District Court, City and County of Denver, Colorado 1437 Bannock Street, Room 256 Denver, CO 80202 Plaintiff: CYNTHIA MASTERS, et al. v. Defendants: SCHOOL DISTRICT NO.1 IN THE CITY AND COUNTY OF DENVER, et. al.	DATE FILED: June 6, 2014 4:53 PM CASE NUMBER: 2014CV30371 ▲ COURT USE ONLY ▲ Case Number: 14 CV 30371 Courtroom: 259

ORDER

THIS MATTER is before the Court on the Motion to Dismiss Plaintiffs' Amended Complaint ("Motion") in its entirety, pursuant to C.R.C.P. 12(b)(5), filed on March 31, 2014 by Defendants School District No. 1 in the City and County of Denver ("DPS") and Defendants' Jane Goff, Elaine Gantz Berman, Debora Scheffel, Pam Mazanec, Marcia Neal, Paul Lundeen, and Angelika Schroeder, in their official capacities as members of the Colorado State Board of Education ("SBE") (collectively "Defendants"). Plaintiffs Cynthia Masters et al. ("Plaintiffs") filed their Memorandum in Opposition to Defendants' Motion to Dismiss on April 25, 2014. Defendants filed their Reply on May 9, 2014. The Court has reviewed the Motion, the pleadings in support and opposition, the case file, and the relevant authority, and being fully informed finds and orders as follows:

BACKGROUND

This matter arises from the 2010 General Assembly's passage of Senate Bill 10-191 ("S.B. 191"), which amended the Teacher Employment, Compensation, and Dismissal Act ("TECDA"). C.R.S. §§ 22-63-101 to -403 (2013). The legislature enacted TECDA in 1990,

thereby repealing and reenacting the Teacher Employment Dismissal and Tenure Act of 1967 ("TEDTA"). C.R.S. § 123-18-1 *et seq*. (1968). TECDA maintained TEDTA's distinction between probationary teachers, who must complete a three-year probationary period, and those who have achieved non-probationary status. Under TECDA, non-probationary teachers may only be dismissed for specified causes and with the opportunity for a hearing. C.R.S. §22-63-301, 302 (1990). These provisions remained in effect with the passage of S.B. 191.

By passing S.B. 191, the legislature altered teacher evaluation methods and placed a new emphasis on measuring effectiveness. Among other changes, the bill added provisions tying the achievement and retention of non-probationary status to effectiveness criteria, which Plaintiffs do not challenge here. C.R.S. §§ 22-63-203(1)(B) & (7), 22-9-105.5(10)(IV)(2013).

S.B. 191 also contained the contested "mutual consent provisions," which allow school districts to remove non-probationary teachers "[w]hen a determination is made that the non-probationary teacher's services are no longer required" as a result of a "drop in enrollment; turnaround; phase-out; reduction in program; or reduction in building, including closure, consolidation, or reconstitution." C.R.S. §§22-63-202(2)(c.5)(III)(B), & (VII). Plaintiffs oppose only these provisions of S.B. 191, codified at §22-63-202(2)(c.5).

Prior to S.B. 191, a school district was required to find a new position for a non-probationary teacher who was displaced from his or her school, without the new school's consent. Now, the law requires that "each employment contract… shall contain a provision stating that a teacher may be assigned to a particular school only with the consent of the hiring principal and with input from at least two teachers at the school." C.R.S. §§22-63-202(2)(c.5)(I).

Upon displacement of a non-probationary teacher for the reasons stated above, school districts must provide "a list of all vacant positions for which [the teacher] is qualified, as well as a list of vacancies in any area identified by the school district to be an area of critical need." C.R.S. §§22-63-202(2)(c.5)(III)(B). Then, "[a]n application for a vacancy shall be made to the principal of a listed school." *Id*. The teacher shall then be transferred to that position upon recommendation of the principal. *Id*. The bill further provides that if a displaced non-probationary teacher "is unable to secure a mutual consent assignment at a school of the school district after twelve months or two hiring cycles, whichever period is longer, the school district shall place the teacher on unpaid leave until such time as the teacher is able to secure an assignment." C.R.S. §§22-63-202(2)(c.5)(IV). If the teacher achieves an assignment while on unpaid leave, the teacher's salary and benefits will be reinstated "at the level they would have been if the teacher had not been placed on unpaid leave." *Id*.

In their Complaint, Plaintiffs allege that Defendants' adoption of the mutual consent provisions violates the Colorado Constitution's Contract Clause, article II, § 11, and Due Process Clause, article II, § 25. Plaintiffs also assert that the District's implementation of the mutual consent provisions violates the Due Process Clause as-applied.

STANDARD OF REVIEW

A C.R.C.P. 12(b)(5) motion is properly granted when the non-moving party has failed to state a claim upon which relief can be granted. The purpose behind a C.R.C.P. 12(b)(5) motion is to test the sufficiency of the claim for relief. *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286, 1290 (Colo. 1992). When analyzing a motion to dismiss for failure to state a claim, a court must view all statements of material fact as true, and all allegations in the light most favorable to the plaintiff. *Verrier v. Colorado Dept. of Corr.*, 77 P.3d 875, 877 (Colo. App.

2003). The claim for relief must be stated in the plaintiff's complaint. *Dillinger v. N. Sterling Irr. Dist.*, 308 P.2d 608, 609 (Colo. 1957). When ruling on a motion to dismiss, the court may only consider matters stated in the complaint and "must not go beyond the confines of the pleadings." *Titan Indem. Co. v. Travelers Prop. Cas. Co. of Am.*, 181 P.3d 303, 306 (Colo. App. 2007). If the complaint states a case for some relief, a motion to dismiss should not be granted. *Dillinger*, 308 P.2d at 609. Further, a court should not dismiss a complaint for failure to state a claim if the plaintiff is entitled to some relief upon any theory of the law. *Pub. Serv. Co. of Colorado v. Van Wyk*, 27 P.3d 377, 386 (Colo. 2001). Applying these standards, the Court now turns to the issues presented in this case.

ANALYSIS

A. Contract Clause

Plaintiffs first claim that TECDA "created contracts between teachers who earned non-probationary status prior to the enactment of S.B. 191 and employers," thereby establishing vested contract rights. Am. Comp. ¶ 25. Therefore, Plaintiffs contend, Defendants impaired these contracts rights "by allowing school officials to effectively discharge non-probationary teachers in the absence of showing TECDA was satisfied." *Id.* ¶ 63. In their Motion, Defendants request that the Court dismiss the Contract Clause claim against them pursuant to C.R.C.P. 12(b)(5) for failure to plead sufficient facts to establish that TECDA created vested contractual rights.

Specifically, Defendants allege that Plaintiffs failed to demonstrate the legislative intent required to overcome the heavy presumption against a statute creating a contract. In support of this claim, Defendants emphasize the absence of language indicating contractual rights in TECDA. They further underscore TECDA's evolution from the prior teacher tenure acts as

supportive of legislative intent to eliminate any suggestion that TECDA created contractual rights. According to Defendants, Plaintiffs improperly rely on case law interpreting preceding versions of the statute, which contained substantively distinct language.

The Colorado Constitution provides, in pertinent part, that "[n]o . . . law impairing the obligation of contracts . . . shall be passed by the general assembly." Colo. Const. art. II, § 11. Courts do not interpret this clause as absolute, and, instead, ascertain "whether the change in law has 'operated as a substantial impairment of a contractual relationship,'" which involves consideration of three factors. *In Re Estate of DeWitt*, 54 P.3d 849, 858 (Colo. 2002). First, the court must determine whether a contractual relationship exists. *Id.* To establish this element, a party must demonstrate that the contract provided that party with a vested right. *Id*; *see also Dodge v. Bd. of Educ*., 302 U.S. 74, 77–78 (1937); *Police Pension & Relief Bd. v. McPhail*, 338 P.2d 694, 697 (1959). Second, a court must determine whether a change in the law impairs that contractual relationship. *DeWitt*, 54 P.3d at 858. If so, the court must then decide whether the impairment is substantial. *Id*. The Court finds that TECDA confers no contractual rights on Plaintiffs as a matter of law, and, therefore, considers only the first factor of this test.

Courts have established that "the presumption is that 'a law is not intended to create . . . contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.' " *Colorado Springs Fire Fighters Ass'n, Local 5 v. City of Colorado Springs*, 784 P.2d 766, 773 (Colo.1989); *accord Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 466 (1985) (quoting in part *Dodge*, 302 U.S. at 79 (1937)). To overcome this presumption, the party claiming the contractual right must demonstrate a clear indication that the legislature intended to bind itself contractually. *Nat'l R.R. Passenger Corp.,* 470 U.S. at 465–6. A court determines whether the legislature so intended by examining

whether the language of the statute and the circumstances surrounding its enactment or amendment manifest an intent to create an enforceable contractual right. *Colorado Springs Fire Fighters Ass'n*, 784 P.2d at 773*; Kilbourn v. Fire & Police Pension Ass'n*, 971 P.2d 284, 287 (Colo.App.1998); *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 17 n. 14 (1977); *see Nat'l R.R. Passenger Corp.*, 470 U.S. at 470. Absent evidence to the contrary, pervasive prior regulation in the area the statute governs suggests that the party had no legitimate expectation that the statute would not change and, hence, no binding contractual right in the prior version of the statute. *See DeWitt*, 54 P.3d at 859; *Nat'l R.R. Passenger Corp*., 470 U.S. at 469; *Energy Reserves Group v. Kan. Power & Light*, 459 U.S. 400, 412–13, 416 (1983).

The record here confirms that Plaintiffs have failed to present sufficient facts, in either their Complaint or Memorandum in Opposition to the instant Motion, demonstrating the legislative intent necessary to rebut the strong presumption that a statute does not create a contract.

Pursuant to the authority cited above, this Court must find a clear indication that the legislature intended to create a contract by evaluating TECDA's language and the circumstances surrounding its amendment. As Plaintiffs' own thorough history of TECDA's prior iterations and evolution makes clear, the legislature has made systematic efforts to remove any contractual rights previously present in the statute. As both parties note in the pleadings, the 1990 Legislature dropped the term "tenure" from the title of the 1967 Teacher Employment, Dismissal, and Tenure Act. *Cf*. C.R.S. § 123-18-1(1967), *with* C.R.S. § 22-63-101 (1990). Simultaneously, the General Assembly removed the definition of tenure from the act and its explicit guarantee that a tenured teacher "shall be entitled to a position of employment." C.R.S. §123-18-15(1) (1967). In 1991, the legislature proceeded to eliminate any remaining mention of

tenure from the act. Contrary to Plaintiffs' assertions otherwise, this removal of language providing for tenure indicates the circumstances surrounding the amendment, and, thus, the legislature's intent to remove any contractual language from the 1990 version of the Act. This evolution of the statute also evidences highly "pervasive prior regulation in the area the statute governs," thus suggesting that Plaintiff had no legitimate expectation of an unchanging statute. *See DeWitt*, 54 P.3d at 859.

Additionally, Plaintiffs' contention that Defendants incorrectly rely on the label and word "tenure" instead of substantive changes to TECDA is flawed. The removal of language expressly guaranteeing that a tenured teacher "shall be entitled to a position of employment" is highly revealing of legislative intent. Further, in *State of Indiana ex re. Anderson v. Brand*, a case which Plaintiffs rely upon in their Memorandum of Opposition, the Court emphasized terminology lacking in TECDA; "The title of the act is couched in terms of contract. It speaks of the making and canceling of indefinite contracts. In the body the word 'contract' appears ten times." 303 U.S. 95, 105 (1938). In one use of the word "contract," that statute stated that a permanent teacher's written contract "shall be deemed to continue in effect for an indefinite period and shall be known as an indefinite contract." *Id*. As the *Brand* Court pointed out, "[n]o more apt language could be employed to define a contractual relationship." *Id.* Comparable language is absent from TECDA, and the legislature intentionally removed similar language from prior iterations of the act.

In support of the theory that TECDA imbued a contractual relationship, Plaintiffs rely upon Colorado case law that focuses on the tenure language that is now absent from TECDA. For example, in *Lockhart v. Bd. Of Educ.*, the Court reasoned "[t]enure, and the right to compensation which accompanies it, rises to the level of a constitutionally protected interest."

735 P. 2d 913,918 (Colo. App. 1980). *See also Julesburg Sch. Dist. No. RE-1. In Sedgwick Cnty. V. Ebke*, 562 P.2d 419, 421 (Colo. 1977) ([T]he Teacher Tenure Act creates a contract by law between the school board and its teachers."); *Maxey v. Jefferson County School District* 408 P.2d 970 (Colo. 1965) ("[A] tenure act has the effect of a contract between teacher and district."). As explained above, the reliance on this terminology is significant and renders these cases distinguishable from the one at hand.

Plaintiffs pointedly emphasize TECDA's provision requiring "every employment contract entered into by any teacher or chief administrative officer for the performance of services for a school district shall be in writing." C.R.S. § 22-63-202(1). However, that provision refers only to a contract created between a school district and a teacher, and does not demonstrate the creation of a legislative contract. This interpretation is confirmed by the provision's application to "*any* teacher," thereby including probationary teachers, who the Plaintiffs do not allege to have a contractual entitlement to continued employment.

For the reasons stated above, the Court finds that Plaintiffs have failed to demonstrate the legislative intent necessary to overcome the substantial presumption that a statute does not create a contract. The Plaintiffs' Contract Clause claim is hereby dismissed.

B. Due Process

i. Facial Challenge

Plaintiffs also allege that because TECDA "create[s] a reasonable expectation of continued employment," its provisions grant non-probationary teachers a "constitutionally protected property interest" in that continued employment. Am. Compl. ¶26. In their Motion, Defendants request that the Court dismiss this claim pursuant to C.R.C.P. 12(b)(5).

First, Defendants assert that by the 1990 and 1991 changes to TECDA, the legislature eliminated any existing property right. Accordingly, Plaintiffs reliance on pre-TECDA cases is not sustainable. Thus, *Frey v. Adams Cnty. Sch. Dist.* No. 14, 804 P. 2d 851, 855 (Colo. 1991), holding that "[a] tenure teacher has a property right in continued employment," and *Howell v. Woodlin School Dist. R–104*, 596 P.2d 56 (1979), concluding the same, do not support Plaintiffs claims. Second, Defendants contend that, even if TECDA does create a property interest in continued employment, the due process claim fails as a matter of law because "the legislative process provides all the process that is due." *McInerney v. Pub. Emps. Ret. Ass'n*, 976 P.2d 348, 353 (1998).

In their Memorandum of Opposition, Plaintiffs assert that the pre-S.B. 191 cases remain applicable. Plaintiffs also acknowledge that the legislature is free to eliminate a property right that it has created. They respond, however, that the legislature did not eliminate the property right in continued employment created by TECDA's for-cause dismissal provisions and, instead, left those provisions in place while adding the mutual consent provisions, thereby establishing a means of "effectively discharg[ing]" a teacher without a hearing.

Pursuant to Article II, Paragraph 25 of the Colorado Constitution, "[n]o person shall be deprived of life, liberty or property, without due process of law." This language is nearly identical to the Due Process Clause of the U.S. Constitution found in Section 1 of the Fourteenth Amendment, and, thus, Colorado courts often consider federal authority when interpreting the clause. State constitutional provisions that violate federal constitutional law can be held invalid facially or as applied. *Alliance for Colorado's Families v. Gilbert,* 172 P.3d 964, 968 (Colo.App.2007). Facial challenges are disfavored because (1) courts may be forced to rely on speculation, (2) there is a risk of premature statutory interpretation, (3) courts may have to

anticipate questions of constitutional law when unnecessary, (4) courts may have to formulate constitutional rules broader than those required by the precise facts to which they would be applied, and (5) they may prevent the implementation of laws that embody the will of the people. *Independence Inst. v. Coffman*, 209 P.3d 1130, 1136 (Colo. Ct. App. 2008) *(*citing *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008)). A party who brings a facial challenge must establish that the law is invalid in all respects and cannot be constitutionally applied in any circumstance. *Sanger v. Dennis*, 148 P.3d 404, 411 (Colo.App.2006).

Additionally, "when a statute does not require or prohibit specific conduct, but merely adjusts a statutory benefit level . . . [t]he legislative process provides all the process that is due. *McInerney v. Pub. Emps. Ret. Ass'n*, 976 P.2d 348, 353 (Colo. App. 1998)(citing *Atkins v. Parker*, 472 U.S. 115, 129–130 (1985)("[A] recipient is not deprived of due process when the legislature adjusts benefit levels. The legislative determination provides all the process that is due.")

The Court finds that Plaintiffs' reliance on case law predating S.B. 191 is not persuasive. Further, application of the *Felderwerth* decision unnecessarily blurs the line of distinction between "dismissal" and "mutual consent" under TECDA as it is presently constituted. Plaintiffs' read into TECDA provisions and purpose that are absent. Based on the *Feldewerth* Court's holding that "[b]ecause [the good and just clause] provision grants to [a non-probationary] teacher a legitimate claim to continued employment, the due process clause of the Fourteenth Amendment requires that that teacher be given notice and hearing before any dismissal takes place" Plaintiffs seek to extend the application of these principles asserting the misperception that the mutual consent provision establishes an "effective discharge." *Feldewerth*

v. Joint Sch. Dist. 28-J of Counties of Adams & Arapahoe ex rel. Hartenbach, 3 P.3d 467, 471 (Colo. Ct. App. 1999).

In order to effectuate legislative intent the Court must apply the ordinary meaning of the statutory language and read the provisions as a whole, construing each consistently and in harmony with the overall statutory design. *People v. Cross*, 127 P.3d 71, 73–74 (Colo. 2006).

Notably, when passing S.B. 191 and the addition of C.R.S. § 22–63–202(2)(c.5), the General Assembly left unchanged sections 22–63–301 & –302, which provide the process the district must follow when non-probationary teachers are recommended for dismissal. Section 22–63–103 defines "dismissal" as the "involuntary termination of employment of a teacher for any reason other than a justifiable decrease in teaching positions." *Felderwerth's* holding depended on the existence of a for-cause *dismissal,* from an *entire district,* under sections 22–63–301 & –302, and, thus, is inapplicable to a *displacement,* from a *particular school in a district,* pursuant to the mutual consent provisions in section 2–63–202(2)(c.5).

Plaintiffs attempt to equate dismissals and displacements is not persuasive. *Displacements,* under the mutual consent provisions, require continued supervision of the displaced teacher's application process by providing the teacher with "a list of all vacant positions for which he or she is qualified" and placing the teacher in a priority hiring pool with "a first opportunity to interview . . . for available positions." C.R.S. § 22–63–202(2)(c.5)(III)(B) & - (III)(A). Following that, a district must place a non-probationary teacher on "unpaid leave" if that teacher does not obtain a mutual consent assignment at a school within two hiring cycles. *Id.* at –202(2)(c.5)(IV). While being on unpaid leave, the displaced teacher still holds a status distinguishable from being fully terminated, given that "[i]f the teacher secures an assignment at a school of the school district while on unpaid leave, the school district *shall reinstate the*

teacher's salary and benefits at the level they would have been if the teacher had not been placed on unpaid leave." *Id* (emphasis added). Therefore, though the ultimate result of displacement followed by unpaid leave may be comparable to that of dismissal, in examining the language of the statute as a whole, the Court finds that the General Assembly intended the mutual consent displacement process as distinct from dismissal. Therefore, *Felderworth's* holding regarding property interest rights in dismissal circumstances is distinguishable from this case.

Similarly, in *Howell v. Woodlin School Dist. R-104, ,* the Court held that the Due Process Clause required a hearing when a tenured teacher was terminated pursuant to the 1967 Tenure Act because the "grant of tenure by its nature engenders a reasonable and objective expectancy of continued employment." 596 P.2d 56, 60 (Colo. 1979). As discussed above, TECDA contains no grant of tenure, and thus this holding is unavailing as used by Plaintiffs. The Plaintiffs' citation to *Frey* is likewise flawed. There, the Court held that under the 1967 Tenure Act, "[a] tenure teacher has a property right in continued employment." As in *Howell*, the *Frey* Court was interpreting a much different statute from TECDA and one that explicitly granted tenured teachers a right of continued employment.

This Court also notes the well-established principle that legislatures have the power to eliminate or modify a property right it has created. Though Plaintiffs acknowledge this principle, they assert its inapplicability to the situation at hand. Again, Plaintiffs' contention relies on their attempt to equate the mutual consent provisions with an "effective discharge." *See* Memorandum in Opposition at 29 ("[T]he legislature left [the for cause dismissal] provisions—and the property interest they create—in place while adding the discharge-without-cause provisions, which purport to introduce an end-run around that property interest by establishing a

mechanism by which non-probationary teachers can be *effectively discharged* without a hearing")(emphasis added).

However, as established above, rather than creating an "effective discharge," the mutual consent provisions represent the General Assembly's rightful exercise of its power "to increase, to decrease, or to terminate" the benefits it has conferred. And, when the legislature choses to do so, Colorado courts have explained, "the legislative determination provides all the process that is due." *McInerney*, 976 P.2d at 353 (Colo. App. 1998)(quoting *Atkins*, 472 U.S at 129–130). As Defendants emphasize in their pleadings, this notion arises from the courts' significant policy concerns regarding the function of our government. As Colorado's statutes explain, "each general assembly is a separate entity, and the acts of one general assembly are not binding on future general assemblies." C.R.S. § 2-4-215(1)(2013). Here, in revising the laws governing the operation of Colorado's public schools to reflect new knowledge and opinions, the General Assembly did not exceed its constitutional bounds.

Therefore, applying the standards set forth above, viewing the allegations in the light most favorable to Plaintiffs and accepting all averments of material fact contained in Plaintiffs' Complaint against Defendants as true, the Court finds that Plaintiffs have failed to state a claim for violation of facial Due Process Clause as required under C.R.C.P. 12(b)(5).

ii. As-Applied Challenge

Defendants also move to dismiss Plaintiffs' as-applied Due Process claim. In contrast to facial challenges, as-applied challenges attempt to invalidate a law only in the "specific circumstances" in which a party has acted or proposes to act; thus, a law that is held invalid as applied is not rendered completely inoperative. *Sanger*, 148 P.3d at 410.

In support of their as-applied due process challenge, Plaintiffs submit the recounting of the factual circumstances in which individual non-probationary teachers were displaced and ultimately placed on unpaid leave. This narrative includes details regarding the number of years the non-probationary teachers had been employed by a particular district, the amount of applications they submitted after being displaced, and whether they were ultimately able to find other employment.

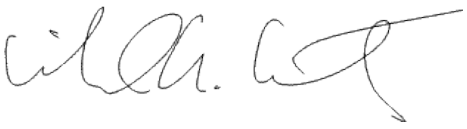
This Court has previously found that the contested provisions of S.B. 191 do not facially violate the Due Process Clause. Nothing about the circumstances under which Defendants implemented C.R.S. §22-63-202(2)(c.5) alters this analysis or conclusion. Therefore, this Court finds that Plaintiffs have failed to state an as-applied due process claim entitling them to relief. For all of the reasons stated herein and pursuant to C.R.C.P 12(b)(5), the Plaintiffs' Due Process Claim cannot be sustained and is now dismissed.

CONCLUSION

WHEREFORE, based on the reasoning stated above, Defendants' Motion to Dismiss Plaintiff's Amended Complaint in its entirety is hereby GRANTED.

Dated this 6th day of June, 2014.

BY THE COURT:



MICHAEL A. MARTINEZ
District Court Judge