

NO. A17-0033

State of Minnesota
In Court of Appeals

Tiffini Flynn Forslund, et al.,

Plaintiffs-Appellants,

v.

State of Minnesota, et al.,

Defendants-Respondents

**BRIEF OF AMICI CURIAE
NATIONAL COUNCIL ON TEACHER QUALITY AND TNTP, INC.**

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INTRODUCTION AND STATEMENT OF AMICI CURIAE

The National Council on Teacher Quality (“NCTQ”) is a nonpartisan research and policy organization led by the vision that every child deserves effective teachers and every teacher deserves the opportunity to become effective. NCTQ recognizes that for far too many children and teachers, this vision is not the reality because all too often the policies and practices of those institutions with the greatest authority and influence over teachers and schools fall short. To that end, NCTQ focuses on the changes institutions such as teacher preparation programs, school districts, state governments, and teachers unions must make to return the teaching profession to strong health, delivering to every child the education needed to ensure a bright and successful future. NCTQ’s Board of Directors and Advisory Board are composed of Democrats, Republicans, and Independents, all of whom believe that policy changes are overdue in the recruitment and retention of teachers.

TNTP, Inc. (“TNTP”) is a national nonprofit organization founded by teachers, committed to advancing policies and practices that ensure effective teaching in every classroom. TNTP believes our nation’s public schools can offer *all* children an excellent education. TNTP works at every level of the public education system to attract and train talented teachers and school leaders, ensure rigorous and engaging classrooms, and create environments that prioritize great teaching and accelerate student learning. TNTP’s work in this area is not limited to the theoretical; TNTP is also one of the leading practitioners of implementing best practices to assess and improve teacher quality. Since 1997, TNTP has partnered with more than 200 public school districts, charter school networks and

state departments of education. TNTP has advised state leaders on policies and systems for assessing teacher effectiveness, improving instructional quality and educator employment policies affecting student access to effective teachers. TNTP has also recruited or trained more than 50,000 teachers, redefined critical education issues through acclaimed studies like *The Widget Effect* (2009) and *The Mirage* (2015), and launched one of the nation’s premiere awards for excellent teaching, the Fishman Prize for Superlative Classroom Practice. Today, TNTP is active in more than 30 cities, working to improve education outcomes, systems, and policies.

NCTQ and TNTP (collectively, “*Amici*”) urge this court to reverse the trial court and deny the Motion to Dismiss.¹ As held by the Minnesota Supreme Court, “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 v. State*, 505 N.W.2d 299, 313 (Minn. 1993) (emphasis in original). That fundamental right includes access “to a ‘general and uniform system of Education’ which provides an adequate education to all students in Minnesota.” *Id.* at 315.²

¹ *Amici* certify that this brief was not authored in whole or in part by counsel for either party to this appeal, and that no person or entity contributed monetarily toward its preparation or submission.

² Since the Plaintiffs in *Skeen v. State* “concede[d] that they continue to receive an adequate education, thereby satisfying the fundamental right to a general and adequate system of education,” Minnesota courts have not determined the components essential to an “adequate education.” *Skeen*, 505 N.W.2d at 315. Other states have found that effective teachers are a critical component of an adequate education. *See, e.g., Connecticut Coal. for Justice in Educ., Inc. v. Rell*, 2016 WL 4922730, at *10 (Conn. Super. Ct. Sept. 7, 2016) (“Most of the state’s education money is spent on teachers. Both

Based on *Amici*'s work with states and school districts across the country to improve public education through the recruitment and retention of high quality teachers, *Amici* have found there is no in-school factor more critical to providing an "adequate education" than having effective teachers.³ By extension, there is no in-school factor more destructive to a child's education—and thus their access to literacy, lifelong earning potential, and ability to contribute as responsible public citizens—than a highly ineffective teacher.⁴ Minn. Stat. § 122A.40 and Minn. Stat. § 122A.41 (collectively, the

sides agree this is where the money belongs. It is also undisputed that good teachers are the key to a good school system."); *Pauley v. Kelly*, 162 W.Va. 672, 706 (1979) (finding provision of constitutionally adequate education "implicit[ly]" requires "supportive services: (1) good physical facilities, instructional materials and personnel; (2) careful state and local supervision to prevent waste and to monitor pupil, teacher and administrative competency"); *Abbeville Cty. Sch. Dist. v. State*, 410 S.C. 619, 633–34 (2014) (noting that "to answer the question of whether each child in the Plaintiff Districts had the opportunity to acquire a minimally adequate education, it was necessary to determine how to measure the presence or absence of that opportunity" and that "the instrumentalities of learning and resources provided to the Plaintiff Districts, including money, curriculum, teachers, and programming" are critical inputs); *Campaign for Fiscal Equity, Inc. v. State*, 861 N.E.2d 50, 53 (2006) (finding that NYC students "were not receiving the opportunity for a sound basic education," partially because "New York City public schools provided inadequate teaching").

³ See also Raj Chetty, John N. Friedman, and Jonah E. Rockoff, *Measuring The Impacts of Teachers II: Teacher Value-Added and Student Outcomes in Adulthood*, 104(9) AMERICAN ECONOMIC REVIEW 2633, 2633-34 (2014) (finding that students assigned to an effective teacher are more likely to attend college and higher-ranked colleges, save more for retirement, and less likely to have children as teenagers); TNTP, THE IRREPLACEABLES 2 (2012), http://tntp.org/assets/documents/TNTP_Irreplaceables_2012.pdf (concluding that districts' high-performing teachers generated 5-6 months more student learning than their poor-performing peers).

⁴ Adults who cannot read fluently face a litany of problems such as: filling in an order or application form; understanding written jury instructions; comparing and contrasting two types of employee benefits; or writing a brief letter explaining an error made on a credit card bill. See *National Assessment of Adult Literacy*, NATIONAL CENTER FOR EDUCATION STATISTICS (2003), https://nces.ed.gov/naal/fr_tasks.asp; Irwin S. Kirsch et al., *Adult*

“Challenged Statutes”) grant teachers tenure before their impact on student achievement can be properly evaluated, establish procedures that make it impossible to efficiently terminate even chronically ineffective teachers, and force schools to irrationally lay off teachers based on seniority without regard to their effectiveness.⁵ These failures of the Challenged Statutes cause Minnesota students to be taught by chronically ineffective teachers and thus deprived of their fundamental right to an adequate education.⁶

The Challenged Statutes burden students’ fundamental right to education, so “must meet strict scrutiny, meaning [they] must be narrowly tailored to serve a compelling government interest.” *See In re Welfare of Child of R.D.L.*, 853 N.W.2d 127, 133 (Minn. 2014). Defendants have argued the Challenged Statutes are necessary “to the

Literacy in America: A First Look at the Findings of the National Adult Literacy Survey, NATIONAL CENTER FOR EDUCATION STATISTICS 10 (April 2002), <https://nces.ed.gov/pubs93/93275.pdf>. Low student achievement has lifelong earning costs. *See Chetty, supra* note 3, at 2633 (finding that replacing a highly ineffective teacher with even an average teacher would increase students’ lifetime earnings by over \$250,000).

⁵ *See infra* Section 1.

⁶ The trial court noted that Appellants failed to define “effectiveness” or provide a standard for measuring whether a teacher is effective or ineffective. Memorandum Supporting Findings of Fact, Conclusions of Law, Order for Judgment, at 8 (October 26, 2016). Yet there is no need for Appellants to do so, as Minnesota state statutes already provide the standard for measuring a teacher’s effectiveness. *See* MINN. STAT. § 122A.40, subd. 8(b)(3), (9); § 122A.41, subd. 5(b)(3), (9). Appellants do not challenge *how* Minnesota defines effective teachers. The primary issue is that, incomprehensibly, Minnesota does not explicitly require considerations of teachers’ effectiveness, *as defined in its own state standards*, for decisions regarding teachers’ permanent employment, dismissal, or layoffs. Ineffective teachers necessarily produce inadequate education, without any need for the court to define a standard of “adequate education.” Accordingly, this case is wholly distinguishable from *Cruz-Guzman v. State*, --- N.W.2d-- -, 2017 WL 957726, (Minn. Ct. App. Mar. 13, 2017).

purpose of promoting stability, certainty, and permanency of teacher employment.”⁷ But Minnesota has no interest in promoting the stability, certainty, and permanency of employment for chronically ineffective teachers. As this brief will demonstrate, not only are the Challenged Statutes not narrowly tailored to further compelling state interests, in many respects they actually work against the interests of teachers and students in achieving an effective, stable teaching force.⁸

A motion to dismiss should be granted “only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which support granting the relief demanded.” *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 602 (Minn. 2014). And when violations of constitutional rights such as the fundamental right to an adequate education are alleged, “the defendant must demonstrate the *complete* frivolity of the complaint before dismissal under Rule 12.02 is proper.” *Elzie v. Comm’r of Pub. Safety*, 298 N.W.2d 29, 33 (Minn. 1980). Defendants fall far short of this burden—to the contrary, there are compelling arguments and numerous facts that support granting

⁷ State Defendants’ Memorandum of Law in Support of Motion to Dismiss Plaintiffs’ First Amended Complaint 34 (Jun. 16, 2016) [*hereinafter* “Motion to Dismiss”]; *see also* Defendant Anoka-Hennepin School District, Independent School District No. 11’s Memorandum of Law in Support of Its Motion to Dismiss 16 (Jun. 16, 2016) (noting that “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”) (quoting *McSherry v. City of St. Paul*, 202 Minn. 102, 108 (1938)).

⁸ *Amici* agree with Appellants that the Challenged Statutes “work to the benefit of ineffective teachers, and to the detriment of students” while the “Education Clause . . . establishes public schools for the benefit of students, *not* teachers.” *See* Appellants’ Brief at 5 (emphasis in original).

Appellants the relief requested—so *Amici* respectfully urges this Court to reverse and find the Motion to Dismiss should be denied.⁹

STATEMENT OF THE CASE AND FACTS

Amici concur with the Appellants’ Statement of the Case and adopt and incorporate the facts set forth in Appellants’ Brief.

⁹ At the very least, Appellants should have the right to replead, a right which should always “be freely granted when justice so requires,” and is particularly crucial for claims alleging children’s constitutional rights to an adequate education are being violated. *See Dean v. City of Winona*, 868 N.W.2d 1, 8 (Minn. 2015).

ARGUMENT

I. THE EXPERIENCE OF OTHER STATES DEMONSTRATES THAT THE CHALLENGED STATUTES ARE NOT NECESSARY TO FURTHER A COMPELLING GOVERNMENT INTEREST.

A. Permanent Employment

Minnesota does not have a compelling interest in attracting and retaining ineffective teachers. And its interest in attracting high quality teachers is not served by Permanent Employment Provisions¹⁰ that do not require meeting a standard of effectiveness in the classroom, or give principals adequate time to determine whether a particular probationary teacher is qualified. The three-year period under Minnesota law does not provide districts with sufficient opportunity to evaluate new teachers. Rather, tenure in Minnesota is awarded virtually automatically—without regard to individual teacher effectiveness.

The experience of other states demonstrates that the Permanent Employment Provisions are not necessary to attract and retain high quality teachers. Having a longer probationary period allows principals to amass and consider evidence of a teacher's effectiveness, including classroom effectiveness as demonstrated by measures of student learning. Recognizing this, over the past several years, states unrestrained by an unnecessarily short probationary period have been able to tie their tenure decisions directly to demonstrated teacher effectiveness. Since 2009, 19 states moved from

¹⁰ See MINN. STAT. §§ 122A.40(5), (7), §§ 122A.41(2), (4) (“Permanent Employment Provisions”).

awarding tenure virtually automatically to considering evidence of student learning before offering teachers tenure.¹¹ Minnesota, however, remains stagnant.¹²

Changes in state tenure policy, 2009-2015

	Virtually automatically	Some evidence of student learning is considered	Evidence of student learning is the preponderant criterion
2009	47 states	4 states	N/A
2011	39 states	4 states	8 states
2013	31 states	9 states	11 states
2015¹	26 states	14 states	9 states

¹ In 2015, two states did not have tenure or did not have a statewide policy around tenure decisions.

Other alternative approaches to Minnesota’s Permanent Employment Provisions exist. In Colorado, tenure is both more difficult to earn and nonpermanent: A teacher there must earn evaluation ratings of either effective or highly effective for three consecutive years to earn nonprobationary status.¹³ If a teacher who has earned nonprobationary status is rated ineffective for two consecutive years, or receives an ineffective rating one year and a partially effective or ineffective rating the next, that teacher loses nonprobationary status.¹⁴

In Tennessee, the probationary period for new teachers is five years.¹⁵ To earn tenure, probationary teachers must receive an overall performance effectiveness rating of above expectations or significantly above expectations during the last two years of the

¹¹ NCTQ, 2009 STATE TEACHER POLICY YEARBOOK 176 (2009); NCTQ, 2011 STATE TEACHER POLICY YEARBOOK 77 (2011); NCTQ, 2013 STATE TEACHER POLICY YEARBOOK 84 (2013); NCTQ, 2015 STATE TEACHER POLICY YEARBOOK 91 (2015).

¹² NCTQ, 2015 STATE TEACHER POLICY YEARBOOK: MINNESOTA 62 (2015) (noting that Minnesota is one of the states that still awards tenure virtually automatically).

¹³ 1 COLO. CODE REGS. § 301-87.

¹⁴ *Id.*

¹⁵ TENN. CODE ANN. § 49-5-503.

probationary period.¹⁶ A tenured teacher who receives two overall ratings of below expectations or significantly below expectations may be reverted to probationary status until he or she receives two consecutive ratings of above expectations or significantly above expectations.¹⁷

The lack of a three-year probationary period before permanent employment has not harmed the ability of these states to attract and retain effective teachers. The number of certified teachers in Colorado and Tennessee has not dropped significantly, and in some cases has increased since those states changed their tenure and related policies.¹⁸

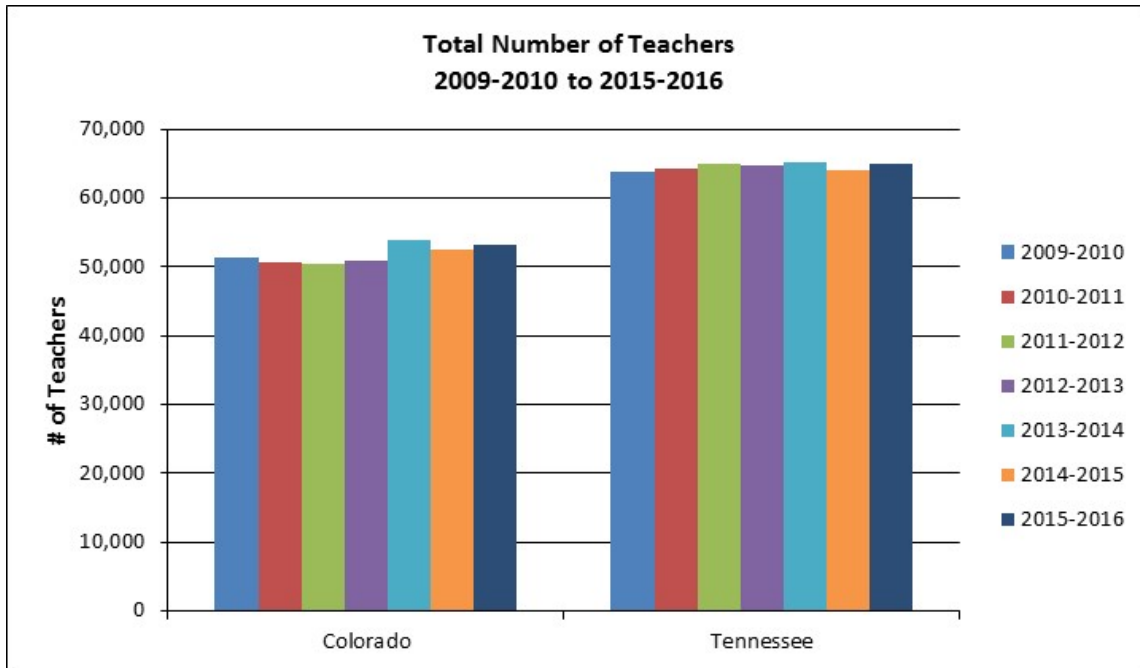
¹⁶ *Id.*

¹⁷ TENN. CODE ANN. § 49-5-504.

¹⁸ *See, e.g., Teachers by Race/Ethnicity and Gender*, COLO. DEP'T OF EDUC., <https://www.cde.state.co.us/cdereval/6-countofteachersbydistrictethnicityandgenderpdf> (number of teachers in the Colorado Department of Education); *Annual Statistics Report*, TENN. DEP'T OF EDUC., <http://www.tn.gov/education/article/2015-annual-statistical-report> (total classroom teachers).

Total Number of Teachers

	Colorado	Tennessee
	<i>Tenure reform passed: 2010</i>	<i>Tenure reform passed: 2011</i>
	# of teachers	# of teachers
2009-2010	51,256	63,765
2010-2011	50,654	64,229
2011-2012	50,326	65,009
2012-2013	50,947	64,702
2013-2014	53,910	65,239
2014-2015	52,560	64,094
2015-2016	53,179	64,928



More importantly, the statutory changes made to tenure have not had a negative impact on student achievement. In fact, student achievement in these two states witnessed growth after the statutory changes.¹⁹

National Assessment of Educational Progress (“NAEP”) Scores

	Year	Grade 4			Grade 8		
		At or above Basic	At or above Proficient	At Advanced	At or above Basic	At or above Proficient	At Advanced
Colorado							
Math	2009	84%	45%	8%	76%	40%	10%
	2011	84%	47%	10%	80%	43%	12%
	2013	87%	50%	11%	77%	42%	12%
	2015 ²⁰	82%	42%	8%	73%	37%	10%
Reading	2009	72%	40%	11%	78%	32%	2%
	2011	71%	39%	9%	81%	40%	4%
	2013	74%	41%	10%	81%	40%	5%
	2015	71%	39%	10%	78%	38%	3%
Tennessee							
Math	2009	74%	28%	3%	65%	25%	4%
	2011	75%	30%	4%	64%	24%	5%
	2013	80%	40%	7%	69%	28%	5%
	2015	82%	41%	7%	68%	29%	6%
Reading	2009	63%	28%	6%	73%	28%	2%
	2011	60%	26%	5%	70%	27%	2%
	2013	67%	34%	8%	77%	33%	3%
	2015	66%	34%	8%	76%	33%	3%

¹⁹ See *State Profiles*, NAT’L CTR. FOR EDUC. STATISTICS, <https://nces.ed.gov/nationsreportcard/states/>.

²⁰ In 2015, NAEP scores nationally declined; stagnancy or dips in exemplar states’ scores in 2015 generally align with the national decrease. See *The Nation’s Report Card*, NAEP, NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS, https://www.nationsreportcard.gov/reading_math_2015/#?grade=4; Liana Heitin, *Drop in U.S. Math, Reading Scores Prompts Blame Game*, EDWEEK, Oct. 30, 2015 (noting that “U.S. students’ math and reading scores show[ed] statistically significant declines on [NAEP] for the first time in more than two decades”).

B. Dismissal

The experience of other states also demonstrates that Minnesota's Dismissal Provisions are not necessary to protect teachers from arbitrary and unfair terminations.²¹ To be sure, teachers are entitled to reasonable due process protection. But the complexity, expense, and time-consuming nature of Minnesota's Dismissal Provisions make terminations so difficult that even chronically ineffective teachers are protected from fair and warranted dismissals, resulting in students taught by chronically ineffective teachers.

Minnesota does not have a streamlined and effective process for removing chronically ineffective teachers, which harms students. First, the Dismissal Provisions provide multiple opportunities for appeal that do not include an expedited time frame.²² This is problematic due to the time and resources multiple rounds of appeal demand on a district.²³ While teachers should have an opportunity to appeal, multiple levels of appeal drain resources from school districts and create a disincentive for districts to attempt to dismiss poor performers.²⁴ Second, and more fundamentally, multiple rounds of appeal

²¹ See MINN. STAT. §§ 122A.40(7)-(9), (13)-(17), §§ 122A.41(5)-(13) (“Dismissal Provisions”); see also Motion to Dismiss, *supra* note 7, at 3 (noting a purpose of tenure is “prevention of *arbitrary* demotion or discharges by school authorities”) (citation omitted, emphasis in original).

²² NCTQ, 2015 STATE TEACHER POLICY YEARBOOK: MINNESOTA 87 (2015).

²³ See Emily Johns and Norman Draper, *State's Bad Teachers Rarely Get Fired*, STAR TRIBUNE, May 10, 2010, <http://www.startribune.com/state-s-bad-teachers-rarely-get-fired/93201809/> (“The dismissal process can take months, cost districts tens of thousands of dollars, and require countless hours to collect evidence to convince an arbitrator that the teacher can't or won't improve.”).

²⁴ *Id.* (““They only go down that path in the absolute worst possible scenario, where they don't have a choice,” said Eastern Carver County Superintendent David Jennings, who

for chronically ineffective teachers contesting dismissal decisions takes professional judgment out of the hands of persons with education experience who are accountable for student achievement, for example, a principal or district administrator, and allows arbitrators who often lack educational expertise or knowledge to substitute their judgment for that of professional educators.

Minnesota has no compelling interest in retaining chronically ineffective teachers. Yet Minnesota’s Dismissal Provisions, bafflingly, do not specify ineffectiveness in the classroom as a ground for dismissal.²⁵ There has been a significant increase over recent years in states that consider teacher effectiveness during dismissals, such that twenty-five states explicitly make teacher ineffectiveness grounds for dismissal.²⁶

The experience of other states again demonstrates that there are feasible alternatives to Minnesota’s Dismissal Provisions that ensure dismissal processes are fair and efficient, and do not keep chronically ineffective teachers in the classroom. Florida, for example, ensures that teacher ineffectiveness is grounds for dismissal. In Florida, all new teachers are placed on annual contracts, and the state requires that such contracts may not be renewed if a teacher has received “two consecutive annual performance

has also served as a legislator and Minneapolis schools superintendent. ‘It institutionalizes mediocrity.’”).

²⁵ NCTQ, 2015 STATE TEACHER POLICY YEARBOOK: MINNESOTA 89 (2015); *State Policy Issues: Dismissal and LIFO*, NCTQ, <http://www.nctq.org/statePolicy/2015/stateFindings.do?policyIssueId=3&masterGoalId=7&stateId=24&yearId=9&x=30&y=9> (containing state data for 2016).

²⁶ NCTQ, 2011 STATE TEACHER POLICY YEARBOOK 121 (2011); NCTQ, 2013 STATE TEACHER POLICY YEARBOOK 116 (2013); NCTQ, 2015 STATE TEACHER POLICY YEARBOOK 130 (2015); <http://www.nctq.org/statePolicy/2015/stateFindings.do?policyIssueId=3&masterGoalId=7&stateId=24&yearId=9&x=30&y=9> (containing state data for 2016).

evaluation ratings of unsatisfactory, two annual performance ratings of unsatisfactory within a three-year period, or three consecutive annual performance evaluation ratings of needs improvement or a combination of needs improvement and unsatisfactory.”²⁷ Teacher contracts are not renewed if a teacher’s performance is unsatisfactory.²⁸ The state also distinguishes between the due process rights of teachers dismissed for ineffective performance as determined by annual performance evaluations and those facing other charges commonly associated with license revocation such as a felony and/or morality violations, a feature that is also missing from the Dismissal Provisions. For teachers dismissed due to ineffective performance, the appeals process is streamlined. If a teacher is dismissed due to ineffective performance, that teacher may contest the dismissal by requesting a hearing with the district school board, but that hearing must take place within 60 days and the district school board’s decision is final.²⁹

Oklahoma also ensures that teacher ineffectiveness is grounds for dismissal. In Oklahoma, teachers rated as ineffective for two consecutive years or needs improvement for three years on the Oklahoma Teacher and Leader Effectiveness Evaluation System “shall be dismissed or not reemployed.”³⁰ Teachers who do not average both a qualitative and quantitative rating of at least effective over a five-year period must be dismissed.³¹ Although the state does not distinguish the due process rights of teachers dismissed for ineffective performance from those facing other charges commonly

²⁷ FLA. STAT. § 1012.33 (3).

²⁸ *Id.*

²⁹ FLA. STAT. § 1012.34 (4).

³⁰ OKLA. STAT. tit. 70, § 6-101.22.

³¹ S.B. 706, OKLA. STATE LEG. § 6-101.22 (2015).

associated with license revocation, such as a felony and/or morality violations, the process is the same regardless of the grounds for termination and includes: “repeated negligence in performance of duty,” “willful neglect of duty,” “incompetency,” “instructional ineffectiveness,” and “unsatisfactory teaching performance.”³² The dismissal process is streamlined, so tenured teachers who are terminated have one opportunity to appeal. After receiving written notice of dismissal, the teacher may request a hearing, which must occur 20 to 60 days after notice.³³ And “[t]he decision of the board regarding a teacher shall be final and nonappealable.”³⁴

These streamlined dismissal policies balance the rights of teachers to be protected from unfair terminations with the rights of students by allowing schools to terminate ineffective teachers efficiently. And the streamlined dismissal process has not harmed the ability of these states to attract and retain effective teachers. The number of certified teachers in Florida and Oklahoma has not dropped significantly and in some cases has increased since those states changed their dismissal processes and policies.³⁵

³² OKLA. STAT. tit. 70, § 6-101.22.

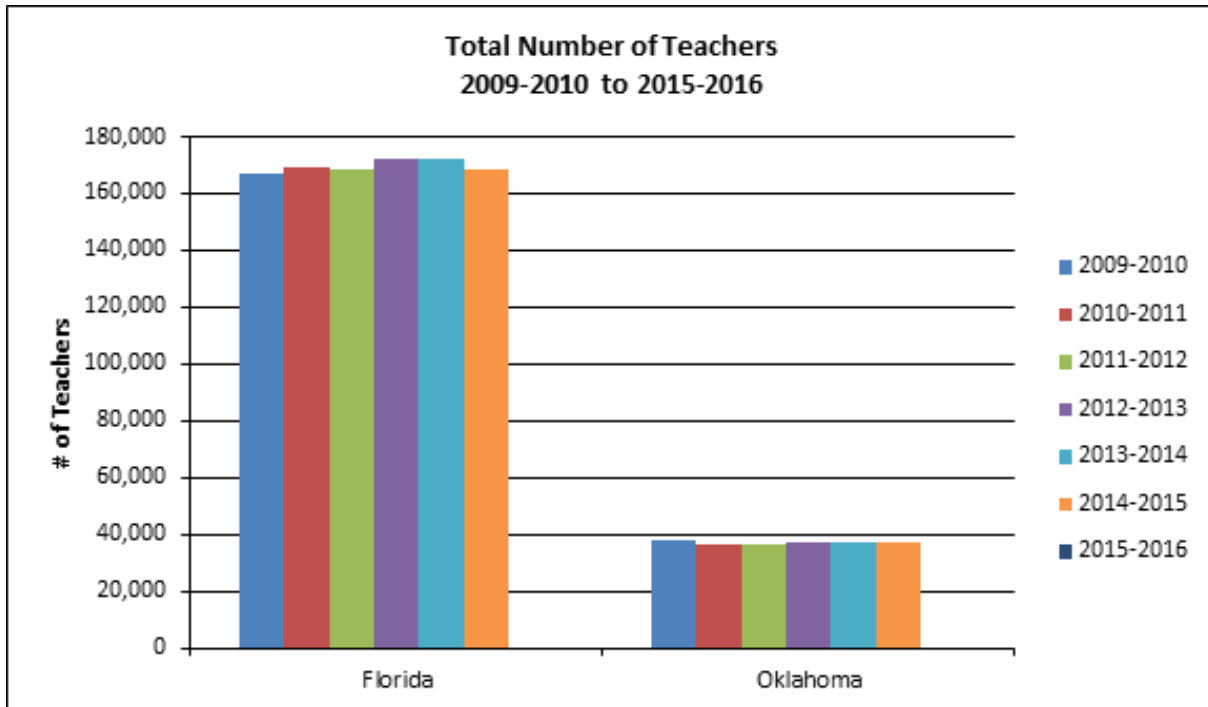
³³ OKLA. STAT. tit. 70, § 6-101.26.

³⁴ *Id.*

³⁵ See *Data Publications and Reports*, FLA. DEPT. OF EDUC., <http://www.fl DOE.org/accountability/data-sys/edu-infoaccountability-services/pk-12-public-school-data-pubs-reports/archive.shtml>; *Profiles State Report*, OKLA. SCH. PROFILES, <http://www.schoolreportcard.org/state-report>.

Total Number of Teachers

	Florida	Oklahoma
	<i>Tenure reform passed: 2011</i>	<i>Tenure reform passed: 2011</i>
	# of teachers	# of teachers
2009-2010	166,724	38,008
2010-2011	169,540	36,749
2011-2012	168,135	36,708
2012-2013	171,833	37,104
2013-2014	172,138	37,258
2014-2015	168,342	37,435



Importantly, in both states, where the dismissal statutes have been streamlined to ensure a fair and efficient process that explicitly considers teacher effectiveness, student achievement has generally increased.³⁶

NAEP Scores

	Year	Grade 4			Grade 8		
		At or above Basic	At or above Proficient	At Advanced	At or above Basic	At or above Proficient	At Advanced
Florida							
Math	2009	86%	40%	5%	70%	29%	6%
	2011	84%	37%	5%	68%	28%	6%
	2013	84%	41%	6%	70%	31%	7%
	2015 ³⁷	85%	42%	7%	64%	26%	5%
Reading	2009	73%	36%	8%	76%	32%	2%
	2011	71%	35%	8%	73%	30%	2%
	2013	75%	39%	9%	77%	33%	3%
	2015	75%	38%	8%	75%	30%	2%
Oklahoma							
Math	2009	82%	33%	3%	68%	24%	3%
	2011	83%	33%	3%	72%	27%	4%
	2013	83%	36%	5%	68%	25%	4%
	2015	84%	37%	5%	67%	23%	3%
Reading	2009	65%	28%	4%	73%	26%	1%
	2011	64%	27%	4%	73%	27%	2%
	2013	65%	30%	5%	75%	29%	2%
	2015	71%	33%	6%	76%	30%	2%

C. LIFO

Minnesota’s LIFO Provision does not further a compelling state interest.³⁸ When districts are forced by budget shortfalls to conduct a reduction in force, district leaders

³⁶ See *State Profiles*, NAT’L CTR. FOR EDUC. STATISTICS, <https://nces.ed.gov/nationsreportcard/states/>.

³⁷ See *supra* note 20 (noting that scores dropped nationally in 2015).

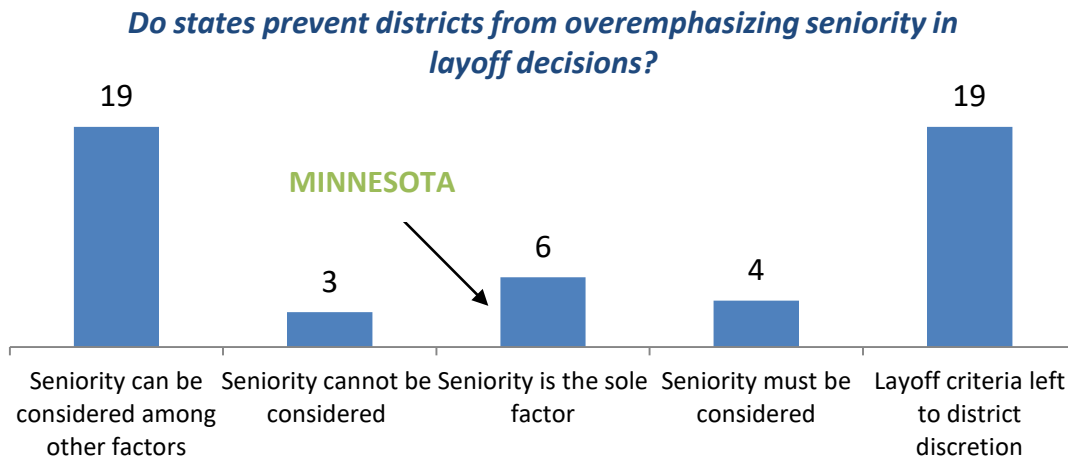
³⁸ See MINN. STAT. §§ 122A.40(10)–(11), 122A.41(14) (“LIFO Provision”).

should make every effort to retain their most effective teachers. Yet Minnesota's LIFO Provision requires school districts to first lay off the last teachers hired, without regard to their effectiveness.³⁹ By preventing any assessment of teacher quality, the LIFO Provision serves to thwart districts' efforts to retain their most effective teachers and denies students their fundamental right to an adequate education. The State Defendants' position would require them to defend the proposition that Minnesota has a compelling interest in separating students from competent teachers and a like interest in the retention of incompetent teachers.

Minnesota's LIFO Provision does not further any compelling state interest and, in many cases, further harms students by retaining the least effective teachers while releasing effective ones. Minnesota is one of only six states that mandate a quality-blind layoff process, prohibiting districts from using teacher effectiveness and performance

³⁹ NCTQ, 2015 STATE TEACHER POLICY YEARBOOK: MINNESOTA 90 (2015). Research consistently demonstrates that teachers' years of experience have little correlation to their effectiveness, especially after a teacher's first few years in the profession. *See, e.g.*, Eric A. Hanushek, John F. Kain & Steven G. Rivkin, *Teachers, Schools, and Academic Achievement*, 73(2) *ECONOMETRICA* 417, 447-49 (2005) (the most significant improvement in teaching quality occurs within the first three years of a teacher's career, after which the teacher's development plateaus); Donald Boyd, Hamilton Lankford, Susanna Loeb, Jonah Rockoff and James Wyckoff, *The Narrowing Gap in Teacher Qualifications and its Implications for Student Achievement* 15 (Nat'l Bureau of Econ. Research, Working Paper, 2008) (although "[t]eachers continue to improve the achievement outcomes of their students over the first 3 to 5 years of their careers," the most significant improvement in teacher effectiveness occurs in the first year); Douglas N. Harris and Tim R. Sass, *Teacher Training, Teacher Quality and Student Achievement* 19 (Nat'l Ctr. for Analysis of Longitudinal Data in Educ. Research (CALDER), Working Paper, 2007) (effect of teacher experience on student outcomes was most significant in the first year, "with subsequent experience yielding diminishing increases in teacher productivity"); Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, *EDUC. POLICY ANALYSIS ARCHIVES* 7 (2000) (the benefits of experience appear to level off after about five years).

evaluation to decide which teachers are laid off and which are retained. The layoff decision is made regardless of each teacher’s impact on students.⁴⁰



The experience of Colorado and Florida demonstrates that feasible alternatives exist to Minnesota’s quality-blind layoff statute. Both of these states require that during a reduction in force: 1) classroom performance is the top criterion used to identify which teachers to layoff and 2) that seniority can only be considered after teacher performance is considered. Colorado considers teacher performance—measured by a performance evaluation—as the top criterion for districts to use in determining which teachers are laid off during reductions in force.⁴¹ In Colorado, other factors, including “the consideration of probationary and nonprobationary status and the number of years a teacher has been

⁴⁰ NCTQ, 2015 STATE TEACHER POLICY YEARBOOK 133 (2015); *State Policy Issues: Dismissal and LIFO*, NCTQ, <http://www.nctq.org/statePolicy/2015/nationalFindings.do?policyIssueId=3&masterGoalId=16&yearId=9&x=17&y=16> (containing state data for 2016).

⁴¹ COLO. REV. STAT. §§ 22-9-106, 22-63-202.

teaching in the school district,” may be considered only after a teacher’s performance is taken into account.⁴²

Florida also requires that teacher performance is the primary factor in determining which teachers are laid off during a reduction in force. In addition, the state ensures that seniority is not the sole factor in determining which teachers are laid off. In Florida, employees with the lowest performance evaluations are the first to be released, and school districts “may not prioritize retention of employees based upon seniority.”⁴³

Moreover, these changes to state layoff laws have not significantly impacted the number of certified teachers in Colorado or Florida.⁴⁴

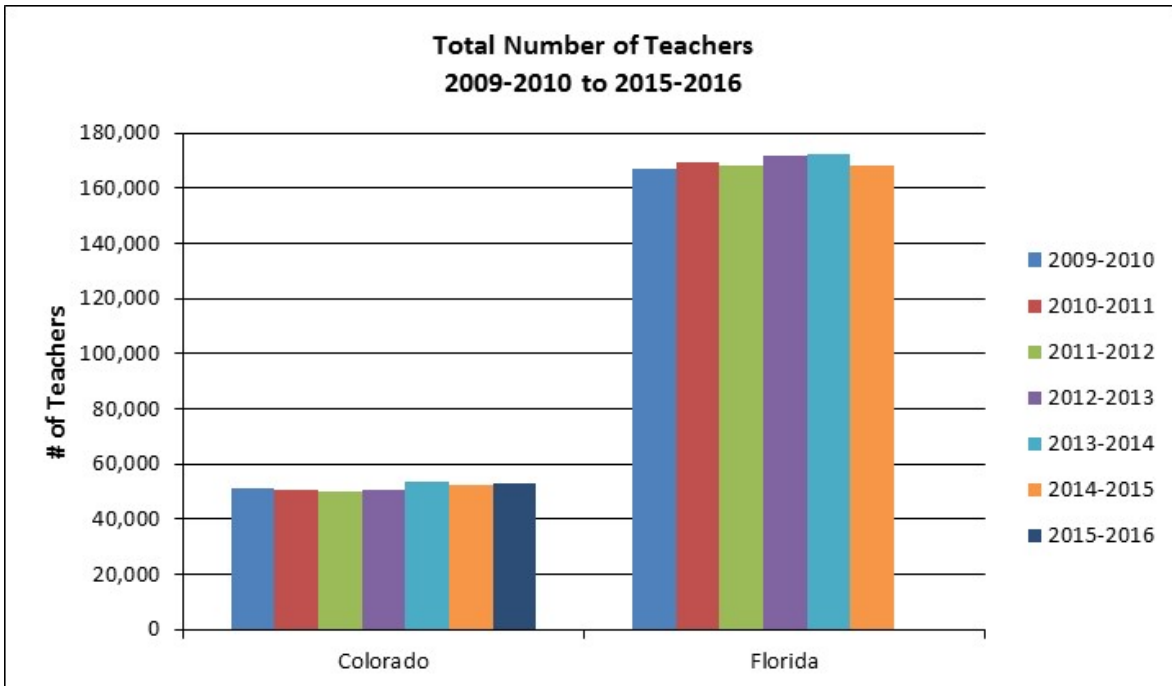
⁴² *Id.*

⁴³ FLA. STAT. § 1012.33 (5).

⁴⁴ *See Teachers by Race/Ethnicity and Gender*, COLO. DEP’T OF EDUC., <https://www.cde.state.co.us/cdereval/6-countofteachersbydistrictethnicityandgenderpdf>; *Data Publications and Reports*, FLA. DEP’T OF EDUC., <http://www.fl DOE.org/accountability/data-sys/edu-infoaccountability-services/pk-12-public-school-data-pubs-reports/archive.stml>.

Total Number of Teachers

	Colorado	Florida
	<i>Tenure reform passed: 2010</i>	<i>Tenure reform passed: 2011</i>
	# of teachers	# of teachers
2009-2010	51,256	166,724
2010-2011	50,654	169,540
2011-2012	50,326	168,135
2012-2013	50,947	171,833
2013-2014	53,910	172,138
2014-2015	52,560	168,342
2015-2016	53,179	--



Furthermore, and more importantly, student achievement in both states witnessed growth following the change to a performance-based LIFO policy.⁴⁵

	Year	Grade 4			Grade 8		
		At or above Basic	At or above Proficient	At Advanced	At or above Basic	At or above Proficient	At Advanced
Colorado							
Math	2009	84%	45%	8%	76%	40%	10%
	2011	84%	47%	10%	80%	43%	12%
	2013	87%	50%	11%	77%	42%	12%
	2015 ⁴⁶	82%	42%	8%	73%	37%	10%
Reading	2009	72%	40%	11%	78%	32%	2%
	2011	71%	39%	9%	81%	40%	4%
	2013	74%	41%	10%	81%	40%	5%
	2015	71%	39%	10%	78%	38%	3%
Florida							
Math	2009	86%	40%	5%	70%	29%	6%
	2011	84%	37%	5%	68%	28%	6%
	2013	84%	41%	6%	70%	31%	7%
	2015	85%	42%	7%	64%	26%	5%
Reading	2009	73%	36%	8%	76%	32%	2%
	2011	71%	35%	8%	73%	30%	2%
	2013	75%	39%	9%	77%	33%	3%
	2015	75%	38%	8%	75%	30%	2%

⁴⁵ See *State Profiles*, NAT'L CTR. FOR EDUC. STATISTICS, <https://nces.ed.gov/nationsreportcard/states/>.

⁴⁶ See also *supra* note 20 (noting that scores nationally dropped in 2015).

II. THE EXPERIENCE OF SCHOOL DISTRICTS NOT SUBJECT TO THE RESTRICTIONS IN THE CHALLENGED STATUTES DEMONSTRATES THAT THOSE RESTRICTIONS ARE NOT NECESSARY TO FURTHER A COMPELLING GOVERNMENT INTEREST.

The experience of school districts not subject to the restrictions in the Challenged Statutes provides further evidence that those statutes are not necessary to achieve the state’s interests in obtaining a high quality, stable teaching force.⁴⁷

A. Shelby County Schools, Tennessee

Tenure reform in Tennessee has allowed Shelby County Schools (“SCS”) to improve the quality of its teaching force and, most importantly, increase student achievement. Tennessee requires five years of teacher performance and two consecutive years of being rated effective before a teacher may earn tenure. Thereafter, tenured teachers who receive two consecutive ineffective ratings can lose their tenured status.⁴⁸ Tennessee state law does not require layoffs based on seniority, but instead gives local school boards discretion to lay off teachers based on their evaluation ratings.⁴⁹ Under Superintendent Dorsey E. Hopson, SCS’s practice has been to consider teacher performance as one of the first criteria when making layoff decisions.⁵⁰ This state framework allows SCS to use data on teacher effectiveness to make retention and

⁴⁷ See *supra* note 7.

⁴⁸ See *supra* note 17.

⁴⁹ TENN. CODE ANN. § 49-5-511(b)(1).

⁵⁰ Shelby County recently had to implement this practice in laying off more than 500 educators. See Kayleigh Skinner, *Layoffs Impact More Than 500 Shelby County Educators*, CHALKBEAT TENN., June 18, 2015, <http://tn.chalkbeat.org/2015/06/18/layoffs-impact-about-500-shelby-county-teachers/#.Ve9VhBFVhHw>.

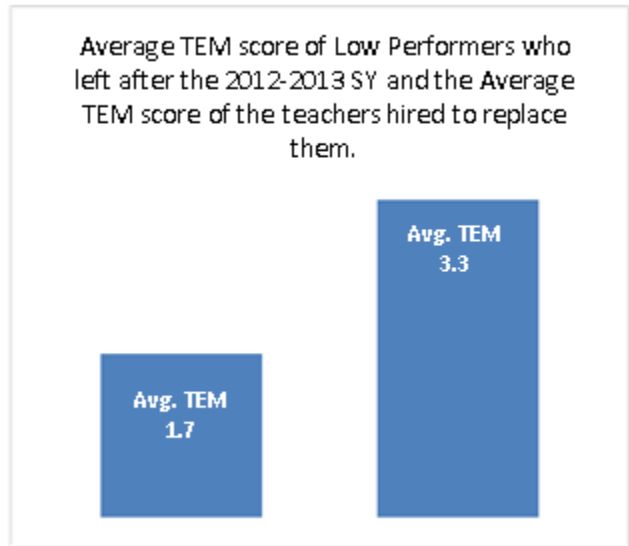
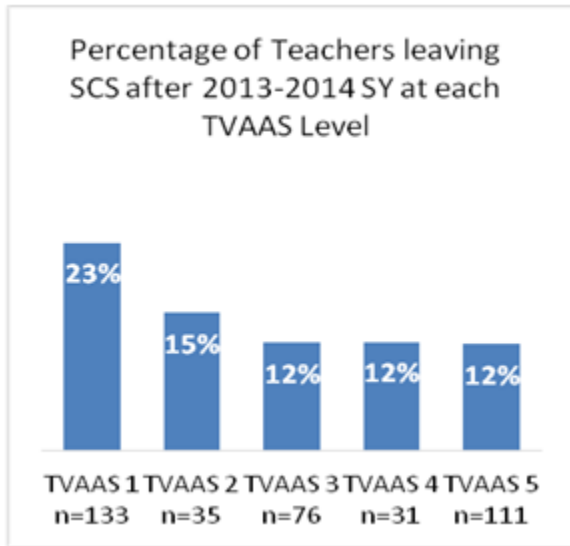
dismissal decisions, rather than being forced not to consider those factors in its employment decisions as is the case in Minnesota.

The ability to consider teacher effectiveness has enabled SCS to retain high performing teachers while removing persistently low performers. In 2012, the district retained 93 percent of its top performers (as measured by Teacher Evaluation Measure (TEM))⁵¹ while retaining 84 percent of its lower performers. In 2015, the district retained 91 percent of its top performers and 71 percent of its lowest performers.

Moreover, after these policies were put in place in 2011, SCS saw a dramatic increase in the number of teacher candidates applying to the district. In 2010, 3,300 candidates started applications to teach in SCS. Since then, the four-year average between 2011-2015 is 7,425. This means that the number of candidates interested in teaching in SCS nearly doubled or tripled each year after these policies were in place than before the policies existed in SCS, suggesting that tenure reform *increased* interest in teaching in the district.

SCS has prioritized teacher quality as the single most important factor in all employment decisions, including recruitment, retention, and dismissal. In fact, as low performers are terminated, SCS have been able to replace them with more effective teachers. As illustrated in the chart below, the average teacher evaluation rating (TEM score) of new hires in Shelby County Schools is substantially higher than the average rating of the teachers they are replacing.

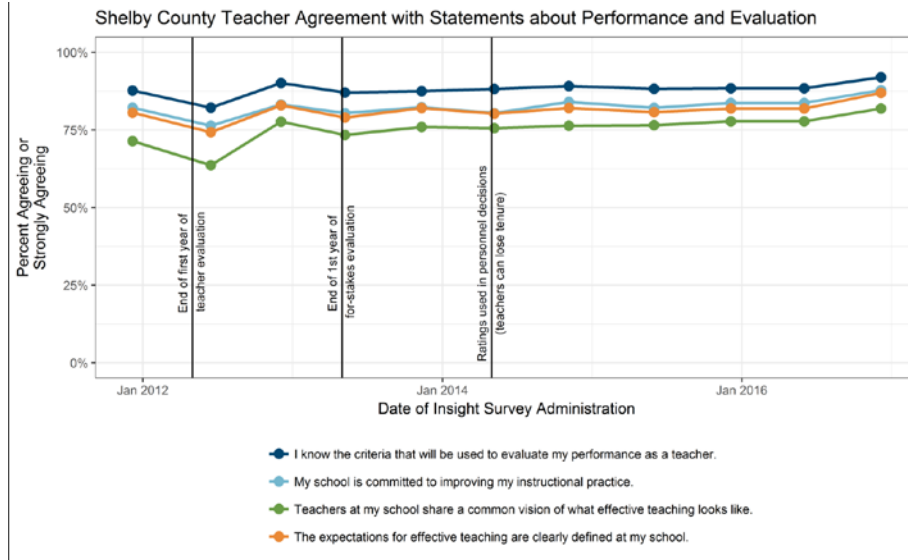
⁵¹ TEM rates teachers on a scale of 1-5, with TEM 1 as the lowest rating and TEM 5 as the highest rating. High performers are characterized as TEM 4 and TEM 5.



The use of teacher effectiveness measures for retention and dismissal decisions has not made teachers feel vulnerable to unfair terminations. To the contrary, teachers report that they feel better-supported by the tenure reforms implemented in Tennessee. Over the last several years, SCS has participated in a TNTP-administered diagnostic assessment of school culture called Instructional Culture Insight (“Insight”), and SCS’s longitudinal results have been overwhelmingly positive.

More than 80 percent of teachers surveyed in SCS self-report that they are aware of the criteria of the evaluation system, that the expectations of effective practice are clearly defined, and that their school is committed to improving their instructional practice. These results signify that SCS has been able to maintain an instructional culture where the majority of teachers in the district understand what is expected of them and feel supported in their practice. The graph shows that belief among district teachers has

remained consistent throughout the implementation of performance-based tenure, dismissal, and layoff policies.⁵²



Furthermore, when SCS changed their employment policies, most importantly, student achievement in SCS increased. Specifically, in the Innovation Zone (I-Zone),⁵³ the lowest performing schools are outpacing student growth for the state on the Tennessee Comprehensive Assessment Program (TCAP), using the value-added measure TVVAS. In 2012-2013, the I-Zone increased proficiency percentage points by 10.0 (math), 2.4 (reading), 13.4 (science), and 11.9 (social studies) for grades 3 through 8 compared to the state increase of 3.5 (math), 0.4 (reading), 2.1 (science), and 0.8 (social

⁵² See also 2016 Tennessee Educator Survey, TENN. DEP’T OF EDUC., <http://educatorsurvey.tnk12.gov/#1/all-districts/all-schools/0> (demonstrating increasing confidence amongst Tennessee teachers in the evaluation system).

⁵³ The Innovation Zone (I-Zone) is a subset of SCS who are “Priority Schools” for the district, which means that the schools perform in the bottom 5% of schools in the state. *Overview of the I-Zone (Innovation Zone)*, SHELBY COUNTY SCH. (2015), <http://www.scsk12.org/uf/izone/>.

studies).⁵⁴ These I-Zone schools, with a history of chronic underperformance, tripled and quadrupled state gains in each content area resulting in better outcomes for students, despite the significant changes the district made to its tenure, dismissal, and LIFO policies.⁵⁵

B. Washington, D.C. Public Schools

Similar to SCS, as described in the prior section, tenure and the related policies reform has also allowed D.C. Public Schools (DCPS) to improve the quality of its teaching force and, most importantly, increase student achievement.⁵⁶ In 2010, after over two years of negotiations, DCPS and the Washington Teachers' Union agreed to a new contract that, like the policies in Tennessee, removed most of the fundamental problems in the Challenged Statutes regarding permanent employment, dismissal, and layoffs.⁵⁷ As a result of this historic contract, DCPS eliminated tenure, added an effectiveness standard to the dismissal policy, and introduced performance-based layoffs.⁵⁸

⁵⁴ See Press Release, *2013 Statewide Accountability System Results*, SHELBY COUNTY SCH. (July 30, 2013), <http://www.scsk12.org/news/?id=52>.

⁵⁵ Along with DC, Tennessee has also witnessed the greatest increases in student achievement on recent NAEP results. See *What states are making gains?*, THE NATION'S REPORT CARD, http://www.nationsreportcard.gov/reading_math_2013/#/state-gains; see also *supra* note 20.

⁵⁶ DCPS adhere to negotiated policies found in the Collective Bargaining Agreement (CBA) between the school system and the Washington Teachers' Union in addition to regulations of the D.C. Office of the State Superintendent of Education (OSSE).

⁵⁷ See Bill Turque, *D.C. Public Schools, teachers union reach tentative deal*, THE WASHINGTON POST, Apr. 7, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/06/AR2010040604392.html>; see also Bill Turque, *D.C. Teachers' Union ratifies contract, basing pay on results, not seniority*, THE WASHINGTON POST, June 3, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/02/AR2010060202762.html>.

⁵⁸ Teachers who previously had permanent status did not lose it.

Specifically, with regard to dismissals, the CBA indicates that teacher effectiveness—as measured by the teacher’s evaluation rating—can be considered in dismissal decisions.⁵⁹ The district’s evaluation handbook explicitly states that a rating of ineffective or two consecutive years of being rated minimally effective can result in dismissal.⁶⁰ With regard to layoffs, DCPS requires “performance-based excessing and mutual consent” for any reductions in staffing.⁶¹ For DCPS’s most recent round of layoffs in 2009, teacher performance and contribution comprised the bulk of ratings used by principals to make elimination decisions.⁶²

Since it implemented these reforms, DCPS has retained its most effective teachers, those rated highly effective, at nearly double the rate it retained low-performing

⁵⁹ COLLECTIVE BARGAINING AGREEMENT BETWEEN THE WASHINGTON TEACHERS’ UNION AND THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS 49-50 (Oct. 1, 2007 – Sept. 30, 2012), <http://www.wtulocal6.org/usr/Final%20WTU%20DCPS%20Tentative%20Agreement.pdf> [*hereinafter* CBA].

⁶⁰ IMPACT: THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS EFFECTIVENESS ASSESSMENT SYSTEM FOR SCHOOL-BASED PERSONNEL 62 (2014-2015), <http://dcps.dc.gov/sites/default/files/dc/sites/dcps/publication/attachments/IMPACT-2014-Grp1f.pdf>.

⁶¹ CBA, *supra* note 59, at 102.

⁶² In 2009, DCPS laid off over 200 teachers as part of a budgetary reduction in force. *See* Editorial, *Judge Rejects D.C. Teachers Union’s Complaint Over Layoffs*, WASHINGTON POST, Nov. 25, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/24/AR2009112403964.html>. Prior to the layoffs, DCPS circulated a memo to principals explaining that, for the rating used to make layoff decisions, 85% of the rating is based on performance-based criteria and seniority only accounted for 5%. *See* Memorandum from Jesus Aguirre, Director of School Operations, Office of the Chancellor, District of Columbia Public Schools, 2-3, 5-10 (Sept. 18, 2009), <http://thewashingtonteacher.blogspot.com/2009/09/rif-memo-sent-to-dc-principals-by-rhee.html>.

teachers.⁶³ Moreover, the policies in DCPS did not appear to have any negative impact on the retention of its highly effective teachers.

From 2012 to 2017, DCPS has retained 90% or more of its Highly Effective teachers. This number exceeds or is on par with the retention of high performers in other comparable urban districts.⁶⁴ And, highly effective teachers in DCPS were more likely to report that they were valued by their school leader or district than were top performers in comparable urban districts.⁶⁵ This demonstrates that, not only did tenure reform allow DCPS to increase the quality of its teaching force, but that reform resulted in higher job satisfaction despite having less job security.

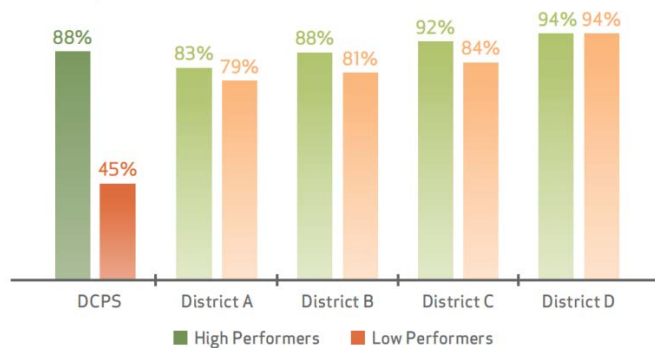
⁶³ Much of the analysis from this section relies on two case studies TNTP performed. In 2012, TNTP conducted a case study of DCPS, *Keeping Irreplaceables in D.C. Public Schools: Lessons in Smart Retention*. The case study was a follow-up to an earlier nationwide report titled *The Irreplaceables*. In *The Irreplaceables*, TNTP studied the retention of effective teachers in four other urban school districts and identified a negligent approach to teacher retention resulting in the loss of many effective teachers. TNTP, *THE IRREPLACEABLES 4* (2012), http://tntp.org/assets/documents/TNTP_Irreplaceables_2012.pdf.

In *The Irreplaceables*, TNTP defined top performers in the four urban districts studied by examining student growth scores on standardized tests and identifying the teachers whose students exhibited the most significant growth. *Id.* at 36-37. For the DCPS Case Study, TNTP reviewed the DCPS teacher evaluation ratings for 3,482 teachers in the 2010-2011 school year in addition to student growth scores. TNTP, *KEEPING IRREPLACEABLES IN D.C. PUBLIC SCHOOLS: LESSONS IN SMART RETENTION 5* (2012), http://tntp.org/assets/documents/TNTP_DCirreplaceables_2012.pdf. Determinations of effectiveness in DCPS are based on their district-wide evaluation system, IMPACT.

⁶⁴ For example, in 2010-2011, DCPS retained 88% of its high performers, while District A retained 83%; District B retained 88%; District C retained 92%; and District D retained 94%. *KEEPING IRREPLACEABLES, supra* note 63, at 6.

⁶⁵ 66% of DCPS top performers said they feel valued by their principal compared to 59% in District A, 63% in District B, 58% in District C, and 58% in District D. *Id.* at 9.

Additionally, DCPS also appeared to act on the policy allowing for the dismissal of twice-rated ineffective teachers without a negative impact on the retention of Highly Effective teachers. The chart below illustrates the retention of top performers compared to low performers in DCPS and comparable urban districts, demonstrating how DCPS retained 45 percent of teachers rated minimally effective or ineffective, whereas other comparable urban districts retained nearly double that amount.⁶⁶ Despite these changes in retention and dismissal policies, DCPS still has been able to retain a significantly greater number of higher quality teachers and therefore ensure more students in the district are taught by a highly effective teacher.



Moreover, in DCPS, dismissal of a low-performing teacher was likely to result in a replacement with a more effective teacher. This is in large part because DCPS’s CBA allowed for the consideration of teachers’ classroom performance when making dismissal decisions. The average evaluation score of the 318 DCPS teachers who were rated low performing in the 2010-2011 school year was 245, compared to an average evaluation

⁶⁶ District A retained 79% of its lower performers; District B 81%; District C 84%; District D 94%. *Id.* at 6.

score of 277 for the district's first-year teachers.⁶⁷ The first-year teachers were performing better on average than teachers of longer tenure with a history of low performance, suggesting a likelihood of replacing a low performing teacher with a higher performing, first-year teacher.

At the same time DCPS implemented these policy changes, student achievement in the district markedly improved. The 2013 results of National Assessment of Educational Progress (NAEP) show students in DCPS have made greater academic gains than any state in the country.⁶⁸ Since 2011, the same time these policies were implemented, DCPS students have improved in each grade and subject tested by NAEP, and their growth exceeds national growth levels in every grade and subject.⁶⁹

⁶⁷ *Id.* at 14.

⁶⁸ Press Release, *2013 DC NAEP Student Achievement Results*, D.C. PUB. SCH. (2013), <http://dcps.dc.gov/sites/default/files/dc/sites/dcps/publication/attachments/FINAL%202013%20DC%20NAEP%20Results%20One-Pager%5B1%5D.pdf>. And, despite lackluster NAEP results nationally in 2015, DCPS continued to see strong achievement growth and was one of only two education systems to have increases in math and reading for 4th grade from 2013 to 2015. *See supra* note 20.

⁶⁹ *District Profiles*, NAT'L CNTR. FOR EDUC. STATISTICS, <http://nces.ed.gov/nationsreportcard/districts/Default.aspx>. The only exception is eighth grade math from 2013 to 2015, which remained statistically even. Press Release, *DC's NAEP Scores Show Sustained, Significant Improvement, Outpace the Nation*, D.C. PUB. SCH. (Oct. 28 2015), <https://osse.dc.gov/release/district-columbias-naep-scores-show-sustained-significant-improvement-outpace-nation>.

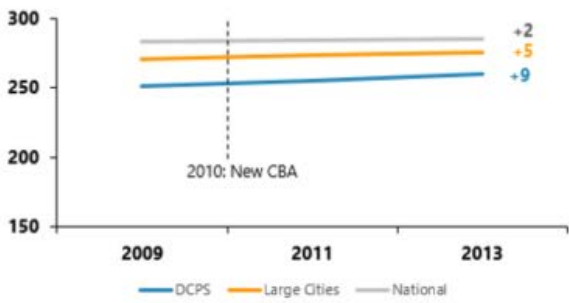
4th Grade Math NAEP Scores



4th Grade Reading NAEP Scores



8th Grade Math NAEP Scores



8th Grade Reading NAEP Scores



III. CONCLUSION

Appellants' claims would establish the Challenged Statutes unconstitutionally burden Minnesota children's fundamental right to an adequate education. For all the foregoing reasons, *Amici* urge the Court to reverse the trial court's decision and deny the Motion to Dismiss.⁷⁰

Dated: March 30, 2017

Respectfully submitted,

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⁷⁰ At the very least, Appellants should have leave to replead, given the critical importance of children's fundamental right to an adequate education. *See supra* note 9.

CERTIFICATE OF COMPLIANCE

This brief of *Amici* complies with the requirements set out in Minn. R. Civ. App. P. 132.01. The brief was prepared using a proportional 13-point font in Microsoft Word 2013, which reports that the brief contains 6,984 words.

Dated: March 30, 2017

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