionally inadequate, and cannot show that the Challenged Statutes are unconstitutional in all applications (as required for a facial challenge). *Id.* 32. The court

[4] Plaintiffs do ***not*** appeal the dismissal of their claims against the school districts.

ruled that Plaintiffs' Equal Protection Clause claim fails because "Plaintiffs' allegations do not fall within the scope of legal protections afforded by the fundamental right to education"; and the Challenged Statutes do not "substantially interfere" with children's fundamental right to education, and satisfy rational basis review. *Id.* 36, 40.

Without addressing Plaintiffs' request for leave to amend, the court dismissed Plaintiffs' complaint with prejudice and entered judgment on November 9, 2016. Plaintiffs now seek reversal of the district court's judgment as it relates to the State.

## SUMMARY OF THE ARGUMENT

Minnesota is a notice-pleading state, requiring only information sufficient to fairly notify the opposing party of the claims against it. *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 604-05 (Minn. 2014). Properly viewed, Plaintiffs' complaint passes this threshold.

***First,*** Plaintiffs have standing to pursue a declaration that the Challenged Statutes unconstitutionally burden their children's fundamental right to an adequate education. Plaintiffs allege that the State is failing its constitutional duty to provide all children an adequate education; that the State's legislative preference for providing ironclad job security to chronically ineffective teachers in every instance impedes its ability to do so, thus burdening children's fundamental right to an adequate education; that their children have been assigned to chronically ineffective teachers protected by the Challenged Statutes; and that their children are at heightened risk of being assigned to such teachers as a result of attending schools that employ a disproportionate share of the same. For standing purposes, Plaintiffs' allegations are analytically indistinguishable from those at issue in *Skeen* and satisfy the minimal requirements for seeking a declaratory judgment.

***Second,*** the Challenged Statutes are not immunized by the political question doctrine. Plaintiffs do not brandish the Education Clause as a sword to claim an entitlement, or to strike down education policies implemented in pursuit of the State's duty to provide an adequate education to all students. Rather, Plaintiffs wield the Education Clause as a shield for protection from laws that "subordinat[e] the paramount rights … of the school children to those of the individual teachers." *See Duluth Bd. of Ed.*, 7 N.W.2d at 555. The relief Plaintiffs seek would merely declare the Challenged Statutes unenforceable. Pre-determined state standards for teacher performance exist by which to assess the validity Plaintiffs' claims. As such, Plaintiffs' constitutional challenge to state law is (again) analytically indistinct from that in *Skeen*, and the Court is eminently capable of assessing its merits: Such is its duty. *Marbury*, 5 U.S. at 178.

***Third,*** Plaintiffs' claims are cognizable and well-pleaded. The Education Clause is the cornerstone of Plaintiffs' claims; the *Skeen* decision is the foundation. Plaintiffs allege that the State is failing its constitutional duty to provide an adequate education to all children, including their own; that the Challenged Statutes are a cause of this failure because they provide ironclad job security to chronically ineffective teachers; and that the State lacks a justifiable basis for providing job security to ineffective teachers at the expense of students' fundamental right to an adequate education. Under *Skeen*, these allegations fall squarely within the zone-of-interests protected by the Education Clause.

***Finally,*** at minimum the district court should have allowed Plaintiffs to amend because dismissal of constitutional claims is warranted only upon a showing of complete frivolity, a standard that the State cannot satisfy (for reasons explained below and herein).

## ARGUMENT

### I. STANDARD OF REVIEW

Issues of subject-matter jurisdiction—including justiciability and standing—are reviewed *de novo* as a question of law. *McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 337 (Minn. 2011). Likewise, whether a complaint sets forth a claim for relief is reviewed *de novo*. *Walsh*, 851 N.W.2d at 606. Dismissal with prejudice is reviewed for abuse of discretion. *Brazinsky v. Brazinsky*, 610 N.W.2d 707, 712 (Minn. Ct. App. 2000).

### II. PLAINTIFFS MAY PURSUE THEIR DECLARATORY JUDGMENT ACTION

#### A. A declaratory judgment action only requires a justiciable controversy.

The district court made a fundamental error when it determined that Plaintiffs lack standing to pursue a declaratory judgment: It started with the *wrong* question. "Standing" is a jurisdictional inquiry "concerned with 'who' may bring a suit." *McKee v. Likins*, 261 N.W.2d 566, 570 n.1 (Minn. 1977). Plaintiffs, as mothers of public school students, are obviously the right parties to pursue a lawsuit seeking a declaration that state law operates to deprive their children of their fundamental right to an adequate education. *See Skeen*, 505 N.W.2d at 313 ("Flowing from [a] constitutionally imposed 'duty' is its jural correlative, a correspondent 'right' permitting control of another's conduct." (quoting *Seattle Sch. Dist. No. 1 of King Cty. v. State*, 585 P.2d 71, 91 (Wash. 1978)).

What the district court should have asked (but did not) is whether Plaintiffs' action is "ripe" and "justiciable." *McKee*, 261 N.W.2d at 570 n.1 (the Declaratory Judgment Act "is directed towards the 'ripeness' of a dispute, i.e., 'when' it may be brought"); *McCaughtry*, 808 N.W.2d at 337. Indeed, Minnesota courts have repeatedly emphasized

that the traditional jurisdictional threshold is relaxed for aggrieved parties seeking a declaratory judgment, and that the "[t]he ***only prerequisite*** for a court's exercise of jurisdiction in declaratory judgment actions is the presence of a 'justiciable controversy.'"[5] *Rice Lake Contracting Corp. v. Rust Env't & Infrastructure, Inc.*, 549 N.W.2d 96, 99 (Minn. Ct. App. 1996) (emphasis added).

The answer to *this* question—i.e., whether now is the proper time for Plaintiffs to raise their claims—is also quite clearly *yes*: Plaintiffs allege that the State, as constitutional obligor, has created a legal impediment to delivering on its constitutional obligation to provide an adequate education to all students. Plaintiffs' children, as constitutional obligees, may enforce their fundamental constitutional right to an adequate education against the State to remove this legal impediment. *Skeen*, 505 N.W.2d at 313-15. There is no analytical difference (for purposes of justiciability and standing) between Plaintiffs' constitutional challenge to the State's tenure laws, the *Skeen* plaintiffs' challenge to the State's education funding statutes, or any other grist-of-the-mill

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[5] This Court has explained that "a 'ripening seeds' inquiry replaces the usual 'present controversy' justiciability inquiry in declaratory judgment situations: if a declaratory judgment claimant possesses 'a bone fide legal interest which has been, or with respect to the ripening seeds of a controversy is about to be, affected in a prejudicial manner,' jurisdiction exists." *Rice Lake Contracting*, 549 N.W.2d at 99 (citations omitted); *see McCaughtry*, 808 N.W.2d at 336-38.

This relaxed jurisdictional threshold reflects the Declaratory Judgment Act's "remedial" purpose "to settle and to afford relief from uncertainty and insecurity with respect to rights." Minn. Stat. § 555.12. The Act is intended "to be liberally construed and administered," *id.*, and empowers courts "to declare rights … whether or not further relief is or could be claimed," *id.* § 555.01. Under the Act, "[a]pplicants are ***entitled*** to seek equitable relief in the form of a declaratory judgment to prevent violation of their constitutional rights." *Hernandez v. Minn. Bd. of Teaching*, No. A16-0065, 2016 WL 4162877, at *5 (Minn. Ct. App. Aug. 8, 2016) (emphasis added).

constitutional challenge to burdensome laws. *See id.* at 315-20; *McCaughtry*, 808 N.W.2d at 336-40 (renters presented justiciable controversy and had standing to pursue facial challenge to rental inspection ordinance that allegedly burdened Minnesota's constitutional guarantee against unreasonable searches by streamlining administrative warrant requirements, even prior to issuance of such warrants); *Minn. Fifth Cong. Dist. Indep.-Republican Party v. State ex rel. Spannaus*, 295 N.W.2d 650, 652 n.1 (Minn. 1980) [hereinafter "*Spannaus*"] (political committee presented justiciable controversy and had standing to pursue facial challenge to state certification requirements for Independent candidates despite no such candidates joining suit because "the interests" it sought to protect were "within the zone of interests protected by the Constitution"). Had the court properly focused its inquiry on "ripeness" first, it would have determined that Plaintiffs' claims are justiciable *and* that Plaintiffs have standing to pursue them.

**B. Plaintiffs' allegations establish a justiciable controversy.**

A justiciable controversy exists if the claim (1) involves concrete assertions of right that emanate from a legal source, (2) involves a genuine conflict in tangible interests between parties with adverse interests, and (3) is capable of specific resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion. *McCaughtry*, 808 N.W.2d at 336. Plaintiffs' action satisfies these three elements.

***First,*** Plaintiffs' claims obviously involve concrete assertions of right that emanate from a legal source. Plaintiffs allege that the Challenged Statutes (1) burden their children's fundamental right to an adequate education, as guaranteed by the Education Clause, and (2) impinge their children's right to equal access to an adequate education, in

violation of the Equal Protection Clause. These rights "emanate" from the Minnesota Constitution, the foundation of Minnesota law. *See id.*

***Second,*** Plaintiffs' claims involve a genuine conflict in tangible interests between parties with adverse interests. Under the Education Clause it is the State's "constitutional duty" to create "a 'general and uniform system of education' which provides an adequate education to all students." *Skeen*, 505 N.W.2d at 315, 320. "The existence of a Constitutional duty presupposes a correlative Constitutional right in the person for whom the duty is to be exercised." *Brewer v. Hoxie Sch. Dist. No. 46 of Lawrence Cty., Ark.*, 238 F.2d 91, 100 (8th Cir. 1956); *see Skeen*, 505 N.W.2d at 313 (same). Here, the fundamental constitutional right (to an adequate education) permitting control of the *State's* conduct belongs to "*all* students in Minnesota," which necessarily includes Plaintiffs' children. *Skeen*, 505 N.W.2d at 315 (emphasis added).

Plaintiffs allege that the State is failing its duty to provide an adequate education to all students in Minnesota; that their children are among those deprived; and that the Challenged Statutes are a cause of this deprivation because they prevent discharge of chronically ineffective teachers. In other words, Plaintiffs allege that the State, as constitutional obligor, has created an impediment to fulfilling its constitutional duty to provide an adequate education to all students. Plaintiffs' children, as constitutional obligees whose fundamental right to an adequate education is jeopardized by the Challenged Statutes, seek vindication of a constitutional right permitting control of the State's conduct. *See id.* Clearly, the parties have "adverse interests" in this dispute, which will be well represented through the litigation. *See McCaughtry*, 808 N.W.2d at 336.

***Finally,*** Plaintiffs' claims are "capable of specific resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion." *Id.* Plaintiffs do *not* demand affirmative relief: An advisory order requiring "effective" teachers or "effective teaching practices" is not at stake. Instead, Plaintiffs simply demand that the Challenged Statutes be declared unconstitutional and permanently enjoined. This result alone is sufficient to vindicate their children's fundamental right to an adequate education. Conversely, upon a determination that the State's legislative preference for protecting chronically ineffective teachers from discharge withstands a strict scrutiny analysis, the Statutes' constitutionality will be affirmed. In either event, the purpose of the Declaratory Judgment Act—"to settle and to afford relief from uncertainty and insecurity with respect to rights"—shall have been fulfilled. Minn. Stat. § 555.12.

**C. Plaintiffs' allegations establish standing.**

Likewise, Plaintiffs have standing to pursue their claims. To recall, "standing … is concerned with 'who' may bring a suit." *McKee*, 261 N.W.2d at 570 n.1. In *Skeen*, the Supreme Court held without qualification "that there is a fundamental right, under the Education Clause, to a 'general and uniform system of education' which provides an adequate education to all students in Minnesota." *Skeen*, 505 N.W.2d at 315. Plaintiffs proceed on their children's behalves, representing "'legally cognizable interests' that are 'distinguished from the general public'"—specifically, students' "interest" in an adequate education. *McCaughtry*, 808 N.W.2d at 338 (quoting *St. Paul Area Chamber of Commerce v. Marzitelli*, 258 N.W.2d 585, 588 (Minn. 1977)). Under *Skeen*, it is inescapable that this "interest" is within "the zone of interests" protected by the

Education Clause. *Spannaus*, 295 N.W.2d at 652 n.1. Thus, Plaintiffs are the correct parties to assert their children's justiciable claims. *Id.*; *McCaughtry*, 808 N.W.2d at 338.

The same result holds under the three-element test applied by the district court, where a plaintiff acquires standing by suffering (1) an injury-in-fact (2) that is fairly traceable to the challenged action of the defendant and (3) likely to be redressed by a favorable decision. *Garcia-Mendoza v. 2003 Chevy Tahoe*, 852 N.W.2d 659, 663 (Minn. 2014). ***First,*** Plaintiffs allege a constitutional injury-in-fact—i.e., "a concrete and particularized invasion of a legally protected interest." *Id.* (quotation marks omitted).[6] Since the founding, it has been the State's constitutional duty to maintain "a general and uniform system of public schools." Minn. Const. art. XIII, § 1. *Skeen* holds that this duty includes a qualitative element: The school system must "provide[] an adequate education to all students," measured by whether it "generate[s] an adequate level of education which meets all state standards." *Skeen*, 505 N.W.2d at 315. "All state standards" necessarily includes "Standards of Effective Practice for Teachers," which require that teachers "ensure [students'] continuous intellectual, social, and physical development," among other things. Minn. R. 8710.2000, subp. 9; *see Skeen*, 505 N.W.2d at 310 (an adequate school system develops children to their "capacity of" literacy, mathematics, and all subjects (quoting *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W.Va. 1979)).

[6] The district court's ruling that Plaintiffs cannot establish an injury attributable to the State because the State does not make individual teacher "retention" decisions misses the mark. Op. 23. Plaintiffs do not seek a declaration that the State has violated their children's right to an adequate education due to certain individual teacher hiring and discharge decisions; they seek a declaration that the tenure laws *themselves* violate their children's right to an adequate education by making it all but impossible under law to remove chronically ineffective teachers from the classroom.

Plaintiffs allege that chronically ineffective teachers cannot provide an adequate education consistent with the State's constitutional obligation because, by the State's own definition, they are unable to ensure the continuous intellectual, social, and physical development of their students. In turn, Plaintiffs allege that laws providing ironclad job security to chronically ineffective teachers are an impediment to the State's constitutional obligation to provide an adequate education to all students, and consequently, a burden on students' correlative "fundamental right, under the Education Clause, to … an adequate education." *Skeen*, 505 N.W.2d at 313, 315. *This* alleged statutory burden—a creation of the State—is the constitutional injury giving rise to Plaintiffs' claims, which, if proved, allows control of the State's conduct. *Id.*; *see also Brewer*, 238 F.2d at 100.

For purposes of standing, there is (again) no conceptual difference between the injury alleged here and the injury alleged in *Skeen*, where the plaintiffs claimed that statutes creating marginal funding disparities among rich and poor districts were an impediment to the State's duty to provide an adequate education to all students, and therefore a burden on students' right to an adequate education. The Court never doubted that this alleged constitutional injury satisfied standing to assert a facial challenge to the funding statutes, even when plaintiffs *conceded* that their children continued to receive an adequate education despite the funding statutes. *Skeen*, 505 N.W.2d at 315-20.[7]

Likewise, there is no conceptual distinction between Plaintiffs' alleged injuries and those at issue in workaday constitutional challenges to state and local laws outside

[7] The *Skeen* plaintiffs' concession doomed the merits of their Education Clause claim, but did not prevent them from attaining standing. *Id.* at 312. Plaintiffs here do *not* concede that "the existing system continues to meet … basic educational needs." *See id.*

the context of the Education Clause. For example, Minnesota's Constitution protects all persons from unreasonable searches. Ordinances making it easier to obtain search warrants of apartment complexes are an impediment to this guarantee, and thus burden all renters' right to be free from unreasonable searches. This burden is a constitutional injury to all renters, and confers every renter with standing to assert a facial challenge to a warrant ordinance, even *before* a warrant is issued. *McCaughtry*, 808 N.W.2d at 336-40.

Alternatively, the First Amendment guarantees all political candidates free political association. Statutes requiring "Independent" candidates to certify that they will not accept donations from political parties are an impediment to this guarantee, and thus a burden on all candidates' right to free political association. This burden is a constitutional injury to all candidates, and confers every candidate with standing to assert a facial challenge to a certification law, even when *no* Independent candidate is involved in the lawsuit. *Spannaus*, 295 N.W.2d at 651-52 & n.1.

In sum, when a plaintiff alleges a facial violation of a recognized constitutional right, the focus of the standing inquiry is on the statutory scheme, *not* the plaintiff's individual circumstances. *See McCaughtry*, 808 N.W.2d at 339 ("The appellants' constitutional challenge does not depend on the contents of any administrative warrant application because a facial challenge asserts that a law 'always operates unconstitutionally.'"). In other words, provided that the "plaintiff[] … allege[s] that the challenged statute injures [her], and that the interests [she] seek[s] to protect are within the zone of interests protected by the Constitution," a constitutional injury-in-fact is established, and the plaintiff may pursue a declaratory judgment. *Spannaus*, 295 N.W.2d

at 651-52 & n.1. In this light, *any student* in Minnesota could seek a declaration that the tenure laws burden students' fundamental right to an adequate education by providing ironclad job security to chronically ineffective teachers because *all students* in Minnesota are guaranteed an adequate education that meets all state standards, and *all students* are at risk of being assigned to a chronically ineffective teacher protected by law but unable to provide instruction at that level.[8] *Skeen*, 505 N.W.2d at 315; *McCaughtry*, 808 N.W.2d at 339; *Spannaus*, 295 N.W.2d at 651-52; *cf. Mo. Coal. for Env't v. F.E.R.C.*, 544 F.3d 955, 957 (8th Cir. 2008) (injury-in-fact established based on "potentially increased risk" of harm). Standing's first element, a constitutional injury-in-fact, is satisfied.

***Second,*** Plaintiffs allege injuries that are obviously traceable to the State. An injury is "fairly traceable to the challenged action of the defendant" when it is "not the result of the independent action of some third party not before the court." *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quotation marks and alterations omitted). Plaintiffs allege that by providing ironclad job security to ineffective teachers, the tenure laws themselves burden students' fundamental right to an adequate education, independent of any action by local administrators. The State is progenitor of state law. Thus, the alleged injury is directly traceable to the State's conduct. *Skeen*, 505 N.W.2d at 308-20 (alleged constitutional injuries caused by education funding statutes traceable to the State); *cf. Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690–91 (1978) (state action, for equal protection purposes, includes laws and ordinances).

[8] Of course, Plaintiffs go further, alleging that their children have been taught by chronically ineffective teachers protected under state law, and face a greater risk of being taught by such teachers as a result of the schools they attend. *See* AC ¶¶ 27-30.

***Finally,*** Plaintiffs' claims are redressable by court order. It is "'likely, as opposed to merely 'speculative,'" that the constitutional deprivations alleged will be relieved "by a favorable decision" because a judgment that tenure laws are unconstitutional would prevent their continued enforcement, eliminating state action that burdens students' right to an adequate education. *Lujan*, 504 U.S. at 561. Redressability is satisfied by the elimination of unconstitutional laws even if other factors contributing to the continued employment of chronically ineffective teachers remain (such as collectively bargained employment contracts). *See Mass. v. E.P.A.*, 549 U.S. 497, 526 (2007) (redressability satisfied where the risk of harm "would be reduced to some extent" by relief sought); *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (rejecting "draconic interpretation" of redressability that would require a favorable decision to relieve "*every* injury").

In sum, Plaintiffs' claims are justiciable and ripe for immediate adjudication, and Plaintiffs, as mothers, have standing to pursue them because they seek to vindicate their children's unique constitutional interest in an adequate education. In this regard, Plaintiffs claims are the same as those at issue in *Skeen* and countless other constitutional challenges to burdensome laws. To determine otherwise—that is, to close the courthouse door even before Plaintiffs have crossed the threshold—is to force upon Plaintiffs "an impossible choice between proceeding without a determination of [their children's] rights and accepting an unsatisfactory status quo." *Rice Lake Contracting*, 549 N.W.2d at 99. Plaintiffs cannot be made to wait: "[W]hen an act is repugnant to the constitution it is the court's duty to invalidate that law immediately." *Wegan v. Vill. of Lexington*, 309 N.W.2d 273, 283 (Minn. 1981) (Amdahl, J., concurring) (citing *Marbury*, 5 U.S. at 178).

The district court's ruling that Plaintiffs lack standing must be reversed.

## III. THE POLITICAL QUESTION DOCTRINE DOES NOT APPLY

A question is political when "it is a matter which is to be exercised by the people in their primary political capacity, or [when] it has been specifically delegated to some other department … of the government, with discretionary power to act." *In re McConaughy*, 119 N.W. 408, 417 (Minn. 1909). However, "[i]f the Legislature transgresses its constitutional limits the courts must say so, for they must ascertain and apply the law, and a statute not within constitutional limits is not law." *State v. Fairmont Creamery Co.*, 202 N.W. 714, 719 (Minn. 1925). Particularly when "a fundamental constitutional guarantee" is at stake, "courts must discharge their duty to vindicate … constitutional rights." *Mitchell v. Smith*, 817 N.W.2d 742, 748 (Minn. Ct. App. 2012); *cf. Elzie v. Comm'r of Pub. Safety*, 298 N.W.2d 29, 32 (Minn. 1980) ("Under well-settled principles of law, allegations of constitutional infirmities deserve a judicial forum.").

### A. Plaintiffs' action squarely presents claims for the Court to decide.

The district court's determination that Plaintiffs present merely a non-justiciable political question is flawed on multiple levels. ***First,*** the court again misconstrued the nature of Plaintiffs' claims: Plaintiffs do not question the wisdom of policies adopted in pursuit of the State's duty to provide an adequate education to all students, Op. 27; Plaintiffs challenge the constitutionality of laws providing ironclad job security to chronically ineffective teachers, thus contributing to an education system that is "inadequate, lacking in uniformity, and discriminatory as to the children served." *See Skeen*, 505 N.W.2d at 311 (discussing *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d

186 (Ky. 1989)). Obviously, the Education Clause requires public schools for the benefit of students, *not* teachers. *See Duluth Bd. of Ed.*, 7 N.W.2d at 555 ("[The Teachers' Tenure Law] should [not] receive a construction … so liberal as to result in subordinating the paramount rights … of the school children to those of the individual teachers."). By alleging that tenure laws work to the benefit of ineffective teachers and to the detriment of students, Plaintiffs unambiguously challenge the Statutes' constitutionality. "Authority to determine the constitutionality of laws resides in the judiciary." *Minn. State Bd. of Health v. City of Brainerd*, 241 N.W.2d 624, 633 n.5 (Minn. 1976).

***Second,*** by definition, a political question involves issues "delegated to some other department … with discretionary power to act." *McConaughy*, 119 N.W. at 417. *Skeen* emphasizes, however, that the State does not act in a discretionary capacity when it fulfills its obligation to provide an adequate education to all students: "[T]he Education Clause *is* a mandate, not simply a grant of power." *Skeen*, 505 N.W.2d at 313.

***Third,*** the district court's reliance on *Associated Schools of ISD 63 v. School District No. 83*, *Alsides v. Brown Institute, Ltd.*, and *Skeen* itself for the proposition that Plaintiffs' concerns are policy-oriented is misplaced. *Skeen*, in fact, stands for the opposite proposition: Plaintiffs' claims are justiciable because they challenge laws impeding the State's constitutional duty to maintain an adequate education system for all children. *Skeen*, 505 N.W.2d at 314-15. The *Skeen* Court never doubted its ability to assess a constitutional challenge to statutes of universal application. *See generally id.*

*Associated Schools* is consistent with this conclusion. There, the Supreme Court upheld state laws allowing school districts that offered secondary education programming

to seek tuition reimbursement from districts that did not offer such programming. 142 N.W. 325, 327 (Minn. 1913). For present purposes, the significance of *Associated Schools* is that, as in *Skeen*, the Supreme Court decided the merits of the Education Clause claim presented; it did not duck behind the political question doctrine. *See id.*

And *Alsides* is a red herring: It addressed a damages action stemming from adult plaintiffs' dissatisfaction with technical training received at a post-secondary, "for-profit, proprietary trade school," which the district court (and, subsequently, this Court) recast as non-justiciable "educational malpractice" claims. *See* 592 N.W.2d 468, 470-73 (Minn. Ct. App. 1999). Plaintiffs' action is different in kind: Plaintiffs do not seek damages based on a particular school's (or a particular teacher's) general "fail[ure] to provide an 'effective education," *See id.* at 473; Plaintiffs seek a declaration that their children's fundamental constitutional right to an education *system* that provides all students an adequate education is burdened by state laws protecting chronically ineffective teachers "unable to prepare students to achieve academic benchmarks." AC ¶ 96. "A legislative preference cannot limit a constitutional right." *Grussing*, 478 N.W.2d at 203 (quotation marks omitted). It is the judiciary's constitutional duty to weigh Plaintiffs' constitutional claims. Minn. Const. art. III, § 1; *Wegan*, 309 N.W.2d at 283 (Amdahl, J., concurring).

***Finally,*** the district court's analysis overlooks authority from high courts around the country, "the vast majority of [which] 'overwhelmingly' have concluded that claims that their legislatures have not fulfilled their constitutional responsibilities under their education clauses are justiciable." *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 226 n.24 (Conn. 2010). These authorities cannot be ignored given the

similarity of the various constitutional provisions at stake. *See id.* (discussing cases).

**B. The *Cruz-Guzman* decision does not control the outcome of this case.**

On March 13, 2017, this Court decided *Cruz-Guzman v. State*, dismissing claims that the State permits "educational and social policies" resulting in segregation and, consequently, "an inadequate education" in violation of the Education Clause. --- N.W.2d ---, 2017 WL 957726, at *1 (Minn. Ct. App. Mar. 13, 2017). Unlike here, the *Cruz-Guzman* plaintiffs did *not* raise an Education Clause challenge to a particular *law*; they focused instead on *policies*. *Id.* Moreover, the plaintiffs demanded affirmative relief to a certain *type* of education—specifically, "an adequate and desegregated education." *Id.* at *2. The district court expressed "[c]oncerns regarding [the] justiciability" of the plaintiffs' claims, but still denied the State's motion to dismiss. *Id.*

This Court reversed, determining that the nature of plaintiffs' allegations and the relief requested would necessarily require a court to define the meaning of an "adequate" education within the context of the plaintiffs' challenge, *and* to define "the attendant qualitative standard" by which to measure adequacy. *Id.* at *4. This endeavor would require "the judiciary to establish educational policy," thus making plaintiffs' claims "a nonjusticiable political question." *Id.* at *5-6. The Court rooted its analysis in *Baker v. Carr*, 369 U.S. 186 (1962), where the U.S. Supreme Court identified six factors to assess whether a political question is "so enmeshed" as to render an action nonjusticiable. *Id.*

*Cruz-Guzman* does not control the outcome of this case because, quite simply, none of the factors that made the *Cruz-Guzman* action nonjusticiable are present here, much less "inextricable." *Id.* ***First,*** and critically, Plaintiffs' claims do *not* require the

Court to "establish[] the appropriate qualitative standard" by which to measure the baseline constitutionality of public education across the state. *Cruz-Guzman*, 2017 WL 957726, at *5. The *Cruz-Guzman* plaintiffs brandished the Education Clause as a substantive sword, alleging that their right to an "adequate education" was violated by *policies* creating segregated schools, and seeking an affirmative order immediately mandating "an adequate and desegregated education." *Id.* at *1-2. By contrast, Plaintiffs here wield the Education Clause as a protective shield, alleging that their fundamental right to an adequate education—*whatever* its contours—is burdened by laws providing ironclad job security to chronically ineffective teachers. Plaintiffs seek merely an order declaring these laws unconstitutional and unenforceable, *not* an order requiring a certain type of education. Stated differently, Plaintiffs merely invoke the Court's time-tested "duty" to "pass[] upon the validity of legislative enactments." *See id.* at *6 (quoting *Curryer*, 25 Minn. at 3). This sword/shield distinction cannot be overemphasized: It is a foundational precept of constitutional law. *Cf. DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989); *Harris v. McRae*, 448 U.S. 297, 318 (1980).

***Second,*** and equally important, Plaintiffs' claims do *not* require the Court to "determine the applicable standard" by which to assess whether the State has "failed to provide an adequate education." *Cruz-Guzman*, 2017 WL 957726, at *6. *Skeen* itself sets the standard: It is the State's constitutional duty to provide an education system that "generate[s] an adequate level of education which meets all state standards" for "all students." *Skeen*, 505 N.W.2d at 315. To repeat: "All state standards" necessarily includes standards of teacher effectiveness, which are required by law and incorporate

student proficiency measures. Plaintiffs allege that a significant portion of Minnesota's students are not meeting academic benchmarks; that chronically ineffective teachers, by the State's *own* definition, cannot adequately prepare students to meet academic benchmarks, and therefore cannot satisfy the State's obligation to provide an adequate education to all students; that chronically ineffective teachers are employed in the school system; and, most important, that chronically ineffective teachers are invariably granted ironclad job security under the Challenged Statutes, which prevents their removal and impedes the State from fulfilling its duty, under the Education Clause, to provide an adequate education to all students. Again, *whatever* the contours of children's fundamental right to an adequate education, Plaintiffs' allegations establish that these laws are a burden requiring legal justification.

***Third,*** unlike *Cruz-Guzman* where the plaintiffs failed to identify—and the Court could not independently ascertain—"any 'judicially discoverable and manageable standards' for resolving [the] inadequate-education claims" at issue, *Cruz-Guzman*, 2017 WL 957726, at *6, Plaintiffs' claims here are resolved by applying metrics specified in state law. In statute, rule, and policy the State has provided the measure of an "effective teacher," and has expressly tied that measure to students' growth and proficiency. *See* Minn. Stat. §§ 122A.40, subd. 8; Minn. Stat. § 122A.41, subd. 5; Minn. R. 8710.2000. Plaintiffs submit that these measures are an appropriate baseline for assessing whether the Challenged Statutes operate as Plaintiffs allege, protecting chronically ineffective teachers unable to deliver an education which meets all state standards for all students, thus burdening children's fundamental right to an adequate education.

In sum, Plaintiffs' claims stand on entirely different footing than those at issue in *Cruz-Guzman*. Plaintiffs allege (1) that the State is failing its constitutional duty to maintain an education system that provides an adequate education to all students; (2) the Challenged Statutes impede the State's ability to provide an adequate education to all students by preventing the removal of ineffective teachers, and thus burden students' fundamental right to an adequate education; and (3) defined metrics already exist to determine whether the Challenged Statutes operate as Plaintiffs allege. Because the factors motivating the *Cruz-Guzman* decision are not involved here, the political question doctrine *cannot* bar Plaintiffs' constitutional claims. *Baker*, 369 U.S. at 217 ("Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence.").

In sum, Plaintiffs allege that the State strayed beyond the "constitutional limits of its legislative powers" by enacting laws providing ironclad job security to ineffective teachers. *See Fairmont Creamery*, 202 N.W. at 719. As such, the Court "cannot abdicate" and must address the merits of Plaintiffs' claims. *Id.* Here again there is no distinction between Plaintiffs' claims and other actions—including *Skeen*—where courts have directly confronted whether a legislative preference burdens a constitutional right.

The court's ruling that Plaintiffs present a political question must be reversed.

## IV. PLAINTIFFS' COMPLAINT STATES CLAIMS UNDER MINNESOTA'S EDUCATION CLAUSE AND EQUAL PROTECTION CLAUSE

### A. The district court employed an impermissibly exacting standard of review.

Minnesota's stated preference is for "non-technical, broad-brush pleadings," and a

motion to dismiss may be granted "only if *it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded*." *Walsh*, 851 N.W.2d at 602 (quotation marks omitted); *Noske v. Friedberg*, 670 N.W.2d 740, 742 (Minn. 2003) (a "minimal" showing survives Rule 12.02(e)). "In addition, where the complaint alleges constitutional violations, a rule 12 motion is subject to increased scrutiny to protect the public from 'possible government overreaching.'" *Schocker v. State Dep't of Human Rights*, 477 N.W.2d 767, 769 (Minn. Ct. App. 1991) (quoting *Elzie*, 298 N.W.2d at 32). Thus, "[w]hen constitutional violations are alleged, the defendant must demonstrate the *complete* frivolity of the complaint before dismissal under Rule 12.02 is proper." *Elzie*, 298 N.W.2d at 33.

Plaintiffs' constitutional claims are not frivolous, and satisfy "Rule 8.01's preference for non-technical, broad-brush pleadings." *Walsh*, 851 N.W.2d at 605.

**B. Plaintiffs' allegations establish a violation of the Education Clause.**

**1. Plaintiffs' Education Clause claim is cognizable.**

Education is unique among rights afforded by the Minnesota Constitution because the Education Clause is the only instance when the Constitution places an affirmative duty on the State. *Skeen*, 505 N.W.2d at 313. For this reason, "there is a fundamental right, under the Education Clause, to a 'general and uniform system of education' which provides an adequate education to all students in Minnesota." *Id.* at 315.

In dismissing Plaintiffs' Education Clause claims, the district court questioned even whether Plaintiffs may allege "a constitutional right to an 'adequate education,'" observing that "*Skeen* is the first and only time Minnesota's appellate courts have used

the word 'adequacy' in connection with the Education Clause."[9] Op. 31. The district court's concerns are ill-founded: *Skeen* leaves no doubt that there is a fundamental right, under the Education Clause, to an education system that provides "an adequate level of education which meets all state standards" for "all students." *Id.* at 315.

***First,*** there is *Skeen's* express holding. Under settled constitutional law, a statute that "operates to the disadvantage of some suspect class or impinges upon a fundamental right" must survive strict scrutiny. *Id.* at 312. The *Skeen* plaintiffs sought a declaration that Minnesota's education funding laws violated students' constitutional rights by creating marginal funding differences among school districts, but could *not* show that these disparities afflicted a particular suspect class. *See id.* at 314. Thus, to determine whether strict scrutiny applied, the Supreme Court first had to decide whether education is a fundamental right. *See id.* at 313-15. The Court's answer was unequivocal:

> In this case, the available evidence suggests that the right of the people of Minnesota to an education is sui generis and that there is a fundamental right, under the Education Clause, to a "general and uniform system of education" which provides an adequate education to all students in Minnesota. In evaluating a challenge to such a fundamental right, this court must employ the strict scrutiny test. Under that test, a law will be upheld only if it is necessary to serve a compelling governmental interest.

*Id.* at 315. The Court then admonished that whether the State has met its constitutional duty to provide an adequate education to all students is measured by whether the system "generate[s] an adequate level of education which meets all state standards." *Id.* Throughout its opinion, the *Skeen* Court deliberately and methodically employed the

[9] *Cruz-Guzman* only addressed justiciability. *Skeen* remains the authoritative decision regarding the scope of students' fundamental right to an adequate education.

same language to describe the contours of children's fundamental right to education: "the state's constitutional duty" (and variations thereof) appears six times, *id.* at 311, 313, 315, 317, 320; "an adequate level of basic education" (and variations thereof), thirteen times, *id.* at 310-12, 315-16, 318; "which meets all state standards" (and variations thereof), four times, *id.* at 315-18; and "all students," "each student," "every child" (and variations thereof), eleven times, *id.* at 315-18, 320. *Skeen's* holding is not a fluke.

***Second,*** there is *Skeen's* reasoning. The *Skeen* Court noted repeatedly that the plaintiffs conceded that all "districts met or exceeded the educational requirements of the state," and that their action was therefore "premised on claims of relative harm" caused by the challenged funding statutes. *Id.* at 302-03. Indeed, the funding mechanisms under attack withstood strict scrutiny under the Education Clause precisely because whatever their marginal effect, the system as a whole provided "funding to each student in the state in an amount *sufficient to generate an adequate level of education which meets all state standards*." *Id.* at 315 (emphasis added). The negative predicate of this holding is that had the *Skeen* plaintiffs sought to prove that basic educational needs were *not* being met, the challenged statutes would have been in constitutional jeopardy.

***Third,*** there is *Skeen's* approval of multiple cases from other jurisdictions determining that their own Education Clause analogues establish a qualitative standard by which to measure whether the State has provided, and children have received, an adequate education. *See id.* at 310-12 (discussing *Pauley*, 255 S.E.2d at 877; *Rose*, 790 S.W.2d at 198; *Seattle Sch. Dist. No. 1 of King Cty.*, 585 P.2d at 97-99; *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990), and others). Since *Skeen*, even more jurisdictions have

determined that their Education Clause analogues embody a right to a certain qualitative level of education. *See Conn. Coal. for Justice in Educ. Funding*, 990 A.2d 206, 244-50 & n.55 ("The vast majority of the other states have reached the … conclusion … that students are entitled to a sound basic, or minimally adequate, education in the public schools." (collecting cases)).

In sum, the only reasonable conclusion is that *Skeen* meant what it said: "there is a fundamental right, under the Education Clause, to a 'general and uniform system of education' which provides an adequate education to all students in Minnesota," measured by whether the system "generate[s] an adequate level of education which meets all state standards." *Skeen*, 505 N.W.2d at 315.

**2. Plaintiffs' Education Clause claim is well-pleaded.**

At its most basic, "non-technical, broad-brush" level, Plaintiffs' complaint alleges that a substantial share of Minnesota students are not meeting state academic benchmarks, AC ¶¶ 6-10, 158-64; that the education system is plagued by significant disparities in education opportunity and achievement, *id.*; that "an arbitrary subset of Minnesota's children" (including their own) are assigned to "ineffective teachers unable to provide students with basic tools to achieve academic benchmarks," *id.* ¶¶ 27-30, 72; and that by preventing discharge of such teachers, the Challenged Statutes "conflict" with the fundamental right to an adequate education guaranteed by the Minnesota Constitution, *id.* ¶ 72. In sum, and consistent with seventy-five years of Minnesota education jurisprudence, Plaintiffs contend that the Challenged Statutes unconstitutionally "subordinat[e] the paramount rights … of the school children to those

of the individual teachers." *See Duluth Bd. of Ed.*, 7 N.W.2d at 555; *see also Grussing*, 478 N.W.2d at 203 ("A legislative preference cannot limit a constitutional right." (quotation marks omitted)). Accordingly, Plaintiffs allege that it is the State's burden to show that the Challenged Statutes satisfy "strict scrutiny." AC ¶ 21.

Simply put, Plaintiffs state a cognizable claim under the Education Clause by alleging that the State has created laws impeding its constitutional mandate to provide an adequate education to all students in Minnesota. *Skeen*, 505 N.W.2d at 315.

**3. Plaintiffs allege a facial violation of the Education Clause.**

"[I]n a facial challenge to constitutionality, the challenger bears the heavy burden of proving that the legislation is unconstitutional in all applications." *McCaughtry*, 831 N.W.2d at 522 (quotation marks omitted)). The district court further determined that Plaintiffs cannot make this showing. Op. 32. Here again, the court erred.

The Challenged Statutes are laws of universal application: In *every* instance, a school principal seeking to discharge a chronically ineffective tenured teacher for ineffective classroom performance must negotiate the super due process hurdles imposed by these laws. Plaintiffs allege that these hurdles require prohibitive time, effort, and cost, and cannot be concluded even over the course of an entire school year. Plaintiffs allege that a single school year assigned to a chronically ineffective teacher is sufficient to cause significant damage to students' academic development.

Quite obviously (but critically), Plaintiffs do *not* allege that the Challenged Statutes are unconstitutional as they relate to *effective* teachers. By definition, an "effective" teacher cannot be dismissed for ineffective performance. Instead, and as

stated, Plaintiffs allege that the Challenged Statutes are unconstitutional because they provide unqualified protection to chronically *ineffective* teachers who universally enjoy ironclad job security and thus invariably occupy classrooms even during the pendency of their discharge proceedings (which cannot be completed except over the course of multiple years), and (by definition) cannot adequately prepare students to attain state academic benchmarks. Plaintiffs further allege that when principals fail to initiate discharge proceedings due to their inherent time, complexity, and cost (as required by the Challenged Statutes), chronically ineffective teachers occupy classrooms in perpetuity. For students, the result is the same in all circumstances: Their fundamental constitutional right to an adequate education is impermissibly burdened by the State's legislative preference for providing job security to chronically ineffective teachers.

**4. Issues of causation are inappropriate for disposition at this stage.**

Finally, the district court determined that Plaintiffs' Education Clause claim also fails because Plaintiffs cannot establish "that teacher tenure laws are causing the system to fall short." Op. 32. However, Plaintiffs are not required to show that the Challenged Statutes are the sole cause of a constitutionally inadequate education system, or even the sole cause of ineffective teachers' continued employment in the public schools. Instead, a *burden* or *impingement* attributable to these laws triggers strict scrutiny, at which point it is the State's obligation to show that they are "necessary to a compelling government interest." *Skeen*, 505 N.W.2d at 312; *cf. Mass. v. E.P.A.*, 549 U.S. at 525-26; *Larson*, 456 U.S. at 243 n.15. Moreover, and in any event, causation is an issue of fact not suited to resolution on a motion to dismiss. *See Ariola v. City of Stillwater*, No. A14-0181, 2014

WL 5419809, at *4 (Minn. Ct. App. Oct. 27, 2014) ("[I]t is premature to reject appellant's assertion of causation on a motion to dismiss under rule 12.02(e)." (citing cases)). For present purposes, it is enough that Plaintiffs allege that the Challenged Statutes "protect ineffective teachers with the consequence that many children are denied their fundamental right to a uniform and thorough education." AC ¶ 23; *id.* ¶ 71 (same).

The court's dismissal of Plaintiffs' Education Clause claim must be reversed.

**C. Plaintiffs' allegations establish a violation of the Equal Protection Clause.**

Minnesota's Equal Protection Clause requires that "all similarly situated individuals must be treated alike." *In re Welfare of Child of R.D.L.*, 853 N.W.2d 127, 131 (Minn. 2014). Thus, even "[a] facially neutral statute can violate the guarantee of equal protection if it is applied in a way that makes distinctions between similarly situated people without a legitimate government interest." *State v. Richmond*, 730 N.W.2d 62, 71 (Minn. Ct. App. 2007). The Equal Protection Clause is particularly concerned by laws that limit fundamental rights or disproportionately burden a suspect class, and upon a showing that either of these conditions exists, the burden shifts, "strict scrutiny will apply, and the state will have to prove that the statute is necessary to a compelling government interest." *Skeen*, 505 N.W.2d at 312; *see R.D.L.*, 853 N.W.2d at 133 (same).

Plaintiffs allege that the Challenged Statutes violate equal protection by unjustifiably creating two classes of students in practice: The first class consists of students whose fundamental right to an adequate education is burdened by having been assigned to chronically ineffective teachers whose employment is protected by the Challenged Statutes; the second class consists of students whose fundamental right to an

adequate education is not burdened for having been assigned to effective teachers. AC ¶ 206. The district court dismissed this claim, determining first that it failed as a matter of law, and second that even if it is cognizable, Plaintiffs' allegations are outside the "scope" of the fundamental right to education, and the Challenged Statutes satisfy rational basis review. Op. 35-36, 40. Again, the court erred at each step.

### 1. Plaintiffs' Equal Protection Clause claim is cognizable.

The court dismissed Plaintiffs' equal protection claim as a nonstarter, reasoning:

- All equal protection claims are "facial" or "as-applied";
- Plaintiffs' claim cannot be "facial" because "[n]othing on the face of the Challenged Statutes … infringes a student's right to education";
- Thus, Plaintiffs' claim must be "as-applied";
- But Plaintiffs' claim cannot be "as-applied" because the relief sought—a declaration that the Challenged Statutes are unconstitutional—extends "beyond the particular circumstances" of this case;
- Therefore, Plaintiffs equal protection claim fails "as a matter of law."

Op. 35 (quoting *John Doe v. Reed*, 561 U.S. 186, 194 (2010)). This logic is flawed.

First, the proposition that Plaintiffs' equal protection claim cannot be "facial" because the Challenged Statutes' text does not expressly burden students' fundamental right to education is incorrect: A "facially *neutral* statute" violates equal protection if in application it creates "distinctions between similarly situated people without a legitimate government interest." *Richmond*, 730 N.W.2d at 71 (emphasis added). This is the very definition of a "disparate impact" equal protection claim. *State v. Frazier*, 649 N.W.2d 828, 842 n.3 (Minn. 2002) (Page, J., dissenting) ("Disparate impact results from practices that, although neutral on their face, fall more harshly on one group than another.").

Here, "disparate impact" is precisely what Plaintiffs allege: The Challenged Statutes, although neutral on their face, inevitably create a class of students whose fundamental right to education is burdened by being assigned to ineffective teachers (whose continued employment is protected by the tenure laws), and a similarly situated class of students whose right to education is not burdened for having been assigned to effective teachers (to whom, by definition, the super due process afforded ineffective teachers is inapplicable). Plaintiffs' claim does not fail simply because the tenure laws' text is agnostic to their children's fundamental rights. *See Frazier*, 649 N.W.2d at 833–34 (statute susceptible to equal protection challenge even when it did not create classifications on its face: "An individual challenging a statute on equal protection grounds must demonstrate that the statute classifies individuals [either on its face or in practice] on the basis of some suspect trait."); *In re McCannel*, 301 N.W.2d 910, 916 (Minn. 1980) (same: "Even though the limitation provision does not speak in terms of classes, this is precisely what it creates for purposes of equal protection analysis.").

The proposition that Plaintiffs' equal protection claim cannot be "as-applied" because Plaintiffs seek a declaration that the Challenged Statutes are unconstitutional is also incorrect. Without precedent or support, the court arrived at this conclusion by re-purposing a test for determining the scope of a federal First Amendment challenge to assess the viability of Plaintiffs' state equal protection claim. For decades, however, Minnesota courts have applied different tests to First Amendment claims. *E.g.*, *State v. Enyeart*, 676 N.W.2d 311, 320 (Minn. Ct. 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."). In other words, the *John Doe* test is inapplicable to a Minnesota equal protection analysis.[10]

Moreover, as noted, Minnesota law provides that a statute is unconstitutional—and must be wholly enjoined—if *in application* it creates "distinctions between similarly situated people without a legitimate government interest." *Richmond*, 730 N.W.2d at 71; *see Dean v. City of Winona*, 843 N.W.2d 249, 258 (Minn. Ct. App. 2014) (same, citing cases), *appeal dismissed* 868 N.W.2d 1 (Minn. 2015). *John Doe* simply does not control the Minnesota judiciary's determination of what characterizes a properly pleaded equal protection claim under Minnesota law. *State v. Russell*, 477 N.W.2d 886, 888 n.2 (Minn. 1991) ("[I]n interpreting our state equal protection clause, we are not bound by federal court interpretation of the federal equal protection clause." (quotation marks omitted)).

In sum, neither the Statutes' text nor the relief sought bars Plaintiffs' equal protection claim. As such, the court's syllogism breaks down, and Plaintiffs may proceed.

**2. Plaintiffs' Equal Protection Clause claim is well-pleaded.**

A properly pleaded fundamental right equal protection claim alleges that a law burdens a fundamental right in practice and causes similarly situated persons to be treated

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[10] *John Doe's* test is likely inapplicable to equal protection challenges even under *federal* law: Decisions post-dating *John Doe* affirm that plaintiffs may assert equal protection claims seeking wholesale invalidation of facially neutral laws because "a facially neutral law whose true purpose (and whose effect) is discrimination violates the Equal Protection Clause every bit as much as a facially discriminatory law." *El-Amin v. McDonnell*, No. 12-538, 2013 WL 1193357, at *3 (E.D. Va. Mar. 22, 2013); *see Lewis v. Ascension Par. Sch. Bd.*, 806 F.3d 344, 353–54 & n.11 (5th Cir. 2015), *cert. denied* 136 S. Ct. 1662 (2016); *Chabad Lubavitch of Litchfield Cty., Inc. v. Litchfield Historic Dist. Comm'n*, 768 F.3d 183, 199 (2d Cir. 2014); *Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 543-44 (3d Cir. 2011).

differently. *See R.D.L.*, 853 N.W.2d at 131. Upon this initial showing, "strict scrutiny will apply, and the state will have to prove that the statute is necessary to a compelling government interest." *Skeen*, 505 N.W.2d at 312. Proof of discriminatory intent is not required to prevail on a fundamental right equal protection claim. *R.D.L.*, 853 N.W.2d at 133 (irrespective of intent, a law that "impinges on fundamental rights … must meet strict scrutiny"); *Greene v. Comm'r of Minn. Dep't of Human Servs.*, 755 N.W.2d 713, 725 (Minn. 2008) (same); *Vergara v. State*, 209 Cal. Rptr. 3d 532, 555 (Cal. Ct. App. 2016), *rev. denied* (Aug. 22, 2016) ("When … a statute impinges a fundamental right … strict scrutiny will apply, irrespective of motive or intent.").

Plaintiffs allege that due to the "time-consuming and expensive" legal hurdles identified above—which, in application, "render dismissal of chronically ineffective, tenured teachers all but impossible," AC ¶ 89—principals are compelled "to leave ineffective teachers in place, or, when feasible, coordinate … transfers." *Id.* ¶ 69. As a result, the Challenged Statutes create two classes among "students of substantially the same age, aptitude, motivation, and ability," *id.* ¶ 203: A class comprised of "students that receive their constitutionally required uniform and thorough education from effective teachers" whose continued employment is not affected by the tenure laws (because an effective teacher cannot be discharged for ineffective performance); and a second class comprised of "students that do not receive their rightful uniform and thorough education because they are taught by ineffective teachers," whose continued employment is preserved by the ironclad job protections provided by the Challenged Statutes. *Id.* ¶ 206. Plaintiffs allege that their children are among students that have been assigned to

chronically ineffective teachers whose continued employment is protected under law, and face heightened risk of being assigned to such teachers due to the schools they attend. *Id.* ¶¶ 27-30, 209-10, 217-18. Thus, Plaintiffs allege that their children are among the class of students whose fundamental right to an adequate education is unconstitutionally burdened by operation of the Challenged Statutes. *See id.*; *id.* ¶¶ 237-48.

Having alleged that the Challenged Statutes burden certain students' fundamental right to an adequate education (including their own) while similarly situated students' rights are *not* burdened, Plaintiffs properly allege a disparate impact equal protection claim, and the State is required to show that these laws satisfy strict scrutiny.

**3. Plaintiffs' Equal Protection Clause claim triggers strict scrutiny.**

Finally, the court ruled that Plaintiffs' equal protection claim fails because the tenure laws satisfy rational basis review. The Court determined that rational basis review, and not strict scrutiny, is the proper standard because (1) "Plaintiffs allegations do not fall within the scope of legal protections afforded by the fundamental right to education," and (2) Plaintiffs cannot show that the Challenged Statutes "substantially interfere" with a cognizable right and are thus "too attenuated" to trigger strict scrutiny. Op. 36.

Again, the court erred on both fronts. For reasons explained, Plaintiffs' allegations establish that the Challenged Statutes burden their children's fundamental right to an adequate education. Accordingly, the State must show that the Challenged Statutes withstand strict scrutiny. *Skeen*, 505 N.W.2d at 315. Moreover, whether the Challenged Statutes "directly or substantially interfere" with Plaintiffs' children's fundamental right to an adequate education is (again) an issue of causation that cannot be decided at this

early stage. *Ariola*, 2014 WL 5419809, at *4.[11]

But even if the district court correctly applied rational basis review to Plaintiffs' claims (it did not), it applied the wrong test, asking merely whether the Challenged Statutes are "rationally related to the achievement of a legitimate government purpose." Op. 40. This is the federal rational basis test. *Scott v. Minneapolis Police Relief Ass'n, Inc.*, 615 N.W.2d 66, 74 (Minn. 2000). Plaintiffs allege claims under Minnesota's Equal Protection Clause, thus requiring Minnesota's more rigorous rational basis test. This test mandates (1) that distinctions among classes created by statute "must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation"; (2) "the classification must be genuine or relevant to the purpose of the law"; and (3) "the purpose of the statute must be one that the state

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[11] The district court's reliance on *Gluba v. Bitzan & Ohren Masonry*, 735 N.W.2d 713, 720 (Minn. 2007), to determine that the connection between the Challenged Statutes and students' right to an adequate education is "too attenuated to trigger" strict scrutiny is misplaced. Op. 36. First, the *Gluba* Court arrived at its conclusion after developing an evidentiary record. *Gluba*, 735 N.W.2d at 717–19. Here, by contrast, the court ruled on the factual issue of causation prior to receiving any evidence. For this reason alone, the district court's ruling on this point must be reversed. *Ariola*, 2014 WL 5419809, at *4.

*Gluba's* facts are also distinguishable. In *Gluba*, the plaintiff alleged that the Workers' Compensation Act violated equal protection because it burdened "the fundamental right 'to live where one chooses.'" 735 N.W.2d at 720. Questioning whether such a "fundamental right" even exists, the Court nonetheless determined that any burden on such right was "too attenuated" to trigger strict scrutiny because it relied on a series of unproved assumptions. *See id.* By contrast, students' fundamental right to an education system that "provides an adequate education to all students in Minnesota" is incontrovertible. *Skeen*, 505 N.W.2d at 315. Additionally, all children are compelled to attend school, Minn. Stat. § 120A.34, making it a certainty—not merely a *possibility*—that some children will be assigned to classrooms occupied by chronically ineffective teachers whose continued employment is protected by the Challenged Statutes. As such, a direct line exists between the Challenged Statutes and the constitutional deprivations alleged here. Strict scrutiny is required. *Skeen*, 505 N.W.2d at 315.

can legitimately attempt to achieve." *Id.* Plaintiffs submit that the Challenged Statutes cannot satisfy Minnesota's "stricter standard of rational basis of review." *Russell*, 477 N.W.2d at 889. In any event, this test is (again) premature without an evidentiary record.

The court's dismissal of Plaintiffs' fundamental right equal protection claim must be reversed.

## V. PLAINTIFFS MUST BE ALLOWED TO AMEND

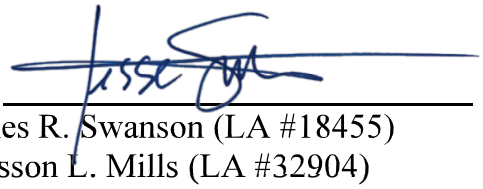
On a final note, the district court prematurely dismissed Plaintiffs' constitutional claims with prejudice and without acknowledging Plaintiffs' express request for leave to amend. While maintaining that their complaint is sufficient to withstand the State's Rule 12 motion, Plaintiffs point out that the discrete deficiencies that troubled the district court are capable of being remedied in a new pleading. Thus, because Plaintiffs allege that their children's constitutional rights are violated by the Challenged Statutes, and because the State has not "demonstrate[d] the *complete* frivolity of the complaint" (for reasons explained herein), the district court abused its discretion when it dismissed Plaintiffs' complaint with prejudice. *See Elzie*, 298 N.W.2d at 33; *see also Dean v. City of Winona*, 868 N.W.2d 1, 8 (Minn. 2015) (a party faced with dismissal may seek leave to amend its complaint, "and amendments should be freely granted when justice so requires").

## CONCLUSION

For these reasons, the district court's order and judgment must be reversed. At minimum, Plaintiffs must be granted an opportunity to amend their complaint.

Dated: March 23, 2017

**FISHMAN HAYGOOD, L.L.P.**



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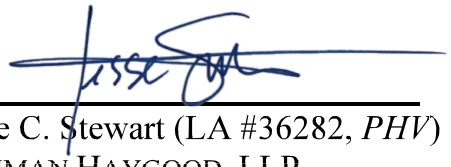
## CERTIFICATION OF LENGTH

I hereby certify that this Appellants' Brief conforms to the requirements of applicable rules, is produced with a proportional 13-point font, and the length of this document is 12,730 words. This document was prepared using Microsoft Word 2010.



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## ADDENDUM

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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

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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; and 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
Case Type: Other Civil

**FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER FOR JUDGMENT**

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This matter came on for hearing on Defendants' motion to dismiss pursuant to Minn. R. Civ. P. 12.02 (a) and (e) on July 14, 2016. James R. Swanson, Esq., Jesse Stewart, Esq., Frederick Finch, Esq. and Nekima Levy-Pounds, Esq. appeared on behalf of plaintiffs. Alethea Huyser, Esq. appeared on behalf of Defendants State of Minnesota, Minnesota Department of Education, Governor Mark Dayton and Minnesota Commissioner of Education Brenda Cassellius. Elizabeth Veira, Esq. appeared on behalf ISD No. 709, Duluth Public Schools. Peter Mikhail, Esq. appeared on behalf of ISD No. 625, St. Paul Public Schools. John Baker, Esq. and

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Jeanette Bazis, Esq. appeared on behalf of ISD No. 11, Anoka-Hennepin School District. James K. Martin Esq. appeared on behalf of Defendant, Independent School District No. 197, West St. Paul, Mendota Heights, Eagan Public Schools ("ISD 197"). The parties filed their final submissions August 19, 2016 and the Court took the matter under advisement at that time.

The Court having considered the submissions and arguments of counsel, and upon all the files, records and proceedings herein, issues the following:

**ORDER**

1. The Defendants' Motions to Dismiss Plaintiffs' Amended Complaint are granted in their entirety.

2. Plaintiffs' Amended Complaint is dismissed with prejudice.

2. The attached Memorandum is made a part hereof and incorporated by reference.

LET JUDGMENT BE ENTERED ACCORDINGLY.

26 October 2016

BY THE COURT:

Margaret M. Marrinan
Judge of District Court

Judgment
I hereby certify the foregoing order constitutes the Judgment of the Court.

Court Administrator
Linda Graske, Deputy Clerk

Graske, Linda
Nov 9 2016 10:45 AM

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MEMORANDUM

## A. BACKGROUND

Plaintiffs are the parents and guardians of five children who currently attend or have attended the Defendant school districts. Their Amended Complaint asks the Court to find M.S. §§ 122A.40 (the "Continuing Contract Law") and 122A.41 (the "Tenure Act") unconstitutional in all applications and to wholly enjoin their application. Specifically, Plaintiffs allege that these statutes are unconstitutional under the following provisions of the Minnesota Constitution: Education Clause (Art. XIII, § 1), Due Process Clause (Art. I, § 7) and the Equal Protection Clause (Art. I, § 2). (AC. ¶ 25.) Regarding the Education and Due Process Clauses, Plaintiff allege that the statutes violate these provisions both facially and as-applied. Regarding the Equal Protection Clause, they challenge the statutes' constitutionality as-applied. In addition to asking that the Court declare these statutes unconstitutional, Plaintiffs seek a permanent injunction enjoining the enforcement, application or implementation of the statutes, or substantially similar statutes, in the future. (AC. p.74 ¶¶ 4-5).

Since their inception in 1927, laws governing teacher tenure have been revised several times.[1] No Minnesota court has previously held that the state's tenure and continuing contract laws violate the Minnesota Constitution. Plaintiffs claim that as implemented today, however,

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[1] Christine Ver Ploeg, *Terminating Public School Teachers for Cause under Minnesota Law,* 31 Wm. Mitchell L. Rev. 303, 306 (2004).

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these tenure and contract laws put low income students and students of color at risk of having ineffective teachers and, as such, are unconstitutional.

For the reasons set forth below, the Court finds that it lacks subject matter jurisdiction to adjudicate the allegations in Plaintiffs' Amended Complaint, and that the Plaintiffs have also failed to state a claim upon which relief can be granted as a matter of law. As a consequence, the Amended Complaint is dismissed with prejudice.

## B. PLAINTIFFS' ALLEGATIONS

For purposes of this motion to dismiss, the Court accepts the factual allegations pled by Plaintiffs as true.

More than 92% of Minnesota children attend the state's more than 2000 public schools, which serve a diverse population of more than 840,000 students. (AC.¶ 2) In the aggregate, Minnesota children continue to outpace their peers from other states on the National Assessment of Educational Progress ("NAEP"), considered "the Nation's Report Card"). (AC. ¶ 4). Despite this, the majority graduate high school unprepared to succeed in college. (AC. ¶ 6).

Dramatic opportunity gaps among the students exist across socioeconomic status, race and ethnicity. These persist throughout the course of the children's education. (AC.¶ 7). Minnesota's disparities in academic outcomes are among the worst in the nation and are reflected in its high school graduation rates. (¶ 11). Despite legislative mandates to close this achievement gap, most Minnesota public schools have failed to make significant progress in narrowing it. (AC. ¶ ¶ 12-15).

Minnesota has adopted statutes relating to the manner in which school districts employ teachers, specifically M.S. § 122A. 40 ("Continuing Contract Law") and M.S. § 122A.41 ("Teacher Tenure Act"). The first applies to most school districts throughout the state, the second

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to school districts serving cities of the first class, including Defendants ISD 625 (St. Paul) and ISD 709 (Duluth). For purposes of this litigation, the provisions of these statutes are identical, and the Court will refer to the statutes collectively as the "Challenged Statutes".

Plaintiffs allege that the provisions regarding hiring and retention of teachers found in these statutes perpetuate the achievement gap and affect students statewide. (AC. ¶¶ 16-18). Specifically, the Challenged Statutes force school leaders to: 1) grant new teachers virtually permanent employment after three years on the job; 2) keep ineffective teachers long after they have shown themselves to be ineffective; and 3) terminate less-senior teachers when budget constraints require staff reductions, regardless of whether these teachers achieve better results for their students than more senior teachers. (AC. ¶ 17). Nonetheless, teachers laid off under these statutes are both effective and ineffective teachers. (AC. ¶ 112.)

As the Amended Complaint applies to the specific Plaintiffs, the following are accepted as facts for purposes of this motion:

1. Anoka-Hennepin School District 11

The allegations pertaining to Plaintiff Forslund appear at AC. p.8, ¶27; pp. 38-40, ¶¶139-144; pp. 52-53, ¶¶184-187, and p. 62, ¶218.

Plaintiff Forslund's daughter K.F., age 17, is an African American student in an unidentified AHSD school. (AC ¶27). K.F. qualifies for free or reduced-price lunch.

The Amended Complaint alleges that K.F. has been assigned to an ineffective teacher, or is at substantial risk of being assigned to an ineffective teacher, or both (AC ¶27.) However, it does *not* allege that K.F. is:

1) Being taught by an ineffective teacher, or is about to be taught by one;

2) Currently assigned to, or about to be assigned to, and ineffective teacher;

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3) Attending, or about to attend, a school that serves predominantly low-income students and students of color, or a school serving the highest percentages of low-income students and students of color.

Although the Amended Complaint alludes to differences in the quality of teachers at two elementary schools (Evergreen Park Elementary and Andover Elementary) (AC ¶¶ 139-44), it does not allege that 17-year old K.F. is attending any elementary school. In fact, Plaintiffs acknowledge that K.F. attends neither of these schools. How this information relates to Plaintiff' Forslund's child is not explained.

Plaintiff makes no reference to her child's grades or other indicia of academic performance, or that s/he has suffered as a result of being enrolled in this school district.

Plaintiffs also allege that, "[u]pon information and belief, the Anoka-Hennepin Public Schools grant tenure to, and continue to employ ineffective teachers, including teachers directly responsible for K.F.'s education" and "engage in quality-blind layoffs which have the effect of depriving K.F. of the opportunity to learn from effective teachers." (AC. ¶ 218.) However, K.F. does not identify what about her teachers at Anoka–Hennepin School District 11 she believes makes them ineffective or any adverse consequences she claims to have suffered as a result.

In sum, Plaintiff Forslund fails to 1) allege any action or inaction by this defendant in relation to these schools; 2) identify what it is about the teachers that she believes make them ineffective; and 3) establish any nexus between the elementary schools and her 17-year old child (and thus what adverse consequences her child has suffered).

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2. West St. Paul-Mendota Heights-Eagan Area Schools, ISD

The allegations pertaining to Plaintiff Justina Person's Complaint against this Defendant appear at AC. p.8, ¶28, pp.40-43, ¶¶145-150, pp. 54-55, ¶¶188-191; and p. 61, ¶ 217.

Plaintiff Person is the mother of J.C., age 14, and D.C., age 8, both of whom are presently students in the West St. Paul–Mendota Heights–Eagan Area Schools, Independent School District 197. They are Caucasian, and qualify for free or reduced-price lunch.

Dissatisfied with the teachers to whom her children were assigned in their previous school district (St. Paul Public Schools, ISD 625), Plaintiff Person transferred them to ISD 197 (AC. ¶ 217), and alleges that "as a direct result of the Challenged Statutes, J.C. and D.C. have been assigned to an ineffective teacher" and remain at substantial risk of being assigned to ineffective teachers. (AC. ¶28.)

As with Ms. Forslund, Plaintiff Person alludes to a comparison between two schools (Moreland Arts & Health Magnet and Mendota Elementary School) within the district. She alleges that Moreland has a greater number of low-income students and ineffective teachers than Mendota. Plaintiffs acknowledge that J.C. and D.C. do not currently attend either of these schools.

Plaintiff does not allege that either child has been assigned to an ineffective teacher while enrolled in ISD 197. Rather, as do the other Plaintiffs, she speculates that the children are at a "substantial risk" of being assigned to an "ineffective teacher". Similarly, she makes no reference to her children's grades or other indicia of academic performance, or that they have suffered as a result of being enrolled in this school district.

Thus, Plaintiff Person fails to 1) allege any action or inaction by this defendant in relation to these schools; 2) identify what it is about the teachers that she believes make them ineffective;

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3) establish any nexus between the elementary schools and her 17-year old child (and thus what adverse consequences her child has suffered).

The Amended Complaint fails to define the term "ineffective teacher" or the standard or method by which an "effective teacher" is distinguished from an "ineffective teacher".

3. St. Paul Schools, ISD 625

The allegations pertaining to ISD 625 are found at AC. pp. 8-.9, ¶ 28 and¶ 30; pp.32-34, ¶¶125-131; pp. 49-52, ¶¶ 176-179; p. 59, ¶ 209 and p. 61, ¶217. Two Plaintiffs make allegations against this Defendant.

The first, Justina Person, described immediately above, moved her children to ISD 197 from ISD 625 following experiences with ineffective teachers in the St. Paul Public Schools. (AC.¶ 28). Ms. Persons does not identify the St. Paul schools her children attended, but alleges that they "have been assigned an ineffective teacher who impedes their equal access to the opportunity to receive a uniform and thorough education" and that "they transferred from the St. Paul Public Schools" as a result. She alleges "upon information and belief" that ISD 625 granted tenure to, and continues to employ the ineffective teachers directly responsible for her children's education.

The second, Roxanne Draughn, is the mother of A.D., age 7. A.D. is African American, qualifies for FRL, and attended an unidentified school in St. Paul, where a substantial majority of the students qualified for FRL and identify as students of color. Ms. Draughn alleges that A.D.'s school's performance on the MCAs lags behind statewide averages, and that "on information and belief, he attends (and has previously attended) a public school that has more than its proportionate share of ineffective teachers." (AC. ¶ 209.)

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Ms. Draughn draws a comparison between two elementary schools in the St. Paul Public Schools (Obama Elementary and Horace Mann Elementary) and alleges disparities in student performance based upon a disparities between the effectiveness of teachers at each of these schools. Nowhere does Plaintiff allege that her son attends either school. Nor does she make any reference to her child's grades, or other indicia of academic performance, or that he has suffered as a result of being enrolled in this school district.

As do the other Plaintiffs, she alleges "on information and belief" that her son "has been assigned to, and/or is at substantial risk of being assigned to, an ineffective teacher"....and is "disproportionately more likely to be assigned to ineffective teachers....than students who attend schools that serve more affluent populations...."(AC.¶ 209).

By letter dated August 11, 2016, counsel for Plaintiff Draughn advised the Court that she has withdrawn A.D. from the St. Paul Public Schools for the 2016-17 school year and has enrolled him in a public charter school.

A.D., J.C., and D.C. do not identify the basis upon which they allege that their teachers in St. Paul are ineffective or what adverse consequences they claim to have suffered as a result.

4. ISD 709 (Duluth Public Schools)

The allegations pertaining to Plaintiff Dominguez are found at the following paragraphs of the Amended Complaint: p. 9, ¶29; p. 35, ¶¶132-134; p. 51, ¶¶ 180-182; and p.60, ¶210.

This Plaintiff alleges that a) her 13-year old child is Native American and qualifies for free or reduced-priced lunch; b) because of the Challenged Statutes she "has been assigned to, and/or is at substantial risk of being assigned to an ineffective teacher who impedes [her] equal access to the opportunity to receive a uniform and thorough education, and that [she] lacks notice of and opportunity to challenge the same". ¶29.

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At pages 35 and 51 of the Amended Complaint, a comparison of two schools within the district is made. At p. 60, Plaintiff alleges that her daughter "currently attends (and has previously attended) a school where a significant majority of students qualify for FRL", that a substantial share of her classmates are students of color, and that her schools lag well-behind district and state performance averages on the Minnesota Comprehensive Assessments ("MCAs"). E.Q. does not identify the school she attends. Nor does she allege that ISD 709 has another school that serves the same grade levels as E.Q.'s school and that serves a more affluent student body with fewer students of color.

She goes on to allege that "[o]n information and belief, [her daughter] has been assigned to, and/or is at substantial risk of being assigned to, an ineffective teacher, at the same time that students in other classrooms in the same school are assigned to effective teachers, and is likely to be assigned to more ineffective teachers than students who attend schools that serve more affluent populations where fewer children identify as students of color..."

Plaintiff makes no reference to her child's grades, or other indicia of academic performance, or that she has suffered as a result of being enrolled in this school district.

Plaintiff Dominguez fails to 1) allege any action or inaction by this defendant in relation to these schools; 2) identify what is it about her teachers that she believes make them ineffective; and 3) identify what adverse consequences her daughter has suffered as a result.

5. State Defendants

Plaintiffs also assert claims against the State of Minnesota, Governor Mark Dayton, the Minnesota Department of Education, and Commissioner of the Minnesota Department of Education, Dr. Brenda Cassellius.

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Plaintiffs sue the State of Minnesota based on its "plenary responsibility for educating all Minnesota public school students" and allege that the remaining State Defendants have some general oversight over education. Plaintiffs neither allege that any of Plaintiffs' children attend a school run by a State entity, nor assert that any named State Defendant has legal authority to hire, fire, supervise, or assign individual teachers.

6. General Allegations

Plaintiffs' Amended Complaint also contains a number general allegations that are not specific to either the Plaintiffs or Defendants in this case. Among them:

a. The key, in-school determinant of student success is teacher quality, and high-quality instruction from effective teachers helps students overcome disadvantages associated with socioeconomic status. (AC. ¶¶45-50).

b. Students are harmed by the hiring and retention of "ineffective teachers". (AC ¶¶57-58, 64, 70).

c. Low-income students and students of color are more likely to be taught by "ineffective teachers" than students attending schools serving more affluent and/or majority-white populations. (AC.¶19).

d. There is a connection between tenure laws, "ineffective teachers" and achievement disparities among students based on socioeconomic status, race and ethnicity (AC.¶¶7-11).

e. Each of the defendant districts are less proficient on standardized tests due to a concentration of 'low-performing", "ineffective" teachers in schools serving the highest percentages of low-income students and students of color. (AC. ¶¶125-150).

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f. Similarly, these teachers have less classroom experience than teachers at schools serving more affluent or more majority-white student populations. (AC.¶¶176-191).

g. In aggregate, Minnesota public school children outperform students in nearly every other state, and outpace peers from other states on the National Assessment of Educational Progress ("NAEP"), "the Nation's Report Card." (AC.¶¶ 1, 3).

Plaintiffs draw no direct connection between the statistics they cite regarding teachers' years of classroom experience and student performance or teacher effectiveness. (AC.¶¶176-191). Defendants, also citing NAEP, have presented public data showing that despite the existence of achievement gap disparities, Minnesota students of all backgrounds perform at or near national averages. Defendants also point to data on Minnesota charter schools, which are not subject to state tenure laws, yet which are disproportionately among the poorest performing schools in Minnesota. Plaintiffs have not addressed this public data, which is available on the Minnesota Department of Education website.

## C. ANALYSIS

### 1. Minnesota's Statewide Education System

The Education Clause of the Minnesota Constitution emphasizes the importance this state places on universal education:

> "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

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> schools.....[and to] make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state....[2]

Historically Minnesota has placed education at the pinnacle of the state's priorities. There is no statewide school board: control over employment decisions at the schools rests with the local school districts. These districts have the discretion to determine the protocol for hiring teachers, evaluating their performance, and implementing statutory requirements for mentoring, educating and improving teaching practices. With this discretion comes the ability to address and remove non-performing teachers. None of the State Defendants have legal authority over the hiring, evaluation or discharge of the teachers.

With more than 840,000 students, over 2,000 public schools and 55,277 public school teachers, state education policy is complex and expansive. The importance of education is reflected in comprehensive and continually evolving legislation that addresses academic standards, curriculum and assessment and accountability.[3]

Although public school students in the state tend to outperform students in other states, Minnesota has an achievement gap in public education that stretches across socioeconomic, racial and ethnic lines. (AC.¶¶ 7-11). Concerned about the gap, the legislature has prioritized closing it by adopting statutes that require school boards to adopt comprehensive, long-range strategic plans designed to achieve that goal. In 2016, it required each district's strategic plan to

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[2] Minn. Const. Art. XIII § 1.The Amended Complaint makes no claim regarding the State's funding duties.

[3] M.S. §§120B.018-.09; §§ 120B.10-.236; and§§ 120B.299-.365, respectively.

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include a process to examine "the equitable distribution of diverse, effective, experienced and in-field teachers and strategies to ensure low-income and minority children are not taught at higher rates than other children by inexperienced, ineffective, or out-of-field teachers..."[4]

Although the epicenter of Amended Complaint is the premise that Plaintiffs' children have the potential to be exposed to "ineffective" teachers, nowhere is this term defined. For purposes of the claims alleged here, the Court must assume that it refers to teachers whose ineffectiveness merits discharge. Plaintiffs do allude to a 2012 survey of Minnesota public school teachers (the "MinnCAN Survey") in which those teachers polled[5] believed that 82.5 % of teachers are effective, and 17.4 % ineffective. ("Ineffectiveness" was defined as being unable "to advance student learning such that, on average, students demonstrate at least one year of academic learning during a school year") AC. ¶ 59. More than 90% of the responses attributed the main reason for "ineffectiveness" to factors *other than* teacher experience or ability.

2. **Background of Teacher Tenure in Minnesota**

Minnesota's first tenure law was adopted in 1927,[6] in order to ensure that teacher employment was driven by job performance.[7] The Challenged Statutes provide a legal

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[4] 2016 Minn. Session Laws, art. 25, §§ 9-12.

[5] The Amended Complaint neither reveals the number of teachers responding to this survey nor what percentage of "ineffective" teachers are tenured or non-tenured.

[6] Act of March 14, 1927, Ch. 36, 1927 Minn. Laws 42–44. Minnesota's first tenure law applied only to teachers in so-called "cities of the first class"—i.e., Minneapolis, St. Paul, and Duluth. Minn. Stat. § 2935-1 *et seq.* (Mason 1927). Approximately ten years later, continuing contracts were extended to teachers in other districts. Minn. Stat. § 2903 (Mason 1938). Although Minnesota law continues to maintain two separate statutory provisions for tenure and continuing contracts, the provisions at issue in this case are now largely similar. As such, the Court refers to both as "tenure" laws, differentiating only where necessary.

[7] *McSherry v. City of St. Paul*, 277 N.W. 541, (Minn. 1938).

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framework for teacher employment decisions made by local school districts, while guaranteeing certain procedural due process protections for teachers.[8] Minnesota law expressly allows districts to terminate or remove any teacher for cause, including for poor teaching.[9]

In *McSherry v. St. Paul,* the Supreme Court reasoned that the purpose of these laws was to protect students and improve the quality of their education through development of a professional teaching staff. It described tenure as having as its basis "the public interest, in that most advantages go to the youth of the land and to the schools themselves rather than the interest of teachers as such" and that it had been adopted so that "better talent would be attracted to the profession." [10] Addressing the genesis of tenure laws, the Court referenced the spoils system that had come into prominence during the presidency of Andrew Jackson, and had flourished for years afterward. To combat these abuses, the principles of the first national civil service act (1883) were later adopted for the teaching profession because "it was thought that for the good of the schools and general public the profession should be made independent of personal or political influence, and made free from the malignant power of spoils and patronage"[11].

The Court went on to elaborate on the legislative intent underlying teacher tenure:

> 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

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[8] For example, see M.S. §§ 122A.40-.41 (Employment Contracts and Teacher Tenure Act).
[9] M.S. §§ 122A.40, subds. 9, 13; 122A.41, subd. 6.
[10] *Supra,* at 544.
[11] *Id.* at 543.

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> provided means of prevention of arbitrary demotion or discharges by school authorities. [The act].....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. On the other hand, it is equally clear the act does not impair discretionary power of school authorities to make the best selections consonant with the public good. . . . The right to demote or discharge provides remedies for safeguarding the future against incompetence, insubordination, and other grounds stated in the act.[12]

More recently, in 1992, the Minnesota Supreme Court explained that "[t]eachers, 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 unrelated to their ability to perform their prescribed duties."[13] Still other Minnesota courts have described the tenure laws as "wise legislation, promotive of the best interests, not only of teachers affected, but of the schools as well." [14]

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[12] *Id.* at 544.
[13] *Frye v. Indep. Sch. Dist. No.* 625, 494 N.W.2d 466, 467 (Minn. 1992).
[14] *Oxman v. Indep. Sch. Dist. Of Duluth,* 227 NW 351 (Minn. 1929).

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### 3. Teacher Tenure and Continuing Contract Laws

Statutes governing the manner in which school districts employ teachers are broken into two categories:

1) The "Teacher Tenure Act" (M.S. §122A.41), applicable to cities of the first class (here, ISD 625 and ISD 709); and

2) The "Continuing Contract Law" (M.S. § 122A.40), applicable to the remaining defendants and all other school districts in the state.

The statutory framework for teacher tenure in all Minnesota school districts is straight-forward, and all school districts in the state are subject to it. Where a district fails to follow the provisions of either M.S. §§ 122A.40 or 122A.41, as applicable, its employment action against a teacher is deemed ineffective. [15] New teachers are considered probationary employees for at least three years. During that time, they must receive at least three evaluations in each school year by a peer review committee. Probationary teachers can be discharged, demoted, or have their contracts non-renewed, and they have no rights of appeal should that occur.[16]

Many effective teachers complete probation successfully and achieve tenure (AC. ¶¶ 53, 65).[17] For those who do so, they "shall continue in service and hold [the] respective position during good behavior and efficient and competent service and must not be discharged or demoted except for cause after a hearing".[18]

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[15] *Perry v. ISD No. 696,* 210 NW2d 283, 287 (Minn. 1973).
[16] M.S. §§ 122A.40, subd. 5; 122A.41, subd. 2.
[17] The Court will use the word "tenure" to apply to both M.S. §§122A.40 and 122A.41.
[18] M.S. §§ 122A.40, subd. 7.

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Tenured teachers can be terminated for cause, including: (1) inefficiency or gross inefficiency in teaching; (2) neglect or willful neglect of duty or persistent violation of school laws, rules, regulations, or directives; (3) conduct unbecoming a teacher, insubordination, immoral conduct, conviction of a felony; (4) failure without justifiable cause to teach; (5) other good and sufficient grounds that render the teacher unfit to perform the teachers' duties.[19]

Individual employment decisions on teacher probation, tenure, and dismissal are made at the local school district level, and the details about the implementation of the statutory requirements are negotiated as part of collecting bargaining agreements. M.S. §§ 122A.40, 122A.41.

Once a teacher obtains tenure, school districts provide development opportunities and evaluation once a teacher obtains tenure. They must implement teacher evaluation and peer review processes in order to "develop, improve, and support qualified teachers and effective teaching practices." [20] In addition to defining affirmative goals to improve teaching quality, districts must address any teacher not meeting professional standards through a teacher improvement plan with established goals and timelines. If the teacher fails to make adequate progress while on an improvement plan, discipline is required including possible termination, discharge, or nonrenewal.[21]

Tenure laws include reduction-in-force provisions that govern default procedures to be followed if conditions, such as budget or lower student enrollment, require a decrease in teacher staffing. Although Minnesota law provides that "[i]n the event it becomes necessary to

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[19] M.S. §§ 122A.40, subds. 9, 13; 122A.41, subd. 6.
[20] M.S. §§ 122A.40, subd. 8(b); 122A.41, subd. (5)(b).
[21] M.S. §§ 122A.40, subd. 8 (12), (13); 122A.41, subd. 5 (13).

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discontinue one or more positions . . . teachers must be discontinued in any department in the inverse order in which they were employed", *it does not mandate the use of this system.* Instead, it expressly allows school boards and teacher representatives in the district to negotiate "a plan providing otherwise".[22]

Plaintiffs' concerns in this case relate to areas currently subject to active policymaking by the Minnesota Legislature. As mentioned above, in the 2015-2016 legislative session, the Minnesota Legislature passed several laws germane to the allegations in Plaintiffs' Amended Complaint:

1) A statutory commitment to teacher assessment, development, and improvement specifically intended to provide for "improved and equitable access to more effective and diverse teachers." [23]
2) A body of laws specifically enacted "to pursue racial and economic integration and increase student achievement, create equitable educational opportunities, and reduce academic disparities. . . ." [24]
3) A requirement that Districts are to publish long-term plans which address "equitable distribution of diverse, effective, experienced and in-field teachers and strategies to ensure low-income and minority children are not taught at higher rates than other children by inexperienced, ineffective, or out-of-field teachers".[25]

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[22] M.S. §§ 122A.41, subd. 14; 122A.40, subd.10-11.
[23] Act of June 1, 2016, ch. 189, 2016 Minn. Laws 1, art. 24, §§ 6-7 (to be codified at M.S. §§122A.40, subd. 8; 122A.41, subd. 5).
[24] *Id.*, and M.S. § 124D.861, subd. 1 (a).
[25] *Id.* at art. 25, §§9-12.

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4) Unless unavoidable, a student must not be taught in two consecutive years by a teacher who is on an improvement plan.

## D. CONCLUSIONS OF LAW

Defendants argue that Plaintiffs' Amended Complaint fails for lack of subject matter of jurisdiction and for the failure to state a cognizable claim. The Court addresses each in turn.

Minn. R. Civ. P. 12.02 provides several bases upon which a complaint may be dismissed. Those pertinent here are 1) the lack of subject matter jurisdiction (Minn. R. Civ. P. 12.02 (a)) and 2) the failure to state a claim upon which relief can be granted. (Minn. R. Civ. P. 12.02 (e)).

### 1. Lack of Subject Matter Jurisdiction

A complaint must be dismissed if the court lacks jurisdiction over the subject matter of the complaint. Minn. R. Civ. P. 12.08 (c).

Standing, a threshold issue to jurisdiction, relates to the Court's authority to redress an injury through coercive relief. It falls under the broader umbrella of justiciability, which "forms a threshold for judicial action and requires, in addition to adverse interests and concrete assertions of rights, a controversy that allows for specific relief by a decree or judgment of a specific character as distinguished from an advisory opinion predicated on hypothetical facts...When a lawsuit presents no injury that a court can redress, the case must be dismissed for lack of justiciability"[26].

To establish a justiciable controversy in a declaratory judgment action that challenges the constitutionality of a law, a plaintiff must show "a direct and imminent injury which results from

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[26] *State ex rel. Sviggum v. Hanson,* 732 NW2d 312, 321 (Minn. App. 2007).

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the alleged unconstitutional provision and that "the law is, or is about to be, applied to his disadvantage".[27] The mere possibility of injury is not enough to establish justiciability *(Id.)* and an action is justiciable only if it "(a) involves definite and concrete assertions of right that emanate from a legal source, (b) involves a genuine conflict in tangible interests between parties with adverse interests, and (c) is capable of specific resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion". [28] Where the complaint "does not state a cognizable claim or cause of action under the substantive law", dismissal is proper.[29] Finally, where claims present nonjusticiable political questions, the court lacks subject matter jurisdiction.[30]

A. Standing

Standing is essential to the existence of a justiciable controversy, and lack of it bars consideration of the claim by the court"[31]. Put succinctly, the question of standing is whether the litigant is entitled to have the court decide the merits of a particular issue. It requires that a party have a sufficient stake in a justiciable controversy to seek relief from the court[32] and that s/he "articulate a legally cognizable interest …suffered because of the State's action and that differs

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[27] *McCaughtry v. City of Red Wing,* 808 NW2d 331, 337 (Minn. 2011).
[28] *Cincinnati Ins. Co. v. Franck,* 621 NW2d 270, 273 (Minn. App. 2001).
[29] 1 David F. Herr& Roger S. Hadock, *Minnesota Practice* § 12.9, at 366 (5th ed. 2009)
[30] "What is generally meant, when it is said that a question is political, and not judicial, is that it is a matter which is to be exercised by the people in their primary political capacity, or that it has been specifically delegated to some other department or particular officer of the government, with the discretionary power to act…" *In re McConaughy*, 119 N.W. 408, 417 (Minn. 1909).
[31] *In re Custody of D.T.R.,* 796 NW2d 509, 512 (Minn. 2011).
[32] *Lorix v. Crompton Corp.,* 736 NW2d 619, 624 (Minn. 2007).

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from injury to the interests of other citizens generally"[33]. Without these requirements, "the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights". [34] The "standing inquiry [is] especially rigorous when reaching the merits of the dispute would force [a court] to decide whether an action taken by another branch of government is constitutional"[35], and the court must be careful to "abstain from encroaching on the power of a coequal branch" of government [36].

To establish standing, a plaintiff bears the burden of showing 1) an injury-in-fact; 2) traceability; and 3) redressability.[37]

(1) Injury-in-fact

For an injury-in-fact, the plaintiff must show a "concrete and particularized invasion of a legally protected interest"[38], and that the harm claimed is "personal, actual or imminent.[39] Where an issue has "no existence other than in the realm of future possibility [it is] purely hypothetical and…not justiciable".[40]

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[33] *Webb Golden Valley, LLC v. State,* 865 NW2d 689, 693 (Minn. 2015).
[34] *Warth v. Seldin,* 95 S.Ct. 2197, 2205 (1975).
[35] *Clapper v. Amnesty Intern.,* 133 S.Ct. 1138, 1147 (2013).
[36] *State ex rel Sviggum, supra.*
[37] *Riehm v. Comm'r of Public Safety,* 745 NW2d 869, 873 (Minn. Ct. App. 2008). See also *All. For Metro. Stability v. Metro Council,* 671 NW2d 905,913 (Minn. App. 2003).
[38] *Lorix v. Crompton Corp.,* 736 NW2d 619, 624 (Minn. 2007). *See also Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992).
[39] *Riehm, supra,* at 873.
[40] *Lee v. Delmont,* 36 NW2d 530, 537 (1949).

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As it relates to the State Defendants, the Amended Complaint does not allege that any of them make any decision regarding the hiring, retention or assignment of Plaintiffs' teachers. Consequently it also fails to allege any specific harm allegedly caused by these parties.

As to each of the named school districts, Plaintiffs have failed to establish an injury-in-fact. There is no claim that an action (or inaction) of the defendant districts has resulted in personal, actual or imminent harm to them. Rather than being pled with the concrete, particularized information required by case law, the Amended Complaint is couched in generalized, conclusory terms. Plaintiffs allege that they have "been assigned to, and/or [are] at substantial risk of being assigned to, an ineffective teacher who impedes [their] equal access to the opportunity to receive a uniform and thorough education". It is only in the complaint against ISD 625 (the St. Paul School District) that a Plaintiff alleges her children actually have been assigned to an "ineffective" teacher. Yet even in that case, there is no definition of what an "ineffective" teacher might be.

(2) Traceability

Nor do *any* of the Plaintiffs identify any negative consequences that have resulted *to them* from the assignment of their teachers. Standing requires that Plaintiffs allege that they themselves have been injured: the harm alleged "must affect [them] in a personal and individual way"[41] , and they must plead "concrete facts showing that the Defendants' *actual actions* have caused the substantial risk of harm" (emphasis supplied)[42]. Nowhere do Defendants allege that

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[41] *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 n. 1(1992).
[42] *Clapper v. Amnesty Int'l USA,* 133 S.Ct. 1138, 1150 (2013).

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the actual actions of any of the Defendant school districts have caused a substantial risk of harm to Plaintiffs' children. Rather, they place the onus on the Challenged Statutes.

Being creatures of statute, school districts and their boards have only such powers as are conferred on them by the legislature.[43] Plaintiffs acknowledge that the Defendant school districts are required to follow these statutes (AC.¶ 74). This being the case, there is no genuine conflict in adverse interests between these parties. As discussed above, where there is no genuine conflict of adverse interests, there is no justiciability.[44]

(3) Redressability

Finally, the Court must be able to redress the harm alleged by Plaintiffs.

"Justiciability doctrines—including mootness and standing—all relate, in some manner, to the court's ability to redress an injury through coercive relief."[45] Because Plaintiffs' alleged harms are not fairly traceable to the teacher tenure and the continuing contract provisions they challenge, a decision by the Court to strike those laws would not redress the harms. In *Warth v. Seldin*, after finding that plaintiffs lacked standing on a number of grounds (including the failure to allege facts showing that there was a substantial probability that the challenged government action caused their harm), the Court also found that plaintiffs had failed to allege facts from which it could be inferred that "if the court afford[ed] the relief requested, the asserted [harm] will be removed".[46]

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[43] *Perry v. ISD 696,* 210 NW2d 283, 286 (1973).
[44] *State ex rel Sviggum, supra.*
[45] *Id. at 321.*
[46] 95 S.Ct. 2197, 2208 (1975).

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Plaintiffs acknowledge that eliminating teacher tenure will not ensure that their children never again receive a teacher they consider "ineffective",[47] and the Amended Complaint itself acknowledges that removing the laws would only provide school districts "greater flexibility." (AC. ¶ 200.) When taken as true, these allegations, still fail to 1) present a substantial probability that "but for" the tenure laws Plaintiffs' alleged harms would not occur; and 2) demonstrate that the harm complained of would be removed were the Court to strike down these laws.

B. Political Question

The political question doctrine exists to preserve the constitutional separation of powers between the executive, legislative, and judicial branches of government. No branch of government "can legally exercise the powers which in the constitutional distribution are granted to any of the others. A grant to one is a denial to the others." [48]

A question is political, and not judicial, when "it has been specifically delegated to some other department or particular officer of the government with discretionary power to act" and although the courts may decide whether the legislature has acted within its Constitutional bounds, they but cannot go further and exercise powers delegated by the constitution to the legislature.[49]

When it comes to education, the Minnesota courts have long recognized that cases challenging educational policies and methods by which they are achieved are legislative

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[48] *McConaughy, supra*, 119 N.W. at 416–17.
[49] *Id.* See also *Smith v. Holm*, 19 N.W.2d 914, 916 (Minn. 1945).

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questions that are not justiciable by the Courts. Among the cases reflecting this is *Assoc. Schools of Ind. Dist. No 63 v. Sch. Dist. No. 83,* in which a plaintiff challenged a legislative requirement that local school districts maintain departments for certain subjects. The Court noted that "the maintenance of public schools is a matter, not of local, but of state, concern" and that the case presented "a legislative and not a judicial question, a question of legislative policy and not of legislative power"[50] In *Skeen v. State,* rejecting a challenge to education funding laws, the Court reiterated the importance of the separation of powers when interpreting the Education Clause: "[We] do not mean to suggest that it would be impossible to devise a fairer or more efficient system of educational funding. Instead, we believe that any attempt to devise such a system is a matter best left to the legislative determination." [51]

Minnesota courts have also recognized in other contexts that claims related to educational quality are not, as a matter of policy, proper for court adjudication. In Alsides *v. Brown Inst., Ltd.*, [52] the Court of Appeals "rejected, on public policy grounds, claims for educational malpractice [which] would require the court to engage in a 'comprehensive review of a myriad of educational and pedagogical factors, as well as administrative policies.'" At issue in *Alsides* were claims that a private school failed to provide adequate instruction and education. Explaining the public policy grounds for rejecting such claims, the Court of Appeals noted:

1) the lack of a satisfactory standard of care by which to evaluate an educator;

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[50] 142 N.W. 325, 327-328 (Minn. 1913).
[51] 505 N.W.2d 299, 308–19 (Minn. 1993).
[52] 592 N.W.2d 468, 473 (Minn. App. 1999) (citation omitted).

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(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."[53]

The Minnesota Constitution commits matters of education policy, including details regarding the type and quality of educators, to the legislative branch. Plaintiffs' quest for a better or more-perfect education is parallel to that pursued by the legislature, but there is nothing in the Amended Complaint that forms a cognizable constitutional claim that can be remedied by a court.

Plaintiffs' concerns in this case relate to the wisdom of the legislative policy. Almost 140 years of state case law stands for the proposition that the appropriate avenue to address that policy is through the legislative process rather than the courts. "The public policy of a state is for the legislature to determine and not the courts." [54]

The Amended Complaint presents no injury that the Court can redress. The final prong required for justiciability and standing is lacking and the suit must be dismissed on that basis.[55]

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[53] *Id.* at 472

[54] *Mattson v. Flynn*, 13 N.W.2d 11, 16 (Minn. 1944).

[55] *McSherry, supra.*

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**2. Failure to State a Claim**

A claim is sufficient against such a motion "if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded"[56]. Put another way, the only question for the court is "whether the complaint sets forth a legally sufficient claim for relief".[57] Addressing such a motion, the district court must consider "only the facts alleged in the complaint, accepting [them] as true and must construe all reasonable inferences in favor of the nonmoving party". [58] A legal conclusion in a complaint is not binding, however, and a plaintiff must provide more than mere labels and conclusions to survive the motion to dismiss.[59] Generally the court must ignore materials outside the pleadings, but it may consider some materials that are part of the public record as well as those necessarily embraced by the pleadings.[60]

In accord with this standard, the Court has taken as true those facts properly alleged in Plaintiffs' Amended Complaint ("AC").

Here, Plaintiffs must establish standing as to *each claim* against *each named Defendant*. The U.S. Supreme Court has explained this concept by stating that "[t]he actual-injury requirement would hardly serve the purpose of . . . preventing courts from undertaking tasks assigned to the political branches[,] if once a plaintiff demonstrated harm from one particular

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[56] *Walsh v. U.S. Bank, N.A.*, 851 NW2d 598, 603 (Minn. 2014).
[57] *Elize v. Comm'r of Pub. Safety,* 298 NW2d 29, 32 (Minn. 1980).

[58] *Hebert, supra* at 229.
[59] *Bahr v. Capella University,* 788 NW2d 76, 80 (Minn. 2010).
[60] *Porous Media Corp. v. Pall Corp.*, 186 F 3d. 1077, 1079 (1999).

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inadequacy in government administration, the court were authorized to remedy *all* inadequacies in that administration." [61]

Seen in the light of the fundamental requirements of pleading, the Amended Complaint fails to state a claim upon which relief may be granted as against each of the defendant districts. While Plaintiffs argue that the districts are proper parties because they supervise and control staffing decisions in the schools serving their children, the Amended Complaint does not allege that any of them have (or are about to take) any action, or fail to take any action, that has caused or will cause harm to any of the Plaintiffs.

The Amended Complaint asserts both facial and as-applied claims, but the requested relief asks that the challenged provisions of the Minnesota teacher tenure and continuing contract laws be found invalid and be wholly enjoined. Regardless of how pled, Plaintiffs' claims are defined by the relief they seek.[62] When the relief sought is an invalidation of the statute in all applications, Plaintiffs are asserting facial claims. *Id.* Because that is the case here, Plaintiffs' claims are all facial claims and Plaintiffs must prove that the statutory provisions they challenge are unconstitutional in all their applications. [63]

A. The Education Clause

> "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

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[61] *DaimerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006).
[62] *John Doe No. 1 v. Reed,* 561 U.S. 186 (2010).
[63] *McCaughtry v. City of Red Wing,* 831 NW2d 518, 522 (Minn. 2013).

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> 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.

The object of this clause is "to ensure a regular method throughout the state, whereby all may be enabled to acquire an education which will fit them to discharge intelligently their duties as citizens of the republic"[64] This language is unambiguously directed at the legislature, *not* to the school districts. As a consequence, it does not create individually enforceable constitutional rights against the individual school district defendants.

The clause addresses two distinct concepts: one addressing the establishment of a "general and uniform system of schools"; the other addressing the financing of the system. At issue here is the first of these concepts.

In *Skeen v. State,*[65] the Minnesota Supreme Court analyzed the term "general and uniform system". Turning back to the days of the Minnesota Constitutional Convention of 1857, the court discussed the wording proposed by various constitutional delegates, and then the language finally adopted. It analyzed at length the phrase "general and uniform", rejected the attempt of the plaintiffs to construe it narrowly, and instead highlighted early state cases that found that the provision should be broadly interpreted. It reaffirmed the concept that "uniform" does not mean "identical" or even "nearly identical", and "merely applies to the general system, not to specific …disparities." [66]

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[64] *Board of Educ. Of Town of Sauk Centre v. Moore,* 17 Minn. 412, 416 (1871).
[65] 505 NW2d 299 (1993).
[66] *Id.,* at 310–11.

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Among the cases the *Skeen* Court followed was *Curryer v. Merrill*. There, arguing that the Education Clause compelled uniformity, the plaintiff challenged a statute that provided books for public schools, but that did not apply to certain school districts. Stating that "[t]he rule of uniformity....has reference to the *system* which [the legislature] may provide, and not to the district organizations that may be established under it", the Court declined to strike down the statute because the objections raised pertained to "legislative discretion and policy only, and not one of power".[67] The Court's continuous emphasis on a "uniform system" has continued from *Curryer* on down through other cases, among them *State ex rel. Klimek v. Otter Tail County*[68], (rejecting the argument that the clause required uniformity in free school busing).

Whether the subject complained of is text books (*Curryer)*, school busing (*Klimek)*, or school funding (*Skeen)*, there simply is no recognized right under the Education Clause to identical or "uniform" education or teachers.

Plaintiffs contend that they are not seeking identical education, but that under *Skeen* they have a constitutional right to an "adequate education," which they generally allege is not being met. *Skeen* is the first and only time Minnesota's appellate courts have used the word "adequacy" in connection with the Education Clause. The plain language of the Education Clause does not contain the word adequacy. As Defendants point out, *Skeen* was a funding case and the adequacy of the basic funding provided was not in dispute. [69] Plaintiffs have cited no case law that supports the proposition that the language of the Education Clause allows a

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[67] 25 Minn. 1, 7 (1878).
[68] 283 NW 397, 398 (Minn.1939).
[69] *Skeen*, 505 N.W.2d at 315 ("In this case, the plaintiffs concede that they continue to receive an adequate education . . .)

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Minnesota court to weigh into debates of educational policy or to become an arbiter of which educational systems and frameworks best serve Minnesota's interest.

Assuming, *arguendo,* that *Skeen* had implied a basic concept of "adequate education" into the plain language of the Education Clause, Plaintiffs' Amended Complaint fails to allege harms that would fall below that measure. Among the cases from other jurisdictions discussed by the *Skeen* Court was one from Wisconsin that defined "uniform" as referring to minimum standards for teacher certification and number of school days as well as standard school curriculum.[70] Another, from West Virginia, suggested basics such as reading, writing, arithmetic and civics.[71]

Nowhere does Plaintiffs' Amended Complaint allege that Minnesota's system of education fails to meet these basic requirements, much less that teacher tenure laws are causing the system to fall short. To the contrary, Plaintiffs acknowledge that Minnesota's system of education generally ranks as one of the best in the country, and that Minnesota schools do have effective teachers. Nowhere do Plaintiffs identify any concrete past or imminent harm, any factual allegations, of how their individual educations failed to meet these concepts of adequacy.

In challenging these statutes on their face, Plaintiffs bear a heavy burden of proving that the legislation is unconstitutional in *all* applications,[72] that is, that the harms they allege occur inevitably as a result of the statutes.[73]. This is a standard Plaintiffs cannot meet.

The plain language of the challenged provisions does not obligate school districts to provide a constitutionally "adequate" education. Rather, these provisions plainly give school

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[70] *Kukor v. Grover*, 436 N.W.2d 568, 577-78 (Wis. 1989).
[71] *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W.Va. 1979).
[72] *Minn. Voters Alliance v. City of Minneapolis,* 766 NW2d 683, 688 (Minn. 2009).
[73] *McCaughtry v. City of Red Wing*, 831 N.W.2d 518, 522 (2013).

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districts the discretion not to hire and retain ineffective teachers. Minn. Stat. §§ 122A.40, 122A.41. School districts can determine whom to hire,[74] and can dismiss teachers who are not performing effectively.[75] They have the authority to restructure reduction-in-force provisions in negotiation with the teacher unions.[76] The Minnesota Supreme Court has recognized explicitly the authority of local administrators to implement the state's tenure laws and has instructed that the laws "must not be construed . . . to impair the right of a school board to determine policy in the administration of school affairs, or to transfer from a school to . . . courts the management of, supervision, and control of school systems." [77]

Regardless of the best efforts of school officials, it is inevitable that there will be variations in school and teacher performance, both in terms of style and quality. There is nothing in the plain language of the Education Clause, or in the state appellate cases interpreting it, that intimates that all such variations should carry constitutional significance. The essence of Plaintiffs' claims is not that Minnesota lacks a "general and uniform" system of education, but rather, a disagreement with the *type* of general and uniform system chosen by the legislature. As such these 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"[78]. Weighing the relative merits of different educational systems is the province of policymakers, not judges.

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[74] Minn. Stat. §§ 122A.40, subd. 5; 122A.41, subd. 2.
[75] Minn. Stat. §§ 122A.40, subds. 9, 13; 122A.41, subd. 6.
[76] Minn. Stat. §§ 122A.40, subd. 10, 122A.41, subd. 14.
[77] *Frye v. ISD. No. 625*, *supra*, 494 N.W.2d at 467-78.
[78] *McCaughtry, supra*, 831 NW2d at 522.

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B. Equal Protection Clause

In addition to claiming that the Challenged Statutes violate the Education Clause, Plaintiffs also assert that they violate the Equal Protection Clause because they result in ineffective teachers being disproportionately assigned to schools serving the largest concentrations of low-income students and students of color. As a consequence they "create an arbitrary distinction between students" who are taught by "effective" as opposed to "ineffective" teachers". (AC. ¶¶ 205–07.)

The Equal Protection Clause states that:

> "No member of this state shall be disenfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgement of his peers..." Minn. Const. art. I, § 2.

Statutes are presumed to be constitutional and will not be declared unconstitutional unless it is shown beyond a reasonable doubt that it violates the constitution,[79] and where constitutionally challenged, the duty is on the challenging party to prove its invalidity.[80] The courts should not substitute their judgment for that of the legislature, and as long as a statute is rationally related to a legitimate government purpose, it should be upheld. *Id.* Strict scrutiny applies only if a challenged statute operates to disadvantage a suspect class or impinge upon a

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[79] *Dimke v. Finke,* 295 NW 75, 78 (Minn. 1940).
[80] *Essling v. Markman,* 335 NW2d 237, 239 (Minn. 1983).

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fundamental right. In that case, the state generally must prove that the statute is necessary to a compelling state interest.[81]

Plaintiffs frame their equal protection claims only as as-applied claims. As discussed above, these claims must be considered facial claims because the only relief they seek is to have the challenged provisions of the teacher tenure and continuing contract laws invalidated in all applications and wholly enjoined. As stated by Chief Justice Roberts in *John Doe No. 1*,[82]

> "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.

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." [83] Nothing on the face of the Challenged Statutes either infringes a student's right to education or treats a student differently on the basis of race or socioeconomic status. Plaintiffs acknowledge that the teacher tenure and continuing contract laws do not facially violate the equal protection clause. For this reason alone, all of Plaintiffs' equal protection claims fail as a matter of law.

But even if Plaintiffs had asserted a proper as-applied claim, those claims would fail as a matter of law. As mentioned above, strict scrutiny applies only if a challenged statute operates to

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[81] *Skeen, supra,* 502 NW2d at 312.
[82] 561 U.S. 186, 194.
[83] *In re McCannel*, 301 N.W.2d 910, 916 (Minn. 1980).

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disadvantage a suspect class or impinge upon a fundamental right (here, the fundamental right to education). In that case, the state generally must prove that the statute is necessary to a compelling state interest.

(1) Fundamental Right to Education

The Minnesota Supreme Court has recognized the right to a "general and uniform system of education" as one of those fundamental rights "which have their origin in the express terms of the Constitution or which are necessarily to be implied from those terms." [84] Plaintiffs fail to cite any case that suggests that this fundamental right to education calls for a strict scrutiny analysis of any and every statute related to any aspect of education in Minnesota. That is not surprising: such an interpretation would be inconsistent with the Minnesota Supreme Court's recognition that the policy decisions made by the legislature in determining *how* to create a general and uniform system are political questions not appropriate for judicial review. For the same reasons discussed in the context of their Education Clause claims, Plaintiffs' allegations do not fall within the scope of legal protections afforded by the fundamental right to education.

In addition, because the Challenged Statutes directly regulate teacher employment decisions, not students, the connection between the laws and Plaintiffs' educational experience is affected by a variety of intervening factors. As our Supreme Court has recognized in a different context, laws that do not "directly or substantially interfere" with a cognizable fundamental right are "too attenuated to trigger the heightened scrutiny that [Plaintiffs] seek". [85]

For these reasons, strict scrutiny does not apply.

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[84] *Skeen*, 505 N.W.2d at 313
[85] *Gluba ex rel Gluba*, 735 N.W.2d 713, 720 (Minn. 2007).

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(2) Suspect Class

Plaintiffs assert that application of the Challenged Statutes either disparately treats or disparately impacts students of color and low-income students. (AC. ¶ 205.) There are two types of equal protection claims: 'disparate treatment' and 'disparate impact.[86]

First, in order to state a disparate treatment claim, "the threshold question is whether the claimant is treated differently from others who are similarly situated, because the equal protection clause does not require the state to treat differently situated people the same", and Minnesota courts "routinely reject equal protection claims when a party cannot establish that he or she is similarly situated to those whom they contend are being treated differently."[87].

Here, Plaintiffs' allegations against Defendants fail to state a "disparate treatment" claim because they do not allege that the Challenged Statutes themselves result in differential treatment of Plaintiffs. Instead, Plaintiffs allege that application of the statutes exacerbates existing discrepancies in low-income and minority schools. (AC. ¶¶ 19–20.) According to Plaintiffs' own allegations, the Challenged Statutes are applied similarly across school districts, but allegedly negatively impact low-income and minority school districts because they have higher numbers of "ineffective teachers." (*Id.*)

Minnesota courts have held that such allegations do not state a claim for disparate treatment under the Equal Protection Clause. For example, in *Odunlade* , the Minnesota Supreme Court rejected plaintiff-taxpayers' argument that they were treated differently in

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[86] *Odunlade v. City of Minneapolis,* 823 NW2d 638, 647 (Minn. 2012).

[87] *Id.*

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violation of the Equal Protection Clause where their residential properties were assessed at higher ratios than other communities due to "bank sales" being excluded from calculation of market value. The court noted that there were simply "more bank sales in relators' neighborhoods" than in other neighborhoods, but that this does not give rise to an equal protection claim, because the statute was applied similarly across all neighborhoods. [88]

The same reasoning applied in *Dean v. City of Winona,* in which the court stated that "[a]ppellants' real complaint is about the effect of an otherwise neutral ordinance on their particular circumstances, which does not give rise to an equal protection claim."[89] Because "discriminatory effects in the absence of disparate treatment" does not give rise to an equal protection claim,[90] Plaintiffs' allegations do not state a claim for disparate treatment under the Equal Protection Clause.

Second, "[t]o make out a claim for an equal protection violation based on disparate impact, a plaintiff must show (1) that a state action impacts his suspect class more than others, and (2) that the state actor intended to discriminate against the suspect class." [91] It is well established that where a statute is facially neutral and may have a disparate impact, "only invidious discrimination is deemed constitutionally offensive".[92]

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[88] 823 N.W.2d at 647–48.
[89] 843 N.W.2d 249, 259 (Mn. Ct. Ap. 2014)
[90] *Odunlade*, 823 N.W.2d at 648.
[91] *Id.*
[92] *Dean v. City of Winona*, 843 N.W.2d 249, 260 (Minn. App. 2014).

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Plaintiffs' First Amended Complaint does not state a disparate impact claim: there is no claim that Defendants have intentionally discriminated against them on the basis of their race.[93] Nor does the financial status of the Plaintiffs play a part in the outcome of this case. Plaintiffs incorrectly argue that it remains an "open question" whether socio-economic status is a suspect class under Minnesota equal protection law. In 2012, the Minnesota Supreme Court held that "wealth or socioeconomic status does not constitute a suspect class." [94]Although Plaintiffs attempt to argue that *Odunlade* applies only to adults, and not children, the Minnesota Supreme Court drew no such distinction.

Finally, when there are legitimate reasons for the state legislature to adopt and maintain a particular statute, the courts "will not infer a discriminatory purpose on the part of the [State]." [95]

As discussed above in the section addressing the background of teacher tenure laws, the Minnesota Supreme Court has repeatedly recognized the legitimate purposes supporting them, observing that the Legislature's rationale was not only legitimate but "wise legislation, promotive of the best interests, not only of teachers affected, but of the schools as well"[96]

Because there is a rational, neutral explanation for the discriminatory impact alleged,

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[93] See *Odunlade*, *supra* at 648, in which the court affirmed dismissal of plaintiffs' disparate impact claim because "relators fail to allege that respondents intentionally discriminated against them on the basis of any suspect class status".

[94] *Id.*, (citing *Rodriguez*, 411 U.S. at 23-24, 28); *Skeen*, 505 N.W.2d at 314–15 ("The alleged 'class' of low-income persons constitutes an incredibly amorphous group, a group which changes over time and by context, and which is unable to show the historical pattern of discrimination that traditional 'suspect' classes can.") (quoting *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d at 1021).

[95] *McClesky v. Kemp*, 481 U.S. 279, 297-99 (1987).

[96] *Oxman v. Indep. Sch. Dist. Of Duluth*, 227 N.W. 351, 352 (Minn. 1929).

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there can be no inference of discriminatory purpose. Accordingly, Plaintiffs have failed to state an Equal Protection Clause claim against Defendants based on the alleged disparate impact of the teacher tenure laws.

C. Teacher Tenure Laws Satisfy Rational Basis Review

Since strict scrutiny does not apply here, the Challenged Statutes (which must be presumed valid) need only satisfy a rational basis review to withstand a constitutional challenge. If the statute is "rationally related to the achievement of a legitimate government purpose, it will be upheld," and a reviewing court must not substitute its judgment for that of the legislature.[97]

For as long as the teacher tenure laws have been on the books, Minnesota courts have recognized their purpose as the promotion of "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." [98] These laws accomplish this purpose by (1) allowing teacher dismissal only for cause and after a hearing, following a three-year probationary period, (2) giving teachers due process rights in the event of a discharge or demotion, and (3) laying off teachers in the order of least to most seniority, unless the school district and teachers' representative reach some other agreement. These enhanced teacher protections are rationally related to the purpose of promoting stability, certainty, and permanency of teacher employment, and promote the interests of the schools as well as those of the teachers.

The teacher tenure laws must be upheld under a rational basis analysis.

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[97] *Skeen*, 505 N.W.2d at 312.

[98] *Strand v. Special Sch. Dist. No. 1*, 361 N.W.2d 69, 72 (Minn. App. 1984), *rev'd on other grounds*, 392 N.W.2d 881 (Minn. 1986).

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D. Procedural Due Process Claim

In addressing this claim, the court must determine first whether the government has deprived the individual of a protected life, liberty, or property interest, and, if so, whether the procedures it followed were constitutionally sufficient.[99]

Plaintiffs allege a property interest relating to a right to have notice and hearings regarding tenure, dismissal and LIFO (layoff) provisions, and assert they have been deprived of these. (AC. ¶¶ 270- 287). To prevail on these claims, they must prove that the interest allegedly interfered with is a constitutionally protected property interest, and that it has been interfered with to an extent that violates the Due Process Clause.[100] A protected property interest "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 understanding that support claims of entitlement to certain benefits' ".[101] While a property interest in public education has been recognized in the context of student expulsion cases,[102] that section guarantees only the right to *attend* a school and has been limited solely to circumstances of "total exclusion from the educational process." [103] Plaintiffs acknowledge that they currently attend school, and do not allege they have suffered "total exclusion" from their public education (AC. ¶¶ 27–30).

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[99] *Sawh v. City of Lino Lakes*, 823 N.W.2d 627, 632 (Minn. 2012).

[100] Minn. Const. art. 1, § 7 provides that no person shall "be deprived of life, liberty, or property without due process of law". This due process protection is identical to that guaranteed under the U.S. Constitution. *Sartori v. Harnischfeger Corp.*, 432 NW2d 448, 453 (Minn. 1988).

[101] *In re Individual 35W Bridge Litigation*, 806 N.W.2d 820, 830 (Minn. 2011).

[102] *J.K. ex rel. Kaplan v. Minneapolis Public Schools (Special School District No. 1)*, 849 F. Supp.2d 865, 871 (Minn. 2011). *See also, e.g., Goss v. Lopez*, 419 U.S. 565, 573–74 (1975).

[103] *Zellman ex rel MZ v. Indep. Sch. Dist. No. 2758*, 594 N.W.2d 216, 220 (Minn. App. 1999) (adding that "[j]udicial intervention in public school systems requires restraint."

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While students may have a property right to attend schools, no court has recognized a property right in having an effective teacher. Nor has any court recognized a right to notice and an opportunity to be heard regarding hiring, firing and lay-off issues, or the assignment of effective or ineffective teachers. That is because the number of students affected by a school district's employment decision would be significant: "[w]here a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption". [104]

Plaintiffs identify no other statutory law or rule which forms the basis for the property interest they seek to assert. Because Plaintiffs' have not been denied a protected interest, they fail to state a claim against any of the defendants under the Procedural Due Process clause[105] .

Dated: 26 October 2016

BY THE COURT:

The Honorable Margaret M. Marrinan
Judge of District Court

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[104] *Hylen v. Owens,* 251 NW2d 858, 861 (Minn. 1977). [104] *Sawh, supra,* 823 N.W.2d at 632 ("If the government's action does not deprive an individual of [a protected] interest, then no process is due.").

[105] *Sawh, supra,* 823 N.W.2d at 632 ("If the government's action does not deprive an individual of [a protected] interest, then no process is due.").

State of Minnesota
Ramsey County

District Court
Second Judicial District

Court File Number: **62-CV-16-2161**

Case Type: Civil Other/Misc.

## Notice of Entry of Judgment

FREDERICK E FINCH
33 S SIXTH ST
STE 3800
MINNEAPOLIS MN 55402-3707

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**In Re: Tiffini Flynn Forslund, Justina Person, Bonnie Dominguez, Roxanne Draughn vs State of Minnesota, Brenda Cassellius, in her official capacity as Commissioner, Mark Dayton, In his orfficial capacity as Governor of the State of Minnesota, Minnesota Department Education, St Paul Public Schools et. al.**

Pursuant to: The Order of Judge Marrinan dated 10/26/16

You are notified that judgment was entered on November 09, 2016.

Dated: November 9, 2016

cc :Alethea Marie Huyser; Jeanette Marie Bazis; James Kendrick Martin; Scott T Anderson; Peter Girgis Mikhail

Lynae K. E. Olson
Court Administrator

By: Linda Draske
Deputy Court Administrator
Ramsey County District Court
15 West Kellogg Boulevard Room 600
St Paul MN 55102
651-266-8253

*62-CV-16-2161*

*NOENJUDG*

**No. A17-0033**

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**STATE OF MINNESOTA**

**IN COURT OF APPEALS**

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Tiffini Flynn Forslund, et. al,

Appellants,

**AFFIDAVIT OF SERVICE OF APPELLANTS' BRIEF**

v.

District Court
Case No. 62-CV-16-2161

State of Minnesota, et al.,

Respondents.

STATE OF LOUISIANA )
)ss.
PARISH OF ORLEANS )

Jesse C. Stewart of the city of New Orleans, Parish and State aforementioned, being duly sworn, states that on March 23, 2017, he served the following document entitled:

**APPELLANTS' BRIEF**

upon the following:

OFFICE OF THE ATTORNEY GENERAL
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by arranging for the electronic transmission of true and correct copies thereof to the email

addresses listed above, and by depositing two bound copies of same in a sealed envelope duly addressed to the above, delivery prepaid, at New Orleans, Louisiana.

Jesse C. Stewart (LA #36282, *PHV*)
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Subscribed and sworn to before me
this 23 day of March, 2017.


Notary Public
My Commission Expires _____
(Notarial Seal)