SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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MYMOENA DAVIDS, et al.,

Plaintiffs,

- against -

THE STATE OF NEW YORK, et al.,

Defendants,

- and -

MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, local 2, American Federation of Teachers, AFL-CIO,

Intervenor- Defendant

- and -

SETH COHEN, et al.,

Intervenors-Defendants

- and -

PHILIP A. CAMMARATA and MARK MAMBRETTI,

Intervenors-Defendants.

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Index No. 101105-2014

Justice: Hon. Justice Minardo

***WRIGHT* PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' AND INTERVENORS-DEFENDANTS' MOTIONS TO DISMISS THE ACTION**

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JOHN KEONI WRIGHT, et al.,

Plaintiffs,

- against -

THE STATE OF NEW YORK, et al.,

Defendants,

- and -

SETH COHEN, et al.,

Intervenors-Defendants,

- and -

PHILIP A. CAMMARATA and MARK MAMBRETTI,

Intervenors-Defendants,

- and -

NEW YORK CITY DEPARTMENT OF EDUCATION,

Intervenor-Defendant,

- and -

MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO,

Intervenor-Defendant.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

PRELIMINARY STATEMENT

New York's schoolchildren are suffering the consequences of an education system in crisis. While most students are failing to meet the State's proficiency standards, ineffective teachers are being promoted and kept in schools at alarming rates. The longer an ineffective teacher remains in the classroom, the more long-lasting the harm, and the higher the number of students who are permanently deprived of their opportunity to succeed. The situation cries out for change. But the hands of administrators and school districts are tied. The Legislature has passed, and the State now enforces, three sets of statutes (the "Challenged Statutes") that together result in the promotion and retention of ineffective teachers at the expense of children's constitutional right to a sound basic education. In effect, school districts are precluded from dismissing or disciplining teachers who are failing to provide children with the basic skills necessary to be responsible citizens able to function in democratic institutions, advance to higher education, and attain productive employment. This is a constitutional crisis of statewide magnitude and national importance.

Plaintiffs are the parents of nine students who attend schools throughout the State, including in Albany, the Bronx, Brooklyn, Manhattan, Queens, and Rochester. They allege that the State's enforcement of the Challenged Statutes violates their children's right under Article XI, § 1 of the New York Constitution to a sound basic education. As they are aware, education is the key to a bright future for their children. An effective teacher can mean the difference for their children between success or failure, advancement or stagnation, and ultimately, professional mobility or unemployment. In short, teacher effectiveness is the single most influential school-based variable in the adequacy of their children's education. Yet Plaintiffs' children have all been assigned to an ineffective teacher and risk being assigned to one each year. Plaintiffs are no longer willing to stake their children's future on a roll of the dice.

Defendants have moved to dismiss Plaintiffs' lawsuit, offering a series of arguments designed to prevent this Court from addressing the constitutional validity of the Challenged Statutes. None of these arguments has merit, and the Court should deny Defendants' motions to dismiss for three primary reasons.

First, Plaintiffs have adequately stated a claim for relief. Plaintiffs allege that Defendants' implementation of the Challenged Statutes has resulted in the retention of ineffective teachers who otherwise would not remain in the classroom, and that this ongoing status quo amounts to a constitutional violation. Because of the Challenged Statutes, school districts grant teachers tenure before they can be sufficiently evaluated, are required to use a flawed evaluation system in making those tenure decisions, and are precluded from dismissing or disciplining teachers who are Ineffective. By requiring school districts to apply the Challenged Statutes, the State is protecting ineffective teachers at the expense of their students' futures, and depriving those students of quality teachers—the most important "input" of a sound basic education. Defendants fault Plaintiffs for not providing more detailed evidence in their Complaint. But the Court should not be fooled—more comprehensive data is solely within the State's control, and this argument is simply an effort to protect the State's actions from discovery and judicial scrutiny. The Complaint contains sufficient factual allegations, including numerous studies and statistics, to support a reasonable inference that ineffective teachers have caused glaring deficiencies in New York schools. No more is required from Plaintiffs at this procedural juncture before Plaintiffs have the benefit of discovery.

Second, the claim is justiciable. Defendants essentially urge that the Legislature should be free to determine education policy without constitutional review or judicial oversight of any kind. But the courts have long recognized that Article XI guarantees the right to a sound basic

education and that it is the court's role to monitor compliance with that right. Defendants' mischaracterizations aside, this case is not a policy crusade against tenure or due process protections for teachers. Plaintiffs have filed suit because protections that go beyond the requirements of due process must not be implemented at the expense of the constitutional right guaranteed under Article XI. The merits of *that* constitutional claim are for the court, not the Legislature, to evaluate.

Third, Plaintiffs have standing and the issues in this suit are ripe for review. This case is brought on behalf of the very schoolchildren expressly protected by Article XI and guaranteed the right to a sound basic education. Plaintiffs have alleged systemic failure that has infected the schools which they attend. Plaintiffs and other New York State school children are the primary victims of this failing system. Because the Challenged Statutes guarantee that Plaintiffs are either presently being taught by ineffective teachers or suffer imminent risk of being assigned to an ineffective teacher, they have standing to assert their claims here.

Ultimately, Defendants do not seriously contest the allegation that ineffective teachers deprive students of their right to a sound basic education. Instead, they press what is best characterized as a policy defense of the statutes that is not germane to the constitutional claim, and certainly has no proper place in a motion to dismiss. At this stage, Plaintiffs are entitled to all reasonable inferences in their favor, and the Complaint's allegations amply support the conclusion that the Challenged Statutes are causing the alleged constitutional harm. Beyond that, to the extent Defendants rise to defend the wisdom of the Challenged Statutes, or to make the case that the benefits to teachers should outweigh the constitutional harms to children, those arguments are relevant, if at all, at the merits phase of this case. This Court should reject

Defendants' plea to insulate unconstitutional legislative action from judicial review, and deny Defendants' motions to dismiss the Complaint.

THE CHALLENGED STATUTES

The Complaint challenges the constitutionality, in whole or in part, of the Challenged Statutes: Education Law §§ 2509, 2510, 2573, 2585, 2588, 2590, 3012, 3012-c, 3020, and 3020(a).

A. The Permanent Employment Statutes

The Education Law includes several statutory provisions that authorize awarding tenure to teachers within school districts of different sizes: §2509 (for city school districts in cities with less than 125,000 inhabitants), §2573 (for city school districts in cities with more than 125,000 inhabitants), and §3012 (for school districts other than city districts, i.e., common, union free, and central high school districts) (collectively, the "Permanent Employment Statutes").

The Permanent Employment Statutes provide that "[at] the expiration of the probationary term of a person appointed for such term, subject to the conditions of this section, the superintendent of schools shall make a written report to the board of education or the trustees of a common school district recommending for appointment on tenure those persons who have been found competent, efficient and satisfactory, consistent with any applicable rules of the board of regents adopted pursuant to section 3012(b) or this article." N.Y. Educ. Law § 3012(2); *see also* N.Y. Educ. Law § 2509(2); N.Y. Educ. Law § 2573(5).

New York school districts typically grant tenure to new teachers after a probationary period of three years, and after only two years of performance review. *See Wright* Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief (hereinafter "Compl.") ¶ 38. Pursuant to New York Education Law § 3012-c(1), New York State implemented the Annual Professional Performance Review (the "APPR") to evaluate teachers and principals. A teacher's review is

meant to be a significant factor in employment decisions, including tenure, retention, and termination. N.Y. Educ. Law. § 3012-c(1).

Under the APPR, teachers receive a numerical score every year and one of four ratings: "Highly Effective," "Effective," Developing," or "Ineffective." Compl. ¶ 40. Each school district negotiates the specific terms of its APPR plans, which must comply with § 3012-c. *Id.* State-developed measures of student growth, such as test results, must form twenty percent of a teacher's rating. *Id.* Another twenty percent must be based on locally-selected measures of student achievement. *Id.* Locally-determined evaluation methods, such as classroom observations by administrative staff, form the remaining sixty percent. *Id.*

In practice, only two years of APPR reviews are considered in a teacher's tenure determination because of the statute's notification requirement. Compl. ¶ 47. Section 3012 requires the superintendent of a school to notify in writing "[e]ach person who is not to be recommended" for tenure of that decision no later than sixty days before the expiration of his or her probationary period. N.Y. Educ. Law § 3012(2). Typically, however, a teacher's probationary term ends before the third-year APPR is reported, at the end of the school year. Compl. ¶ 47. The final APPR rating may not be provided until September 1 of the following school year. N.Y. Educ. Law § 3012-c(2)(c)(2). A tenure determination, therefore, may be made on the basis of only two years of APPR reviews, and without regard to an Ineffectiveness determination in the third year.

In addition, inaction by the superintendent or an administrator results in *de facto* tenure for a teacher whose probationary period is expiring. *See Ricca v. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 47 N.Y.2d 385, 391 (1979). Specifically, if the superintendent does not notify the teacher of a recommendation against tenure, or an administrator does not dismiss the teacher,

or extend his or her probationary period, tenure protections will kick in at the end of the probationary period.

Once a teacher receives tenure, he or she is guaranteed continued employment except in limited enumerated circumstances and only after a disciplinary hearing pursuant to section 3020(a). Compl. ¶ 48.

B. The Disciplinary Statutes

Once a teacher receives tenure, he or she cannot be removed except for just cause and in accordance with the disciplinary process prescribed by § 3020-a. *See* N.Y. Educ. Law § 3020(1), § 2590 (same for New York City) (collectively with § 3020-a, the "Disciplinary Statutes"). The following causes may constitute reason to remove or discipline a teacher: insubordination, immoral character or conduct unbecoming of a teacher, inefficiency, incompetency, physical or mental disability, neglect of duty, or a failure to maintain required certification. N.Y. Educ. Law § 3012(2).

As applied, the Disciplinary Statutes result in the retention of ineffective teachers. The Disciplinary Statutes impose dozens of hurdles to dismiss or discipline an ineffective teacher, including investigations, hearings, improvement plans, arbitration processes, and administrative appeals. Compl. ¶ 50. In contrast to the more streamlined process for removing other public employees, such as civil servants, the Disciplinary Statutes impose a far more cumbersome removal process. *Compare* N.Y. Educ. Law § 3020-a *with* N.Y. Civ. Serv. Law §§ 75-76 (permitting a hearing before an officer with authority to remove the employee, such as a supervisor). On top of the Disciplinary Statutes' procedural obstacles, the standard for proving just cause to terminate a teacher is almost impossible to satisfy. Compl. ¶ 50.

A number of factors deter administrators from even bringing charges under the Disciplinary Statutes. As an initial matter, administrators are deterred from giving an Ineffective

rating that would constitute grounds for initiating disciplinary proceedings, and are inclined to rate teachers artificially high, because of the lengthy appeals process for an ineffectiveness rating and because they must partake in the development and execution of a teacher improvement plan ("TIP") for Developing and Ineffective teachers. N.Y. Educ. Law § 3012-c(4); Compl. ¶ 53. The TIP must be mutually agreed upon by the teacher and principal and must include "needed areas of improvement, a timeline for achieving improvement, the manner in which improvement will be assessed, and, where appropriate, differentiated activities to support a teacher's or principal's improvement in those areas." N.Y. Educ. Law § 3012-c(4).

Administrators also have difficulty complying with the truncated timeline for bringing disciplinary charges, given the significant evidentiary hurdles to initiating disciplinary proceedings. Section 3020-a imposes a three-year limit for bringing charges against a teacher, which constrains administrators' ability to remove ineffective teachers. Before administrators may initiate proceedings to discipline or terminate an ineffective or incompetent teacher, they must meticulously build a trove of evidence that includes extensive observation, detailed documentation, and consultation with the teacher. Compl. ¶ 54. It is difficult for school districts to collect enough evidence for a 3020-a hearing within the three-year period. *Id.* This laborious and complicated process deters administrators from trying to remove ineffective teachers from the classroom. *Id.*

The disciplinary process is also impractically long and costly. Once an administrator clears the hurdles to file charges, termination can result only after a 3020-a hearing. N.Y. Educ. Law § 3012(2). Despite statutory time limits, from 2004 to 2008, 3020-a disciplinary proceedings took an average of 502 days, from the time charges were brought until a final decision. *Id.* ¶ 56. Incompetency proceedings, which may include charges such as inability to

control a class and failure to prepare required lesson plans, take even longer. From 1995 to 2006, incompetency proceedings in New York took an average of 830 days, costing $313,000 per teacher. *Id.* ¶ 57. Two consecutive Ineffective ratings constitute a pattern of ineffective teaching or performance, subjecting a teacher to an expedited § 3020-a hearing. N.Y. Educ. Law § 3020-a(3)(c)(i-a)(A). But because ineffective teachers are rarely rated as such, two consecutive Ineffective ratings are very uncommon and the expedited process is thus rarely triggered. ¶ 58. While charges are pending, ineffective teachers must continue to be paid even if they are suspended, except if the teacher is convicted of certain felony crimes. Compl. ¶ 59 (citing N.Y. Educ. Law § 3020-a(2)(b)).

Section 3020(1) incorporates the "alternate disciplinary procedures contained in a collective bargaining agreement." N.Y. Educ. Law § 3020(1). The statute thus authorizes modifying the procedural requirements by contract. And in practice, the collective bargaining agreements add conditions that delay the disciplinary process even further and make it even more difficult to remove ineffective teachers. For example, in New York City the arbitrator must be jointly selected with the union, which effectively grants the union the power to veto arbitrators on the list. Compl. ¶ 61. The refusal to appoint hearing officers contributes to the massive backlog of disciplinary cases in New York City. *Id.*

If administrators are ever able to comply with the myriad procedural requirements that precede disciplinary action, they then confront a burden of proof that is nearly insurmountable. In order to terminate a teacher, administrators must not only validate the charges, but also prove that the school has undertaken sufficient remediation efforts, that all remediation efforts have failed, and that they will continue to fail indefinitely. Compl. ¶ 64; s*ee, e.g.*, *deSouza v. Dep't of Educ. of City Sch. Dist. of N.Y.*, 28 Misc. 3d 1201(A) (N.Y. Sup. Ct. 2010) (Table) (despite

arbitrator finding that nine of ten charges against a teacher were valid, because the arbitrator "felt that petitioner could be rehabilitated," she was "merely docked one month's salary and ordered…to enroll in classes.").

C. The LIFO Statutes

The Education Law includes a number of statutory provisions mandating the termination of teachers with the least seniority in a position's particular area of instruction for teachers teaching within school districts of various sizes. These statutes are §2510 (for city school districts in cities with less than 125,000 inhabitants), §2585 (for city school districts in cities with more than 125,000 inhabitants), and §2588 (for city school districts in cities with more than 1,000,000 inhabitants) (collectively, the "LIFO Statutes").

When school districts conduct layoffs that reduce the teacher workforce, New York Education Law § 2585, which is mirrored in §§ 2510 and 2588, mandates that the last teachers hired be the first teachers fired. Under the LIFO Statutes, "[w]henever a board of education abolishes a position under this chapter, the services of the teacher having the least seniority in the system within the tenure of the position abolished shall be discontinued." N.Y. Educ. Law § 2585(3).

Under the LIFO Statutes, school districts conducting layoffs must fire junior high-performing teachers. While these teachers are lost to the classroom, senior, low-performing, and more highly-paid teachers continue to provide poor instruction to their students. Compl. ¶ 68.

In recent years, various school districts in New York, including the Rochester City School District, have implemented district-wide layoffs due to budgetary constraints. In Rochester, the district laid off 116 teachers in 2010, 400 teachers in 2011, and 56 teachers in 2012. Compl. ¶ 70. Pursuant to the LIFO Statutes, school administrators discontinued the

employment of top-performing teachers with lower seniority, and retained low-performing teachers with greater seniority. *Id.*

STANDARD OF REVIEW

On a motion to dismiss, "the pleading is to be afforded a liberal construction." *ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 N.Y.3d 208, 227 (2011).[1] The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994); *see also Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 318 (1995) ("*CFE I*") ("our well-settled task is to determine whether … plaintiff can succeed upon any reasonable view of the facts stated").

ARGUMENT

I. THE COMPLAINT STATES A CLAIM THAT DEFENDANTS ARE VIOLATING ARTICLE XI OF THE NEW YORK STATE CONSTITUTION.

The Court should deny Defendants' motions to dismiss[2] because the *Wright* Plaintiffs have stated a claim for relief under Article XI of the New York State Constitution. Plaintiffs have alleged that the State has caused a deprivation of their right to a sound basic education, which is all that is necessary to state a claim for relief under the Education Article.

As the court explained in *New York Civil Liberties Union v. State*, "[A]n Education Article claim requires two elements: the deprivation of a sound basic education, and causes

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[1] Unless otherwise noted, all internal citations are omitted and all emphasis has been added.

[2] Five motions to dismiss and accompanying memoranda of law were filed in response to Plaintiffs' Complaint: Memorandum of Law in Support of the State of New York, et al., Defendants' Motion to Dismiss the Action ("State MTD"); Memorandum of Law in Support of Seth Cohen, et al., Intervenors-Defendants' Motion to Dismiss the Action ("NYSUT MTD"); Memorandum of Law in Support of Philip A. Cammarata and Mark Mambretti, Intervenors-Defendants' Motion to Dismiss the Action ("SAANYS MTD"); Memorandum of Law in Support of the New York City Department of Education, Intervenor-Defendant's Motion to Dismiss the Action ("DOE MTD"); and Memorandum of Law in Support of Michael Mulgrew, as President of the United Federation of Teachers, Intervenor-Defendant's Motion to Dismiss the Action ("UFT MTD").

attributable to the State." 4 N.Y.3d 175, 178-79 (2005). As to the first element, courts have recognized that a systemic failure to provide a sound basic education is a legally cognizable claim under Article XI. Here, Plaintiffs have pleaded a systemic statewide failure by alleging that ineffective teachers employed by New York schools are impairing the constitutional rights of schoolchildren across New York State. As to the second element, Plaintiffs have alleged that the State's enforcement of the Challenged Statutes causes the promotion and retention of ineffective teachers, who therefore remain in the classroom at the expense of their students' educational rights.

A. The Complaint Adequately Alleges A Deprivation Of Plaintiffs' Right To A Sound Basic Education.

Plaintiffs have satisfied the first element of an Article XI claim by alleging a "systemic failure" in the state's educational system such that a significant number of students are being denied their right to a sound basic education. Article XI requires the Legislature to "provide for the maintenance and support of a ***system*** of free common schools, wherein all the children of this state may be educated." And courts have recognized a legally cognizable claim where plaintiffs allege systemic failure in the quality of education. *See, e.g.*, *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 914 (2003) ("*CFE II*"), *aff'd*, 8 N.Y.3d 14 (2006) ("*CFE III"*) (holding that "tens of thousands of students [] placed in overcrowded classrooms, taught by unqualified teachers, and provided with inadequate facilities and equipment … is large enough to represent a systemic failure").

A complaint adequately states an Article XI claim where, for example, it provides data that "illustrate[s] glaring deficiencies in the current quality of the schools in plaintiffs' districts." *Hussein v. State*, 81 A.D.3d 132, 136 (3d Dep't 2011), *aff'd*, 19 N.Y.3d 899 (2012). And plaintiffs may allege a systemic failure by showing deficiencies in "inputs" such as "teaching,

facilities and instrumentalities of learning" and "outputs" such as "test results and graduation rates." *Paynter v. State*, 100 N.Y.2d 434, 440 (2003); *see also CFE I*, 86 N.Y.2d at 319 (complaint adequately alleged Article XI claims on the basis of "fact-based claims" of deficient inputs and outputs and "inferences to be drawn therefrom").

As the Complaint alleges, there is a systemic crisis of educational performance that is the result of promoting and retaining ineffective teachers under the Challenged Statutes. *See* Compl. ¶¶ 25-26. While the State may disclaim responsibility to provide students "with an optimal education," State MTD at 16, it can hardly deny its obligation at the very least to "provide a minimal constitutionally sufficient education," State MTD at 15. The State, however, is falling short even of that bare constitutional minimum. As Plaintiffs allege, and as Defendants cannot seriously contest, public school students on the whole are not receiving an adequate public school education. That much is clear from extremely poor student outputs. For example, the Complaint cites data that in 2013, 69% of students taking English Language Arts and Math standardized tests failed to meet the State's own standard for proficiency. *See* Compl. ¶ 41.

As the Complaint also alleges, deficient student outputs are the result of gross deficiencies in the most critical educational input: teacher effectiveness. *See* Compl. ¶¶ 41-44. The Court of Appeals has already recognized this matter of common sense—children can only learn basic skills if they are taught by effective teachers. Not only does the "quality of teaching correlate[] with student performance," but the negative effects of an ineffective teacher compound over time—"the longer students are exposed to … bad teachers, the …worse they perform." *CFE II*, 100 N.Y. 2d at 910-11. *See also Hoke Cnty. Bd. of Educ. v. State*, 599 S.E.2d 365, 390 (N.C. 2004) (affirming that the state must "ensure there are competent teachers in classrooms" to satisfy its obligation to provide students with a "sound basic education"); *State v.*

Campbell Cnty. Sch. Dist., 19 P.3d 518, 550 (Wyo. 2001) (holding that "teacher quality is critical to providing a constitutional education"). Several studies, cited in the Complaint, lend further support to the straightforward allegation that effective teachers are a necessary component of a sound basic education. *See, e.g.*, Compl. ¶ 29 ("In the short-term, effective teachers provide tangible educational results in the form of higher test scores and higher graduation rates."); ¶ 30 ("In the long-term, students taught by effective teachers … are more likely to progress in their education … earn more money through their lives, live in neighborhoods of higher socioeconomic status, and save more money for retirement."); ¶ 31 ("High-quality instruction from effective teachers help students overcome traditional barriers demographics impose").

Most recently, the California Superior Court found that "grossly ineffective teachers substantially undermine the ability of that child to succeed in school" and, for that reason, held that statutes similar to those at issue here violated California's Constitution. *See Vergara v. State*, 2014 WL 2598719, at *4 (Cal. Super. Ct. June 10, 2014). The *Vergara* decision held that California's teacher tenure and last-in-first-out statutes violated California students' constitutional right to a "meaningful, basically equal educational opportunity." 2014 WL 2598719, at *3.[3] While the *Vergara* plaintiffs asserted some constitutional claims that Plaintiffs do not allege here, the substance of their claim was that the statutes negatively affected "the quality of [their] education." 2014 WL 2598719, at *2. Before the *Vergara* court reached the merits of the constitutional claims, it denied the State Defendants' motion to dismiss because the complaint alleged that throughout California "'grossly ineffective' teachers are retained at 'alarming rates.'" *Vergara v. State*, Case No. BC484642 (Cal. Super Ct. Nov. 9, 2012),

[3] It is of little consequence that the California statute at issue there required tenure decisions to be made after two years instead of three, *id.*, because here Plaintiffs allege that the New York Permanent Employment Statute effectively requires tenure decisions to be made based on only two years of teaching. *See* Compl. ¶ 38.

available at http://studentsmatter.org/wp-content/uploads/2012/11/SM_Demurrers-Tent.-Ruling_11.09.12.pdf. Under a comparable standard of review to the governing standard here, the court held that those allegations were sufficient to state a claim for relief. *See id*. Here, the Complaint alleges unconstitutional educational deficiencies with even greater specificity than the *Vergara* complaint.

B. The Complaint Adequately Pleads Causation By The State.

Defendants hardly contest that ineffective teachers cause poor educational outputs and neither do they seriously disagree that ineffective teachers are employed throughout New York State. Instead, they argue that the court should turn a blind eye to the crisis facing New York schools because the State is not primarily responsible for the employment of ineffective teachers. But Plaintiffs have adequately pleaded causation by alleging that the State's enforcement of the Challenged Statutes impedes school districts from hiring effective teachers and removing ineffective ones and is therefore a significant cause of the alleged educational inadequacies. Plaintiffs are not required to allege that the State action complained of is the exclusive cause of those deficiencies. On the contrary, the case law does not require "a search for a *single cause* of the failure of New York … schools." *CFE II*, 100 N.Y.2d at 920. And at the pleading stage, a plaintiff's burden to plead causation is minimal. *See CFE I*, 86 N.Y.2d at 318 (stating that an "extended causation discussion … is premature given the procedural context of th[e] case").

Plaintiffs have easily satisfied this minimal burden by alleging that the employment and retention of huge numbers of inadequate teachers is attributable to three sets of statutes enacted and enforced by the State: the Permanent Employment Statutes, the Disciplinary Statutes, and the LIFO Statutes. *See* N.Y. Educ. Law §§ 2509, 2510, 2573, 2585, 2588, 2590, 3012, 3012-c, 3020, and 3020-a. In combination, the Challenged Statutes force school districts to offer permanent employment, through tenure, to nearly all junior teachers without giving school

districts sufficient time to determine which teachers will be minimally effective, and then impede school districts from dismissing the worst performing teachers after they are prematurely awarded tenure. *See, e.g.*, Compl. ¶ 41 (in 2013, only 1% of teachers were rated "Ineffective" under the APPR, even though only 31.5% of students met the State proficiency standards);[4] ¶¶ 37, 42 (97% of tenure-eligible New York City teachers receive tenure even though fewer than 97% of teachers are effective); ¶ 60 (school must pass through a tedious nine step process involving several hearings and adjudicatory entities to bring disciplinary charges against a teacher); ¶ 70 (school district are forced to lay off top-performing teachers with lower seniority, while retaining low-performing teaching teachers with greater seniority).

Thus, as a result of the Challenged Statutes, the State grants tenure to almost all teachers, regardless of their effectiveness. *See* Compl. ¶¶ 36-37. And, because of the State's implementation of the Disciplinary Statutes, an ineffective teacher with tenure is rarely, if ever, removed. *See* Compl. ¶¶ 62-64. As applied, the procedural hurdles of the Disciplinary Statutes—which are prohibitively difficult, expensive, and time consuming—make it nearly impossible for administrators to remove an ineffective teacher with tenure. *See* Compl. ¶¶ 50-51.

The inexorable inference from these factual allegations is that too many ineffective teachers are working in New York public schools as a result of the Challenged Statutes. At a minimum, this inference is supported by a "reasonable view of the facts," which is all that Plaintiffs must show to withstand a motion to dismiss. *CFE I*, 86 N.Y.2d at 318. Defendants argue that the Complaint contains only "vague and conclusory allegations," based on "specious statistics." UFT MTD at 10. But only "allegations consisting of bare legal conclusions, as well

[4] Defendants are simply wrong that the APPR is suddenly effective now that it "has been fully implemented." *See* SAANYS MTD at 7. To the contrary, only 1% of teachers were rated Ineffective for the 2012-13 school year. N.Y. State, *Education Evaluation Data*, *available at* https://data.nysed.gov/evaluation.php?year=2013&state=yes&report=appr (accessed Dec. 2, 2014).

as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to [be accorded every favorable inference]." *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 27 (2005) (quoting *Caniglia v. Chi. Tribune–N.Y. News Syndicate*, 204 A.D.2d 233, 233-34 (1st Dep't 1994). Far from making bare legal assertions, Plaintiffs cite a number of reputable reports, many of them authored by highly-regarded academics in the fields of education, which hardly constitute "specious statistics" and which Defendants have not rebutted with documentary evidence. *See, e.g.*, Compl. ¶¶ 28-32, 37, 41-42, 55-57, 62, 69, 74.

As only one example, a 2009 survey found that 48% of districts surveyed considered bringing 3020-a charges to remove a teacher and declined to do so, often because the process was too cumbersome or expensive. *See* Compl. ¶ 55. Another telling example is that, to comply with the LIFO Statutes, between 2010 and 2012 the Rochester school district made over 500 teacher layoffs due to budgetary constraints and had to discontinue the employment of top performing, recently-hired, teachers, while retaining low-performing teachers, who happened to have been hired earlier. *See* Compl. ¶ 70. Defendants' challenge to these studies as "specious statistics," like so many of Defendants' arguments, is a merits argument that is not appropriately considered on a motion to dismiss. Indeed, "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I,* 5 N.Y.3d at 19; *see also Hussein*, 81 A.D.3d at 136 ("In the procedural context of this case, it would be premature for [the Court] to determine the merits of plaintiffs' allegations" and whether they "are inadequate to meet the constitutional standards established by the Court of Appeals in the *CFE* cases.").

Defendants' objection that the Complaint only alleges that there are "*some* ineffective teachers" is similarly beside the point. UFT MTD at 2. Plaintiffs need not allege that every New

York student is being taught by an ineffective teacher. *See CFE II*, 100 N.Y.2d at 914 (finding a deprivation of the sound basic right to education where "[t]here are certainly City schools where the inadequacy is not 'gross and glaring'" and there are "[s]ome of these school may even be excellent."). They have met their burden by alleging a systematic failure. *CFE II* made clear that this is enough. *Id.* at 919.

Defendants misstate Plaintiffs' burden by arguing that the Challenged Statutes cannot cause employment of inadequate teachers because the statutes do not "compel" school boards to hire ineffective teachers and do not make it "impossible" to remove them. UFT MTD at 11, 41-43. This argument ignores the crux of the Complaint, which is that the Challenged Statutes are unconstitutional—not because they require schools to employ ineffective teachers—but because the ***effect*** of their application is to prevent school districts from effectively determining which teachers deserve tenure, and once tenure has been granted, from disciplining and removing ineffective teachers. *See, e.g.*, Compl. ¶¶ 46-47, ¶¶ 50-51, ¶ 75. It is well established that legislation may be unconstitutional due to its effect. *See, e.g.*, *Tenn. Gas Pipeline Co. v. Urbach*, 96 N.Y.2d 124, 131 (2001) (declaring the Natural Gas Import Tax statute unconstitutional based on its "practical effect"); *Flushing Nat'l. Bank v. Mun. Assistance Corp. for City of N.Y.*, 40 N.Y.2d 731, 736 (1976) (declaring the New York State Emergency Moratorium Act unconstitutional because its "effect ... is [] to permit the city… to ignore its pledge of faith and credit"); *New Yorkers for Students' Educ. Rights v. State*, 2014 N.Y. Misc. LEXIS 4957, at *11 (Sup. Ct. Nov. 17, 2014) (complaint adequately alleged that statewide cap on local property taxes resulted in constitutionally insufficient funding of public schools); *Vergara*, 2013 WL 6912924, at *4 (holding that "[p]laintiffs' evidence raise[d] triable issues of fact as to the effect of the

Challenged Statutes," specifically whether they "result[] in grossly ineffective teachers obtaining and retaining permanent employment").[5]

Additionally, Defendants should not benefit at this stage of litigation from their own withholding of information from the public about teacher quality and the retention of ineffective teachers. It bears emphasis that because the State's APPR system does not adequately identify teachers who are truly "Developing" or "Ineffective," Compl. ¶ 41, accurate information about teacher effectiveness is largely within Defendants' knowledge and control. *See CFE II*, 100 N.Y.2d at 909 (describing expert testimony that "principals' reviews tend to conceal teacher inadequacy because principals find it difficult to fire bad teachers"). *Cf. Berkowitz v. Molod*, 261 A.D.2d 128, 129 (1st Dep't 1999) (denying a motion to dismiss where the complaint plead facts upon information and belief that were "peculiarly within the knowledge of the party against whom the charges were being asserted") (quoting *Jered Contracting Corp. v. N.Y.C. Transit Auth.*, 22 N.Y.2d 187, 194 (1968)). As the court explained in *CFE I*, at this procedural juncture before discovery, "an exhaustive discussion and consideration of a 'sound basic education is premature. Only after discovery and development of a factual record can this issue be fully evaluated and resolved." 86 N.Y.2d at 317. Plaintiffs have limited access and resources to the State's comprehensive data about teacher retention and promotion at this stage, and it is precisely for that reason that this type of information is not required of a complaint. The Complaint

[5] Because Plaintiffs are challenging the effect of the Challenged Statutes, and alleging constitutional violations resulting from their implementation, this is an as-applied challenge. *See, e.g.*, *Boddie v. Conn.*, 401 U.S. 371, 379 (1971) ("Our cases further establish that a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question."). It is not (as Defendants contend) a facial one. *See* State MTD at 10. In any event, whether or not Plaintiffs are required to "prov[e] that the invalidity of the law is beyond a reasonable doubt," *id.*, is not a question for this stage of the litigation, where Plaintiffs are entitled to all reasonable inferences in their favor. *See Leon*, 84 N.Y.2d at 87-88 ("We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within ***any cognizable legal theory***.").

provides adequate factual foundation for the claim that as a result of the Challenged Statutes, New York schools employ too many teachers ill-equipped to provide their students with a sound basic education.

Finally, Defendants try to shift causative responsibility from the State to school districts and local boards of education for failing to effectively hire and fire teachers. State MTD at 18-19; SAANYS MTD at 9-10; UFT MTD at 17-18. But the Complaint alleges that the Challenged Statutes are why school boards and districts are failing to properly evaluate teacher effectiveness before granting tenure, *see, e.g.*, Compl. ¶ 46, and failing to remove ineffective teachers, *see, e.g.*, *id.* at ¶¶ 62, 74. Moreover, to establish causation of a systemic failure, a plaintiff need "not … eliminate any possibility that other causes contribute to that failure." *CFE II*, 100 N.Y.2d at 923. Instead, "the law recognizes that there may be many causal links to a single outcome" and does not "mandate[] a search for a single cause of the failure of … schools." *Id.* at 920. It is therefore irrelevant if other factors, such as the actions of local school boards and districts, are partially responsible for ineffective teachers. The primary causes of these bad results is a factual determination that cannot be decided on a motion to dismiss—it suffices that Plaintiffs have alleged facts that plausibly attribute the cause to enforcement of the Challenged Statutes.

Paynter and *New York Civil Liberties Union* do not compel a different conclusion because in neither case did the plaintiffs credibly allege that a State statute resulted in a student being denied a sound basic education. *N.Y. Civil Liberties Union*, 4 N.Y.3d at 180 (complaint did not contain a "clear articulation of the asserted failings of the State"); *Paynter*, 100 N.Y.2d at 443 (complaint failed to allege a sufficient nexus between "a 30-year-old amendment to a housing statute" and the alleged educational deficiencies). Thus, both cases merely held that a complaint does not state an Article XI claim by alleging that the State has failed to take

affirmative measures to remedy unidentified or local educational inadequacies. *See Paynter*, 100 N.Y.2d at 438-39 (complaint alleged that the state "fail[ed] to mitigate demographic factors that may affect student performance"); *N.Y. Civil Liberties Union*, 4 N.Y.3d at 180 (complaint sought "to charge the State with the responsibility to determine the causes of the schools' inadequacies and devi[s]e a plan to remedy them"). Requiring such affirmative measures, the Court in *N.Y. Civil Liberties Union* explained, would "subvert local control" over schools by obligating the State "to intervene on a school-by-school basis to determine each of the … school's sources of failure and devise a remedial plan." 4 N.Y.3d at 182.

The opposite is true here. Defendants suggest that Plaintiffs are asking the Court to order additional affirmative actions by the State to optimize educational opportunities. State MTD at 30. But in fact, the claim is that the ongoing affirmative actions of the State have harmed, are harming, and will inevitably continue to harm New York schoolchildren if not halted. Plaintiffs allege that the state is actively causing schools to employ ineffective teachers, not that the State has failed to take affirmative steps to remedy vague educational inadequacies. And Plaintiffs are seeking to permit local authorities to promote more effective teachers without the burdensome constraints of the Challenged Statutes, not to have the State take control of teacher retention decisions. Compl. Prayer for Relief.

C. The Education Article is Not Limited to Claims of Underfunding.

Defendants contend that the only State action that can support an Article XI claim is the State's failure to provide resources: "the State's affirmative obligation to provide resources" is "the *sine qua non* of a cognizable Education Article suit." UFT MTD at 20. What Defendants ignore in making this argument is that the resources the State is constitutionally obligated to provide its children are not limited to school funding. *See, e.g.*, *id.* at 19–20. Nothing in Article XI, or the case law interpreting Article XI, restricts Plaintiffs from alleging that State actions

other than underfunding have caused a deprivation of rights. The court made this clear in *New York Civil Liberties Union v. State*, 4 N.Y.3d 175 (2005). There, the court faulted the plaintiffs for failing to allege a "failure of the State to provide 'resources'—*financial or otherwise*" that would be necessary to guarantee a constitutionally adequate education. *Id.* at 180. To be sure, Plaintiffs have not brought an inadequate funding claim as in *CFE I*. But they have alleged that the State is causing ineffective teachers to remain in schools and is thus failing to provide the most fundamental educational resource: effective teachers. *See* Compl. ¶¶ 23-26.

As courts have explained, the right to a sound basic education encompasses a variety of entitlements, ranging from adequate facilities and physical learning materials, to effective teaching by adequately-trained personnel. The State "must assure that some essentials are provided." *CFE I*, 86 N.Y.2d at 317. For example, children "are entitled to minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn." *Id.* As another example, children "should have access to minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks." *Id.* In addition, children are "entitled *to minimally adequate teaching* of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies, *by sufficient personnel* adequately trained to teach those subject areas." *Id.*

Quality teaching is the foremost input that the State must provide its students as part of a sound basic education. *CFE II*, 100 N.Y.2d at 909 ("Teaching. The first and surely most important input is teaching."). That is a matter of the simplest common sense—a state-of-the-art school facility and top-of-the-line textbooks are useless without effective teachers to put them to appropriate use. Notably, Defendants do not dispute that effective teaching is part and parcel of the right to a sound basic education. *See, e.g.*, NYSUT MTD at 33 ("Teacher defendants, of

course, agree that teachers are essential to providing students with a sound basic education."). Instead, they try to limit the scope of Article XI's protection by arguing that Plaintiffs can only state a claim that the State "caused" ineffective teaching if the alleged cause is a lack of adequate state funding. DOE MTD at 20-21. This argument mischaracterizes the established standard for alleging an Article XI claim. While underfunding may result in the failure to provide minimally adequate teaching, so may the application of statutes that make it impossible to remove ineffective teachers and make way for quality teaching.

Several prior Article XI cases have dealt with inadequate school funding. But in those cases, causation from inadequate funding was considered sufficient, not necessary, to allege an Article XI claim. In *CFE I* the plaintiffs were asserting funding-related claims, and the court explained: "In order to succeed in the *specific context of this case*, plaintiffs will have to establish a causal link between the present funding system and any proven failure to provide a sound basic education to New York City school children." 86 N.Y.2d at 318. Neither did *Paynter* suggest that funding is the *sine qua non* of an Article XI claim; the court simply described that an "element[] *of the CFE plaintiffs*' viable Education Article claim" included evidence that the State's failure to provide a sound basic education was "casually connected to the funding system." 100 N.Y.2d at 441. But the court did not hold that *CFE* delimits the universe of viable Article XI claims. *CFE I*, the court observed, did not "delineate the contours of all possible Education Article claims." *Id.* In *Paynter*, the plaintiffs failed to state a viable claim because they failed to attribute the asserted educational failures to State action at all, instead pointing to the unequal "demographic composition of the school district in which they reside." *Id.* at 440. The court reasonably concluded that the State could not be held "responsible for the demographic composition of every school district" nor be made "responsible for where

people choose to live." *Id.* at 442. Here, by contrast, Plaintiffs attribute causation to the State's implementation of the Challenged Statutes, rather than to vague conditions that are beyond the State's control or not traceable to State action.

Defendants' attempt to shoehorn this case into the cramped requirements of Article XI funding cases should therefore fail. Plaintiffs are required to make allegations "sufficiently detailed and specific to the school district represented by the plaintiff" *only if* the underlying constitutional claim is about funding disparities in that district. State MTD at 13. In *New York State Association of Small City School Districts v. State*, 42 A.D.3d 648 (3d Dep't 2007), the plaintiffs were required to make district-specific allegations solely because the underlying claim was that underfunding of small city schools led to educational inequalities in particular districts, a claim that required some basis from which to compare one district to another. State MTD at 13-14. Here, however, district-specific allegations are unnecessary—Plaintiffs allege that the challenged statutory scheme creates endemic failures across the entire state. *See, e.g.*, Compl. ¶¶ 24-26 (alleging that administrators are uniformly hamstrung from dismissing and disciplining teachers whose performance is subpar). This case is therefore also unlike *New York Civil Liberties Union*, where allegations about educational inadequacies in "individual schools" failed to show a "district-wide failure." 4 N.Y.3d at 181. Plaintiffs here do *more* than plead actionable district-wide failures; they allege ***systematic*** failure within the State's education system due to universal application of the Challenged Statutes. Compl. ¶¶ 23-26; *CFE II*, 100 N.Y.2d at 914.[6]

[6] In any event, Plaintiffs *do* allege widespread failures in school districts in both New York City and Rochester. *See, e.g.*, Compl. ¶ 37 (stating that nearly all New York City teachers were granted tenure, irrespective of their effectiveness); ¶ 42 (stating that a disproportionately small number of teachers were rated ineffective despite metrics demonstrating more widespread Ineffectiveness in New York City); ¶ 62 (stating that only 12 teachers were dismissed for Ineffectiveness in New York City over a ten year period despite the existence of many more cases where an arbitrator found a teacher ineffective); ¶ 74 (noting that if LIFO layoffs had been conducted in New York City between 2006-2009, no teacher who had received an Unsatisfactory rating would have been laid off due to their relative seniority); ¶ 70 (stating that LIFO layoffs in Rochester removed effective teachers

D. A Rational Government Objective Alone Does Not Defeat An Article XI Claim.

Despite the well-established standard for pleading an Article XI claim, Defendants contend that such a claim should be dismissed when the Legislature had a rational policy reason for enacting the Challenged Statute. State MTD at 10-11, NYSUT MTD at 32, UFT MTD 38-39. Rational basis review is the appropriate standard for an equal protection claim, *not* an Article XI claim. This argument is yet another attempt by Defendants to distract the Court's attention away from the legal issues at hand.

The little authority that Defendants cite to support applying rational basis review is not on point. In *Board of Education, Levittown Union Free School District v. Nyquist*, the court applied rational basis review to an equal protection claim: plaintiffs alleged unconstitutional disparities in school funding between rich and poor school districts. 57 N.Y.2d 27, 43 (1982). In that case, however, the provision of a sound basic education was not in question. As the *Levittown* court explained, "no claim is advanced in this case … that the educational facilities or services provided in the school districts that they represent fall below the State-wide minimum standard of educational quality and quantity fixed by the Board of Regents." *Id.* at 38. Instead, plaintiffs' "attack [was] directed at the existing disparities in financial resources which lead to educational unevenness *above that minimum standard*." *Id.*

For that reason, the court in *CFE I* rejected the State defendants' efforts to analogize the plaintiffs' Education Article claim to that in *Levittown*. 86 N.Y.2d at 314, 316, 320 (applying rational basis review to equal protection claim and not applying it to Education Article claim). The Court explained that "[p]laintiffs advance the very claim we specifically stated was not

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where more senior yet ineffective teachers maintained their positions); ¶ 84 (further claiming that the LIFO Statutes as applied in Rochester denied students a sound basic education).

before us in *Levittown*, i.e., that minimally acceptable educational services and facilities are not being provided in plaintiffs' school districts." *Id.* at 316. *Levittown*, the *CFE I* court explained, "manifestly left room for a conclusion that a system which failed to provide for a sound basic education would violate Article XI." *Id.*; *see also N.Y.S. United Teachers ex rel. Iannuzzi v. State*, 993 N.Y.S.2d 475, 483 (Sup. Ct. 2014). *CFE I* not only distinguished the facts of *Levittown*, but also did not import *Levittown*'s rational basis analysis to the context of an alleged Education Article violation.

Here, the Complaint does not merely allege that the State has failed to "optimize student educational opportunities," State MTD at 30, but that the State has enacted statutes that have caused school districts to fall below the constitutional floor and the minimum standard of educational adequacy. Compl. ¶¶ 23-26. Defendants' fear that considering Plaintiffs' claim will invite courts to rewrite New York's Education law on any number of issues (e.g., class size, number of classroom assistants, or amount of special education services) is therefore misguided. *See* NYSUT MTD at 57-58. Only those claims, like the one here, that credibly allege a failure below the constitutional guarantee require scrutiny beyond rational basis review. It is therefore also inapposite whether the Challenged Statutes rationally afford teachers protections comparable to other civil service employees. *See* SAANYS MTD at 31-32. The protections afforded elsewhere do not, as the protections do here, affect the constitutional rights of students. And in fact, the protections for teachers are far more detailed, and make it far more cumbersome to dismiss an ineffective teacher, than the protections afforded under the general civil service law for most public employees. *Compare* N.Y. Educ. Law § 3020-a *with* N.Y. Civ. Serv. Law §§ 75-76.

It is likewise immaterial that courts have described in passing the policy reasons for the challenged statutes. Statutes can certainly enact policies that are in some ways beneficial or seemingly wise, but that in other respects violate constitutional rights. The State's heavy reliance on *Ricca v. Board of Education of City School District of City of New York* is thus misplaced. *See* State MTD at 1, 14, 22, 31 (quoting *Ricca*, 47 N.Y.2d 385). *Ricca* concerned a question of statutory interpretation, namely whether a former substitute teacher's probationary period started when he became licensed and began working as a regular teacher or when the school board formally appointed as such. 47 N.Y.2d at 388-90. The answer to this question would determine whether a teacher was denied tenure too late because his probationary period had already expired and resulted in *de facto* tenure. *Id.* at 392. The court concluded that a school district "may not avoid strict application of the statutory scheme for granting tenure to *qualified and experienced teachers*" by delaying formal appointment of a teacher to a position which he already fills (i.e., the position of a probationary teacher). 47 N.Y.2d 385, 391 (1979).

Ricca was *not* about the constitutionality of the tenure statute or whether its application, in conjunction with other laws, unconstitutionally prevents school districts from dismissing *unqualified* and ineffective teachers. It is of no moment then that the court had occasion to opine on the policy rationale for the statute. And it is incorrect, if not flatly misleading, that the State characterizes those reflections as a holding that the Permanent Employment Statutes are *per se* constitutional. *See* State MTD at 1. The question of the statute's constitutionality was simply not before the court. The other cases cited by Defendants to illustrate the wisdom of the legislature's policy decision are of a piece—each involved questions of statutory interpretation and none concerned an alleged deprivation of a student's sound basic education. *See Abramovich v. Bd. of Educ. of Cent. Sch. Dist. No. 1 of Towns of Brookhaven & Smithtown*, 46

N.Y.2d 450, 453 (1979) (in a settlement, teacher may waive his rights under section 3020-a); *Cole v. Bd. of Educ., S. Huntington USFD*, 90 A.D.2d 419, 420 (2d Dep't 1982) (explaining how to calculate seniority under LIFO Statutes).

II. AN ALLEGED DEPRIVATION OF THE RIGHT TO A SOUND BASIC EDUCATION IS A JUSTICIABLE QUESTION

A. The Complaint Does Not Raise A "Political Question."

Defendants' second argument, that the Complaint presents a non-justiciable question, is also without merit. Defendants assert that the Complaint presents only "nonjusticiable policy questions" that are "properly in the purview of the legislature and executive branches." State MTD at 28. They urge that "the appropriate place to debate such education policy, if necessary, is in the voting booth or the Legislature, not the courts." UFT MTD at 21. But while matters of policy may be the exclusive domain of the majoritarian branches, constitutional rights decidedly are not. Plaintiffs have asserted constitutional claims, not policy arguments, against application of the challenged statutes. And alleged deprivations of constitutional rights are not insulated from judicial review merely because the Legislature had a policy reason for enacting statutes that may run afoul of the Constitution. Defendants exhaust numerous pages defending the policy determinations of the Legislature, but even the most compelling policy rationale does not give carte blanche to violate the Constitution. A claim under Article XI that the State is depriving children of their right to a sound basic education is unquestionably a judicial and justiciable question.

It is the role of the judiciary to determine whether a statute, whatever the policy rationale for its enactment, offends the New York State Constitution. *See, e.g. CFE III*, 8 N.Y.3d at 28 ("We [the judiciary of New York] are the ultimate arbiters of our State Constitution."); *Cohen v. State*, 94 N.Y.2d 1, 11 (1999) ("The courts are vested with a unique role and review power over

the constitutionality of legislation."). And like other constitutional entitlements, the rights under Article XI are enforced through judicial review. *See CFE II*, 100 N.Y.2d at 920 ("[W]e have a duty to determine whether the State is providing students with the opportunity for a sound basic education."). Defendants acknowledge that the "Education Article, by its very inclusion in the State Constitution, may implicate some judicial encroachment on the traditional educational purview of the Legislature and the Executive branches." UFT MTD at 22. But what Defendants characterize as "encroachment" is the heart of the judicial function: "it is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them." *CFE III*, 8 N.Y.3d at 28.

The amount of legislative deliberation and revision that preceded enactment of the Challenged Statutes is thus irrelevant to the question of justiciability. *See* UFT MTD at 27. What is good "policy" to some does not offer talismanic immunity to violate the constitutional rights of others. "While the Legislature may vote to [enact a law], it cannot create one that offends constitutional rights." *People v. LaValle*, 3 N.Y.3d 88, 120, 128 (2004). Here in particular, the mandate of Article XI is directed at the Legislature: "The legislature *shall provide* for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." N.Y. Const. Art. XI, § 1. And even a statute that may be "valid when enacted may become invalid by change in the conditions to which it is applied." *Realty Revenue Corp. v. Wilson*, 44 N.Y.S.2d 234, 235-36 (Sup. Ct. 1943). *See also Hous. & Dev. Admin. of City of N.Y. v. Cmty. Hous. Improvement Program, Inc.*, 90 Misc. 2d 813, 815 (N.Y. App. Term), *aff'd sub nom.*, 59 A.D.2d 773 (2d Dep't 1977) ("Laws constitutional when enacted may become unconstitutional as administered or applied.").

Defendants nonetheless maintain that "New York courts act with restraint and do not interfere with matters that fall within the province of the Legislature, so as to preserve the separation of powers." UFT MTD at 22. It is beyond question, however, that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). And in the realm of constitutional rights, separation of powers is not defined by judicial inaction and legislative fiat. "The Court … plays a crucial and necessary function in our system of checks and balances. It is the responsibility of the judiciary to safeguard the rights afforded under our State Constitution." *LaValle*, 3 N.Y.3d at 128. For this reason, Defendants cannot identify a single case where a constitutionally-protected right was at issue, but the court nevertheless concluded that the matter was non-justiciable on political question grounds. Instead, the cases Defendants cite on this point involve one of two irrelevant scenarios: 1) dismissing claims about alleged violations of *statutory* rights, *see e.g. Matter of N.Y.S. Inspection, Sec. & Law Enforcement Emps., Dist. Council 82 v. Cuomo*, 64 N.Y.2d 233 (1984) (statutory right to safe workplace); *Retired Public Emps. Ass'n v. Cuomo*, N.Y.S.2d __, 2014 WL 5285635 (3d Dep't Oct. 16, 2014) (statutory right to monthly benefits); or 2) dismissing claims where the plaintiffs did not assert an established right at all, *see, e.g. Jones v. Beame*, 45 N.Y.2d 402, 406 (1978) (claim against the Mayor of New York City for failing to adequately provide for animals in city zoos); *Abrams v. N.Y.C. Transit Auth.*, 39 N.Y.2d 990, 992 (1976) (claim against the New York City Transit Authority for noisy subways). None of these cases involved claimed violations of constitutional rights, and therefore each is inapposite to the question of justiciability here. In any event, it is not uncommon for the Court of Appeals to determine that a legislative enactment runs afoul of the constitution, whether the law furthers a compelling policy or not.[7]

[7] *See, e.g. City of N.Y. v. N.Y.S. Div. of Human Rights*, 93 N.Y.2d 768, 771 (1999) (statute unconstitutional under

The inclusion of Article XI in the New York State Constitution tells us that the Legislature and the Executive are not the sole guardians of children's educational rights. As Judge Ciparick explained in *Hussein v. State*: "If we declare that a sound basic education consists only of what the Legislature and Executive dictate, the scope of the State's constitutional duty under the Education Article and, conversely, the scope of the constitutional rights of our schoolchildren, is limited to what those branches say it is." 19 N.Y.3d at 903 (Ciparick, J. concurring). But the Constitution neither "entrust[s] the Legislature and Executive with the decidedly judicial task of interpreting the meaning of the Education Article" nor "cast[s] them in the role of being their own constitutional watchdogs." *Id.* Instead, the task of constitutional review is emphatically a judicial one: "Our system of separation of powers does not contemplate or permit such self-policing, nor does it allow [courts] to abdicate [their] function as 'the ultimate arbiters of our State constitution.'" *Id.*[8]

B. The Alleged Deprivation Is Redressable By This Court.

In the same vein, Defendants erroneously assert that the alleged constitutional violation cannot be redressed by this Court. UFT MTD at 30-32. But Defendants mischaracterize the relief that Plaintiffs seek. Plaintiffs are not asking the court to rewrite the tenure laws or

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N.Y. Const. art. V, § 6); *LaValle*, 3 N.Y.3d 88, 120 (2004) (statute unconstitutional under N.Y. Const. art. I, § 6); *People v. Golb*, 23 N.Y.3d 455, 468 (2014) (statute unconstitutional under N.Y. Const. art. I, § 8); *Aliessa ex rel. Fayad v. Novello*, 96 N.Y.2d 418, 429 (2001) (statute unconstitutional under N.Y. Const. art. XVII, § 1); *McDermott v. Regan*, 82 N.Y.2d 354, 358 (1993) (statute unconstitutional under N.Y. Const. art. V, § 7); *N.Y.S. Bankers Ass'n v. Wetzler*, 81 N.Y.2d 98, 101 (1993) (statute unconstitutional under N.Y. Const. art. VII, § 4); *Burrows v. Bd. of Assessors for Town of Chatham*, 64 N.Y.2d 33, 36 (1984) (statute unconstitutional under N.Y. Const. art. I, § 11); *Cnty. of Rensselaer v. Regan*, 80 N.Y.2d 988, 992 (1992) (statute unconstitutional under N.Y. Const. art. V, § 1). *Bellanca v. N.Y.S. Liquor Auth.*, 54 N.Y.2d 228, 236 (1981) (statute unconstitutional under N.Y. Const. art. I, § 8).

[8] The court's holding in *Brady v. A Certain Teacher*, 166 Misc. 2d 566 (N.Y. Sup. Ct. 1995), is irrelevant to justiciability here. *See* State MTD at 11. The *Brady* court's determination about the merits of a different Article XI claim does not speak to whether Plaintiffs have alleged facts which state a cause of action under Article XI's guarantee of a sound basic education. 166 Misc. 2d 566 (finding that Education Laws requiring school boards to pay salary and benefits to suspended teachers did not violate State constitution).

"assum[e] administrative supervision of every local school district and administrator in the State." UFT MTD at 31. Unlike in *New York Civil Liberties Union v. State*, Plaintiffs here are not requesting that the court order an investigation into the causes of each of the alleged-failing schools' inadequacies. 4 N.Y.3d at 179. Instead, Plaintiffs are asking for a routine judicial remedy, namely for the court to enjoin the unconstitutional enforcement of the Challenged Statutes. Compl. Prayer for Relief. While such a remedy may have a significant effect, "big impact" is not a cognizable argument against judicial review. *See, e.g.*, *CFE III*, 8 N.Y.3d at 19, 21 (directing the State to ensure "that every school in New York City would have the resources necessary for providing the opportunity for a sound basic education" and estimating that this would cost the State "$1.93 billion … in additional annual operating funds"); *Vergara*, 2014 WL 2598719 (holding unconstitutional California's tenure and last-in-first-out statutes). Plaintiffs have stated a redressable claim by clearly articulating "the asserted failing of the State, sufficient for the State to know what it will be expected to do should the plaintiffs prevail." *N.Y. Civil Liberties Union*, 4 N.Y.3d at 180.

Plaintiffs' aim is not, as Defendants insist, to strip teachers of their "property interest in continued employment" or of "all procedural due process rights with respect to that employment." NYSUT MTD at 45-46. If this Court grants Plaintiffs the relief that they seek, the Legislature will remain free to design new protections for teachers that also comply with the constitutional guarantee that students receive a sound basic education. That is precisely what happened in *CFE.* There, the Court of Appeals "specif[ied] the constitutional deficiencies" with existing legislation, offered "remedial directions," and then monitored the Legislature's compliance with the court's directive. *CFE II*, 100 N.Y.2d at 931-32. In response to *CFE II*, the Legislature modified the State's educational funding system, which the court later upheld as

constitutional. *CFE III*, 8 N.Y.3d at 20. This legislative course correction is all that Plaintiffs seek here.

III. PLAINTIFFS HAVE STANDING AND THE ISSUE IS RIPE

Despite the well-pleaded allegations of systematic failure in the state education system, Defendants claim that Plaintiffs have failed to articulate a sufficient injury to survive a motion to dismiss. Defendants contend that Plaintiffs lack standing, and their claims are not ripe, because Plaintiffs do not allege that any of their children have had an ineffective teacher. UFT MTD at 33-35, NYSUT MTD at 8-9, State MTD at 23-27, SAANYS MTD at 15-16. This is yet another attempt to immunize State action in the education sphere from judicial review. But because Plaintiffs are part of the very class protected by Article XI and—as a result of the Challenged Statute's enforcement—are being taught by or are at imminent risk of being taught by ineffective teachers, they have standing, as well as a ripe claim.[9]

Plaintiffs have established standing by alleging an injury that is within the zone of interests protected by Article XI. *See Ass'n for a Better Long Island, Inc. v. N.Y.S. Dep't of Envtl. Conservation*, 23 N.Y.3d 1, 6 (2014). As an initial matter, Defendants mischaracterize the "zone of interests" standing requirement by asserting that "Plaintiffs are not within the 'zone of interest' *of the challenged statutes*." SAANYS MTD at 16. Plaintiffs need not allege that they are within the zone of interests of the Challenged Statutes, but of the constitutional provision under which they seek relief. As the court recently explained, "a plaintiff must allege an injury that is within the zone of interests sought to be protected by the [provision] *alleged to have been*

[9] Defendants make the baffling claim that "the real parties in interest here would be the infants, who are not named as parties, and the Wright Complaint must be dismissed as a matter of law." SAANYS MTD at 14. Of course, though it is the schoolchildren who have suffered injury, the parents are the named plaintiffs here pursuant to the requirements of CPLR 1201. *See Campaign for Fiscal Equity v. State*, 187 Misc. 2d 1, 18 (N.Y. Sup. Ct. 2001) ("[T]he children of these parents who attend public school in New York City have established an injury in fact which is redressable by this court. Pursuant to CPLR 1201 children must appear in court via their parent or guardian.").

violated." *Ass'n for a Better Long Island,* 23 N.Y.3d at 6. *See also New Yorkers for Students' Educ. Rights*, 2014 N.Y. Mis. LEXIS 4957, at *2 ("The determination for standing requires that the party seeking relief sufficiently establish a recognizable stake in the proceedings and their outcome so that the dispute is capable of judicial resolution.")

Here, Plaintiffs allege a violation of Article XI, which requires the Legislature to "provide for the maintenance and support of a system of free common schools, wherein *all the children of this state* may be educated." Art. XI, § 1. There is no doubt that however far the zone of Article XI radiates, its primary beneficiaries are the schoolchildren of New York State. This case is no different from *New Yorkers for Students' Educ. Rights v. State*, where the court accepted plaintiffs' argument that they had standing because "as parents of school children they fall within the zone of interest that is protected by the New York State Constitution." 2014 N.Y. Misc. LEXIS 4957, at *2. As the court explained, "[t]here is no reason to close the courthouse doors to parents and children with viable constitutional claims." *Id.* (quoting *Hussein* 19 N.Y.3d at 904). As those expressly singled out for Article XI's protection, and as current students in the State's education system, Plaintiffs have a "genuine stake in the litigation" that is "different from that of the public at large," and which is therefore sufficient to confer standing. *Ass'n for a Better Long Island,* 23 N.Y.3d at 6. Defendants also allege that Plaintiffs who are not presently enrolled in public schools lack standing. State MTD at 28. But the right to a sound basic education under Article XI is not limited to current public school students, it extends to "all children of the state." Art. XI, § 1. And but for the constitutional deficiencies in the current system, these Plaintiffs would be able to receive a free, adequate education in the public school system, without resorting at considerable cost to private school.

In addition, Plaintiffs have alleged a systemic harm that falls squarely within the protections of Article XI. Plaintiffs are attending school in districts handicapped by the Challenged Statutes—statutes which result in the promotion and retention of ineffective teachers. Plaintiffs have clearly alleged how the Challenged Statutes deny their right to a sound basic education, *see* Compl. ¶¶ 27-33, by, for example, granting a teacher tenure before she has been proven effective, Compl. ¶¶ 34-48, keeping ineffective teachers in the classroom as a result of a faulty disciplinary hearing system, Compl. ¶¶ 49-65, and maintaining the employment of more senior, yet ineffective, teachers at the expense of less experienced, but more effective, teachers, Compl. ¶¶ 66-76. Because—as a result of implementation of the Challenged Statutes—ineffective teachers are not properly being evaluated as such, nor are they being dismissed, *see* Compl. ¶ 55, Plaintiffs have been taught, are being taught, or are at imminent risk of being taught, by an ineffective teacher. That inference is sufficient here, where to state a claim Plaintiffs are required to allege system-wide failure.

Indeed, as Defendants themselves concede, individualized accounts of injury are irrelevant when the standard of proof is systemic harm. Defendants argue that: "It has never been held, *and would be incongruous with the language of the Education Article*, that a student's individual educational experience can give rise to a facial constitutional challenge under the Education Article." State MTD at 27. The State cannot have it both ways: if, as the State argues, an individual education experience is not the standard for a constitutional claim under Article XI, then it cannot also claim Plaintiffs' standing is deficient for failure to allege an injury that is individualized rather than systemic. Moreover, Defendants are masking a merits argument as a standing question. Whether—even assuming systemic harm—the individual Plaintiffs have been injured is a repackaged variation of Defendants' causation argument, which

can only be answered on a fuller record and at the merits stage. Courts routinely decline to decide standing on a motion to dismiss where the defendants raise standing challenges that turn on a question of fact. *See, e.g.*, *Deutsche Bank Nat'l Trust Co. v. Rivas*, 95 A.D.3d 1061, 1062 (2d Dep't 2012); *U.S. Bank Nat'l Ass'n v. Faruque*, 120 A.D.3d 575, 578 (2d Dep't 2014); *Brach v. Harmony Servs., Inc.*, 93 A.D.3d 748, 750 (2d Dep't 2012); *Genger v. Genger*, 87 A.D.3d 871 (1st Dep't 2011); *Celestin v. Am. Transit Ins. Co.*, 747 N.Y.S.2d 920, 923 (Civ. Ct. 2002). It thus would be premature to dismiss this case on the basis that Plaintiffs have not been injured by ineffective teachers, before Plaintiffs have an opportunity to factually develop their claims.

In any event, the imminent risk of injury alone establishes standing, and is not unduly speculative as Defendants contend. Future harm suffices to confer standing where, as here, "there is more than an amorphous allegation of potential future injury." *Ass'n for a Better Long Island*, 23 N.Y.3d at 7. Unfortunately, it is an inevitability that some number of New York schoolchildren each year will land in a classroom controlled by an ineffective teacher whom administrators are unable to dismiss due to enforcement of the Challenged Statutes. That is not speculation, but a reality of the status quo. Each year, tens of thousands of New York students find themselves in the classrooms of those ineffective teachers who would be removed but for the challenged statutory scheme, and Plaintiffs—no less than other students—face an imminent threat each year that they move into a new teacher's classroom. "[P]roof of a likelihood of the occurrence of a threatened deprivation of constitutional rights is sufficient to justify prospective or preventative remedies…without awaiting actual injury." *N.Y. Cnty. Lawyers' Ass'n v. State*, 294 A.D.2d 69, 74 (1st Dep't 2002) (citing *Swinton v. Safir*, 93 N.Y.2d 758, 765 (1999)); s*ee also Hussein*, 81 A.D.3d at 137 ("[T]he hardship that may be suffered if we do not permit

consideration of these claims to go forward cannot be said to be insignificant, remote or contingent."). That makes sense: there is no reason to wait for inevitably greater harm to occur when relief can be provided now. Indeed, prospective review is particularly appropriate for a declaratory judgment, where the "primary purpose … is to adjudicate the parties' rights before a 'wrong' actually occurs in the hope that later litigation will be unnecessary." *Klostermann v. Cuomo*, 61 N.Y.2d 525, 538 (1984).

For the same reason Plaintiffs have standing, this claim is ripe, and this case is unlike those dismissed for lack of ripeness. Defendants, for example, cite *New York State Inspection* for the proposition that "[w]here the harm sought to be enjoined is contingent upon events which may not come to pass, the claim to enjoin the purported hazard is nonjusticiable as wholly speculative and abstract." NYSUT MTD at 13 (citing *N.Y.S. Inspection, Sec. & Law Enforcement Emps.*, 64 N.Y.2d at 240). In that case, however, the harm sought to be avoided was one which was not certain to occur to anyone, let alone the plaintiffs at issue, as an administrative decision had yet to be rendered at all. *Id.* Here, by contrast, the Complaint alleges that many New York students are harmed each year through placement in the classrooms of ineffective teachers who would otherwise be removed from their positions but for the Challenged Statutes. Compl. ¶ 25. The harm is existing and ongoing and the claim is therefore ripe.

Plaintiffs allege a very serious harm, the infringement of a constitutional right. Defendants argue that the harm at issue is not significant enough, or that there are other administrative steps that Plaintiffs could take to justify a finding that ripeness is lacking. NYSUT MTD at 27 (citing *Adirondack Council, Inc. v. Adirondack Park Agency*, 92 A.D.3d 188 (3d Dep't 2012); *N.Y. Blue Line Council, Inc. v. Adirondack Park Agency*, 86 A.D.3d 756, 760

(3d Dep't 2011)); UFT MTD at 37 (citing *Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 522-23 (1986)). This argument devalues the rights granted by New York's Constitution. And unlike the cases cited by Defendants, *see* NYSUT MTD at 27, there is no administrative remedy available to fix the harms that Plaintiffs face. In the case of 3020-a, even if a parent were to ask for a review of a decision not to commence charges, *id*. at 28, the unreasonably lengthy timeline of an administrative proceeding would unduly delay relief. And it would not forestall the danger of future assignment to an ineffective teacher. With respect to LIFO and the Permanent Employment Statutes, a parent or child has no potential administrative remedy at all.

Finally, the newly revised Disciplinary Statutes are also ripe for review. Defendants claim that it is premature to review the effect of the newly implemented and revised evaluation procedures of § 3012-c expediting disciplinary procedures under § 3020-a. *See id*; UFT MTD at 37. However, Defendants overstate the significance of the renewed time-window limitations, which have never been complied with. As stated in the Complaint, the previous version of 3020-a also had statutory time limits which were routinely violated. *See* Compl. ¶¶ 56-58. Additionally, even if the review process now takes less time, students' rights are still infringed during the two years of Ineffective teaching necessary to collect the reviews to begin 3020-a proceedings. *See id*. Moreover, the standards by which teachers are adjudged have not changed, nor have the potential consequences if a teacher is found Ineffective, thus it remains extremely difficult to remove ineffective teachers. Defendants would hide behind the new law, but a new coat of paint cannot mask an already-crumbling structure. *See Conn. Coalition for Justice in Educ. Funding v. Rell, 2*013 WL 6920879, at *6 (Conn. Sup. Ct. Dec. 4, 2013) (rejecting motion to dismiss complaint for lack of ripeness, holding that "[t]he plaintiffs should be given an

opportunity to prove … that the education system remains unconstitutional in spite of [recent] reforms."). For the same reasons, the revisions do not render Plaintiffs' claims moot. Defendants would have the Court believe that the revisions render this suit both too early and too late. *Compare* NYSUT MTD at 28 *with* NYSUT MTD at 29-30. Both cannot be true, and in fact neither is. The statute still impermissibly restricts administrators' ability to remove ineffective teachers and none of the revisions address the constitutional deficiencies Plaintiffs allege here. For example, the revised statute still allows an arbitrator to decide against dismissing a teacher who has been found guilty of incompetence on the basis that future remedial efforts may help. *See* Compl. ¶¶ 62-64.

Defendants' standing and ripeness arguments are another variation of their plea to protect legislative action in the education sphere from judicial review. But courts have cautioned against using standing doctrine to that end. As the court explained in *Association for a Better Long Island*, "standing rules should not be heavy-handed" and courts should be "reluctant to apply [standing] principles in an overly restrictive manner where the result would be to completely shield a particular action from judicial review." 23 N.Y.3d at 6. And most recently, the court rejected this very argument in the context of an Education Article claim, explaining that the "Court will not 'close the courthouse doors' on the individual plaintiffs' potentially viable constitutional claims affecting schoolchildren in New York State." *New Yorkers for Students' Educ. Rights*, 2014 N.Y. Misc. LEXIS 4957, at *2-3.

If the schoolchildren learning in the very system with alleged endemic failures have no ability to assert their constitutional rights, it is hard to imagine who would. *See N.Y.S. Ass'n of Small City Sch. Dists.*, 42 A.D.3d at 648 (concluding that individually named parent and student plaintiffs had standing to bring education funding claim). And it is well established that "where

a denial of standing would pose 'in effect … an impenetrable barrier to any judicial scrutiny of legislative action,' [the court's] duty is to open rather than close the door to the courthouse." *Saratoga Cnty. Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 814 (2003). *See also N.Y.S. United Teachers ex rel. Iannuzzi*, 993 N.Y.S.2d at 480-81 (accepting plaintiffs' argument that "if standing is denied, an important constitutional issue would be effectively insulated from judicial review"); *Boryszewski v. Brydges*, 37 N.Y.2d 361, 364 (1975) (recognizing standing "where, as in the present case, the failure to accord such standing would be in effect to erect an impenetrable barrier to any judicial scrutiny of legislative action."). Indeed, the court has accepted jurisdiction even when an individual plaintiff may lack standing, but raises an issue of "sufficient public importance" that may affect countless other people. *See, e.g.*, *People v. Parker*, 41 N.Y.2d 21, 25 (1976). If there were ever a claim of sufficient public import, it is the violation asserted here, which affects—and which will continue to affect—innumerable schoolchildren across the State.

IV. DEFENDANTS' JOINDER ARGUMENTS ARE MERITLESS

A. Joinder Of All New York School Districts Is Unnecessary.[10]

Defendants mistakenly claim that the Complaint must be dismissed for failing to join all New York school districts as parties to the action. DOE MTD at 21-22, NYSUT MTD at 56. But it is well established that in matters where governmental policies and programs are challenged, "only those governmental entities that are primarily responsible for the challenged policy are necessary parties." *Joanne S. v. Carey*, 115 A.D.2d 4, 9 (1st Dep't 1986); *see also Mid Island Therapy Assocs., LLC v. N.Y.S. Dep't of Educ.*, 99 A.D.3d 1082, 1083 (3d Dep't

[10] Defendants argue both that Plaintiffs joined too few and too many defendants. *See* State MTD at 32-33. But each defendant named by the Plaintiffs was properly identified as a party because, as alleged, each is legally responsible for the operation of the New York State educational system and ensuring compliance with relevant state and federal constitutional requirements. Compl. ¶¶ 17-21.

2012). Because the State of New York and the Board of Regents are primarily responsible for enacting and enforcing the Challenged Statutes, the joinder of all school districts is unnecessary.

Defendants would extend the holding of *Paynter v. State* beyond its logical bounds. DOE MTD at 21-22. In that case, the plaintiffs, without naming the school districts as defendants, asked the court to redistribute poor and minority students across districts in Monroe County. The court held that "school districts [] have distinct interests that they are entitled to defend when, as here, suit has been brought calling into question their very existence." *Paynter*, 270 A.D.2d at 820. It was only because the *Paynter* plaintiffs' claim would affect the "very existence" of certain school districts that those districts were necessary parties. Here, by contrast, Plaintiffs' do not seek to alter the makeup or existence of any school district. Plaintiffs' claims only concern the constitutionality of certain statutes which have been promulgated and enforced by the State, for which the school districts of the state bear only a subordinate responsibility.

B. Joinder Of Teachers' Unions Is Unnecessary.

Defendants claim that the local teachers' unions are necessary parties is also without merit. While Defendants premise this joinder argument on the contention that collective bargaining agreements will be affected if the challenged statutory scheme is found unconstitutional, NYSUT MTD at 54-56, Plaintiffs' claim concerns the constitutionality of the Challenged Statutes, and is not an action to set aside the contracts of teachers. Thus, teachers' unions need not be joined.

C.P.L.R. § 1001(a) states that the parties necessary to an action include those "who might be inequitably affected by a judgment in the action." While joinder is required where there is a real possibility that the judgment might diminish or derogate a nonparty's right or constrain the nonparty from exercising or enjoying its rights, "[j]oinder is not required where, regardless of the court's determination, the judgment can have no influence upon the conduct of the non-party or

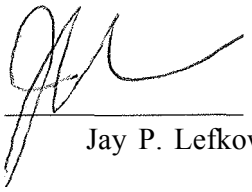
the integrity of its rights." *McCrory v. Vil!. of Mamaroneck,* 34 Misc. 3d 603, 618 (N.Y. Sup. Ct. 2011). Defendants cite *Scarlino v. Fathi* for the proposition that where a labor union may be inequitably affected by a judgment, it must be joined as a necessary party. NYSUT MTD at 56. However, in *Scarlino,* the action brought involved the interpretation of the excluded labor union's contract and therefore the union's rights could have been adversely affected. *See Scarlino v. Fathi,* 107 A.D.3d 514, 515 (1st Dep't 2013). Here, Plaintiffs' claim does not implicate the interpretation of any labor union contract with the State. Plaintiffs instead assert their right to a sound basic education, and any ancillary effect that may have on the collective bargaining agreements of teachers' unions does not make those unions necessary parties.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motions to dismiss.

Dated: New York, New York
December 5, 2014

Kirkland & Ellis LLP

By: 
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Attorneys for the Wright Plaintiffs

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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MYMOENA DAVIDS, *et al.,*

Plaintiffs,

- against -

THE STATE OF NEW YORK, *et al.,*

Defendants,

- and -

MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, local 2, Amelican Federation of Teachers, AFL-CIO,

Intervenor- Defendant,

- and -

SETH COHEN, *et al.,*

Intervenors-Defendants ,

- and -

PHILIP A. CAMMARATA and MARK MAMBRETTI,

Intervenors-Defendants.

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Index No. 101105-2014

Justice: Hon. Philip G. Minardo

***WRIGHT* PLAINTIFFS' AFFIRMATION IN OPPOSITION TO DEFENDANTS' AND INTERVENORS-DEFENDANTS' MOTIONS TO DISMISS THE ACTION**

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JOHN KEONI WRIGHT, *et al.,*

Plaintiffs,

- against -

THE STATE OF NEW YORK, *et al.,*

Defendants,

- and -

SETH COHEN, *et al.,*

Intervenors-Defendants,

- and -

PHILIP A. CAMMARATA and MARK MAMBRETTI,

Intervenors-Defendants,

- and -

NEW YORK CITY DEPARTMENT OF EDUCATION,

Intervenor-Defendant,

- and -

MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO,

Intervenor-Defendant.

----------X

JAY P. LEFKOWITZ, an attorney duly admitted to the practice of law before the courts of the state of New York, affinns the following under the penalty of perjury:

1. I am an attorney for Plaintiffs John Keoni Wright, et al. I am familiar with the facts and the circumstances of this case. I submit this affomation in further support of the *Wright* Plaintiffs' Memorandum of Law in Opposition to Defendants' and Intervenor-Defendants' (collectively "Defendants") Motions to Dismiss the Action, for the purpose of providing the Cowt with additional, new information regarding New York State teacher evaluations and student test scores for the 2013-14 school year.

2. Attached hereto as Exhibit A is a copy of a presentation prepared by the New York State Education Department ("NYSED") containing summations of the English Language Arts ("ELA") and Mathematics examination results for the 2013-14 school year.

3. Attached hereto as Exhibit B is a copy of a presentation prepared by NYSED containing summations of the 2014 statewide evaluation results for teachers and principals.

4. Attached hereto as Exhibit C is a copy of a letter sent by Jim Malatras, New York State Director of State Operations, on behalf of Governor Andrew Cuomo to Menyl H. Tisch, Chancellor of the New York State Board of Regents, and John B. King, New York State Commissioner of Education, on December 18, 2014.

5. In tlleir complaint, the *Wright* Plaintiffs alleged that "[t]he APPR does not adequately identify teachers who are truly 'Developing' or 'Ineffective.' For example, teachers are not rated ineffective even when their students consistently fail state exams. In 2012, only 1% of teachers were rated 'Ineffective.' At the same time, 91.5% of New York teachers were rated 'Highly Effective' or 'Effective,' even though only 31% of students taking the English Language Aits and Math standardized tests met the standard for proficiency." *Wright* Compl. if 41.

6. After the complaint was filed, the test results and teacher evaluations for the 2013-14 school year were made publicly available. According to that data, 31.2% of students statewide tested at or above proficiency in math in 2013, and 35.8% of students statewide tested at proficiency or above in math in 2014. Ex. A at 19. Similarly, 31.3% of students statewide tested at or above proficiency in ELA in 2013, and 31.4% of students statewide tested at proficiency or above in 2014. Ex. A at 31.

7. At the same time, 94.5% of teachers statewide were rated "Highly Effective" or "Effective" in 2013, and 95.6% were rated "Highly Effective" or "Effective" in 2014. Ex. B at 7. Only 1% of teachers statewide were rated "Ineffective" in 2013, and only 0.7% of teachers statewide were rated "Ineffective" in 2014. *Id.*

8. In New York City specifically, only 30.1% of students tested at or above proficiency in math in 2013, and only 34.5% of students tested at or above proficiency in math in 2014. Ex. A at 19. Similarly, only 27.4% of New York City students tested at or above proficiency in ELA in 2013, and only 29.4% of New York City students tested at or above proficiency in ELA in 2014. Ex. A at 31.

9. At the same time, 91.7% of teachers in New York City were rated "Highly Effective" or "Effective" in 2014. Only 1.2% of New York City teachers were rated "Ineffective" in 2014.[1] Ex. B at 9.

10. Governor Cuomo recently expressed his concern about the low number of teachers rated "Ineffective" despite the majority of New York State students failing to meet basic

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[1] 2013 evaluation data for New York City teachers is unavailable because the City did not have a teacher evaluation system in place due to the inability of the City and teachers' union to agree on a plan for the teacher evaluation system. *Wright* Compl. ¶41 n.2.

proficiency levels in math and ELA. In a December 18, 2014, letter sent to the Chancellor of the Board of Regents, Merryl H. Tisch, and departing Education Commissioner, John B. King Jr., Jim Malatras, Governor Cuomo's Director of State Operations, noted, "Although we spend the most per pupil than any other state, we lag behind in graduation rates, only 34.8 [sic] percent of our students are proficient in math, 31.4 percent proficient in ELA and only 37.2 percent of our high school students are college ready. We all can agree that this is simply unacceptable." Ex. C.

11. The Governor's letter also expressed concerns about the credibility of the teacher evaluation system, asking, "How is the cunent teacher evaluation system credible when only one percent of teachers are rated ineffective? The NYC system was negotiated by Commissioner King directly and no one claims it is an accurate reflection of the reality of the state of education in NYC." *Id.*

Dated: New York, New York
January 12, 2015

Kirkland & Ellis LLP

By: _____
Jay P. Lefkowitz

EXHIBIT A

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January 12, 2015

Hon. Philip G. Minardo
New York State Supreme Court
18 Richmond Terrace
Staten Island, New York 10301
Attn: Robert Soos, Esq., Principal Law Clerk

Re: *Davids et. al. v. State of New York, et al.,* Richmond County Index No. 101105/14, File No. 258495-N 1OO

Dear Justice Minardo:

I submit this affinnation to respond to a new argument set forth in reply by Intervenors-Defendants NYSUT that poor student outcomes are not indicative of ineffective teaching because the "2013 tests were aligned to brand new curriculum." NYSUT Reply at 4 & n.2. The affinnation includes State-published summations of 2014 student examination results, which demonstrate that poor student results were not an anomaly in 2013 but are part of an ongoing trend of deficient student outputs.

A court may consider affidavits in assessing the adequacy of a plaintiff s allegations. *See E&B Giftware LLC v. Fungo Play LLC,* 2014 WL 2451355, *2 (Sup. Ct. N.Y. Cty. 2014) ("The court may consider documents referenced in the complaint, other evidentiary submissions, or affidavits submitted by the plaintiff, to assess the viability of the pleading."); *Leon v. Martinez,* 84 N.Y.2d 83, 88 (1994) (same). Where, as here, a defendant introduces new evidence or new factual arguments in a reply brief, plaintiffs are pennitted to submit a surreply affidavit to respond. *See, e.g., Interweb, Inc. v. iPayment, Inc.,* 2004 WL 5487978 (Sup. Ct. N.Y. Cty. 2004) (new evidence); *Castaldi v. Chen,* 56 A.D.3d 420, 420 (2d Dep't 2008) (new factual arguments).

In addition, it is long settled that the Court may take judicial notice of the data in this affidavit, and treat it as part of the complaint, because the data is part of the public record. *See, e.g., Stahl Soap Corp. v. City of New York,* 164 N.Y.S.2d 79, 82 (Sup. Ct.) *rev 'd on other grounds,* 167 N.Y.S.2d 717 (2d Dep't 1957) *aff'd,* 5 N.Y.2d 200 (1959) (taking judicial notice of "matters of public record" and "treating such facts as if embodied in the complaint"); *Siwek v. Mahoney,* 39 N.Y.2d 159, 163 n.2 (1976) ("Data culled from public records is, of course, a

proper subject of judicial notice[.]"). *See also Int 'l Painters & Allied Trades Indus. Pension Fund v. Cantor Fitzgerald, L.P.,* 41 Misc. 3d 770, 777 n.3 (Sup. Ct. 2013) (taking judicial notice of a matter of public record on a motion to dismiss); *Buffalo Retired Teachers 91-94 Alliance v. Ed. of Educ. for City Sch. Dist. of City of Buffalo,* 689 N.Y.S.2d 562, 566 (4th Dep't 1999) (taking judicial notice of public statistics when assessing a motion to dismiss).

Sincerely,

Jay P. Lefkowitz

cc: all counsel