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.

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

FISHMAN HAYGOOD, L.L.P.
James R. Swanson (LA # 18455)
Alysson L. Milles (LA #32904)
Jesse C. Stewart (LA #36282, PHV)
201 St. Charles Avenue, Suite 4600
New Orleans, Louisiana 70170-4600
(504) 586-5252

BASSFORD REMELE
A Professional Association
Lewis A. Remele, Jr. (MN #90724)
Kate L. Homolka (MN #395229)
100 South Fifth Street, Suite 1500
Minneapolis, Minnesota 55402-1254
(612) 333-3000

NEKIMA LEVY-POUNDS (MN #335101)
2901 Lyndale Avenue North
Minneapolis, Minnesota 55411
(612) 210-3731

Attorneys for Plaintiffs-Appellants

OFFICE OF THE ATTORNEY GENERAL
Althea M. Huyser (MN #389270)
Jason Marisam (MN #398187)
445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
(651) 757-1243

Attorneys for Defendants-Respondents

(*Counsel for* amici *appear on following page)*

FABYANSKE, WESTRA, HART & THOMSON, P.A.
Nathan R. Sellers (MN #0393010)
333 South Seventh Street, Suite 2600
Minneapolis, MN 55402
(612) 359-7600

Attorneys for* Amicus Curiae *Ed Allies

SUBBARAMAN PLLC
Mahesha P. Subbaraman
222 S. 9th Street, Suite 1600
Minneapolis, MN 55402
(612) 315-9210

Attorneys for* Amicus Curiae *Freedom Foundation of Minnesota

SIDLEY AUSTIN LLP
James D. Arden
Peter D. Kaufman
787 Seventh Avenue
New York, NY
(212) 839-5833

JOHN CAIRNS LAW, P.A.
John Cairns
2751 Hennepin Avenue, Box 280
Minneapolis, MN 55408
(612) 986-8532

Attorneys for* Amici Curiae *National Council on Teacher Quality and TNTP, Inc.

AMERICAN FEDERATION OF TEACHERS, AFL-CIO
David J. Strom
Samuel J. Lieberman
555 New Jersey Avenue Northwest
Washington, DC 20001
(202) 393-7472

NATIONAL EDUCATION ASSOCIATION
Alice O'Brien
Emma Leheny
Kristin Hollar
Amanda Shaprio
1201 16th Street Northwest
Washington, DC 20036
(202) 822-7018

Attorneys for* Amici Curiae *American Federation of Teachers, AFL-CIO and National Education Association

MILLER O'BRIEN JENSEN, P.A.
Timothy J. Louris
Canadian Pacific Plaza
120 S. Sixth Street, Suite 2400
Minneapolis, MN 55402
(612) 333-5831

Attorneys for* Amici Curiae *Centro de Trabajadores Unidos en Lucha, ISAIAH, and TakeAction Minnesota

EDUCATION MINNESOTA
David M. Aron
Cedrick R. Frazier
Adosh D. Unni
41 Sherburne Avenue
St. Paul, MN 55103
(651) 292-4819

Attorneys for* Amicus Curiae *Education Minnesota

ROGER J. ARONSON
P.O. Box 19350
Diamond Lake Station
Minneapolis, MN 55419
(612) 865-1459

Attorneys for* Amicus Curiae *Minnesota Association of Secondary School Principals

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Court Cases

State Court Cases

Statutes

Rules

State Constitutional Provisions

Other Authorities

ARGUMENT[1]

I. APPELLANTS' CLAIMS ARE NON-JUSTICIABLE BECAUSE DEFINING EFFECTIVE TEACHING IS FUNDAMENTALLY A POLICY MATTER.

In their attempt to ride on the coattails of the Minnesota Supreme Court's decision in *Cruz-Guzman v. State*, 916 N.W.2d 1 (Minn. 2018), Appellants ignore fundamental differences between their claims and those presented in racial segregation and funding cases that Minnesota and other courts have deemed justiciable. Unlike the plaintiffs in *Cruz-Guzman* or *Skeen v. State,* 505 N.W.2d 299 (Minn. 1993), Appellants do not seek a judicial assessment of whether the state is fulfilling its constitutional duty to provide a "general and uniform system of public schools." Rather, they seek to have the judiciary establish baseline standards for effective teaching without a constitutional mandate to do so. *See* App.s' Supp. Br. at 6-7. Contrary to *Cruz-Guzman*, this case presents non-justiciable political questions. Appellants ask the Court to weigh in on policy decisions about employment laws for teachers and their relationship to effective teaching that are appropriately within the purview of the Legislature.

A. Courts In Minnesota And Many Other Jurisdictions Have Declined To Establish A Qualitative Standard For Effective Teaching.

Appellants have cited no case law from Minnesota or any other jurisdiction that has established a constitutional or judicial standard for effective or ineffective teaching. Minnesota Courts have repeatedly rejected constitutional challenges based on

[1] This supplemental amicus brief is authorized by the Court's August 24, 2018 Order reinstating this appeal. *Amici* certify under Minn. R. Civ. App. P. 129.03 that: (1) no counsel for a party authored this brief in whole or in part; and (2) no person or entity has made a monetary contribution to the preparation or submission of this brief other than *amici*, their members, and their counsel.

disagreements with legislative policy on education matters. *Assoc. Schs. v. Sch. Dist. No. 83*, 142 N.W. 325, 327 (Minn. 1913) (legislative requirement that school districts maintain specified departments is "a legislative and not a judicial question"); *Curryer v. Merrill*, 25 Minn. 1 (1878) (dismissing a challenge to a statute regulating textbooks as a matter for the Legislature, not the courts).

Courts in Minnesota and other states have consistently rejected analogous claims for educational malpractice that would require judicial recognition of a qualitative standard for effective teaching. In *Alsides v. Brown Inst.*, this Court rejected a claim for educational malpractice against a private school on public policy grounds, finding that such a claim would require the court to wade into "a myriad of educational and pedagogical factors" 592 N.W.2d 468, 473 (Minn. Ct. App. 1999) (quoting *Andre v. Pace Univ.*, 655 N.Y.S.2d 777, 779-80 (N.Y.App. Term 1996)). The Court in *Alsides* also noted "the lack of a satisfactory standard of care by which to evaluate an educator[.]" *Id.* (citing *Ross v. Creighton Univ.*, 957 F.2d 410, 414 (7th Cir. 1992)).

These cases are not outliers. The Court of Appeals for the State of California raised similar concerns in dismissing an educational negligence claim against a school district. *Peter W. v. San Francisco Unified Sch. Dist.*, 60 Cal. App. 3d 814 (Cal. App. 1st Dist. 1976). The Court observed, "The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might—and commonly does—have his own emphatic views on the subject." *Id.* at 824-25. Courts in Maryland, New York, and Alaska have also rejected negligence or malpractice claims against school districts that would have required them to articulate a standard of care for

adequate instruction. *Hunter v. Bd. of Educ. of Montgomery Cnty.*, 292 Md. 481, 482, 439 A.2d 582, 584 (1982); *D.S.W. v. Fairbanks No. Star Bor. Sch. Dist.*, 628 P.2d 554 (Alaska 1981) *Donohue v. Copiague Union Free School Dist.*, 391 N.E.2d 1352 (N.Y. 1979). Appellants' claims are an attempt to resurrect the tort of educational malpractice as a constitutional claim. This Court's reasoning in *Alsides* is still sound, and the public policy rationales for rejecting a claim of educational malpractice are valid here as well.

B. Unlike Racial Segregation And School Finance Cases, There Are No Existing Standards For Measuring A Constitutionally Adequate Level Of Teaching.

In *Cruz-Guzman,* the Minnesota Supreme Court held that the parents of students in racially segregated schools raised justiciable claims against the state under the Education and Equal Protection Clauses of the Minnesota Constitution. 916 N.W.2d 1 (Minn. 2018). The Court reaffirmed that "[c]laims based on racial segregation in education are indisputably justiciable," noting that "courts are well equipped to decide whether a school system is segregated, and have made such determinations since *Brown*." *Id.* at 10 n.6 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954)). Courts are well equipped to make these determinations in segregation cases because the existence and extent of racial segregation in a school district or state education system is identifiable based on student demographic data. The Court made clear in *Cruz-Guzman* that the claims against the state are justiciable when they "ask the judiciary to answer a yes or no question" about whether the Legislature has met its constitutional duty to provide "a general and uniform

system of public schools" that is "thorough and efficient." *Id.* at 9 (quoting Minn. Const. art. XIII, § 1).

In contrast to *Cruz-Guzman*, Appellants are not merely asking the judiciary a "yes or no" question. Unlike racial segregation claims or the many school financing claims that state courts around the country have held to be justiciable,[2] Appellants point to no reliable standards in this case for measuring the extent of teacher effectiveness on a statewide basis. Recognizing Appellants' claims as justiciable would require the judiciary to agree on a standard of effective teaching that is consistent across all districts, grade levels, and subjects. Not only is this an inherently political task, it is an impossible one.

Appellants have previously insisted that "manageable standards exist" to evaluate their allegations of ineffective teaching, but they fail to specify where they are located or how courts should apply them. App.'s Reply Br. at 9. In reality, effective teaching looks very different depending on the student population and subject matter being taught. Even the standards of effective practice developed by the Minnesota Board of Teaching[3] do not create a feasible standard that a court or an expert could apply to measure student outcomes or how many teachers in the state are effective and how many are not. *See* Minn. R. 8710.2000 (2017).[4] *Cruz-Guzman*'s analysis of the judiciary's ability to assess

---

[2] *See, e.g.*, *Gannon v. State*, 319 P.3d 1196 (Kan. 2014); *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206 (Conn. 2010); *Lobato v. State*, 218 P.3d 358 (Colo. 2009); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989).

[3] Now known as the Public Educator Licensing and Standards Board.

[4] In addition, each licensure field contains different standards, but even these are not manageable standards for measuring teacher effectiveness. Minn. R. 8710.2100-.5800.

segregation claims does not apply equally to Appellants' claims of allegedly ineffective teaching because courts lack manageable standards to evaluate these claims.

C. Administrators And School Boards, Not Courts, Are Best Suited To Evaluate Teacher Quality And Make Personnel Decisions.

Like many states, the Minnesota Legislature has made the policy determination that school administrators should be responsible for evaluating teachers and that elected school boards should be responsible for discharge and nonrenewal decisions. Under the Teacher Development and Evaluation Law, which is part of the statutes Appellants are challenging, every teacher with tenure or continuing contract rights must be evaluated by a "qualified and trained evaluator such as a school administrator" on a three-year cycle. Minn. Stat. §§ 122A.40, subd. 8(b), 122A.41, subd. 5(b) (2018). School districts in Minnesota already have the ability, as well as the obligation, under current law to evaluate teachers, identify those in need of support and improvement, and discipline a teacher placed on an improvement plan who fails to make progress. Minn. Stat. §§ 122A.40, subds. 12, 13, 122A.41, subd. 13 (2018). Minnesota courts have held that the tenure and continuing contract laws are central to school boards' management of their affairs, and that the laws should not be interpreted to transfer that management and supervision to the courts. *Frye v. Ind. Sch. Dist. No. 625*, 494 N.W.2d 466, 467-68 (Minn. 1992) (*citing Eelkema v. Board of Ed. of City of Duluth*, 11 N.W.2d 76 (Minn. 1943)). Appellants are effectively asking the judiciary serve as the final arbiters of effective teaching in this state, contrary to precedent.

Although Appellants assert that the judiciary's role in this case would be limited to determining whether the due process laws prevent the Legislature from fulfilling a duty

to ensure effective teachers, the ramifications of such a ruling would transcend this case. Recognizing a constitutional standard of effective teaching would invite parents to file lawsuits any time they disagree with an education policy decision made by the state, or possibly even a school district.[5] Appellants' request that the judiciary define a constitutional level of effective teaching must be rejected because it would require courts to substitute their judgments about effective instruction for those of licensed administrators, elected school boards, and the Legislature.

II. APPELLANTS CANNOT SHOW THAT THE DUE PROCESS LAWS INHERENTLY VIOLATE THEIR CONSTITUTIONAL RIGHTS.

Even if this Court were to determine that the Education Clause creates a measurable standard for effective teaching, *Cruz-Guzman* has not cured the other fatal defects in Appellants' claims that the district court identified, including a lack of standing. To establish standing, Appellants bear the burden of showing 1) an injury-in-fact; 2) traceability; and 3) redressability. *Riehm v. Comm'r of Public Safety*, 745 N.W.2d 869, 873 (Minn. Ct. App. 2008). Appellants continue to lack standing because the due process statutes on their own are not dispositive of teacher effectiveness. These laws are administered by individual school districts throughout the state, and their elimination would in no way guarantee a level of teaching statewide that Appellants consider effective or constitutionally adequate.

[5] Appellants' Amended Complaint states that under current law, "students and their parents lack any method by which to challenge a school district's decision to grant tenure to ineffective teachers." Am. Compl. ¶ 86.

A. Teacher Due Process Laws Cannot Be Isolated From The Multitude Of Factors That Impact The Quality Of Instruction Students Receive.

Amici do not dispute that teacher quality can and does often have a profound impact on student learning, but the laws themselves do not determine the manner or extent to which districts use them to identify, support, or dismiss educators.[6] Appellants acknowledge that "the majority of Minnesota's teachers deliver to students a uniform and thorough education." Am. Compl. ¶ 53. This concession is notable given that these presumably effective teachers enjoy the same due process protections as the allegedly ineffective ones.

In reality, tenure is only one of many factors that can potentially influence a teacher's effectiveness. Adopting Appellants' view would effectively allow many other educational inputs to remain unchanged, for example: licensure statutes allowing districts to hire teachers who have not successfully completed a teacher preparation program[7]; the absence of any laws limiting class size[8]; required preparation time of only five minutes per every twenty-five minutes of instruction[9]; required staff development funding limited to a 2% set aside of the district's basic revenue[10]; the various tests teachers must spend

---

[6] For example, school districts are free to determine their own criteria for teachers to obtain continuing contract or tenure status at the end of their three-year probationary period. Minn. Stat. §§ 122A.40, subd. 5; 122A.41, subd. 2 (2018).

[7] Minn. Stat. §§ 122A.181; 122A.182; 122A.183 (2018). Effective July 1, 2018. Laws of Minnesota 2017, 1st Spec. Sess. chapter 5, article 3, sections 10-12.

[8] There is a narrow exception in a special education "case load" rule that applies to some early childhood and school-age special education settings. Minn. R. 3525.2340 (2017).

[9] Minn. Stat. § 122A.50 (2018).

[10] Minn. Stat. §§ 122A.60 and 122A.61 (2018).

time preparing their students to take[11]; the requirements for teacher preparation programs[12]; the number of volunteers in the classroom; the hiring selectivity of employers; and the high tuition costs required to obtain a graduate education. Despite all of these important factors, Appellants are inappropriately tying their constitutional argument with one pre-determined method of correction. They are not merely asking this Court a "yes or no" question. They are insisting that the Court agree with their policy determination of how to fix the problem.

B. Eliminating The Due Process Statutes Cannot Guarantee A Level Of Teaching Statewide That Appellants Consider Adequate.

Just as Appellants cannot show that the existence of due process protections for teachers precludes high quality teaching, they cannot show that the elimination of these laws would ensure it. In their supplemental brief, Appellants compare due process laws for educators to laws prohibiting contraception, flag burning, and minimum residency requirements to receive welfare benefits. App.s' Supp. Br. at 7. In each of these cases, the invalidation of the law being challenged provided the plaintiffs with the redress they were seeking. In contrast, striking down due process protections for Minnesota teachers would do nothing to ensure that school leaders discharge or retain teachers in the manner Appellants see fit, or that Minnesota's students would receive a level of instruction that Appellants consider adequate. If eliminating the due process laws were a guaranteed means of ensuring effective teaching, then Minnesota charter schools, which are not

---

[11] Minn. Stat. § 120B.31, subd. 2 (2018): "all school districts shall give a uniform statewide test to students at specified grades to provide information on the status, needs and performance of Minnesota students."

[12] Minn. R. ch. 8705.

covered by the tenure or continuing contract laws, would significantly outperform traditional public schools on the standardized tests Appellants hold out as the most reliable indicators of effective and ineffective teaching. They don't. Adjusted for student demographic data, charter schools lagged behind traditional public schools by 9.3 percentage points in reading and 6.2 percentage points in math during the 2014-15 school year.[13]

Appellants state that "[i]n the absence of this statutory scheme, school leaders would have the ability to make employment and dismissal decisions that serve the interests of Minnesota's children." Am. Compl. ¶ 73. This is far from a guarantee that all districts would immediately identify and discharge supposedly ineffective teachers, or that Appellants would agree that the teachers identified for dismissal were in fact the least effective. Appellants also fail to consider the strong likelihood that the absence of due process protections in a profession that is already extremely demanding and heavily scrutinized will drive away many of the teachers they consider "effective." As the district court correctly recognized, Appellants lack standing because they are unable to show that striking down the due process laws would remedy the harms they allege.

Appellants' claims differ from those in *Cruz-Guzman* in important ways. Most notably, Appellants challenge laws that have no bearing on the disparities in educational outcomes for which they seek redress. Appellants' own pleadings concede that tenure is

---

[13] Institute on Metropolitan Opportunity, University of Minnesota Law School, *The Minnesota School Choice Project, Part I: Segregation and Performance*, 6 (Feb. 2017) *available at* https://www.law.umn.edu/sites/law.umn.edu /files/imo-mscp-report-part-one-segregation-and-performance.pdf.

not dispositive of teacher effectiveness, and therefore Appellants' attempt to single out Minnesota's teachers and the due process laws that govern their employment as the scapegoats for these inequities must be rejected.

CONCLUSION

For all the foregoing reasons, *amici curiae* Education Minnesota and Minnesota Association of Secondary School Principals support Respondent State of Minnesota's request that the Court affirm the district court's decision granting Respondent's Motion to Dismiss and dismissing Appellant's Amended Complaint in its entirety and with prejudice.

Respectfully submitted,

Dated: October 12, 2018

/s/ David M. Aron
David M. Aron, (#392074)
Cedrick R. Frazier, (#387647)
Adosh D. Unni (#0391438)
Education Minnesota
Saint Paul, MN 55103
651-292-4819

Attorneys for Amicus Curiae *Education Minnesota*

/s/ Roger J. Aronson
Roger J. Aronson, (#3220)
P.O. Box 19350
Diamond Lake Station
Minneapolis, MN
612-865-1459

Attorney for Amicus Curiae *Minnesota Association of Secondary School Principals*