SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

----------x

MYMOENA DAVIDS, et al.,

Plaintiffs,

- against -

THE STATE OF NEW YORK, et al.,

Defendants,

- and -

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

Intervenor- Defendant

- and -

SETH COHEN, et al.,

Intervenors-Defendants

- and -

PHILIP A. CAMMARATA and MARK MAMBRETTI,

Intervenors-Defendants.

----------x

Index No. 101105-2014

Justice: Hon. Philip G. Minardo

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

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JOHN KEONI WRIGHT, et al.,

Plaintiffs,

- against -

THE STATE OF NEW YORK, et al.,

Defendants,

- and -

SETH COHEN, et al.,

Intervenors-Defendants,

- and -

PHILIP A. CAMMARATA and MARK MAMBRETTI,

Intervenors-Defendants,

- and -

NEW YORK CITY DEPARTMENT OF EDUCATION,

Intervenor-Defendant,

- and -

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

Intervenor-Defendant.

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PRELIMINARY STATEMENT

Enshrined in the New York State Constitution is a fundamental guarantee that the State will provide its students a sound basic education in the public primary and secondary school settings.[1] Elementary, Intermediate and High School Students in New York Public Schools must be guaranteed a sound basic education. The failure to equip our youth with the tools necessary to meet minimum standards as informed civic participants capable of voting in elections and serving on juries when called is a fundamental threat to social order and a civil society. This minimum educational standard cannot be legislated away. Nor can a "wait and see" approach be permitted where there is the substantial possibility that the State has failed to deliver on its Constitutional mandate. The stakes are high as the failure to discharge the New York State Constitution's minimum educational guarantee threaten to saddle the jury rolls with unqualified jurors and the voting polls with incapable voters for years to come. The Courts stand in the unique position to safeguard the educational promise enshrined in the New York State Constitution that serves as a basis for our civil society and our social order.

Collectively, a set of statutes[2] (the "Challenged Statutes") operate to undermine the social order and deny New York schoolchildren their Constitutional right to a sound basic education. The Defendants would like to make this case about "tenure" and would use "teacher tenure" as a pretext and an "attack on organized labor" as a smokescreen to cloud the issues surrounding the Challenged Statutes, allowing their white-shoe attorneys to pick up with the Courts where their high-priced lobbyists left off with the Legislative and Executive Branches of the New York State Government.

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[1] New York State Constitution, Article XI § 1 ("Article XI")

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

Subterfuge aside, make no mistake about it - the Challenged Statutes erode the New York State Constitution's minimum educational guarantee of a sound basic education in three substantial ways: 1) by compelling school districts to grant permanent, lifetime tenure to nearly all junior teachers; 2) by preventing the removal of ineffective teachers from the classroom; and 3) mandate that layoffs be based on seniority alone, rather than by effectiveness or some other measure or range of measures. As the *Davids* Plaintiffs allege in their Amended Complaint (the "Complaint"), the Challenged Statutes—individually and as-applied in combination—prevent the minor children for whom the Plaintiffs bring this action from obtaining the sound basic education guaranteed under Article XI.

In their Complaint, the Plaintiffs cite to vast academic, educational and social sciences authority that shows teacher effectiveness is the single most influential school-based variable (or input) in the adequacy of a child's education. Plaintiffs also cite to studies and investigations that show the *de facto* impossibility that the Challenged Statutes create in the dismissal of a teacher that, by any measure, fails to discharge the Constitutionally-mandated minimum standards in education. Once the issues in this mater are joined and discovery can begin, Plaintiffs plan to assemble expert and lay testimony alike to support the allegations made in the Complaint. Plaintiffs will show, *inter alia*, that for the all-too-many New York schoolchildren taught by ineffective teachers who fail to discharge the Constitutionally-mandated minimum standards in education, the damage to their educational advancement is significant and long-lasting. And what is more, this damage is not contained to the individual, but this damage threatens the social order and the very fabric of our civil society contemplated by the guarantees of the New York State Constitution. Plaintiffs should be afforded the opportunity to prove, among other important factors, the likely failures in the administration of justice, the likely rising

monetary costs in court administration, and the intolerably high social cost in the undermining of jury verdicts[3] and election results[4] as a direct result of an educational system that fails to discharge the Constitutionally-mandated minimum standard of a sound basic education.

Defendants seek to dismiss Plaintiffs' Complaint. Their arguments are simultaneously voluminous and spurious. None of Defendants' arguments in support of their motions has merit.

Plaintiffs have adequately stated claims upon which relief may be granted. Plaintiffs seek declaratory judgment that the Challenged Statutes are unconstitutional and allege that Defendants' implementation of the Challenged Statutes has resulted in the failure of the Defendants to deliver the sound basic education guaranteed by the New York State Constitution. The Defendants' failure is based on the retention of ineffective teachers who otherwise would not remain in the classroom but for the framework provided by the Challenged Statutes, and that this ongoing *status quo* amounts to a Constitutional violation. Cumulatively, the Challenged Statutes make it nearly impossible for school administrators to hire and retain teachers based on effectiveness or to dismiss or discipline teachers with a proven track record of ineffectiveness or misconduct. By requiring school districts to apply the Challenged Statutes, the State is protecting ineffective teachers at the expense of their students' futures, depriving those students of quality teachers—the most important "input" of a sound basic education, and depriving civil

[3] What is clear is that a criminal conviction based on the unanimous decision of illiterates does not in any way, shape or form comport with the guarantees of the New York State Constitution, the due process requirements of the Federal Constitution nor their original understanding. However, how long is it before there are regular post-verdict motions that amount in sum and substance to: "The jury was a pack of illiterates" – thus placing additional onus on the State to prove that the jury is or was not so.

[4] The electoral process is historically wrought with chicanery and subterfuge by political operators. How can any election results be certified if the same are shown to be substantially related to the action or inaction of illiterates?

society of functional future members who can help to uphold the social order and discharge basic civic responsibilities of serving on a jury and voting in an election.

The Plaintiffs' claims are clearly justiciable. Defendants essentially urge that the Legislature should be free to determine education policy without constitutional review or judicial oversight of any kind. This notion is abhorrent to the separation of powers and the independence of the judiciary—the branch that is constitutionally charged with the defense of the minimum requirements of the New York State Constitution and the proper administration justice. The Courts have long recognized that Article XI guarantees the State discharge a sound basic education and that it is the Court's obligation to monitor compliance with that charge – lest social order and our entire civic establishment be placed in jeopardy. Defendants' mischaracterizations aside, this case is not a policy crusade against tenure or due process protections for teachers – even though they would like it to be to help further rattle the sabre and commit their patrons to the further commitment of resources in tilting at a windmill that - by their own accounts – will destroy collective bargaining. Back here in reality, Plaintiffs have filed suit because protections that go beyond the requirements of due process must not be implemented at the expense of the Constitutional right guaranteed under Article XI. The merits of *that* Constitutional claim are for the Court, not the Legislature, to evaluate.

The Plaintiffs have standing and the issues in this case are ripe for review. The *Davids* Plaintiffs—through their respective parents and natural guardians—are the very schoolchildren guaranteed a sound basic education under the Article XI. The *Davids* Plaintiffs have alleged the Challenged Statutes as applied violate each Plaintiff's Constitutional rights protected under Article XI. The Plaintiffs have cited numerous credible studies, articles and alarming statistics that sufficiently show a direct correlation between the Challenged Statutes, the retention of

ineffective teachers and the impact on students (both short term impacts with development and long term socioeconomic impacts). As students in New York public schools, each and every one of the Plaintiffs has been harmed, or is at substantial risk of being harmed, as a result of the Challenged Statutes. Further, Plaintiffs have plead an injury in fact that falls within their "zone of interest" as required. Accordingly, Plaintiffs have standing.

Procedurally, at this point in the case, Plaintiffs need only show they have standing, the issue is ripe for review, and adequately plead a justiciable cause of action—the Plaintiffs have done this. Indeed, Plaintiffs are entitled to all reasonable inferences in their favor. Plaintiffs have cited numerous studies and statistics showing the correlation between the application of the Challenged Statutes, the systemic failure of the State to discharge its duty to provide a sound basic education and the impact it has a New York public schoolchildren—thus satisfying its burden.

SUPPLEMENTAL MEMORANDUM OF LAW

This Memorandum of Law by the *Davids* Plaintiffs in Opposition to the several Defendants' Motions to Dismiss shall serve to supplement the Memorandum of Law by the *Wright* Plaintiffs. As the legal issues presented are substantially similar, the *Davids* Plaintiffs join in and adopt the legal arguments of the *Wright* Plaintiffs. The *Davids* Plaintiffs present this Memorandum of Law in further opposition to the Defendants' motions.

THE CHALLENGED STATUTES

Plaintiffs' Complaint challenges the constitutionality of New York Education Law Sections 1102(3), 2509, 2573, 2590(j), 3012, 3014, 3020-a, and 3013(2). Collectively, the Challenged

Statutes fail to provide the minimum standard of education—a sound basic education—as enshrined in Article XI.

As a result of the Challenged Statutes, both individually and collectively, a certain number of ineffective teachers retain employment in the New York public school system despite their ineffective performance. In the absence of the Challenged Statutes, most, if not all, of these ineffective teachers would be dismissed for their poor performance. In addition, in the absence of the Challenged Statutes, school administrators would have the flexibility to attract teachers of superior performance to New York's public schools, retain high-performing teachers even during economic layoffs, and provide incentives to encourage teachers to become or remain high performers. Instead, the Challenged Statutes prevent school administrators from making employment and dismissal decisions that serve the interest of New York's students in having effective teachers. Such a system has a substantially negative impact on the education that certain New York public school students receive.

Students taught by ineffective teachers are not "afford[ed]. . . the opportunity for a meaningful high school education, one which prepares them to function productively as civic participants" or "prepare[s] [them] to compete for jobs that enable them to support themselves." *CFE II*, 100 N.Y.2d at 906, 908. As the Court of Appeals has held, "a high school level education is now all but indispensable" for students, yet students taught by ineffective teachers are less likely to graduate from high school. And even if they graduate, such students are less likely to have gained the knowledge expected of a high school graduate. To the contrary, students taught by ineffective teachers lose six or more months of learning in a single school year and never catch up to their peers. Moreover, these negative effects persist beyond high school, reducing students' college attendance rates, college graduation rates, and lifetime earnings. All

of these negative effects constitute the denial of a sound basic education, in violation of the New York Constitution.

As students in New York public schools, each and every one of the Plaintiffs has been harmed, or is at substantial risk of being harmed, as a result of the Challenged Statutes.

A. New York's Dismissal Statutes

Teachers in the State of New York are afforded "super" due process rights that are codified primarily in New York Education Law Sections 1102(3), 2509, 2573, 2590(j), 3012, 3014, and 3020-a (the "Dismissal Statutes"). The Dismissal Statues provide New York teachers with an insurmountable array of additional rights and privileges that are significantly greater than traditional due process. Indeed, unlike private companies, public employees in New York cannot be dismisses for unsatisfactory performance or otherwise, unless they are afforded certain due process rights—which include notice of the proposed action, the reasons for the action, and the right to respond before the proposed discipline or termination can be made effective. *See Beck-Nichols v. Bianco*, 20 N.Y.3d 540, 559 (2013). While the *Davids* Plaintiffs do not challenge that teachers should be afforded due process rights, they do challenge the Dismissal Statutes' scope and application.

The Dismissal Statutes create an inordinate amount of obstacles to navigate before a district can dismiss an ineffective teacher. These obstacles result in a labyrinthine dismissal process requiring investigations, hearings, union grievances, administrative appeals, court challenges, and re-hearings—all of which can and often do take multiple years and cost hundreds of thousands of dollars.[5]

[5] One study concluded that the average cost of dismissing a teacher for ineffectiveness in New York is $313,000, and takes an average of 830 days. *See* New York State School Boards

As a result of the Dismissal Statutes' difficulty, complexity, cost, and length of time associated with the removal process, dismissal proceedings are rarely initiated to remove an unsatisfactory teacher. Further, when administrators do initiate dismissal proceedings based upon teacher performance, it rarely results in teacher dismissal because the burden on the administrators is unnecessarily burdensome. [6]

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

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

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

Association, *Accountability for All* (March 2007), *available at* http://www.nyssba.org/clientuploads/gr_3020a_reform.pdf. The same study concluded that, between 1995 and 2006, just 547 teachers statewide—out of nearly 220,000 teachers total—were dismissed via the Dismissal Statutes, either because they were ineffective or for other reasons, such as misconduct. The dismissal process has not improved in the years since 2007. *See* Katharine B. Stevens, *Firing Teachers: Mission Impossible*, N.Y. Daily News, Feb. 17, 2014, *available at* http://www.nydailynews.com/opinion/firing-teachers-mission-impossible-article-1.1615003.

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

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

Seniority is not an accurate predictor of teacher effectiveness, as recent studies have demonstrated. Yet the LIFO Statute mandates that layoffs be governed exclusively by seniority. This prevents a good teacher's effectiveness from being the yardstick by which other teachers are measured for layoff purposes. Ultimately, pursuant to the LIFO Statute, districts are being forced to keep ineffective senior teachers while laying off top-performing teachers with less seniority. The impact of the LIFO Statutes on schoolchildren is profound.[7]

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

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

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

STANDARD OF REVIEW

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

ARGUMENT

I. THE COMPLAINT STATES A CAUSE OF ACTION

Plaintiffs' Complaint seeks declaratory relief that the Challenged Statutes, as written and as applied, violate the Plaintiffs' Constitutional rights by failing to provide Plaintiffs with a sound basic education pursuant to Article XI. This satisfies Plaintiffs' requirement to plead a cause of action pursuant to Article XI. Accordingly, Defendants' motions to dismiss must be denied.

An Article XI claim requires: (1) the deprivation of a sound basic education; and (2) causes attributable to the State. *New York Civil Liberties Union v. State*, 4 N.Y. 3d 175, 179 (2005). Here, Plaintiffs plead a systemic failure by the State to provide a sound basic education through the State's application of the Challenged Statutes. The Plaintiffs have cited numerous credible studies and statistics in support of their claims. As stated above, the question in whether

the "facts as alleged fit within any cognizable legal theory." *Leon*, 84 NY2d at 87-88). The Plaintiffs' need not prove their case at this procedural juncture. The Court need only determine, under the facts and law in the Complaint, if Plaintiffs' have a claim based upon any cognizable legal theory.

Moreover, the Plaintiffs seek Declaratory Judgment under CPLR § 3001 as to the Constitutional claims presented. Declaratory judgment is the appropriate vehicle for examination of the constitutionality of legislation. *Boryszewski v. Brydges*, 37 N.Y.2d 361 (N.Y. 1975). Where the differences between the parties on a motion to dismiss revolve exclusively around questions of law and once it has been determined that the case is properly one for declaratory relief, the court may properly proceed, on a motion to dismiss in an action for a declaratory judgment, to a consideration of the sufficiency of the plaintiff's claims on the merits. *Id.*

In the instant case, the several Defendants' moving papers have made clear that Defendants will not stipulate to or admit the facts as presented by Plaintiffs and, as such, there are substantial questions of facts that must be resolved through discovery. Additionally, where necessary information is contained in books or documents in the exclusive possession of an opposing party, it is a settled matter of law that a party is entitled to inspect such books and documents in order to gain the necessary information. *Albany Brass & Iron Co. v. Hoffman*, 12 Misc. 167 (N.Y. Sup. Ct. 1895). Here, the development of the facts will entail extensive discovery of materials that are in the sole and exclusive possession of the Defendants.

Accordingly, dismissal of Plaintiffs' complaint at this point would be abhorrent to the administration of justice.

II. THE COMPLAINT DOES NOT RAISE A POLITICAL QUESTION

The Complaint does not raise a political question that would preclude this Court from granting Plaintiffs' request for declaratory relief. As stated above, the judiciary is the sole arbiter of the constitutionality of the Challenged Statutes and their application. The Defendants' claim that Plaintiffs' Complaint contains non-justiciable policy questions more appropriately handled in the Legislature is without merit. Plaintiffs' claims are constitutional in nature. Under the system of checks and balances, the judiciary, not the executive or legislative branches, is entrusted with reviewing alleged deprivations of constitutional rights.

The paramount concern is that the judiciary not undertake tasks that the other branches are better suited to perform. *Klostermann v. Cuomo*, 61 N.Y.2d 525, 535-536 (N.Y. 1984). The line separating the justiciable from the nonjusticiable has been subtle. The United States Supreme Court identified several factors that relate to the jusicability of a matter in *Baker v Carr*, 369 U.S. 186, 208-237 (U.S. 1962), and the New York State Court of Appeals has looked to these factors in the justicability doctrine developed under New York State law. See *Klostermann, supra.* These *Baker v. Carr* factors include:

1. A textually demonstrable constitutional commitment of the issue to a coordinate political department;
2. A lack of judicially discoverable and manageable standards for resolving it;
3. The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;
4. The impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
5. An unusual need for unquestioning adherence to a political decision already made;
6. The potentiality of embarrassment from multifarious pronouncements by various departments on one question.

The central question in this matter is based on the State's delivery of a "sound basic education." The State must ensure that New York's public schools are able to teach 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. *Campaign for Fiscal Equity, Inc. v. State of New York*, 8 N.Y.3d 14 (N.Y. 2006) ("*CFE III*"). In assessing adequacy of education, this standard is the constitutional minimum or floor. *Id.* A sound basic education consists of teaching skills that enable students to undertake civil responsibilities meaningfully. *Id.* It is the opportunity for a meaningful high school education, one which prepares children to function productively as civic participants. *Id.* Upon the development of a full factual record, the Court is keenly capable of determining whether the State is able to keep its promise of a sound basic education under the education clause of the New York State Constitution in the face of the Challenged Statutes. This is particularly so because the stakes involved will be shown to undermine the ability of New York's primary and secondary public education students – the future civic participants, voters and jurors – to be able to discharge their responsibilities in any meaningful way. The courts are the defenders of the social order and the promised Constitutional guarantees under Article XI. The Court can and should decide this justiciable matter.

The Court of Appeals has recognized the tension between the judiciary's responsibility to safeguard rights and the necessary deference of the Courts to the policies of the legislature. *Id.* The manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the political branches of government. When a court reviews the acts of the legislature and the executive, it does so to protect rights, not to make policy. *Id.* The relief

requested by the Plaintiffs seeks only to protect the basic and fundamental rights in the New York State Constitution to a sound basic education.

Despite Defendants' attempt to persuade the Court that the Legislature had numerous policy reasons for enacting the Challenged Statutes, there is no policy argument that can shield a statute that violates a constitutional right from judicial review.

III. PLAINTIFFS HAVE STANDING

Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria. *Matter of Association for a Better Long Is., Inc. v. New York State Dept. of Envtl. Conservation*, 23 N.Y.3d 1 (N.Y. 2014). Standing rules should not be heavy-handed. Courts have been reluctant to apply standing principles in an overly restrictive manner where the result would be to completely shield a particular action from judicial review. *Id.*

Here, the Plaintiffs have the burden of establishing both an injury in fact and that the asserted injury is within the zone of interests sought to be protected by the education article of the New York State Constitution as alleged. See, e.g., *Soc'y of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761 (N.Y. 1991). Plaintiffs are clearly within the class specifically meant to be protected under Article XI—children attending public schools in the State of New York. Plaintiffs alleged claims that are within the zone of interests protected by Article XI, as the Court of Appeals has recognized the right to a sound basic education enshrined in the New York State Constitution. See, e.g., *CFE III*. The Plaintiffs have plead a cognizable claim for the failure of the State to deliver on its Constitutional educational promise of a sound basic education by the systemic failure of the State in the application of the Challenged Statutes.

Contrary to what the several Defendants have said, Plaintiffs need not allege that they have had a specific ineffective teacher to have standing. Plaintiffs need only allege that they are within the protected class and that their claims are within the zone of interests protected by Article XI – *viz.* – that they are at imminent risk of being assigned to an ineffective teacher who is incapable of discharging the minimum Constitutional educational standard. The Plaintiffs' pleadings have alleged numerous studies and statistics that show the correlation between the Challenged Statues and their application and the effect on the education system in New York—specifically, the retention of ineffective teachers and the impact that it has on the delivery of a sound basic education to New York public school students.

Accordingly, Defendants' argument that Plaintiffs do not have standing is without merit.

IV. DEFENDANTS FAIL TO MEET THEIR BURDEN TO HAVE THE MATTER DISMISSED AND PLAINTIFFS SHOULD BE AFFORDED THE RIGHT TO FURTHER DEVELOP THEIR CLAIMS IN DISCOVERY

Several of the Intervening Parties attempt to further their smoke-screen strategy by claiming that collectively-bargained contracts between state entities and teachers' unions in some way bear relevance to their arguments to dismiss the Plaintiff's Complaint. Boiled down, the arguments amount to: this Court should not even entertain the potential New York State Constitutional violations because so doing may affect the several Teachers Unions' existing collective bargaining agreements.

It is a matter of hornbook law that impossibility of performance obviates a contractual requirement to perform where the specific term is limited by operation of law. See, *International Paper Co. v. Rockefeller*, 161 A.D. 180 (N.Y. App. Div. 1914); 6 Williston, Contracts (Rev. ed.), §1935; 10 N. Y. Jur., Contracts, § 357; Restatement, Contracts, § 457. In effect, the Intervening

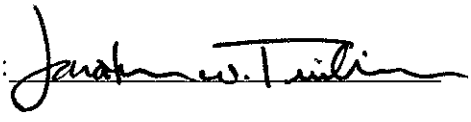
Parties would argue that even entertaining a Constitutional violation that may potentially invalidate certain portions of existing collective bargaining agreements - because the terms are based upon an illegal and unconstitutional understanding - makes it inappropriate for the Court to continue to entertain this matter. The argument is patently absurd, as it elevates a collective bargaining agreement between private parties to the level of Constitutional command. In reality, if the New York State Constitution is to have any meaning whatsoever, it cannot and should not be steered in its interpretation by the whims of private parties over the sovereign rights granted to the citizens of the State of New York.

CONCLUSION

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

Dated: Staten Island, New York
December 5, 2014

JONATHAN W. TRIBIANO, PLLC

By: 

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SUPREME COURT OF THE STATE OF NEW YORK
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MEMORANDUM OF LAW

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Facsimile: (718) 865-5191

To:

Service of a copy of the within
is hereby admitted.

Dated: _____20____

Attorney(s) for:

PLEASE TAKE NOTICE:

Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the Courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contentions herein contained in the annexed documents are not frivolous.

[] NOTICE OF ENTRY

That the within is a (certified) true copy of a
Duly entered in the office of the clerk of the within named court on 20 .

[]NOTICE OF SETTLEMENT

That an order of which the within is a true copy will be presented for settlement to the HON.
one of the judges of the within named Court, at
on 20 at M.

AFFIRMATION OF SERVICE

The Undersigned attorney duly admitted to practice law in the Courts of the State of New York a non-party to this action over 18 years of age and residing in Staten Island, New York, did serve the papers herein contained by:

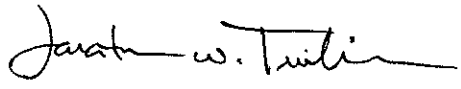
[ ] Personal Service on _____
at _____.

[ ] Overnight Mail Service by mailing a true copy of the attached papers, enclosed and properly sealed in a postpaid envelope, which I deposited, on _____, in an official depository under the exclusive care and custody of the Overnight Carrier and mailed to _____.

[X] By electronic mail, as per stipulation, to all parties in the action on December 5, 2014.

Dated: Staten Island, New York
December 5, 2014

Yours, etc.



JONATHAN W. TRIBIANO, ESQ.