**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF FLORIDA**
**GAINESVILLE DIVISION**

KIM COOK, BETHANN BROOKS, EMILY JEFFERIS, CATHY MCCONNELL, SHAUNA PAEDAE, JANINE PLAVAC, CATHERINE BOEHME, ALACHUA COUNTY EDUCATION ASSOCIATION, HERNANDO CLASSROOM TEACHERS ASSOCIATION, and ESCAMBIA EDUCATION ASSOCIATION,

Plaintiffs,

v. CASE NO.: 1:13cv72-MW-GRJ

PAMELA STEWART[1], in her official capacity as Interim Florida Commissioner of Education; GARY CHARTRAND, ADA G. ARMAS, SALLY BRADSHAW, JOHN A. COLON, BARBARA S. FEINGOLD, JOHN R. PADGET, and KATHLEEN SHANAHAN, in their official capacities as members of the Florida State Board of Education; SCHOOL BOARD OF ALACHUA COUNTY, SCHOOL BOARD OF HERNANDO COUNTY, and SCHOOL BOARD OF ESCAMBIA COUNTY,

Defendants.
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**ORDER ON MOTIONS TO DISMISS AND FOR MORE DEFINITE STATEMENT**

In this case, seven Florida public school teachers and three county school

[1] In accordance with Federal Rule of Civil Procedure 25(d), Pamela Stewart in her official capacity as Interim Florida Commissioner of Education is substituted in place of Tony Bennett, who resigned from office.

teachers associations are suing to invalidate the Student Success Act[2] and the teacher evaluations policies promulgated by the Alachua, Hernando, and Escambia county school boards in response to the Act. The plaintiffs complain that evaluations being conducted under the Act are arbitrary and unlawful because many teachers are being evaluated based on test scores of students that they do not teach or on subjects that they do not teach. The evaluations may even be based on students who attend other schools. These flawed evaluations can be used to make important employment decisions affecting teachers, such as renewal of contracts, terminations, and reductions in force.

The plaintiffs have filed suit against the Florida Commissioner of Education and members of the State Board of the Florida Board of Education in their official capacities ("the state defendants"). They have also filed suit against the school boards of Alachua County, Hernando County, and Escambia County. Although Alachua County has filed an answer to the complaint, the state defendants as well as Hernando and Escambia counties have filed motions to dismiss raising various grounds.

The state defendants and Escambia County argue that the plaintiffs have failed to allege an injury in fact sufficient to plead standing. In addition, the state

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[2] The Student Success Act is also known as Senate Bill 736 and the provisions of the Act are codified in the Florida Statutes, specifically section 1012.34, 1008.22, 1012.22, 1012.335, 1002.33, 1003.621, 1012.07, 1012.2315, 1012.27, 1012.28, 1012.33, and 1012.795.

defendants argue that any injury suffered by the plaintiffs is not fairly traceable to the Student Success Act and thus cannot be redressed by enjoining enforcement of the Act. Arguments have also been raised concerning the justiciability of the plaintiffs claims based on a recent correction to the Act, which requires student growth data for teacher evaluations to be based on students the teacher actually teaches.[3] The defendants also note the work in progress by state and local officials to implement fair evaluation policies under the Act. The defendants also argue that the plaintiffs' complaints about the Act and the county evaluation policies are too abstract and that the plaintiffs should be required to provide a more definite statement of their claims.

## I. STANDING

The case or controversy requirement of Article III of the Constitution prohibits federal courts from adjudicating cases in the abstract. Thus a plaintiff is required to show standing to bring a case to court by demonstrating a real stake in the issues to be resolved. To have standing, a plaintiff must have suffered an injury in fact. Lujan v. Defenders of Wildlife, 504 U.S. 559, 560 (1992). The injury must be fairly traceable to the conduct complained of and likely to be redressed by a favorable decision from the court. Id. at 560-61. It is not sufficient to satisfy the injury in fact

[3] The Student Success Act was amended by 2013 Senate Bill 1664, adopted on June 14, 2013 and effective July 1, 2013, Ch. 2013-185, § 3, Laws of Fla., to require "student performance data . . . [to] be based upon learning growth or achievement of the teacher's students . . . ." (emphasis supplied).

requirement with an injury that is hypothetical or conjectural. Id. at 560. So the injury must have actually happened or its occurrence must be imminent. Id.

When standing is challenged on a motion to dismiss, general factual allegations may be sufficient to plead standing, although greater support may be necessary at successive stages of the litigation. Fla. Pub. Interest Research Group Citizen Lobby, Inc. v. EPA, 386 F.3d 1070, 1083 (11th Cir. 2004). If the allegations of standing are "wholly barren of specifics," a Rule 12(e) motion for more definite statement is an appropriate remedy. See Havens Realty Corp v. Coleman, 455 U.S. 363, 384 (1982) (Justice Powell concurring and citing to United States v. SCRAP, 412 U.S. 669, 689-90, n. 15 (1973)).

The plaintiffs contend that they have alleged an injury in fact sufficient to establish standing based on allegations that (1) Plaintiff Cook, who works for the School Board of Alachua County, initially received an unsatisfactory rating for the 2011-12 school year, (2) Plaintiff Brooks, who works for the School Board of Hernando County, received an effective rating rather than a highly effective rating for the 2011-12 school year, and (3) Plaintiff Plavac, who works for the School Board of Alachua County, received an effective rating rather than a highly effective rating for the 2011-12 school year. It is not stated in the complaint what evaluations Plaintiffs McConnell, Jefferis, Paedae, and Boehme received. Moreover none of the plaintiffs, even the ones who received lower evaluations, have alleged any actual harm to their concrete interests regarding renewal of contracts, terminations, and

reductions in force. It is merely the potential for such harm arising from the flawed evaluation system that the plaintiffs complain of.

The plaintiffs further argue that the fact that they are required to be evaluated based on an unfair method is a sufficient injury by itself to establish standing. The plaintiffs request the Court to take judicial notice of the Florida Department of Education's Personnel Evaluation Data, available at http://www.fldoe.org/profdev/pdf/StatewideResults.pdf. According to the plaintiffs, the 2011-12 school year evaluations produced extreme and inexplicable variation in outcomes between counties and individual schools, thus demonstrating that the evaluation methods being used under the Act are unsound across the board. The plaintiffs contend that the fact that teachers are required to undergo a state-mandated process that is unfair is a "procedural injury" that is sufficient to establish standing. Doc. 40 at p.5. According to the plaintiffs, "[t]he injury in fact . . . is the distortion of the process to the potential detriment of the plaintiffs' concrete interests . . . ." Id.

Standing is an issue that "often turns on the nature and source of the claim asserted." Warth v. Seldin, 422 U.S. 490, 500 (1975). Assessment of the plaintiffs' standing has been made difficult because the nature and source of the plaintiffs' claims are not clear from the complaint. The discussion that follows addresses the possible claims raised by the plaintiffs.

**A. Procedural Due Process**

Procedural due process requires the government to use fair procedures when depriving a person of a protected interest; and this generally entails individual notice and some form of hearing. Reams v. Irvin, 561 F.3d 1258, 1262 (11th Cir. 2009). "Procedural due process is not itself an independent right, but merely the condition precedent to the deprivation of a life, liberty or property interest." Hatian Refugee Ctr. v. Smith, 676 F.2d 1023, 1037 (11th Cir. 1982). A claim for violation of procedural due process has three elements: (1) deprivation of a protected interest, (2) by state action, and (3) constitutionally inadequate process. Grayden v. Rhodes, 345 F.3d 1225, 1232 (11th Cir. 2003).

Procedural due process is implicated when the state action comes in the form of an adjudicative or executive act. 75 Acres, LLC v. Miami-Dade County, Fla., 338 F.3d 1288, 1294 (11th Cir. 2003). An adjudicative or executive act is an act that affects only one person or a small number of persons. Id. A procedural due process claim will generally not lie for a legislative act. Id. at 1293-94. The reason is, "[w]hen the legislature passes a law which affects a general class of persons, those persons have all received procedural due process–the legislative process. The challenges to such laws must be based on their substantive compatibility with constitutional guarantees." Id. at 1294 quoting Ronald E. Rotunda & John E. Nowak, Treatise on Constitutional Law § 17.8 (3d ed.1999). There are no additional procedures beyond the legislative process that are due. Id.

In the context of this case, if the injury in fact the plaintiffs are relying upon is the unfairness of the teacher evaluation method prescribed by the Student Success Act and the county school board policies, then they cannot state a valid procedural due process claim. The evaluation methods that the plaintiffs complain of are legislative acts that affect a general class of teachers. While it may be possible for the plaintiffs to challenge these methods as being unfair to teachers in general, the challenge must come in the form of a substantive challenge, not a procedural one. Id.

If the plaintiffs are relying upon the low evaluations received by Plaintiffs Cook, Brooks, and Plavac as an injury in fact, then they have still not stated a valid claim for violation of procedural due process. The plaintiffs make no allegation that they have suffered any actual harm to their concrete interests regarding renewal of contracts, terminations, and reductions in force as a result of the evaluations. Nor have they alleged the lack of remedial procedures available to them in the event such interests become an issue.

The complete store of procedures available, including post-deprivation processes such as agency review, should be considered in assessing a procedural due process claim. McKinney v. Pate, 20 F.3d 1550, 1560 (11th Cir. 1994). Where post-deprivation processes are available, a state should be given the opportunity to remedy procedural deficiencies before becoming liable for failure to provide due process. Id. "[O]nly when the state refuses to provide process sufficient to remedy

the procedural deprivation does a constitutional violation actionable under § 1983 arise." Id. at 1557. Here, the plaintiffs provide no allegations regarding the lack of post-deprivation remedies so as to allege a procedural due process injury.

**B. Substantive Due Process and Equal Protection**

The plaintiffs appear to be making a facial or quasi-facial challenge to the teacher evaluations policies prescribed by the Act and the local school board policies. In contrast to an as-applied challenge, which argues that a law is unconstitutional as enforced against the plaintiffs before the court, a facial challenge reaches beyond the particular circumstances of the plaintiffs' case and "seeks to invalidate a statute or regulation itself." Am. Fed. of State, Cnty, and Mun. Emps. Council 79 v. Scott, 717 F.3d 851, 863 (11th Cir. 2013). A quasi-facial challenge also reaches beyond the particular circumstances of the plaintiffs' case, but not necessarily to the entire reach of the law being challenged. Id. Regardless of whether a challenge is facial or quasi-facial, for any injunctive relief reaching beyond the particular circumstances of the plaintiffs' case, the plaintiff must show that law can never be applied in a constitutional manner. Id.

To state a claim for violation of their substantive due process rights, the plaintiffs must show that the legislative acts they are challenging are without a rational basis. Fresenius Med. Care Holdings, Inc. v. Tucker, 704 F.3d 935, 945 (11th Cir. 2013). A legislative act will survive such a challenge if the act has a "legitimate legislative purpose [that is] furthered by rational means." Swisher Int'l Inc.

v. Schafer, 550 F.3d 1046, 1057 (11th Cir. 2008). Similarly for an equal protection claim, a rational basis test applies. In re Wood, 866 F.2d 1367, 1371 (11th Cir. 1989).

The fact that the challenged law is being applied by the government to the plaintiffs is enough to establish standing for the plaintiffs' facial challenge on substantive due process and equal protection grounds. In contrast to a procedural due process claim, which focuses on a specific deprivation and the processes used to affect that deprivation, the focus of the plaintiffs' substantive due process and equal protection claims is the government's action in applying a law that has no rational basis. "[W]hen the suit is one challenging the legality of government action . . . standing depends considerably upon whether the plaintiff is himself an object of the action . . . at issue." Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). "If he is, there is ordinarily little question that action . . . has caused him injury, and that a judgment preventing . . . the action will redress it." Id. at 561-62. Furthermore, because the plaintiffs' harm comes from an injurious policy within the law being applied to them, there is a non-speculative likelihood of the injury happening. 31 Foster Children v. Bush, 329 F.3d 1255, 1266 (11th Cir. 2003); Alabama-Tombigbee Rivers Coalition v. Norton, 338 F.3d 1244, 1253 (11th Cir. 2003); see also Florida State Conference of N.A.A.C.P. v. Browning, 522 F.3d 1153, 1163-64 (11th Cir. 2008) (finding standing where "eventual injury does not begin with an assumption that someone will commit an illegal act" but as a natural result of

"unavoidable human errors" in carrying out the challenged statute). So to the extent the plaintiffs are proceeding on a facial challenge on substantive due process and equal protection grounds, the plaintiffs have stated a sufficient injury to establish standing.

The plaintiffs, however, appear to be pursuing another type of claim as well based on the denial of fundamental rights, for which the strict scrutiny test would apply. Doc. 40 at pp. 12-15. In their complaint, the plaintiffs allege that they have a fundamental liberty interest to be free from "punishments and other legal burdens" imposed due to "actions over which they ha[ve] no responsibility or ability to control." Doc. 1 at ¶ 105. The plaintiffs explain that the Act and the school board policies violate this fundamental liberty interest by allowing teachers to be evaluated based on test scores of students that they do not teach or on subjects that they do not teach.

To support this claim, the plaintiffs rely on St. Ann v. Palisi, 495 F.2d 423 (5th Cir. 1974), a decision from the former Fifth Circuit, which allowed two children to challenge their suspension from school. See doc. 40 at pp. 12-15. The suspension was based on the conduct of the children's mother, who attacked school personnel, and not on any conduct of the children themselves. St. Ann, 495 F.2d at 424. "[B]road language" in St. Ann "to the effect that '[f]reedom from punishment in the absence of personal guilt is a fundamental concept in the American scheme of justice,' id. at 425, and is thus protected by the substantive component of the due

process clause, id. at 425-26" has been limited by subsequent Fifth Circuit panels. Fernandez v. San Felipe Del Rio Consol. Indep. Sch. Dist., 68 F.3d. 467 (5th Cir. 1995). But there are no subsequent Eleventh Circuit decisions specifically limiting St. Ann, so it remains binding precedent.[4]

Assuming under St. Ann that the plaintiffs have a fundamental liberty interest to be free from punishment in the absence of personal guilt, the plaintiffs have not alleged an injury in fact that is sufficient to pursue this claim. Being subject to unfair teacher evaluation methods, while enough to establish standing for their facial challenges, is not enough to establish standing for a St. Ann type claim because the focus of the claim is punishment. The punishment in the St. Ann case was a suspension from school, depriving the plaintiffs of their property interest to attend public school. Burris v. Willis Indep. Sch. Dist., Inc., 713 F.3d 1087, 1093 n.3 (5th Cir. 1983). The closest thing to punishment alleged by the plaintiffs in this case are the poor evaluations received by Plaintiffs Cook, Brooks, and Plavac. A poor evaluation does not implicate a protected interest[5], however, and thus falls short of the punishment involved in St. Ann.

Whether the plaintiffs would eventually suffer punishment based on poor

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[4] Decisions from the former Fifth Circuit decided on or before September 30, 1981 are binding precedent in the Eleventh Circuit. Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir.1981) (en banc).

[5] See Silva v. Bieluch, 351 F.3d 1045, 1048 (11th Cir. 2003) (discussing the kinds of employment decisions that affect protected interests).

evaluations depends on a string of future acts and choices that cannot be predicted. "When a plaintiff cannot show that an injury is likely to occur immediately, the plaintiff does not have standing . . . ." 31 Foster Children v. Bush, 329 F.3d 1255, 1265 (11th Cir. 2003). The allegations made by the plaintiffs are not sufficient to establish standing for a claim under St. Ann.[6]

## II. MORE DEFINITE STATEMENT

Having concluded that the plaintiffs have alleged standing to the extent they are making a facial or quasi-facial challenge on substantive due process and equal protection grounds, the defendants raise other issues with the complaint that should be addressed. First, the complaint is 36 pages long and describes many details of the evaluation process. But lost within its pages is any meaningful notice of the nature of the claims the plaintiffs are raising.[7] Furthermore, all of the paragraphs in

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[6] Furthermore, because this case involves issues of public employment law, rather than a suspension from school, the plaintiffs' substantive due process claim based on an adjudicative act of punishment is likely foreclosed by the Eleventh Circuit's en banc decision in McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994). McKinney overruled prior decisions and held that "[b]ecause employment rights are state-created rights and are not 'fundamental' rights created by the Constitution, they do not enjoy substantive due process protection." Id. at 1560.

[7] The procedural and substantive due process issues have been discussed earlier in this order. With respect to the possible substantive due process claim, it is unclear whether the plaintiffs are proceeding on the theory that the Act and policies lack a rational basis, as alleged in paragraphs 99 through 102 of the complaint, or on a novel theory that the plaintiffs have a fundamental right not to be subject to employment decisions based on actions over which they have no responsibility or ability to control, as alleged in paragraphs 105 and 108 through 110 of the complaint. With regard to the equal protection claim, the plaintiffs complain

the complaint are alleged by all of the plaintiffs against all of the defendants for all of the claims, without any differentiation. The plaintiffs concede that their suit is not monolithic; they are not as a group suing all of the defendants as a group. Doc. 41 at p.5. But to figure out who is suing who, one must match up the allegations of where each plaintiff teacher works and the membership of the plaintiff organizations and infer who each plaintiff is suing.[8] The same process must be done with the allegations in the complaint to match them up with the claims against the defendants. A more definite statement is necessary to clarify these matters.

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in paragraph 54 of the complaint that the Act creates a two-track system of employment contracts depending on whether the employee is hired before July 1, 2011 or after July 1, 2011. In paragraph 114 of the complaint, however, the classification the plaintiffs complain of is that some teachers are evaluated based on student growth data for students that they teach and for subjects that they teach, while other teachers are evaluated based on student growth data for students that they do not teach of for subjects that they do not teach. It is unclear whether the plaintiffs are challenging just the latter classification or both of these classifications in their equal protection claim.

[8] For example, Plaintiffs Cook and Plavac, who work for the Alachua County Public Schools, are presumably suing the School Board of Alachua County and possibly the state defendants also. The same would go for Plaintiff Alachua County Education Association, who represents the instructional employees of the School Board of Alachua County, and would therefore being suing the School Board of Alachua County and possibly the state defendants. Plaintiff Brooks, who works for the Hernando County Public Schools, would presumably be suing the School Board of Hernando County and possibly the state defendants. The Plaintiff Hernando County Classroom Teachers Association would be suing the same parties. Plaintiffs Jeffries, McConnell, Paedae, and Boehme, who work of the Escambia County School Board, would be suing the Escambia County Public Schools and possibly the state defendants, as would the Escambia Education Association.

Second, facial challenges present justiciability issues even when the laws being challenged are not in a state of transition.

> Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records. Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate questions of constitutional law broader than is required by the precise facts to which it is to be applied. Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.

Am. Fed. of State, Cnty, and Mun. Emps. Council 79, 717 F.3d at 864 (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450-51 (2008)). These general problems with facial challenges are made more difficult in this case by the fact that the laws and policies being challenged by the plaintiffs are changing. As acknowledged by the plaintiffs in their complaint, next year "Florida is slated to roll out new standardized statewide end of course exams in several subjects not now tested along with mandatory state formulas for measuring student growth on those exams, which districts must adopt as both the assessment and the required growth formula for those subjects." Doc. 1 at ¶ 41. This development is likely to make moot the prospective relief that the plaintiffs are seeking. Furthermore, the Student Success Act was amended by 2013 Senate Bill 1664, adopted on June 14, 2013 and effective July 1, 2013, Ch. 2013-185, § 3, Laws of Fla., to require "student performance data . . . [to] be based upon learning growth

or achievement of the teacher's students . . . ." (emphasis supplied). In their arguments, the plaintiffs acknowledge the amendment but provide only a brief explanation of how it affects their facial challenge.[9] The amendment is significant, however, and warrants amendment of the complaint to address it.

At this point, it remains unclear whether the plaintiffs will be able to raise a valid facial challenge. In the amended complaint, the plaintiffs should clarify the claims that they are raising and the injuries they are alleging. The plaintiffs should also specify the portions of the Act and school board policies that they contend are unlawful and that should be stricken by the Court despite the upcoming changes to the law and policies governing teacher evaluations. Based on the foregoing, it is

ORDERED AND ADJUDGED: The motions to dismiss (docs. 34, 35, and 36) are **granted** to require the plaintiffs to provide an amended complaint with a more definite statement of their claims. The plaintiffs shall have up to and including **October 21, 2013,** to file the amended complaint.

**SO ORDERED on September 30, 2013.**

**s/Mark E. Walker**
**United States District Judge**

[9] The plaintiffs state: "The recent amendment is prospective only, does not prevent future employment actions based on the first two years of arbitrary and unlawful evaluations, does not address the evaluation of teachers on the basis of subjects they do not teach, and has not yet been implemented by the State Defendants." Doc. 40 at p. 12.