CASE NO. A17-0033

STATE OF MINNESOTA
IN COURT OF APPEALS

Tiffini Flynn Forslund, et al.,

Appellants,

v.

State of Minnesota State of Minnesota, et al.,

Respondents.

BRIEF OF AMICI CURIAE EDUCATION MINNESOTA AND MINNESOTA ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS

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IDENTIFICATION OF AMICI CURIAE

Education Minnesota is the leading advocate for public education in Minnesota. Our over 70,000 union members work in preK-12 schools and higher education institutions statewide, including almost all of Minnesota's preK-12 public school teachers; education support professionals; faculty at university, community, and technical colleges; students preparing for careers in education; and retired educators who have devoted their lives to students. Our nearly 440 locals statewide help mentor new teachers, provide professional development, negotiate and maintain work contracts, as well as direct services and support. Education Minnesota gives voice to the issues that affect public education, educators, and the students they teach.

Minnesota Association of Secondary School Principals ("MASSP") members include 1,100 principals and assistant principals who are responsible for the administration, supervisions, and control of Minnesota's public high, middle, and junior high schools. MASSP helps its members to lead their schools consistent with state law, sound practice, and licensure requirements. [1]

[1] Pursuant to Minn. R. Civ. App. P. 129.03, counsel for *amici* Education Minnesota and MASSP certify that they authored this brief and no other person or entity made monetary contribution to its preparation or submission.

ARGUMENT

Appellants are not seeking a remedy for their children; they only seek to change education policy in the state through a lawsuit. Over the course of nearly ninety years, the Minnesota Legislature initially enacted and has revised Minnesota Statutes §122A.40 (commonly referred to as the Continuing Contract Law) and §122A.41 (Teacher Tenure Act) (collectively referred throughout as the "due process laws"),[2] pursuant to its explicit delegated duty and because it is essential to public school education in Minnesota. These are robust, rigorous, and well-litigated laws, but changes happen when circumstances demand and stakeholders engage in the political process to bring about that change. However, they remain in place because they are as essential today and continue to advance the original purpose.

Appellants may have their own view of how to reform education through destroying the profession of teaching and perpetuating an endless assault on teachers, but the debate over the good reform, the bad reform, the perfect reform, or maintaining the status quo all belong at the Legislature, not in the courts. The answer is surely not by eliminating employment rights to all the teachers in Minnesota, which is the only remedy Appellants have demanded in this case.

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[2] The two laws are treated as being essentially equivalent under the law. *Jurkovich v. Indep. Sch. Dist. No. 708*, 478 N.W.2d 232, 233 (Minn. Ct. App. 1991) (referring to predecessor statutes); *Montplaisir v. Indep. Sch. Dist. No. 23*, 779 N.W.2d 880, 881(Minn. Ct. App. 2010).

As the District Court correctly concluded, the questions raised by the Appellants are education policy questions, not questions of constitutional powers justiciable by the courts. This Court should affirm the District Court's well-reasoned decision supporting dismissal of this lawsuit.

I. The Legislature enacted due process laws that embody a balance between district discretion and teacher rights for the benefit of students and public education in Minnesota, which are still necessary today.

The origins of the due process laws begin in the 1920's with high teacher turnover, but not for job-related reasons. *See* Christine Ver Ploeg, *Terminating Public School Teachers for Cause under Minnesota Law*, 31 Wm. Mitchell L. Rev. 303, 306 (2004). It was the result of "local politics, a teacher's residing outside the district, favoritism to friends and relatives, undercutting opposition to board policies, or seeking to hire lesser-paid, new teachers." *Id*. To turn the times around, the Minnesota Legislature recognized that "for the good of the schools and the general public the profession should be made independent of personal or political influence, and made free from the malignant power of spoils and patronage." *McSherry v. City of St. Paul*, 277 N.W. 541, 543 (Minn. 1938). In 1927, the teacher tenure law, the predecessor to Minn. Stat. §122A.41, was created for the "cities of the first class," at the time just Duluth, Minneapolis, and St. Paul, to ensure teacher hiring was not based on patronage and firing was only for cause after basic due process was provided. Ver Ploeg, *supra,* at 306. In 1937, the Legislature added the continuing contract law, the predecessor to Minn. Stat. §122A.40, applicable to all the other school districts in the state, but it only allowed for year-end termination after simple

notice. *Id*. It was not until 1967 that the same due process protections were added to the continuing contract law, providing parity in all school district across the state. *Id*.

When faced with individual challenges under the due process laws, the courts have repeatedly recognized the legislative purpose behind the laws – to prevent arbitrary dismissals of teachers, allow school districts to manage effectively, and to benefit public schools.[3] *Hudson v. Independent School District No. 77*, 258 N.W.2d 594, 597 (Minn. 1977) ("The overriding legislative purpose behind the tenure laws was undeniably the prevention of arbitrary demotions and discharges of teachers without their regard to ability… [b]alanced against this legislative goal is the need to allow the school board enough latitude to administer effectively the operation of the public schools."); *Montplaisir v. Indep. Sch. Dist. No. 23*, 779 N.W.2d 880, 883 (Minn. Ct. App. 2010) ("[Minn. Stat. §122A.40][sic] was enacted to protect teachers from arbitrary discharge, but was not intended to place an unreasonable restriction on the powers which a school board must possess to effectively administer the operation of the public schools.")(*quoting Keller v. Indep. Sch. Dist. No. 742*, 224 N.W.2d 749, 752 (Minn. 1974)(internal quotations omitted)); *Krueth v. Indep. Sch. Dist. No. 38*, 496 N.W.2d 829, 839 (Minn. Ct. App. 1993)("The purposes of the teacher tenure law are stability, certainty and permanency of employment and prevention of arbitrary demotions and discharges."); *McSherry*, 277

[3] Principals are included within the definition of teachers. Minn. Stat. §§122A.40, subd. 1; 122A.41, subd. 1(a); *see Mohn v. Indep. Sch. Dist. No. 697*, 471 N.W.2d 723, 726 (Minn. Ct. App. 1991).

N.W. at 546 ("The Teacher Tenure Act is based upon the public policy of protecting the educational interests of the state, not upon a policy of granting special privileges to teachers as a class or as individuals."). The due process laws are still true to that purpose today.

At the time of initial adoption, the due process laws improved quality teaching, and by extension, education for students. These safeguards are still important for teachers who hold students to high standards, protect students from abuse, challenge their school district, teach controversial subjects, are subject to false allegations, fight for equity in education, or for teachers who just cost too much money in a cash-strapped district. Without them, teachers would again risk arbitrary and unfair termination decisions not based on ability, performance, or proven cause, but based on cronyism, nepotism, personal vendettas, or because one teacher is more expensive than another is. As one teacher framed it:

> The most important duty one generation has to the next is providing a high-quality education. It's a responsibility Duluth teachers feel every day we go to work. We know the students in our classrooms are the future leaders of our communities. . . [T]he due process protections. . . are what allow teachers to fearlessly advocate for our schools, honestly inform parents about their children's education, and maintain high academic standards without fear of being fired. Without these protections, I doubt good teachers could do their best work.

Bernadette Burnham, *Local view: Don't lash out at hardworking teachers over frustration with underachievement*, Duluth News Tribune (June 8, 2016),

http://www.duluthnewstribune.com/opinion/local-view/4050810-local-view-dont-lash-out-hardworking-teachers-over-frustration.

The days of needing due process protections are not behind us. Consider the teacher who supports a transgender student to access a bathroom without shame; the teacher that engages in community activism, leadership, or political engagement around equity for people of color; and the teacher who advocates for their student who receives special education services, even when that advocacy places the teacher at odds with an administrator or parent. The due process laws do not blindly create a job for life for these teachers, but they do allow these teachers to speak up and advocate for what they know is best for students. We cannot afford to lose that for our teachers in Minnesota, because we cannot afford to lose it for our students.

Also, practically speaking, if this Court makes a holding contrary to the principles outlined in *Cruz-Guzman v. State*, 2017 WL 957726 (Minn. Ct. App. 2017), *rev. granted* (April 26, 2017), the Court could be creating a constitutional challenge around every school district decision. It will have a chilling effect on teacher advocacy and will lead to litigation between well-meaning parents and school districts over placements of students, curriculum and grades, and staffing decisions. It will undoubtedly disrupt and restrict a school district's ability to manage the district for the benefit of students. That result is in stark contrast to the benefits of the due process laws, which are a component of the strong public school system in Minnesota.

II. The due process laws are essential to quality public education in Minnesota.

The due process laws embody good public policy and are essential to quality public education in Minnesota. They create a skilled, professional, and stable workforce. They provide rights to teachers who have earned them after years of proven performance, rights to a process that guards against political pressures and discrimination. They provide a balance between teachers and public school districts, allowing local school boards and school district administrators to retain a great deal of control through discretion, reserved managerial rights, or collective bargaining with local teachers.

A. The due process laws create a skilled, professional, and stable workforce for the benefit of students and public education in Minnesota.

Minnesota has one of the most robust pathways for creating a strong workforce of professional teachers who will spend a career in education. From probation through teacher development and evaluation, the due process laws create a framework that guides and supports teachers down that pathway. Appellants allege that these laws drive people out of the profession, that they demand districts be blind to teacher performance, and that they allow struggling teachers to have permanent job security. Simply put, that is not true. The due process laws do not stand alone as the only tool, but they are one essential tool for recruitment, professional development and improvement of a great teacher workforce, and retention of teachers in Minnesota.

1. The due process laws give school districts three years to evaluate the skills of probationary teachers before committing itself to ongoing employment and give teachers who have proven their fitness to teach protections from arbitrary dismissal.

Minnesota's probationary provisions found in Minn. Stats. §§122A.40, subd. 5 and 122A.41, subd. 2, were created and revised by the Legislature to balance employment of beginning teachers and local school districts' needs to manage public schools effectively for the benefit of their students. The probationary period provides an opportunity for the school district to observe and evaluate a teacher's abilities before deciding whether to employ her on an ongoing basis. *Id*.; *Montplaisir*, 779 N.W.2d at 885; *Emanuel v. Indep. Sch. Dist. No. 273*, 615 N.W.2d 415, 418 (Minn. Ct. App. 2000); *Flaherty v. Indep. Sch. Dist. No. 2144*, 577 N.W.2d 229, 236 (Minn. Ct. App. 1998). The laws address length of probationary service, eligible years of service, evaluation requirements, and expansive school district discretion for termination and non-renewal. *Id.* This framework gives every employing school district, no matter where they fall in the teacher's career path, an opportunity to evaluate a teacher before committing itself to ongoing employment.

"The first three years of a teacher's first teaching experience in Minnesota in a single district is deemed to be a probationary period." Minn. Stat. §§122A.40, subd. 5; 122A.41, subd. 2. For teachers who move from one district to another, a new probationary period is required, depending on whether it is a district covered under .40 (one additional year) or under .41 (three consecutive years). *Id*. This additional probationary period is

even applicable for a district where it rehired a teacher who previously had a continuing contract but resigned. *See Montplaisir,* 779 N.W.2d at 886.

During the probationary period, teachers must be evaluated three times each year, starting in the first 90 days on the job. Minn. Stat. §§122A.40, subd. 5; 122A.41, subd. 2. Evaluation of performance during the probationary period is important for the professional development of a new teacher, even if "the evaluation requirement is designed to benefit the school district." *Flaherty*, 577 N.W.2d at 235 (*citing Berland v. Spec. Sch. Dist. No. 1*, 314 N.W.2d 809, 814 (Minn. 1981)).

Because the Legislature wanted to ensure school districts had enough time and opportunity to evaluate a probationary teacher's skills, the laws have been strengthened to extend the length of service for a teacher to accomplish a year of probation, growing from a *de minimis* amount of service, to 60 days, to the current 120-day requirement. Minn. Stat. §§122A.40, subd. 5(e); 122A.41, subd. 2(d); *Flaherty*, 577 N.W.2d at 236 (79 hours); 1st Sp. 2005 c. 5 art. 10 s. 1 (60 days); 1st Sp. 2011 c. 11 art. 2 s. 12-15 (120 days, excluding conferences, workshops, staff development days, and absences).

Concerned about the effect this 120-day service requirement could have on parents or others with medical leaves, the Legislature modified the law in 2016 to mirror an exception for active military service and allow for a probationary teacher whose first three years of consecutive employment are interrupted for maternity, paternity, or medical leave but resume teaching within 12 months is considered to have consecutive teaching experience in the probationary period. Minn. Stat. §§122A.40, subd. 5(c), (d); 122A.41,

subd. 2 (b), (c); 2014 c. 272 art. 3 s. 13-14. It does not remove the 120-day requirement, but it prevents new mothers, for example, from being perpetually probationary.

A school board has complete discretion whether to non-renew a probationary teacher's contract, even if the reasons are arbitrary and capricious and even if the school district failed to comply with the evaluation requirements. *Allen v. Bd. of Educ. Indep. Sch. Dist. No. 582*, 435 N.W.2d 124, 126-127 (Minn. Ct. App. 1989); *Pearson v. Indep. Sch. Dist. No. 716*, 188 N.W.2d 776, 778 (Minn. 1971). Put another way, a probationary teacher can be non-renewed for a good reason, a bad reason, no reason, just not an illegal reason. During the probationary period, "any annual contract with any teacher may, or may not be renewed as the school board shall see fit." Minn. Stat. §§122A.40, subd. 5(a);122A.41, subd. 2(a) (after consulting with the peer review committee). There is no right to a hearing for the teacher just a right to request the reasons for the non-renewal. *Id.* This can be very hard for a beginning teacher because many districts choose to non-renew probationary teachers when they are facing budget cuts, with the hopes that they will be able to rehire them in the fall. Many of the "layoffs due to LIFO" that Appellants and *amicus* Ed Allies decry as being a result of seniority alone, are actually school districts exercising their total discretion to non-renew probationary teachers.

When the teacher's conduct is such that non-renewal at the end of the year is not appropriate and a district needs to act during the school year, under Minn. Stat. §122A.40, subd 5(a), a teacher can be terminated for cause effectively immediately "after a hearing

held upon due notice," while under §122A.41, subd 2(a) the district may discharge or demote a teacher for cause after providing 30 days' notice, without right of appeal.

Three years is a significant amount of time for a school district to evaluate a teacher's performance and determine whether they would like to continue to employ the teacher. It is hard to find another profession with such an extensive probationary period. If the district is doing its work to evaluate, mentor, and improve a new teacher, three years is a sufficient amount of time. Only after a teacher has completed probation are rights to discharge for cause earned. "The current structure serves "the legislative purposes 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." *McSherry,* 277 N.W. at 544.

Over the years, the Legislature has engaged and listened to stakeholder concerns to create thoughtful policies to best ensure that our students are provided with great teachers. The due process laws create a probationary period with ample opportunity to evaluate teachers and district discretion to base employment decisions on performance and the best interest of students and the school community.

2. The due process laws mandate that all teachers in Minnesota are evaluated and supported to develop and improve.

In 2011, the Minnesota Legislature enacted one of the most significant policy changes to teaching in Minnesota with the addition of the teacher development, evaluation, and peer coaching provisions to the due process laws. Minn. Stat. §§122A.40,

subd. 8; 122A.41, subd. 5; 1st Sp. 2011 c. 11 art. 2 s. 14, 19. The express purpose is "to improve student learning and success" and "to develop, improve, and support qualified teacher and effective teaching practices, improve student learning and success, and provide all enrolled students in a district or school with improved and equitable access to more effective and diverse teachers." *Id.* at subds. 8(a), (b); subds. 5(a), (b).

Today, every teacher in Minnesota must be evaluated. Minn. Stat. §§122A.40, subd. 8; 122A.41, subd. 5. Every school district must have a plan for an annual teacher evaluation and peer review process in place, either through a locally designed and agreed on plan or by using the state's default teacher-evaluation plan. *Id.*[4] The plans must establish a three-year professional review cycle for each teacher that includes an individual growth and development plan, a peer review process, and at least one

[4] These plans can be extremely rigorous. Just one performance rubric of the state default model is 24 pages long, addressing domains and indicators such as: 1) Planning: aligns learning targets with standards and student data inform planning, uses content, resources and student knowledge to design coherent instruction, and plans for assessment and differentiation; 2) Environment: creates a respectful classroom culture of trust, safety, and high expectations, establishes and maintains clear expectations for classroom and behavior management; 3) Instruction: communicates learning targets and content effectively, facilitates activities and discussions that promote high cognitive engagement, uses varied assessment techniques to advance student learning; and 4) Professionalism: reflects on teaching practice, engages in professional development, maintains professional responsibilities and communicated with families. Minnesota Department of Education, Teacher Development and Evaluation State Model, *State Teacher Model Performance Standards of Teacher Practice Rubric* (July 10, 2015), available at http://education.state.mn.us/MDE/dse/edev/mod/.

summative evaluation performed by a qualified and trained evaluator. *Id*. The evaluations must meet specific criteria set out in the law including: being based on the professional teaching standards established in Minn. Rule 8710.2000; [5] use state or local measures of student growth and literacy; and use longitudinal data on student engagement and connection and other student outcome measures explicitly aligned with the elements of curriculum of which the teachers are responsible. *Id.*

The law gives teachers not meeting professional teaching standards support to improve through a teacher improvement process that includes established goals and timelines. *Id*. In fact, school districts must take employment action against teachers who are either unwilling or unable to improve in the improvement process. *Id*.

In 2015, the Legislature continued to give practical effect to the student-centered policy goals of the due process laws through language prohibiting student placement with teachers on an improvement plan or teachers who had not gone through a summative evaluation. *Id.* at subds. 8(d); 5(d); 1st Sp. 2015 c. 3 art. 2 s. 23, 25. Potentially challenging to implement, stakeholders advocated for the change and it happened - not by eliminating the entire due process law - but by changing the law to better protect students and improve the teaching profession.

The Legislature sought to make the teaching force even better for the benefit of students by adding the teacher development and evaluation provisions to the due process

[5] Minnesota Rule 8710.2000, Standards of Effective Practice for Teachers

laws. Prior to the addition of these provisions, the chronically bad teacher narrative was perpetuated, exactly as Appellants do. Over and over, "reformers" of education policy have reached for that disparaging narrative to support their agenda, enticing adults to recall their own long-ago, bad-teacher experience to relate to current day. Those narratives do not hold up any longer because the laws have changed. The only way to perpetuate that narrative is to ignore the plain language of the law, which Appellants and their supporters have done throughout this litigation. They should be at the Legislature fighting for funding for teacher professional development and evaluation supports, which is what students in this state need.

Ironically, Appellants claim to cry out for the use of teacher performance to inform employment decisions, and yet, they seek to have the very law that requires performance evaluation and action taken based on those evaluations declared unconstitutional and repealed leaving behind no system except school district discretion. Striking down the due process laws will eliminate required teacher development and evaluation in Minnesota. That elimination would cause a result that is in direct opposition to Appellants' stated goal of having effective teachers for students.

3. The due process laws help recruit and maintain a stable workforce of experienced teachers.

Promotion of teacher longevity is not the enemy of student success; students are better off if teachers stay. The due process laws actually provide some of the most important pieces to make teaching in Minnesota a profession that would attract individuals

to join and make their career. Like higher wages, professional development and due process protections against arbitrary firings are conditions of employment that attract good people into teaching. It is not the only tool, but is still one of the valuable tools, among other innovative ideas in education policy, to recruit and retain teachers. Appellants want to dismantle these tools during a time when Minnesota is facing a teacher shortage. *Smart Solutions to Minnesota's Teacher Shortage: Developing and Sustaining a Diverse and Valued Educator Workforce*, Educator Policy Innovation Center (March 2016), http://www.educationminnesota.org/EDMN/media/edmn-files/advocacy/EPIC/EPIC-Recruitment-Retention-Report.pdf at 6.

Minnesota is seeing a substantial exodus of teachers from the profession. Although there is unlikely to be a single cause to the shortage, some numbers do provide some hints that are driving education policy debates, like the one raised in this lawsuit. According to the Minnesota Department of Education's 2017 Report of Teacher Supply and Demand, there has been a 46 percent increase in the number of teachers reported leaving districts since 2008-09. Available at http://www.gomn.com/wp-content/uploads/2017/02/2017-Teacher-Supply-and-Demand-Corrected.pdf, at 23. That number should make everyone in Minnesota concerned, since the number of teachers leaving due to reductions in staff or layoffs has decreased by 34 percent since 2008-09. *Id*. Teachers are leaving for other reasons; seniority-based layoffs, argued by Appellants as causing great harm to the profession, are not the cause. Hiring officials identified the top four barriers for retaining

qualified teachers: 1) teacher licensing standards, 2) testing requirements, 3) teacher salary, and 4) a competitive job market. *Id*. at 24. The tenure laws are not among them.

We know what the achievement gap will look like if the only thing done is eliminate the due process laws; it will persist and possibly get worse. "Freedom" from due process protections at charter schools has not improved student outcomes among minority and low-income students. *See* Arzamendia Aff., Doc. ID #36. In 2015, charter schools were disproportionately represented among Priority Schools and Focus Schools in Minnesota. *Id*. at ¶ 8. [6] As the District Court noticed, Appellants ignore this. Appellants' Addendum at 60. Arguably, because it does not support their misleading narrative.

Aside from generalized shortage data, school districts report that some specific positions are impossible or very difficult to fill. *See Smart Solutions*, *supra* at 8. The licensure fields of emotional and behavioral disorders, Autism spectrum disorders, developmental disabilities, and speech-language pathologists are among the top five that are either impossible or very difficult to fill. *Id*. Many of these students fall within the academic gap; students with some of the greatest needs are disproportionately impacted by the shortage. It is an absurd notion that removing the due process laws will magically create an applicant pool of effective teacher candidates to fill the already hard-to-fill vacancies. Theoretically, the recruitment and retention of teachers could be helped by

[6] Priority Schools are Title 1-funded schools performing in the bottom five percent in the state's Multiple Measurements Rating system. Focus Schools are the ten percent of schools with the largest achievement gaps. *Id*. at ¶¶3, 6, 7.

reducing the probationary period so newer teachers would gain the protections sooner. Either way, this only highlights, once again, that these are policy debates only appropriate for the Legislature.

With many factors to consider in the challenge of recruiting and retaining teachers, the removal of due process protections will not help. It could hurt. That is a policy decision. When due process protections are stripped away by legislative action, teachers leave and are attracted to places where they exist. Joseph E. Brown Sr., *Minnesota superintendent thanks Iowa lawmakers for passing collective bargaining*, available at, http://www.desmoinesregister.com/story/opinion/readers/2017/02/17/minnesota-superintendent-thanks-iowa-lawmakers-passing-collective-bargaining/98059920/, ("As the Fairmont Area School district superintendent, located in south central Minnesota, I want to personally thank the Iowa Legislature for dismantling Chapter 20 of the Iowa Code. . . It will result in Iowa becoming a loser and neighboring states becoming winners."). The Minnesota Legislature could follow the same ill-advised path as Iowa and Wisconsin, but the many voices of educators, students, parents, school communities and other stakeholders should be participating in that discussion, like all education policy questions.

Individuals enter the teaching profession because they care about students. Not every teacher will be perfect or great; they are as unique as the students they teach. However, great teachers are everywhere - in every school district and in every building in this state. They are great because they take risks in teaching, they advocate for their

students, and because they advocate for public education. They must engage in courageous conversations, teach respect for and allow divergent opinions, and they must sometimes educate on topics not popular in a particular community. Teachers must support students who have adverse childhood experiences ("ACEs") and trauma at home. Teachers must have discretion to be the trained and licensed professionals they are when teaching to the required state standards. The due process laws are essential because teachers must be insulated from retaliation for doing all of this or Minnesota will lose some of the greatest and most effective teachers. Without these protections, they will leave the profession or it will chill the very risk-taking work and passion that made them great.

B. The due process laws provide rights to teachers who have earned them after years of proven performance, rights to a process that guards against political pressures and discrimination.

These laws do not give teachers jobs for life; they prevent good teachers from being fired for bad reasons. They strike a meaningful balance between district and educator.

1. The discharge and termination provisions embody the necessary balance between district discretion and employee rights.

The Legislature established a clear process that provides school districts with the necessary tools to act when it determines they would like to end the employment relationship with a particular teacher. The law is based on sound education policy. They are embedded in district discretion over whether to pull a teacher from a classroom

immediately and terminate mid-year because they do not fit their assignment, while at the same time balancing out the need to guard against arbitrary or discriminatory actions. After earning due process rights, non-probationary teachers who face allegations that they should be terminated have a fair and equitable opportunity to respond to any charges against them and have their case decided by a neutral, mutually-selected decision maker.

Minn. Stat. §122A.40, subd. 9 provides a school district with a process to terminate a teacher after giving notice of performance deficiencies to the teacher and allowing the teacher to remediate those deficiencies. There is no prescribed time to allow for remediation; that is left up to the district's discretion, but it must be "reasonable." *Id.* The statutory grounds in subdivision 9 are broad and include "inefficiency in teaching," "neglect of duty," "conduct unbecoming a teacher," and "other good and sufficient grounds rendering the teacher unfit to perform the teacher's duties." *Id.*

At no time is a school district required to keep a teacher in a classroom with students when they want to terminate the teacher. It is both inherent in the managerial rights reserved by school district administrations, and it is explicit in the law for teachers, even those with due process rights. Minn. Stats. §§122A.40, Subds. 7, 13 and 122A.41, Subd.12. Additionally, there is no requirement that any district use a performance termination process based on notice and a right to remediate or that their action cannot take effect until year end. All districts, whether under Minn. Stat. §122A.40 or .41, have the discretion, if the performance problems are concerning enough, not to allow for a remediation period and move forward on an immediate discharge action. Minn.

Stats.§§122A.40, Subd. 13 and 122A.41, Subd. 6. Those actions also take effect immediately, not at the end of the school year. *Id.*

Appellants have a very narrow view of the body of law that has developed over time under the due process laws. The landscape is understood for all sides in this process. School districts know that they need to do and how to document inefficiencies, provide support for improvement, or when to take immediate action. For our part, the unions representing licensed educators also know how to shape the odds and assess the risks for individual educators. In many instances, the well-developed and well-understood body of law supporting the due process laws mean matters are resolved without having to go through the entire process and if there is no likelihood of a different result for the same or similar facts.

Due process protections do not guarantee a result – that a struggling teacher will have permanent employment. Nor does the availability of due process protections mean that every teacher will avail themselves of every element of the process to its exhaustion. Appellants blindly and erroneously link providing due process with exhausting that process. That is not true in Minnesota, especially when a union is involved. The true link in Minnesota is that providing due process has protected against discrimination and eliminated the need for many to exhaust their due process rights. When a district acts with a legitimate purpose and with the appropriate support, a teacher cannot necessarily overcome a predictable outcome.

2. The availability of arbitration brings fairness to termination proceedings and limits litigation.

For a long time, the due process rights teachers had to dispute a discharge were rights to a fundamentally unfair process. Ver Ploeg, *supra*, at 312-313; Christina L. Clark & Harley M. Ogata, *Are Minnesota Teacher Termination Procedures Progressive: How Much Process is Due?*, 33 Wm. Mitchell L. Rev. 339, 346-352 (2006). A local school board would propose a teacher for discharge; hold the hearing for the teacher to dispute that proposal after they just voted to discharge; and then take final action to discharge based on the hearing they just held. The local school board was prosecutor, judge, and jury. The Minnesota Supreme Court questioned the fairness of such termination proceedings. *See Ganyo v. Independent School Dist. No. 832*, 311 N.W.2d 497, 499 (Minn. 1981). However, it was not until *Schmidt v. Independent School District No. 1*, 349 N.W.2d 563, 568 (Minn. Ct. App. 1984), that this Court determined that an independent hearing examiner was required for teacher terminations. Even then, who could be a hearing examiner and the relationship the hearing examiner had to the school board, who hired and paid them, remained concerning and the number of teachers being fired at an alarming rate.[7]

[7] Arbitration was already part of collective bargaining agreements pursuant to the Public Employment Labor Relations Act ("PELRA"), Minn. Stat. §§179A.01, *et seq*., but it did not supersede the more specific provisions of the due process laws. Clark, *supra*, at 343-350.

It was not until 1991 that the Legislature addressed the evidence of systemic unfairness and added binding arbitration by a mutually-selected arbitrator in the due process laws. Act of May 27, 1991, ch. 196, 1991 Minn. Laws 455-460; Minn. Stat. §§ 122A.40, subd. 15(e); 122A.41, subd. 13(e). Those changes also directed the commissioner of the Bureau of Mediation Service to maintain a specific list of arbitrators to conduct those teacher discharge hearings including judges and former judges, qualified arbitrators, and neutral lawyers "qualified by experience to conduct these hearings, and who is without bias to either party." *Id*.

The Legislature sought to balance fairness for teachers with an appropriate level of process. School districts still have all the discretion to act on performance issues or misconduct, just as they did before, but now teachers can engage in a process free from bias. Notably, and contrary to assertions by Appellants that the process is too burdensome to engage in, by making this change, the Legislature added what appears to be more process, however, it furthers existing policy by limiting litigation related to teacher discharges. Arbitration is "final and binding on the parties," subject to the Uniform Arbitration Act, Minn. Stat. Chapter 572B, which has limited grounds to vacate the decision. Minn. Stat. §§ 122A.40, subd. 15(e); 122A.41, subd. 13(e); Minn. Stat. §572B.23. The lack of court cases on teacher terminations is not evidence of the exhaustive and unduly burdensome teacher termination process; it is the outcome flowing from the Legislature's modification of the law to allow arbitration.

Appellants see this as not being necessary today. However, rather than have that policy debate at the Legislature, they think this Court should just eliminate the due process laws. Sadly, years of history tell us that these protections are still necessary and the Legislature has acted and engaged to address this policy over time. If struggling teachers are in the classroom, it is not the due process laws that are a barrier. School districts have all the tools they need to do their job for the benefit of students. Striking down the due process laws will not eliminate disputes when people are fired, it will just shift those disputes to the courts for a more protracted and expensive process.

C. The due process laws provide for local decision making around layoff plans and flexibility to consider effectiveness or protect less senior teachers.

Since 1974, the due process laws were amended to address the problem of staff cuts due to declining student enrollment, by adding provisions for local school districts and teachers to negotiate layoff plans. Minn. Stat. §§122A.40, subds. 10 and 11 require a layoff plan, either agreed to locally or by using the state default plan. The law gives school districts and its teachers the flexibility to negotiate a system of layoffs that meets their mutual needs, which can be changed every two years if the needs of the school district or teachers change. Courts have repeatedly found that the layoff provisions of the due process laws properly balance the needs of teachers to be protected from discriminatory layoffs, without restricting the school district's ability to manage a school system with decreased need for teachers while still demanding high standards in the

classroom. *Jerviss v. Indep. Sch. Dist. No. 294*, 273 N.W.2d 638, 645-646 (Minn. 1978); *Laird v. Indep. Sch. Dist. No. 317*, 346 N.W.2d 153, 154-155 (Minn. 1984).

Layoffs pursuant to the due process laws do not force school districts to layoff effective teachers and retain less effective teachers. Nobody wants good teachers to be cut at any time, but especially in a time of teacher shortage, good teachers laid off in one district should become a good teacher in another district. The due process laws do not prevent employment of new good teachers. Current law allows for a system that lays off teachers based on evaluation results, student test scores, or school district discretion, if that is what they want locally. For example, in St. Paul, they have agreed to protect teachers who possess Montessori certifications, are assigned to immersion programs, and teachers in American Indian Studies programs with a credential in American Indian Language and Culture. 2015-2017 Master Agreement, http://www.spps.org/cms/lib010/MN01910242/Centricity/Domain/126/C%20Teacher%2015-17%20FINAL.pdf, at 42. In Minneapolis, they have flexibility of staffing in its lowest performing Title-I schools driven explicitly by the shared "common goal in strengthening academic performance at schools identified by the district." 2015-2017 Teacher Contract, Memoranda & Policies, http://humanresources.mpls.k12.mn.us/uploads/teachers2015-17.pdf, at 205. Minneapolis and its teachers also agreed to use "hiring and retention programs to help staff" and they will meet and collaborate "on the design of options to help attract and retain teachers in hard to fill" schools. *Id*.

The layoff provisions in the due process laws are an example of ongoing policymaking with engagement of stakeholders. The Legislature has, in recent years, considered amendments that make layoffs based on rankings and evaluation. Today it is considering a change that would eliminate the state default system and mandate local negotiation of layoff plans in all districts. H.F. 1478, 90th Leg. (2017). This is an area of active policymaking.

Although the layoff provisions of due process laws may change, layoffs have been a well-settled area of the laws since the 90s. The courts have decided issues around seniority, grounds for layoffs, filling gaps in negotiated plans, grievability of layoffs, layoff procedures, changed circumstances, realignment, bumping, reinstatement rights, claiming work, split or new position, and continuing contract rights. *See Harms v. Indep. Sch. Dist. No. 300*, 450 N.W.2d 571 (Minn. 1990). The courts recognize the public policy balancing that takes place when districts determine layoffs are necessary, even when layoffs mean cutting good teachers. *Laird*, 346 N.W.2d at 154-155 ("the tenure act was designed to protect the educational interests of the state by preventing arbitrary teacher demotions and discharges unrelated to ability, it was not intended to place unreasonable restrictions on the powers a school district must possess to effectively administer the operation of the public schools…the unrequested leave of absence provisions of the tenure act do not eliminate the board's flexibility").

Appellants argue that the removal of the due process laws and their layoff provisions will protect effective teachers from dismissals during layoffs, but that is naïve.

It is not a guaranteed result in a system of total administrative discretion, which is exactly what they would be getting. It is simply not necessary for the due process laws to be destroyed to have teacher effectiveness as part of a layoff plan; it could be in any locally negotiated plan under current law. There are sound reasons why many districts do not want that because it creates a culture of competition rather than collaboration in a school, it is unpredictable, and it can open up many potential legal challenges to use a factor such as evaluation, student or parent surveys, or district discretion as the basis for layoffs. Legal challenges could lead to a protracted layoff process leaving multiple teachers and administration in limbo.

Seniority-based layoffs provide a predictable, reliable, and credible system for layoffs. Unlike evaluation data, seniority dates are not private personnel data and can be posted early in the school year so any challenges are resolved early. Teachers knowing that their district will be facing cuts will know early on if they might need to consider looking for positions with other school districts.

As teacher evaluation, peer review, and professional development continue, as well as the collaboration through mentoring, induction, and professional learning communities, the differences in performance should be minimized. With all other things being equal, seniority is a legitimate and fair way to do layoffs. For districts where this is already true, then using seniority makes sense. Not only should no school district wait around for budget cuts to eliminate struggling teachers, as discussed above, the law explicitly requires action to be taken against teachers if they cannot or will not improve. Minn. Stats.

§§122A.40, Subd. 8(13); 122A.41, Subd. 5(13). Like the other statutory provisions for probationary periods, arbitration in discharge cases, and teacher development and evaluation, the layoff provisions provide a balance between teacher protections and school district decision making.

CONCLUSION

We appreciate the opportunity to be heard in this matter. For the reasons stated in Respondents' brief and the above-stated reasons, *Amici* Education Minnesota and MASSP respectfully request that this Court affirm the District Court's decision dismissing Appellants' claims, with prejudice.

Respectfully submitted,

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WORD COUNT CERTIFICATE OF COMPLIANCE

Pursuant to Minn. R. Civ. App. P. 132.01(3), I hereby certify the foregoing Brief of Amici Curiae Education Minnesota and Minnesota Association of Secondary School Principals complies with the typeface requirements of Minn. R. Civ. App. P. 132.01(1), because it is in 13-point, proportionally-spaced Times New Roman typeface and was prepared using Microsoft Office Word 2016. I further certify that the Brief complies with the length limitation of Rule 132.01(3)(c), because it contains 6,789 words, exclusive of table of contents tables of citations as counted by the word-count function of Microsoft Office Word 2016, except for those portions exempted by Rule 132.01(3).

Dated: May 1, 2017 By: /s/ Jess Anna Glover