To be argued by:
PHILIP V. TISNE
15 minutes requested

Supreme Court, Richmond County – Index No. 10105/14

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

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

Plaintiffs-Respondents,

-against-

Docket No. 2015-03922, 2015-12041

THE STATE OF NEW YORK,

Defendants-Appellants,

Michael Mulgrew, as President of the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO,

Intervenor-Defendant-Appellant,

(*caption continues on inside front cover*)

BRIEF FOR STATE APPELLANTS

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Dated: March 28, 2016

(*caption continued from front cover*)

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

Plaintiffs-Respondents,

-against-

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

Defendants-Appellants,

-and-

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,

Intervenors-Defendants-Appellants.

JOHN KEONI WRIGHT, GINET BORRERO, TAUANA GOINS, NINA DOSTER, CARLA WILLIAMS, MONA PRADIA, ANGELES BARRAGAN,

Plaintiffs-Respondents,

-against-

THE BOARD OF REGENTS 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-Appellants,

-and-

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

Intervenors-Defendants-Appellants.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION–SECOND DEPARTMENT

MYMOENA DAVIDS &c., *et al.*,

Plaintiffs–Respondents,

- against -

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

Defendants–Appellants,

and

MICHAEL MULGREW &c., *et al.*,

Intervenor-Defendants–Appellants,

JOHN KEONI WRIGHT, *et al.*,

Plaintiffs–Respondents,

- against -

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

Defendants–Appellants,

and

SETH COHEN, *et al.*,

Intervenor-Defendants–Appellants,

Docket Nos. 2015-03922, 2015-12041

Index No. 101105/14
(Consolidated)
Supreme Court
Richmond County

Statement Pursuant to C.P.L.R. 5531

1. The index number of the case below is 101105/14.

2. This appeal involves two consolidated actions: (1) *Davids et al. v. State of New York et al.*, Index No. 101104/14 (Sup. Ct. Richmond County) ("the *Davids* action"); and (2) *Wright et al. v. State of New York et al.*, (Sup. Ct., Albany County) ("the *Wright* action").

   In the *Davids* action: the original plaintiffs were Mymeona Davids by her parent and natural guardian Maimona Davids, Eric Davids by his parent and natural guardian Maimona 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 Kenra Oke, and all others similarly situated; and the original defendants were the State of New York, the New York State Board of Regents, the New York State Department of Education, the City of New York, the New York City Department of Education, John and Jane Does 1-100, and XYZ Entities 1-100.

In the *Wright* action: the original plaintiffs were John Keoni Wright, Ginet Borrero, Tauana Goins, Nina Doster, Carla Williams, Mona Pradia, and Angeles Barragan; and the original defendants were the State of New York, the Regents of the University of the State of New York, Merryl H. Tisch as Chancellor of the Board of Regents, and John B. King as the Commissioner of Education and President of the University of the State of New York.

Since the original pleadings were filed: (i) the *Davids* action is no longer prosecuted on behalf of all others similarly situated; (ii) the following parties were permitted to intervene as interenor-defendants in both the *Wright* and the *Davids* actions: Michael Mulgrew as President of the United Federal 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; Karen E. Magee, individually and as President of the New York State United Teachers; Philip A. Cammarata; and Mark Mambretti; and (iii) in the *Wright* action, the New York City Department of Education was permitted to intervene as intervenor-defendant.

3. The *Davids* action was commenced in Supreme Court, Richmond County. The *Wright* action was commenced in Supreme Court, Albany County, and consolidated with the *Davids* action before Supreme Court, Richmond County.

4. The *Davids* action was commenced on June 30, 2014, by a verified class action complaint served on or about July 25, 2014. Plaintiffs in the *Davids* action filed and served a verified amended complaint on or about July 25, 2014. The *Wright* action was commenced on July 28, 2014, by a complaint served on or about July 28, 2014. Plaintiffs in the *Wright* action filed and served an amended complaint on or about November 13, 2014.

5. Plaintiffs seek a declaration that the system of tenure for public school teachers in New York State deprives public school students of the opportunity to receive a sound basic education in violation of the Education Article of the New York Constitution, *see* N.Y. Const. art. XI. Plaintiffs also seek an injunction against enforcement of the teacher tenure system.

6. This appeal is from (i) an order of Supreme Court, Richmond County (Minardo, J.S.C.), dated March 12, 2015, and entered March 20, 2015; and (ii) an order of the same court (Minardo, J.S.C.), dated October 22, 2015, and entered October 28, 2015.

7. The method of appeal being used is the full reproduced record.

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PRELIMINARY STATEMENT

Plaintiffs in these consolidated actions advance the novel, and groundless, theory that the State's longstanding policy of attracting qualified educators and promoting academic freedom by protecting public school teachers against arbitrary dismissal violates the Education Article of the New York Constitution. *See* N.Y. Const. art. XI, § 1. Plaintiffs' unprecedented challenge to New York's teacher tenure system fails as a matter of law and should have been dismissed by Supreme Court, Richmond County (Minardo, J.). This Court should reverse, for three reasons.

First, these actions are moot. Plaintiffs filed their operative complaints in 2014, but the Legislature substantially amended the very statutes challenged by plaintiffs less than one year later. The trial court gave plaintiffs an opportunity to amend their pleadings, but they chose not to do so. Plaintiffs' actions accordingly attack a statutory scheme that no longer exists, and thus are moot.

That point compels dismissal regardless of whether courts are skeptical that the Legislature's 2015 reforms will fully address plaintiffs' concerns. Whether or not plaintiffs theoretically *might*

assert Education Article claims based on the amended statutory scheme, they *have asserted* claims based on the unamended scheme only. Those claims seek relief from legislation that is no longer in effect—and in doing so, specifically target superseded aspects of the former teacher tenure system and rely on allegations about the supposed effects of the former, but not the amended, system. Such claims do not present a live controversy.

Second, plaintiffs' claims are nonjusticiable. As their decision not to amend their pleadings demonstrates, plaintiffs' grievance does not depend on the specifics of any particular teacher tenure regime. Rather, plaintiffs fundamentally disagree with the Legislature's considered judgment that providing for teacher tenure (in any form) will enhance the quality of public education in the State. Plaintiffs thus seek to litigate what is in essence a policy dispute properly left to the political process. Such disagreements are not appropriate for resolution by the courts.

Third, plaintiffs fail to plead a constitutional violation, in any event. A viable Education Article claim requires concrete allegations of (i) gross and glaring, district-wide deficiencies that

deny the students of a specific school district the opportunity to receive a sound basic education, and (ii) causes attributable to the State. Plaintiffs allege neither.

Plaintiffs' complaints are devoid of concrete allegations that any particular school district—let alone each of the State's nearly 700 school districts—has a teaching force so deficient that it denies students district-wide the ability to acquire the basic literacy, calculating, and verbal skills making up a sound basic education. And plaintiffs do not concretely allege causes attributable *to the State*. Plaintiffs rely exclusively on the theory that incompetent teachers are denying students minimally adequate instruction, but teachers are employed by individual school districts—not the State—and the teaching force in any given district is thus a product of that district's employment decisions. Plaintiffs' attempt to hold *the State* responsible for *school districts'* independent decisionmaking overlooks a crucial aspect of local control over public education—and in addition depends on speculative and conclusory assertions about the

State's former teacher tenure system. Such allegations do not state a claim.

QUESTIONS PRESENTED

1. Is plaintiffs' constitutional challenge to the State's former teacher tenure system moot, especially given that the complaints specifically target superseded aspects of the former system and rely on allegations about the supposed effects of the former, but not the amended, system?

2. Does plaintiffs' disagreement with the Legislature's considered judgment that having some form of teacher tenure will enhance the quality of public education present a policy dispute properly left to resolution by political, rather than judicial, processes?

3. Did plaintiffs fail to state an Education Article claim by making insufficient allegations of (i) gross and glaring, district-wide deficiencies that deny the students of a specific school district the opportunity to receive a sound basic education, and (ii) causes attributable to the State?

Supreme Court answered these questions in the negative.

STATEMENT OF THE CASE

A. Statutory Background

Plaintiffs in these consolidated actions are parents and students who reside in the New York City, Rochester and Albany public school districts. They challenge a statutory scheme comprising the State's public school teacher tenure system, which plaintiffs claim denies students the opportunity to receive a sound basic education and thus violates the Education Article of the New York Constitution. N.Y. Const. art. XI, § 1.

Plaintiffs' complaints, filed in 2014, address aspects of the then-prevailing teacher tenure system governing performance evaluation, tenure eligibility, professional discipline, and seniority protection against layoffs.[1] Legislation adopted in 2015 made substantial changes to the teacher tenure system, including

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[1] The Education Law contains parallel statutory provisions governing the teacher tenure system for each of the different types of school district in the State. There are slight differences among those parallel statutory provisions that are not material here. We discuss in text the provisions governing the New York City and Rochester city school districts and note parallel provisions in the margin.

revisions in each of the areas identified by plaintiffs. We discuss below the relevant provisions of both the superseded system and the current one.

1. The superseded teacher tenure system

Teacher Evaluation. When plaintiffs filed these actions, public school teachers were evaluated according to Education Law § 3012-c. *See* ch. 103, 2010 N.Y. Laws at 1-4 (L.R.S.) (enacting Education Law § 3012-c). That measure required each school district to adopt an annual professional performance review (APPR) system, under which teachers would be given one of four ratings—highly effective, effective, developing, and ineffective. *Id.* at 1. The APPR ratings were to be assigned based on three subcomponents: (1) student achievement on State assessments or other comparable measures; (2) locally selected measures of student achievement; and (3) other locally selected criteria consistent with standards established by the SED Commissioner. *Id.* at 1-3. School districts were required to make APPR ratings a significant factor in teacher employment decisions, including decisions about tenure. *Id.* at 1.

Tenure Eligibility. Under the prior system, a new public school teacher was appointed by a school district for an initial probationary period that generally lasted three years, during which time the teacher could be terminated by the district at will. *See* Education Law § 2573(1)(a).[2] At the end of the probationary period, a teacher was granted tenure if his or her superintendent certified that the teacher was "competent, efficient and satisfactory." *Id.* § 2573(5).

Teacher Discipline Procedures. Once tenured, a teacher could be removed only for cause after a hearing pursuant to procedures set forth in Education Law § 3020-a.[3] *Id.* § 2573(5)(a).

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[2] As noted above, parallel provisions govern tenure eligibility in the various other types of school districts throughout the State. *See* Education Law § 2509 (city school districts in cities with less than 125,000 residents); *id.* § 3012 (non-city school districts); *id.* § 1102(3) (county vocational education and extension boards (SVEEBs)); *id.* § 3014 (boards of cooperative educational services (BOCES)).

[3] Provisions governing the different types of school district provide that tenured teachers may be disciplined only according to procedures set forth in Education Law § 3020-a. *See* Education Law § 2590-j(7) (New York City school district); *id.* § 3020 (all other school districts).

Under those procedures, after charges were filed against a teacher, the employing board of education was required to determine within five days whether probable cause existed to initiate a disciplinary proceeding. *Id.* § 3020-a(2)(a). If probable cause existed, the teacher had ten days to request a hearing, *see id.* § 3020-a(2)(c), and, if he or she did so, the board and the teacher had a further fifteen days to select a hearing officer (or a panel of three hearing officers) from a list supplied by the American Arbitration Association, *see id.* § 3020-a(3)(a), (b)(ii)-(iii).

Ten to fifteen days after the hearing officer agreed to serve, he or she was required to conduct a pre-hearing conference to address any possible discovery or motions, *see id.* § 3020-a(3)(c)(ii)-(iii), and schedule a hearing to occur within sixty days, *see id.* § 3020-a(3)(c)(vi). The hearing officer was required to issue a decision thirty days after the hearing, *see id.* § 3020-a(4)(a), which was reviewable by Supreme Court under the standards applicable to arbitration awards, *see id.* § 3020-a(5); *see also* C.P.L.R. 7511.

Seniority Protection. When plaintiffs filed these actions, the Education Law contained a "last in, first out" (LIFO)

requirement for teacher layoffs mandating that, should a school district abolish a teacher position, the teacher or teachers with the least seniority in that position must be terminated first. *See* Education Law § 2585(3).[4]

2. The current teacher tenure system

In 2015, the Governor proposed a series of education reforms that included "improvements to the systems for teacher evaluation, tenure, certification and preparation." Div. of the Budget (DOB), *2015-16 Executive Budget Briefing Book*, at 71 (Jan. 2015). The Legislature enacted major aspects of that proposal as part of the Education Transformation Act of 2015 (the "Transformation Act"). *See* ch. 56, pt. EE, 2015 N.Y. Laws at 108-156 (L.R.S.). The Transformation Act substantially modified each aspect of the teacher tenure system discussed above.

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[4] *See* Education Law § 2510(2) (school districts in cities with less than 125,000 inhabitants); *id.* § 2588(3)(a) (school districts in cities with more than 1,000,000 inhabitants); *id.* § 3013(2) (non-city school districts and BOCES).

Teacher Evaluation. The Transformation Act created a new statutory provision, establishing a new evaluation system, Education Law § 3012-d. *See id.* pt. EE, subpt. E, 2015 N.Y. Laws at 127 (L.R.S.). The new provision retains the prior law's rating categories, but significantly modifies how those ratings are assigned, reducing local control over the criteria used to evaluate teachers and giving greater weight to specific criteria. Under the new legislation, a teacher's overall rating is based on evaluations in two separate categories: student performance, which is generally based on student achievement on state tests or other comparable measures; and teacher observation, which is generally based on classroom observations by one or more administrators and impartial observers, and in some cases by a peer evaluator as well. *See id.* at 127-28 (codifying Education Law § 3012-d(4)).

A teacher's rating in both categories determines his or her overall rating according to a matrix set forth in the statute. *See* N.Y. Bd. of Regents, APPR Update, at 21 (June 15, 2015). The statute also contains special rules for teachers who receive certain ratings in each category. For instance, a teacher rated "ineffective"

in either category cannot receive an overall rating of "highly effective" or "effective." *See* ch. 56, pt. EE, subpt. E, 2015 N.Y. Laws at 128-29 (L.R.S.) (codifying Education Law § 3012-d(5)). And any student instructed by a teacher who received an APPR rating of "ineffective" for the year may not be instructed the next year by the same teacher or another teacher who received an "ineffective" rating.[5] *See id.* at 130 (codifying Education Law § 3012-d(8)).

Tenure Eligibility. The Transformation Act extended the probationary period for teachers from three years to four. *See id.* at 114, 117, 121, 124. It also amended the tenure eligibility requirements to provide that a teacher must have received an

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[5] The State is currently revising the state learning standards for public school students. *See* N.Y. Common Core Task Force, *Final Report*, at 9 (Dec. 10, 2015). During implementation of the revised standards, SED has established a four-year transition phase for the new APPR system created by the Transformation Act. *See* 37 N.Y. Reg. 37 (Dec. 30, 2015) (adding 8 N.Y.C.R.R. § 30-3.17). During that phase-in period, each teacher will receive an advisory APPR rating that is based on student performance on tests tailored to the new learning standards, but will also receive an additional transitional APPR rating based on other criteria to be used for employment purposes, including tenure determinations. *See id.* at 19 (adding 8 N.Y.C.R.R. § 30-3.17(b)).

APPR rating of "highly effective" or "effective" in at least three of his or her four probationary years, and must not have received an "ineffective" rating in his or her last year. *See id.* at 115-16, 119, 122-23, 125. And the Transformation Act clarified that, during a teacher's probationary period, a school district has an "unfettered statutory right" to dismiss him or her for any permissible reason, including poor performance in the classroom. *Id.* at 126.

Teacher Discipline Procedures. The Transformation Act streamlined the general disciplinary procedures described above and created new expedited procedures specifically designed to remove ineffective teachers. *See id.* at 144-47 (codifying Education Law § 3020-b). Under those new procedures, if a teacher receives two consecutive "ineffective" APPR ratings, any removal hearing must be completed within ninety days after it is requested. *See id.* at 146. At the hearing, the teacher's two "ineffective" ratings are prima facie evidence of incompetence that can be overcome only by clear and convincing evidence that the teacher is not incompetent. *See id.* at 147.

Procedures that are even more stringent govern removal of teachers who receive three consecutive "ineffective" APPR ratings. The Transformation Act *requires* school districts to initiate removal proceedings against such teachers, *see id.* at 144, and any hearing must be completed within thirty days after it is requested, *see id.* at 146. At the hearing, the teacher's three consecutive "ineffective" ratings are prima facie evidence of incompetence that can be overcome only by clear and convincing evidence that the APPR ratings were the product of fraud.[6] *See id.* at 147.

Finally, the Transformation Act provides that a hearing officer who fails to abide by these expedited timeframes can be excluded from the list of eligible hearing officers. *See id.* at 146.

Seniority Protection. The Transformation Act added a new provision that limits seniority protection for teachers in the State's failing schools. *See id.* at 153 (codifying Education Law

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[6] The Transformation Act amended Education Law § 3020 to require that any alternate disciplinary procedures contained in a collective bargaining agreement contain substantially the same system of expedited hearing procedures as is set forth in Education Law § 3020-b. *See* ch. 56, pt. EE, subpt. G, § 2, 2015 N.Y. Laws at 134-35 (L.R.S.) (codifying Education Law § 3020(3)).

§ 211-f(7)(b)). Under that provision, a school may be designated as "failing" if it is among the worst-performing five percent of schools in the State for at least three consecutive years, and may be designated as "persistently failing" if it is among the lowest achieving public schools in the State for ten consecutive years. *See id.* at 148. For such schools, the SED Commissioner may appoint a receiver who is authorized to take various remedial measures, including abolishing some or all of the teaching positions at the school. *See id.* at 152-54 (codifying Education Law § 211-f(7)). In that event, teachers with the lowest APPR ratings are terminated first. *See id.* at 153.

B. Procedural History

1. Plaintiffs' complaints filed in 2014 challenging the State's then-prevailing teacher tenure system

This appeal involves two consolidated actions. The first, *Davids v. State of New York, et al.* (Index No. 101105/14), was filed in Supreme Court, Richmond County, by eleven students who allegedly reside in the New York City public school district.[7] (R. 39-41 [¶¶ 8-18].) The second action, *Wright v. State of New York, et al.* (Index No. A00641/2014), was filed in Supreme Court, Albany County, by nine students and their parents who allegedly reside in the New York City and Rochester City public school districts.[8] (R. 70-71 [¶¶ 10-16].) By order dated September 18, 2014, Supreme Court, Richmond County (Minardo, J.), consolidated the actions before it. (R. 763-765.)

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[7] Ten plaintiffs in the *Davids* action allegedly attend public schools in New York City (R. 39-41 [¶¶ 8-12, 14-18]); there is no allegation about where the eleventh plaintiff attends school (R. 40 [¶ 13]).

[8] Eight of the original plaintiffs in the *Wright* action allegedly attend public schools in either New York or Rochester (R. 70-71 [¶¶ 10-14, 16]); the ninth original plaintiff allegedly attends a private school in Rochester (R. 71 [¶ 15]).

The operative amended complaints were filed on July 24, 2014 (in the *Davids* action (R. 36-58)) and November 13, 2014 (in the *Wright* action (R. 1350-1374)).[9] Those complaints allege that the teacher tenure system in place before the Transformation Act was adopted effectively forced school districts to retain incompetent teachers.[10] (R. 49-50 [¶¶ 52-53], 1357 [¶¶ 24-25].) And because school districts supposedly employ incompetent teachers, plaintiffs claim that the districts are incapable of providing students with the opportunity to receive a sound basic education in violation of the Education Article. *See* N.Y. Const. art. XI, § 1. (R. 49-50 [¶¶ 52-53], 1357 [¶ 25].) Plaintiffs seek a declaration that the statutory provisions governing teacher evaluation, tenure eligibility, discipline, and seniority protection

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[9] The amended complaint in the *Wright* action added two additional student plaintiffs and their parents, one of whom allegedly attends a public school in Albany County. (R. 1355 [¶ 16(a)-(b)].)

[10] Specifically, plaintiffs challenge: Education Law § 3012-c (teacher evaluation); Education Law §§ 1102(3), 2509, 2573, 3012, 3014 (tenure eligibility); Education Law §§ 2590-j, 3020, 3020-a (teacher discipline procedures); and Education Law §§ 2510, 2585, 2588, 3013(3) (seniority protection).

violate the Constitution (R. 53, 1373) and seek an injunction against those provisions' continued enforcement (R. 53, 1374).[11]

Teacher Evaluation. Plaintiffs claim that the State's former APPR system did not "adequately identify teachers who are truly 'Developing' or 'Ineffective.'" (R. 1361 [¶ 41].) Plaintiffs based this assertion on data indicating that relatively few public school teachers received "ineffective" ratings, even though, in plaintiffs' view, students scored poorly on standardized tests in 2013, and certain New York City teachers had "low attendance" and "low value added." (R. 1361-1362 [¶¶ 41-42].)

Tenure Eligibility. Plaintiffs also take issue with the manner in which tenure was granted prior to adoption of the Transformation Act. Plaintiffs complain that teacher competence cannot be determined during the first three years of teaching, but

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[11] The *Davids* plaintiffs also request an injunction preventing the State from implementing "any system of teacher employment, retention and dismissal" that grants public school teachers "greater protections against dismissal than the due process rights applicable to other New York state employees" and that "prevents school administrators from meaningfully considering teacher effectiveness when making employment, retention and termination decisions about teachers." (R. 53.)

rather "is typically established by the fourth year of teaching." (R. 1363 [¶ 46].) And plaintiffs allege that before the Transformation Act was enacted, teachers often received tenure before an APPR rating was assigned for the final year of their probationary period, making the period of evaluation under the superseded law even shorter than three years. (R. 1360 [¶ 38], 1363 [¶ 47].)

Teacher Discipline Procedures. Citing studies from 2009 and earlier (R. 46 [¶ 39], 1366 [¶¶ 55-57]), plaintiffs allege that the pre-Transformation Act procedures for disciplining teachers made it "prohibitively expensive, time-consuming, and effectively impossible to dismiss" incompetent teachers. (R. 1364 [¶ 51]; *see also* R. 44 [¶ 33].) They claim that disciplinary proceedings often took "multiple years and cost hundreds of thousands of dollars" to complete due to the "labyrinthine" procedures required. (R. 46 [¶ 38]; *see also* R. 1368-1369 [¶¶ 60-61].) And plaintiffs assert that the "laborious and complicated process" of collecting evidence through "extensive observation, detailed documentation and consultation with the teacher" further deterred administrators from disciplining teachers. (R. 1365 [¶ 54].) The result, plaintiffs

allege, is that "most ineffective teachers are not dismissed for their poor performance." (R. 44 [¶ 32]; *see also* R. 1364 [¶ 50].)

Seniority Protection. Finally, based on their assumption that experience "is not an accurate predictor of teacher effectiveness" (R. 48 [¶ 46]; *see also* R. 1370 [¶ 69]), plaintiffs allege that the LIFO requirement that existed before the Transformation Act was enacted forced schools "to lay off top-performing teachers with low seniority" and prevented them from "laying off low-performing teachers with high seniority" (R. 48 [¶ 47]). According to plaintiffs, this system also "hinder[ed] recruitment of talented personnel" because new hires could be laid off "regardless of their abilities and performance" (R. 1371 [¶ 73]), and particularly affected students at lower performing schools, which "generally have a disproportionate number of newly-hired teachers" (R. 1371 [¶ 72]).)

2. The state defendants' 2014 motion to dismiss

Defendants the State of New York, the Board of Regents, the State Education Department (SED) and two related individuals moved to dismiss the claims against them.[12] Supreme Court, Richmond County (Minardo, J.), dismissed the claims against the individual state defendants but denied the balance of the motion without significant explanation in an order dated March 12, 2015 (R. 17-33), stating that it would not "close the courthouse door to parents and children with viable constitutional claims" (R. 32.)

3. The Legislature's 2015 reforms to the teacher tenure system, plaintiffs' decision not to replead, and the state defendants' 2015 motion to dismiss

Approximately one month later, the Governor signed the Transformation Act into law, substantially revising the system of teacher tenure challenged in plaintiffs' actions. *See* ch. 56, 2015

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[12] Plaintiffs in the *Davids* action also sued the City of New York and the City Department of Education. In addition, Supreme Court permitted representatives of three teachers unions and several related individuals to intervene as defendants in both actions.

N.Y. Laws at 108-156 (L.R.S.) (signed Apr. 13, 2015). See *supra* at 9-14. Supreme Court afforded plaintiffs an opportunity to amend their complaints (R. 1337), but plaintiffs elected not to do so. The state defendants moved to dismiss and/or to renew their motion to dismiss, arguing that passage of the Transformation Act rendered plaintiffs' challenge to the superseded teacher tenure system moot.

Supreme Court denied that motion, noting that arguments about the Transformation Act should have been raised in the State's motion to dismiss and holding, in any event, that the Transformation Act did not render plaintiffs' claims moot because "the legislature's marginal changes . . . are insufficient to achieve the required result." (R. 957.) The state defendants timely appealed both orders. (R. 9-13, 949-952.)

ARGUMENT

POINT I

PLAINTIFFS' CONSTITUTIONAL CHALLENGES TO A STATUTORY SCHEME NO LONGER IN EFFECT ARE MOOT

A. Plaintiffs Cannot Obtain Prospective Relief from Superseded Legislation.

Plaintiffs seek strictly prospective relief against allegedly unconstitutional legislation. Their claims fail at the outset for the simple reason that such relief is unavailable where, as here, the legislation at issue has already been superseded: any inquiry into the validity of legislation that is no longer in effect is by definition an academic exercise.

Here, the legislation described in plaintiffs' complaints consists solely of the teacher tenure system as it existed in 2014, when these actions were filed. The Legislature overhauled the teacher tenure system in 2015, but plaintiffs deliberately chose not to amend their pleadings. As a result, plaintiffs' *only* claims seek relief from the operation of legislation that is no longer operative. It is well settled that such claims are moot. For instance, in *Cornell University v. Bagnardi*, the Court of Appeals

dismissed as "clearly moot" constitutional challenges to a town's housing ordinance that was amended while the case was on appeal. 68 N.Y.2d 583, 592 (1986). And in *Matter of Jenkins v. Astorino*, this Court dismissed as moot claims that a county executive violated provisions of a 2012 budget that were superseded by the 2013 budget law. 121 A.D.3d 997, 999 (2d Dep't 2014); *see, e.g.*, *903 Park Ave. Corp. v. City Rent Agency*, 31 N.Y.2d 330, 333 (1972); *N.Y. City Parents Union v. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 124 A.D.3d 451, 451 (1st Dep't 2015); *Funderburke v. N.Y. State Dep't of Civil Serv.*, 49 A.D.3d 809, 810-11 (2d Dep't 2008).

The rationale underlying these decisions is straightforward and pragmatic: no declaration about the validity of superseded legislation, or injunction against its enforcement, can have any "practical effect on the parties." *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 811 (2003). The absence of such practical effects renders the parties' dispute academic—and courts do not entertain academic disputes.

This bedrock principle of New York law compels dismissal of plaintiffs' complaints here. Those complaints target a system of teacher tenure statutes that the Legislature revamped as part of what the Governor aptly haled as the State's "most dramatic and fundamental" education reforms "in years," Governor Andrew Cuomo, Governor Cuomo Announces Highlights from the Passage of the 2015-16 State Budget (Apr. 1, 2015). Those reforms substantively altered every aspect of the teacher tenure system identified in the complaints. Plaintiffs' claims therefore should have been dismissed under unambiguous governing precedent.

Supreme Court, however, held that plaintiffs' claims were not moot because the Transformation Act supposedly made only "marginal changes" to the State's teacher tenure system. (R. 957.) This was error. Plaintiffs' claims are moot regardless of the trial court's views of the differences between the current system and the old one. The unavoidable—and dispositive—fact is that the two systems are subtantively different, and yet plaintiffs' complaints contain *no allegations whatsoever* about the current system, how it operates, or what effect is has on plaintiffs (or

anyone else). Any supposition that the *current system* violates the Constitution therefore cannot be based on plaintiffs' complaints.

Moreover, because the statutory scheme that *is* attacked in the complaints no longer exists, it would be a pointless academic exercise to determine whether that system violated the Constitution when it was in effect. Any relief the courts can give to plaintiffs must be directed toward the system that is in effect now. But plaintiffs' complaints are silent about that system due to plaintiffs' deliberate decision not to amend their pleadings.

Supreme Court consequently should have dismissed plaintiffs' complaints, rather than fashioning a "marginal changes" exception to the rule that constitutional challenges to superseded legislation are moot. Indeed, even if such an exception existed, this case would not qualify, as we explain below.

B. Even If the Extent of the 2015 Teacher Tenure Reforms Were Relevant to the Question of Mootness, Those Reforms Would Bar Plaintiffs' Claims in Their Entirety.

Plaintiffs' claims are academic because they attack superseded legislation. Supreme Court attempted to avoid that conclusion by labeling the State's 2015 teacher tenure reforms a set of "marginal changes" to the previously existing system. But the court's effort is unavailing, both because its appraisal of the State's new teacher tenure system cannot be substituted for pleadings alleging harm from that system (see *supra* at 24-25), and because the changes made in the new system are not "marginal," in any event. The Legislature's reforms went well beyond the type of technical revision or recodification that carries forward the substance of preexisting statutes without changing their meaning. To the contrary, the Legislature's thorough reforms to the teacher tenure system described in the complaints render plaintiffs' attacks on *that* system moot in their entirety.

1. The Legislature amended every aspect of the teacher tenure system criticized in plaintiffs' complaints.

As noted above (see *supra* at 17-19), plaintiffs criticize four areas of the State's superseded teacher tenure system: teacher evaluation, tenure eligibility, teacher discipline, and seniority protection. Plaintiffs' claims are now moot because the Legislature has substantively reformed the teacher tenure system in each of these areas.

Teacher Evaluation. Plaintiffs claimed that the APPR evaluations mandated by Education Law § 3012-c did not "adequately identify" incompetent teachers. (R. 1361 [¶ 41].) The Transformation Act, however, created an entirely new statewide evaluation system for teachers codified in a new statutory section, Education Law § 3012-d. *See* ch. 56, pt. EE, subpt. E, 2015 N.Y. Laws at 127 (L.R.S.).

Unlike its predecessor, the new APPR system places greater emphasis on student growth measures, such as performance on standardized tests, requires classroom observations by impartial evaluators, and prescribes a new rating methodology. Plaintiffs'

allegations about the former APPR system do not say anything about the current system, let alone support a reasonable inference that *it* operates as a "rubber stamp" (R. 1362 [¶ 42]) or fails to "identify pedagogically incompetent teachers" (R. 1362 [¶ 44]).

Tenure Eligibility. Plaintiffs alleged that the process for granting tenure under prior law was a "formality" and not a genuine "appraisal of teacher performance." (R. 1360 [¶ 36].) Plaintiffs pointed to the three-year probationary period, which they claimed was too short. (R. 1363 [¶ 46].) But the Transformation Act extended the probationary period to four years. *See* ch. 56, 2015 N.Y. Laws at 114, 117, 121, 124 (L.R.S.).

That change directly addresses plaintiffs' objection to the prior probationary period. Plaintiffs specifically alleged that although the three-year period was too short, a four-year period would not present the same problem because "[m]ost studies indicate that teacher effectiveness is typically established by the fourth year of teaching." (R. 1363 [¶ 46].) The new probationary period thus aligns with plaintiffs' own allegations.

Plaintiffs also complained that, under the prior law, teachers were considered for tenure before they received an APPR rating in the final year of their probationary period. (R. 1360 [¶ 38], 1363 [¶ 47].) The Transformation Act changed that, too: under current law, a teacher's APPR rating for the final year of his or her probationary period must be considered—indeed, tenure cannot be granted if the teacher received an APPR rating of "ineffective" in his or her final year. *See* ch. 56, pt. EE, subpt. E, 2015 N.Y. Laws at 115-16, 120, 122-23, 125 (L.R.S.). These changes dispose of any effort by plaintiffs to rely on their allegations about the supposed inadequacy of the State's prior tenure eligibility requirements.

Teacher Discipline Procedures. Plaintiffs alleged that, under the prior system governing teacher discipline, the length of disciplinary proceedings and the burden of proving incompetence deterred school administrators from dismissing incompetent teachers. (R. 44 [¶ 33], 46 [¶ 38]; *see also* R. 1365 [¶ 54], 1368-1369 [¶ 60-61].) But the Transformation Act overhauled the procedures for disciplining teachers by streamlining the general disciplinary procedures and creating new, expedited procedures to remove

teachers with a track record of ineffectiveness. *See* ch. 56, pt. EE, subpt. G, 2015 N.Y. Laws at 144-47 (L.R.S.). These new procedures are not only faster than the ones that plaintiffs complained about—a teacher may be removed in as few as thirty days, *see id.* at 146—but they also place the burden on teachers to prove by clear and convincing evidence that they should not be dismissed, *see id.* at 147. Plaintiffs' complaints about the old procedures thus do not present a live controversy.

Seniority Protection. Plaintiffs complained that the prior system of seniority protection hindered recruitment because new teachers could be laid off "regardless of their abilities and performance" (R. 1371 [¶ 73]), and negatively affected students at lower performing schools, which "generally have a disproportionate number of newly-hired teachers" (R. 1371 [¶ 72]).) But under the current system of seniority protection, the State's lowest performing schools are authorized to lay off teachers according to their APPR ratings. *See* ch. 56, pt. EE, subpt. H, 2015 N.Y. Laws at 152-53 (L.R.S.).

Moreover, plaintiffs' attack on the superseded LIFO scheme is intertwined with their attack on the other superseded elements of the State's former tenure system. Plaintiffs theorize that LIFO statutes—rather than helping students by retaining a district's most experienced teachers in case of layoffs—harm students by shielding incompetent teachers with greater seniority. But that view assumes that incompetent teachers have enough seniority to be protected by LIFO statutes—which, in turn, assumes that incompetent teachers have earned tenure and kept their jobs over a sustained period despite their inadequacy. Plaintiffs' complaints are premised on the notion that New York's *former* teacher tenure system supposedly allowed that to happen—but plaintiffs say nothing about how the *current* system operates. And that failing is crucial in light of the Transformation Act's reforms in the areas of teacher review, tenure eligibility, and teacher discipline, all of which create enhanced opportunities—and obligations—for school districts to remove incompetent instructors.

Thus, here, too, plaintiffs' allegations about the State's former teacher tenure system are based on a statutory scheme that no longer exists.

2. In any event, plaintiffs challenge the combination of statutes making up the teacher tenure system, and that combination has changed substantially.

As shown above, the Transformation Act addressed every area of the State's teacher tenure system criticized by plaintiffs. But even if this were not so—and regardless of what quibbles plaintiffs may raise over the extent of the Legislature's changes in one area or another—it is enough to dispose of plaintiffs' actions to observe that the system as a whole has changed.

That is because the constitutional injury plaintiffs allege ultimately results from the *combined* effect of all of the statutes plaintiffs challenge—not from any one particular statute or group of statutes. The gravamen of plaintiffs' complaints is that the State's public-school teaching pool is constitutionally deficient because of statutory provisions that effectively force school districts to employ incompetent teachers. (R. 49-50 [¶52], 1357

[¶¶ 24-25].) In the course of their complaints, plaintiffs identify distinct categories of statute (e.g., those governing teacher evaluation and tenure eligibility) that supposedly make it unduly difficult for school districts to identify or terminate ineffective teachers.

But plaintiffs make no concrete allegation that any one statute or category of statutes *alone* causes a constitutional deficiency in the State's supply of effective public school teachers. There is no concrete allegation, for instance, that the State's teacher disciplinary procedures or tenure eligibility requirements, operating independently of the rest of the teacher tenure system, caused a constitutional injury. Rather, plaintiffs challenged the collective effect of an integrated statutory system, not the effects of its constituent parts.[13]

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[13] Plaintiffs cite one provision that the Transformation Act did not amend: Education Law § 1102(3), which governs tenure at CVEEBs. There are two such institutions in the State—the Suffolk County Fire Academy and the Nassau County CVEEB—and no plaintiff attends either institution. Nor do plaintiffs allege how teacher tenure at these institutions, which do not teach high school, affects the State's constitutional obligation to provide

(*continued on next page*)

Thus, by changing the teacher tenure system as a whole—including in ways that directly addressed plaintiffs' objections—the Legislature replaced the statutory mechanism of plaintiffs' asserted constitutional injury with a new and different mechanism. And plaintiffs make no allegations at all about the teaching pool created by that new mechanism. Their actions are consequently moot.

POINT II

PLAINTIFFS' CLAIMS RAISE NONJUSTICIABLE QUESTIONS

Plaintiffs' decision not to amend their complaints following the Transformation Act's substantial reforms to the teacher tenure system renders their claims moot. See *supra* at 22-34. It also demonstrates another fatal flaw in their claims: plaintiffs object not to the State's particular form of teacher tenure, but rather, to the very existence of a teacher tenure system.

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students with "the opportunity for a meaningful high school education," *i.e.*, a sound basic education. *See Campaign for Fiscal Equity, Inc. v. State* ("*CFE II*"), 100 N.Y.2d 893, 908 (2003).

Plaintiffs contend that their claims remain live even though the Legislature has replaced the specific statutory scheme that they challenged in their complaints. But that could be the case only if plaintiffs' dispute were with the concept of teacher tenure, rather than with the particular statutory form it takes.[14] Such a broadside attack to the institution of teacher tenure, however, raises fundamental policy questions that are properly reserved to resolution through political—not judicial—means.

Courts have long adhered to the view that they should not "intrude upon the policy-making and discretionary decisions that are reserved to the legislative and executive branches." *Klostermann v. Cuomo*, 61 N.Y.2d 525, 541 (1984). Although it contours may be "nebulous," *id.* at 525, this justiciability doctrine has its roots in the separation of powers and at its core reflects

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[14] Plaintiffs' singular reliance below on the decision by a California state trial court in *Vergara v. State* (R. 1115-1116) only confirms this point. That case did not involve New York's particular form of teacher tenure, let alone address the requirements of New York's Constitution. Its only conceivable relevance here is that it also addresses the concept of teacher tenure.

two fundamental concerns, *see Jones v. Beame*, 45 N.Y.2d 402, 408 (1978). First, it reflects the Judiciary's reluctance to intrude upon discretionary decisions, responsibility for which is "conferred upon a coordinate branch of government." *Matter of N.Y. State Inspection, Sec. & Law Enf't Emps., Dist. Council 82 v. Cuomo*, 64 N.Y.2d 233, 238-39 (1984). Second, the doctrine reflects the Judiciary's sound judgment not to "undertake tasks that the other branches are better suited to perform." *Klostermann*, 61 N.Y.2d at 535. Both of these concerns are squarely implicated here.

It is well settled that the Education Article evidences a policy to commit fundamental questions of education policy to the Legislature and the Executive. The Court of Appeals long ago recognized that "[t]he general legislative and constitutional system for the maintenance of public schools" was intended "to make all matters pertaining to the general school system of the state within the authority and control of the department of education and to remove the same so far as practicable and possible from controversies in the courts." *James v. Bd. of Educ. of the City of N.Y.*, 42 N.Y.2d 357, 366 (1977) (quotation marks

omitted). And the Court has emphasized that courts should not, "under the guise of enforcing a vague educational public policy, . . . assume the exercise of educational policy vested by constitution and statute in school administrative agencies." *N.Y. City Sch. Bds. Ass'n, Inc. v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y.*, 39 N.Y.2d 111, 121 (1976).

It is equally clear that determining how to attract and retain the highest quality teacher workforce involves a complex balancing of priorities that the judiciary is ill-suited to undertake and that is paradigmatically legislative in nature. Indeed, for nearly a century, the Legislature has weighed those priorities and interests in favor of affording public school teachers some form of job security through the protection of tenure. *See* ch. 786, 1917 N.Y. Laws 2501, 2510 (adding former Education Law § 872). The Legislature has thus erected a "strong public policy" favoring public school teacher tenure, *Feinerman v. Bd. of Co-op. Educ. Servs. of Nassau Cty.*, 48 N.Y.2d 491, 497 (1979), in order to "attract qualified persons to teaching and to provide job protection to teachers who have given years of satisfactory service." *Matter of*

Baer v. Nyquist., 34 N.Y.2d 291, 295 (1974). This policy reflects the Legislature's determination that the public interest "can best be served by a system 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. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 47 N.Y.2d 385, 391 (1979). Plaintiffs suggest no judicially manageable standard for courts to use in passing on the wisdom of that basic policy determination (as opposed to declaring whether a specific system has the effect in practice of depriving students of a minimally adequate education. *See CFE II*, 100 N.Y. 2d at 929-30 ("[W]e know of no practical way to determine whether members of the political branches have complied with an order that the funding process become as transparent as possible, and we therefore decline to incorporate such a directive into our order."); *see also Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 39 n.4 (1982).

Both of these concerns—the constitutional commitment of matters of education to the coordinate branches, and the absence

of manageable judicial standards—have long pervaded the Court of Appeals' jurisprudence in the context of public education and have consistently weighed against judicial intervention. In *Donohue v. Copiague Union Free School District*, for instance, the Court refused to entertain claims for "educational malpractice" against the State on public policy grounds, finding that doing so would "require the courts not merely to make judgments as to the validity of broad educational policies—a course [it had] unalteringly eschewed in the past—but, more importantly, to sit in review of the day-to-day implementation of these policies." 47 N.Y.2d 440, 444-45 (1979). This, the Court observed, would constitute "blatant interference with the responsibility for the administration of the public school system lodged by Constitution and statute in school administrative agencies." *Id.*

The same was true in *James v. Board of Education of the City of New York*, where parents sought to prohibit the New York City school district from using a particular test, the integrity of which had been compromised by cheating. 42 N.Y.2d at 361-62. In refusing to enjoin the test, the Court observed that doing so would

constitute "an unlawful interference with an educational policy judgment made by the appropriate school authorities in exercise of constitutional and statutory power." *Id.* at 358-59. The Court refused to second guess the pedagogic validity of the school district's determination, noting that "[w]hile it is possible to question the educational wisdom of this solution, it is not for the courts to do so." *Id.* And in refusing to intervene, the Court stressed that plaintiffs sought to compel the school district to undertake a series of actions that "would be impossible for a court to oversee." *Id.* at 368.

This long history of abstention from the field of education animated even the Court's decisions in the *Campaign for Fiscal Equity* litigation—the one context in which the Court has sanctioned greater judicial involvement in matters of education. While acknowledging the Judiciary's undisputed obligation to protect constitutional rights, the Court nevertheless repeatedly emphasized "the responsibility" of the Judiciary "to defer to the Legislature in matters of policymaking," *CFE II*, 100 N.Y.2d at 925, and therefore cautioned "courts to tread carefully," *Campaign*

for Fiscal Equity, Inc. v. State ("*CFE III*"), 8 N.Y.3d 14, 28 (2006). This caution reflected both the fact that "[d]evising a state budget is a prerogative of the Legislature and Executive," *id.* at 28-29, as well as "the limited access of the Judiciary to the controlling economic and social facts," *id.* at 28 (quotation marks omitted).

Plaintiffs ask this court to engage in exactly the type of policymaking courts have long recognized is properly left to the Legislature and the Executive. In effect, they seek a declaration that job protection for public school teachers, no matter what form it takes, is fundamentally incompatible with affording students the opportunity to achieve a sound basic education. But the Legislature, exercising its constitutional authority over matters of education policy, *see* N.Y. Const. art. XI, § 2, has determined that the opposite is true: that some form of job protection for public school teachers will enhance the teaching workforce and the educational opportunities afforded to students in New York. Plaintiffs are free to "question the educational wisdom" of this determination, *James*, 42 N.Y.2d at 367, but they cannot enlist

the courts to enforce their own version of "educational public policy," *N.Y. City Sch. Bds. Ass'n, Inc.*, 39 N.Y.2d at 121.

POINT III

PLAINTIFFS FAIL TO STATE A CLAIM UNDER THE EDUCATION ARTICLE

Even without the fatal flaws described above, plaintiffs' claims would still fail because their complaints do not concretely allege the necessary elements of an Education Article claim, *i.e.*, gross and glaring educational deficiencies that deprive students the opportunity to receive even a minimally adequate sound basic education, and specific causes attributable to the State. Both of these elements must be pleaded at the school-district level, and allegations about particular schools or statewide aggregate data will not suffice.

Plaintiffs' allegations' fall well short of these standards. Plaintiffs assert in vague and conclusory fashion that they are receiving constitutionally deficient instruction from incompetent teachers. But plaintiffs allege no facts reasonably suggesting that there is a critical mass of incompetent teachers in their school

districts preventing students from acquiring even the basic skills making up a constitutionally adequate education. And even if plaintiffs had made such allegations, their complaints would still fail for lack of concrete allegations that the *State's* policies—rather than individual school districts' independent teacher-employment decisions—were responsible.

A. An Education Article Claim Requires District-Specific Allegations of Constitutional Educational Deficiencies and Causes Attributable to the State

The Education Article of the New York Constitution requires the Legislature to maintain a system of free public schools capable of providing every student with the opportunity to receive a sound basic education. *See* N.Y. Const. art. XI, § 1; *see also Bd. of Educ., Levittown Union Free Sch. Dist.*, 57 N.Y.2d at 47-48. An Education Article claim can survive a motion to dismiss only if it satisfies two requirements. First, the claim must include specific, concrete allegations that the public schools throughout a particular district do not provide constitutionally adequate educational services. Second, the claim must allege that the reason for these deficiencies

is the State's failure to ensure adequate educational resources. Moreover, both the identification of deficiencies and the explanation of causation must be established for individual school districts, rather than as a statewide matter. *Paynter v. State*, 100 N.Y.2d 434, 440 (2003).

1. Plaintiffs must concretely allege deprivation of the opportunity to obtain even a minimally adequate sound basic education.

The first element of an Education Article claim requires that plaintiffs concretely allege "gross and glaring" deficiencies affecting the schools throughout a district. *Id.* at 439. These deficiencies must be so severe that they deny students the opportunity to receive even a minimally sufficient education consisting of the "basic literacy, calculating, and verbal skills" necessary for civic participation, *Campaign for Fiscal Equity, Inc. v. State* ("*CFE I*"), 86 N.Y.2d 307, 316 (1995); *see also CFE III*, 8 N.Y.3d at 20 (a sound basic education is a "constitutional minimum or floor").

Satisfying this element requires specific allegations that the public schools in a district are not equipped with even "minimally adequate" educational *inputs*. *See CFE I*, 86 N.Y.2d at 317-18. These inputs consist of physical facilities (such as classrooms and laboratories), instrumentalities of learning (such as computers and textbooks), and teachers who are both sufficient in number and adequately trained to cover essential materials. *See id.* at 319 ("fact-based claims of inadequacies in physical facilities, curricula, numbers of qualified teachers, availability of textbooks, library books, etc." sufficed to state Education Article claim).

Plaintiffs also must concretely allege deficient *outputs*, such as poor student results on standardized tests and low graduation rates. *See Paynter*, 100 N.Y.2d at 440; *see also CFE II*, 100 N.Y.2d at 908 n.3 (noting that "proof of inadequate inputs is necessary for an Education Article claim, [but not] sufficient for such a claim" (emphasis omitted)). Although required, allegations about outputs must be treated "cautiously," given that "there are a myriad of factors which have a causal bearing on test results," *CFE I*, 86 N.Y.2d at 317, and "causes of academic failure may be manifold,

including such factors as the lack of family supports and health care," *Paynter*, 100 N.Y.2d at 441. Moreover, noncompliance with one or more minimum statewide educational standards established by the Regents and the Commissioner "may not, standing alone, establish a violation of the Education Article," because many of those standards "exceed notions of a minimally adequate or sound basic education" and "some are also aspirational." *CFE I*, 86 N.Y.2d at 317.

2. Plaintiffs also must concretely allege that the State is responsible for constitutional deficiencies in their schools.

The second element of an Education Article claim is causation: a complaint must include specific "allegations that the State somehow fails in its obligation to provide minimally acceptable educational services." *Paynter*, 100 N.Y.2d at 441; *see also N.Y. Civil Liberties Union v. State* ("*NYCLU*"), 4 N.Y.3d 175, 178-79 (2005) ("[E]ven gross educational inadequacies are not, standing alone, enough to state a claim under the Education Article."). This element "requires a clear articulation of the

asserted failings of the State." *NYCLU*, 4 N.Y.3d at 180. It will not suffice for plaintiffs asserting an Education Article claim to allege deficiencies in public schools and then "charge the State with the responsibility to determine the causes of the schools' inadequacies and devise a plan to remedy them." *Id.*

3. Plaintiffs must concretely allege both constitutional deficiencies and causation on a district-specific basis.

The two elements of an Education Article claim must be established for particular school districts—and thus a statewide claim (as plaintiffs attempt to plead here) must be founded on concrete factual allegations of constitutional educational deficiencies in each of the State's nearly 700 school districts.

As the Third Department has held, an Education Article claim cannot rely solely on aggregate or statewide information. *See N.Y. State Ass'n of Small City Sch. Dists., Inc. v. State*, 42 A.D.3d 648 (3d Dep't 2007) ("*Small City School Districts*"). Plaintiffs in *Small City School Districts* alleged that districts for small cities suffered constitutional deficiencies as a result of lower per-student funding than that provided to noncity school districts. *Id.* at 652. The Third

Department affirmed dismissal of the complaint because it included no factual allegations "specific to the four school districts" represented by plaintiffs who had standing. *Id.* Although the complaint contained aggregate statistics and generalized data about small-city school districts, "no district-wide failure" was alleged "for any particular district," and no facts or statistical data were alleged to show that the four districts with representative plaintiffs were "actually experiencing the problems reflected by the aggregate statistics." *Id.* It was thus "impossible to determine" whether those plaintiffs were "actually aggrieved," and the complaint was properly dismissed. *Id.*

The need to establish deficiencies and causation on a district-wide basis for each school district serves important underlying policies. New York has a long tradition of shared state-local control over public education, which the Court of Appeals described as "state-local partnership" that the Education Article has "enshrined in the Constitution." *NYCLU*, 4 N.Y.3d at 181 (quotation marks omitted). The school district is the basic unit allowing local participation in public-school governance under that partnership. *Id.*

It also is the entity that, under the State's long-standing "basic policy," bears sole "responsibility for selecting probationary teachers and evaluating them for appointment on tenure." *Matter of Frasier v. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 71 N.Y.2d 763, 766 (1988); *see also Ricca*, 47 N.Y.2d at 392 (teacher employment decisions are "entrusted by law to the school board alone"); *Gulino v. N.Y. State Educ. Dep't*, 460 F.3d 361, 378-79 (2d Cir. 2006) (Wesley, J.) (local school districts, not the State, are teachers' employers for purposes of Title VII of the federal Civil Rights Act of 1964). A plaintiff's Education Article claim accordingly warrants dismissal if the claim improperly focuses on aggregate rather than district-specific information, *see Small City School Districts*, 42 A.D.3d at 652, or if it focuses on individual schools rather than "alleg[ing] any *district-wide* failure," *NYCLU*, 4 N.Y.3d at 181 (emphasis added).

B. Plaintiffs Do Not Adequately Allege Either Required Element of an Education Article Claim.

1. Plaintiffs do not allege that a critical mass of incompetent teachers in their school districts denies students the opportunity for a sound basic education.

Plaintiffs do not adequately plead the first required element of an Education Article claim. To do so, they would have to set forth concrete, fact-based allegations that their school districts employ so many incompetent teachers as to deny students district-wide the opportunity to receive a minimally adequate sound basic education. Plaintiffs' complaints fall short of that standard in several respects.

First, plaintiffs misapprehend the nature of educational opportunities protected by the Education Article's "constitutional minimum or floor." *CFE III*, 8 N.Y.3d at 20. Those opportunities consist of the chance to learn the "*basic* literacy, calculating and verbal skills necessary to enable [students] to function as civic participants capable of voting and serving as jurors." *CFE I*, 86 N.Y.2d at 318 (emphasis added). To be sure, the State has long maintained learning standards that far exceed the "constitutional

minimum" contemplated by the Education Article, *see id.* at 317, and is currently implementing even more rigorous standards of excellence, *see* N.Y. Common Core Task Force, *Final Report* at 19. But as the Court of Appeals has made clear, an Education Article claim will not lie merely from the allegation that students are denied the opportunity to achieve at those higher levels. *See CFE I*, 86 N.Y.2d at 317.

Similarly, an Education Article claim will not lie merely because a student alleges that he or she was taught by one incompetent teacher. Such a student could receive adequate instruction from competent teachers in other years and still acquire the basic skills making up a sound basic education by the end of his or her schooling.[15]

But plaintiffs' complaints overlook these basic points. The only allegations that describe the actual experiences of any

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[15] Indeed, the Transformation Act strives to ensure that no student is taught by a series of incompetent teachers by prohibiting a student from being taught in consecutive years by a teacher who received an APPR rating of "ineffective." *See* Education Law § 3012-d(8).

plaintiff students involve a single pair of twins, Kaylah and Kyler. The *Wright* complaint alleges that "last year," Kyler was taught by an incompetent teacher, and Kaylah was taught by a competent teacher. (R. 1352 [¶ 4].) "The effects are apparent," plaintiffs claim. (R. 1353 [¶ 5.]) "Kaylah excelled . . . while Kyler fell behind and is still struggling to catch up." (R. 1353 [¶ 5.]) The two are alleged to be "reading several levels apart." (R. 1353 [¶ 5.]) These scant, vague allegations furnish no support for a reasonable inference that, as a result of her single year with an incompetent teacher, Kyler is incapable of completing her schooling prepared to equipped with the basic skills necessary to vote or sit on a jury.

Second, plaintiffs' efforts to identify gross and glaring educational deficiencies suffer from a fatal conceptual flaw. Plaintiffs identify just one allegedly substandard educational input—supposedly "ineffective" teachers—but plaintiffs do not supply any definition or metric for determining what an "ineffective" teacher is. Plaintiffs do not, for instance, refer to any of the indicators of adequate teaching identified by the Court of Appeals in *CFE*—namely, certification rates, test results, and

teaching experience, *CFE II*, 100 N.Y.2d at 909-10—even though extensive statistics in those categories are available on SED's website. *See, e.g.*, SED, 2013-2014 Report Card Database. Nor do plaintiffs specify any other standards or criteria differentiating "effective" and "ineffective" teachers.

As a result, plaintiffs' reasoning is entirely circular: they claim they are being denied constitutionally adequate instruction because they are taught by "ineffective teachers," but their complaints contain no discernible definition of "ineffective teacher"—other than "teacher who does not provide constitutionally adequate instruction." But such a circular definition, devoid of any factual content, is conclusory and insufficient to survive a motion to dismiss. *See*, *e.g.*, *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009).

Third, although Education Article violations must be pleaded on the district level, plaintiffs do not allege that their *districts* have critical masses of incompetent teachers, or that such teachers have caused their districts to have deficient educational outputs. Plaintiffs simply do not allege there is such a heavy

concentration of incompetent teachers in either of their school districts that students there lack the opportunity to receive a sound basic education. Indeed, Plaintiffs' complaints barely mention the composition of the teacher workforce—let alone attempt to quantify current concentrations of incompetent teachers—in the New York City and Rochester public school districts.[16] Plaintiffs' allegations thus do not support a reasonable inference of "systemic failure" as necessary to sustain an Education Article claim. *CFE II*, 100 N.Y.2d at 914.

And plaintiffs' complaints fail to allege deficient outputs—*i.e.*, test results and graduation rates—for students in their districts. *See CFE II*, 100 N.Y.2d at 903. The requirement to allege deficient outputs exists because, as the Court of Appeals has explained, the existence of adequate outputs "might indicate that

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[16] Although the *Davids* plaintiffs allege that there were "far more than 12 ineffective teachers in the New York City school district" between 1997 and 2007 (R. 39 [¶ 6]), plaintiffs' claims cannot succeed based an allegation that there were more than twelve incompetent teachers in a school district that employed well over one hundred thousand teachers during a period that ended seven years before these lawsuits were filed.

[students] somehow still receive the opportunity for a sound basic education" despite deficient inputs. *Id.* at 914; *see also id.* at 906 n.3 ("*Paynter* holds that proof of inadequate inputs is *necessary* for an Education Article claim, *not that such proof is sufficient* for such a claim."). But there is no fact allegation in either complaint—not one—about the performance of students in the New York City or Rochester school districts.

Finally, although plaintiffs do provide some data about levels of inadequate teachers and inadequate educational outputs statewide, those data do not indicate a constitutional violation in any event. Plaintiffs do not concretely allege that incompetent teachers predominate across the State or in any particular part of it. To the contrary, plaintiffs allege only that a "certain number" of incompetent teachers can be found in the State. (R. 47 [¶ 43], 49-50 [¶¶ 51-52].) And plaintiffs admit that the "majority of teachers in New York are providing students with a quality education." (R. 38 [¶ 4].) Such vague allegations do not give rise to a plausible interference that the State's public school teacher workforce is so incompetent, either on the whole or in some specific area, that

students are being denied the opportunity to receive a sound basic education.

Nor do plaintiffs fare any better in their attempt to rely on statewide student performance data. Plaintiffs' sole allegation about educational outputs is a statewide allegation that "only 31% of students taking the English Language Arts and Math standardized tests met the standard for proficiency." (R. 1361 [¶ 41].) This allegation, in addition to saying nothing about the districts where plaintiffs actually reside, does not raise a plausible inference that students across the State are deprived of the minimal education that the Constitution requires. Plaintiffs cite the English language arts and mathematics tests for administered in 2013 to students in grades three through eight. (R. 1361 [¶ 41].) But those tests evaluated student performance according to the Regents Common Core learning standards—and the Court of Appeals has recognized that the Regents standards are not the measure of a sound basic education. *See CFE I*, 86 N.Y.2d at 317.

And as SED has explained, because the Common Core standards were new, poor results on the 2013 tests could not "be

interpreted as a decline in student learning or as a decline in educator performance." Field Memo of Deputy Comm'r Ken Slentz, Transition to Common Core Assessments (Mar. 2013), at 6. Thus, even if a statewide allegation could be sufficient (and it cannot), plaintiffs' allegation here simply does not support a plausible inference of widespread student failures, let alone failure to achieve the constitutional minimum of a sound basic education.

2. Plaintiffs do not allege causes attributable to the State.

Finally, plaintiffs' claims fail because they do not plausibly allege causes attributable to the State. Plaintiffs posit that the State's teacher tenure system forces every school district in the State to employ a teaching force too incompetent to allow students to acquire a minimally adequate education. That theory is untenable.

To begin with, plaintiffs' theory fails because their complaints do not contain a single allegation about the current teacher tenure system. Because the current system includes

reforms to key areas affecting teacher employment—including teacher evaluation, tenure eligibility, and teacher discipline—plaintiffs' allegations about the former system (R. 37-38 [¶¶ 3-5], 1352 [¶¶ 2-3]) cannot carry plaintiffs' burden on causation.

But plaintiffs' causation theory fails for another basic reason as well: it overlooks the crucial role played by school districts, which alone decide which teachers to employ in their schools. Because each school district decides for itself which teachers to hire and retain, it cannot be inferred simply from an allegation that a school district employs incompetent teachers—or even a critical mass of incompetent teachers (something plaintiffs do not concretely allege)—that the *State* is responsible.[17] On the contrary, it is settled that local school districts alone decide which teachers to hire, which teachers to retain and promote, which teachers to discipline, and which teachers to fire. *See Frasier*, 71

[17] This case is therefore unlike *CFE*, where the plaintiffs alleged that there were shortfalls in state education aid—something within the State's power to control. By contrast, the factual predicate for the alleged Education Article violation here—the employment of incompetent teachers—is not something over which the State exercises control.

N.Y.2d at 766; *see also Ricca*, 47 N.Y.2d at 392. Merely because an overlay of state law affects those quintessentially local decisions does not alter the fact that it is the local school district, not the State, that is responsible for making them.

Given this reality, plaintiffs must make some fact-based (*i.e.*, not conclusory or speculative) allegation indicating that the *reason* school districts employ incompetent teachers is because state law requires them to do so. Plaintiffs advance no such allegations here, and instead simply speculate that school districts across the State would readily terminate some unspecified concentration of incompetent teachers but for the effects of the State's teacher tenure laws. But such speculation is insufficient to sustain a claim—especially in the present context, where too lightly inferring causation would undermine the "state-local partnership" that is "enshrined" in the Education Article. *Paynter*, 100 N.Y.2d at 442 (quotation marks omitted). Making the State responsible for deficiencies in school districts' teacher workforce, would encourage direct state control over teacher employment decisions, a domain historically reserved for local school districts under New

York's long-standing "basic policy." Such an outcome would be appropriate, if at all, only upon a clear showing of a constitutional violation that is unmistakably the result of a failure by the State. Plaintiffs do not come close to alleging such a violation here.

CONCLUSION

For all of these reasons, Supreme Court's decision should be reversed and these consolidated actions should be dismissed.

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CERTIFICATE OF COMPLIANCE
PURSUANT TO 22 NYCRR § 670.10.3(f)

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