To Be Argued By:
JONATHAN W. TRIBIANO
Time Requested: 5 Minutes

Supreme Court of the State of New York
Appellate Division – Second Department

DOCKET NOS.
2015-03922
2015-12041

MYMOENA DAVIDS,
by her parent and natural guardian MIAMONA DAVIDS,
Plaintiffs-Respondents,

—against—

THE STATE OF NEW YORK,
Defendants-Appellants,
MICHAEL MULGREW, as President of the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO,
Intervenor-Defendant-Appellant.

(*Caption continued on next page*)

BRIEF FOR PLAINTIFFS-RESPONDENTS MYMOENA DAVIDS, ET AL.

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July 8, 2016

Richmond County Clerk's Index No.: 101105/14

ERIC DAVIDS, by his parent and natural guardian MIAMONA DAVIDS, ALEXIS PERALTA, by her parent and natural guardian ANGELA PERALTA, STACY PERALTA, by her parent and natural guardian ANGELA PERALTA, LENORA PERALTA, by her parent and natural guardian ANGELA PERALTA, ANDREW HENSON, by his parent and natural guardian CHRISTINE HENSON, ADRIAN COLSON, by his parent and natural guardian JACQUELINE COLSON, DARIUS COLSON, by his parent and natural guardian JACQUELINE COLSON, SAMANTHA PIROZZOLO, by her parent and natural guardian SAM PIROZZOLO, FRANKLIN PIROZZOLO, by his parent and natural guardian SAM PIROZZOLO, IZAIYAH EWERS, by his parent and natural guardian KENDRA OKE,

Plaintiffs-Respondents,

—against—

THE NEW YORK STATE BOARD OF REGENTS, THE NEW YORK STATE EDUCATION DEPARTMENT, THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION, JOHN and JANE DOES 1-100, XYZ ENTITIES 1-100,

Defendants-Appellants,

—and—

SETH COHEN, DANIEL DELEHANTY, ASHLI SKURA DREHER, KATHLEEN FERGUSON, ISRAEL MARTINEZ, RICHARD OGNIBENE, JR., LONNETTE R. TUCK, and KAREN E. MAGEE, individually and as President of the New York State United Teachers, PHILIP A. CAMMARATA and MARK MAMBRETTI,

Intervenors-Defendants-Appellants.

JOHN KEONI WRIGHT, GINET BORRERO, TAUANA GOINS, NINA DOSTER, CARLA WILLIAMS, MONA PRADIA, ANGELES BARRAGAN, LAURIE TOWNSEND and DELAINE WILSON,

Plaintiffs-Respondents,

—against—

THE STATE OF NEW YORK and THE BOARD OF REGENTS OF THE STATE OF NEW YORK,

Defendants-Appellants,

—and—

SETH COHEN, DANIEL DELEHANTY, ASHLI SKURA DREHER, KATHLEEN FERGUSON, ISRAEL MARTINEZ, RICHARD OGNIBENE, JR., LONNETTE R. TUCK, and KAREN E. MAGEE, individually and as President of the New York State United Teachers, PHILIP A. CAMMARATA, MARK MAMBRETTI, NEW YORK CITY DEPARTMENT OF EDUCATION, and MICHAEL MULGREW, as President of the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO,

Intervenors-Defendants-Appellants.

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QUESTIONS PRESENTED IN OPPOSITION

QUESTION #1: Have Plaintiffs adequately pleaded a violation of Article XI by alleging a systemic state-wide failure to provide effective teachers that is having a negative effect on student performance and is caused by the State's enforcement of the Challenged Statutes?

ANSWER: The trial court answered "Yes."

QUESTION #2: Does the Judiciary have the power to adjudicate this alleged constitutional violation

ANSWER: The trial court answered "Yes."

QUESTION #3: Were Plaintiffs required to join as defendants every individual school district and every teacher's union in the State of New York?

ANSWER: The trial court answered "No."

PRELIMINARY STATEMENT

The *Davids* Plaintiffs (hereinafter "Plaintiffs" or "Respondents") are eleven New York school children, represented by their respective parents, seeking to challenge the continued enforcement of certain New York statutes (the "Challenged Statutes") that effectively prevent the removal of ineffective teachers from the classroom, and, in economic downturns, require layoffs of more competent teachers.[1]

Plaintiffs' Complaint seeks declaratory relief that the Challenged Statutes, as written and as applied, violate the Plaintiffs' Constitutional rights by failing to provide Plaintiffs with a sound basic education pursuant to Article XI. (R.34-58).[2] Further, it is well settled that Declaratory judgment is the appropriate vehicle for examination of the constitutionality of legislation. *Boryszewski v. Brydges*, 37 N.Y.2d 361 (N.Y. 1975). Defendants' claims that Plaintiffs' Amended Complaint is nothing more than "examples of lobbying under the guise of litigation, an attempt to force educational policy change…by using the Judiciary to force the adoption of the so-called reforms they have been unable to press upon the political braches" (Brief of the Intervenor-Defendant-Appellant UFT at p.19) is meritless. Indeed, Defendants' opposition to Plaintiffs' respective Amended Complaints is

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[1] The Challenged Statutes are New York Education Law Sections 1102(3), 2509, 2573, 2590(j), 3012, 3014, 3020-a, and 3013(2).

[2] References preceded by "R." are to pages of the Record on Appeal.

precisely "lobbying under the guise of litigation" to maintain the *status quo* created by the Challenged Statutes (and the contracts and statutes negotiated by the United Federation of Teachers and other Defendants) to the detriment of all New York school children.

The lower Court properly determined that it was well suited to determine a declaratory judgment action to "interpret and safeguard constitutional rights and review the acts of the other branches of government, not for the purpose of making policy decisions, but to preserve the constitutional rights of its citizenry." R. 31 (citing , *Campaign for Fiscal Equity, Inc. v. State of New York* 100 N.Y.2d at 931 ["CFE II"]). Finally, the lower Court properly stated that it "will not close the courthouse door to parents and children with viable constitutional claims." (R. 32)

As stated *infra*, the question is whether the "facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 NY2d at 87-88; *ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 227 (2011). The Plaintiffs need not prove their case at this procedural juncture and, more importantly, the Plaintiffs are not required to offer clear evidence of causation at the pleading stage. *Campaign for Fiscal Equity, Inc. v. State of New York*, 86 N.Y.2d at 318 ("CFE I"). The lower Court recognized that it need only determine, under the facts and law in the Amended Complaint, if Plaintiffs' have a claim based upon any cognizable legal theory—a question the lower Court answered in the affirmative.

An Article XI claim requires: (1) the deprivation of a sound basic education; and (2) causes attributable to the State. *New York Civil Liberties Union v. State*, 4 N.Y. 3d 175, 179 (2005). Plaintiffs seek declaratory judgment—and adequately pleaded—that the Challenged Statutes are unconstitutional and allege that Defendants' implementation of the Challenged Statutes has resulted in the failure of the Defendants to deliver the sound basic education guaranteed by the New York State Constitution.[3] Further, Plaintiffs pleaded a systemic failure by the State to provide a sound basic education through the State's application of the Challenged Statutes. This satisfies Plaintiffs' requirement to plead a cause of action pursuant to Article XI.

As a result, the lower Court properly held that Plaintiffs adequately pleaded at cause of action under Article XI:

> [T]he facts alleged in the respective complaints are sufficient to state a cause of action for a judgment declaring that the challenged sections of the Education Law operate to deprive students of a "sound basic education" in violation of Article XI of the New York State Constitution, *i.e.*, that the subject tenure laws permit ineffective teachers to remain in the classroom; that such ineffective teachers continue to teach in New York due to statutory impediments to their discharge; and that the problem is exacerbated by the statutorily-established "LIFO" system dismissing teachers in response to mandated lay-offs and budgetary shortfalls. In opposition, none of the defendants or intervenor-defendants have demonstrated that any of the material facts alleged in the complaints are untrue. (R. 30)

[3] Article XI

Moreover, the lower Court enumerated the sufficiency of specific allegations of Plaintiffs' Amended Complaint stating:

> ...[P]laintiffs' allegations of serious deficiencies in teacher quality; its negative impact on the performance of students; the role played by subject statutes in enabling ineffective teachers to be granted tenure and in allowing them to continue teaching despite ineffective ratings and poor job performance; a legislatively prescribed rating system that is inadequate to identify the truly ineffective teachers; the direct effect that these deficiencies have on a student's right to receive a 'sound basic education; plus the statistical studies and surveys cited in support thereof are sufficient to make out a prima facie case of constitutional dimension connecting the retention of ineffective teachers to the low performance levels exhibited by New York students..." (R. 31)

Finally, the Court properly held: "Once it is determined that plaintiffs may be entitled to relief under any reasonable view of the facts stated, the court's inquiry is complete and the complaint must be declared legally sufficient." (citing *CFE I* 86 N.Y.2d at 318). (R. 31). Indeed, one of the Defendants specifically stated that Plaintiffs have met their burden to properly state a claim under Article XI in stating:

> The amended complaints (R. 36-58, 1351-74), allege that New York's public school system is failing to provide students with a sound basic education, as mandated by Article XI, Section 1 of the State Constitution. The plaintiffs allege that this statewide failure is caused by some thirteen provisions of the Education Law, which refulate teacher probation, tenure and dueprocess, professional evaluations and layoffs. (R. 39-39, 1359-72). (*See* Intervenors-Defendants-Appellants' Seth Cohen, et al. at p.2).

This admission in and of itself is indicative of the nature of every challenge to Plaintiffs' Amended Complaint—the challenges are without merit at this procedural juncture.

In regards to *Davids* Plaintiffs' Amended Complaint, despite Defendants' bald conclusory statements to the contrary, Plaintiffs have cited numerous academic, educational and social sciences studies and data in support of their allegations that the Challenged Statutes do in fact deprive New York school children the right to a sound basic education. (R.34-58). Specifically, Plaintiffs stated and cited:

- *See, e.g.*, Raj Chetty et al., *The Long-Term Impacts of Teachers II: Teacher Value-Added and Student Outcomes in Adulthood*, American Economic Review (forthcoming), *available at* http://obs.rc.fas.harvard.edu/chetty/w19424.pdf. Students taught by effective teachers are more likely to attend college, attend higher-quality colleges, earn more, live in higher socioeconomic status neighborhoods, save more for retirement, and are less likely to have children during their teenage years. *Id.* (R. 37-38)
- For example, in New York City, the largest school district in the State with over 75,000 teachers, only 12 teachers were dismissed "for incompetent teaching" over the entire decade from 1997 to 2007—only

1.2 teachers per year. *See* Katharine B. Stevens, *Firing Teachers: Mission Impossible*, N.Y. Daily News, Feb. 17, 2014, available at http://www.nydailynews.com/opinion/firing-teachers-mission-impossible-article-1.1615003. (R. 39)

- In fact, teacher quality affects student success more than any other in-school factor. According to one of the nation's foremost education economists, "teachers near the top of the quality distribution can get an entire year's worth of additional learning out of their students compared to those near the bottom." (R. 43)

- Recent studies have found that the Dismissal Statutes effectively prevent New York school administrators from dismissing teachers for poor performance. One study concluded that the average cost of dismissing a teacher for ineffectiveness in New York is $313,000, and takes an average of 830 days. *See* New York State School Boards Association, *Accountability for All* (March 2007), *available at* http://www.nyssba.org/clientuploads/gr_3020a_reform.pdf. The same study concluded that, between 1995 and 2006, just 547 teachers statewide—out of nearly 220,000 teachers total—were dismissed via the Dismissal Statutes, either because they were ineffective or for other reasons, such as misconduct. The dismissal process has not improved in

the years since 2007. *See* Katharine B. Stevens, *Firing Teachers: Mission Impossible*, N.Y. Daily News, Feb. 17, 2014, *available at* http://www.nydailynews.com/opinion/firing-teachers-mission-impossible-article-1.1615003. (R. 46)

- In 2011, for example, nearly 3 percent of New York teachers were laid off under the LIFO statue statewide—more than 7,000 teachers, including top performers. (R. 48)

In addition to the above examples, Plaintiffs cited other examples as well as extensive case law in support of Plaintiffs' allegations. These studies and facts are not anecdotal, outdated or irrelevant as Defendants suggest—they are alarming. Defendants' challenge of the facts and studies in both Plaintiffs' Amended Complaints only bolsters Plaintiffs' argument that this case cannot be decided at the pleading stage and must proceed to discovery so that this case can be decided on the merits.

Accordingly, the lower Court was correct in denying Defendants' respective motions to dismiss and Defendants' subsequent motions to renew.

NATURE OF THE CASE

The *Davids* Plaintiffs are eleven school children, represented by their parents, who attend public schools throughout the City of New York. In Plaintiffs' Amended Complaint they allege that the Challenged Statutes, as written and as

applied, violate the Plaintiffs' Constitutional rights by failing to provide Plaintiffs with a sound basic education pursuant to Article XI.

1. Plaintiffs' Allegations

Plaintiffs allege in their Amended Complaint that cumulatively, the Challenged Statutes make it nearly impossible for school administrators to hire and retain teachers based on effectiveness or to dismiss or discipline teachers with a proven track record of ineffectiveness or misconduct. By requiring school districts to apply the Challenged Statutes, the State is protecting ineffective teachers at the expense of their students' futures, depriving those students of quality teachers—the most important "input" of a sound basic education, and depriving civil society of functional future members who can help to uphold the social order and discharge basic civic responsibilities of serving on a jury and voting in an election. (*Paynter v. State of New York* 100 N.Y.2d at 440).

A. New York's Dismissal Statutes

Teachers in the State of New York are afforded "super" due process rights that are codified primarily in New York Education Law Sections 1102(3), 2509, 2573, 2590(j), 3012, 3014, and 3020-a (the "Dismissal Statutes"). The Dismissal Statues provide New York teachers with an insurmountable array of additional rights and privileges that are significantly greater than traditional due process. Indeed, unlike private companies, public employees in New York cannot be

dismisses for unsatisfactory performance or otherwise, unless they are afforded certain due process rights—which include notice of the proposed action, the reasons for the action, and the right to respond before the proposed discipline or termination can be made effective. *See* Beck-Nichols v. Bianco, 20 N.Y.3d 540, 559 (2013). While the *Davids* Plaintiffs do not challenge that teachers should be afforded due process rights, they do challenge the Dismissal Statutes' scope and application.

The Dismissal Statutes create an inordinate amount of obstacles to navigate before a district can dismiss an ineffective teacher. These obstacles result in a labyrinthine dismissal process requiring investigations, hearings, union grievances, administrative appeals, court challenges, and re-hearings—all of which can and often do take multiple years and cost hundreds of thousands of dollars.

As a result of the Dismissal Statutes' difficulty, complexity, cost, and length of time associated with the removal process, dismissal proceedings are rarely initiated to remove an unsatisfactory teacher. Further, when administrators do initiate dismissal proceedings based upon teacher performance, it rarely results in teacher dismissal because the burden on the administrators is unnecessarily burdensome. [4]

[4] When an administrator does feel a teacher is ineffective, the Dismissal Statutes require the administrator to leave that teacher in the classroom for one to two year in order to gather enough evidence in order to initiate and prevail in the dismissal proceeding. Indeed, even after dismissal

If the Dismissal Statutes were declared unconstitutional, teachers would still retain similar due process right other public employees enjoy. However, administrators would be given the autonomy to identify and remove teachers that fail to afford New York schoolchildren the minimum standard of education guaranteed to them under Article XI.

The current dismissal system as written and applied ensures that a certain number of ineffective teachers remain in New York classrooms providing our children with a substandard education. Accordingly, the Dismissal Statutes foster and environment where student are ill prepared to compete in the economic marketplace or to participate in a democracy.

B. New York's Last-In First-Out ("LIFO") Statute

New York Education Law § 3013, subdivision (2) (the "LIFO Statute") defines how district-wide layoffs are conducted. The LIFO Statute is a seniority-based layoff system, regardless of a teacher's performance, effectiveness, or quality. It states: "Whenever a trustee, board of trustee, board of education or board of cooperative educational services abolishes a provision under this chapter, the services of the teacher having the least seniority in the system within the tenure

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proceedings are initiated against an ineffective teacher, that teacher often remains in the classroom.

of the position abolished shall be discontinued." N.Y. Educ. Law § 3013, subd. (2).

Seniority is not an accurate predictor of teacher effectiveness, as recent studies have demonstrated. Yet the LIFO Statute mandates that layoffs be governed exclusively by seniority. This prevents a good teacher's effectiveness from being the yardstick by which other teachers are measured for layoff purposes. Ultimately, pursuant to the LIFO Statute, districts are being forced to keep ineffective senior teachers while laying off top-performing teachers with less seniority. The impact of the LIFO Statutes on schoolchildren is profound.[5]

On information and belief, in the absence of the LIFO Statute, school administrators, when forced to conduct layoffs would have the opportunity to base their decision on the performance and effectiveness of a teacher—not be bound by seniority alone.

The LIFO Statute, alone and in conjunction with the other statutes at issue, ensures that a certain number of ineffective teachers who are unable to prepare students to compete in the economic marketplace or to participate in a democracy retain employment in the New York school system. This substantially reduces the

[5] One recent study demonstrated that making layoff decisions based on teachers' seniority instead of teachers' performance costs students $2.1 million in lifetime earnings per teacher laid off.

overall quality of the teacher workforce in New York public schools and violates the Plaintiffs' Constitutional rights.

2. Proceedings Below

In the interest of judicial economy and to not be duplicative the *Davids* Plaintiffs adopt and make a part hereof the *Wright* Plaintiffs statement of the procedural history of this case. (*See Wright* Plaintiffs' Brief, Counterstatement of the Nature of the Case, Section B, p. 10-18).

STANDARD OF REVIEW

It is well settled that "On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction." *Leon v Martinez*, 84 NY2d 83, 87 (1994); *see* CPLR § 3026. Courts 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 as alleged fit within any cognizable legal theory." *Leon*, 84 NY2d at 87-88; *ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 227 (2011). "The criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17; *Rovello v. Orofino Realty Co., supra,* 40 N.Y.2d at 636, 389 N.Y.S.2d 314, 357 N.E.2d 970; *Leon v Martinez*, 84 NY2d 83, 88 (1994).

ARGUMENT

In the interest of judicial economy and to not be duplicative the *Davids* Plaintiffs adopt and make a part hereof the *Wright* Plaintiffs' legal argument in opposition to the respective briefs of Defendants herein. (*See Wright* Plaintiffs' Brief, Argument, p. 19-68).

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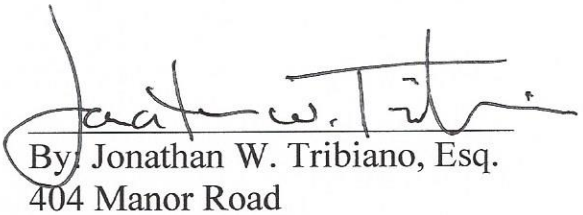
CONCLUSION

The judgment of the Supreme Court, Richmond County should be affirmed.

Dated: Staten Island, New York
July 8, 2016

Respectfully submitted,

JONATHAN W. TRIBIANO, PLLC



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CERTIFICATION OF COMPLIANCE

The undersigned, an attorney admitted to practice law in the courts of the State of New York affirms as follows:

1. To comply with 22 NYCRR § 670.10.3(f): the foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

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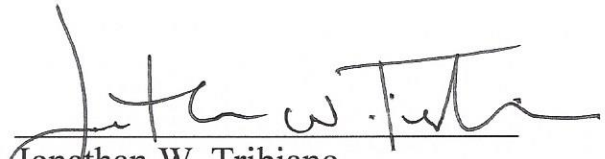
2. The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certification of compliance, or any other authorized addendum containing statutes, rules, regulations, etc., is 2,889.

3. Upon information and belief and reasonable inquiry, the contentions herein contained in the annexed documents are not frivolous.

Dated: Staten Island, New York
July 8, 2016



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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF RICHMOND)

I, JONATHAN W. TRIBIANO, the undersigned, being duly sworn, say:

I am not a party to the action, am over 18 years of age and have an office address of 404 Manor Road, Staten Island, New York 10314.

That on the 12th day of July 2016, I did serve the attach papers by mailing a true copy of the attached papers, enclosed and properly sealed in a postpaid envelope, which I deposited, on July 12, 2016, in an official depository under the exclusive care and custody of the United States Postal Services within the State of New York addressed to:

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12th day of July, 2016

Notary Public

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NO. 01PL6343257
Qualified in Orange County
My Commission Expires Jun 6, 2020