A17-0033

STATE OF MINNESOTA
SUPREME COURT

Tiffini Flynn Forslund, et al.,

Plaintiffs-Petitioners,

v.

State of Minnesota, et al.,

Defendants-Respondents.

PLAINTIFFS-PETITIONERS' PETITION FOR REVIEW

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Petitioners seek review of the Minnesota Court of Appeals' September 5, 2017 decision, which affirmed the district court's order granting Defendants' Motion to Dismiss Petitioners' Complaint with prejudice ("Order").[1] As discussed below, this case presents two important issues that warrant a decision from this State's highest Court.

LEGAL ISSUES TO BE REVIEWED

1. Are claims that state law unconstitutionally burdens students' fundamental right to an adequate education under the Education and Equal Protection Clauses of the Minnesota Constitution justiciable, or are they insulated from review by the political-question doctrine?

Disposition: The decision below holds that Petitioners' claims present nonjusticiable political questions because they are based on a right to education of a certain quality.

2. Must constitutional claims be afforded solicitude such that requests to amend should be considered in whatever form presented, or may the district court ignore a request to amend and dismiss with prejudice when such request is not presented in a motion?

Disposition: The decision below holds that the district court did not err by ignoring Petitioners' request to amend because Petitioners did not present their request in a separate motion.

[1] The decision appears at Addendum ("Add.") 1-12, the Order at Add. 13-54.

REASONS FOR GRANTING REVIEW

This Petition merits review under Rule 117, subd. 2(a), because the issues presented are important, involving the education of thousands of schoolchildren and the construction of the Education and Equal Protection clauses of the Minnesota Constitution. High courts in 30 jurisdictions have decided similar constitutional challenges. When, as here, students' entitlement to "an adequate education" is a recognized "fundamental right," high courts universally agree that students' constitutional claims are justiciable.

Additionally, the Petition merits review under Rule 117, subd. 2(c), because the decision sharply departs from this Court's decision in *Skeen v. State*, 505 N.W.2d 299 (Minn. 1993). *Skeen* held 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." *Id.* at 315. The decision disregards this clear-cut constitutional standard, instead holding that Petitioners' claims are nonjusticiable political questions because they are based on a right to education of a certain quality.

Finally, pursuant to Rule 117, subd. 2(d)(1) and (2), review by this Court will clarify the law with respect to constitutional issues of statewide significance. The decision's reasoning is based on the Court of Appeals' recent decision in *Cruz-Guzman v. State*, which observed that claims to "an 'adequate' education under the Education Clause" are issues "of first impression," 892 N.W.2d 533, 538 (Minn. App. 2017), despite *Skeen's* holding that all students in Minnesota enjoy the fundamental right to "an adequate level of education which meets all state standards." *Skeen*, 505 N.W.2d at 315.

STATEMENT OF THE CASE

Petitioners are mothers of children attending public schools. They allege that their children's fundamental right to an adequate education is burdened by state laws—the "tenure laws"[2]—making it virtually impossible to fire ineffective teachers. Petitioners allege that these laws prioritize job security for ineffective teachers, burdening students' "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.*

Defendants moved to dismiss the Complaint, arguing that Petitioners raise nonjusticiable political questions. The District Court granted Defendants' motion, further determining that Petitioners lack standing and fail to plausibly allege a constitutional claim upon which relief can be granted. Add. 32-54. The Order dismissed Petitioners' Complaint with prejudice and without granting leave to amend, despite Petitioners having requested leave to amend in their opposition papers.

Petitioners appealed, arguing: (1) Their claims are justiciable because they allege that the tenure laws burden students' fundamental right to an adequate education and "[a]uthority 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); (2) they have standing because they are mothers seeking to vindicate their children's "interest" in an adequate education, which, under *Skeen*, is within "the zone of interests" protected by the Education Clause, *Minn. Fifth Cong. Dist. Indep.-Republican Party v. State ex rel. Spannaus*, 295 N.W.2d 650, 652 n.1 (Minn. 1980); and (3) their claims are cognizable

[2] The tenure laws are codified at Minn. Stat. §§ 122A.40 and 122A.41.

because in Minnesota "there is a fundamental right … to a 'general and uniform system of education' which provides an adequate education to all students," which right cannot be burdened without showing that the law "is necessary to serve a compelling governmental interest." *Skeen*, 505 N.W.2d at 315. Petitioners further argued that the District Court should have granted leave to amend because "allegations of constitutional infirmities deserve a judicial forum," and dismissal of constitutional claims with prejudice enhances the risk of "governmental overreaching." *Elzie v. Comm'r of Pub. Safety*, 298 N.W.2d 29, 32 (Minn. 1980).

The Court of Appeals affirmed, construing Petitioners' allegations to demand an "education of a certain quality" for their children. Add. 9. The decision held that such claims raise nonjusticiable political questions under *Cruz-Guzman*, and further held that the District Court did not err by disregarding Petitioners' request to amend. The decision did not address Petitioners' remaining arguments.

ARGUMENT

The Supreme Court should grant review because the decision is contrary to *Skeen*, misconstrues the Complaint, ignores high court decisions from other states, and disregards that it is the Judiciary's function (not the Legislature's) to assess whether "the Legislature transgresses its constitutional limits." *State v. Fairmont Creamery Co.*, 202 N.W. 714, 719 (Minn. 1925). Further, Petitioners' claims present important issues of statewide significance.

A. *Skeen* instructs that challenges to laws threatening students' fundamental right to an adequate education are justiciable

The decision ignores that for justiciability purposes, there is no conceptual difference between the claims here and the claims in *Skeen*. The *Skeen* plaintiffs challenged state laws that created funding disparities among rich and poor districts, alleging that these laws burdened students' rights under the Education and Equal Protection Clauses. This Court never questioned justiciability. *Skeen* is the blueprint for Petitioners' claims. *Skeen* instructs that facial challenges rooted in students' fundamental right to an adequate education are justiciable, even if they ultimately fail on the merits. *See Skeen*, 505 N.W.2d at 315-20.

B. *Skeen* sets the constitutional standard for judging Petitioners' claims, which do not require defining "an adequate education"

Skeen held 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. The core of Petitioners' Complaint is their allegation that effective teaching is elemental to students' fundamental right to an adequate education. This allegation is uncontroversial: "A town may not herd children in an open field to hear lectures by illiterates." *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 232 (Conn. 2010).

Still, to prevail, Petitioners must prove that effective teaching *is* part of the fundamental right to an adequate education. Petitioners accept this burden, and will present evidence showing that effective teaching benefits students and, conversely, ineffective teaching causes enduring harm. Upon seeing the evidence the Court will

decide if it agrees and rule accordingly. In doing so, the Court will exercise its unique judicial (not legislative) role, just as it does when it decides whether the fundamental right to privacy includes accessing contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965), or the fundamental right to free speech includes burning a flag, *Texas v. Johnson*, 491 U.S. 397 (1989), or the fundamental right to travel includes welfare benefits upon arrival in a new state, *Shapiro v. Thompson*, 394 U.S. 618 (1969).

This threshold question—whether effective teaching is part of the fundamental right to an adequate education—is answered "yes" or "no." This question does not force the Court to answer "what quality of teaching is constitutionally required" because Petitioners do not invoke a novel right to "effective teaching." Add. 7. Just as the plaintiffs in *Griswold*, *Johnson*, and *Shapiro* invoked already-recognized fundamental rights to challenge burdensome laws in new contexts, Petitioners invoke the already-recognized fundamental right to an adequate education to challenge the tenure laws. Stated differently, if the Court agrees that an adequate education means more than "lectures by illiterates," it may also agree that the tenure laws burden this right regardless what benchmarks distinguish an effective teacher from an ineffective teacher.

The question here is whether effective teaching is part of "an adequate education." This question is not political because it may be answered "yes" or "no" without determining what effective teaching means, or even passing judgment on the Legislature's measures of effectiveness. If the Court answers "yes," it should remand to judge the merits of Petitioners' claims that the tenure laws burden students' fundamental right to an adequate education by providing job security to ineffective teachers, and do

not otherwise "serve a compelling governmental interest." *Skeen*, 505 N.W.2d at 315.

C. When education is a fundamental right high courts unanimously agree that claims alleging a burden on that right are justiciable

The decision also disregards that "the vast majority of jurisdictions 'overwhelmingly' have concluded that claims that their legislatures have not fulfilled their constitutional responsibilities under their education clauses are justiciable." *Rell*, 990 A.2d at 226 n.24. Jurisdictions adopting the minority view—that educational adequacy claims are not justiciable—are jurisdictions where education is *not* a fundamental right. *See id*. Obviously the minority view is inapplicable here, given *Skeen's* holding "that education *is* a fundamental right under the state constitution, not only because of its overall importance to the state but also because of the explicit language used to describe this constitutional mandate." *Skeen*, 505 N.W.2d at 313.

D. It is the Judiciary's function to judge Petitioners' claims

It is the Judiciary's independent responsibility to safeguard the protections embodied in the Minnesota Constitution, including students' fundamental right to an adequate education. *Kahn v. Griffin*, 701 N.W.2d 815, 828 (Minn. 2005) ("State courts are, and should be, the first line of defense for individual liberties within the federalist system."). As with other fundamental rights, alleged violations of students' right to an adequate education require strict judicial scrutiny. *Skeen*, 505 N.W.2d at 315.

The commitment to separate legislative, executive, and judicial functions cannot allow expanding the political question doctrine to immunize alleged constitutional violations from judicial review. *Baker v. Carr*, 369 U.S. 186, 217 (1962) ("The doctrine

of which we treat is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority."). The dangers of allowing the political question doctrine to impede courts' ability to protect fundamental rights are no less than those envisioned in *Marbury v. Madison*, where Chief Justice Marshall stated, "it is a general and indisputable rule, that where there is a legal right, there is also a remedy by suit or action at law, whenever that right is invaded." 5 U.S. 137, 163 (1803). When 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." *Fairmont Creamery*, 202 N.W. at 719.

Alleged violations of fundamental rights are not matters in which the Legislature enjoys the final say. *Id.* This Court should reject the argument that all cases involving students' fundamental right to an adequate education are not justiciable.

E. Petitioners' Complaint raises important issues

856,000 students—91 percent of school-age children—attend Minnesota's public schools. Any student in any year may be assigned an ineffective teacher protected by the tenure laws. As such, this case impacts the education of nearly every child in Minnesota. The Decision should be reversed because constitutional claims "deserve a judicial forum," and dismissal with prejudice risks that Petitioners' children (and others) will be victims of "governmental overreaching." *Elzie*, 298 N.W.2d at 32.

CONCLUSION

For these reasons, Petitioners request that their Petition be granted.

Dated: October 4, 2017

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CERTIFICATION OF LENGTH

I hereby certify that this Brief of Amici Curiae conforms to the requirements of applicable rules, is produced with a proportional 13-point font, and the length of this document is 2,000 words. This document was prepared using Microsoft Word 2010.

Dated: October 4, 2017

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ADDENDUM

STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0033

Tiffini Flynn Forslund, et al.,
Appellants,

vs.

State of Minnesota, et al.,
Respondents,

St. Paul Public Schools, et al., Defendants.

Filed September 5, 2017
Affirmed
Smith Tracy M., Judge

Ramsey County District Court
File No. 62-CV-16-2161

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Considered and decided by Smith, Tracy M., Presiding Judge; Cleary, Chief Judge; and Toussaint, Judge.*

U N P U B L I S H E D O P I N I O N

SMITH, TRACY M., Judge

Under Minnesota law, tenured teachers in public schools are entitled to certain procedural protections before they may be discharged. *See* Minn. Stat. §§ 122A.40, .41 (2016) (the teacher-tenure statutes). Appellants Tiffini Flynn Forslund, Justina Person, Bonnie Dominguez, and Roxanne Draughn argue that the teacher-tenure statutes unconstitutionally burden their children's right to an adequate education by protecting the jobs of ineffective teachers in violation of the Education Clause and Equal Protection Clause of the Minnesota Constitution. The district court dismissed appellants' claims under Minn. R. Civ. P. 12.02.

Appellants argue on appeal that the district court erred in concluding that (1) appellants do not have standing; (2) appellants' claims are nonjusticiable under the

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

political-question doctrine; (3) appellants failed to state a claim under the Education Clause; and (4) appellants failed to state a claim under the Equal Protection Clause. Appellants also argue that the district court erred because it did not allow them to amend their complaint before dismissing their claims. Because we conclude that appellants' Education Clause claim and Equal Protection Clause claim raise nonjusticiable political questions under a recent Minnesota Court of Appeals decision, and because appellants failed to properly file a motion for leave to amend their complaint, we affirm. We do not address the remainder of appellants' arguments.

FACTS

Minnesota's teacher-tenure statutes provide public-school teachers who have successfully completed a three-year probationary period with procedural protections when a school district seeks to terminate their employment. Before termination, the school board must provide the tenured teacher with notice, stating the grounds for the proposed termination. Minn. Stat. §§ 122A.40, subd. 7(a), .41, subd. 7. The school board may terminate a teacher's employment for a number of reasons, including "inefficiency in teaching." Minn. Stat. §§ 122A.40, subd. 9, .41, subd. 6. After receiving notice of the proposed termination, tenured teachers have a right to a hearing before the school board or an arbitrator. Minn. Stat. §§ 122A.40, subd. 7(a), .41, subd. 7. At this hearing, the teacher may be represented by counsel, examine witnesses, and present arguments. Minn. Stat. §§ 122A.40, subd. 14, .41, subd. 8. If the school board decides to terminate the teacher's employment, it must issue a written decision explaining the grounds on which it based its decision. Minn. Stat. §§ 122A.40, subd. 16, .41, subd. 10.

Appellants, the parents of children enrolled in Minnesota schools, allege that these "time-consuming and expensive hurdles" make it "all but impossible" to dismiss ineffective teachers. In particular, appellants assert that the teacher-tenure statutes "(1) prematurely confer near permanent employment on Minnesota teachers [and] (2) effectively prevent the removal of chronically ineffective teachers from their classrooms and, instead, result in the shuffling of ineffective teachers from higher-performing schools to already lower-performing schools."

Appellants seek a judgment declaring that the teacher-tenure statutes violate the Minnesota Constitution and a permanent injunction enjoining the enforcement of the statutes. For purposes of this appeal,[1] appellants argue that the teacher-tenure statutes violate the Minnesota Constitution in two ways. First, appellants argue that the teacher-tenure statutes violate the Education Clause because students are deprived of a "uniform and thorough education" when they are taught by ineffective teachers. Second, appellants argue that the teacher-tenure statutes violate the Equal Protection Clause by creating an "arbitrary distinction between schools that provide their students with the constitutionally required uniform and thorough education, and schools in which students are more likely to be taught by ineffective teachers."

Respondents moved to dismiss appellants' claims under Minn. R. Civ. P. 12.02. The district court granted respondents' motion, concluding that (1) appellants lack standing, (2) appellants' claims present nonjusticiable political questions, and

[1] Appellants have abandoned a claim that the statutes violate students' rights under the Minnesota Constitution's Due Process Clause. *See* Minn. Const. art. I, § 7.

(3) appellants failed to state claims under the Education Clause or the Equal Protection Clause.

This appeal follows.

D E C I S I O N

I. Appellants' claims present nonjusticiable political questions.

Appellants argue that the district court erred in concluding that their claims present nonjusticiable political questions. In particular, appellants argue that our recent decision in *Cruz-Guzman v. State*, 892 N.W.2d 533 (Minn. App. 2017), *review granted* (Minn. Apr. 26, 2017), is distinguishable and that the Minnesota Supreme Court created a standard to evaluate whether a government action interferes with the right to an adequate education in *Skeen v. State*, 505 N.W.2d 299 (Minn. 1993). Justiciability is a question of law that we review de novo. *See McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 337 (Minn. 2011).

Appellants' claims are based on the Education Clause and the Equal Protection Clause of the Minnesota Constitution. The Education Clause of the Minnesota Constitution states, "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." Minn. Const. art. XIII, § 1. The Equal Protection Clause of the Minnesota Constitution states, "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 judgment of his peers." Minn. Const. art. I, § 2. The Equal Protection Clause "mandate[s] that all similarly situated individuals shall be treated alike." *Scott v. Minneapolis Police Relief Ass'n*, 615 N.W.2d 66, 74 (Minn. 2000). A statute may violate

the Equal Protection Clause if it involves a suspect classification or impermissibly limits a fundamental right. *Granville v. Minneapolis Pub. Schs., Special Dist. No. 1*, 668 N.W.2d 227, 230 (Minn. App. 2003), *review denied* (Minn. Nov. 18, 2003). Education is a fundamental right created by the Education Clause. *Skeen*, 505 N.W.2d at 313.

Courts lack subject-matter jurisdiction to hear claims arising out of political questions that are best resolved by the other branches of government. *See McConaughy v. Sec'y of State*, 106 Minn. 392, 415, 119 N.W. 408, 417 (1909). As explained by the U.S. Supreme Court, a political question involves (1) a textually demonstrable constitutional commitment of the issue to a particular political department, (2) a lack of judicially discoverable and manageable standards for resolving it, (3) the impossibility of deciding the question without making an initial policy determination of a kind clearly for nonjudicial discretion, (4) the impossibility of a court's undertaking independent resolution without expressing a lack of the respect due to other branches of government, (5) an unusual need for unquestioning adherence to a political decision already made, or (6) the potential for confusion from multiple conflicting decisions by various departments on one question. *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 710 (1962). Constitutional questions are not immune from the political-question doctrine. *See id.* (applying the political-question doctrine to an issue concerning the Fourteenth Amendment of the U.S. Constitution); *Cruz-Guzman*, 892 N.W.2d at 535, 538-40 (applying the political-question doctrine to an issue concerning the Education Clause and Equal Protection Clause).

Recently, and after the district court's decision in this case, we held in *Cruz-Guzman* that claims based on a purported right to an education of a certain quality under the

Education Clause present nonjusticiable political questions. 892 N.W.2d at 534. The plaintiffs in *Cruz-Guzman* alleged that Minnesota public schools are racially and socioeconomically segregated and that this segregation results in achievement gaps, in violation of their children's right to an "adequate" education under the Education Clause and the Equal Protection Clause. *Id.* at 535. On appeal from the district court's decision on a motion to dismiss, this court concluded that the plaintiffs' claims implicated three characteristics of a nonjusticiable political question. *Id.* at 536. First, to the extent that the Education Clause mandates the provision of a certain quality of education, it textually commits that duty and the establishment of the appropriate qualitative standard to the legislature. *Id.* at 539. Second, to resolve the plaintiffs' claims, the court would have to create an applicable standard, which is an initial policy determination for the legislature. *Id.* at 539-40. Finally, the court could not discover a manageable standard for resolving the plaintiffs' inadequate-education claims. *Id.* at 540.

We adhere to the analysis of *Cruz-Guzman* in concluding that appellants' Education Clause and Equal Protection Clause claims present nonjusticiable political questions. Appellants' Education Clause claim is founded on their asserted right, under that clause, to an adequate education, which, they assert, is impaired by ineffective teaching caused by the procedural protections for teachers in the teacher-tenure statutes. As in *Cruz-Guzman*, even assuming that the Education Clause includes an adequacy requirement based on a qualitative standard, appellants' claim would still require us to define the qualitative standard. *Id.* at 538. Specifically, we would need to decide whether that qualitative standard includes effective teaching and what effective teaching means, in terms of

defining both what an effective teacher is and what level or prevalence of ineffectiveness in teaching represents an inadequate education under the Constitution. In other words, what quality of teaching is constitutionally required? Appellants have not identified a constitutional standard that answers this question. Appellants concede that a number of ineffective teachers will remain in the education system even if the teacher-tenure statutes are held unconstitutional. Appellants do not identify what percentage of ineffective teachers would demonstrate an unconstitutional burden on children's right to an adequate education. As in *Cruz-Guzman*, because resolution of appellants' claims "requires the establishment of a qualitative educational standard, which is a task for the legislature and not the judiciary," appellant's Education Clause claim presents a nonjusticiable political question. *Id.* at 541.

Appellants' Equal Protection Clause claim raises the same political question. Appellants argue that the teacher-tenure statutes result in the assignment of an ineffective teacher to some students and not to others, and thus limit their children's fundamental right to an adequate education.[2] *See Granville*, 668 N.W.2d at 230. Again, we would need to determine the constitutionally required quality of teaching in order to determine whether the teacher-tenure statutes result in an unconstitutional limitation on the fundamental right to education. As *Cruz-Guzman* concluded, equal protection claims based on a purported

[2] Appellants argued before the district court that the teacher-tenure statutes resulted in a disparate impact on students of different racial and socioeconomic backgrounds. Appellants have abandoned these arguments on appeal.

right to an education of a certain quality are nonjusticiable. *Cruz-Guzman*, 892 N.W.2d at 541.

Appellants argue that *Cruz-Guzman* is distinguishable for three reasons. First, appellants observe that the plaintiffs in *Cruz-Guzman* challenged the constitutionality of policies and sought not just the prohibition of continued discrimination but also an affirmative injunction to provide an adequate education, whereas appellants seek the invalidation of state statutes they argue impair their children's right to an adequate education. We do not see a legally significant distinction. In both cases, the judicial action sought depends on a determination that students have the right to a certain quality of education, and *Cruz-Guzman* holds that such a determination is a nonjusticiable political question.

Second, appellants argue that, while the plaintiffs in *Cruz-Guzman* sought to establish new standards, appellants in this case seek to apply an existing standard identified in *Skeen*. 505 N.W.2d at 299. The plaintiffs in *Skeen* challenged the state's education-finance system under the Education Clause and the Equal Protection Clause. *Id.* at 301. The Minnesota Supreme Court upheld the state's education-finance system as constitutional because the system provides an "adequate level of education which meets all standards." *Id.* at 315. As *Cruz-Guzman* concluded, however, *Skeen* did not require the Minnesota Supreme Court to consider whether claims based on an adequate education are justiciable and did not create a standard for assessing the adequacy of education. *Cruz-Guzman*, 892 N.W.2d at 541. Unlike the plaintiffs in *Cruz-Guzman* and appellants in this case, the plaintiffs in *Skeen* conceded that they received an adequate education. *Skeen*, 505

N.W.2d. at 315. While *Skeen* described the education-finance system as providing an "adequate level of education which meets all state standards," *Skee*n did not "identify the relevant state standards and did not suggest that those standards emanated from the Education Clause." *Cruz-Guzman*, 892 N.W.2d at 541 (quoting *Skeen*, 505 N.W.2d at 315). "Most importantly, the supreme court did not consider or discuss whether it would be appropriate for the judiciary to establish qualitative educational standards." *Id.* We adhere to *Cruz-Guzman*'s conclusion that *Skeen* did not decide whether claims based on a right to an education of a certain quality are justiciable.

Finally, with or without *Skeen*, appellants argue that, unlike in *Cruz-Guzman*, here we can examine "state standards"—statutes and administrative rules on teacher effectiveness—to develop the necessary constitutional standard. In *Cruz-Guzman*, we rejected the plaintiffs' argument that the constitutional standard for assessing the issue in their case could be based on data about standardized test scores and graduation rates. *Id.* at 538. Similarly, appellants cite two possible sources for state standards that supposedly provide the measure of an "effective teacher." Appellants first cite the teacher-tenure statutes. While the teacher-tenure statutes specify that school districts may terminate teachers for "inefficiency in teaching," the teacher-tenure statutes do not define "inefficiency in teaching" or set standards for identifying ineffective teachers. Minn. Stat. §§ 122A.40, subd. 9, .41, subd. 6. Second, appellants cite the rule for "Standards of Effective Practice for Teachers." Minn. R. 8710.2000 (2015). This rule contains 10 standards made up of a total of 125 subparts used for determining whether to grant teacher licensure to an individual candidate. *Id.* Even if this 125-part test provided a judicially

"manageable" constitutional standard for determining whether an individual teacher is effective, *see Baker*, 369 U.S. at 217, 82 S. Ct. at 710, it does not establish an overall effectiveness-in-teaching standard required for an adequate education. Thus, even if statutes and administrative rules could be relied upon to define a standard of constitutionally required effectiveness in teaching, they do not do so here.

In sum, appellants' claims under the Education Clause and Equal Protection Clause present nonjusticiable political questions because they are based on a right to an education of a certain quality. *Cruz-Guzman*, 892 N.W.2d at 534.

II. The district court did not abuse its discretion by dismissing appellants' claims without affording them an opportunity to amend their complaint.

Appellants argue that the district court abused its discretion because it did not afford appellants the opportunity to amend their complaint. The district court has broad discretion in deciding whether to allow an amendment to the complaint, and its decision will not be reversed absent an abuse of discretion. *St. James Capital Corp. v. Pallet Recycling Assocs. of N. Am., Inc.*, 589 N.W.2d 511, 516 (Minn. App. 1999).

In their memorandum opposing respondents' motion to dismiss, appellants requested to amend their complaint if the district court dismissed their claims. Appellants never filed a motion to amend. In *St. James Capital Corp.*, the appellants did not formally move for leave to amend but instead requested to do so in their memorandum opposing respondents' motion to dismiss. *Id.* This court affirmed the district court's denial of the appellants' request, ruling that the appellants did not properly bring a motion for leave to amend before the district court. *Id.* Similarly, here, no motion for leave to amend was

properly brought before the district court and, therefore, the matter was not properly argued to and was not considered by the district court. Because appellants did not properly bring a motion for leave to amend, the district court did not abuse its discretion when it did not address appellants' request to amend. *Id.*

Affirmed.

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STATE OF MINNESOTA

COUNTY OF RAMSEY

DISTRICT COURT

SECOND JUDICIAL DISTRICT

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

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."
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> 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.").