

Case No. A17-0033

**STATE OF MINNESOTA  
IN COURT OF APPEALS**

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Tiffini Flynn Forslund, et al.,

Appellants,

v.

State of Minnesota, et al.,

Respondents.

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**BRIEF OF *AMICUS CURIAE* ED ALLIES**

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## **STATEMENT OF INTEREST OF *AMICUS CURIAE* ED ALLIES<sup>1</sup>**

Ed Allies is a Minnesota-based education advocacy nonprofit committed to the belief that all Minnesota students deserve an excellent education regardless of race, ethnicity, or socio-economic status. Ed Allies partners with other education, civic, and philanthropic leaders to advocate for better education policies and legislation in Minnesota. Consistent with the Minnesota Constitution's protection of education as a fundamental right, Ed Allies promotes legislation and policies that lead to the recruitment, preparation, support, and retention of effective classroom educators.

Appellants' claims in this case raise significant questions regarding the constitutionality of the Challenged Statutes. And Appellants are entitled to a full hearing on the merits of their claims. Within that constitutional question, however, is another concern: in addition to offending the state constitution—or, more accurately, as a corollary to constitutional violations—there is substantial evidence that the Challenged Statutes harm Minnesota students, by impeding the placement of a highly-qualified teacher in every Minnesota classroom.

For Ed Allies and its community partners, the issues presented by this case are of the utmost importance. Access to a high-quality teacher is the most important in-school factor affecting student achievement. Therefore, Ed Allies appears as *amicus* in this case to address the Challenged Statutes' harmful effect on Minnesota students.

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<sup>1</sup> In accordance with Minn. R. Civ. App. P. 129.03, Ed Allies certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than Ed Allies, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

Appellants challenge the constitutionality of certain sections of Minnesota's Continuing Contract Law, Minn. Stat. § 122A.40, and Tenure Act, Minn. Stat. § 122A.41 (the "Challenged Statutes"). Relevant here are the so-called "Last-In-First-Out" provisions (the "LIFO Provisions"), which are found in Minn. Stat. § 122A.40, subd. 10 and 11, and § 122A.41, subd. 14. These provisions generally require Minnesota school districts to use a seniority-based system for teacher layoffs. (AC ¶ 100.) Similarly, when a school district reinstates previously laid-off teachers, the school district generally must first re-hire the most senior teachers. (Id. ¶ 101.)

Because the LIFO Provisions force school districts to make seniority-based hiring and firing decisions, a school district cannot make such decisions based on a teacher's classroom effectiveness or positive impact on student academic achievement. This means that a school district facing layoffs generally has no discretion to retain its best teachers. This is true even if, for example, a teacher has won a statewide "Teacher of the Year" award or shown promise as a transformative classroom leader who consistently improves his or her students' likelihood of success.

Research shows that forcing a school district to lay off its most effective teachers has a negative impact on educational achievement as well as other outcomes, such as teenage pregnancy, lifetime earnings, and retirement savings. Further, the LIFO Provisions have a disproportionately negative effect on traditionally underserved students, including low-income students, students of color, and students with disabilities. That is because (a) these students benefit the most from highly-qualified teachers and (b) schools serving marginalized

student populations typically employ the least experienced teachers and when layoffs occur, these less-senior teachers are among the first a school district must let go.

The district court's premature dismissal of Appellants' claims has needlessly prevented constitutional review of harmful statutory mandates. *Cf. Elzie v. Comm'r of Pub. Safety*, 298 N.W.2d 29, 33 (Minn. 1980) ("When constitutional violations are alleged, the defendant must demonstrate the complete frivolity of the complaint before dismissal under [Minn. R. Civ. P.] 12.02 is proper."). Therefore, this court should **reverse** the district court's dismissal of Appellant's Amended Complaint.

### **ARGUMENT**

Education is a fundamental right under the Minnesota Constitution. *Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993). In *Skeen*, the Supreme Court of Minnesota recognized that every Minnesota student is fundamentally entitled to an "adequate education." *Id.* at 315. Thus, the Education Clause, Minn. Const. art. XIII, § 1, places an affirmative duty on the legislature to ensure a "regular method throughout the state whereby all [Minnesota children are] enabled to acquire an education which will fit them to discharge intelligently their duties as citizens of the republic." *Id.* at 310 (citing *Bd. of Educ. of Town of Sauk Ctr. v. Moore*, 17 Minn. 412, 416, 17 Gil. 391, 394 (1871)); *see also* Kathleen Smith Ruhland, *Equal Opportunity Education for Minnesota's School Children: A Missed Opportunity by the Court*, 20 WM. MITCHELL L. REV. 559 (1994) (citing *State ex rel. Bd. of Educ. of City of Minneapolis v. Erickson*, 190 Minn. 216, 222, 251 N.W. 519, 521 (1933)).

Significant social science research and anecdotal evidence demonstrates that the LIFO Provisions—which generally require seniority-based hiring and firing—offend these

core constitutional principles. By prioritizing seniority over effectiveness, the LIFO Provisions have a detrimental impact on Minnesota students, especially those who are most disadvantaged.

**I. The LIFO Provisions protect chronically ineffective teachers by forcing Minnesota school leaders to lay off teachers based solely on seniority, without consideration to quality or classroom effectiveness.**

Not all teachers are created equal. Some teachers “year after year produce bigger gains in student learning than other teachers.” Dan Goldhaber, *In Schools, Teacher Quality Matters Most*, EDUCATION NEXT 56, 60 (Spring 2016). Research also shows that variations in classroom effectiveness are not correlated with experience or seniority. While the impact of experience may be strong during the first few years of a teacher’s career, a teacher’s effectiveness rarely improves with experience after these initial gains. See Jennifer King Rice, *The Impact of Teacher Experience: Examining the Evidence and Policy Implications*, NAT’L CTR. FOR ANALYSIS OF LONGITUDINAL DATA IN EDU. RESEARCH (August 2010). Indeed, one study found that “[t]he amount of experience in the classroom—with the exception of the first few years—[] bears no relationship to [teacher] performance.” Eric A. Hanushek, *The Economic Value of Higher Teacher Quality*, 30 ECONOMICS OF EDU. REV. 466, 467 (2011); see also Goldhaber, *supra*, at 61 (“Most studies find that teachers improve with additional experience only early on in their careers. Gains in average teacher quality after five years are seldom detected, however.”).

This means that less experienced teachers are routinely more effective than their more senior colleagues. See Rice, *supra* at 2; see also Matthew A. Kraft, *Teacher Layoffs, teacher quality and student achievement: Evidence from a discretionary layoff policy*, EDU. FINANCE & POLICY

1, 3 (August 2015) (collecting citations). And the assumption that younger teachers are generally less effective than their more experienced colleagues is “wrong.” See *The Irreplaceables: Understanding the Real Retention Crisis in America’s Urban Schools*, TNTP 10 (2012) (hereinafter “*The Irreplaceables?*”), available at [https://tntp.org/assets/documents/TNTP\\_Irreplaceables\\_2012.pdf](https://tntp.org/assets/documents/TNTP_Irreplaceables_2012.pdf).

The LIFO Provisions embody the disproven assumption that more experience is necessarily better. Under the LIFO Provisions, school administrators are generally forced to lay off teachers in inverse order of seniority within licensure area, without consideration of classroom effectiveness. (FAC ¶ 100, citing Minn. Stat. § 122A.40, subs. 10 & 11; Minn. Stat. § 122A.41, subd. 14.) And when positions are restored, administrators must reinstate teachers in order of seniority. See *id.* Hence, the LIFO Provisions protect chronically ineffective teachers, often keeping them in the classroom at the expense of younger, more effective teachers. (FAC ¶ 110.)

In 1991, THE NEW YORK TIMES ran a feature on Cathy Nelson, a Minnesota teacher who had just been named the state’s Teacher of the Year. The purpose of the news article was not to highlight her award or her “innovative” teaching methods. Instead, the article called attention to another “outrage”: based solely on her lack of seniority, Ms. Nelson had just been laid off. See William Celis, *Minnesota Teacher of the Year is Laid Off in a Budget Crisis*, THE NEW YORK TIMES (Jan. 27, 1991), available at <http://www.nytimes.com/1991/01/27/us/minnesota-s-teacher-of-the-year-is-laid-off-in-budget-crisis.html>. Describing the fallout from district budget cuts and declining student

enrollment, her former principal told the TIMES, “What happened is obvious: Last hired is first fired.” *Id.*

Layoffs, of course, remain an annual concern for school administrators. *See Teacher Supply and Demand: Fiscal Year 2015 Report To the Legislature*, MINN. DEPT. OF EDU. (January 2015) (hereinafter “DOE FY 2015 Report”), available at <https://www.educationevolving.org/files/blog/MDE-Teacher-Supply-Demand-Report-2015.pdf>; *see also generally* Kraft, *supra*. Yet, in the more than 25 years after the state’s reigning Teacher of the Year was laid off based solely on her lack of seniority, little has changed to protect Minnesota’s best teachers from Ms. Nelson’s fate.

Between 2008 and 2013, nearly 2,200 Minnesota teachers were laid off under the LIFO Provisions. *See* DOE FY 2015 Report, *supra*, at 33. And many, like Ms. Nelson, were above-average educators: a recent survey of teachers in the state’s third-largest school district, Minneapolis Public Schools, revealed that over half of the district’s teachers know five or more teachers who left the district as a result of layoffs, and 72 percent of these teachers believe the teachers lost to layoffs were integral to the effectiveness of their respective school’s teaching team. *See Strengthening School Staffing in Minneapolis Public Schools*, THE NEW TEACHER PROJECT (May 2009).

## **II. By prioritizing seniority over effectiveness, the LIFO Provisions harm Minnesota students.**

Extensive research confirms that a great teacher can dramatically alter the likelihood of his or her students’ success. Thus, by removing discretion from school administrators to

retain their best and most effective teachers, the LIFO Provisions undeniably harm Minnesota students.

The best educators can help students not only keep pace, but achieve as much as a year and a half of learning in a single year. Goldhaber, *supra*, at 60. “In other words, two students starting at the same level of achievement can know vastly different amounts at the end of a single academic year due solely to the teacher to which they are assigned.” *Id.* It is thus unsurprising that researchers have reached a consensus that teacher quality and effectiveness has a greater impact on student achievement than any other measured aspect of schools. *See* Hanushek, *supra*, at 467; *see also* Goldhaber, *supra*, at 58 (“The quality of teachers shows a stronger relationship than school facilities and curricula to pupil achievement.”).

This research demonstrates that the method by which teachers are laid off and re-hired has significant implications for students. *See* Donald J. Boyd, et al., *Teacher Layoffs: An Empirical Illustration of Seniority vs. Measures of Effectiveness*, NAT’L CTR. FOR ANALYSIS OF LONGITUDINAL DATA IN EDU. RESEARCH (July 2010). By laying off a single high-quality teacher instead of a chronically ineffective teacher, a school district reduces the likelihood of future achievement for hundreds of students.

In addition, the effects of teacher quality have an even larger impact on low-income students and students of color. *See* Goldhaber, *supra*, at 58. Hence, the LIFO Provisions are especially harmful to students who are most underserved in Minnesota’s schools.

By almost any measure, Minnesota owns one of the country's worst achievement gaps between white students and students of color.<sup>2</sup> Yet, it would be wrong to presume that these gaps are irreversible. Research has shown that for traditionally underserved students, assignment to a great teacher for four or five consecutive years can close achievement gaps. See Eric. A. Hanushek, *Teacher Deselection* in *CREATING A NEW TEACHING PROFESSION* 165, 172 (2009).

Further, the impact of an effective educator extends well beyond the classroom. Assignment to a great teacher can have life-changing, positive consequences: according to a recent study of more than 2.5 million low-income children and children of color in grades 3-8, placement in the classroom of a highly effective teacher **for just one year** increases a student's likelihood of attending college and earning a higher salary. See Raj Chetty, et al., *Measuring the Impacts of Teachers II: Teacher Value-Added and Student Outcomes in Adulthood*, 104 *AM. ECON. REV.* 2633 (2014). Another study has demonstrated that replacing a chronically

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<sup>2</sup> While Minnesota boasts an impressive overall high school graduation rate of 77%, those graduation rates show dramatic gaps when broken down by students' race: 85% of Minnesota's white high-school students graduate in four years, but fewer than 60 percent of the state's black and Hispanic high-school students graduate on time. also Tim Post, *Minnesota Near Bottom in On-Time Graduation for Students of Color*, *MPRNEWS* (Feb. 19, 2015). Ingloriously, a U.S. Department of Education report on state graduation rates shows that Minnesota has the lowest nationwide four-year graduation rate for Hispanic/Latino and Asian students in the country and the second lowest graduation rate for black and Native-American students. *Provisional Data File: SY2010-11 Four-Year Regulatory Adjusted Cohort Graduation Rates*, U.S. DEPT. OF EDU. (2012), available at <https://www2.ed.gov/documents/press-releases/state-2010-11-graduation-rate-data.pdf>. Results from the Minnesota Comprehensive Assessments tell the same story. Minnesota's white students attain proficiency scores in math and reading at least 20 percentage points higher than students from traditionally disadvantaged backgrounds. *High School Academic Preparation and College Readiness*, MINN. OFFICE OF HIGHER ED., available at [https://www.ohe.state.mn.us/pdf/MM/1\\_MNMeasures\\_highschool\\_academicprep.pdf](https://www.ohe.state.mn.us/pdf/MM/1_MNMeasures_highschool_academicprep.pdf).

ineffective teacher with even an average teacher reduces teenage birth rate and increases the probability of having a 401(k) retirement account at age 25. See Raj Chetty, et al., *The Long-Term Impacts of Teachers: Teacher Value-Added And Student Outcomes in Adulthood*, NAT'L BUREAU OF ECON. RESEARCH (2011).

Yet, in a particularly cruel twist, the LIFO Provisions disproportionately affect students of color. While seniority-based, quality-blind layoffs and re-hires are bad for all students, they are especially hard on schools and districts with a high concentration of low-income students and students of color. That is because high-poverty schools in Minnesota tend to employ the least experienced teachers. See, e.g., Alejandra Matos, *Minneapolis' worst teachers are in the poorest schools, data show*, STAR TRIBUNE (Nov. 2, 2014). Thus even when a teacher from a high-poverty school has proven to be a transformative, change-the-odds teacher, a school district may have no discretion to keep that teacher if they lack seniority compared to less-effective colleagues. Further, when a high-poverty school loses an effective teacher due to seniority-based layoffs, it is less likely than other schools to find an equally effective replacement when budgets are restored; according to one study, only one in eleven candidates for the re-opened teaching position will be as effective as the top-performing teacher that was laid off. See *The Irreplaceables*, *supra*, at 11.

## **CONCLUSION**

The Minnesota Constitution protects education as a fundamental right of all Minnesota students. Because the LIFO Provisions generally force school leaders to make effectiveness-blind firing and re-hiring decisions, the provisions harm Minnesota students, especially and low-income students and students of color.

Appellants' challenge to the constitutionality of the LIFO Provisions and the other Challenged Statutes deserves a full and fair hearing on the merits. Therefore, this court should *reverse* the district court's dismissal of Appellant's Amended Complaint.

Respectfully submitted.

Dated: March 30, 2017

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**CERTIFICATE UNDER MINN. R. APP. P. 132.01**

This brief complies with the type-volume limitation in Minn. R. App. P. 132.01, subd. 3(c) because this brief contains 2,450 words excluding the parts exempted by R. 132.01, subd. 3. This brief complies with the type-face requirements of Minn. R. App. P. 132.01, subd. 1 because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 13-point Garamond font.

Dated: March 30, 2017

/s/ Nathan R. Sellers  
Nathan R. Sellers