Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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MYMEONA DAVIDS, by her parent and natural guardian, MIAMONA DAVIDS, *et. al.*, and JOHN KEONI WRIGHT, *et.al.*,

Plaintiffs-Respondents,

- against -

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

Defendants-Appellants,

- and -

MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO, 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, and THE NEW YORK CITY DEPARTMENT OF EDUCATION,

Intervenors-Defendants-Appellants.

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Affidavit in Opposition to Motion for Enlargement of Time

Docket No. 2015-03922

Index No.: 101105/14 (Sup. Ct., Richmond Cty.) (Consolidated)

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

I, Devora W. Allon, being duly sworn, depose and say that:

1. I am a partner in the law firm of Kirkland & Ellis LLP, located at 601 Lexington Avenue, New York, New York 10022. I am an attorney for John Keoni Wright, *et. al.*, Plaintiffs-Respondents ("*Wright* Respondents") in this action, and I am familiar with all the facts and circumstances set forth in this affidavit. I submit this affidavit in opposition to the motion of Defendants-Appellants City of New

York and New York City Department of Education and Intervenor-Defendant-Appellant New York City Department of Education (the "City Appellants") for an additional thirty-one-day enlargement of time, from February 26, 2016 up through and including March 28, 2016, to perfect their appeals in the above referenced litigation.

2. This is Appellants' *third* attempt to stall this appeal and delay the Respondents' pursuit of their constitutional rights. Enough is enough. Appellants have failed to identify a single compelling reason why they are unable to perfect their appeal within the extended and generous timeframe already granted by this Court. The extraordinary relief they seek—to expand their extension to a total of *158* days or *over five months*—should therefore be denied.

3. Attached hereto as Exhibit 1 is a true and correct copy of the Decision and Order of the Supreme Court, Richmond County (Minardo, J.S.C.), dated March 12, 2015, and entered in the office of the Clerk of the County of Richmond on March 20, 2015 (the "March 12, 2015 Decision and Order").

4. Attached hereto as Exhibit 2 is a true and correct copy of the Decision and Order of the Supreme Court, Richmond County (Minardo, J.S.C.), dated October 22, 2015, and entered in the office of the Clerk of the County of Richmond on October 28, 2015 (the "October 22, 2015 Decision and Order").

5. Attached hereto as Exhibit 3 is a true and correct copy of *Wright* Respondents' amended complaint titled "*Wright* Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief" (the "*Wright* Complaint"). The *Wright* Complaint is attached without its exhibits as they are not referenced in this motion. They are available upon request.

6. Attached hereto as Exhibit 4 is a true and correct copy of the Decision and Order on Motion of this Court, dated October 28, 2015, granting an extension of the time for Appellants to perfect their appeals of the March 12, 2015 Decision and Order until December 28, 2015.

7. Attached hereto as Exhibit 5 is a true and correct copy of the Decision and Order on Motion of this Court, dated January 26, 2016, granting an extension of the time for Appellants to perfect their appeals of the March 12, 2015 Decision and Order until February 26, 2016 and denying Appellants' motion to consolidate the appeals of the March 12, 2015 and October 22, 2015 orders.

8. *Wright* Respondents are nine parents of New York school children who allege that the State enforces three sets of statutes (the "Challenged Statutes") that together result in the promotion and retention of ineffective teachers at the expense of New York schoolchildren's right to a sound basic education under Article XI of the New York State Constitution. These statutes include the laws

governing teacher tenure, teacher discipline, and teacher layoffs.[1] *Wright* Respondents commenced their action on July 28, 2014, by serving a summons and complaint on the State of New York, and several individual defendants. *Wright* Respondents' action was later consolidated with an action brought by Mymeona Davids, by her parent and natural guardian, Miamona Davids, *et.al.* ("*Davids* Respondents," collectively with *Wright* Respondents, "Respondents"). The United Federation of Teachers, the New York State United Teachers, Philip A. Cammarata and Mark Mambretti (both tenured administrators in New York schools), and the New York City Department of Education have all intervened as defendants (collectively "Intervenors-Defendants-Appellants"). *Wright* Respondents served an amended complaint, which added two additional plaintiffs, on Defendants-Appellants and Intervenors-Defendants-Appellants (collectively "Appellants") on November 13, 2014, attached hereto as Exhibit 3. Appellants first moved to dismiss the Respondents' complaints in late October 2014, alleging that Respondents had failed to state a cause of action under Article XI, the allegations were non-justiciable, Respondents did not have standing, the issues were not ripe or were moot, necessary parties had not been joined, and unnecessary State parties had been joined.

[1] Education Law §§ 2509, 2510, 2573, 2585, 2588, 2590, 3012, 3012-c, 3020, and 3020(a).

9. Following full briefing by the parties, the Honorable Justice Philip Minardo of the Supreme Court, Richmond County, heard oral argument on the motions on January 14, 2015. In an order dated March 12, 2015, the Supreme Court severed and dismissed the claims against Merryl H. Tisch, in her official capacity as Chancellor of the Board of Regents of the University of the State of New York, and John B. King, in his official capacity as the Commissioner of Education of the State of New York and President of the University of the State of New York. The Supreme Court denied the balance of the motions. The court held that Respondents' allegations:

> 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. Exhibit 1 at 14.

The court also held that Respondents have standing, as they, or their children, are:

> students attending various public schools within the State of New York who have been or are being injured by the deprivation of their constitutional right to receive a "sound basic education," which injury, it is claimed, will continue into the future so long as the subject statutes continue to operate in the manner stated. *Id.* at 16.

10. Upon entry of the order in the office of the Clerk of Richmond County on March 20, 2015, all Appellants served and filed notices of appeal by April 22,

2015, resulting in an October 22, 2015 deadline for perfection of the latest filed appeals pursuant to 22 N.Y.C.R.R. § 670.8(e)(1).

11. On May 7, 2015, Respondents moved for a preference under C.P.L.R. § 5521(a), and 22 N.Y.C.R.R. § 670.7(b)(2), an expedited deadline for perfection of Appellants' appeals, and expedited calendaring of the appeals. Appellants opposed the motion, and this Court denied Respondents' motion in an order dated June 2, 2015.

12. Following the March 12, 2015 Decision and Order of the Supreme Court, the New York State Legislature made minor modifications to the Education Law as part of the 2015-16 budget bill. Though the revisions to the Challenged Statutes were modest at best (as acknowledged by members of the Legislature themselves)[2] Appellants seized on the changes as a purported basis to renew their already-rejected motions to dismiss. In Late May 2015, Appellants moved for leave to renew the prior motions to dismiss, to dismiss, and for a stay of the proceedings pending the appeals of the March 12, 2015 Decision and Order.

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[2] As Assemblyman Thiele stated, "We will be back here again revisiting this issue. . . . I feel like we are rearranging the deck chairs on the Titanic." Nick Reisman, *Lawmakers Reluctantly Approved Education Budget Bill*, State of Politics (Mar. 31, 2015, 11:30 PM), http://www.nystateofpolitics.com/2015/03/lawmakers-reluctantly-approved-education-budget-bill/.

13. Following full briefing by the parties, the Honorable Justice Philip Minardo of the Supreme Court, Richmond County, heard oral argument on the motions on August 25, 2015.

14. While awaiting a decision on the pending motions, the State of New York, the Board of Regents of the University of the State of New York, and the New York State Education Department (collectively, the "State Appellants") filed a motion in this Court on behalf of all Appellants on September 29, 2015, requesting an enlargement of sixty days to perfect their appeals of the March 12, 2015 Decision and Order from October 22, 2015 (the original deadline for perfection) to and including December 21, 2015. This Court granted the State Appellants' motion in a decision and order dated October 28, 2015, and *sua sponte* extended the deadline for perfection to December 28, 2015. *See* Exhibit 4.

15. In an order dated October 22, 2015, the Supreme Court denied the motions for leave to renew and/or dismiss Respondents' complaints, and granted Appellants' motion for a stay of proceedings pending resolution of their appeals of the March 12, 2015 Decision and Order. The court explained that Appellants' arguments in support of the motions, "assert the same grounds for dismissal rejected by the Court in its prior determination." Exhibit 2 at 4. For that reason, the court concluded that Respondents' efforts to renew their motions lacked merit:

"the present motions to dismiss are essentially motions for leave to reargue and, as such, are improperly 'based on matters of fact not offered on the prior motion(s)' (CPLR 2221[d][2]), *e.g.*, the aforementioned legislative amendments." *Id.* at 4.

16. Upon entry of the October 22, 2015 Decision and Order in the office of the Clerk of Richmond County on October 28, 2015, all Appellants served and filed notices of appeal.

17. On December 16, 2015, the State Appellants moved in this Court on behalf of all Appellants to consolidate the appeals of the March 12, 2015 and October 22, 2015 orders of the Supreme Court and for a second sixty-day enlargement of the time to perfect the appeals of the March 12, 2015 Decision and Order from December 28, 2015 to and including February 26, 2016.

18. In an order dated January 26, 2016, this Court granted the State Appellants' motion to enlarge the time to perfect the appeals of the March 12, 2015 Decision and Order until February 26, 2016, and denied the motion to consolidate the appeals as unnecessary as the appeals may be consolidated as of right. *See* Exhibit 5.

19. On February 12, 2016, the City Appellants, on behalf of all Appellants, filed the present motion in this Court requesting a *third* enlargement of the time to perfect the appeals of the March 12, 2015 Decision and Order, this time

by thirty-one days, until and including March 28, 2016. If the motion is granted, Appellants will have delayed the original deadline for perfection by 158 days, or over five months.

20. Further delay will unjustifiably hinder resolution of Respondents' constitutional rights, which were already deemed justiciable by the trial court. The Supreme Court held that Respondents have adequately stated a claim that enforcement of the Challenged Statutes is violating their constitutional right to a sound basic education by keeping ineffective teachers in the classroom. Exhibit 1 at 14; *see also* Exhibit 2 at 4. The longer litigation drags on without a resolution of Respondents' constitutional claims, the more long-lasting harm will be inflicted on New York's schoolchildren. This Court should recognize the urgency of resolving the claims at issue in this case and reject the City Appellants' motion on behalf of Appellants for enlargement of time to perfect their appeals.

21. Justice Minardo held that Respondents stated a claim that countless New York students are harmed each year as a result of ineffective teachers who, absent enforcement of the Challenged Statutes, would not remain in the classroom. *See* Exhibit 1 at 14; *see also* Exhibit 3 at ¶ 25. The harm is existing and ongoing, and of a constitutional magnitude. Any delay in the progress of Respondents'

claim will detrimentally affect thousands of New York children. As alleged in *Wright* Respondents' complaint:

> In the long-term, students taught by effective teachers are given a strong foundation from which to advance and achieve. These students are less likely to become teenage parents and more likely to progress in their education, attending college and matriculating at colleges of higher quality. They are more likely to earn more money throughout their lives, live in neighborhoods of higher socioeconomic status, and save more money for retirement...If schools were able to replace the least effective teachers, it would add enormous value to the future earning of students and the U.S. economy as a whole. Exhibit 3 at ¶¶ 30, 32.

Students taught by ineffective teachers are denied these benefits. They should not be disadvantaged for any longer a period of time than is reasonably necessary to resolve this litigation.

22. Respondents have not identified a single compelling reason that outweighs the harm of further delay. The City Appellants claim that as Appellants intend to consolidate and perfect their appeals from the March 12, 2015 and October 22, 2015 orders simultaneously, "compiling the record for these appeals has been logistically complex. Consequently, [Appellants] require additional time to perfect." Affirmation of Benjamin Welikson in Support of Motion to Enlarge Time ¶ 11, Davids v. State, Dkt. No. 2015-03922 (2d Dep't Feb. 12, 2016). Respondents have not explained how consolidating the appeals has made compiling the record materially more complex. Appellants are appealing a motion to dismiss, which means that discovery has not started and there is no complex

factual record at issue. The case involves the allegations in the Complaint and two versions of the Education Law. It is hard to see how compiling those materials is infeasible, particularly within the generous timeframe already afforded to Respondents.

23. Further, Appellants do not require the full six-month period to perfect their appeals of the October 22, 2015 Decision and Order. The Supreme Court concluded that Appellants' renewed motions to dismiss largely reiterated the same failed arguments previously raised in their initial motions. Because the motions did not tread new ground, it would be excessive to further delay the deadline for the first appeal simply because Appellants wish to consolidate the two appeals. As the Supreme Court explained:

> while the introduction of "new facts" or "a change in the law" may serve as the basis for a renewal motion under CPLR 2221(e)(2), the motion will nevertheless be denied where, as here, neither of the foregoing "would change the prior determination" of the court (*id.*). In this case, the [L]egislature's marginal changes affecting, *e.g.*, the term of probation and/or the disciplinary proceedings applicable to teachers, are insufficient to achieve the required result. Exhibit 2 at 4.

24. Not only were the successive motions to dismiss duplicative, but this appeal concerns legal issues that were already briefed *twice* before the Supreme Court. Appellants thus do not need extended time to construct new arguments out of whole cloth.

25. Moreover, Appellants' intent to consolidate the appeals already formed the basis for this Court's previous enlargement of time and does not justify an additional extension. In its last order on January 26, 2015, this Court granted Appellants additional time and noted that Appellants could consolidate the two appeals as of right. *See* Exhibit 5. This prior enlargement was thus made with the understanding that it afforded Appellants ample time to consolidate and perfect their appeals by February 26, 2016. There have been no new developments since that order was issued to justify even more time.

WHEREFORE, it is respectfully requested that an order be made and entered, denying the City Appellants' motion for an enlargement of time, together with such other relief as the Court deems proper.

Dated: February 24, 2016

By: _____
Devora W. Allon

Sworn to before me this
24th day of February, 2016

_____
Notary Public

JOSEPH J. CALI
Notary Public, State of New York
No. 01CA5015323
Qualified in New York County
Commission Expires July 19, 2017

EXHIBIT 1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

DCM PART 6

MYMOENA DAVIDS, by her parent and natural guardian MIAMONA DAVIDS, *et al.*, and JOHN KEONI WRIGHT, *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, 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, and THE NEW YORK CITY DEPARTMENT OF EDUCATION,

Intervenor-Defendants.

HON. PHILIP G. MINARDO

DECISION & ORDER

Index No. 101105/14

Motion Nos.[1] 3580 - 008
3581 - 009
3593 - 010
3595 - 011
3598 - 012

[1]The motions have been consolidated for purposes of disposition.

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The following papers numbered 1 to 12 were fully submitted on the 14th day of January, 2015.

Papers Numbered

Notice of Motion to Dismiss by Defendant THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF EDUCATION, with Exhibits and Memorandum of Law, (dated October 28, 2014) 1

Notice of Motion to Dismiss by Intervenor-Defendant MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO, with Exhibits and Memorandum of Law, (dated October 28, 2014) 2

Notice of Motion to Dismiss by Intervenor-Defendants PHILIP CAMMARATA and MARK MAMBRETTI, with Exhibits and Memorandum of Law, (dated October 23, 2014) 3

Notice of Motion to Dismiss by Intervenor-Defendants SETH COHEN, *et al.*, with Exhibits and Memorandum of Law, (dated October 27, 2014) 4

Notice of Motion to Dismiss by Defendants STATE OF NEW YORK, *et al.*, with Affirmation and Supplemental Affirmation of Assistant Attorney General Steven L. Banks, Exhibits and Memorandum of Law, (dated October 28, 2014) 5

Affirmation in Opposition of Plaintiffs MYOMENA DAVIDS, *et al.* to Defendants and Intervenor-Defendants' Motions to Dismiss, with Exhibits and Memorandum of Law, (dated December 5, 2014) 6

Affirmation in Opposition by Plaintiffs JOHN KEONI WRIGHT, *et al.*, to Defendants and Intervenors-Defendants' Motions to Dismiss, with Exhibits and Memorandum of Law, (dated December 5, 2014) 7

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Reply Memorandum of Law by Defendant THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF EDUCATION,
(dated December 16, 2014) 8

Reply Memorandum of Law by Intervenor-Defendant MICHAEL MULGREW, as President Of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO,
(dated December 15, 2014) 9

Reply Memorandum of Law by Intervenors-Defendants PHILIP CAMMARATA and MARK MAMBRETTI,
(dated December 15, 2014) 10

Reply Memorandum of Law by Intervenors-Defendants SETH COHEN, *et al.*,
(dated December 15, 2014) 11

Reply Memorandum of Law by Defendants STATE OF NEW YORK, , *et al.*,
(dated December 15, 2014) 12

Upon the foregoing papers, the above-enumerated motions to dismiss the complaint pursuant to CPLR 3211(a)(2), (3), (7), and (10), by the defendants and intervenor-defendants in each action are denied, as hereinafter provided.

This consolidated action, brought on the behalf of certain representative public school children in the State and City of New York, seeks, *inter alia*, a declaration that various sections of the Education Law with regard to teacher tenure, teacher discipline, teacher layoffs and teacher evaluations are violative of the Education Article (Article XI, §1) of the New York State Constitution. The foregoing provides, in relevant part, that "[t]he 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." (NY Const. Art. XI, §1). As construed by plaintiffs, the Education Article guarantees to all students in New York State a "sound basic education", which is alleged to be the

key to a promising future, insofar as it adequately prepares students with the ability to realize their potential, become productive citizens, and contribute to society. More specifically, plaintiffs argue that the State is constitutionally obligated to, *e.g.* systemically provide its pupils with the opportunity to obtain "the basic literacy, calculating, and verbal skills necessary to enable [them] to eventually function productively as civic participants capable of voting and serving on a jury" (Campaign for Fiscal Equity, Inc. v. State of New York (86 NY2d 307, 316), *i.e.*, "to speak, listen, read and write clearly and effectively in English, perform basic mathematical calculations, be knowledgeable about political, economic and social institutions and procedures in this country and abroad, or to acquire the skills, knowledge, understanding and attitudes necessary to participate in democratic self-government" (*id.* at 319). More recently, the Court of Appeals has refined the constitutionally-mandated minimum to require the teaching of skills that enable students to undertake civic responsibilities meaningfully; to function productively as civic participants (Campaign for Fiscal Equity, Inc. v. State of New York, 8 NY3d 14, 20-21). Plaintiffs further argue that the Court of Appeals has recognized that the Education Article requires adequate teaching by effective personnel as the "most important" factor in the effort to provide children with a "sound basic education" (*see* Campaign for Fiscal Equity, Inc. v. State of New York, 100 NY2d 893, 909). With this as background, plaintiffs maintain that certain identifiable sections of the Education Law foster the continued, permanent employment of ineffective teachers, thereby falling out of compliance with the constitutional mandate that students in New York be provided with a "sound basic education". Finally, it is claimed that the judiciary has been vested with the legal and moral authority to ensure that this constitutional mandate is honored (*see* Campaign for Fiscal Equity, Inc. v. State of New York, 100 NY2d 902).

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At bar, the statutes challenged by plaintiffs as impairing compliance with the Education Article include Education Law §§1102(3), 2509, 2510, 2573, 2588, 2590-j, 3012, 3013(2), 3014, and 3020. To the extent relevant, these statutes provide, *inter alia*, for (1) the award of, *e.g.*, tenure of public school teachers after a probationary period of only three years; (2) the procedures required to discipline and/or remove tenured teachers for ineffectiveness; and (3) the statutory procedure governing teacher lay-offs and the elimination of a teaching positions.[2] In short, it is claimed that these statutes, both individually and collectively, have been proven to have a negative impact on the quality of education in New York, thereby violating the students' constitutional right to a "sound basic education" (*see* NY Const, Art. XI, §1).

As alleged in the respective complaints, sections §§2509, 2573, 3012 and 3012(c) of the Education Law, referred to by plaintiffs as the "permanent employment statutes", formally provide, *inter alia*, for the appointment to tenure of those probationary teachers who have been found to be competent, efficient and satisfactory, under the applicable rules of the board of regents adopted pursuant to Education Law §3012(b) of this article. However, since these teachers are typically granted tenure after only three years on probation, plaintiffs argue that when viewed in conjunction with the statutory provisions for their removal, tenured teachers are virtually guaranteed lifetime employment regardless of their in-class performance or effectiveness. In this regard, it is alleged by plaintiffs that three years is an inadequate period of time to assess whether a teacher has demonstrated or earned the right to avail him or herself of the lifelong benefits of tenure. Also

2. The present statutes require that probationary teachers be furloughed first, and the remaining positions be filled on a seniority basis, *i.e.*, the teachers with the greatest tenure being the last to be terminated. For ease of reference, this manner of proceeding is known as "last-in, first-out" or "LIFO".

drawn into question are the methods employed for evaluating teachers during their probationary period.

In support of these allegations, plaintiffs rely on studies which have shown that it is unusual for a teacher to be denied tenure at the end of the probationary period, and that the granting of tenure in most school districts is more of a formality rather than the result of any meaningful appraisal of their performance or ability. For statistical support, plaintiffs argue, *e.g.*, that in 2007, 97% of tenure-eligible teachers in the New York City school districts were awarded tenure, and that recent legislation intended to implement reforms in the evaluation process have had a minimal impact on this state of affairs. In addition, they note that in 2011 and 2012, only 3% of tenure-eligible teachers were denied tenure.

With regard to the methods for evaluating teacher effectiveness prior to an award of tenure, plaintiffs maintain that the recently-implemented Annual Professional Performance Review ("APPR"), now used to evaluate teachers and principals is an unreliable and indirect measure of teacher effectiveness, since it is based on students' performance on standardized tests, other locally selected (*i.e.*, non-standardized) measures of student achievement, and classroom observations by administrative staff, which are clearly subjective in nature. On this issue, plaintiffs note that 60% of the scored review on an APPR is based on this final criterion, making for a non-uniform, superficial and deficient review of effective teaching that generally fails to identify ineffective teachers. As support of this postulate, plaintiffs refer to studies that have shown that in 2012, only 1% of teachers were rated "ineffective" in New York (as compared to the 91.5% who were rated as "highly effective" or "effective"), while only 31% of students taking the standardized tests in English Language Arts and Math met the minimum standard for proficiency. As a further example,

plaintiffs allege that only 2.3% of teachers eligible for tenure between 2010 and 2013 received a final rating of "ineffective", even though 8% of teachers had low attendance, and 12% received low "value added" ratings. Notably, these allegations are merely representative of the purported facts pleaded in support of plaintiffs' challenge to the tenure laws, and are intended simply to illustrate the statutes' reliance on some of the more superficial and artificial means of assessing teacher effectiveness, leading to an award of tenure without a sufficient demonstration of merit. Each of the above are alleged to operate to the detriment of New York students.[3]

With regard to plaintiffs' challenge to those sections of the Education Laws which address the matter of disciplining or obtaining the dismissal of a tenured teacher, it is alleged that they, too, operate to deny children their constitutional right to a "sound basic education". As pleaded, these statutes are claimed to prevent school administrators in New York from dismissing teachers for poor performance, thereby forcing the retention of ineffective teachers to the detriment of their students. Among other impediments, these statutes are claimed to afford New York teachers "super" due process rights before they may be terminated for unsatisfactory performance by requiring an inordinate number of procedural steps before any action can be taken. Among the barriers cited are the lengthy investigation periods, protracted hearings, and antiquated grievance procedures and appeals, all of which are claimed to be costly and time-consuming, with no guaranty that an underperforming teacher will actually be dismissed. As a result, dismissal proceedings are alleged to be rare when based on unsatisfactory performance alone, with scant chance of success. According to plaintiffs, the cumbersome nature of dismissal proceedings operates as a strong disincentive for

[3] Also worthy of note in this regard is plaintiffs' allegation that most of the teachers unable to satisfactorily complete probation are asked to extend their probation term.

administrators attempting to obtain the dismissal of ineffective teachers, the result of which is that their retention is virtually assured.

Pertinent to this cause of action, plaintiffs rely upon the results of a survey indicating that 48% of districts which had considered bringing disciplinary charges at least once, declined to do so. In addition, it was reported that between 2004 and 2008, each disciplinary proceeding took an average of 502 days to complete, and between 1995 and 2006, dismissal proceedings based on allegations of incompetence took an average of 830 days to complete, at a cost of $313,000 per teacher. It is further alleged that more often than not these proceedings allow the ineffective teachers to return to the classroom, which deprives students of their constitutional right to a "sound basic education".

Finally, plaintiffs allege that the so-called "LIFO" statutes (Education Law §§2585, 2510, 2588 and 3013) violate the Education Article of the New York State Constitution in that they have failed, and will continue to fail to provide children throughout the State with a "sound basic education". In particular, plaintiffs maintain that the foregoing sections of the Education Laws create a seniority-based layoff system which operates without regard to a teacher's performance, effectiveness or quality, and prohibits administrators from taking teacher quality into account when implementing layoffs and budget cuts. In combination, these statutes are alleged to permit ineffective teachers with greater seniority to be retained without any consideration of the needs of the students, who are collectively disadvantaged. It is also claimed that the LIFO statutes hinder the recruitment and retention of new teachers, a failure which was cited by the Court of Appeals (albeit on other grounds) as having a negative impact on the constitutional imperative (Campaign for Fiscal Equity, Inc. v. State of New York, 100 NY2d at 909-911).

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In moving to dismiss the complaints, defendants and intervenor-defendants (hereinafter collectively referred to as the "movants") singly and jointly, seek dismissal of the complaints on the grounds (1) that the courts are not the proper forum in which to bring these claims, *i.e.*, that they are nonjusticiable; (2) that the stated grievances should be brought before the state legislature; and (3) that the courts are not permitted to substitute their judgment for that of a legislative body as to the wisdom and expediency of legislation (*see e.g.* Matter of Retired Pub Empl Assoc, Inc. v. Cuomo, – Misc3d –, 2012 NY Slip Op 32979 [U][Sup Ct Albany Co]). In brief, it is argued that teacher tenure and the other statutes represent a "legislative expression of a firm public policy determination that the interest of the public in the education of our youth can best be served by [the present] system [which is] designed to foster academic freedom in our schools and to protect competent teachers from the abuses they might be subjected to if they could be dismissed at the whim of their supervisors" (Ricca v Board of Edu, 47 NY2d 385, 391). Thus, it is claimed that the policy decisions made by the Legislature are beyond the scope of the Judicial Branch of government.

It is further claimed that if these statutes violated the Education Article of the Constitution, the Legislature would have redressed the issue long ago. To the contrary, tenure laws have been expanded throughout the years, and have been amended on several occasions in order to impose new comprehensive standards for measuring a teacher's performance, by, *e.g.*, measuring student achievement, while fulfilling the principal purpose of these statutes, *i.e.*, to protect tenured teachers from official and bureaucratic caprice. In brief, it is movants' position that "lobbying by litigation" for changes in educational policy represents an incursion on the province of the Legislative and Executive branches of the government, and is an improper vehicle through which to obtain changes in education policy. Accordingly, while conceding that there may be some room for judicial

encroachment, educational policy is said to rest with the Legislature.

Movants also argue that the complaints fail to state a cause of action. In this regard, it is claimed that in order to state a valid cause of action under Article XI, a plaintiff must allege two elements: (1) the deprivation of a sound basic education, and (2) causes attributable to the State (*see* New York Civ Liberties Union v. State of New York, 4 NY3d 177, 178-179). Moreover, the crux of a claim under the Education Article is said to be the failure of the state to "provide for the maintenance and support" of the public school system (Paynter v. State of New York, 100 NY2d 434, 439 [internal quotation marks omitted]; New York State Assn of Small City School Dists Inc. v. State of New York, 42 AD3d 648, 652). Here, it is claimed that the respective complaints are devoid of any facts tending to show that the failure to offer a "sound basic education" is causally connected to the State, rather than, as claimed, administered locally.

The movants also argue that the State's responsibility under the Education Article is to provide minimally adequate funding, resources, and educational supports to make basic learning possible, *i.e*, the requisite funding and resources to make possible "a sound basic education consist[ing] of the basic literacy, calculating and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury" (Paynter v. State of New York, 100 NY2d at 439-440). On this analysis, it is alleged to be the ultimate responsibility of the local school districts to regulate their curriculae in order to effect compliance with the Education Article while respecting "constitutional principle that districts make the basic decision on ... operating their own schools" (New York Civ Liberties Union v. State of New York, 4 NY3d at 182). Thus, it is the local districts rather than the State which is responsible for recruiting, hiring, disciplining and otherwise managing its teachers. For example, the APPR,

implemented to measure the effectiveness of teachers and principals, reserves 80% of the evaluation criteria for negotiation between the local school district and its relevant administrator and unions. Movants argue that these determinations do not constitute state action.

In addition, movants argue that both complaints fail to state a cause of action because they are riddled with vague and conclusory allegations regarding their claim that the tenure and other laws combine to violate the Education Article, basing their causes of action on (1) alleged "specious statistics" regarding the number of teachers receiving tenure, (2) the alleged cost of terminating teachers for ineffectiveness, (3) inconclusive surveys of school administrators on the reasons why charges often are not pursued, and (4) a showing that the challenged statutes result in a denial of a "sound basic education". According to the movants, none of these allegations are sufficient to establish the unconstitutionality of the subject statutes, *i.e.*, that there exists no rational and compelling bases for the challenged probationary, tenure and seniority statutes.

Also said to be problematic are plaintiffs' conclusory statements that students in New York are somehow receiving an inadequate education due to the retention of ineffective educators because of the challenged statutes. Moreover, while plaintiffs argue that public education is plagued by an indeterminate number of "ineffective teachers", they fail to identify any such teachers; the actual percentage of ineffective educators; or the relationship between the presence of these allegedly ineffective teachers and the failure to provide school children with a minimally adequate education. Accordingly, movants claim that merely because some of the 250,000 teachers licensed to teach in New York may be ineffective, is not a viable basis for eliminating these basic safeguards for the remaining teachers. In brief, movants maintain that aside from vague references to ineffective teachers and "cherry-picked" statistics without wider significance, the plaintiffs have done little to

demonstrate that the alleged problem is one of constitutional dimension.

Movants also argue that the action should be dismissed for the failure to join necessary parties as required by CPLR 1001 and 1003. In this regard, it is claimed that since the relief which plaintiffs seek would affect all school districts across the state, this Court should either order the joinder of every school district statewide, or dismiss the action. In addition, the movants argue that plaintiffs have failed to allege injury-in-fact, and that the claims which they do make are either not ripe or fail to plead any imminent or specific harm. More importantly, the complaints fail to take into account the recent amendments to these statutes, which are claimed to render all of their claims moot (*see generally* Hussein v. State of New York, 81 AD3d 132). In the alternative, it is alleged that the subject statutes are meant, *inter alia*, to protect school district employees from arbitrary termination rather than the general public or its students (*but see* Chiara v. Town of New Castle, – AD3d –, 2015 NY Slip Op 00326, *21-22 [2d Dept]).

Finally, defendants the STATE of NEW YORK, the BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, MERRYL H. TISCH, in her official capacity as Chancellor of the Board of Regents of the University of the State of New York; and JOHN B. KING, in his official capacity as the Commissioner of Education of the State of New York and President of the University of the State of New York, argue that complaints as against them should be dismissed since they were not involved in the enactment of the challenged statutes and cannot grant the relief requested by plaintiff.

The motions to dismiss are granted to the extent that the causes of action against MERRYL H. TISCH and JOHN B. KING, in their official capacities as Chancellor and Commissioner are

severed and dismissed, the balance of the motions are denied.[4]

The law is well settled that when reviewing a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, a court "must accept as true the facts as alleged in the complaint and any submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and [without expressing any opinion as to whether the truth of the allegations can be established at trial], determine only whether the facts as alleged fit within any cognizable legal theory" (Sokoloff v. Harriman Estates Dev. Corp., 96 NY2d 409, 414; *see* Sanders v. Winship, 57 NY2d 391, 394). Accordingly, "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations [can be] discerned which taken together manifest any cause of action cognizable at law the motion ... will fail" (Guggenheimer v. Ginzburg, 43 NY2d 268, 275). However, where evidentiary material is considered on the motion, "the criterion [becomes] whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and, unless it can be said that no significant dispute exists regarding it", the motion must be denied (*id*.). Here, it is the opinion of this Court that the complaints are sufficiently pleaded to avoid dismissal.

The core of plaintiffs' argument at bar is that school children in New York State are being denied the opportunity for a "sound basic education" as a result of teacher tenure, discipline and seniority laws (*see* Education Laws §§2573, 3012, 1103(3), 3014, 3012, 3020, 2510, 2585, 2588,

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[4] Claims against municipal officials in their official capacities are really claims against the municipality and are therefore, redundant when the municipality is also named as a defendant (*see* Frank v. State of NY Off. of Mental Retardation & Dev. Disabilities, 86 AD3d 183, 188).

3013). While the papers submitted on the motions to dismiss undoubtedly explain that the primary purpose of these statutes is to provide employment security, protect teachers from arbitrary dismissal, and attract and keep younger teachers, when afforded a liberal construction, the 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.

It is undisputed that the Education Article requires "[t]he 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." (NY Const. Art. XI, §1). Moreover, this Article has been held to guarantee all students within the state a "sound basic education", which is recognized by all to be the key to a promising future, preparing children to realize their potential, become productive citizens, and contribute to society. In this regard, it is the state's responsibility to provide minimally adequate funding, resources, and educational supports to make basic learning possible, *i.e.*," the basic literacy, calculating and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury" (Paynter v. State of New York, 100 NY2d at 440), which has been judicially recognized to entitle children to "minimally adequate teaching of reasonably up-to-date basic curricula ... by sufficient personnel adequately trained to teach those

subject areas" (Campaign for Fiscal Equity, Inc. v. State of NewYork, 86 NY2d at 317). Further, it has been held that the state may be called to account when it fails in its obligation to meet minimum constitutional standards of educational quality (*see* New York Civ Liberties Union v. State of New York, 4 NY3d at 178), which is capable of measurement, as alleged, by, *inter alia*, sub-standard test results and falling graduation rates (*id.*) that plaintiffs have attributed to the impact of certain legislation.

More to the point, accepting as true plaintiffs' 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, *e.g.*, a lack of proficiency in math and english (*see* Campaign for Fiscal Equity, Inc. v. State of New York, 100 NY2d at 910). 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 (*see* Campaign for Fiscal Equity, Inc. v. State of New York, 86 NY2d at 318).

The Court also finds the matter before it to be justiciable since a declaratory judgment action is well suited to, *e.g.*, 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 (*see* Campaign for Fiscal Equity, Inc. v. State of New York, 100

NY2d at 931).

With regard to the issue of standing, in the opinion of this Court, the individually-named plaintiffs clearly have standing to assert their claims as students attending various public schools within the State of New York who have been or are being injured by the deprivation of their constitutional right to receive a "sound basic education", which injury, it is claimed will continue into the future so long as the subject statutes continue to operate in the manner stated. Further details regarding the individual plaintiffs' purported injuries can certainly be ascertained during discovery. Moreover, since these children are the intended beneficiaries of the Education Article, in the opinion of this Court, they are clearly within the zone of protected interest.

Only recently have the courts recognized the right of plaintiffs to seek redress and not have the courthouse doors closed at the very inception of an action where the pleading meets the minimal standard to avoid dismissal (*see* Campaign for Fiscal Equity, Inc. v. State of New York, 86 NY2d at 318). This Court is in complete agreement with this sentiment and will not close the courthouse door to parents and children with viable constitutional claims (*see* Hussein v. State of New York, 19 NY3d 899). Manifestly, movants' attempted challenge to the merits of plaintiffs' lawsuit, including any constitutional challenges to the sections of the Education Law that are the subject of this lawsuit, is a matter for another day, following a further development of the record.

The balance of the arguments tendered in support of dismissal, including the joinder of other parties, have been considered and rejected.

Accordingly, it is

ORDERED that the motion (No. 3598 - 012) of defendant-intervenors MERRYL H. TISCH, in her official capacity as Chancellor of the Board of Regents of the University of the State of New

York, and JOHN B. KING, in his official capacity as the Commissioner of Education of the State of New York and President of the University of the State of New York is granted; and it is further

ORDERED that the causes of action against said individuals are hereby severed and dismissed; and it is further

ORDERED that the balance of the motions are denied; and it is further

ORDERED that the clerk shall enter judgment accordingly.

ENTER,

J.S.C.

Dated: MAR. 12, 2015

GRANTED

MAR 17 2015

STEPHEN J. FIALA

EXHIBIT 2

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

DCM PART 6

MYMOENA DAVIDS, by her parent and natural guardian MIAMONA DAVIDS, *et al.*, and JOHN KEONI WRIGHT, *et al.*,

Plaintiffs,

-against-

HON. PHILIP G. MINARDO

DECISION & ORDER

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

Defendants,

-and-

Index No. 101105/14

MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO, 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, and THE NEW YORK CITY DEPARTMENT OF EDUCATION,

Intervenor-Defendants.

Motion Nos.[1] 1996 - 013
2012 - 014
2110 - 015
2111 - 016
2186 - 017

x

[1]These motions have been consolidated for purposes of disposition.

MYMOENA DAVIDS, *et al.* v. THE STATE OF NEW YORK, *et al.*

The following papers numbered 1 to 12 were fully submitted on the 25th day of August, 2015.

Papers Numbered

Notice of Motion to Dismiss and/or Renew by Intervenors-Defendants MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO, with Exhibits and Memorandum of Law, (dated May 27, 2015) 1

Notice of Motion to Dismiss and/or Renew by Defendants THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF EDUCATION, with Exhibits and Memorandum of Law, (dated May 27, 2015) 2

Notice of Motion to Dismiss and/or Renew by Defendants STATE OF NEW YORK, *et al.*, with Affirmation and Supplemental Affirmation of Assistant Attorney General Steven L.Banks, with Exhibits and Memorandum of Law, (dated May 27, 2015) 3

Notice of Motion to Dismiss and/or Renew by Intervenors-Defendants SETH COHEN, *et al.*, with Exhibits and Memorandum of Law, (dated May 26, 2014) 4

Notice of Motion to Dismiss and/or Renew by Intervenors-Defendants PHILIP CAMMARATA and MARK MAMBRETTI with Exhibits and Memorandum of Law, (dated MAY 26, 2015) 5

Affirmation in Opposition by Plaintiffs JOHN KEONI WRIGHT, *et al.*, to Defendants and Intervenors-Defendants' Motions to Dismiss and/or Renew, with Exhibits and Memorandum of Law (dated June 26, 2015) 6

Affirmation in Opposition of Plaintiffs MYOMENA DAVIDS, *et al.*, to Defendants and Intervenors-Defendants' Motion to Dismiss and/or Renew, with Exhibits and Memorandum of Law, (dated December 5, 2014) 7

MYMOENA DAVIDS, et al. v. THE STATE OF NEW YORK, et al.

Reply Memorandum of Law by Intervenors-Defendants MICHAEL MULGREW, as President Of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO,
(dated July 7, 2015) 8

Reply Affirmation by Defendants THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF EDUCATION,
(dated July 7, 2015) 9

Reply Affirmation by Intervenors-Defendants PHILIP CAMMARATA and MARK MAMBRETTI,
(dated July 1, 2015) 10

Reply Memorandum of Law by Intervenors-Defendants SETH COHEN, *et al.*,
(dated July 7, 2015) 11

Reply Memorandum of Law by Defendants STATE OF NEW YORK, , *et al.*,
(dated July 7, 2015) 12

Upon the foregoing papers, the motions by defendants and intervenor-defendants for, *inter alia*, dismissal of the complaints and/or leave to renew their prior motions for like relief are decided as follows.

The parties' familiarity with the facts is presumed from their participation in this litigation and the exhaustive Decision and Order of this Court entered on March 20, 2015.

In this action for a judgment declaring, singly and in combination, various sections of the Education Law as violative of Art. XI, §1 of the New York State Constitution[2] (hereinafter the Education Article), this Court previously denied defendants' and intervenor-defendants' several motions to dismiss the complaints on various grounds which the Court found to be without merit.

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[2] To the extent relevant, this article guarantees to all of the students within the State of New York a "sound basic education".

Defendants and intervenor-defendants subsequently appealed that determination to the Appellate Division, Second Department, where it has yet be to calendared for oral argument. At or about the same time, the State Legislature undertook to amend certain sections of the Education Law challenged by plaintiffs, which prompted defendants and intervenor-defendants to file a second round of motions to dismiss on the ground that this action of the Legislature rendered the complaints moot and/or nonjusticiable. In the alternative, defendants and intervenor-defendants moved for leave to renew their prior motions based on "new facts not offered on the prior motions" or "a change in the law" (CPLR 2221[e][2]), both of which plaintiffs strenuously opposed. Oral argument was held on August 25, 2015, at which time decision was reserved.

Except to the extent hereinafter provided, the motions are denied.

In principal part, movants assert the same grounds for dismissal rejected by the Court in its prior determination. To this extent, the present motions to dismiss are essentially motions for leave to reargue and, as such, are improperly "based on matters of fact not offered on the prior motion(s)" (CPLR 2221[d][2]), *e.g.*, the aforementioned legislative amendments. Accordingly, these motions are denied. Neither is the Court persuaded that the above amendments operated to render the prior motions nonjusticiable or moot, or to deprive this Court of subject matter jurisdiction (*see* CPLR 3211[a][2]; Matter of Newton v. Town of Middletown, 31 AD3d 1004, 1005-1006).

Moreover, while the introduction of "new facts" or "a change in the law" may serve as the basis for a renewal motion under CPLR 2221(e)(2), the motion will nevertheless be denied where, as here, neither of the foregoing "would change the prior determination" of the court (*id.*). In this case, the legislature's marginal changes affecting, *e.g.*, the term of probation and/or the disciplinary proceedings applicable to teachers, are insufficient to achieve the required result.

Nonetheless, given the extensive nature of discovery likely to be required in this case, it is only proper that all further proceedings in this matter should be stayed pending the determination of the Appellate Division.

Accordingly, it is

SO ORDERED.

J.S.C.

Dated: Oct. 22, 2015

GRANTED
OCT 23 2015
STEPHEN J. FIALA

EXHIBIT 3

SUPREME COURT FOR THE STATE OF NEW YORK
COUNTY OF RICHMOND

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MYMEONA DAVIDS, by her parent and natural guardian, MIAMONA DAVIDS, 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,

- against -

THE STATE OF NEW YORK, 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,

- and -

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

Intervenor-Defendant,

- 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,

Intervenors-Defendants,

- and -

PHILIP A. CAMMARATA and MARK MAMBRETTI,

Intervenors-Defendants.

Index No.: 101105-2014

Wright Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief

Hon. Justice Minardo

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

Plaintiffs,

- against -

THE STATE OF NEW YORK; THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK; MERRYL H. TISCH, in her official capacity as Chancellor of the Board of Regents of the University of the State of New York; JOHN B. KING, in his official capacity as the Commissioner of Education of the State of New York and President of the University of the State of New York,

Defendants,

- 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,

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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PRELIMINARY STATEMENT

1. New York's Constitution guarantees all children in the State a sound basic education. Yet in any given school year, New York schoolchildren are at risk of being assigned to an ineffective teacher.

2. A child's teacher is the single most influential school-based variable in the adequacy of the child's education, and a teacher's quality is a critical determinant of a student's educational success. For the all-too-many New York children taught by an ineffective teacher, the damage to their educational advancement is significant and long-lasting.

3. The status quo in New York's education system is neither tolerable nor unavoidable. It is the product of outdated laws that protect ineffective teachers well above what due process requires and at the direct expense of their students' constitutional rights. These laws hamstring school administrators from making employment decisions based on student need and obstruct them from restoring the quality of the New York public education system. Cumulatively, these laws make it nearly impossible to dismiss and discipline teachers with a proven track record of ineffectiveness or misconduct. Plaintiffs, and other New York State schoolchildren, are the primary victims of this failing system.

4. Plaintiff John Keoni Wright's twin daughters, Kaylah and Kyler are New York public school students whose divergent experiences at school exemplify the direct effects that a teacher's quality has on a child's education. Kaylah and Kyler share nearly everything in common, including their birth date and home life. But one variable separates their life experiences and futures: last year, Kyler was assigned to an ineffective teacher.

5. The effects are apparent. In one year alone, the difference in the twins' teachers caused measurable differences in their educational progress. Kaylah excelled with the benefit of an effective teacher, while Kyler fell behind and is still struggling to catch up with her twin. In terms of reading skills alone, Kaylah and Kyler are now reading several levels apart. The gulf between Kaylah's and Kyler's learning illustrates what is a matter of common sense. An ineffective teacher can leave a student ill-equipped to advance, or even to stay apace of those alike in all respects except the quality of their teacher.

6. This suit challenges the constitutionality, in whole or in part, of Education Laws §§ 2509, 2510, 2573, 2585, 2588, 2590, 3012, 3012-c, 3020, and 3020(a) (the "Challenged Statutes"). The Challenged Statutes confer permanent employment, prevent the removal of ineffective teachers from the classroom, and mandate that layoffs be based on seniority alone, rather than effectiveness. These Statutes prevent students like Kyler Wright and the other plaintiffs from obtaining the sound basic education guaranteed under Article XI, § 1 of the New York Constitution (the "Education Article").

7. This suit seeks to strike down the legal impediments that prevent New York's schools from providing a sound basic education to all of their students, as guaranteed by the New York Constitution. Plaintiffs seek a declaration that the Challenged Statutes violate the constitutional rights of New York schoolchildren and a permanent injunction to prevent their future enforcement.

JURISDICTION AND VENUE

8. Venue is proper in the County of Albany pursuant to the Civil Practice Law and Rules 503(a) and 505(a) because the Defendants' principal offices are located in the County of Albany.

9. The Supreme Court has jurisdiction to hear this case and grant declaratory judgment and appropriate injunctive relief pursuant to Civil Practice Law and Rules 3001 and 3017(b).

PARTIES

Plaintiffs

10. Plaintiff John Keoni Wright sues on his own behalf and on behalf of his minor children, Kaylah and Kyler Wright, students who attend P.S. 158, a Brooklyn school in the New York City School District.

11. Plaintiff Ginet Borrero sues on her own behalf and on behalf of her minor child, Raymond Diaz, Jr., a student who attends I.S. 171, a Brooklyn school in the New York City School District.

12. Plaintiff Tauana Goins sues on her own behalf and on behalf of her minor child, Tanai Goins, a student who attends P.S. 106, a Queens school in the New York City School District.

13. Plaintiff Nina Doster sues on her own behalf and on behalf of her minor children, Patience and King McFarlane, students who attend P.S. 140, a Queens school in the New York City School District.

14. Plaintiff Carla Williams sues on her own behalf and on behalf of her minor child, Jada Williams, a student who previously attended Nathaniel Rochester Community School No. 3 in the Rochester City School District and now attends World of Inquiry School No. 58 in the Rochester City School District.

15. Plaintiff Mona Pradia sues on her own behalf and on behalf of her minor child, Adia-Jendayi Pradia, a student who previously attended Audubon School No. 333 in the Rochester City School District and now attends Norman Howard School, paid for by the Rochester City School District.

16. Plaintiff Angeles Barragan sues on her own behalf and on behalf of her minor child, Natalie Mendoza, a student who attends P.S. 94, Kings College Elementary School, a Bronx school in the New York City School District.

a) Plaintiff Laurie Townsend sues on her own behalf and on behalf of her minor child, Nakia Townsend, a student who attends P.S. 101, a Queens school in the New York City School District.

b) Plaintiff DeLaine Wilson sues on her own behalf and on behalf of her minor child, Meta Wilson, a student who attends Albany High School in the Albany City School District.

Defendants

17. Defendant the State of New York (the "State") is responsible for the educational system in New York.

18. Defendant Regents of the University of the State of New York ("Board of Regents") is an executive department of the State of New York. The Board of Regents is

empowered by the New York Legislature to determine educational policy and promulgate rules to effectuate New York State education law and policies.

19. Defendant Merryl H. Tisch is the Chancellor of the Board of Regents. As Chancellor, Ms. Tisch is the head of the Board of Regents and presides over Regents meetings and appoints its committees. N.Y. Educ. L. § 203; 8 NYCCR 3.1(a). She is sued in her official capacity.

20. Defendant John B. King, Jr. is the Commissioner of Education and President of the University of the State of New York. As Commissioner, Mr. King has the obligation and authority to supervise and monitor all public schools and to assure that educational services are being provided in New York as required by law and regulation. N.Y. Educ. L. §§ 302-03, 305(2), 308. He is sued in his official capacity.

21. Collectively, the defendants are legally responsible for the operation of the New York State educational system and are required to ensure that its operation complies with relevant state and federal constitutional requirements.

BACKGROUND

22. The Education Article provides that "[t]he 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. Article XI guarantees all students in New York a sound basic education. A sound basic education is the key to a promising future, preparing children to realize their potential, be productive citizens, and contribute to society.

23. The State fails to meet its constitutional obligation when it provides deficient inputs to adequately educate its students. Students are entitled to adequate teaching by effective personnel because teachers are the core "input" of a sound basic education.

24. The New York Legislature enacted the Challenged Statutes. Through enforcement by the Defendants, the Challenged Statutes confer permanent employment, prevent the removal of ineffective teachers, and result in layoffs of effective teachers in favor of less-effective, more senior teachers. Under the existing tenure laws, teachers are granted essentially permanent employment before their effectiveness can be determined. The current dismissal and disciplinary laws for tenured teachers make it nearly impossible to remove ineffective teachers from the classroom once they are prematurely tenured.

25. Because of the Challenged Statutes, New York schoolchildren are taught by ineffective teachers who otherwise would not remain in the classroom. These laws prevent school administrators from dismissing and disciplining teachers who do not meet the most basic standards of adequacy and effectiveness, and from making employment decisions driven by their students' constitutional right to a sound basic education.

26. The State's promotion and retention of ineffective teachers, through its promulgation and enforcement of the Challenged Statutes, violates the New York Constitution.

I. TEACHER EFFECTIVENESS IS A NECESSARY INPUT TO A SOUND BASIC EDUCATION.

27. Effective teachers are the most important factor in student performance. Recent studies have confirmed what the Court of Appeals recognized over ten years ago: teachers "are

the first and surely the most important input" in creating an adequate education. *Campaign for Fiscal Equality, Inc. v. State (CFE II)*, 100 N.Y.2d 893, 909 (2003).

28. The key determinant of educational effectiveness is teacher quality. (*See, e.g.*, Ex. 1, Chetty et al., Nat'l Bureau of Econ. Research, *The Long-Term Impacts of Teachers: Teacher Value-Added and Student Outcomes in Adulthood* (2011).)

29. In the short-term, effective teachers provide tangible educational results in the form of higher test scores and higher graduation rates. (Ex. 2, Bill & Melinda Gates Found., *Ensuring Fair and Reliable Measures of Effective Teaching: Culminating Findings from the MET Project's Three-Year Study* (2013); Ex. 3, Eric A. Hanushek, *Valuing Teachers: How Much Is a Good Teacher Worth?*, Education Next, Summer 2011, at 42.)

30. In the long-term, students taught by effective teachers are given a strong foundation from which to advance and achieve. These students are less likely to become teenage parents and more likely to progress in their education, attending college and matriculating at colleges of higher quality. They are more likely to earn more money throughout their lives, live in neighborhoods of higher socioeconomic status, and save more money for retirement. (*See* Ex. 1, Chetty et al., *supra*.)

31. Teacher quality affects student success more than any other in-school factor. High-quality instruction from effective teachers helps students overcome the traditional barriers demographics impose, (*see* Ex. 4, Steven G. Rivkin et al., *Teachers, Schools, and Academic Achievement*, 73 Econometrica 417, 419 (2005)), and may have the greatest positive effect on low-performing students and minorities, (*see* Ex. 5, Daniel Aaronson et al., *Teachers and Student Achievement in the Chicago Public High Schools*, 25 J. Lab. Econ. 95, 126-128 (2007)).

32. If schools were able to replace the least effective teachers, it would add enormous value to the future earnings of students and the U.S. economy as a whole. (Ex. 3, Hanushek, *supra*, at 43-44.)

33. In light of the substantial and enduring effect that teachers have on their students' achievement, the ability to remove ineffective teachers employed by the New York public school system would improve the lives and better the futures of the students who would otherwise be assigned to those teachers. Yet the Challenged Statutes deprive New York students of a sound basic education, providing no true means for administrators to remove teachers with a track record of ineffectiveness, and causing too many students to remain in the classroom with ineffective teachers.

II. THE TEACHER TENURE STATUTES CONFER PERMANENT EMPLOYMENT ON INEFFECTIVE TEACHERS.

34. Sections 2509, 2573, 3012 and 3012-c (the "Permanent Employment Statutes"), alone and in conjunction with the other statutes at issue, ensure that ineffective teachers unable to provide students with a sound basic education are granted virtually permanent employment in the New York public school system and near-total immunity from termination.

35. New York Education Law § 3012(2)[1] provides 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

[1] Section 3012 applies to certain school districts, including common school districts and/or school districts employing fewer than eight teachers, other than city school districts. Section 2509 applies the same law to school districts of cities with less than 125,000 inhabitants. Section 2573 applies the same law to school districts of cities with 125,000 inhabitants or more.

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."

36. Tenure confers extraordinary benefits and protections, but it is out of the ordinary for a teacher to be denied tenure. The default is to grant teachers tenure and the process is a formality, rather than an appraisal of teacher performance. (*See* Ex. 6, Ann Duffett et al., Educ. Sector, *Waiting to Be Won Over: Teachers Speak on the Profession, Unions, and Reform* 3 (2008).)

37. In 2007, 97 % of tenure-eligible New York City teachers received tenure. Even with recent reforms meant to strengthen the evaluation system, few teachers are denied tenure. In 2011 and 2012, while some teachers had their probationary periods extended, only 3 % of tenure-eligible teachers were denied tenure outright. (*See* Ex. 7, Susanna Loeb et al., *Performance Screens for School Improvement: The Case of Teacher Tenure Reform in New York City* (2014).) These numbers indicate that most ineffective teachers are not denied tenure.

38. 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. The statute's prescribed methods for evaluating effectiveness before granting tenure are deficient and three years is inadequate to assess whether a teacher has earned the lifelong benefits of tenure.

39. 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).

40. Under the APPR, teachers receive a numerical score every year that is transposed into one of four ratings: "Highly Effective," "Effective," Developing," or Ineffective." Each school district negotiates the specific terms of their APPR plans, which must comply with § 3012-c. State-developed measures of student growth, such as test results, must form twenty percent of a teacher's rating. Another twenty percent must be based on locally selected measures of student achievement. Locally determined evaluation methods, such as classroom observations by administrative staff, form the remaining sixty percent. Rather than impose a uniform definition of what constitutes conduct unworthy of tenure, the Permanent Employment Statutes have invited variable and superficial definitions of ineffective teaching that do not ensure tenure is awarded only to effective teachers.

41. The 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."[2] 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 Arts and Math standardized tests met the standard for proficiency. (Ex. 8, Cathy Woodruff, *Why Are Most Teachers Rated Effective When Most Students Test Below Standards?*, N.Y. St. Sch. Bds. Ass'n, (Dec. 16, 2013), http://www.nyssba.org/news/2013/12/12/on-board-online-december-16-2013/why-are-most-teachers-rated-effective-when-most-students-test-below-standards/.)

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[2] The data excludes New York City teachers because the city and teachers' union were unable to agree on a plan for the teacher evaluation system. (Ex. 9, Geoff Decker, *Few Teachers Across New York State Earned Low Ratings Last Year*, Chalkbeat, (Oct. 22, 2013), http://ny.chalkbeat.org/2013/10/22/few-teachers-across-new-york-state-earned-low-ratings-last-year/#.U3oacPldXgU.) On information and belief, the New York City data would be similar to the overall New York State data.

42. Similarly, of the New York City teachers eligible for tenure from 2010-11 to 2012-2013, only 2.3 % received a final rating of "Ineffective" (302 teachers), even though 8 % of the teachers had low attendance (more than twenty absences over prior two years) and 12 % of teachers had low value added. (*See* Ex. 7, Loeb et al., *supra.*) These discrepancies indicate that the APPR ratings operate as a rubber stamp for tenure and are not a meaningful check within the tenure process.

43. The APPR's deficient and superficial means of assessing teacher effectiveness is the most highly predictive measure of whether a teacher will be awarded tenure. (*See id.*)

44. The few teachers receiving an "Ineffective" or "Developing" rating are not the only ineffective teachers in the New York public school system. It is less likely that so few teachers are ineffective than that the ratings of many ineffective teachers are inflated and the ineffective performance by teachers is roundly ignored. The ratings do not identify pedagogically incompetent teachers, including teachers unable to control their classroom, who fail to provide instruction, prepare lesson plans, or distribute homework, and teachers indifferent to their students' educational advancement.

45. Of the miniscule percentage of ineffective teachers actually rated as such, not all are denied tenure. Between 2010 and 2013, close to 1 % were approved for tenure and 18.2 % had their probationary periods extended. (*See id.*) In addition, teachers have the right to appeal an Ineffective rating[3] and tenure cannot be denied to a probationary teacher while an APPR appeal about the teacher's performance is pending. N.Y. Educ. Law § 3012-c(5). Moreover,

[3] Most districts also allow tenured, as well as non-tenured, teachers to appeal a Developing rating. (*See* Ex. 10, Alexander Colvin et al., Scheinman Inst. on Conflict Resolution, *APPR Teacher Appeals Process Report* (2014).)

administrators renew probationary teachers in their final probationary year despite any performance concerns. (Ex. 11, Communities for Teaching Excellence, *Earned, Not Given: Transforming Teacher Tenure* 3 (2012).)

46. A teacher's long-term effectiveness cannot be determined with any degree of confidence during the first two or three years of teaching. Most studies indicate that teacher effectiveness is typically established by the fourth year of teaching. (*Id.* at 5.) After that, effective teachers tend to remain relatively effective, and ineffective teachers remain relatively ineffective. Deciding tenure after a three-year probationary period confers permanent employment on many teachers who will be ineffective for the rest of their teaching career.

47. The statute's notification requirements make it effectively impossible to consider a teacher's third-year APPR before a tenure determination is made, even if a teacher is found to be ineffective in the third year of his or her probationary period. Section 3012 requires the superintendent of school to notify in writing "each 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. (*See* Ex. 12, Warren H. Richmond III, *Evaluation Law Could Limit Ability to Terminate Probationary Teachers*, N.Y.L.J., May 16, 2013, at 2.) 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.

48. 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).

III. THE DISCIPLINARY STATUTES KEEP INEFFECTIVE, TENURED TEACHERS IN THE SCHOOL SYSTEM.

49. 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. N.Y. Educ. Law § 3020(1) (§ 3020-a and § 3020 hereinafter collectively referred to as 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, or neglect of duty, or a failure to maintain required certification. N.Y. Educ. Law § 3012(2).

50. 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. On top of these procedural obstacles, the standard for proving just cause to terminate a teacher is nigh impossible to satisfy. The statutorily mandated hearings are "consuming and expensive hurdles that make the dismissal of chronically ineffective, tenured teachers almost impossible." (Ex. 11, Communities for Teaching Excellence, *supra*, at 5.)

51. The Disciplinary Statutes make it prohibitively expensive, time-consuming, and effectively impossible to dismiss an ineffective teacher who has already received tenure. Because of the difficulty, cost, and length of time associated with removal, the number of

ineffective teachers who remain employed is far higher than the number of those disciplined or terminated.

52. Disciplinary proceedings are rarely initiated. It is well known that "because of the cumbersome, lengthy, and costly due process protections [tenure] affords, many school districts rarely attempt to fire teachers--in effect granting them permanent employment." (*Id.* at 2.)

53. As an initial matter, administrators are deterred from giving an Ineffective rating. On information and belief, principals and other administrators may be 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). 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." *Id.*

54. Section 3020-a imposes a three-year limit for bringing charges against a teacher. But 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. On information and belief, it may be difficult for school districts to collect enough evidence for a 3020-a hearing within the three-year period. This laborious and complicated process deters administrators from trying to remove ineffective teachers from the classroom. (*See* Ex. 13, John Stossel, *How to Fire*

an Incompetent Teacher, Reason (Oct. 2006), http://cloudfront-assets.reason.com/assets/db/12639308918768.pdf.)

55. On information and belief, principals and administrators would be more likely to use the 3020-a process to discipline or dismiss a teacher if it was less time-consuming and more effective. A 2009 survey found that 48 % of districts surveyed considered bringing 3020-a charges at least once, but did not. The districts stated multiple reasons for not filing charges, including that the process was too cumbersome, too expensive, that their case was not strong enough, or that the employee resigned. (*See* Ex. 14, Patricia Gould, *3020-a Process Remains Slow, Costly*, N.Y. St. Sch. Bds. Ass'n (May 11, 2009), http://www.nyssba.org/index.php?src=news&refno=853&category=On%20Board%20Online%20May%2011%202009.)

56. Once an administrator clears the hurdles to file charges, termination can result only after a 3020-a hearing. Despite statutory time limits, from 2004-2008, 3020-a disciplinary proceedings took an average of 502 days, from the time charges were brought until a final decision. (*See* Ex. 15, 3020-a Teacher Discipline Reform, N.Y. State Sch. Bds. Ass'n, http://www.nyssba.org/index.php?src=gendocs&ref=3020-a%20Teacher%20Discipline%20Reform&category=advocacy_legislation.)[4]

57. Incompetency proceedings, which may include charges such as inability to control a class and failure to prepare required lesson plans, take even longer. From 1995-2006, incompetency proceedings in New York took an average of 830 days, costing $313,000 per teacher. (*Id.*)

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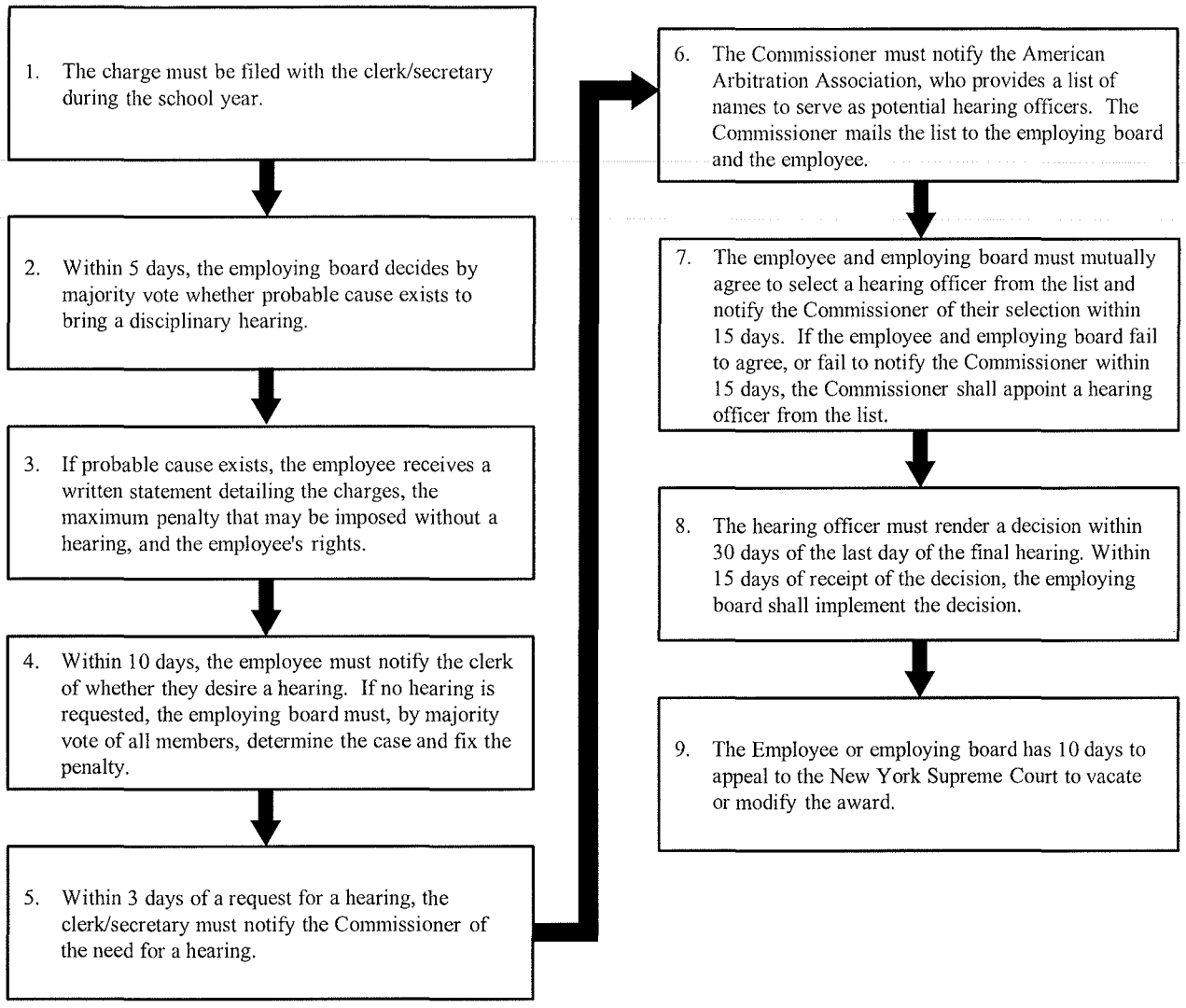
[4] The statistics in paragraphs 56-57 exclude New York City, which has an alternate disciplinary process.

58. 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 few teachers receive two consecutive Ineffective ratings to trigger an expedited process.

59. While charges are pending, ineffective teachers continue to be paid even if they are suspended. Unless a teacher is convicted of certain felony crimes, the teacher "may be suspended pending a hearing on the charges and the final determination thereof" *with pay*. N.Y. Educ. Law § 3020-a(2)(b).

60. The Disciplinary Statutes require the following procedure to discipline a teacher:



61. Section 3020(1) incorporates the "alternate disciplinary procedures contained in a collective bargaining agreement." N.Y. Educ. Law § 3020(1). This means that the Statute allows its procedural requirements to be modified by contract. In practice, the collective bargaining agreements make it even more difficult to remove ineffective teachers and add conditions that delay the process even further. 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. The refusal to appoint hearing officers contributes to the massive backlog of disciplinary cases in New York City.

62. These proceedings are not only long, they are futile. When administrators do pursue disciplinary action, few 3020-a proceedings result in termination, *even when an arbitrator determines that the teacher is ineffective, incompetent, or has engaged in misconduct.* In a study of New York City 3020-a proceedings from 1997-2007, only twelve teachers were dismissed for incompetent teaching. (Ex. 16, Katharine B. Stevens, *Firing Teachers: Mission Impossible*, N.Y Daily News (Feb. 17, 2014), http://www.nydailynews.com/opinion/firing-teachers-mission-impossible-article-1.1615003.)

63. On information and belief, dismissals are so rare not because there are no incompetent teachers, but because the Permanent Employment and Disciplinary Statutes make it impossible to fire them.

64. Thus, 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. *See, e.g.*, *deSouza v. Dep't of Educ.*, 28 Misc. 3d 1201(A) (N.Y. Sup. 2010).

65. The result of these proceedings is that ineffective teachers return to the classroom, and students are denied the adequate education that is their right.

IV. THE LIFO STATUTES REQUIRE THE STATE TO RETAIN MORE SENIOR TEACHERS AT THE EXPENSE OF MORE EFFECTIVE TEACHERS.

66. When school districts conduct layoffs that reduce the teacher workforce, New York Education Law § 2585 mandates that the last teachers hired be the first teachers fired (the "Last In First Out" or "LIFO" Statute).[5] Under the LIFO Statute, "[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).

67. New York is one of only ten states to conduct layoffs on the basis of seniority alone, irrespective of a teacher's performance, effectiveness, or quality. (Ex. 17, *Vergara v. California*, No. BC484642 (Cal. Super. Ct. June 10, 2014).)

68. Under the LIFO Statute, 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.

69. Seniority is not an accurate predictor of teacher effectiveness. Studies demonstrate that a teacher's effectiveness generally levels off of returns to experience after five to seven years. (Ex. 18, Allison Atteberry et al., *Do First Impressions Matter? Improvement in Early Career Teacher Effectiveness* 4 (CALDER, Working Paper No. 90, 2013).) Yet the LIFO Statute requires that seniority, which has little correlation to a teacher's effectiveness, be the sole factor in layoffs.

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[5] Section 2585 applies to school districts of cities with 125,000 inhabitants or more, such as Rochester City School District. Section 2510(1)-(2) applies the same law to school districts of cities with less than 125,000 inhabitants. Section 2588 applies to school districts of cities with over 1,000,000 inhabitants, such as New York City.

70. 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. Pursuant to the LIFO Statute, school administrators discontinued the employment of top-performing teachers with lower seniority, and retained low-performing teachers with greater seniority.

71. Under a seniority-based layoff system, school districts must fire more teachers to satisfy budgetary constraints because newer teachers are paid less. The higher the number of layoffs, the greater the detriment suffered by schools and students.

72. Seniority-based layoffs affect children at struggling schools the most, because lower-performing schools generally have a disproportionate number of newly-hired teachers.

73. The LIFO Statute hinders recruitment of talented personnel because newly-hired teachers face a heightened risk of being laid off, regardless of their abilities and performance.

74. Layoffs determined on the basis of teacher effectiveness, rather than seniority alone, would result in a more effective workforce. If New York City had conducted seniority-based layoffs between 2006 and 2009, none of the New York City teachers that received an Unsatisfactory[6] rating during those years would have been laid off. In the absence of the LIFO Statute, school administrators conducting layoffs would consider teacher performance, a higher number of effective teachers would be retained, and fewer children would suffer the loss of an

[6] New York changed their rating system in 2010, from rating teachers as 'Satisfactory' or 'Unsatisfactory,' to 'Highly Effective,' 'Effective,' 'Developing,' and 'Ineffective.'

effective teacher. (Ex. 19, Donald Boyd et al., *Teacher Layoffs: An Empirical Illustration of Seniority Versus Measures of Effectiveness*, 6 Educ. Finance & Pol. 439 (2011).)

75. The LIFO Statute, both alone and in conjunction with the other Challenged Statutes, ensures that a number of ineffective teachers unable to provide students with a sound basic education retain employment in the New York school system.

76. Cumulatively, the State's enforcement of the Challenged Statutes forces schools to retain ineffective teachers and violates New York students' right to a sound basic education.

FIRST CAUSE OF ACTION

77. Plaintiffs repeat and re-allege each and every allegation set forth in Paragraphs 1 through 76 as though fully set forth herein at length.

78. The Permanent Employment Statute violates the Education Article of the New York Constitution because it has failed, and continues to fail to provide all children in New York State with a sound basic education.

79. Teacher effectiveness cannot be determined within three years. The teachers who obtain tenure may fail to provide students with an effective education, but are guaranteed lifetime employment and compensation.

SECOND CAUSE OF ACTION

80. Plaintiffs repeat and re-allege each and every allegation set forth in Paragraphs 1 through 76 as though fully set forth herein at length.

81. The Disciplinary Statutes violate the Education Article of the New York Constitution because they fail to provide all children in New York State with a sound basic education by preventing the dismissal of ineffective teachers.

82. Principals are unlikely to take action to attempt to dismiss or discipline an ineffective teacher. Because disciplinary proceedings are time-consuming, costly, and unlikely to result in the removal of teachers, ineffective teachers are kept in the classroom.

THIRD CAUSE OF ACTION

83. Plaintiffs repeat and re-allege each and every allegation set forth in Paragraphs 1 through 76 as though fully set forth herein at length.

84. The LIFO Statute violates the Education Article of the New York Constitution because it has failed, and will continue to fail to provide children throughout the Rochester City School District with a sound basic education.

85. LIFO prohibits administrators from taking teacher quality into account when conducting layoffs so that ineffective, more senior teachers are retained and effective teachers are fired.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that this Court enter a judgment against Defendants as follows:

As to each Count, a declaratory judgment, that the Challenged Statutes violate the New York Constitution in the manner alleged above.

As to each Count, preliminary and permanent injunctions enjoining Defendants from implementing or enforcing the Challenged Statutes.

Award plaintiffs all costs and expenses incurred in bringing this action, including reasonable attorney's fees and costs;

Such other relief available under New York law that may be considered appropriate under the circumstances, and further relief as this Court deems just and proper.

Dated: New York, New York
November 13, 2014

Kirkland & Ellis LLP

By: _____
Jay P. Lefkowitz

Jay P. Lefkowitz
Devora W. Allon
Danielle R. Sassoon
KIRKLAND & ELLIS LLP
601 Lexington Ave.
New York, NY 10022
Telephone (212) 446-4800
Facsimile (212) 446-6460

Attorneys for Plaintiffs

EXHIBIT 4

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

M200755
E/sl

JOHN M. LEVENTHAL, J.P.
SHERI S. ROMAN
SYLVIA O. HINDS-RADIX
BETSY BARROS, JJ.

2015-03922 DECISION & ORDER ON MOTION

Mymoena Davids, etc., et al., respondents,
v State of New York, et al., defendants-appellants;
Michael Mulgrew, etc., et al., intervenors-appellants.

(Index No. 101105/14)

Joint motion by the appellants to enlarge the time to perfect appeals from an order of the Supreme Court, Richmond County, dated March 12, 2015.

Upon the papers filed in support of the motion and the papers filed in relation thereto, it is

ORDERED that the motion is granted, the time to perfect the appeals is enlarged until December 28, 2015, and the joint record or appendix on the appeals and the appellants' respective briefs must be served and filed on or before that date.

LEVENTHAL, J.P., ROMAN, HINDS-RADIX and BARROS, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court

October 28, 2015

DAVIDS v STATE OF NEW YORK

EXHIBIT 5

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

M205421
E/sl

REINALDO E. RIVERA, J.P.
JOHN M. LEVENTHAL
SANDRA L. SGROI
SYLVIA O. HINDS-RADIX, JJ.

2015-03922, 2015-12041 DECISION & ORDER ON MOTION

Mymoena Davids, etc., et al., respondents,
v State of New York, et al., defendants-appellants;
Michael Mulgrew, etc., et al., intervenors-appellants.

(Index No. 101105/14)

Motion by the appellants State of New York, New York State Board of Regents, New York State Education Department, City of New York, and New York City Department of Education to enlarge the time to perfect appeals from an order of the Supreme Court, Richmond County, dated March 12, 2015, and to consolidate those appeals with appeals from an order of the same court dated October 22, 2015.

Upon the papers filed in support of the motion and the papers filed in relation thereto, it is

ORDERED that the branch of the motion which is to enlarge the time to perfect the appeals from the order dated March 12, 2015, is granted, the time to perfect the appeals is enlarged until February 26, 2016, and the joint record or appendix on the appeals and the appellants' respective briefs must be served and filed on or before that date; and it is further,

ORDERED that the branch of the motion which is to consolidate the appeals is denied as unnecessary as the appeals may be consolidated as of right (*see* 22 NYCRR 670.7[c][1]).

RIVERA, J.P., LEVENTHAL, SGROI and HINDS-RADIX, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court

January 26, 2016

Docket No. 2015-03922
INDEX NO.: 101105-2014 (Sup. Ct. Richmond Cnty.)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

MYMEONA DAVIDS, by her parent and natural guardian, MIAMONA DAVIDS, *et. al.*,

Plaintiffs-Respondents,

- against -

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

Defendants-Appellants,

MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO, 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, and THE NEW YORK CITY DEPARTMENT OF EDUCATION

Intervenors-
Defendants-Appellants.

Affidavit in Opposition to Motion for Enlargement of Time

Kirkland & Ellis
Citigroup Center
601 Lexington Avenue
New York, NY 10022
(212) 446-4800