

2001

William Miller, Joshua A. Lee, Karl Blunck, Karen Blunck, Kacey Blunck, Marlo Chappel, Michelle Morley, Molly Llewellyn, Amy Thomas v. Wendy Weaver : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Stephen C. Clark; ACLU Foundation of Utah, Inc.; Richard A. Van Wagoner; Snow, Christensen and Martineau; Attorneys for Appellee Wendy Weaver.

Matthew Hilton; Matthew Hilton, PC; Attorney for Appellants.

Recommended Citation

Brief of Appellee, *William Miller, Joshua A. Lee, Karl Blunck, Karen Blunck, Kacey Blunck, Marlo Chappel, Michelle Morley, Molly Llewellyn, Amy Thomas v. Wendy Weaver*, No. 20010065 (Utah Court of Appeals, 2001).

https://digitalcommons.law.byu.edu/byu_ca2/3110

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH SUPREME COURT

WILLIAM MILLER, JOSHUA A. LEE,
KARL BLUNCK, KAREN BLUNCK,
KACEY BLUNCK, MARLO CHAPPEL,
MICHELLE MORLEY, MOLLY
LLEWELLYN, and AMY THOMAS,

Appellants,

vs.

WENDY WEAVER,

Appellee.

Appeal No. 20010065-SC

(Oral Argument Requested)

Priority No. 2

ON APPEAL FROM FOURTH DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH
The Honorable Ray M. Harding, Jr. Presiding
(Trial Court Case No. 98-404217)

BRIEF OF APPELLEE

MATTHEW HILTON
MATTHEW HILTON, P.C.
Post Office Box 781
Springville, Utah 84663

Attorney for Appellants

STEPHEN C. CLARK (A4551)
ACLU FOUNDATION OF UTAH, INC.
355 North 300 West, Suite 1
Salt Lake City, Utah 84103
(801) 521-9862

RICHARD A. VAN WAGONER (A4690)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Suite 1100
Post Office Box 45000
Salt Lake City, Utah 84145
(801) 521-9000

Attorneys for Appellee Wendy Weaver

FILED
UTAH SUPREME COURT

MAR 14 2002

PAT BARTHOLOMEW
CLERK OF THE COURT

IN THE UTAH SUPREME COURT

WILLIAM MILLER, JOSHUA A. LEE,
KARL BLUNCK, KAREN BLUNCK,
KACEY BLUNCK, MARLO CHAPPEL,
MICHELLE MORLEY, MOLLY
LLEWELLYN, and AMY THOMAS,

Appellants,

vs.

WENDY WEAVER,

Appellee.

Appeal No. 20010065-SC

(Oral Argument Requested)

Priority No. 2

ON APPEAL FROM FOURTH DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH
The Honorable Ray M. Harding, Jr. Presiding
(Trial Court Case No. 98-404217)

BRIEF OF APPELLEE

MATTHEW HILTON
MATTHEW HILTON, P.C.
Post Office Box 781
Springville, Utah 84663

Attorney for Appellants

STEPHEN C. CLARK (A4551)
ACLU FOUNDATION OF UTAH, INC.
355 North 300 West, Suite 1
Salt Lake City, Utah 84103
(801) 521-9862

RICHARD A. VAN WAGONER (A4690)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Suite 1100
Post Office Box 45000
Salt Lake City, Utah 84145
(801) 521-9000

Attorneys for Appellee Wendy Weaver

I. ORAL ARGUMENT REQUESTED

Appellee requests oral argument because of the important issues this appeal implicates.

II. LIST OF PARTIES IN THE COURT BELOW

Citizens of Nebo School District for Moral and Legal Values, William Miller, Donna Stevens, Joshua A. Lee, Karl Blunck, Karen Blunck, Kacey Blunck, Ron Hammond, Alisa Hammond, Kristine Burningham, Marlo Chappel, Michelle Morley and Lynda Thomas, represented by Matthew Hilton. Not all of these plaintiffs are included among Appellants, and Appellants include two persons—Molly Llewellyn and Amy Thomas--who were not plaintiffs below.

Wendy Weaver, represented by Stephen C. Clark of the American Civil Liberties Union of Utah Foundation, Inc. and Richard A. Van Wagoner of Snow, Christensen & Martineau.

Additional defendants below were the Utah State Board of Education, the Director of the Division of Occupational and Professional Licensing, Craig Jackson, and Attorney General of Utah Jan Graham. Appellants do not appeal the trial court's Order in connection with these defendants.

III. TABLE OF CONTENTS

| | <u>Page</u> |
|---|-------------|
| I. ORAL ARGUMENT REQUESTED | i |
| II. LIST OF PARTIES IN THE COURT BELOW | i |
| III. TABLE OF CONTENTS | ii |
| IV. TABLE OF AUTHORITIES | iv |
| V. STATEMENT OF JURISDICTION | 1 |
| VI. STATEMENT OF ISSUES AND STANDARD OF REVIEW | 1 |
| VII. CONSTITUTIONAL AND STATUTORY PROVISIONS | 2 |
| VIII. STATEMENT OF CASE | 6 |
| A. Nature of the Case, Course of Proceedings and Disposition in the Trial Court | 6 |
| B. Statement of Facts | 12 |
| IX. SUMMARY OF ARGUMENT | 19 |
| X. ARGUMENT | 22 |
| A. The Trial Court Correctly Ruled the Nebo Citizens' Statutory Claims Fail to State a Claim Because They Do Not Meet Mandatory Requirements for Declaratory Relief | 22 |
| 1. The Trial Court Correctly Ruled The Nebo Citizens' Statutory Claims Are Not Justiciable. | 23 |

| | | |
|------|--|----|
| 2. | Although The Trial Court Did Not Directly Rule On The Issue, It Is Clear The Interests Of The Parties To This Appeal Are Not “Adverse” <i>Vis-à-Vis</i> The Statutory Claims. | 29 |
| 3. | The Trial Court Correctly Ruled The Statutory Claims Fail To Establish a “Legally Protectible Interest” Because The Statutes on Which The Nebo Citizens Rely Do Not Create An Express Or Implied Private Right Of Action | 32 |
| 4. | The Nebo Citizens’ Allegations Do Not Establish The Requisite “Personal Stake,” “Causal Relationship” or “Public Interest.” . . . | 36 |
| 5. | The Trial Court Correctly Ruled The Statutory Claims are Not Ripe. | 42 |
| B. | The Trial Court Properly Dismissed Count III, a Constitutional Claim Based on Alleged Statutory Violations | 44 |
| XI. | CONCLUSION | 46 |
| XII. | CERTIFICATE OF SERVICE | 48 |

IV. TABLE OF AUTHORITIES

| <u>Cases</u> | <u>Page</u> |
|--|-------------|
| <i>Ambus v. Utah State Board of Educ.</i> , 858 P.2d 1372 (Utah 1993) | 27 |
| <i>Archer v. Board of State Lands & Forestry</i> , 907 P.2d 1142 (Utah 1995) | 37 |
| <i>Baird v. State</i> , 574 P.2d 713 (Utah 1978) | 23 |
| <i>Baker v. Carr</i> , 369 U.S. 186 (1962) | 37 |
| <i>Barnard v. Utah State Bar</i> , 857 P.2d 917 (Utah 1993) | 22 |
| <i>Bell v. The Little Axe Independent School District No. 70</i> , 766 F.2d 1391 (10 th Cir. 1985) | 39 |
| <i>Blackmun v. Salt Lake City</i> , 375 P.2d 756 (Utah 1962) | 29 |
| <i>Bott v. DeLand</i> , 922 P.2d 732 (Utah 1996) | 45 |
| <i>Boyle v. National Union Fire Ins. Co.</i> , 866 P.2d 595 (Utah Ct. App. 1993) | 1, 22 |
| <i>Brown & Root Ind. Serv. V. Ind. Comm’n of Utah</i> , 947 P.2d 671 (Utah 1997) | 34, 35 |
| <i>Brown v. Board of Educ.</i> , 347 U.S. 483 (1954) | 14, 34 |
| <i>City of Cleburne v. Cleburne Living Center</i> , 473 U.S. at 432 (1985) | 15 |
| <i>Concerned Parents of Stepchildren v. Mitchell</i> , 645 P.2d 629 (Utah 1982) | 29 |
| <i>Cruz v. Middlekauff Lincoln-Mercury, Inc.</i> , 909 P. 2d 1252 (Utah 1996) | 1 |
| <i>Duke Power Co. v. Carolina Env’tl. Study Group, Inc.</i> , 438 U.S. 59 (1978) | 37 |

| | |
|--|----------------|
| <i>FMA Acceptance Corp. v. Leatherby Ins. Co.</i> , 594 P.2d 1332 (Utah 1979) | 32 |
| <i>Gaylord v. Tacoma Washington Sch. Dist. No. 10</i> , 559 P.2d 1340 (Wash. 1997) | 13 |
| <i>Glover v. Williamsburg Local Sch. Dist.</i> , 20 F. Supp. 2d 1160 (S.D. Ohio 1998) | 15 |
| <i>Hall v. Utah State Dep’t of Corrections</i> , 24 P.3d 958 (2001) | 12 |
| <i>In re J.P.</i> , 648 P.2d 1364 (Utah 1982) | 45, 46 |
| <i>Jantz v. Muci</i> , 759 F. Supp. 1543 (D. Kan. 1991), rev’d, 976 F.2d 623 (10 th Cir. 1992) cert. denied, 508 U.S. 952 (1993) | 14 |
| <i>Jenkins v. Swan</i> , 675 P.2d 1145 (Utah 1983) | 22, 37, 39, 41 |
| <i>Lee v. State</i> , 635 P.2d 1282 (Mont.), cert. denied, 456 U.S. 1006 (1981) | 23 |
| <i>Little v. Mitchell</i> , 604 P.2d 918 (Utah 1979) | 12 |
| <i>Lyon v. Bateman</i> , 228 P.2d 818 (1951) | 29 |
| <i>Madsen v. Borthnick</i> , 769 P.2d 245 (Utah 1988) | 36 |
| <i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) at 177 | 44 |
| <i>Miles v. Idaho Power Co.</i> , 778 P.2d 757 (Idaho 1989) | 23 |
| <i>Milliner v. Elmer Fox & Co.</i> , 529 P.2d 806 (Utah 1974) | 32 |
| <i>U.S. v. Moreno</i> , 413 U.S. 528 (1973) | 15 |
| <i>Nielson v. Division of Peace Officer Standards and Training (POST)</i> , <i>Department of Public Safety</i> , 851 P.2d 1201 (Utah Ct. App. 1993) | 27 |
| <i>Olsen v. Samuel McIntyre Investment Co.</i> , 956 P.2d 257 (Utah 1998) | 36 |
| <i>Olson v. Salt Lake City School District</i> , 724 P.2d 960 (Utah 1986) | 36 |

| | |
|--|------------|
| <i>Palmore v. Sidoti</i> , 466 U.S. 429 (1984) | 15 |
| <i>Redwood Gym v. Salt Lake County Comm’n</i> , 624 P.2d 1138 (Utah 1981) | 43 |
| <i>Roberts v. Madigan</i> , 921 F.2d 1047 (10th Cir. 1990) | 37, 40, 41 |
| <i>Rochin v. People of California</i> , 342 U.S. 165 (1952) | 45 |
| <i>Rocky Mtn. Thrift Stores, Inc. v. Salt Lake City Corp.</i> , 784 P.2d 459 (Utah 1989) | 35 |
| <i>Romer v. Evans</i> , 517 U.S. 620 (1996) | 14, 15 |
| <i>Salt Lake County v. Bangerter</i> , 928 P.2d 384 (Utah 1996) | 22 |
| <i>Salt Lake County v. Bangerter</i> , 928 P.2d 384 (Utah 1996) | 29 |
| <i>Skokos v. Corradini</i> , 900 P.2d 539 (Utah Ct. App. 1995) | 24 |
| <i>State v. Lusk</i> , 37 P.3d 1103 (Utah 2001) | 35 |
| <i>State v. Schlosser</i> , 774 P.2d 1132 (Utah 1989) | 35 |
| <i>Stemler v. City of Florence</i> , 126 F.3d 856 (6 th Cir. 1997), <i>cert. denied sub nom. City of Florence v Chipman</i> , 523 U.S. 1118 (1998) | 15 |
| <i>Strawberry Elec. Serv. Dist. v. Spanish Fork City</i> , 918 P.2d 870 (Utah 1996) | 22 |
| <i>United States v. Kennedy</i> , 225 F.3d 1187 (10 th Cir. 2000) | 45 |
| <i>Weaver v. Nebo Sch. Dist.</i> , 29 F. Supp. 2d 1279 (D. Utah 1998) | 15, 16, 28 |
| <i>Wilde v. Wilde</i> , 35 P.3d 341 (Utah App. 2001) | 36 |
| <i>Williams v. State</i> , 716 P.2d 806 (Utah 1986) | 16, 23 |

Rules

| | |
|--|----|
| Rule 277, Utah Admin. Code 514-1 B | 10 |
| Rule 57, Utah Rules of Civil Procedure | 22 |

Statutes

| | |
|---|-------|
| Utah Code Ann. § 53A-7-110(1)(a)(I) and (c) | 25 |
| Utah Code Ann. § 58-1-203 | 5 |
| Utah Code Ann. § 53A-7-202 | 33 |
| Utah Code Ann. § 58-1-201 | 5 |
| Utah Code Ann. § 58-1-307 | 5 |
| Utah Code Ann. § 58-1-202 | 5 |
| Utah Code Ann. § 58-61-501 (2) | 6 |
| Utah Code Ann. § 58-61-501(1) | 6 |
| Utah Code Ann. § 58-61-501(3) | 6 |
| Utah Code Ann. § 53A-1-401 (1998) | 3 |
| Utah Code Ann. § 53A-7-101 | 42 |
| Utah Code Ann. § 53A-1-301 (1998) | 2 |
| Utah Code Ann. § 53A-13-101 | 8, 16 |
| Utah Code Ann. § 53A-13-101(5)(a) | 9 |
| Utah Code Ann. § 53A-13-101(5)(b) | 10 |

| | |
|---|-------|
| Utah Code Ann. § 53A-13-101(5)(e) | 32 |
| Utah Code Ann. § 53A-13-301 | 7 |
| Utah Code Ann. § 53A-3-421(1)(c) | 33 |
| Utah Code Ann. § 53A-6-301 (1998) | 3, 30 |
| Utah Code Ann. § 53A-7-110 (1998) | 3, 30 |
| Utah Code Ann. § 53A-7-110(1), | 42 |
| Utah Code Ann. § 53A-7-202 | 32 |
| Utah Code Ann. § 53A-7-202 (1998) | 4, 33 |
| Utah Code Ann. § 58-1-307(1)(f) | 26 |
| Utah Code Ann. § 58-61-101 | 26 |
| Utah Code Ann. § 58-61-201 (1998) | 5 |
| Utah Code Ann. § 58-61-301 (1998) | 5 |
| Utah Code Ann. § 58-61-307 (1998) | 6 |
| Utah Code Ann. § 58-61-501 (1998) | 5 |
| Utah Code Ann. § 58-61-503 (1998) | 6 |
| Utah Code Ann. § 58-62-101 | 8 |
| Utah Code Ann. § 68-3-3 | 34 |
| Utah Code Ann. § 78-2-2(3)(j) | 1 |
| Utah Code Ann. § 78-33-1 | 22 |
| Utah Code Ann. § 78-33-1 (2001) | 6 |

| | |
|--|----|
| Utah Code Ann. § 78-33-6 (2001) | 6 |
| Utah Code Ann. § 53A-6-301(1)(a) | 25 |
| Utah Code Ann. §§ 58-61-201(3), -501 and -503(1) | 26 |
| Utah Code Ann. § 58-61-201 | 26 |
| Utah Code Ann. § 58-61-501 | 26 |
| Utah Code Ann. § 58-61-503 | 26 |

Other Authorities

| | |
|---|----|
| 1A N. Singer, SUTHERLAND ON STATUTORY CONSTRUCTION § 22.30 (Sands 4th rev. ed. 1985) | 36 |
| BLACK’S LAW DICTIONARY 53 (6 th ed. 1990) | 29 |
| Utah Const. Art. I | 8 |
| Utah Const. Art. I, § 4 | 9 |
| Utah Const. Art. III, §§ 1 and 4 | 9 |
| Utah Const. Art. V, { 1 | 2 |
| Utah Const. Art. X, Sec. 3 | 2 |
| Utah Const. Art. X, Sec. 3 | 3 |

V. STATEMENT OF JURISDICTION

This Court has jurisdiction under Utah Code Ann. § 78-2-2(3)(j).

VI. STATEMENT OF ISSUES AND STANDARD OF REVIEW

A. Did the trial court abuse its discretion in declining to grant the declaratory relief requested in the First Amended Complaint on the ground it would not terminate the uncertainty or controversy giving rise to this proceeding?

B. Did the trial court err in dismissing the statutory claims (Counts I, II, IV, VIII, IX and X) of the First Amended Complaint on the ground that they fail to satisfy the requirements for a declaratory judgment against Weaver?

C. Did the trial court err in dismissing Count III of the First Amended Complaint on the ground that it seeks “to impermissibly expand the Utah Constitution to require parental consent for constitutionally unprotected interferences with their parental prerogatives”?

The trial court’s decision to deny declaratory relief is reviewed for an abuse of discretion. *Boyle v. National Union Fire Ins. Co.*, 866 P.2d 595, 598 (Utah Ct. App. 1993). The trial court’s decision to grant a motion to dismiss is a question of law that is reviewed for correctness. *Cruz v. Middlekauff Lincoln-Mercury, Inc.*, 909 P. 2d 1252, 1253 (Utah 1996).

VII. CONSTITUTIONAL AND STATUTORY PROVISIONS

As Appellants note, many constitutional and statutory provisions are relevant to this appeal. The most salient are the following:

Constitution of Utah, Art. V, Sec. 1

The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or provided.

Constitution of Utah, Art. X, Sec. 3

The general control and supervision of the public education system shall be vested in the State Board of Education. The membership of the board shall be established and elected as provided by statute. The State Board of Education shall appoint a State Superintendent of Public Instruction who shall be the executive officer of the board.

Utah Code Ann. § 53A-1-301 (1998)

Appointment--Qualifications--Duties. (1) The State Board of Education shall appoint a superintendent of public instruction, hereinafter called the state superintendent, who is the executive officer of the board and serves at the pleasure of the board. The board shall appoint the state superintendent on the basis of outstanding professional qualifications. The state superintendent shall administer all programs assigned to the State Board of Education in accordance with the policies and the standards established by the board. (2) The superintendent shall perform duties assigned by the board, including the following: (a) investigating all matters pertaining to the public schools.

Utah Code Ann. 53A-1-401 (1998)

Powers of State Board of Education--Adoption of rules--Enforcement. (1) (a) The State Board of Education has general control and supervision of the state's public education system. (b) "General control and supervision" as used in Article X, Sec. 3, of the Utah Constitution means directed to the whole system. (2) The board may not govern, manage, or operate school districts, institutions, and programs, unless granted that authority by statute. (3) The board may adopt rules and policies in accordance with its responsibilities under the constitution and state laws, and may interrupt disbursements of state aid to any district which fails to comply with rules adopted in accordance with this subsection.

Utah Code Ann. § 53A-6-301 (1998)

Disciplinary action against educator. (1) (a) The State Board of Education shall take appropriate action against any person who is, or at the time of an alleged offense was, the holder of a certificate issued by the board, and who is: (i) found pursuant to a criminal, civil, or administrative action to have exhibited behavior evidencing unfitness for duty through immoral, unprofessional, or incompetent conduct, or to have committed any other violation of standards of ethical conduct, performance, or professional competence; or (ii) alleged to have exhibited such behavior or committed such a violation. (b) Prior to taking action based upon an allegation or the decision of an administrative body, the board shall direct the Professional Practices Advisory Commission to review the allegations and any related administrative action and provide findings and a recommendation to the board. (c) No adverse recommendation may be made without the opportunity for a hearing. (d) The board's action may include: (i) revocation or suspension of a certificate; (ii) restriction or prohibition of recertification; (iii) a warning or reprimand; or (iv) required participation in and satisfactory completion of a rehabilitation or remediation program. (e) The certificate holder is responsible for the costs of rehabilitation or remediation required under this section.

Utah Code Ann. § 53A-7-110 (1998)

Powers and duties. (1) The commission: (a) shall make recommendations to the State Board of Education and professional organizations of educators:

(i) concerning standards of professional performance, competence, and ethical conduct for persons holding certificates issued by the board; and (ii) for the improvement of the education profession; (b) shall adopt rules to carry out the purposes of this chapter; (c) shall establish procedures for receiving and acting upon charges and recommendations regarding immoral, unprofessional, or incompetent conduct, for duty, or other violations of standards of ethical conduct, performance, and professional competence; (d) shall establish the manner in which hearings are conducted and reported, and recommendations are submitted to the State Board of Education for its action; (e) may: (i) warn or reprimand a certificate holder; (ii) recommend that the State Board of Education revoke or suspend a certificate, or restrict or prohibit recertification; (iii) enter into a written agreement requiring a current or former educator who has been the subject of a commission action to demonstrate to the satisfaction of the commission that the individual is rehabilitated and will conform to standards of professional performance, competence, and ethical conduct; or (iv) take other appropriate action; (f) may administer oaths, issue subpoenas, and make investigations relating to any matter before the commission; and (g) where reasonable cause exists, may initiate a criminal background check on a certificate holder: (i) the certificate holder shall receive written notice if a fingerprint check is requested as a part of the check; (ii) fingerprints of the individual shall be taken, and the Law Enforcement and Technical Services Division of the Department of Public Safety shall release the individual's full record, as shown on state, regional, and national records, to the commission; and (iii) the commission shall pay the cost of the background check except as provided under Section 53-6-103, and the moneys collected shall be credited to the Law Enforcement and Technical Services Division to offset its expenses.

Utah Code Ann. § 53A-7-202 (1998)

- (1) No civil action by or on behalf of a student relating to the professional competence or performance of a certified employee of a school district . . . or a violation of ethical conduct by an employee of a school district may be brought in a court until at least 60 days after the filing of a written complaint with the board of education of the district, or until findings have been issued by the board after a fair hearing on the complaint, whichever is sooner.

- (2) Within 15 days of receiving a complaint under Subsection (1), a local school board may elect to refer the complaint to the State Board of Education.
- (3) If a complaint is referred to the State Board of Education, no civil action may be brought in a court on matters relating to the complaint until the State Board of Education has held a hearing and issued its findings or until 90 days after the filing of the complaint with the local school board, whichever is sooner.

Utah Code Ann. § 58-61-201 (1998)

Board. (1) There is created the Psychologist Board consisting of four licensed psychologists and one member from the general public. (2) The board shall be appointed, serve terms, and be compensated in accordance with Section 58-1-201. (3) The duties and responsibilities of the board are in accordance with Sections 58-1-202 and 58-1-203. In addition, the board shall: (a) designate one of its members on a permanent or rotating basis to assist the division in review of complaints concerning unlawful or unprofessional practice by a licensee in the profession regulated by the board and to advise the division regarding the conduct of investigations of the complaints; and (b) disqualify any member from acting as presiding officer in any administrative procedure in which that member has reviewed the complaint or advised the division.

Utah Code Ann. § 58-61-301 (1998)

A license is required to engage in the practice of psychology, except as specifically provided in Section 58-1-307.

Utah Code Ann. § 58-61-501 (1998)

Unlawful conduct. As used in this chapter, "unlawful conduct" includes: (1) practice of psychology unless licensed under this chapter or exempted from licensure under this title; (2) practice of mental health therapy by a licensed psychologist who has not acceptably documented to the division his completion of the supervised training in psychotherapy required under Subsection 58-61-304(1)(f); or (3) representing oneself as or using the title of psychologist unless currently licensed under this chapter.

Utah Code Ann. § 58-61-503 (1998)

Penalty for unlawful conduct. An individual who commits any act of unlawful conduct as defined in: (1) Subsection 58-61-501(1) or (2) is guilty of a third degree felony; or (2) Subsection 58-61-501(3) is guilty of a class A misdemeanor.

Utah Code Ann. § 58-61-307 (1998)

Except as otherwise provided by statute or rule, the following persons may engage in the practice of their occupation or profession, subject to the stated circumstances and limitations, without being licensed under this title: . . . (f) an individual licensed under the laws of this state, other than under this title, to practice or engage in an occupation or profession, while engaged in the lawful, professional, and competent practice of that occupation or profession.

Utah Code Ann. § 78-33-1 (2001)

The district courts within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment is prayed for. The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree.

Utah Code Ann. § 78-33-6 (2001)

The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

VIII. STATEMENT OF CASE

A. Nature of the Case, Course of Proceedings and Disposition in the Trial Court

This case involves a group of students, parents and other members of the Nebo

School District community (the “Nebo citizens”) who were upset by the alleged failure of state administrative agencies and officials “to interpret, enforce or follow state laws . . . that govern teachers’ conduct.” (R. 83) The Nebo citizens commenced this civil action against the State Office of Education; the Division of Occupational and Professional Licensing and its director, Craig Jackson; the Utah Attorney General; and the teacher whose conduct they claimed violated the law, Wendy Weaver. (R. 43-84)

As reviewed by the trial court, the First Amended Complaint (the “Complaint”) included nine claims, in which the Nebo citizens sought “declaratory relief clarifying that state law and, in some instances, an award of nominal damages under the Utah Constitution.”¹ (R. 83) The claims can be summarized as follows:

Count I sought a declaration that (1) Weaver’s alleged administration of personality tests to Kacey Blunck and Abbey Llewellyn without prior parental permission, (2) Weaver’s alleged “requiring the disclosure of personal dreams and interpreting the same in psychology class without prior disclosure to the parents and without their written permission,” and (3) Weaver’s alleged pressuring of Joshua Lee to disclose “familial, religious and [anti-gay] sexual attitudes in class” without prior disclosure to and written permission from his parents, violated the Utah Family Educational Rights and Privacy Act, Utah Code Ann. § 53A-13-301 *et seq.*, which

¹ The First Amended Complaint included ten counts. Before argument on the motions, Plaintiffs withdrew Count VI. (R. 590, 630)

prohibits administration of “psychological tests” designed to reveal the “sexual behavior, orientation or attitudes” of the student, or the student’s “critical appraisals of individuals” within the student’s family. (R. 59-60; *see also* App. Br. pp. 35-36)

Count II sought a declaration that (1) Weaver’s alleged administration and interpretation of purported personality tests to Kacey Blunck and Abbey Llewellyn, and the MMPI to Molly Llewellyn, and (2) “soliciting dreams from students and interpreting the same,” violated the Psychologist Licensing Act, Utah Code Ann. § 58-62-101 *et seq.*, which prohibits the practice of psychiatry or psychology without a license. (R. 58-59; *see also* App. Br. pp. 34-35)

In Count III, Karl and Karen Blunck sought a declaration that the alleged statutory violations in Counts I and II also constituted violations of their family privacy and parental autonomy rights protected by Sections 7 and 25, respectively, of Article I, Constitution of Utah. They sought an award of nominal damages. (R. 57; *see also* App. Br. pp. 27-33)

Count IV sought a declaration that Weaver’s alleged comments about religious matters and alleged pressuring of Joshua Lee “to express his religious and moral perspective in a hostile class environment when he did not want to” violated the Utah Recognizing Constitutional Freedoms in School Act, Utah Code Ann. § 53A-13-101, *et seq.*, and associated regulations, which prohibit school officials and employees from

using “their positions to endorse, promote, or disparage a particular religious, denominational, sectarian, agnostic, or atheistic belief or viewpoint.” (R. 55-56)

Count V sought a declaration that Weaver’s allegedly stating her opinion concerning certain religious matters, and allowing others to do the same, violated rights of religious conscience and exercise protected by Article I, § 4 and Article III, §§ 1 and 4 of the Constitution of Utah, and regulations promulgated thereunder. It sought nominal damages on behalf of Joshua Lee. (R. 54-55)

Count VII sought a declaration that allowing Weaver access to the girls’ locker room violates the Utah Constitution’s guarantee of equal protection of the laws and warrants an award of nominal damages to Jeana Barney. (R. 49-51)

Count VIII sought a declaration that the statutory and constitutional violations alleged in prior counts and the fact that Weaver “has stated under oath that she is cohabiting in a marital-like, lesbian relationship” violate Weaver’s statutory duties “to serve as an example to her students of morality, obedience to law, and respect for parents and other relevant virtues” and not to support or encourage criminal conduct by teachers or students. (R. 46-49)

Count IX sought a declaration that Weaver’s private conduct (1) “cohabiting in a lesbian, marital-like relationship” — violates Utah Code Ann. § 53A-13-101(5)(a) because she “supports, or . . . encourages criminal conduct by students, teachers or volunteers,” and (2) disclosing her sexual orientation out-of-class in response to a

student's question, filing a federal court lawsuit following discipline subsequently imposed upon her by the school and the District, and the attendant publicity, violate Utah Code Ann. § 53A-13-101(5)(b), because Weaver purportedly "knew or should have known" that her speaking out "could result in a material and substantial interference or disruption of the normal activities of the school," and in fact did "result in a material and substantial disruption in the normal activities of the school." (R. 45-46)

Count X sought a declaration that Weaver's cohabitation with another woman in a "marital-like relationship" disqualifies Weaver under teacher certification requirements, Utah Admin. Code R277-514-1 B, because it purportedly evidences "an unfitness for duty through immoral, unprofessional, or incompetent conduct," or exhibits "immoral . . . behavior in conflict with generally and traditionally held community standards of morality." (R. 43-44)

The Nebo citizens moved for partial summary judgment and for leave to amend the Complaint. Weaver moved to dismiss the Complaint. The remaining Defendants moved for judgment on the pleadings. Following briefing and oral argument, the trial court, Judge Ray M. Harding, Jr., issued a 48-page ruling dated March 16, 1998. (R. 588-635) On November 30, 2000, the court entered an Order of Dismissal. (R. 656-658)

The trial court's ruling can be summarized as follows:

(1) Counts V and VII of the Complaint stated a cause of action upon which relief can be granted, except Count VII of the Complaint failed to state a cause of action upon which relief can be granted with respect to the

equal protection claim because it failed to identify any specific statute or policy that allegedly violated equal protection. (R. 634) Weaver’s Motion to Dismiss Counts V and VII was otherwise denied. (R. 590, 634)

(2) Counts I, II, IV, VIII, IX and X of the Complaint (the “statutory claims”) failed to state a cause of action upon which relief can be granted, and Weaver’s Motion to Dismiss those Counts was granted, because “Plaintiffs have failed to establish each requirement for a declaratory judgment with respect to the statutory claims as pled.” (R. 590, 612, 634) With respect to Count II, the court added that “it is the decision of the Division of Occupational and Professional Licensing, not this Court, that determines whether a person has violated the Psychologist Licensing Act.” (R. 633)

(3) Count III of the Complaint failed to state a cause of action upon which relief can be granted, and Weaver’s Motion to Dismiss that Count was granted, because it seeks “to impermissibly expand the Utah Constitution to require parental consent for constitutionally unprotected interferences with their parental prerogatives.” (R. 633)

(4) Certain Plaintiffs – parents without children attending Spanish Fork High School and grandparents of children attending Spanish Fork High School – lacked standing to pursue their claims.² (R. 589, 633)

(5) Certain Defendants – the Attorney General and the Utah Department of Occupational and Professional Licensing – did not have the requisite adverse interest vis-à-vis Plaintiffs.³ (R. 589, 632-33)

(6) Plaintiffs were granted leave to amend the Complaint, Plaintiffs’ motion for partial summary judgment was denied as moot, and the remaining Defendants’ motion for judgment on the pleading was denied as untimely. (R. 589, 632)

² Only one of those Plaintiffs, William Miller, is a party to this appeal in his capacity as a taxpayer in the school district where Weaver teaches. *See* App. Br. p. 7.

³ Appellants state they “are not pursuing appeals against the named government officials or entities named in the trial court action.” *See* App. Br. p. 1.

Following the trial court's ruling, the Nebo citizens voluntarily dismissed Counts V and VII – the only two counts the trial court found to state a claim.⁴ (R. 657) They also decided not to pursue an amended complaint; instead, they sought a ruling that leave to file a proffered Second Amended Complaint would not be granted “on grounds of futility.” (R. 656) The trial court declined to enter such a ruling. (*Id.*) This appeal ensued.

B. Statement of Facts

Because this appeal comes before this Court for review of the trial court's ruling granting Weaver's Motion to Dismiss, Weaver recognizes that this Court must accept the well-pleaded factual allegations in the Complaint relating to the relevant claims as true. *Hall v. Utah State Dep't of Corrections*, 2001 UT 34, ¶¶ 3, 11; 24 P.3d 958 (2001). Weaver objects to the Nebo citizens' Statement of Facts, however, to the extent it seeks to focus on allegations that are not relevant or material to the issues on appeal and to the extent it consists of allegations beyond those set forth in the Complaint.

Section B.1 of the Statement of Facts goes entirely to the substance of the Nebo citizens' claims: whether Weaver's conduct, as alleged in the Complaint, violates “mandatory laws of the State of Utah” governing teachers. App. Br. p. 10. As set forth in

⁴ Although Appellants seem to believe otherwise, or at least are unclear about which specific claims they seek to pursue on appeal, their decision voluntarily to dismiss these two Counts means they cannot pursue them on appeal. See *Little v. Mitchell*, 604 P.2d 918, 918-19 (Utah 1979) (“the trial court denied the defendant's motion to dismiss, thus leaving the parties in court, and there was, therefore, in fact no final judgment”).

the Argument below, that question was not before the trial court, and is not currently before this Court. The only question before this Court is the threshold question of whether the Nebo citizens' claims that Weaver violated "mandatory laws of the State of Utah" governing teachers, even if all the factual allegations underlying them are true, are justiciable as against Weaver. Weaver's legal contention that she has not in fact violated any laws governing teachers is immaterial to the resolution of that threshold question, and the substantive dispute about whether Weaver's conduct violates state law is not before the Court.

Similarly, Section B.2 of the Statement of Facts comprises a discussion of a 1977 Washington case upholding the firing of a teacher based on his admission that he was gay and the concern that allowing "an overt homosexual" to teach school would generate "fear, confusion, suspicion, parental concern and pressure on the administration by students, parents, and other teachers." *See* App. Br. pp. 11-13, quoting *Gaylord v. Tacoma Washington Sch. Dist. No. 10*, 559 P.2d 1340, 1342, 1344-45 (Wash. 1997). For present purposes, Weaver does not dispute, and there is no suggestion in the trial court's ruling that it "failed to take into account," the allegation that Weaver is "cohabiting in a marital-like lesbian relationship." App. Br. at 11. To the contrary, the trial court acknowledged that, for purposes of her motion, Weaver "admits the facts alleged in the complaint but challenges the plaintiff's right to relief based on those facts," including specifically the fact that she "publicly announced that she was living in a marital type

relationship with another woman.” (R. 629) Whatever relevance that fact may have to the substance of the Nebo citizens’ statutory claims – that Weaver is therefore unfit to be a teacher – the substance of those claims is not before this Court.

While the question of whether gay and lesbian public school teachers who choose to live their personal lives honestly and openly are categorically unfit to be teachers is not before this Court, Weaver cannot leave unaddressed the inferences raised by the Nebo citizens’ improper attempts to focus on that question. In the 25 years since the Washington case on which the Nebo citizens rely, our society and our law have evolved to the point that the kinds of views reflected in the Washington court’s opinion are no longer determinative of one’s ability to teach and serve as an appropriate role model. The following ruling, made in the context of Ms. Weaver’s federal court challenge to discipline that stopped short of the punishment the Nebo citizens seek to impose upon her, reflects the current state of the law in this respect:

The "negative reaction" some members of the community may have to homosexuals is not a proper basis for discriminating against them. So reasoned the Supreme Court in the context of race. *See, e.g., Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (declaring that racial school segregation is unconstitutional despite the widespread acceptance of the practice in the community and in the country). If the community's perception is based on nothing more than unsupported assumptions, outdated stereotypes, and animosity, it is necessarily irrational and under *Romer* and other Supreme Court precedent, it provides no legitimate support for the School District's decisions. *See also Jantz v. Muci*, 759 F. Supp. 1543, 1548-49, 1551 (D. Kan. 1991) (describing discrimination, prejudice, and stereotypes that haunt homosexuals and finding that a principal's refusal to hire a teacher on the basis of the teacher's sexual

orientation was an arbitrary and capricious action that violated the Equal Protection Clause), *rev'd on other grounds*, 976 F.2d 623 (10th Cir. 1992).

* * *

Although the Constitution cannot control prejudices, neither this court nor any other court should, directly or indirectly, legitimize them. *See City of Cleburne*, 473 U.S. at 448; *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). Indeed, as the Supreme Court has recently admonished, “[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” *Romer*, 517 U.S. at 634 (quoting *Moreno*, 413 U.S. at 534). Nor can public officials avoid their constitutional duty by “bowing to the hypothetical effects of private ... prejudice that they assume to be both widely and deeply held.” *Palmore*, 466 U.S. at 433 (quotation omitted). Simply put, the private antipathy of some members of a community cannot validate state discrimination. *See City of Cleburne*, 473 U.S. at 448. Because a community's animus towards homosexuals can never serve as a legitimate basis for state action, the defendants' actions based on that animus violate the Equal Protection Clause. *See Romer*, 517 U.S. at 634; *City of Cleburne*, 473 U.S. at 448-50; *Stemler*, 126 F.3d at 874.

Weaver v. Nebo Sch. Dist., 29 F. Supp. 2d 1279, 1288-89 (D. Utah 1998); *see also Glover v. Williamsburg Local Sch. Dist.*, 20 F. Supp. 2d 1160, 1169, 1172 (S.D. Ohio 1998)

(Under fundamental Equal Protection Clause principles, “a desire to effectuate one’s animus against homosexuals can never be a legitimate governmental purpose”). Thus, to the extent the Nebo citizens rely on a 25-year-old Washington case to suggest Weaver can be fired because she is an “out” lesbian, they ignore important developments in the law that prohibit state actors from taking such actions.

Finally, Section B.3 of the Statement of Facts comprises certain allegations the Nebo citizens say relate to Weaver’s claimed violation of Utah Code Ann. § 53A-13-101(5)(b) (purporting to restrict teachers’ speech “outside of their official capacities” if their speech causes “a material and substantial disruption in the normal activities of the school”). (See App. Br. pp. 13-17) Those allegations do not appear anywhere in the Complaint that is the subject of this appeal; they appear only in the Second Amended Complaint. The Nebo citizens elected not to pursue that complaint, notwithstanding the fact that the trial court granted them leave to amend. (See App. Br. p. 13, R. 591-92, 656-57) Therefore, the trial court did not rule on the sufficiency of the allegations in the Second Amended Complaint, there is no “final judgment” on that complaint, and the allegations in that complaint cannot properly be considered in this Court’s determination of whether the trial court erred in dismissing the First Amended Complaint. See *Williams v. State*, 716 P.2d 806, 808 (Utah 1986) (plaintiff given leave to amend by the trial court can either waive his right to amend the complaint and appeal the order dismissing the complaint as final, or pursue an amended complaint indicating he did not intend to treat dismissal as final, but he can’t do both).⁵

⁵ Moreover, the facts alleged in the Second Amended Complaint go entirely to whether Weaver’s out-of-classroom speech caused material and substantial disruption at Spanish Fork High School, again an issue not before this Court. It is worth noting, however, that a federal court held Weaver’s out-of-classroom speech was protected under the First Amendment. *Weaver v. Nebo*, 29 F. Supp. 2d at 1285 (ruling that “inquiries and complaints” the Nebo School District received about Weaver’s sexual orientation failed to constitute material and substantial disruption; indeed, “one of the duties a school

In addition to the foregoing, Weaver refers the Court to the following material facts pertaining to the procedural history of this matter.

1. On November 12, 1997, Joshua Lee complained to the school district concerning Weaver. (R. 81, Complaint ¶ 4(i)) The Complaint does not disclose the contents of the complaint or whether that complaint was in writing.

2. On December 16, 1997, the Board of Trustees of plaintiff Citizens for Moral and Legal Values (not an Appellant here) forwarded to counsel for the Nebo School District a request for (unspecified) action concerning Weaver within a time-frame not set forth in the Complaint. (R. 81, Complaint ¶ 4(ii)) The Complaint does not disclose whether that request was in writing or specifically what it was the District was asked to do.

3. That same day, counsel for the local school district informed plaintiffs, through counsel, that the school district would not act within the time-frame requested. (R. 81, Complaint ¶ 4(iii))

4. On December 23, 1997, plaintiffs filed their Complaint and the accompanying Affidavits. (R. 81, Complaint ¶ 4(iv).)

administrator undertakes is the handling of student, faculty, parent, and community complaints”).

5. At or before a school board meeting on January 14, 1998, counsel for plaintiffs delivered a copy of the Complaint and the Affidavits to counsel for Defendant Utah State Board of Education. (R. 80-81, Complaint ¶ 4(v).)

6. On February 19, 1998, plaintiffs filed a First Amended Complaint in the action originally filed on December 23, 1997. (R. 80, Complaint ¶ 4(vi).)

7. On or about May 26, 1998, plaintiffs initiated a second lawsuit (this case), which alleges essentially the same matters set forth in the lawsuit filed on December 23, 1997. (R. 80, Complaint ¶ 4(vii))

8. On June 11, 1998, plaintiffs filed the First Amended Complaint in this case, a motion to consolidate the two cases, and a motion for leave to file a Second Amended Complaint. (R. 43, 80)

9. The Complaint alleged that “no notice for any hearing regarding Defendant Wendy Weaver has been issued or has any hearing been conducted by the school district or Defendant Board of Education since the written petitions, letters, and documented complaints have been submitted by the Plaintiffs.” (R. 80, Complaint ¶ 4(ix))

10. The Complaint alleged that DOPL “has taken no action regarding the conduct of Defendant Weaver under any statutes addressing licensure and the practice of psychology,” “[d]espite having received the Complaint and affidavits” (R. 73-74, Complaint ¶ 15).

IX. SUMMARY OF ARGUMENT

In a painstakingly thorough decision, the trial court laid out the appropriate legal standards applicable to requests for declaratory relief and then carefully applied those standards to the Nebo citizens' various claims. The trial court concluded the statutory claims failed to satisfy the necessary requirements for a declaratory judgment. The trial court also concluded Count III of the Complaint failed to state a constitutional claim based on statutory violations alleged in Counts I and II. Those rulings are correct and should be affirmed, for a number of reasons.

First, the claims the Nebo citizens attempt to state in Counts I, II, IV, VIII, IX and X (the "statutory claims") are non-justiciable. Under the political question doctrine, which this Court has fully embraced, the courts refrain from interfering with coordinate branches of government or telling them how they must carry out their duties. They do so because they lack the specialized processes and standards with which to fairly analyze and resolve what are inherently fact-intensive situations requiring a large degree of discretion. The trial court correctly concluded that entertaining the Nebo citizens' request to declare that Weaver violated professional standards would usurp the authority and discretion the Legislature has vested in other state agencies and officials and risk multifarious pronouncements by different branches of the government. It also correctly concluded that the courts' proper role is limited to considering a request for mandamus against the state agencies and officials ordering them to comply with their own mandatory

procedures – something the Nebo citizens pointedly do not request. *See* Argument Section A.1, *infra*.

Second, the Nebo citizens’ statutory claims improperly seek this Court’s advisory opinion in the absence of any adverse interests between them and Weaver. In Counts I, II and IV, the Nebo citizens seek declarations that, even if made, would have virtually no practical effect. In Counts VIII, IX and X the Nebo citizens essentially claim Weaver is in violation of criminal laws and ask this Court, in this civil case, to conclude by a preponderance of the evidence that Weaver has engaged in criminal behavior and she should therefore be disqualified from teaching. The advice and findings plaintiffs seek would be advisory at best. *See* Argument Section A.2, *infra*.

Third, the statutes on which the Nebo citizens rely do not create any express or implied private right of action against schoolteachers. The fact that, after the lawsuit was filed and the trial court’s decision was rendered a new statute took effect purporting to grant parents standing to sue employees of a school attended by their children is irrelevant for purposes of this appeal, because that new statute does not and cannot retroactively create a cause of action where none existed at the time of filing. *See* Argument Section A.3, *infra*.

Fourth, the Nebo citizens lack standing to pursue their statutory claims against Weaver. Taxpayer standing is of no use, because the taxing and spending entities are not parties to this case. The Nebo citizens do not allege facts that meet the well-established

standing requirements of showing a “personal stake” in the controversy and a “causal relationship” between their status, Weaver’s alleged conduct and the relief they seek. Nor can it be said that “matters of great public interest and societal impact are concerned” in this action, which centers on the alleged conduct of a single teacher that, for the most part, occurred many years ago and is limited to plaintiffs’ particular claims. *See* Argument Section A.4, *infra*.

Fifth, Utah laws and regulations governing the conduct of teachers and the conduct of professionals impose certain requirements as to the appropriate procedures for making claims such as those the Nebo citizens purport to state. The trial court correctly concluded either the Nebo citizens failed to properly exhaust mandatory administrative remedies, in which case their claims are not ripe, or the administrative agencies with proper jurisdiction to enforce the laws and regulations (DOPL and the local School Board) have in fact taken action in connection with concerns raised by plaintiffs, and the Nebo citizens are in no position to challenge the actions taken. *See* Argument Section A.5, *infra*.

Finally, the trial court properly dismissed the Nebo citizens’ attempt in Count III to elevate alleged statutory violations to the level of violations of constitutional rights. Even if the facts alleged with regard to Counts I and II are sufficient to make out a prima facie case that Weaver violated state laws governing teachers and the practice of psychology, they do not state any cognizable constitutional claim. *See* Argument Section B, *infra*.

X. ARGUMENT

A. The Trial Court Correctly Ruled the Nebo Citizens' Statutory Claims Fail to State a Claim Because They Do Not Meet Mandatory Requirements for Declaratory Relief

In their Complaint, the Nebo citizens seek declaratory relief under Utah Code Ann. § 78-33-1 *et seq.* and Rule 57, Utah Rules of Civil Procedure. This Court has held “four requirements must be satisfied before the trial court can proceed in an action for declaratory judgment: ‘(1) there must be a justiciable controversy; (2) the interests of the parties must be adverse; (3) the parties seeking relief must have a legally protectible interest in the controversy; and (4) the issues between the parties must be ripe for judicial determination.’” *Jenkins v. Swan*, 675 P.2d 1145, 1148 (Utah 1983); *see also Salt Lake County v. Bangerter*, 928 P.2d 384 (Utah 1996); *Strawberry Elec. Serv. Dist. v. Spanish Fork City*, 918 P.2d 870 (Utah 1996); *Barnard v. Utah State Bar*, 857 P.2d 917 (Utah 1993); *Boyle v. National Union Fire Ins. Co.*, 866 P.2d 595 (Utah Ct. App. 1993). If a claim fails to meet any one of these requirements, it must be dismissed as a matter of law. *Boyle v. Nat’l Union Fire Ins. Co.*, 866 P.2d 595, 598 (Utah Ct. App. 1993). The Nebo citizens’ statutory claims fail to meet any of these requirements, and the trial court correctly dismissed them.

1. The Trial Court Correctly Ruled The Nebo Citizens' Statutory Claims Are Not Justiciable.

A justiciable controversy – one that involves an actual, present and existing dispute as to which a judicial determination will have the effect of a final judgment upon the rights of real parties in interest – is fundamental to the sufficiency of a pleading. *See Baird v. State*, 574 P.2d 713, 715-16 (Utah 1978). Non-justiciable claims include those that seek to involve the courts in political and administrative questions, the resolution of which would impinge on the power and discretion lawfully vested in another branch of government. *See, e.g., Williams v. University of Utah*, 626 P.2d 500 (Utah 1981); *Miles v. Idaho Power Co.*, 778 P.2d 757 (Idaho 1989); *Lee v. State*, 635 P.2d 1282 (Mont.), *cert. denied*, 456 U.S. 1006 (1981).

In the Complaint, the Nebo citizens did not seek an order of the court requiring state agencies or officials to comply with state law; instead, they sought “declaratory relief clarifying that state law.” (R. 83) On appeal, they continue to insist they are not seeking mandamus, only “clarification of the legal obligations of the Appellee under laws Appellants understood were mandatory” and “judicial redress defining the parameters of mandatory law that governs all those who serve as public school teachers.”⁶

⁶ For the first time on appeal, the Nebo citizens purport to seek a more specific ruling, to the effect they “have pled sufficient facts regarding [Weaver’s] conduct in a public school classroom to (1) establish a prima facie violation” of various state statutes “and (2) serve as a basis for declaratory and injunctive relief that funds spent for the salary of Appellee and use of the physical plant when such conduct occurred or occurs are illegally spent.” (See App. Br. pp. 36, 37, 40, 41-42, and 43-44) The Nebo citizens did

(See App. Br. pp. 5, 33) Those claims for relief are plainly non-justiciable under the above well-established standards.

Carefully applying the justiciability standards set forth in *Skokos v. Corradini*, 900 P.2d 539, 541 (Utah Ct. App. 1995), the trial court concluded the Nebo citizens' statutory claims raise exactly the types of questions that are not only entrusted to but strictly within the competence of coordinate branches of government:

The substance of the statutory claims allege violations of educational policies or conduct that precluded Defendant Weaver from fulfilling her certification requirements. . . . Indeed, Counts VIII, IX and X of the Complaint directly ask this Court to decree that Defendant Weaver is no longer fit to teach. Plaintiffs attack the appropriateness of allowing Defendant Weaver to continue as a certified public school teacher rather than pleading that the Board has failed to follow proper procedure in investigating or disciplining Defendant Weaver. . . . In similar fashion, the discretionary authority over Count II of the Complaint has also been statutorily delegated to another coordinate branch of government. . . . A request to compel the requisite administrative bodies to comply with mandatory disciplinary procedures is the only action this Court can appropriately take against the Board in regard to teacher certification.

(R. 622-23)

not seek the declaratory relief they now request with respect to the expenditure of public funds, and they did not seek injunctive relief at all, in the Complaint. To the extent such relief was sought, it was sought in the Second Amended Complaint, which the Nebo citizens elected not to pursue. Therefore, the request for declaratory and injunctive relief with respect to the expenditure of public funds, and any request "if needs be to preserve jurisdiction under Article I § 11 [to] issue an injunction to compel performance of mandatory law" (see App. Br. p. 33), is not properly before this Court. Accordingly, the following discussion focuses on the only issue before this Court on the statutory claims: whether the Nebo citizens' claims that Weaver violated certain state statutes meet the requirements for the declaratory relief sought in the Complaint.

The trial court saw that, under the guise of claims for declaratory relief, the Nebo citizens are essentially asking the courts to assume and discharge administrative and prosecutorial duties the Legislature has vested in other state agencies and officials. It correctly concluded each of those duties involves a specialized function and a broad discretion the courts simply are not equipped or authorized to exercise.

As the trial court noted, the Legislature has adopted a comprehensive statutory scheme charging responsible state agencies and officials with the primary responsibility for receiving, investigating, adjudicating and taking action on the very types of allegations the Nebo citizens make in this case. Utah law vests power in the State Board of Education to set “standards of professional performance, competence, and ethical conduct for persons holding certificates issued by the board”; to establish “procedures for receiving and acting upon charges . . . regarding immoral [and] unprofessional conduct”; and to “take appropriate action against any person who is . . . the holder of a certificate issued by the board, and who is found . . . to have exhibited behavior evidencing unfitness for duty through immoral and unprofessional conduct.” (R. 624-25, citing Utah Code Ann. §§ 53A-6-301(1)(a) and 53A-7-110(1)(a)(I) and (c)). Similarly, Utah law vests power in the Division of Occupational and Professional Licensing and the Attorney General to investigate claims of practicing psychology without a license and to discipline

or prosecute violators.⁷ (R. 623, citing Utah Code Ann. §§ 58-61-201(3), -501 and -503(1)).

Given this complete vesting of discretionary authority in a coordinate branch of state government, it is utterly improper for the Nebo citizens to seek to circumvent administrative mechanisms established for investigating complaints about teachers and ask the courts directly to make findings that Weaver (1) has not met the minimum standards for public schools, (2) has not satisfied the standards for qualification and certification of educators, (3) is in violation of the state or federal Family Educational Rights and Privacy Act, and (4) has “support[ed] or encourage[d] criminal conduct by students, teachers, or volunteers” in violation of Curriculum in the Public Schools Act. As the trial court concluded, to entertain such a request and make such findings “would

⁷ The Psychologists Licensing Act, Utah Code Ann. § 58-61-101 *et seq.*, provides that there “is created the Psychologist Board consisting of four licensed psychologists and one member from the general public.” *Id.* § 58-61-201. The legislatively created Board is established to review complaints concerning unlawful or unprofessional practices. Unlawful conduct includes “practic[ing] psychology unless licensed under this [Act].” *Id.* § 58-61-501. . . . That Act provides criminal penalties for violation of the licensing requirements. *Id.* § 58-61-503. There is an exemption under the Act for those, such as teachers, who are licensed to engage in an occupation or profession “while engaged in the lawful, professional, and competent practice of that occupation or profession.” *See* Utah Code Ann. § 58-1-307(1)(f). The Nebo citizens baldly assert Weaver is not entitled to this exemption, but that position is obviously entirely derivative of their broader assertion that Weaver has violated some other requirement for the “lawful, professional, and competent” practice of her profession as a teacher.

require the Court to make determinations that fall squarely within the discretion of the Board.” (R. 622-23)

For the same reasons, it is improper for the Nebo citizens to ask the civil courts directly to determine that Weaver is guilty of the crime of practicing psychology without a license. As the trial court noted, The DOPL and the Attorney General are uniquely qualified to deal with the myriad fact-specific situations that can arise on the edges of “practicing psychology without a license” and to decide whether and how to punish and prosecute any violations. (R. 621-22, citing *Ambus v. Utah State Board of Educ.*, 858 P.2d 1372, 1378-79 (Utah 1993)) The trial court properly declined to issue a “declaration” that would dictate to DOPL some substantive conclusion on whether Weaver’s administration of tests as a teaching exercise violated the statute, or that would dictate to the Attorney General what is essentially a criminal conviction. *See Nielson v. Division of Peace Officer Standards and Training (POST), Department of Public Safety*, 851 P.2d 1201, 1204 (Utah Ct. App. 1993) (all plaintiffs can do is request that agency conduct investigation; they cannot ask court to second-guess agency’s conclusion).

In their brief, the Nebo citizens never address, let alone analyze, the trial court’s reasoning behind these straightforward and sensible conclusions. Instead, they attempt to dismiss what they call “fears that adjudication should be deferred to another branch of government” with a bare recitation of the justiciability standards and brief, unsupported assertions that their claims are justiciable. (*See App. Br. pp. 18-20.*) They do not even

cite, discuss or attempt to distinguish the case law on which Weaver relied. It is difficult even to respond to such a failure to join issue on relevant principles.

Fortunately, the trial court's powerful reasoning, which stands totally un rebutted, provides overwhelming support for the conclusion the Nebo citizens' statutory claims are non-justiciable, and therefore fail to meet the first requirement for the declaratory relief the Nebo citizens seek. As the trial court plainly understood, the Nebo citizens are basically asking the courts to determine whether Weaver is a moral person fit to serve as a role model for students. One can concede Weaver does not conform to the Nebo citizens' ideal, because she is a member of a minority they obviously despise. But the governmental authorities charged with assessing and in the best position to assess Weaver's fitness to teach have determined she should be allowed to continue to teach. A federal judge determined that even the limited discipline the school district imposed violated *Weaver's* constitutional rights. *Weaver v. Nebo*, 29 F. Supp. 2d at 1289-90 ("The defendants have failed to advance any justification for not assigning Ms. Weaver as volleyball coach than that there was 'negative' reaction in the community," and threats to discipline her for "discussing her intimate associations and sexual orientation" outside of class lacked any rational basis, let alone compelling state interest). The Nebo citizens' efforts to get this Court to declare otherwise should be rejected.

2. Although The Trial Court Did Not Directly Rule On The Issue, It Is Clear The Interests Of The Parties To This Appeal Are Not “Adverse” *Vis-à-Vis* The Statutory Claims.

The second requirement for declaratory relief is the interests of the parties must be adverse. Utah courts have long held that “the Declaratory Judgment Act is not designed for giving advisory opinions in a non-adversary action.” *Blackmun v. Salt Lake City*, 375 P.2d 756, 759 (Utah 1962) (citing *Lyon v. Bateman*, 228 P.2d 818 (1951)); *see also* *Concerned Parents of Stepchildren v. Mitchell*, 645 P.2d 629, 636-37 (Utah 1982) (“it is a long-established principle that neither an action for injunction nor a declaratory judgment may be used to vindicate an abstract principle of justice, or to determine a dispute in which neither a benefit may be gained nor an injury suffered”). As the trial court stated: “An ‘adverse interest’ is some ‘legal right or liability [that] will be acquired, lost, or materially affected by the judgment.’” (R. 620, quoting BLACK’S LAW DICTIONARY 53 (6th ed. 1990)) The purpose of this important requirement is to “prevent the judiciary from becoming ‘a forum for hearing academic contentions[,] rendering advisory opinions,’ or adjudicating false conflicts.” (R. 620, quoting *Salt Lake County v. Bangerter*, 928 P.2d 384, 385 (Utah 1996), and citing *Lyon v. Bateman*, 228 P.2d at 820)

The trial court did not directly rule on whether the Nebo citizens’ interests were “adverse” to Weaver’s with respect to the statutory claims, but the clear implication of the trial court’s ruling is that any such judgment would *not* be “adverse” to Weaver:

The statutory claims ask the Court to determine whether specific acts on the part of Defendant Weaver were unlawful and should be grounds to withdraw her certification as a teacher. Because the authority to make such a determination has been delegated to either the Board or the DOPL, a judgment rendered by this Court as to these claims would be *adverse to their discretionary power*. As a result, both the Board and the DOPL have a stake in the outcome of this case.

(R. 619) (emphasis added) Whether or not the trial court intended by this statement to rule that the statutory claims would not be adverse to Weaver, that is the correct conclusion, and it provides an additional reason the Nebo citizens' statutory claims do not satisfy the requirements for a declaratory judgment against Weaver.

Suppose the courts were to entertain jurisdiction and make the findings and the declarations the Nebo citizens request. The effect of those findings and declarations on Weaver would be virtually nil. As the trial court recognized, with regard to the statutory claims "the Plaintiffs do not seek injunctive relief or any damages, but instead a declaration of the law" that Weaver violated certain statutes. (R. 621) Nowhere do the Nebo citizens establish, or even assert, it is *per se* illegal to continue to employ a teacher who has been found to have violated one of the laws on which they rely. Therefore, even if such a declaration were issued, in order for it to have any meaningful legal effect on Weaver it would be necessary to "take appropriate action against any person who is . . . the holder of a certificate issued by the board, and who is found . . . to have exhibited behavior evidencing unfitness for duty through immoral and unprofessional conduct." See Utah Code Ann. §§ 53A-6-301(1)(a) and 53A-7-110(1)(a)(I) and (c).

The decision about what action to take, if any, is (like all the other matters concerning teacher discipline raised in the Complaint) ultimately up to the District – the entity that employs the teachers and expends the funds – which is not even before the Court. Even if, contrary to the trial court’s sound judgment, the courts were to undertake to exercise the discretion vested in the State Board of Education and the DOPL to determine what disciplinary action might be appropriate, the Nebo citizens did not ask the trial court, and do not ask this Court, to do so.

To put it differently, as the trial court observed, issuing the declarations the Nebo citizens seek risks multifarious and inconsistent pronouncements on whether Weaver is fit to teach. This highlights “the fact that as to the statutory claims the declaratory relief sought by the Plaintiffs may not resolve the controversies in question.” (R. 621-22) In short, the Nebo citizens’ request for declaratory relief against Weaver on the statutory claims presents the classic case of an “advisory opinion” lacking the necessary adverse interests between the parties, and the trial court wisely exercised its discretion in declining the Nebo citizens’ invitation to grant the declaratory relief they request. The Nebo citizens have utterly failed to meet their burden of establishing that the trial court’s ruling constituted an abuse of discretion, and for that reason alone this Court should affirm the trial court’s denial of declaratory relief on the statutory claims.

3. The Trial Court Correctly Ruled The Statutory Claims Fail To Establish a “Legally Protectible Interest” Because The Statutes on Which The Nebo Citizens Rely Do Not Create An Express Or Implied Private Right Of Action.

Just as the courts wisely impose jurisdictional requirements to avoid improperly interfering where they cannot provide an effective remedy, they refrain from creating a “legally protectible interest” in the form of a remedy where the Legislature has not done so, and generally will not create a private right of action under a statute where no such right is expressly stated. *See FMA Acceptance Corp. v. Leatherby Ins. Co.*, 594 P.2d 1332, 1335 (Utah 1979); *Milliner v. Elmer Fox & Co.*, 529 P.2d 806, 808 (Utah 1974).

In this case, the statutes under which the Nebo citizens purport to bring claims contain no express private right of action, and the trial court correctly ruled they cannot be read to create an implied right of action, either. “In fact, part of the specific statutory language relied upon by Plaintiffs for Counts IV, VIII, IX, X expressly states that it should not be construed to limit ‘the ability or authority of the Board and local school boards to enact and enforce or take actions that are otherwise lawful, regarding educators’ . . . qualifications or behavior evidencing unfitness for duty.’” (R. 616, quoting Utah Code Ann. § 53A-13-101(5)(e)) Similarly, “nowhere in Title 58 of the Utah Code does this Court find any statutory provision that would suggest the existence of a private right of action that would sustain Count II of the Complaint.” (R. 616) Finally, the trial court ruled that the statute on which the Nebo citizens principally rely, Utah Code Ann. § 53A-

7-202, does not create a cause of action for adjudicating claims of professional misconduct, but is simply a “mandatory staying provision.” (R. 617)

On appeal, the Nebo citizens effectively concede the correctness of the trial court’s rulings, including its interpretation of Section 53A-7-202. They now rely exclusively on new language in a different statute that they say provides “additional clarification” of their claimed private right of action, and assume without any argument it applies retroactively and thus allows them to proceed against Weaver. (*See App. Br. pp. 23-24*) The Nebo citizens are wrong.

The new statute on which the Nebo citizens rely purports only to grant parents “standing to file a civil action against an employee who provides services to a school attended by the student.” Utah Code Ann. § 53A-3-421(1)(c) (repealing and reenacting Section 53A-7-202). This new language does nothing to address the trial court’s conclusion that this statute does not create an independent cause of action, but merely sets forth a mandatory requirement of first adverting the school district to the claim and awaiting school district action or the expiration of the mandatory staying period before attempting to pursue such a cause of action in court. What was true under Section 53A-7-202 – that the right to bring tort or other justiciable claims “is neither enhanced nor diminished . . . but merely delayed as to when the claim may be brought before a court” (R. 617)--remains true under the new statute.

Assuming, without conceding, this new statute creates a direct cause of action against a teacher for claimed unprofessional conduct, it cannot be said to be a “clarification” of a previous statute that did not create such a cause of action, but rather constitutes a substantive addition. As such, it cannot be applied retroactively. Under Utah law, a statutory amendment does not apply retroactively unless either (1) the amendment itself expressly indicates that it applies retroactively, (2) the amendment is purely procedural, or (3) the amendment merely clarifies the law as it existed before the amendment. This Court has recognized “the general rule is that statutes are not applied retroactively unless retroactive application is expressly provided for by the legislature.” *Brown & Root Ind. Serv. V. Ind. Comm’n of Utah*, 947 P.2d 671, 675 (Utah 1997); *see* Utah Code Ann. § 68-3-3 (“No part of these revised statutes is retroactive, unless so declared”).

The exceptions to this rule are narrow. “[P]urely procedural” amendments may be applied retroactively, but only if they “do not enlarge, eliminate, or destroy vested or contractual rights.” *Brown & Root*, 947 P.2d at 675 (internal quotations omitted) (holding that amendments to workers’ compensation law did not apply retroactively because worker had vested right to indefinite medical coverage under previous law). An amendment that affects substantive rights does not apply retroactively. *Id.*⁸ *Similarly, an*

⁸ While the distinction between “substantive” and “procedural” effects is frequently used to torture law students, this Court has defined it in such a way as to facilitate straightforward application in this case. “Substantive law is defined as the

amendment does not simply “clarify the meaning of an earlier enactment” or constitute “merely an amplification as to how the law should have been understood prior to its enactment” if it operates in such a way as “to deprive a party of his rights, or impose greater liability upon him.” Rocky Mtn. Thrift Stores, Inc. v. Salt Lake City Corp., 784 P.2d 459, 461-62 (Utah 1989) (internal quotations omitted) (holding that an amendment to the Governmental Immunity Act was substantive and did not apply retroactively when it would give defendants greater immunity than they would otherwise have had).

The new statute on which the Nebo citizens rely does not expressly state that it is to apply retroactively. It clearly has substantive, as opposed to purely procedural, effect, since at the very least it expressly grants standing to parents for claims against teachers where no such express right previously existed.⁹ Most significantly, there is a

positive law which creates, defines and regulates the rights and duties of the parties and which may give rise to a cause of action. In contrast, procedural law merely pertains to and prescribes the practice and procedure or the legal machinery by which the substantive law is determined or made effective. Thus, statutory changes are purely procedural only where they provide a different mode or form of procedure for enforcing substantive rights.” *Id.* (internal quotations and citations omitted). *See also State v. Lusk*, 37 P.3d 1103, 1110 (Utah 2001) (holding that although statutes of limitations are procedural in nature, an amended statute of limitations for a criminal violation would not apply retrospectively if a claim was already barred by the previous statute of limitations at the time the amendment went into effect, because “a defendant has a vested right to rely on the limitations defense, which right cannot be rescinded by subsequent legislation extending a limitations period”).

⁹ Utah courts have not explicitly held that a statutory amendment that accords standing or a right to sue on a particular party is a substantive change for purposes of retroactive application. However, because such an amendment affects a defendant’s liability, and a plaintiff’s right to bring some claim, it is plainly substantive. *See State v. Schlosser*, 774

“presumption that a [statutory] amendment is intended to change existing legal rights.” *Madsen v. Borthnick*, 769 P.2d 245, 252 n.11 (Utah 1988) (citing 1A N. Singer, SUTHERLAND ON STATUTORY CONSTRUCTION § 22.30 (Sands 4th rev. ed. 1985)); *see also Olsen v. Samuel McIntyre Investment Co.*, 956 P.2d 257, 261 (Utah 1998) (stating “We also presume that when the legislature amends a statute, it intended the amendment to change existing legal rights” (internal quotations omitted), and holding that amendment to workers’ compensation notice requirements was substantive); *Wilde v. Wilde*, 35 P.3d 341 (Utah App. 2001) (“When the Legislature amends a statute, we presume it intended to make a substantive, rather than procedural or remedial change” for purposes of determining retroactive application) (holding that amendment to alimony statute was substantive). Accordingly, the Nebo citizens’ reliance on the new statute as a basis for pursuing claims against Weaver is misplaced.

4. The Nebo Citizens’ Allegations Do Not Establish The Requisite “Personal Stake,” “Causal Relationship” or “Public Interest.”

Although not technically bound by the constraints of Article III of the U.S. Constitution, Utah courts routinely impose standing requirements to insure against inappropriately intervening in cases that are not justiciable. *See Olson v. Salt Lake City School District*, 724 P.2d 960, 962 n.1 (Utah 1986) (court’s authority to grant standing is

P.2d 1132, 1138 (Utah 1989) (holding that the issue of standing for purposes of the Fourth Amendment standing doctrine was “a substantive doctrine that identifies those who may assert rights against unlawful searches and seizures” and so could not be raised for the first time on appeal).

“not unbounded” but must be carefully applied to avoid inappropriate judicial intervention). This requires, at a minimum, that plaintiffs demonstrate a “personal stake in the controversy and some causal relationship between the injury, the governmental actions, and the relief requested. . . .” *Archer v. Board of State Lands & Forestry*, 907 P.2d 1142, 1145 (Utah 1995); *Jenkins v. Swan*, 675 P.2d at 1150-51.¹⁰

Because it dismissed the statutory claims as non-justiciable, the trial court did not analyze whether each of the plaintiffs/Appellants had standing to pursue the statutory claims, and this Court need not do so. Nevertheless, because such analysis provides an alternative basis for affirming the trial court’s conclusion, and because the Nebo citizens

¹⁰ These requirements are virtually identical to those the federal courts have established:

At the outset, we note that in order to satisfy the Article III “case or controversy” requirement, the students and parents must allege that they have “such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues.” *Baker v. Carr*, 369 U.S. 186, 204, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962). Thus, standing has been held to exist only if the aggrieved party makes a two-fold showing. First, the plaintiffs must show that they have suffered a “distinct and palpable injury.” *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72, 57 L. Ed. 2d 595, 98 S. Ct. 2620 (1978). Second, the plaintiffs must demonstrate a causal link between the claimed injury and the challenged conduct. *Id.*

Roberts v. Madigan, 921 F.2d 1047, 1050-51 (10th Cir. 1990). Given these similarities, Utah courts often look to federal precedent when considering issues of justiciability, including standing.

continue to argue standing (*see* App. Br. pp. 21-22), Weaver provides the following analysis.

First, as the trial court observed, the gist of the Nebo citizens' statutory claims is "the requisite state authorities have not acted on their complaints concerning Defendant Weaver's conduct," and "such non-action is, de facto, a decision not to discipline." (R. 613-14) Assuming that is the case, "the Plaintiffs do not have the legal right to question it on direct appeal":

For any actions taken by the [State Board of Education], only parties bound by "an initial determination" rendered by that Board may seek its review by means of an "adjudicative proceeding." Utah Admin. Code R277-102-3(A) and R277-102-12(A)(1996). Similarly, only aggrieved parties subject to a "final agency action" by the DOPL "may obtain judicial review." Utah Code Ann. §§ 63-46b-1(1)(a) and 63-46b-14(1) (1998). The Plaintiffs cannot be parties to any final decision (express or implied, formal or informal) taken by the Board or the DOPL in regards to the alleged conduct of Defendant Weaver.

(R. 613)

On appeal, the Nebo citizens fail to address this conclusion. Instead, they insist they have "taxpayer standing." (App. Br. pp. 24-26)¹¹ Weaver does not dispute that the doctrine of taxpayer standing permits taxpayers "to prosecute an action *against municipalities and other political subdivisions of the state* for illegal expenditures."

¹¹ Although Appellants' Brief refers from time to time to Citizens for Moral and Legal Values, an organization that was named as a plaintiff in the Complaint, which the district court deemed to have associational standing, that plaintiff is not before this Court as an Appellant, and whether it has standing to pursue the statutory claims is therefore not at issue here.

Jenkins v. Swan, 675 P.2d at 1153 (emphasis added). That doctrine is irrelevant here, however, because the putative taxpayers are seeking only to prosecute an action against a teacher (not the Nebo School District, the relevant “political subdivision”) for a declaration that she violated state laws governing teachers (not for an injunction against the allegedly illegal expenditure of state funds). As the trial court observed:

In this case, there are no allegations which suggest the improper use of taxpayer monies. Plaintiffs merely claim that Defendant Weaver is an unfit teacher, and thereby infer[] that their tax money should not be spent to fund her salary. The Plaintiffs’ claims are not sufficient to grant them taxpayer standing. This is an area where the principle that generalized grievances are best addressed to another branch of government is most forcefully vindicated.

(R. 610)

In the specific context of suits by parents or students against teachers for allegedly improper conduct in the classroom, the courts have articulated a set of prudential standing principles. Those principles are more appropriately applied here than the doctrine of “taxpayer standing.” They require “(1) the plaintiff must assert his own legal rights; (2) the court must refrain from adjudicating ‘generalized grievances’ most appropriately addressed by one of the other branches of government; and (3) the plaintiff’s complaint must fall within the zone of interests to be protected by the particular constitutional [or statutory] guaranty invoked.” *Bell v. The Little Axe Independent School District No. 70*, 766 F.2d 1391, 1398 (10th Cir. 1985). This means students (and their parents or

guardians) only have standing to challenge practices in classrooms in which they actually participate. *See Roberts*, 921 F.2d at 1051.

The Nebo citizens utterly failed to show they meet these standing requirements. Instead, they aver only the most generalized interest “as taxpayers” in ensuring that tax monies are not spent “for illegal purposes.” (App. Br. pp. 24-26) None of the Nebo citizen Appellants allege they or their children or grandchildren are currently coached or taught by Weaver. Miller claims to have grandchildren attending other schools in the District, but not Spanish Fork High. (R. 78) Karl and Karen Blunck allege they have a son who used to attend Spanish Fork High, two children who currently attend Spanish Fork High, and two children at other schools in the District, but they do not claim to have any child currently in any of Weaver’s classes. (R. 76) Only Joshua Lee, Kacey Blunck, Amy Thomas, Marlo Chappel and Michelle Morley allege they were coached or taught by Weaver. Lee and Blunck were seniors in the 1997-98 academic year; the others graduated long ago. (R. 74-77) There is no allegation any of these students were coached or taught by Weaver when this suit was filed.

All of the Nebo citizens occupy exactly the same position as the plaintiffs the *Roberts* court found to lack standing. As to former students and their parents or grandparents, the court stated:

Because none of the students involved in this suit were in Mr. Roberts’ class at the time this suit was filed, none of the students, and therefore none of their parents, were directly affected by the district’s actions in Mr.

Roberts' classroom. We conclude that none of the students or parents satisfy the two-prong standing requirement set forth above.

Roberts, 921 F.2d at 1051-52.

As to potential future students, the *Roberts* court stated:

Kelly White and Amy Nelson were both too young to be in Mr. Roberts' class at the time of this suit. There is no more than a speculative likelihood that either of these students will be in his class in the future. Accordingly, we conclude that Kelly White and Amy Nelson fail to satisfy the first prong of the standing requirement because they can demonstrate no "distinct and palpable injury" caused by the district's directive to Mr. Roberts.

Roberts, 921 F.2d at 1052. Indeed, the Nebo citizens' position with respect to the statutory claims is even more attenuated than were the plaintiffs' claims in *Roberts*, because they are not seeking damages or injunctive relief, but merely "declarations" that might give them some psychic satisfaction but no real legal remedy. In short, the Nebo citizens fail to establish the "personal stake" and the "causal connection" requirements of standing to assert a claim for declaratory relief.

Finally, the Nebo citizens insist, without any analysis, that the Court should waive traditional standing requirements and address the merits of their claims because it is in the public interest to do so. *See Jenkins v. Swan*, 675 P.2d at 1150-51 (absent personal stake, plaintiff must show that no other party has a greater interest in the outcome of the case and that the issues are unlikely otherwise to be addressed, or that the issues are of great public importance such that the court should decide them in the public interest). While Weaver does not doubt the issues the Nebo citizens try to raise are of great importance to

them, there is no allegation in the Complaint to support the conclusion those issues are emerging throughout the school district or the state and causing serious disruption in the schools. The bottom line of the Nebo citizens' Complaint is they are unhappy with the school authorities for not firing Weaver. As noted elsewhere in this brief, there are administrative procedures for dealing with such matters. It is in the public interest for the courts to defer to those procedures.

5. The Trial Court Correctly Ruled The Statutory Claims Are Not Ripe.

The final requirement for a declaratory judgment is that the issues between the parties must be “ripe for judicial determination.” Utah law establishes certain well-defined procedures for adjudicating claims of professional misconduct by teachers. Utah Code Ann. Section 53A-7-101 *et seq.* provides for investigation of and action upon such claims by a Professional Practices Advisory Commission. Under Utah Code Ann. § 53A-7-110(1), the Commission “is required to “establish procedures for receiving and acting upon charges and recommendations regarding immoral, unprofessional, or incompetent conduct, unfitness for duty, or other violations of standards of ethical conduct, performance, and professional competence.” Such claims cannot be brought in court until they are investigated and acted upon through this mandatory procedure.

The fact is with respect to allegations about Weaver's unfitness to teach, the Nebo citizens never have exhausted the administrative procedures for pursuing such allegations. Instead, they filed some petitions and some grievances with the school board urging

certain policy changes. One week later – without even waiting for the 90-day statutory time frames to lapse – they initiated the precursor of this action. They sought relief entirely different from that sought in the original grievances filed with the school board (which centered on policy changes), and they sought it against different parties, including Weaver, but not against the school board. Now, they have dismissed all the parties except Weaver. The resulting confusion, which left the trial court understandably unclear about the precise status and nature of the Nebo citizens’ grievances, underscores the wisdom of the requirement that litigation await the outcome of administrative procedures.

Therefore, the trial court properly ruled that, whether the state agencies and officials charged with adjudicating complaints against teachers or persons practicing psychology without a license have not rendered a final decision, or have rendered a final decision the Nebo citizens do not like, the Nebo citizens’ request for declaratory relief does not present “the ‘imminent clash of legal rights and obligations’ necessary for judicial ripeness.” (R. 613, quoting *Redwood Gym v. Salt Lake County Comm’n*, 624 P.2d 1138, 1148 (Utah 1981))¹²

In summary, whether their claims are analyzed in terms of justiciability, adversity of interests, standing or ripeness, the Nebo citizens have failed to state any cognizable statutory claim against Weaver, and are simply barking up the wrong tree in pursuing

¹² Once again, the Nebo citizens fail to address this analysis, and address ripeness with a single meaningless sentence. (App. Br. p. 20 (“Appellants request for a declaratory order that Appellee violated state law remains unaddressed.”))

their appeal exclusively against her. Weaver respectfully requests that this Court affirm the trial court's dismissal of the statutory claims and bring an end, once and for all, to the Nebo citizens' use of litigation to harass her.

B. The Trial Court Properly Dismissed Count III, a Constitutional Claim Based on Alleged Statutory Violations

In addition to seeking declaratory relief under the statutes on which they rely in Counts I and II, the Nebo citizens sought in Count III to convert those alleged statutory violations into a claim under the Utah Constitution, and to recover nominal damages. The trial court properly dismissed that claim as groundless because it does not allege facts sufficient to elevate the parents' grievances to the level of the important rights the Constitution protects.

At the outset, because the Nebo citizens seek to create the impression that the trial court somehow failed to respect their rights, it is worth emphasizing the trial court accorded full respect to the Nebo citizens' claims that their constitutional rights had been violated, and fully embraced the courts' "province and duty . . . to say what the law is," especially when it involves constitutional interpretation." (R. 604-05, quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) at 177) Weaver certainly understands and appreciates the importance of individuals' ability to seek redress in the courts for violations of their constitutional rights. At the same time, in order that constitutional rights maintain both their power and their unique role and status in our legal system, it is important to recognize the difference between ordinary, if actionable, legal wrongs and violations of

fundamental rights secured by the Constitution. *See, e.g., Rochin v. People of California*, 342 U.S. 165 (1952), and *United States v. Kennedy*, 225 F.3d 1187 (10th Cir. 2000) (both cautioning against the “constitutionalization” of every wrong but holding that misconduct by the government may rise to the level of a substantive due process violation if it is so outrageous as to “shock the conscience”); *see also Bott v. DeLand*, 922 P.2d 732, 739 (Utah 1996) (not all mistreatment constitutes cruel and unusual punishment).

There is no question that the right of parents to rear their children as they see fit is a fundamental right which, although not absolute, is entitled to the utmost degree of legal protection. Weaver herself treasures this right as she seeks to rear her own children, and does not wish in any way to denigrate that important right. But that does not mean that every state action that is claimed to impinge upon that right or even to violate some state law intended to protect that right rises to the level of a constitutional violation.

This Court has recognized and sensitively and sensibly addressed these issues. As the trial court observed, “the Utah Supreme Court has held that [Article I § 25] of the Constitution protects the right of parents to rear their children, not the right to oversee every governmental interaction involving their child’s education.” (R. 604, citing *In re J.P.*, 648 P.2d 1364 (Utah 1982)) The trial court declined to read Article I Section 25 so broadly as to require, as a matter of constitutional law, parental consent for everything that transpires in the classroom. (R. 603) Instead, the trial court correctly concluded that

“parents are not deprived of their constitutional liberty to rear their children when tests are given in school without parental consent.” (R. 602)

Once again, the trial court’s analysis of this issue stands unrebutted, as the Nebo citizens utterly fail to address it.¹³ The trial court’s analysis and conclusion are clearly correct. Even assuming the statutes the Nebo citizens invoke apply to the conduct alleged and, even disregarding the trial court’s ruling that they “do not create a parental right or place any statutory duty on teachers” (R. 602), it would only trivialize and demean the fundamental right to rear one’s own children as one sees fit to equate it with the statutory rights asserted in Counts I and II. *C.f. In re J.P.*, 648 P.2d at 1364 (addressing the much more serious and substantial issue of the constitutionality of a Utah statute authorizing involuntary termination of all parental rights upon a determination that such is in the best interest of the child).


XI. CONCLUSION

For the foregoing reasons, Weaver submits that the trial court’s ruling dismissing the statutory claims and Count III of the Complaint is correct in all respects, and requests that it be affirmed. Weaver further requests that, given the Nebo citizens’ utter failure to

¹³ Instead, the Nebo citizens engage in a lengthy discussion – indeed, the longest discussion in their entire brief – of the Governmental Immunity Act and qualified immunity. (*See App. Br.* pp. 27-33) The sole purpose of that discussion is to establish a point that is not in dispute or in issue before this Court – that if the Nebo citizens make out a constitutional violation they may be entitled to nominal damages.

address the substance of that ruling, she be awarded her costs on appeal and such other and further relief as the Court deems just and proper.

SUBMITTED this 14th day of March, 2002.



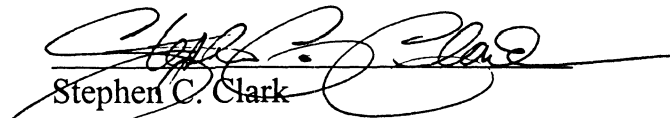
STEPHEN C. CLARK
-RICHARD A. VAN WAGONER
Attorneys for Appellant

N \222222\58\finbrief.wpd

XII. CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of March, 2002, I caused two true and correct copies of Brief of Appellee to be served via U.S. First Class Mail, postage prepaid, upon the following:

MATTHEW HILTON
MATTHEW HILTON, P.C.
Post Office Box 781
Springville, Utah 84663
Attorney for Appellants


Stephen C. Clark
Attorney for Appellee

N:\222222\58\finbrief.wpd