SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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MYMEONA DAVIDS, by her parent and natural guardian, MIAMONA DAVIDS, ERIC DAVIDS, by his parent and natural guardian MIAMONA DAVIDS, ALEXIS PERALTA, by her parent and natural guardian, 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 her parent and natural guardian SAM PIROZZOLO, IZAIYAH EWERS, by his parent and natural guardian KENDRA OKE,

Plaintiffs,

- against -

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

Defendants,

-and-

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

Intervenor-Defendant,

-and-

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

Intervenors-Defendants,

-and-

PHILIP A. CAMMARATA and MARK MAMBRETTI,

Intervenors-Defendants.

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Consolidated Index No. 101105/14
(DCM Part 6)
(Minardo, J.S.C.)

THE CITY DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS

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

Plaintiffs,

- against –

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

Defendants

-and-

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

Intervenors-Defendants,

-and-

PHILIP A. CAMMARATA and MARK MAMBRETTI,

Intervenors-Defendants,

-and-

NEW YORK CITY DEPARTMENT OF EDUCATION,

Intervenor-Defendant,

-and-

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

Intervenor-Defendant.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

NEW YORK CONSTITUTION AND STATUTES

PRELIMINARY STATEMENT

There are three sets of reasons why plaintiffs' complaints should be dismissed. First, plaintiffs' causes of action are nonjusticiable. That plaintiffs couch their causes of action as constitutional does not change this conclusion. *Vieth v. Jubelierer,* 541 U.S. 267 (2003). In addition, plaintiffs' causes of action are not redressable or justiciable. To the contrary, they would require the court to make policy judgments, with no judicially manageable standards for fair evaluation. To decide plaintiffs' causes of action, this court would have to make policy determinations concerning who is and is not an effective teacher and management of the State's public education system, including teacher tenure, discipline and lay-offs. These policy determinations are committed to the Executive Department by statute and constitution. *See,* N.Y. Constitution, Article XI, § 2; N.Y. Education Law § 207. The courts are neither empowered nor competent to make these decisions. For these additional reasons, the court should dismiss the plaintiffs' complaints as nonjusticiable.

Second, plaintiffs fail to state an Education Article cause of action. Our courts have reiterated that an Education Article cause of action has two elements: "first, that the State fails to provide [the plaintiff students] a sound basic education in that it provides deficient inputs – teaching, facilities and instrumentalities of learning – which lead to deficient outputs such as test results and graduation rates; and second, that this failure is causally connected to the funding system." *Paynter v. State,* 100 N.Y.2d 434, 440, 765 N.Y.S.2d 819, 822 (2003); *New York State Ass'n of Small City School Districts, Inc. v. State,* 42 A.D.3d 648, 652, 840 N.Y.S.2d 179, 183 (3d Dep't 2007). No Education Article cause of action has survived a motion to dismiss without pleading underfunding by the State as the alleged cause of the constitutional deprivation. This is not surprising since the Education Article, by its express terms, provides that: "The "Legislature

shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." Moreover, *Board of Education, Levittown Union Free School Dist. v. Nyquist,* 57 N.Y.2d 27, 453 N.Y.S.2d 643 (1982) made clear that the appropriate standard of review for an Education Article cause of action is rational basis – which all of the challenged statutes easily meet. Thus, plaintiffs' complaints should be dismissed because they fail to state legally sufficient causes of action since they do not allege a state defalcation that falls under the Education Article and do not deny the rational bases for any of the fourteen Challenged Statutes.

Finally, if this litigation is to go forward, all school districts must be joined as necessary parties. The challenged statutes are part of the package of benefits that school districts use to attract and retain effective teachers. Since plaintiffs seek to have these declared unconstitutional and their enforcement enjoined, there will be both specific legal duties imposed on and potential prejudice to school districts statewide resulting from the declaration and injunction that plaintiffs seek. At a minimum, the remedy sought by plaintiffs will alter school districts' bargaining power. Thus all school districts in this state should be joined in this action if it is not dismissed.

TERMS USED IN THIS REPLY MEMORANDUM OF LAW

Plaintiffs challenge the constitutionality of fourteen statutes, which plaintiffs call the "Challenged Statutes." City Defendants have used that term throughout this reply brief. The fourteen Challenged Statutes fall into three categories. The first category, the "Teacher Tenure Statutes" concerns the standards for granting tenure to teachers. The Teacher Tenure Statutes are N.Y. Education Law §§ 1102(3), 2509, 2573, 3012, and 3012-c and are discussed in detail in City Defendants' moving brief at pages 8-9. The second category, the "Teacher Discipline

Statutes," concerns the substantive standards and procedural due process protections involved in disciplining tenured teachers. The Teacher Discipline Statutes are N.Y. Education Law §§ 3012, 3014, 3020, 3020-a and 2590-j and are discussed in detail in City Defendants' moving brief at pages 10-11. The third category, the last-in, first-out ("LIFO") statutes, mandates seniority-based teacher lay-offs. The LIFO Statutes are N.Y. Education Law §§ 2510, 2585, 2588 and 3013, and are discussed in detail in City Defendants' moving brief at page 12.

LEGAL ARGUMENT

POINT ONE

BECAUSE PLAINTIFFS' CAUSES OF ACTION ARE POLICY QUESTIONS COMMITED TO THE STATE EXECUTIVE AND LEGISLATURE, THEY ARE BEYOND THE JURISDICTION OF THIS COURT AND SHOULD BE DISMISSED AS NONJUSTICIABLE

As City Defendants explained at pages 12-20 of their moving brief, this Court should dismiss plaintiffs' complaints because they are not justiciable. Plaintiffs seek to overturn the Challenged Statues, which are fourteen statutes that reflect the State Legislature's policy judgments concerning teacher tenure, discipline of tenured teachers, and seniority-based teacher lay-offs. Some of these statutes were originally enacted a century ago and all have been repeatedly amended and updated to reflect the Legislature's policy choices. Plaintiffs' disagreements with those policy choices are grievances that should be brought to their State legislators who may properly address them through the legislative process. *Jones v. Beame,* 45 N.Y.2d 402, 408-9, 408 N.Y.S.2d 449, 452-3 (1978).

Plaintiffs raise two arguments to try to avoid the fact that their causes of action are nonjusticiable. First, they argue that because they allege deprivation of a constitutional right (i.e., the right to a sound basic education), their causes of action are justiciable. As a legal matter

they are incorrect for there are instances, both under the political question doctrine and on prudential grounds, where courts have dismissed as nonjusticiable causes of action that allege constitutional injury. Second, plaintiffs argue that because they seek a "routine judicial remedy," an injunction enjoining enforcement of the fourteen Challenged Statutes, their causes of action are redressable. They are again mistaken. Assuming that plaintiffs could prove that they have been or are in imminent danger of losing the opportunity to obtain a sound basic education because some teachers are ineffective, their causes of action still must be dismissed because there are no judicially manageable standards for judicially deciding how many and which teachers must be terminated before the remaining cadre of teachers is sufficient to provide minimally adequate teaching, one of three inputs identified by the Court of Appeals in *Campaign for Fiscal Equity, Inc. v. State of New York,* 86 N.Y.2d 307, 317, 631 N.Y.S.2d 565, 570 (1995) ("*CFE I*")[1] for determining whether the state offered the opportunity for a sound basic education. Depriving all teachers of the opportunity for tenure and its protections will not create that cadre. Nor is this Court equipped to determine who is effective.

A. Nonjusticiable causes of action may include those alleging constitutional injury.

Plaintiffs argue that their causes of action are justiciable because they allege deprivation of a constitutional right, a sound basic education, which they argue the court must decide. Plaintiffs are mistaken. As City Defendants explained in their moving papers, the touchstone of justiciability is whether the court is being asked to decide an issue that is the province of another branch of government or that the court is ill-equipped to or cannot decide. Justiciability is not decided by whether the cause of action is couched as constitutional or not.

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[1] The Court of Appeals described this input in *CFE I* as "minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science and social studies, by sufficient personnel adequately trained to teach those subject areas." 86 N.Y.2d at 317, 631 N.Y.S.2d at 570.

In *Urban Justice Center v. Pataki,* 38 A.D.3d 20, 29-32, 828 N.Y.S.2d 12, 19-21 (1st Dep't 2006), the First Department rejected as nonjusticiable, four of plaintiffs' five causes of action,[2] all asserted on state and federal constitutional grounds challenging State legislative decisions concerning unequal funding and allocation of resources to state legislators. The First Department based its ruling both on separation of powers grounds, finding the issues rested solely within the province of the State legislature, and on a lack of judicially discernible and manageable standards for assessing how much political activity should be permitted the legislators in representing their constituents and attempting to enact legislation. *Id.; accord, Courtroom Television Network LLC v. State,* 5 N.Y.3d 222, 235, 800 N.Y.S.2d 522, 529 (2005). In rejecting plaintiffs' First Amendment and State constitutional challenges to Civil Rights Law § 52, the Court of Appeals ruled:

> We will not circumscribe the authority constitutionally delegated to the Legislature to determine whether audiovisual coverage of courtroom proceedings is in the best interest of the citizens of this state. "A state constitutional rule expanding the rights of the media in New York to include the right to photograph and broadcast court proceedings would derail what is, and always has been, a legislative process."

Id., 5 N.Y.3d at 235, 800 N.Y.S.2d at 529.

Moreover, other courts, including the U.S. Supreme Court, have dismissed causes of action asserting constitutional violations as nonjusticiable when a political question is present. *See, e.g., Vieth,* 541 U.S. at 281-306 (Political gerrymandering case dismissed for lack of judicially manageable standards notwithstanding plaintiffs' cause of action of violation of one man, one vote mandate of Article I, § 2 of the Constitution); *Nixon v. U.S.,* 506 U.S. 224, 235-6

[2] The fifth cause of action, concerning the use of an autopen signature by the governor to sign legislation as opposed to a "by hand" signature, was dismissed for failure to state a cause of action.

(1993). Thus plaintiffs are mistaken when they argue that causes of action asserting constitutional violations must be justiciable.

B. Plaintiffs' causes of action should be dismissed as nonjusticiable because they require the court to make policy judgments outside its judicial function, and there are no judicially manageable standards by which to decide them.

Plaintiffs argue that their causes of action are redressable and justiciable because they seek a "routine judicial remedy," an injunction enjoining enforcement of the Challenged Statutes. Putting aside the fact that the requested remedy is extraordinary and not routine, the remedy does not make the causes of action justiciable. To decide plaintiffs' causes of action, this court would have to make the policy determinations of who is and is not an effective teacher,[3] and how many and which teachers must be terminated before the remaining cadre of teachers is sufficient to provide a sound basic education. Not only are these policy determinations entrusted to the Executive Department by statute and constitution (*see,* N.Y. Constitution, Article XI, § 2; N.Y. Education Law § 207), but also there are no judicially discernible and manageable standards by which to decide them. Rather they are educational judgments that require the expertise of and are the province of school district administrators and the State Education Department. Plaintiffs' requested injunction -- invalidating the teacher tenure, discipline and layoff statutes – does not

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[3] The assessment of teacher performance is made annually through an annual professional performance review ("APPR") of teacher effectiveness. N.Y. Education Law § 3012-c. The APPR statute was substantially and materially amended in 2012 and 2013. Under the newly amended statute, a teacher's APPR must include measures of student achievement and be a significant factor for employment decisions, including promotion, retention, tenure, termination and supplemental compensation. *Id.* at § 3012-c(1). Pursuant to the statute, a classroom teacher will receive one of the following four ratings: highly effective, effective, developing or ineffective. The APPR is composed of (i) 20% or 25% of state-developed measures of student growth, such as state assessments, (ii) 20% or 15% of locally developed measures of student achievement, and (iii) 60% of locally determined evaluation measures of teacher effectiveness, such as classroom observations and the like. *Id.* at § 3012(2)(a)(1). Under § 3012-c(2)(g)(4), the locally developed measures of student achievement must be determined through collective bargaining, and under § 3012-c(2)(h), the 60% of locally determined evaluation measures of teacher effectiveness are to be negotiated between local school districts and their teachers' unions pursuant to Article 14 of the Civil Service Law (a/k/a the Taylor Law, codified as N.Y. Civil Service Law § 200, *et seq.*). The APPR provisions of the statute went into full effect throughout the state with the 2013-2014 school year.

address the question of who is an effective teacher or ensure the "minimally adequate teaching" input identified in *CFE I*.[4]

Thus plaintiffs' complaints should be dismissed as nonjusticiable because the declaration of unconstitutionality of the Challenged Statutes and the statewide injunction sought would require this court to usurp the authority conferred on the Legislature and the Regents and State Education Department to provide for the maintenance and support of a system of free public schools and set educational policy and standards, including in areas of teacher performance, tenure, discipline and lay-offs. N.Y. Constitution, Article XI, §§ 1 and 2; N.Y. Education Law § 207. In addition, the complaints are nonjusticiable because they would require the court to make policy judgments without judicially manageable standards. Finally, taking plaintiffs' argument to its logical conclusion would mean that probationary developing teachers who are not yet effective could not be retained because they would be among those teachers not providing the opportunity for a sound basic education,[5] even if they could be coached and have the potential to develop into outstanding teachers.[6]

City Defendants further note that the injunctive relief that plaintiffs seek is fundamentally flawed because it would have several illegal consequences. First, tenured teachers, whether effective or ineffective, have property interests in continued employment, created by the challenged State statutes, of which the government cannot deprive them without pretermination notice and meaningful opportunity to be heard, the process that is due by virtue of the 14th

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[4] Moreover, the State satisfies its Education Article promise if it puts adequate resources into the classroom, even if student performance remains substandard. *Paynter,* 100 N.Y.2d at 441.

[5] The court would also have to parse whether the right is to "minimally adequate teaching," the CFE identified input, or to an "effective teacher," as plaintiffs argue. Even assuming that the court could decide the relationship between the two, the decision of how best to manage all of New York's school districts is neither committed to this court nor within the court's judicial function.

[6] It should also be remembered that there is no cause of action for educational malpractice in New York. *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 444-45, 418 N.Y.S.2d 375, 378 (1979); *Introna v. Huntington Learning Centers, Inc.*, 78 A.D.3d 896, 899, 911 N.Y.S.2d 442, 445 (2d Dep't 2010).

Amendment to the federal Constitution. *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 537, 542 (1985); *Board of Regents v. Roth,* 408 U.S. 564, 576-78 (1972). Our State constitution also contains this due process guarantee and further provides that State citizens shall not be illegally deprived of any rights they possess. N.Y. Constitution, Article 1, § 6. Second, the requested injunction would impair the right to organize and collectively bargain protected by our State constitution in Article 1, § 17, and state labor laws. It would injure not only teachers, but also school districts which rely on the Challenged Statutes and collective bargaining agreements to attract and retain effective teachers. It is respectfully submitted that such relief is not only beyond the power of this Court to grant, but also would be unconstitutional and illegal if granted.

Moreover, even if the complaints were rewritten to articulate some reduced level of due process protection and property interests for tenured teachers that plaintiffs find acceptable, the complaints would still have to be dismissed because the relief sought would require this Court to rewrite the Challenged Statutes thereby usurping the State legislature's function. So long as the State action at issue – the enactment and enforcement of the challenged statutes – is within the powers delegated to the State (here the State legislature and executive branches) and is not ultra vires, the Court's inquiry ends. The wisdom of the challenged legislation is for the State legislature, not this Court. N.Y. Statute Law, §73 (Avoidance of judicial legislation); *Matter of New York State Inspection, Security and Law Enforcement Employees, Dist. Council 82 v. Cuomo,* 64 N.Y.2d 233, 238, 485 N.Y.S.2d 719, 721 (1984); *Jones,* 45 N.Y.2d at 408-9, 408 N.Y.S.2d at 452-3; *Urban Justice Center,* 38 A.D.3d at 29-32, 828 N.Y.S.2d at 19-21; *Retired Employees Association, Inc. v. Cuomo,* 2012 N.Y. Misc. LEXIS 5714 at *15 (Sup. Ct. Dec. 17,

2012), *aff'd,* 2014 N.Y. App. Div. LEXIS 7030 (3d Dep't, Oct. 16, 2014); *see also, Courtroom Television,* 5 N.Y.3d at 235, 800 N.Y.S.2d at 529.

POINT TWO

THE COMPLAINTS FAIL TO STATE EDUCATION ARTICLE CAUSES OF ACTION

A. Plaintiffs' causes of action do not fall within the interests protected by Section 1 of the Education Article.

The language of Section 1 of the Education Article is the starting point and most compelling criterion in interpreting its meaning – and the words employed are to "be given their natural and obvious meaning." *Fappiano v. NYC Police Dep't,* 95 N.Y.2d 738, 745, 724 N.Y.S.2d 685, 689 (2001). It states:

> The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.

By its express terms, it imposes on the State Legislature the obligation to maintain and support a free public education system. This section does not require equal educational facilities or services throughout the state or equal educational opportunity. It does, however, require that all children in the state be offered the opportunity of a sound basic education. *Levittown,* 57 N.Y.2d at 48, 453 N.Y.S.2d at 653.

Plaintiffs argue that their complaints state legally sufficient Education Article causes of action because they allege a statewide systemic crisis of educational performance, measured by deficient student outputs, allegedly caused by promoting and retaining ineffective teachers under the Challenged Statutes, which in turn is allegedly caused, at least in part, by the State's enforcement of the Challenged Statutes. Wright Plaintiffs' Memorandum of Law at 12-14. City Defendants fail to see how this theory tracks the provisions of the Education Article, which

impose an obligation on the State Legislature of providing maintenance and support. Moreover, every successful Education Article cause of action has alleged a district-wide failure to provide a sound basic education that is causally connected to the State funding system (*CFE I,* 86 N.Y.2d at 318, 631 N.Y.S.2d at 570 and *Hussein v. State,* 19 N.Y.3d 899, 900, 950 N.Y.S.2d 342 (2012), *affirming* 81 A.D.3d 132, 136-7, 914 N.Y.S.2d 464 (3d Dep't 2011)). In contrast, all other Education Article suits were dismissed on motions to dismiss, at least in part because they lacked allegations linking a district-wide sound basic education deprivation to a defalcation in the resources provided by the State. *Paynter,* 100 N.Y.2d at 441 (Sound basic education deprivation alleged to arise from state's failure to mitigate demographic factors and not lack of funding); *ACLU v. State,* 4 N.Y.175, 180 (2005) (Premise of plaintiffs' cause of action was that the State was obligated to determine the causes of their schools' inadequacies and devise a remedial plan); *Levittown,* 57 N.Y.2d at 43 (Inequality of educational opportunity alleged rather than deprivation of sound basic education); *Reform Educational Financing Inequities Today v. Cuomo*, 86 N.Y.2d 279, 285, 631 N.Y.S.2d 551, 553 (1995) (Same as *Levittown); NYS Ass'n of Small City School District,* 42 A.D.3d at 652, 840 N.Y.S.2d at 183-4 (Amended complaint dismissed because it lacked factual allegations specific to each school district). Because the sound basic education deprivations of which plaintiffs complain are not causally linked to the state's failure to provide funding or resources, their complaints fail to state viable Education Article causes of action.

B. The Challenged Statutes should be upheld as a matter of law because they are rationally related to legitimate governmental purposes.

Plaintiffs argue that the constitutionality of the Challenged Statutes should not be measured by the rational basis test because that test is applicable only to equal protection causes of action, not Education Article causes of action. Plaintiffs are mistaken. In *Levittown,* the

Court of Appeals ruled that rational basis was the proper standard of review for challenged State action that implicated the right to public education.

> We turn then to the claims of both original plaintiffs and intervenors that, whatever may be determined with respect to the equal protection clause of the Federal Constitution, a violation of the comparable provision of our State Constitution (art I, § 11) has been demonstrated -- the conclusion reached by both courts below. Our attention must first be directed to identification of the standard appropriate to the subject now before us (financial support for public education) for examination as to whether there has been a violation of our constitutional mandate of equal protection (*Montgomery v Daniels*, 38 NY2d 41, 59). The Appellate Division, declining to apply the measurement of strict scrutiny that had been employed by the trial court and under which the trial court had found the education finance system invalid, concluded that the intermediate or more careful scrutiny test described in *Alevy v Downstate Med. Center of State of N. Y.* (39 NY2d 326) was properly to be employed -- justifying this decision by its conclusion that the right to education in this State "represents an important constitutional interest". (83 AD2d, at p 241.) The choice of that intermediate standard, under which the appellate court also found the system invalid, cannot be sustained however, both for the previously recited reasons articulated in the *San Antonio* case and in face of our decision in *Matter of Levy* (38 NY2d 653, app dsmd *sub nom.* *Levy v City of New York*, 429 U.S. 805, reh den 429 U.S. 966). In *Levy* we expressly held that rational basis was the proper standard for review when the challenged State action implicated the right to free, public education. Nothing in the present litigation impels a departure from that decision, made as it was with full recognition of the existence in our State Constitution of the education article (Art XI).

57 N.Y.2d at 43. Moreover, to date our courts have not seen fit to deem education a fundamental constitutional right. *Id.* Thus, so long as the rationale for the Challenged Statutes is reasonable, the statutes are constitutional and plaintiffs' complaints must be dismissed. *Id.; see also, Bernstein v Toia,* 43 N.Y.2d 437, 448, 402 N.Y.S.2d 342, 348 (1977) (rational basis review applied to constitutional challenge to public assistance to the needy, which is also a subject of significant public interest covered by our State constitution (Art. XVII, § 1); *Hernandez v.*

Robles, 7 N.Y.3d 338, 361, 821 N.Y.S.2d 770, 778 (2006) (rational basis review applied to constitutional challenge for Domestic Relations Law limiting marriage to opposite-sex couples). Most telling is the fact that plaintiffs fail to identify *any* standard by which to judge their constitutional challenge to the Challenged Statutes.

The Teacher Tenure Statutes (N.Y. Education Law §§ 1102(3), 2509, 2573, 3012, and 3012-c) that plaintiffs challenge are the "legislative expression of a firm public policy determination that the interests of the public in the education of our youth 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. Board of Education,* 47 N.Y.2d 385, 391, 418 N.Y.S.2d 345, 349 (1979). Second, they help school districts attract and retain effective teachers – a fact that is conceded by plaintiffs, since they seek only to challenge the retention of ineffective teachers who they acknowledge constitute a minority of all tenured teachers. *Davids Complaint,* ¶¶4, 30, 51, 52; *Wright Complaint,* ¶¶65, 81.

The discipline statutes that plaintiffs challenge (N.Y. Education Law §§ 3012, 3014, 3020, 3020-a and 2590-j(7)) concern, *inter alia,* procedural due process protections for tenured teachers. Courts have determined that the dual purposes served by these statutes are "protection to tenured teachers from official and bureaucratic caprice" and a "means of assessing the fitness of a teacher to carry out his or her professional responsibilities." *Flota v. Sobol,* 210 A.D.2d 857, 858, 621 N.Y.S.2d 136, 137 (3d Dep't 1994); *see also, Holt v. Board of Education,* 52 N.Y.2d 625, 632, 439 N.Y.S.2d 839, 842-3 (1981) (§ 3020-a is "a critical part of the system of contemporary protections that safeguard tenured teachers from official and bureaucratic

caprice"); *McElroy v. Board of Education,* 5 Misc.3d 321, 323, 783 N.Y..S.2d 781, 783 (Sup. Ct. 2004).

The lay-off statutes that plaintiffs challenge (N.Y. Education Law §§ 2510, 2585, 2588 and 3013), provide that when a teaching position is eliminated, the services of the least senior person holding a position within the tenure area of the abolished position shall be discontinued, and that the services of a teacher tenured in the affected area cannot be discontinued if another teacher in the affected area has not acquired tenure, regardless of seniority. The purposes of a seniority-based lay-off system is to provide a mandatory preference in rehiring for teachers who have lost their positions as a result of "excessing" and reflects the State public policy that qualified tenured teachers "should generally be preferred for purposes of re-employment." *Avila v. Board of Education,* 240 A.D.2d 661, 662, 658 N.Y.S.2d 703, 704 (2d Dep't 1997), citing *Matter of Leggio v Oglesby,* 69 AD2d 446, 449) and *Matter of Brewer v Board of Educ.,* 51 NY2d 855, 857).

Plaintiffs contest neither the rationales for these statutes nor that the rationales are reasonably related to legitimate governmental purposes. Rather, they argue that rational basis review is applicable only to equal protection causes of action, but fail to articulate any standard of review for judging an Education Article claim. As discussed earlier, plaintiffs are mistaken. Hence, the above showing is sufficient to defeat plaintiffs' Education Article challenge to the Challenged Statutes as a matter of law.

Finally, plaintiffs' argument that their challenge is an "as applied" challenge does not change the analysis. Plaintiffs' causes of action challenge the constitutionality of the Challenged Statutes as applied to all public school children in New York, not just as to the children of the plaintiff parents, and the relief sought is a statewide injunction. This makes plaintiffs' challenge

a facial challenge (*People v. Stuart,* 100 N.Y.2d 421, 427, 765 N.Y.S.2d 1, 8 (2003)), which defendants have properly analyzed under the rational basis standard.

For all these reasons, plaintiffs' complaints must be dismissed for failure to state a cause of action.

POINT THREE

THIS MOTION TO DISMISS SHOULD BE GRANTED BECAUSE PLAINTIFFS HAVE FAILED TO JOIN ALL NECESSARY PARTIES

As the City Defendants explained in their moving brief, CPLR 1001 mandates the joinder of all persons who might be inequitably affected by the judgment, and CPLR 1003 provides that the nonjoinder of a party who should be joined is a ground for dismissal of any action without prejudice. Plaintiffs do not dispute that they seek a declaration and statewide injunction enjoining enforcement and implementation of the Challenged Statutes, that this relief will affect all school districts and tenured teachers across the state, and that the relief has the potential to impair the ability of New York school districts to attract and retain competent teachers, since the modicum of job security offered by the Challenged Statutes is one of the benefits and constitutionally protected entitlements offered to public school teachers in this State. Rather, plaintiffs resist the required joinder of school districts statewide arguing that the State and Regents are the only necessary defendants because they are the government entities that are primarily responsible for enacting and enforcing the Challenged Statutes.

Plaintiffs' argument misses the point of CPLR 1001. Joinder is required of all persons who might be inequitably affected by the judgment. Thus unlike *Joanne S. v. Carey,* cited by plaintiffs, where the State Defendants identified no specific legal duties that would be assigned to the City agencies which were not joined or other prejudice (115 A.D.2d 4, 8-9, 498 N.Y.S.2d

817, 820 (1st Dep't 1996)), if plaintiffs are successful here, all public school districts statewide will be enjoined from offering tenure to deserving teachers, from utilizing procedural due process protections that the Supreme Court has declared the constitutional minimum for tenured employees, and from honoring collectively bargained contract provisions concerning teacher tenure, discipline of tenured teachers, and seniority-based layoffs of teachers (which appears to violate Article 1, § 17 of the State constitution). Thus, there will be both specific legal duties imposed on and potential prejudice to school districts statewide resulting from the declaration and injunction that plaintiffs seek.

Moreover, our courts have recognized that school districts have extensive independent responsibilities separate and apart from their cooperation with the State. In rejecting a similar argument raised by the plaintiffs in *Paynter* in the context of an Education Article cause of action, the Appellate Division distiguished *Joanne S.* and ordered the joinder of the affected school districts noting local community control of basic decisions on funding and school administration, and the substantial independent responsibilities that fall to local school districts for the administration of public education in their districts. Thus, because the relief that plaintiffs sought could have resulted in Rochester students attending suburban districts, the joinder of the suburban districts was ordered. *Paynter,* 270 A.D.2d at 820, 704 N.Y.S.2d at 764; *see generally, Hussein,* 81 A.D.3d at 134, 914 N.Y.S.2d at 465.

The relief sought by plaintiffs in the instant suit is even more far-reaching. If plaintiffs are granted the declaration and injunction they seek, the property rights of teachers across the state will be altered. School districts will lose incentives and benefits they traditionally offer to attract and retain effective teachers. Moreover, the provisions in collective bargaining agreements that pertain to teacher tenure, discipline and lay-offs will be unenforceable. This not

only impairs the ability of boards of education to run their school districts, but also jeopardizes their ability to provide a sound basic education. At a minimum, all should be joined since all may be inequitably affected by the judgment.

CONCLUSION

For the reasons set forth in City Defendants' Memorandum of Law in Support of its Motion to Dismiss and this Reply Memorandum of Law, it is respectfully submitted that this Court should dismiss the complaints filed by the Wright plaintiffs and the Davids plaintiffs.

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ZACHARY W. CARTER
Corporation Counsel for the City of New York
Attorney for Defendants City of New York and New York City Department of Education
100 Church St., Room 2-195
New York, NY 10007

By: _____
Janice Birnbaum
Senior Counsel
jbirnbau@law.nyc.gov