

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

<p>CYNTHIA CAIN; RACHEL DIETSCH; JOAN DOBBERT; ANTHONY HERNANDEZ; SKYE HOEKSTRA; MICHELLE HUGHES; KATELYN KNIGHT; LEAH LARSON; ANTHONY MUNSTERMAN; ABERDEEN RODRIGUEZ</p> <p style="text-align: center;">Plaintiffs,</p> <p>v.</p> <p>MINNESOTA BOARD OF TEACHING,</p> <p style="text-align: center;">Defendant.</p>	<p style="text-align: center;">Civil Case No. 62-CV-15-1979</p> <p style="text-align: center;"><b>PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT</b></p>
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Plaintiffs Cynthia Cain, Rachel Dietsch, Joan Dobbert, Anthony Hernandez, Skye Hoekstra, Michelle Hughes, Katelyn Knight, Leah Larson, Anthony Munsterman, and Aberdeen Rodriguez<sup>1</sup> hereby move the Court for partial summary judgment and the entry of: (1) a declaratory judgment that the Board of Teaching violated Minnesota law by refusing to accept applications for teacher licensure through the portfolio process; (2) an injunction requiring the Board of Teaching to reinstate the process; and (3) an injunction requiring the Board of Teaching to promulgate rules governing the licensure via portfolio process.

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<sup>1</sup> The issues raised in this summary judgment apply equally to the ten Plaintiffs who moved to be added to the Complaint on May 28, 2015.

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## **INTRODUCTION**

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By 2004, federal and state laws mandated a number of reforms intended to reduce education achievement gaps. In response, the Minnesota Board of Teaching developed an alternative teacher licensure application process known as “licensure via portfolio.” The portfolio process was designed to recognize personal and professional experiences not accounted for by the traditional application process, and to help reduce one of the worst race- and income-based achievement gaps in the nation by giving talented teachers a clear pathway to licensure.

By the Board’s own account, the portfolio process was a tremendous success. The Board received over 700 applications from teachers across the state, and issued licenses to over 90%. The portfolio process became an important part of licensure in Minnesota and was touted by the Board and Department of Education as demonstrating Minnesota’s compliance with federal laws.

In 2008, the Board of Teaching lobbied the Minnesota legislature to enact licensure via portfolio in statute to ensure its continuing availability to all teachers. The legislature obliged and enacted Minn. Stat. § 122A.21, subdivision 2. To ensure the licensure via portfolio process was self-sustaining, the legislature also approved a higher application fee and the creation of a special fund exclusively for licensure via portfolio.

In 2012, without any public notice or discussion of any kind, the Board of Teaching announced it was “discontinuing” the licensure via portfolio process and would no longer be accepting applications or issuing licenses to qualified teachers.

The licensure via portfolio statute remains in effect and a legally available option for all teachers. The Board’s refusal to follow the law has harmed the plaintiffs, as well as schools and students across the state. Plaintiffs ask the Court for a declaratory judgment and an injunction requiring the Board of Teaching to comply with the plain letter of the law.

## STATEMENT OF UNDISPUTED MATERIAL FACTS

### **I. Federal and State laws require change to teacher licensing.**

In 2001, Congress enacted “a comprehensive educational reform bill” known as No Child Left Behind (“NCLB”). NCLB amended the Elementary and Secondary Education Act of 1965, which itself was intended to help overcome “any effects of past racial discrimination.” *See, e.g., School Dist. Pontiac v. Secretary, U.S. Dept of Education*, 584 F.3d 253, 257 (9th Cir. 2008) (citations omitted).

NCLB provided substantial federal funding for states willing to comply with the Act’s “comprehensive regime of educational assessments and accountability measures” intended to address educational achievement gaps. *See Connecticut v. Spellings*, 453 F. Supp. 2d 459 (D. Conn. 2006); 20 U.S.C. § 6301(2) (part of NCLB’s stated purpose was to meet “the educational needs of low-achieving children in our Nation’s highest-poverty schools, limited English proficient children, migratory children, children with disabilities, Indian children, neglected or delinquent children, and young children in need of reading assistance.”).

One of NCLB’s major focuses was teacher quality. By that time, the education community generally, and the Secretary of Education specifically, recognized “that an essential component of academic achievement and accountability is that students be taught by ‘highly qualified’ teachers.” *Renee v. Duncan*, 573 F.3d 903, 906 (9th Cir. 2009) (quoting a letter from Margaret Spellings to Chief State School Officers (Oct. 21, 2005)) (“Teacher quality is one of the most important factors in improving student achievement and eliminating these achievement gaps.”).

To ensure teacher quality, Congress required all teachers of core academic areas to become “highly qualified” by the 2005-06 school-year. 20 U.S.C. § 6319(a)(2). The Act

defined “highly qualified” as having “full State certification as a teacher (including certification obtained through alternative routes to certification)” and not having “certification or licensure requirements waived on an emergency, temporary, or provisional basis.” 20 U.S.C. § 7801(23)(A); *see also* 34 C.F.R. § 200.56.

In 2004, in order to receive federal funding under NCLB, Minnesota adopted “highly qualified teacher” requirements. Under Minnesota law, “[f]or the purposes of the federal No Child Left Behind Act, a highly qualified teacher is one who holds a valid licensure under this chapter, including under section 122A.245, among other sections and is determined by local administrators as having highly qualified status according to the approved Minnesota highly qualified plan.” Minn. Stat. § 122A.16(b).

## **II. Minnesota adopted licensure via portfolio to ensure compliance with NCLB.**

In response to NCLB, the Board of Teaching developed licensure via portfolio. In a Statement of Need and Reasonableness, the Board of Teaching explained: “The 2004 Legislature directed the Board of Teaching to develop teacher licensure assessment alternatives. As a result, the Board created the Licensure via Portfolio process (MN Rule 8700.7620).” (Minnesota Board of Teaching, Statement of Need and Reasonableness, attached to March 20, 2007, Letter to Legislative Reference Library, p. 6, attached as Exhibit 1).

In a 2004 Report to the Legislature, the Board similarly explained that MN Rule 8700.7620 was “necessary to meet the new requirements of the federal Elementary and Secondary Education Act legislation [amended as NCLB in 2001] for those individuals who wish to enter the field of education from a non-traditional path. The BOT recommends that this rule remain in effect.” (Board of Teaching Report to the Legislature, August 1, 2004, attached as Exhibit 2).

In a 2007 joint memorandum, the Board of Teaching's Executive Director and the Department of Education's Executive Director of Licensing similarly explained: "Licensure via Portfolio was created in 2004 and as Minnesota's only state approved alternative pathway, it has been an invaluable licensure option for many individuals." (October 1, 2007, Board of Teaching Memorandum, attached as Exhibit 3).

The Board of Teaching and Department of Education not only touted the value and necessity of the portfolio process within the state, but they also touted the process to the federal government as well. In 2006, the Minnesota Department of Education submitted a Revised State Plan for Meeting the Highly Qualified Teacher Goal to the Secretary of Education, as required by NCLB. (Minnesota's 2006 State Plan for Meeting the Highly Qualified Teacher Goal, attached as Exhibit 4). As part of the State Plan, the MDE was required to outline the programs and services it provided to help schools ensure all their teachers were highly qualified. (*Id.* at p. 16). One of the programs the MDE listed was licensure via portfolio. (*Id.* at p. 18).

The plan also required the MDE to identify its strategies for "addressing the inequities in teacher assignment," including the "assignment of inexperienced, unqualified or out-of-field teachers to schools with poor or minority students." (*Id.* at p. 33). Again, the MDE responded by relying on the portfolio process. The MDE noted that:

[licensure via portfolio] provides opportunities to expand the field of teachers thereby providing district administrators greater opportunities to hire HQ [highly qualified] teachers particularly in schools with high poverty and have been identified as having inequities in their teacher assignments. This strategy also enables out-of-field teachers to become highly qualified by providing evidence of knowledge and skills they've acquired outside the traditional modes.

(*Id.* at p. 35). The MDE went on to note that the portfolio process had been successful and had "increased the number of HQ teachers in Minnesota and may be a viable option for schools that have been identified as having inequities in high poverty schools." (*Id.*).

Finally, the MDE's State Plan notes the success and importance of charter schools and their reliance on the portfolio process. The MDE wrote:

[T]he state cannot ignore the fact that many of the students that enroll in charter schools have high needs, have not been successful in a 'traditional' school and the enrollment of students in charter schools continues to increase.... Many charter schools hire individuals with content expertise who don't have teaching credentials. Consequently they request waivers from the Board of Teaching; this results in identification for having out-of-field, inexperienced or unqualified teachers. MDE in collaboration with MAC [Minnesota Association of Charter Schools] will also provide information on the licensure via portfolio alternative pathway as a strategy for obtaining HQ status.

(*Id.* at 40).

**III. In 2008, the Board lobbied the legislature to enact licensure via portfolio in statute.**

In 2008, after years of using licensure via portfolio, the Board of Teaching lobbied the legislature to enact it in statute. The Executive Director of the Board told the house and senate that the bill had the support of the Board of Teaching, the Department of Education, Education Minnesota, the Minnesota Association of Colleges for Teacher Education (MACTE), and the Perpich Center for Arts Education.<sup>2</sup> (March 18, 2008, House K-12 Education Committee Hearing, K. Balmer Fmr. Executive Director Board of Teaching) (noting "This bill that you have before you is supported by a number of really important stakeholders, of course the Board of Teaching, Minnesota Department of Education, Education Minnesota, and MACTE."); (March 18, 2008, Senate Finance E-12 Education Budget Committee Hearing, K. Balmer) (same); (Dec. 8, 2005, PCAE Meeting Minutes, attached as Exhibit 5).

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<sup>2</sup> Perpich Center for Arts Education is a state agency responsible for supporting arts education. See Minn. Stat. § 129C.10; Minn. Rule 3600.0010.

In front of the house and senate education committees, the Board of Teaching's then-Executive Director Karen Balmer lauded the success and importance of licensure via portfolio.

She explained:

Licensure via portfolio is an option that allows an individual to become licensed in a non-traditional manner. The individual can use prior coursework and transcripts, they can use professional development experiences, professional experiences and other types of things to demonstrate that they have met the same competencies and standards that a teacher would be required to meet in a traditional preparation program. For example, an individual who wishes to become a Spanish teacher who had served in the Peace Corps in a South American country could use some of those experiences and the professional work done at that time as a Peace Corps member towards their licensure and have those experiences recognized.

(March 18, 2008, Senate Finance E-12 Education Budget Committee Hearing, K. Balmer); *see also* (March 18, 2008, House K-12 Education Committee Hearing, K. Balmer) (making the same point nearly verbatim).

Ms. Balmer also testified that "licensure via portfolio has become a very valuable and increasingly popular option" and that it has become "tremendously valuable since we launched it in 2004." (March 18, 2008, House K-12 Education Committee Hearing); (March 18, 2008, Senate Finance E-12 Education Budget Committee Hearing); *see also* (March 18, 2008, Senate Finance E-12 Education Budget Committee Hearing, K. Balmer) ("We find that there are lots and lots of people who are interested in licensure via portfolio."). Ms. Balmer also explained that teachers from every area of the state had been issued a license through the portfolio process. (March 18, 2008, Senate Finance E-12 Education Budget Committee Hearing, K. Balmer) ("But really to say that this has been a statewide option used by every region – folks by every region in the state.").

In response to a question from Rep. Augustine Dominquez, Ms. Balmer explained that licensure via portfolio had universal applicability and could be used by anyone to obtain any



education license. (March 18, 2008, House K-12 Education Committee Hearing, K. Balmer) (“This can be used for, this can be accessed, so from math teachers to elementary teachers, to physical education, science, and the list goes on. And I do have information today about all the different licensure areas that have been accessed and it includes all those I’ve mentioned and many more.”).

To help get the bill passed and ensure that licensure via portfolio would be available to all teachers, Ms. Balmer invited Ms. Laura Mestler, an out-of-state teacher who had obtained a Minnesota license through the portfolio process, to testify about her experience. (Affidavit of Ms. Mestler, attached as Exhibit 6). Ms. Mestler explained to both the house and senate committees:

I was told I would need a number of classes to acquire a Minnesota license in communication arts. The portfolio option allowed me to get licensed in Minnesota, and it was a great option for me, because to take those classes, they were very expensive, obviously time consuming, and additionally, they would not meet the requirements for a lane change and the salary schedule because they were undergraduate classes and I did have a master’s degree. So, the classes that they were suggesting were basically beginners teaching classes, so for me, the portfolio option was just awesome. It was a way for me to get back into communication arts in this state.

(March 18, 2008, House K-12 Education Committee Hearing, L. Mestler); (March 18, 2008, Senate Finance E-12 Education Budget Committee Hearing, L. Mestler) (adding licensure via portfolio “was a great option for me, and many others coming to the State.”).

Ms. Mestler testified before the committees because she was a proponent of licensure via portfolio, and she wanted to encourage the legislature to adopt it as a viable option for all teachers. (Exhibit 6). From her conversations with Ms. Balmer, Ms. Mestler understood the Board of Teaching was working toward the same goal. *Id.*

Similarly, Mr. Jim Bartholomew, a member of the Board of Teaching from 2004 to 2011, testified that during his time, one of the Board's "foremost missions was creating and sustaining alternative (*i.e.* nontraditional) pathways to licensure for individuals seeking a Minnesota teaching license." (Aff. of J. Bartholomew, attached as Exhibit 7). Mr. Bartholomew also testified that licensure via portfolio was a valid and viable option, and that the Board explored proposals to make it easier and less cumbersome. It never discussed discontinuing it. *Id.*

The licensure via portfolio bill was included in an omnibus funding and appropriations bill and passed in the house and senate without debate. (H.F.1812, S.F. 3813). In the house, Rep. Grieling, Chair of the K-12 Education Finance Committee, commented that the omnibus bill included a new licensure process: "Representative Swails's provision on teacher licensure is in here to have a quicker and cheaper way for teachers to get alternative licensure so they can teach in our schools but still be qualified." (April 2, 2008, HF1812 Floor Debate, Omnibus State Government Operations Funding Provided and Money Appropriated, at 0:21:19-0:21:30).

The legislature obliged the Board of Teaching's requests and adopted licensure via portfolio in Minn. Stat. § 122A.21, Subdivision 2. It reads in its entirety:

**Subd. 2. Licensure via portfolio.**

- (a) An eligible candidate may use licensure via portfolio to obtain an initial licensure or to add a licensure field, consistent with the applicable Board of Teaching licensure rules.
- (b) A candidate for initial licensure must submit to the Educator Licensing Division at the department one portfolio demonstrating pedagogical competence and one portfolio demonstrating content competence.
- (c) A candidate seeking to add a licensure field must submit to the Educator Licensing Division at the department one portfolio demonstrating content competence.
- (d) A candidate must pay to the executive secretary of the Board of Teaching a \$300 fee for the first portfolio submitted for review and a \$200 fee for any portfolio submitted subsequently. The fees must be paid to the executive secretary of the Board of Teaching. The revenue generated from the fee must be deposited

in an education licensure portfolio account in the special revenue fund. The fees set by the Board of Teaching are nonrefundable for applicants not qualifying for a license. The Board of Teaching may waive or reduce fees for candidates based on financial need.

2008 c 363 art 2 s 2 (adopting Minn. Stat. § 122A.21, subdivision 2).

In addition to adopting licensure via portfolio as an application process, the legislature appropriated \$17,000 to fund it. (May 12, 2008, House Research Bill Summary, p. 7, attached as Exhibit 8) (“Subd. 6. Licensure by portfolio. Appropriates \$17,000 to the Board of Teaching for costs associated with licensing teachers by portfolio.”); (May 21, 2008, House Research Act Summary) (same) (attached as Exhibit 9).

**IV. The Board asks the legislature to increase available funding to run the portfolio process.**

The next year, because of the success of licensure via portfolio, the Board of Teaching asked the legislature for an increase in appropriations. The legislature consented and increased the appropriation to \$30,000 for 2009 and 2010. (Minn. Laws 2009, c 96 sec 3, subd. 3, attached as Exhibit 10).

Two years later, in 2011, the Board of Teaching returned to the legislature and again asked that its appropriation be continued for another two years. At the committee hearings, Executive Director Balmer again testified that licensure via portfolio was an important option:

Licensure via portfolio is a licensure option... [It] is an option that’s been available since 2004 to individuals who believe that they have the requisite skills and knowledge and professional experience to meet our licensing standards by not going through a licensure program. But it’s an opportunity for them to demonstrate those same licensure standards in a different way.

(March 16, 2011, House K-12 Education Committee Hearing, K. Balmer); (March 17, 2011, Senate Education Committee Hearing, K. Balmer) (making the same point).

To emphasize the success of licensure via portfolio, Executive Director Balmer again brought a teacher who had obtained licensure through the portfolio process to testify about her

experience. Ms. Kelly Semlak explained to the committee that she was a teacher at the Academy for Sciences and Agriculture (AFSA) and that the licensure via portfolio process allowed her to expand her licensure area to include a developmental delays special education license. (March 16, 2011, House K-12 Education Committee Hearing, K. Semlak). Ms. Semlak explained to the committee how the process helped her personally, and her school:

And there's various reasons this helps our school, and one of the reasons being that we no longer have to contract out for services from a DCD [Developmental Coordination Disorder] consult, which we used to have to do before. And another reason is that it was just a huge benefit for my family, financially. I was expecting another child at the time when I went through this program, and didn't feel it was going to be possible for me to go back to college. So I really wanted to take the time with my family and just do this pathway to acquire another license on my own time rather than a schedule through a college or university. Financially, I didn't want to add any more burden to my financial loans than I had through my previous college time.

(March 16, 2011, House K-12 Education Committee Hearing, K.Semlak). Ms. Semlak is still teaching students with special education needs at AFSA High School and is currently serving as the Special Education Supervisor. (K. Semlak bio-page from AFSA, attached as Exhibit 11).

Following Ms. Balmer and Ms. Semlak's presentation, Rep. Greiling praised the Board of Teaching for its work on licensure via portfolio. She testified:

I just have to take this opportunity to say that I really like licensure by portfolio, and to point out that even though Secretary of Education Arnie Duncan says we don't have pathways that aren't connected with Higher Ed, this is one of them. When people say he needs to do his homework better, he does on this one. And I compliment you on doing that.

(March 16, 2011, Senate Finance E-12 Education Budget Committee Hearing, Rep. Greiling).

Through the legislative appropriations and application fees, licensure via portfolio is an entirely self-sustaining process that costs the Board nothing to implement. *See* Minn. Stat. § 122A.21, subdivision 2(d); Minn. Laws 2009, c 96 sec 3, subd. 3; Minn. Laws 2013 c 116 art 9 s 1.

**V. In 2012, the Board unilaterally discontinued the licensure via portfolio process without explanation or public involvement of any kind.**

By 2012, the Board had approved 531 teachers for licensure through the portfolio process and had another 196 applications pending. (2012 Proposed Changes to Licensure via Portfolio, attached as Exhibit 12). In total, the Board approved over 92 percent of the applications and issued licenses in a variety of subjects, including special education, English as a second language, mathematics, chemistry, life sciences, health, physics, and vocal and classroom music. (Licensure via portfolio at a Glance, attached as Exhibit 13).

Nonetheless, despite its success and universal support, in 2012 the Board of Teaching announced it was “discontinuing” the portfolio process and would no longer be accepting applications. (March 24, 2014, Depo. of Board of Teaching at 20:15-21:3, attached as Exhibit 14). The Board of Teaching did not offer any public statement or reasoning of any kind for its decision. In fact, in response to data practice act requests and discovery requests in unrelated proceedings, the Board has not produced a single document of any kind discussing its decision or the legal or factual basis for it.

Instead, the Department of Education simply posted a notice on its website:

## Application for Licensure via Portfolio

### Portfolio Process Discontinued

Due to budget reductions and policy changes, the Licensure via Portfolio process has been discontinued. Interested candidates and past candidates who were unsuccessful are encouraged to contact a Minnesota college or university to complete a teacher preparation program. Many programs are offered in flexible formats to accommodate candidates.

In 2011, the Minnesota Legislature authorized the creation of alternative programs that will eventually offer new options (though, to date, no programs have been created by eligible providers). A list of Minnesota colleges and universities offering programs can be found on the *Train to Become a Teacher in Minnesota* page.

(May 20, 2015, Printout of Minnesota Department of Education Website) (available at: <http://education.state.mn.us/MDE/EdExc/Licen/LicenPort/>, attached as Exhibit 15).

Despite the Board's refusal to accept applications through the portfolio process, the legislature reauthorized the Board's special account to cover all costs associated with licensure via portfolio for 2014 and 2015. *See* Minn. Laws 2013 c 116 art 9 s 1.

Moreover, during the current state legislative session the republican-controlled house and democrat-controlled senate passed a unified bill modifying licensure via portfolio to impose deadlines on the Board of Teaching to respond to applications. Although Gov. Dayton vetoed the entire education omnibus bill, the amendment to Minn. Stat. § 122A.21, subd. 2 provides a new paragraph (d), that reads:

(d) The Board of Teaching must notify a candidate who submits a portfolio under paragraph (b) or (c) within 90 calendar days after the portfolio is received whether or not the portfolio was approved. If the portfolio was not approved, the board must immediately inform the candidate how to revise the portfolio to successfully demonstrate the requisite competence. The candidate may resubmit a revised

portfolio at any time and the Educator Licensing Division at the department must approve or disapprove the portfolio within 60 calendar days of receiving it.

(H.F. 2, 4<sup>th</sup> Engrossment, 89<sup>th</sup> Legislature, (2015-2016), attached as Exhibit 16).

In a letter responding to the 2015 legislative amendments, the Board explained it “transitioned” the licensure via portfolio special fund to the Minnesota Department of Education in 2012. (January 16, 2015, Board of Teaching Response to HF 2, 89<sup>th</sup> Legislative Session, attached as Exhibit 17).<sup>3</sup> The Board went on to say that the MDE discontinued the process in part because it decided not to hire a new “portfolio coordinator” after Ms. Erin Doan, the previous coordinator, was promoted to Executive Director of the Board of Teaching. *Id.* The Board explained to the legislature, “Due to the inability to support this type of review, the licensure via portfolio pathway was discontinued. Neither the BOT nor MDE’s Educator Licensing division is staffed to support this work as the past process has required 1 FTE to support the review of 25-40 successful applicants per year.” *Id.*

Internal emails between the Board of Teaching and the Department of Education, however, show that licensure via portfolio was operated at a substantial profit and took only .5 FTEs to operate. (Exhibit 12). From 2009 to January 2011, the Board collected \$52,200 in revenue from licensure via portfolio application fees. (Jan. 19, 2011 M. Miller email to K. Balmer) (Exhibit 18). During the same period, it incurred only \$36,715.74 in expenses. *Id.* For those two years alone, the Board had a surplus of over \$15,000 from the licensure via portfolio process. *Id.*

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<sup>3</sup> Despite being responsive to a number of document requests and data practices act requests, this document has never been produced by the Board of Teaching.

Moreover, when the licensure via portfolio process was discontinued, the special account had an undisclosed amount of excess funds available to the Board. (Oct. 1, 2012, R. Wassen email to K. Balmer) (Exhibit 19).<sup>4</sup>

**VI. The Board's discontinuation of the portfolio process has substantially harmed plaintiffs as well as educators and schools across the state looking to close achievement gaps.**

The Board of Teaching's refusal to accept applications for licensure through the portfolio process deprives plaintiffs of their statutory rights, infringes on their livelihood, and deprives schools and students of the best qualified teachers. The Board's refusal to follow the law also creates uncertainty in the application process and hinders the ability of schools to recruit and retain the best qualified teachers.

For example, Plaintiff Anthony Munsterman has been teaching K-12 music for 30 years, including 20 here in Minnesota. (Munsterman Resume, attached as Exhibit 20). Mr. Munsterman graduated from Augsburg College in 1984 with a bachelor's in music education. *Id.* On the strength of his degree, he received licenses to teach 5-12 instrumental band, general music, and orchestra. *Id.* Had he graduated from the same program at the same school the year before, he would have been issued a general K-12 music license that would have also allowed him to teach K-4 and choir.

Unfortunately, Mr. Munsterman is about to lose his job because the Board refuses to even review his application to extend his licenses to include K-4 and choir. (Email from E. Doan, attached as Exhibit 21). Mr. Munsterman is a passionate teacher with exceptional experience.

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<sup>4</sup> Despite having been served with discovery requests, data practices act requests, and a corporate deposition notice in unrelated proceedings requesting all information relating to the funds in the licensure via portfolio special account, the Board has produced only the two emails referenced here. The Board has also declined to respond to similar discovery requests in this case, despite all the information being public by law.



He has: (i) 30 years of experience teaching music; (ii) 22 years specifically teaching K-4 music; (iii) he has completed master's level courses in music education; (iv) he has prepared his students for approximately 90 recitals and concerts; (v) many of his students have won awards and recognitions; (vi) he has directed 16 different community choirs; and (iv) he has been involved in 40 different local music groups. (Munsterman resume, attached as Exhibit 20). But none of that matters to the Board. It refuses to review or consider his experience and training.

Instead, the Board told Mr. Munsterman that he cannot obtain licensure without completing a costly and time-consuming Minnesota preparation program, including student teaching (despite Mr. Munsterman having worked as a supervisor to student teachers) and choral conducting (despite his having taken a choral conducting class as an undergraduate). Even though Mr. Munsterman's school desperately wants him to stay, it is legally required to make all reasonable efforts to replace him with a licensed teacher and has been forced to advertise his position. (St. Clair State Advertisement, attached as Exhibit 22).

Similarly, the Board has refused to even consider the experience and training of Plaintiff Skye Hoekstra. Ms. Hoekstra is a kindergarten teacher at a free, public charter school in North Minneapolis founded for the specific purpose of combatting achievement gaps in early childhood education. (Hoekstra resume, attached as Exhibit 23). Ms. Hoekstra has a master's degree in education, years of experience, and a proven track record of closing education achievement gaps. (Affidavit of C. Anderson, attached as Exhibit 24). According to Northwest Evaluation Association (NWEA), 100 percent of her students met growth targets in math, and 90 percent met growth targets in reading. *Id.* According to NWEA, that places Ms. Hoekstra in the 99<sup>th</sup> percentile of classroom teachers. *Id.* Nonetheless, the Board will not consider her application until she completes a Minnesota college preparation program.

Plaintiff Joan Dobbert was in the middle of submitting her portfolio application for an early childhood license based on her master's degree in early childhood education, her six years of teaching experience, and her 12 years of related early childhood education experience when the Board suddenly discontinued the process. (Dobbert Resume, attached as Exhibit 25). Her only option for licensure now is to complete an expensive and time-consuming Minnesota preparation program despite meeting all the statutory requirements for licensure.

Similarly, Plaintiff Michelle Hughes has spent over a year-and-a-half embroiled in an intractable application process. The Board has refused to consider her 12 years of experience as a special education and elementary teacher in Oakland, California and out-right refused to issue her an elementary license of any kind. (Hughes resume, attached as Exhibit 26). Within a week of Ms. Hughes filing this lawsuit, however, she was suddenly issued a license. The reviewer informed Ms. Hughes, "I did review the materials submitted with the attached email [which Ms. Hughes had sent four months earlier] and have determined you do met [sic] the standards for Minnesota's K-6 Elementary Education license." (D. Odell April 7, 2015, email, attached as Exhibit 27). For reasons known only to the Board, despite meeting the standards for licensure, Ms. Hughes was issued only a temporary license that was valid for just two months later. (M. Hughes License, attached as Exhibit 28).

Plaintiff Cynthia Cain has similarly been unable to convince the Board of Teaching to consider her experience and training. Ms. Cain graduated with a bachelor's degree in physical education where she was an NCAA Academic All-American. (Cain Resume, attached as Exhibit 29). She is licensed in Alaska to teach K-12 physical education and health, and has over 15 years of teaching experience. *Id.* Despite having more experience teaching health than physical

education, the Board granted her a license to teach physical education and refused to even consider her application for a health license.

The Board of Teaching has similarly refused to consider the experience and training of Plaintiffs Rachel Dietsch, Anthony Hernandez, Katelyn Knight, Leah Larson, and Aberdeen Rodriguez. Each Plaintiff has been harmed by the Board's refusal to even consider their applications under the portfolio process.<sup>5</sup>

The Board's refusal to follow the law harms not only the named plaintiffs, but the schools who want to recruit and retain them, and the students who need them. The Board's refusal to follow the law has made it difficult, if not impossible, for schools and teachers to understand what the licensure requirements are, and how they can be satisfied. *See, e.g.*, (Aff. of A. Abraham, attached as Exhibit 30); (Aff. of J. Bacal, attached as Exhibit 31). As a result, schools are unsure who they can hire, and highly qualified out-of-state teachers are increasingly deciding not to come to Minnesota. *Id.* Schools are also finding themselves spending exorbitant amounts of time working to get their best qualified teachers licensed. *Id.* The Minnesota Department of Education's Fiscal Year 2015 Report to the Legislature on Teacher Supply and Demand quotes a number of school administrators who have expressed the same concerns, examples include:

“The extreme requirements to become licensed as a special education teacher have been very difficult. Very few programs even give people the opportunity to graduate with a bachelor's degree.... Not having reciprocity between states for licensure results in about 5 people not accepting my positions each year (I just had someone from Colorado ask about MN licensure because they are

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<sup>5</sup> The ten plaintiffs who moved to be added to the complaint have been similarly harmed by the Board's refusal to accept their portfolio applications.

For example, the Board refuses to consider Mr. Zmudy's 40 years of experience teaching special education, his work with special needs veterans, or his master's degree in special education. It also refuses to consider Ms. Myrold's master's degree in math and science education, her master's degree in educational leadership, or her more than 10 years of experience teaching math and science.

considering moving to town; when she found out the requirements she said she would stay in CO).”

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“Teaching candidates from other states (IA, SD, ND, WI, NE) won’t come to Minnesota.”

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“... Future teachers from other states are no longer coming to MN for licensure as in the past because of the difficulty of obtaining a license with all of the extra requirements beyond their own state licensing. It is quite intimidating to think that one was good enough to be licensed and teach in another state and that MN would require such an additional burden to get licensed.”

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“Getting candidates is difficult. Out of state candidates won’t even apply because of all the hoops they have to jump through...”

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“...The hoops that prospective teachers have to jump through to get a license in MN is causing a shortage of licensed staff in all areas. We can’t hire licensed teachers from neighboring states because they don’t meet our over the top licensing requirements.”

(Minnesota Department of Education, Teacher Supply and Demand, Fiscal Year 2015 Report to the Legislature, attached as Exhibit 32).

## **ARGUMENT**

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The Board of Teaching's refusal to accept applications for licensure by portfolio is a clear violation of Minnesota law. Section 122A.21 unambiguously provides that teachers "may use licensure via portfolio to obtain an initial licensure or to add a licensure field." Minn. Stat. § 122A.21, subd. 2. The Board's refusal to review portfolio applications and allow qualified applicants to obtain licensure directly contradicts the law.

Moreover, even if there were any doubt that the plain language of the statute creates a portfolio process, the legislative history shows that it was clearly the intent of the legislature to mandate a viable, alternative application process.

The Board of Teaching's refusal to follow the law and issue licenses to qualified applicants has harmed the plaintiffs, their school, and their students. The Court should enter a declaratory judgment finding that the Board's discontinuation of the portfolio process is a violation of law, and issue an injunction requiring it to reinstate the process and promulgate rules governing its operation.

### **I. The Board of Teaching must follow the law.**

The Board of Teaching is the administrative agency responsible for "establishing and maintaining licensure standards" consistent with Minnesota laws. (Exhibit 14, at 26:11-14); (Exhibit 15). Its primary function is to ensure that all applicants are treated fairly and that those who meet the statutory requirements are issued a license. *See, e.g.*, Minn. Stat. §§ 122A.23; 122A.09.

As the supreme court explained, "It is elementary that [an agency], being creature of statute, has only those powers given to it by the legislature. The legislature states what the

agency is to do and how it is to do it.” *Peoples Natural Gas Co. v. Minnesota Public Utilities Com’n*, 369 N.W.2d 530, 534 (Minn. 1985).

In exercising any of its executive functions, the Board must comply with applicable law. “Any other conclusion would enable an executive branch administrative agency to ignore or amend the plain language of a statute enacted by the legislature, in contravention of separation of powers.” *Kmart Corp. v. County of Stearns*, 710 N.W.2d 761, 771 (Minn. 2006); *see also Sleepy Eye Care Center v. Commissioner of Human Services*, 572 N.W.2d 766, 770 (Minn. App. 1998) (“An agency’s action must be consistent with its statutes and not based on mere whim.”) (quotation omitted); *Monk & Excelsior, Inc. v. Minnesota State Bd. of Health*, 225 N.W.2d 821, 825 (Minn. 1975) (“The purpose of the Administrative Procedure Act is to ensure that we have a government of law and not of men. Under that act, administrative officials are not permitted to act on mere whim, nor their own impulse, however well-intentioned they might be, but must follow due process in their official acts and in the promulgation of rules defining their operations.”).

## **II. Minnesota law clearly and unambiguously establishes a licensure via portfolio process.**

In 2008, at the request of the Board of Teaching, and with the support of Department of Education, the Minnesota Association of Colleges for Teacher Education, and the Perpich Center for Arts Education, the legislature enacted Minn. Stat. § 122A.21, subdivision 2. By its express terms, the statute created licensure via portfolio as an alternative application process. The subdivision reads in its entirety:

### **Subd. 2. Licensure via portfolio.**

(a) An eligible candidate may use licensure via portfolio to obtain an initial licensure or to add a licensure field, consistent with the applicable Board of Teaching licensure rules.

(b) A candidate for initial licensure must submit to the Educator Licensing Division at the department one portfolio demonstrating pedagogical competence and one portfolio demonstrating content competence.

(c) A candidate seeking to add a licensure field must submit to the Educator Licensing Division at the department one portfolio demonstrating content competence.

(d) A candidate must pay to the executive secretary of the Board of Teaching a \$300 fee for the first portfolio submitted for review and a \$200 fee for any portfolio submitted subsequently. The fees must be paid to the executive secretary of the Board of Teaching. The revenue generated from the fee must be deposited in an education licensure portfolio account in the special revenue fund. The fees set by the Board of Teaching are nonrefundable for applicants not qualifying for a license. The Board of Teaching may waive or reduce fees for candidates based on financial need.

The only question before this Court is whether Minn. Stat. § 122A.21, subdivision 2 allows applicants to obtain licensure through a portfolio process. By its explicit terms, it clearly does.

When interpreting statutes, courts must “ascertain and effectuate the intent of the legislature.” Minn. Stat. § 645.16. In so doing, they first determine whether the statutory language is ambiguous on its face. *A.M. Tower v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001). A statute is ambiguous only if its plain language is subject to more than one reasonable interpretation. *Id.* When the legislative intent is clear from the plain and ordinary meaning of the statute, it must be given effect without resort to any other rules of statutory interpretation. *Id.* (citations omitted); *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999) (“When the language of a statute is plain and unambiguous, the plain language must be followed.”). Courts cannot disregard the letter of the law “under the pretext of pursuing the spirit of the law.” *Amaral*, 598 N.W.2d at 384 (citing Minn. Stat. § 645.16).

The plain language of Subdivision 2 clearly establishes a licensure via portfolio process. Paragraph (a) expressly provides that applicants “may use licensure via portfolio to obtain an

initial licensure or to add a licensure field.” *Id.* at 122A.21, subd. 2(a). “May” means, “have permission to,” “have liberty to,” II *Webster’s Third New International Dictionary* 1397 (1981), “be allowed to,” or be “permitted to,” *The American Heritage Dictionary of the English Language* (5th ed. 2011). Thus, the plain, ordinary meaning of the statute is that teacher applicants have permission and liberty to and are allowed and permitted to use licensure via portfolio to obtain an initial licensure or to add a licensure field. *See, e.g., Larson v. State*, 790 N.W.2d 700, 703 (Minn. 2010) (citing Minn. Stat. § 645.08(1)) (“Statutory words and phrases must be construed according to the rules of grammar and common usage.”); *State v. Hayes*, 826 N.W.2d 799, 803 (Minn. 2013) (When interpreting a statute, courts must “give words and phrases their plain and ordinary meaning.”).

The Board’s policy of not accepting portfolio applications directly contradicts the plain language of the statute. Under the Board’s policy, teachers do not have permission to or liberty to use licensure via portfolio to obtain a license or to add to a licensure field. The Board’s current policy effectively rewrites the statute to read: “an eligible candidate may **not** use licensure via portfolio an initial licensure or add a licensure field.” A statutory interpretation that rewrites or adds words to a statute is of course invalid. *See Laase v. 2007 Chevrolet Tahoe*, 776 N.W.2d 431, 438 (Minn. 2009) (“We cannot rewrite a statute under the guise of statutory interpretation.”).

Any changes to the portfolio process would have to come from the legislature. The Board of Teaching has no authority to change, amend, or ignore the law. *See In re Claim for Benefits by Meuleners*, 725 N.W.2d 121, 124 (Minn. App. 2006) (“When statutory language is plain and unambiguous, changes or additions can only be made by the legislature.”) (citation omitted); *J.C. Penney Co. v. Comm’r of Econ. Sec.*, 353 N.W.2d 243, 246 (Minn. App. 1984)



(“When the words of a law are clear and unambiguous, amendments to the law must be made by the legislature in the form of a statute. They cannot be made by the Commissioner in the form of a rule.”); *In re Claim for Benefits by Meuleners*, 725 N.W.2d 121, 124 (Minn. App. 2006) (“When statutory language is plain and unambiguous, changes or additions can only be made by the legislature.”) (citing *J.C. Penney Co.*, 353 N.W.2d at 246); *see also International U. of Operating Eng. v. Arthurs*, 355 F. Supp. 7, 9 (W.D. Okla 1973), *aff’d*, 480 F.2d 603 (10th Cir. 1973) (“Where an agency completely ignores the purpose of the controlling statute, as the defendants did in this case, there cannot be any rational basis in law to support its decision. A reviewing court would be doing less than its duty if it failed to set aside the agency action. By holding an agency accountable to its lawful duties, the administrative process will be vindicated.”); *Avalon’s v. Agency for Health Care Admin*, 80 So. 3d 347, 351 (Fla. App. 2012) (“An agency cannot ignore the legislative requirements set forth in a statute.”).

There is nothing ambiguous or unclear about the existence of a portfolio process. The statute clearly establishes the portfolio process as a pathway to licensure for all teachers. Based on the plain language of the statute, the Court should find the Board of Teaching’s refusal to consider applications and issue licenses under the portfolio process violates the law.

### **III. The legislature’s intent to create a portfolio process is also demonstrated by the legislative history of Minn. Stat. § 122A.21, Subdivision 2.**

Even assuming there was any ambiguity about whether the plain language of Minn. Stat. § 122A.21 creates a portfolio process, the legislative history and general rules of statutory construction confirm the legislature intended to do exactly what the statute says.

When the words of statute are not clear, courts may determine the intent of the legislature by considering a number of factors, including: (a) the occasion and necessity for the law; (b) the consequences of a particular interpretation; and (c) the legislative and administrative

interpretations of the statute. Minn. Stat. § 645.16. Each of these factors weigh heavily in favor of finding the legislature intended to mandate a licensure via portfolio application process.

**A. The occasion and necessity for the law**

Licensure via portfolio was adopted in response to federal and state laws designed to reduce achievement gaps. It is a “tremendously valuable” tool for teachers and schools to attack one of the most embarrassing and inexcusable issues facing our state. (March 18, 2008, House K-12 Education Committee Hearing) (K. Balmer).

The Board has repeatedly affirmed that licensure via portfolio was adopted to comply with NCLB. The Board of Teaching itself has explained: “The 2004 Legislature directed the Board of Teaching to develop teacher licensure assessment alternatives. As a result, the Board created the Licensure via Portfolio process (MN Rule 8700.7620).” (Minnesota Board of Teaching, Statement of Need and Reasonableness, attached to March 20, 2007, Letter to Legislative Reference Library, p. 6, attached as Exhibit 1). The Board has similarly explained that Minn. Rule 8700.7620 was “necessary to meet the new requirements of the federal Elementary and Secondary Education Act legislation [amended in 2001 as the NCLB Act] for those individuals who wish to enter the field of education from a non-traditional path.” (Board of Teaching Report to the Legislature, August 1, 2004, attached as Exhibit 2).

The Minnesota Department of Education had the same understanding. Former Rep. Karen Klinzing, who was the Assistant Commissioner for the Department of Education from January 2007 to May 2010, explained that licensure via portfolio was created as an alternative pathway to licensure to ensure compliance with NCLB. (Aff. of K. Klinzing, attached as Exhibit 33). She also testified:

I was surprised by the Board of Teaching’s decision to suspend licensure via portfolio in 2012. As I understood the statute, Section 122A.21, subd. 2(a) gives permission to a candidate to decide whether to access licensure via portfolio.

However, I do not understand the statute to give the Board of Teaching or the Department of Education permission to suspend or eliminate licensure via portfolio. Put differently, I do not understand the statute to give the Board of Teaching or the Department of Education any choice regarding licensure via portfolio.

(*Id.* at ¶ 9).

Documents created by the Department of Education confirm Ms. Klinzing's understanding. Minnesota's State Plan on Teacher Quality made repeated references to the role of the portfolio process in complying with NCLB. Most notably, the State Plan states:

**Portfolio**

Licensure via portfolio provides an alternative pathway to a full professional Minnesota education license. The portfolio process assesses knowledge, skills and competencies of license applicants who have not completed an approved teacher preparation program in Minnesota in the licensure field being sought. This strategy provides opportunities to expand the field of teachers thereby providing district administrators greater opportunities to hire HQ teachers particularly in schools with high poverty and have been identified as having inequities in their teacher assignments. This strategy also enables out-of-field teachers to become highly qualified by providing evidence of knowledge and skills they've acquired outside the traditional modes.

**Success:** Since the Fall of 2004, 125 applicants have submitted portfolios for review and 95 have been approved to receive a Minnesota professional teaching license. This strategy has increased the number of HQ teachers in Minnesota and may be a viable option for schools that have been identified as having inequities in high poverty schools.

(September 29, 2006, Minnesota Department of Education Revised State Plan for meeting the Highly Qualified Teacher Goal, p. 35, attached as Exhibit 4).

Licensure via portfolio was adopted in response to federal and state mandates requiring the creation of an alternative application process. The statute was clearly intended to create the alternative application process lauded by the Board of Teaching and relied on by the MDE.

**B. The consequences of a particular interpretation.**

Although its reasons and legal authority for discontinuing the licensure via portfolio process have never been explained, the Board's position that it can unilaterally discontinue the process is clearly at odds with the statute.

Discontinuing licensure via portfolio renders the entire subdivision meaningless and has the same effect as a legislative repeal. "A statute should be interpreted, whenever possible, to give effect to all of its provisions; no word, phrase, or sentence should be deemed superfluous, void, or insignificant." *American Family Ins. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000) (citations and quotations omitted); Minn. Stat. § 645.17(2) ("the legislature intends the entire statute to be effective and certain").

The Board does not have the authority to act outside of the law and dictate teacher licensing through its own whims. *State by Spannaus v. Northwestern Bell Tel. Co.*, 304 N.W.2d 872, 876 (Minn. 1981) ("[A]dministrative interpretations must be rejected if they contravene plain statutory language.") (citation omitted); *Monk & Excelsior, Inc. v. Minnesota State Bd. of Health*, 225 N.W.2d 821, 825 (Minn. 1975) ("The purpose of the Administrative Procedure Act is to ensure that we have a government of law and not of men. Under that act, administrative officials are not permitted to act on mere whim, nor their own impulse, however well-intentioned they might be, but must follow due process in their official acts and in the promulgation of rules defining their operations.").

**C. The legislative and administrative interpretations of the statute**

The record is also replete with evidence that the Board of Teaching and legislature understood licensure via portfolio was an alternative application process. The Board of Teaching and Minnesota Department of Education consistently expressed the virtues of the process:

- In an October 1, 2007, memorandum, the Board of Teaching and Department of Education jointly explained that: “Licensure via Portfolio was created in 2004 and as Minnesota’s only state-approved alternative pathway, it has been an invaluable licensure option for many individuals. Over 200 licenses, including both initial licenses and additional licenses, have been issued through this process. John Melick, MDE’s Director of Educator Licensing, believe [sic] that the Licensure via Portfolio option will continue to grow in the coming years, and we are committed to maintaining it as a licensure option.” (Board of Teaching October 1, 2007, Memorandum, attached as Exhibit 3).

- In a 2007 report to the legislature, the Minnesota Department of Education said: “[T]he Minnesota Department of Education Licensing and Teacher Quality Division and the Minnesota Board of Teaching have developed and implemented a Licensure via Portfolio option for individuals with extensive skills and/or experience in a given licensure area, who lack formal teacher preparation, to obtain teaching licenses.” (Minnesota Department of Education 2007 Report to the Legislature, p. 19, attached as Exhibit 34).

- As late as 2011, the Board of Teaching’s website read: “Licensure via Portfolio provides an alternative pathway to a full professional Minnesota education license. The portfolio process assesses knowledge, skills and competencies of license applicants who have not completed an approved teacher preparation program in Minnesota in the licensure field being sought.” (Board of Teaching 2011 Website, attached as Exhibit 35).

- In a November 18, 2011 letter to an applicant, Ms. Balmer wrote: “we strongly recommend that you pursue Licensure via Portfolio, which will allow you to draw on experiences that the out-of-state application process in Educator Licensing is not equipped to recognize.” (Balmer Letter to Atella, Nov. 18, 2011, attached as Exhibit 36).

- By 2012, the Board had approved 531 teachers for licensure through the portfolio process and had another 196 applications pending. (2012 Proposed Changes to Licensure via Portfolio, attached as Exhibit 12). In total, the Board approved over 92 percent of the applications for licensure via portfolio. (Licensure via portfolio at a Glance, attached as Exhibit 13).

\* \* \*

Similarly, the legislature consistently expressed its understanding that licensure via portfolio was an approved alternative preparation program:

- In introducing the bill on the House floor, Rep. Greiling, Chair of the K-12 Education Finance Committee noted: “Representative Swails’s provision on teacher licensure is in here, to have a quicker and cheaper way for teachers to get alternative licensure so they can teach in our schools but still be qualified.” (H.F. 1812 Omnibus supplemental budget bill, Thursday, April 3, 2008 Session at 0:21:19-0:21:30).

- In introducing the bill before the House committee, Rep. Swails said: “This is a bill that establishes licensure via portfolio process.” (March 18, 2008, House K-12 Education Committee Hearing, Rep. Swails).

- In the Session Weekly, a nonpartisan House of Representatives publication, the House discussed the bill by noting: “Sponsored by Rep. Mindy Greiling (DFL-Roseville), the bill would establish a new review process for teachers.” (March 14, 2008, Session Weekly, vol. 25, no. 5, p. 5, attached as Exhibit 37).

- In introducing the Senate bill, the March 13, 2008, Senate Report notes: “S.F.No.3708: A bill for an act relating to education; establishing teacher licensure via portfolio;

amending Minnesota Statutes 2006, section 122A.21.” (March 13, 2008, Senate Session, Introduction and First Reading of Senate Bills, at 7317, attached as Exhibit 38).

- A March 27, 2008, House Research Bill Summary describes paragraphs (b) and (c) as: “Allow[ing] a qualified candidate to use the licensure via portfolio to obtain an initial licensure or add a licensure field. Specify portfolio content requirements for candidates seeking an initial license and for teachers seeking to add a licensure field.” (March 27, 2008 House Research Bill Summary, p. 5, attached as Exhibit 39).

- In the current session, the House and Senate adopted amendments to Minn. Stat. § 122A.21, subdivision 2 that impose deadlines on the Board to respond to portfolio applications. (H.F. 2, 4<sup>th</sup> Engrossment, 89<sup>th</sup> Legislature, (2015-2016), attached as Exhibit 16).

- The legislature has also renewed the special fund for licensure via portfolio for 2014 and 2015. *See* Minn. Laws 2013 c 116 art 9 s 1.

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There can be no doubt that the Board of Teaching and the legislature intended and understood that Minn. Stat. § 122A.21, subdivision 2 created and implemented an alternative application process through portfolio.

#### **IV. The Board’s decision to ignore the law is not entitled to any deference.**

Whether Minn. Stat. § 122A.21, subd. 2 allows teachers to submit applications for licensure through a portfolio process is a question of law for the Court to review *de novo*. The Board’s decision to ignore the statute is not entitled to any deference. *See e.g. In re Hubbard*, 778 N.W.2d 313, 318 (Minn. 2010) (“Whether an administrative agency has acted within its statutory authority is a question of law that we review *de novo*.”); *In re Administravit Order Issued to Wright County*, 784 N.W.2d 398, 402 (Minn. App. 2010) (same); *In re Guardianship of*

*Tschumy*, 853 N.W.2d 728, 741, n.10 (Minn. 2014) (“Interpreting statutes, however, is work the judicial branch has been doing since our State was founded.”) (citation omitted); *St. Otto’s Home v. Minn. Dep’t of Human Servs.*, 437 N.W.2d 35, 39-40 (Minn. 1989) (“When a decision turns on the meaning of words in a statute or regulation, a legal question is presented. In considering such questions of law, reviewing courts are not bound by the decision of the agency and need not defer to agency expertise.”); *In re Claim for Benefits by Meuleners*, 725 N.W.2d 121, 123 (Minn. App. 2006) (Courts “retain the authority to review de novo ‘errors of law which arise when an agency decision is based upon the meaning of words in a statute.’”) (quoting *In re Denial of Eller Media Co.’s Applications for Outdoor Adver. Device Permits*, 664 N.W.2d 1, 7 (Minn. 2003)).

Moreover, courts are “not bound by an agency’s construction of statutory language where the statute is phrased in common, rather than exceedingly technical terms.” *J.C. Penney Co. v. Comm’r of Econ. Sec.*, 353 N.W.2d 243, 246 (Minn. App. 1984) (citing *Minnesota Microwave, Inc. v. Public Service Commission*, 190 N.W.2d 661, 665 (Minn. 1971)); see also *No Power Line, Inc. v. Minnesota Environmental Quality Council*, 262 N.W.2d 312, 320 (Minn. 1977) (“Because this conclusion is based on legal rather than factual considerations, the reviewing court is not bound by the decision of the agency and need not defer to agency expertise.”).

The Board of Teaching’s current policy is also not entitled to any deference for the simple reason that it is so plainly wrong. See *J.C. Penney Co. v. Comm’r of Econ. Sec.*, 353 N.W.2d 243, 246 (Minn. App. 1984) (“Administrative interpretations are not entitled to deference when they contravene plain statutory language, or where there are compelling indications that the agency’s interpretation is wrong.”).



Not only should the Court not give the Board's policy any deference, but it should view its claim to have the authority to discontinue the process skeptically. In determining whether an agency acted within its statutory authority courts review the relevant statute to see whether it "unambiguously grants authority for an administrative agency to act in the manner at issue." *In re Administravit Order Issued to Wright County*, 784 N.W.2d 398, 402 (Minn. App. 2010) (quotation omitted). "As a general rule, we resolve any doubt about the existence of an agency's authority against the exercise of such authority." *In re Qwest's Wholesale Servs. Quality Standards*, 702 N.W.2d 246 (Minn. 2005) (citation omitted); *see also In re Excelsior Energy, Inc.*, 782 N.W.2d 282, 289 (Minn. App. 2010) ("Any reasonable doubt about the existence of a power in the commission should be resolved against the exercise of such power.") (citation omitted); *In re Application of Minn. Power for Authority to Increase Rates for Elec.*, 838 N.W.2d 747, 753 (Minn. 2013) ("We resolve any doubt about the existence of an agency's authority against the exercise of such authority.") (quotation omitted).

**V. Even if the Board's policy were consistent with law, it would still be inappropriate for the Board to discontinue licensure via portfolio without proper rulemaking.**

Even if Minn. Stat. § 122A.21, subd. 2 was ambiguous, and even if the Board's interpretation that it can decline to accept applications was reasonable, the Board's discontinuation of licensure via portfolio would still be inappropriate because it did not engage in formal rulemaking.

Minnesota law is clear that administrative agencies must adopt their rules through a formal rulemaking process that includes public notice and the opportunity for all interested persons to submit comments. Minn. Stat. §§ 14.14; 14.22; *see also In the Matter of Pera Salary Determinations*, 820 N.W.2d 563, 570 (Minn. App. 2012). The Minnesota Administrative Procedure Act defines "rules" as including "every agency statement of general applicability and

future effect, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure.” Minn. § 14.02, subd. 4. Administrative agencies must promulgate all legislative and interpretive rules. *In the Matter of Pera Salary Determinations*, 820 N.W.2d at 570.

An administrative rule that has not been promulgated is invalid unless it satisfies one of two exceptions: “if the agency’s interpretation of a statute corresponds with its plain meaning, or if the statute is ambiguous and the agency interpretation is a longstanding one.” *Id.* (quoting *Cable Comm. Bd. v. Nor-West Cable Comm. P’ship*, 356 N.W.2d 658, 667 (Minn. 1984)); *see also Minnesota Transitions Charter School v. Commission of Minnesota Dept. of Educ.*, 844 N.W.2d 223, 233-34 (Minn. App. 2014) (“If an agency’s interpretation of a statute is not properly promulgated and is not within an exception, it is invalid.”).

Neither exception applies in this case. The Board of Teaching’s policy of not allowing teachers to apply for licensure via portfolio does not correspond with the plain meaning of the statute that “an eligible candidate may use licensure via portfolio to obtain an initial licensure or to add a licensure field.”

Moreover, the Board’s policy of not allowing teachers to apply for licensure via portfolio is clearly not a longstanding policy. The Board accepted over 700 applications and issued licenses to 92 percent of them. The Board’s decision to discontinue the process is a recent and unexplained change in policy. Despite numerous discovery requests across a variety of actions, the Board has not provided a single document of any kind explaining the basis for its decision. *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 416 (Minn. 1981) (“In *Zylka*, we commented that ‘the failure of the council to record any legally sufficient basis for its determination at the time it acted made a prima facie showing of arbitrariness inevitable.’”) (quoting *Zylka v. City of*

*Crystal*, 167 N.W.2d 45 (Minn. 1969)); *FPC v. Texaco, Inc.*, 417 U.S. 380, 397 (1974) (“[W]e cannot accept appellate counsel’s post hoc rationalizations for agency action; for an agency’s order must be upheld, if at all, on the same basis articulated in the order by the agency itself.”) (international quotations omitted).

As the Minnesota Supreme Court explained, the “notice and comment procedures exist for good reason: to ensure that unelected administrators, who are not directly accountable to the populace, are forced to justify their quasi-legislative rulemaking before an informed and skeptical public.” *Swenson v. Emerson Elec. Co.*, 374 N.W.2d 690, 702 (Minn. 1985). The Board’s failure to adopt a rule interpreting licensure via portfolio renders its policy invalid and inappropriate. *See, e.g., Application of Orr*, 396 N.W.2d 657 (Minn. App. 1986) (“An agency cannot institute an absolute moratorium by consistently denying a permitted activity under its rules without first engaging in rule-making procedures.”); *Weber v. Hvass*, 626 N.W.2d 426, 433 (Minn. App. 2001) (explaining, on review from district court decision, “[t]his court must declare an agency’s action invalid if the agency adopts policy without complying with statutory rulemaking requirements”); *White Bear Lake Care Ctr, Inc. v. Minn. Dep’t of Pub. Welfare*, 319 N.W.2d 7, 9 (Minn. 1982) (affirming district court’s invalidation of a rule and noting, “Rules must be adopted in accordance with specific notice and comment procedures established by statute, and the failure to comply with necessary procedures results in invalidity of the rule.”); *Application of Crown CoCo, Inc.*, 458 N.W.2d 132 (Minn. Ct. App. 1990) (invalidating agency policy not adopted through rulemaking and noting, “Where important questions of social and political policy are involved, the rulemaking process must be followed.”).

## CONCLUSION

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The Board of Teaching's unilateral and unjustified refusal to accept applications for licensure via portfolio is a clear violation of Minn. Stat. § 122A.21, subd. 2.

The Court should enter a declaratory judgment finding that the Board's moratorium on licensure via portfolio applications violates Minnesota law. The Court should also enter an injunction requiring it to reinstate the process and adopt rules governing its application. *See, e.g., International U. of Operating Eng. v. Arthurs*, 355 F. Supp. 7, 9 (W.D. Okla 1973), *aff'd*, 480 F.2d 603 (10th Cir. 1973) ("Where an agency completely ignores the purpose of the controlling statute, as the defendants did in this case, there cannot be any rational basis in law to support its decision. A reviewing court would be doing less than its duty if it failed to set aside the agency action. By holding an agency accountable to its lawful duties, the administrative process will be vindicated."); *Ekstedt v. Village of New Hope*, 193 N.W.2d 821, 829 (Minn. 1972) ("[T]he court's decision on matters of law is binding upon the agency, and it can, by writ of mandamus, compel performance of a judicially determined mandatory duty rather than remand to the agency for further proceedings according to law.") (citations omitted); *Montgomery v. Minneapolis Fire Dept. Relief Ass'n*, 15 N.W.2d 122 (Minn. 1944) (Supreme Court affirmed trial court's entry of declaratory judgment interpreting a statute as requiring the inclusion of years of service in the armed forces in plaintiff's pension program.); *Sermon v. City of Deluth*, 97 N.W.2d 464 (Minn. 1959) (District court correctly issued a declaratory judgment that a city ordinance was contrary to a city charter).

Dated: May 28, 2015

FAEGRE BAKER DANIELS LLC

s/Rhyddid Watkins

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Ll. Rhyddid Watkins, #0390514  
2200 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, Minnesota 55402-3901  
Phone: (612) 766-7000  
Fax: (612) 766-1600  
Email: Rhyddid.Watkins@FaegreBD.com

Nathan R. Sellers  
Fabyanske, Westra, Hart & Thomson, P.A.  
333 South Seventh Street, Suite 2600  
Minneapolis, MN 55402  
Phone: (612) 359-7600  
Fax: (612) 359-7602  
Email: nsellers@fwhtlaw.com

**ATTORNEYS FOR PLAINTIFFS**