To be argued by: Richard E. Casagrande
Time Requested: 15 Minutes

NEW YORK SUPREME COURT
APPELLATE DIVISION -- SECOND DEPARTMENT

MYMOENA DAVIDS, et al.,
Plaintiffs-Respondents,
-against-

THE STATE OF NEW YORK, et al.,
Defendants-Respondents,
-and-

MICHAEL MULGREW, et al.,
Intervenors-Defendants-Appellants.

Docket Nos. 2015-03922
2015-12041

Richmond County
Index No.: 101105/14
(Consolidated)

JOHN KEONI WRIGHT, et al.,
Plaintiffs-Respondents,
-against-

THE STATE OF NEW YORK, et al.,
Defendants-Appellants,
-and-

SETH COHEN, et al.,
Intervenors-Defendants-Appellants.

BRIEF ON BEHALF OF INTERVENORS-DEFENDANTS-APPELLANTS

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STATE OF NEW YORK
SUPREME COURT

APPELLATE DIVISION
SECOND JUDICIAL DEPARTMENT

MYMOENA DAVIDS, et al.,

Plaintiffs-Respondents,

-against-

THE STATE OF NEW YORK, et al.,

Defendants-Respondents,

-and-

MICHAEL MULGREW, et al.,

Intervenors-Defendants-Appellants.

STATEMENT PURSUANT TO CPLR §5531

Docket Nos. 2015-03922
2015-12041

Richmond County
Index No.: 101105/14
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JOHN KEONI WRIGHT, et al.,

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-and-

SETH COHEN, et al.,

Intervenors-Defendants-Appellants.

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1. The index number of the consolidated cases in the court below is 101105/14.

2. The full names of the original parties are as follows: Plaintiffs-

Respondents: Mymoena Davids, by her parent and natural guardian Miamona Davids; Eric Davids, by his parent and natural guardian Miamona Davids; 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; John Keoni Wright; Ginet Borrero; Tauana Goins; Nina Doster; Carla Williams; Mona Pradia; Angeles Barragan. Defendants-Appellants: The State of New York; 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; 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. Intervenors-Defendants-Appellants: Seth Cohen; Daniel Delehanty; Ashli Skura Dreher; Kathleen Ferguson; Israel Martinez; Richard Ognibene, Jr.; Lonnette R. Tuck; Karen Magee, Individually and as President of the New York State United Teachers; Michael Mulgrew, as President of the United

Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO; Philip A. Cammarata; Mark Mambretti.

The *Wright* Plaintiffs-Appellants added the following Plaintiffs-Appellants when they filed their Amended Complaint on or about November 13, 2014: Laurie Townsend and Delaine Wilson.

3. The proceedings were commenced in Supreme Court, Albany County (*Wright*, et al.) and in Supreme Court, Richmond County (*Davids*, et al.). The proceedings were consolidated in Richmond County by order dated September 18, 2014, under the above-referenced index number.

4. The proceedings were commenced by the *Davids* Plaintiffs-Respondents, upon information and belief, on or about June 30, 2014 by filing the Summons and Complaint with the Richmond County Clerk's Office; and commenced by the *Wright* Plaintiffs-Respondents on July 28, 2014 by filing the Summons and Complaint electronically with the Albany County Clerk's Office. The Summons and Complaint filed by the *Davids* Plaintiffs-Respondents was served, upon information and belief, upon Defendants-Appellants on or about July 7, 2014; and the Summons and Complaint filed by the *Wright* Plaintiffs-Respondents was served, upon information and belief, upon Defendants-Appellants on or about July 28, 2014.

The *Davids* Plaintiffs-Respondents filed an Amended Complaint with the Richmond County Clerk's Office, on or about July 25, 2014 and served the Amended

Complaint upon Defendants-Appellants, upon information and belief, on or about July 25, 2014. The *Wright* Plaintiffs-Respondents filed an Amended Complaint with the Richmond County Clerk's Office on or about November 13, 2014, and served the Amended Complaint upon Defendants-Appellants and Intervenors-Defendants-Appellants on or about November 13, 2014.

5. These are proceedings initiated by Plaintiffs-Respondents seeking to enjoin and declare unconstitutional Education Law §§ 1102, 2509, 2510, 2573, 2585, 2588, 2590, 2590(j), 3012, 3012-c, 3013, 3014, 3020 and 3020-a, alleging that those statutes caused a statewide failure to provide students with a sound basic education as required by Article XI, Section 1 of the New York State Constitution.

6. This appeal is from two decisions and orders of the Supreme Court, Richmond County (Minardo, Philip G., J.S.C.) dated March 12, 2015 and October 22, 2015, which were entered in the Richmond County Clerk's Office on March 20, 2015 and October 28, 2015, respectively.

7. The appeal is being taken on a full printed record.

Dated: March 24, 2016

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QUESTIONS PRESENTED

1. Did the lower court err in denying defendants-appellants' motions to dismiss the amended complaints, which alleged that several New York Education Law sections violate the Education Article (XI, § 1) of the New York State Constitution, when the motions averred that plaintiffs' claims were non-justiciable, failed to state a claim; and failed to join necessary parties?

Yes.

2. Did the lower court err in denying defendants-appellants' motions for leave to renew the motions to dismiss the amended complaints as moot, after the Legislature amended the challenged statutes on April 1, 2015?

Yes.

PRELIMINARY STATEMENT

Intervenor-defendants-appellants, eight New York State public school teachers and NYSUT ("teacher defendants"), appeal from the Richmond County Supreme Court's (Minardo, J.) denial of their motions to dismiss the plaintiffs-respondents' ("plaintiffs") consolidated lawsuits and denial of appellants' motions to renew the motions to dismiss. (R. 17-33, 954-58).[1]

The underlying actions involve amended complaints filed by the *Davids* plaintiffs in Richmond County and the *Wright* plaintiffs in Albany County in July

[1] References to the Record on Appeal are identified as R. _____.

2014. The cases were consolidated by the lower court. (R. 763-65). The amended complaints (R. 36-58, 1351-74), allege that New York's public school system is failing to provide students with a sound basic education, as mandated by Article XI, Section 1 of the State Constitution. The plaintiffs allege that this statewide failure is caused by some thirteen provisions of the Education Law, which regulate teacher probation, tenure and due process, professional evaluations and layoffs. (R. 38-39, 1359-72). Plaintiffs want these laws struck down. (R. 39, 1353).

The Legislature has carefully refined the challenged laws, over more than a century, to attract and retain qualified teachers; to protect academic freedom; to safeguard educators' right to speak concerning sound educational practices and student safety; and to protect good teachers from arbitrary or wrongful dismissal. Yet plaintiffs assert the legally unsupportable proposition that because there may be *some* ineffective teachers, *all* of New York's 250,000 teachers should lose their legislatively-promised employment safeguards. As will be shown, the Legislature has wisely rejected the perverse notion that it can help students by harming their teachers.

Plaintiffs may disagree with the Legislature's policy decisions, but the bare allegations contained in the amended complaints are insufficient to warrant judicial intervention in this non-justiciable controversy. The amended complaints also lack an adequate factual basis for the claim that "throughout New York" - - 700 school

districts[2] - - students are not provided the opportunity for a sound basic education. Plaintiffs support this claim with academic studies, none of which are directly connected to the challenged statutes or New York's constitutional mandate to provide students with the opportunity for a sound basic education. (R. 90-329).

Plaintiffs have failed to allege facts sufficient to support their claim that the challenged laws violate the Education Article or that there is a statewide failure to provide a sound basic education. Plaintiffs predominantly rely on the State's 2013 Grade 3-8 Math and English Language Arts standardized test scores. (R. 1361). These test results, however, do not establish an adequate factual basis for plaintiffs' sweeping claim of a statewide failure of New York's public schools.

If these factually threadbare complaints are allowed to proceed, any plaintiff could challenge any section of the Education Law by alleging that the law was somehow responsible for the unsatisfactory test scores. Existing Education Article pleading requirements, carefully outlined by the Court of Appeals, would be rendered meaningless. The amended complaints - - which ask the Court to strike down the basic employment rights and protections for *every* teacher in the State - - should have been dismissed.

---

[2] There are "nearly 700 school districts and 5,000 schools and more than 200,000 teachers and 2.65 million students" in New York. New York Common Core Task Force Final Report, p. 35, *available at* https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NewYorkCommonCoreTaskForceFinalReport_Update.pdf (last visited Mar. 3, 2016).

STATEMENT OF FACTS

Teacher-Defendants

The individual teacher defendants are all experienced educators, employed by school districts throughout New York. (R. 703-39). They include the 2008, 2012 and 2014 State Teachers of the Year. (R. 716, 721, 731). None has ever been the subject of disciplinary charges. (R. 705, 710, 717, 722, 727, 733, 737). Several are themselves parents of public school students. (R. 706-07, 713, 718-19, 728). Each attests that the challenged statutes are essential to attract and retain highly qualified teachers and to ensure that teachers are free to teach without political interference and to advocate for students by speaking freely about threats to student safety, inadequate resources, and other problems that may affect public education. (R. 705-07, 710-13, 717-19, 722-24, 727-28, 733-34, 737-39).

NYSUT is a labor federation representing over 600,000 retired and in-service public and private employees in New York, including over 266,000 public school teachers, teaching assistants, school counselors, school social workers, and school psychologists who are protected by the challenged statutes. (R. 741).

The Complaints

Plaintiffs challenge Education Law §§ 1102, 2509, 2510, 2573, 2585, 2588, 2590, 2590(j), 3012, 3012-c, 3013, 3014, 3020, and 3020-a (the "challenged statutes"). (R. 38, 1353). These statutes establish teachers' basic terms of

employment, including the length of probation; the requirements for achieving tenure; the grounds and procedures for teacher discipline; teacher evaluation standards and procedures; and layoff procedures.

Plaintiffs claim these statutes are "legal impediments that prevent New York's schools from providing a sound basic education to all of their students ...." (R. 38, 1353). They say that "ineffective teachers" remain in New York classrooms because of the allegedly unconstitutional tenure protections - - protections they inaccurately call "lifetime" employment laws. (R. 44, 1359-60). Plaintiffs claim these laws make it "nearly impossible for school administrators to dismiss ineffective teachers." (R. 44-45, 1359, 1372). Plaintiffs also say that New York's seniority-based layoff system denies a sound basic education by prohibiting schools "from taking teacher quality into account...so that ineffective, more senior teachers are retained and effective teachers are fired." (R. 47-49, 1370-72, 1373). Further, plaintiffs attack a three-year probationary term, claiming it is too short. On April 1, 2015, the Legislature extended New York's probationary term to four years for all teachers hired on or after July 1, 2015. (R. 992-93).

The *Wright* plaintiffs attempt to support their claim of a statewide failure to provide a sound basic education by citing the 2013 State assessment scores for Grades 3-8 English Language Arts and Math and by relating an anecdote about one of the plaintiff's twin daughters. The amended complaint alleges that in 2013, one

twin was assigned an "ineffective" teacher, causing her to "f[a]ll behind," while the other twin "excelled with the benefit of an effective teacher." (R. 1352-53). No facts are pleaded, however, to show that either twin did not receive a sound basic education or that one twin's teacher was ineffective. And, the plaintiffs evidently see no irony in proposing to punish the allegedly ineffective teacher *and* the effective teacher by stripping *both* of their tenure, seniority, and collective bargaining rights.

Curiously, the *Wright* plaintiffs point to the high number of e*ffective* and *highly effective* teacher ratings as a basis for their claims, contending that these numbers are inflated by a flawed evaluation system. (R. 1362). The *Davids* plaintiffs concede that the vast majority of New York's teachers (95%) are effective, but also allege, without a factual basis, that ineffective teachers make up "approximately the bottom five percent of educators of New York." (R. 38, 43).

The Proceedings Below

In October 2014, all defendants moved to dismiss the amended complaints, asserting that plaintiffs' claims were non-justiciable; that plaintiffs lacked standing; that the complaints failed to state a cause of action; and that plaintiffs failed to join necessary parties. (R. 461-63, 598-601, 747-50, 751-53, 754-58). In March 2015, the lower court denied the motions to dismiss, holding that the complaints were "sufficiently pleaded to avoid dismissal." (R. 17-33).

Following the April 1, 2015 Education Law amendments, all defendants moved in August 2015 for leave to renew, arguing that the amendments significantly altered the challenged statutes, mooting plaintiffs' claims.[3] In October 2015, the lower court denied these motions, holding that the amendments "would not change the [court's] prior determination...." (R. 954-58).

ARGUMENT

POINT I

THE AMENDED COMPLAINTS SHOULD BE DISMISSED BECAUSE THEY ALLEGE NON-JUSTICIABLE POLICY DISAGREEMENTS.

The plaintiffs disagree with the Legislature's policy decisions, but they have failed to present a justiciable dispute.

A. Justiciablity standards

"CPLR 3001 requires that parties seeking a declaratory judgment present a 'justiciable controversy.'" *Hodgkins v. Cent. Sch. Dist. No. 1*, 78 Misc. 2d 91, 94 (Sup. Ct., Broome Co. 1974), *aff'd*, 48 A.D.2d 302 (3d Dep't 1975), *lv. denied*, 42 N.Y.2d 807 (1977). Basically, the "judiciary [should] not undertake tasks that the

[3] In this brief, the teacher defendants will address only failure to state a claim, justiciability and failure to join necessary parties. The teacher defendants, for the reasons stated in the briefs submitted by defendants-appellants State of New York and United Federation of Teachers (UFT), join in the request that the amended complaints be dismissed because the plaintiffs lack standing and because the April 1, 2015 amendments to the challenged statutes moot the plaintiffs' claims.

other branches [of government] are better suited to perform." *Klostermann v. Cuomo*, 61 N.Y.2d 525, 535 (1984).

Courts, ". . . as a policy matter . . . will abstain from venturing into areas if [they are] ill-equipped to undertake the responsibility and other branches of government are far more suited to the task." *Jones v. Beame*, 45 N.Y.2d 402, 408-09 (1978). "This is particularly true in those cases that involve political questions -- "those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the legislative and executive branches.'" *Roberts v. Health and Hosp. Corp.*, 87 A.D.3d 311, 323 (1st Dep't 2011) (citation omitted), *lv. denied* 17 N.Y.3d 717 (2011). Courts do not review legislative acts to make policy. *See Campaign for Fiscal Equity, Inc. v. State*, 8 N.Y.3d 14, 28 (2006).

B. The complaints fail to present a justiciable controversy

1. The plaintiffs' generalized conclusions cannot form the basis of a justiciable controversy.

In *Benson Realty v. Beame,* 50 N.Y.2d 994, 995-96 (1980), *appeal dismissed*, 449 U.S. 1119 (1981), the plaintiffs challenged a rent control law as an "unconstitutional taking," alleging that "as applied it is confiscatory," and that there had "been such a failure of administration of the law as to mandate its being declared unconstitutional." The Court of Appeals denied the challenge because it relied on "generalized conclusions" and dealt with political questions the judiciary

could not address. *Id.* at 996. The *Benson* Court discussed circumstances quite similar to the instant case:

> On the question of unconstitutional taking it need only be noted that plaintiffs' papers contain only generalized conclusions which, however persuasive in the forum of public opinion, do not establish that the property of any individual property owner has been "taken" or demonstrate, sufficiently to overcome the presumption of constitutionality, that rent control is the cause of what plaintiffs claim is the present plight of New York City landlords.
>
> With respect to the claimed collapse in administration, we...know of no authority, and appellants cite none, recognizing any proposition that proof of mal-administration or non-administration of a statute may serve as the predicate for a judicial declaration that the statute is unconstitutional. *The role of the judiciary is to enforce statutes and to rule on challenges to their constitutionality either on their face or as applied in accordance with their provisions. Any problems that result from pervasive non-enforcement are political questions for the solution of which recourse would have to be had to the legislative or executive branches; the judiciary has neither the authority nor the capabilities for their resolution. Id.* (emphasis added).

Here, as in *Benson*, the plaintiffs' claim that the Education Law's tenure provisions are being maladministered or non-administered. (R. 44, 1364-65). They make this claim based on generalized conclusions, without the requisite showing of personal harm needed for a justiciable controversy.

The *Davids* plaintiffs allege that "school district administrators believe that attempting to dismiss ineffective teachers is futile and prohibitively resource-

intensive, and that the dismissal process established by the Challenged Statutes is unlikely to result in dismissal of those teachers." (R. 44). The *Wright* plaintiffs claim that "[d]isciplinary proceedings are rarely initiated" because of "cumbersome, lengthy, and costly due process protections ..." (R. 1365). But merely couching this alleged maladministration of the Education Law as a constitutional challenge does not create a justiciable action.

General claims like "[t]eacher effectiveness cannot be determined within three years," (R. 1372); that "disciplinary procedures are time-consuming," (R. 1373); and that "[seniority] prohibits administrators from taking teacher quality into account when conducting layoffs," (R. 1373) are claims about policy, not an actual controversy between the parties.

Plaintiffs say that 3020-a cases take too long (R. 45-47; 1364-69), but cite no authority for the proposition that a due process procedure, designed to adjudicate important property rights, is unconstitutional because it has a statutory five-month time frame. *See* Education Law §§ 3020-a(3)(c)(vi), (4). In fact, it is difficult to cite any other civil procedure that must be completed so quickly.

The amendments of section 3020-a in 2008, 2010, 2012, and 2015 show that plaintiffs' claims are not justiciable. This periodic re-examination of 3020-a is akin to *Benson*, where the Court stressed that, "The need for rent control has been re-examined legislatively at intervals of three years." *Benson*, 50 N.Y.2d at 995.

The plaintiffs' allegations are merely opinions and conclusions, supported by opinions and conclusions in academic papers. (R. 37-38, 46, 1357-59). Courts cannot economically acquire "data and apply[ ] expert advice to formulate broad programs," which is why addressing "complex societal and governmental issues is a subject left to the discretion of the legislative and executive branches ...." *Klostermann*, 61 N.Y.2d at 535-36. The academic articles attached to the complaints cannot be cited as *factual* allegations, as the economists in the articles are simply making inferences or giving opinions by applying statistical analysis, subject to standards of error, to the data they collected. The Court cannot draw a reasonable inference from something that is itself an inference; the Court can only draw a reasonable inference from facts.

The plaintiffs have alleged no facts upon which to establish a justiciable controversy.

2. The amended complaints are non-justiciable because education policy is a matter for the legislature.

In *New York State Inspection, Security and Law Enforcement Emp. v. Cuomo,* 64 N.Y.2d 233, 237, 239-40 (1984), the Court of Appeals explained that the judiciary may not "preempt the exercise of discretion" by a coordinate branch:

> . . . petitioners call for a remedy which would embroil the judiciary in the management and operation of the State correction system...Where, as here, policy matters have *demonstrably and textually been committed to a coordinate, political branch of government,* any

> consideration of such matters by a branch or body other than that in which the power expressly is reposed would, absent extraordinary or emergency circumstances, constitute an *ultra vires* act. (emphasis added) (citations omitted).

Here, the State's duty to provide a sound basic education is "demonstrably and textually committed" to the Legislature by the Education Article itself, which specifically identifies the "legislature" as having the duty to ". . . provide for the maintenance and support of a system of free common schools . . .." *See Id.*, N.Y.S. Constitution, Art. XI, Sec. 1. As in *New York State Inspection*, plaintiffs call for a remedy that would improperly embroil the courts in the day-to-day operation of New York's public education system. 64 N.Y.2d at 239.

3. The amended complaints inappropriately dispute legislative policy determinations.

The Legislature has made detailed policy judgments about the length of teacher probation; about teacher tenure and due process; concerning teacher evaluation; and addressing economic layoffs. Plaintiffs are misusing the courts to dispute these policy judgments.

a. Probation

The *Wright* plaintiffs originally challenged the Education Law's three-year probationary period, asserting that at least four years are required to judge an effective teacher (R. 1363). Citing "most studies" (R. 1363), the *Wright* plaintiffs asked the lower court to overrule the Legislature's policy judgment on a matter

over which it has "plenary" authority. *See, e.g., Union Free Sch. Dist. No. 22 v. Wilson,* 281 A.D. 419, 424 (3d Dep't 1953), *lv. denied,* 306 N.Y. 979 (1953). Notably, now that the Legislature changed the probationary period to four years, the plaintiffs are still not satisfied.

For decades, statutory probationary periods for teachers have fluctuated between three and five years. From 1917 to 2015, the Legislature amended the teacher probation statutes at least nine (9) times, each time taking into account the policy choices important at the time. *See* L. 1917, c. 786; L. 1937, c. 314; L. 1945, c. 833; L. 1950, c. 762; L. 1955, c. 583; L. 1971, c. 116; L. 1974, c. 735; L. 1980, c. 442; L. 2015, c. 56. Unless it is unconstitutional for the Legislature to establish a probationary term, the length of that term is a policy matter for the Legislature.

b. Tenure

In New York, teachers have been statutorily provided a protected property right in continued employment. *Gould v. Bd. of Educ. Sewanhaka Cent. High Sch. Dist.,* 81 N.Y.2d 446, 451 (1993). The specific due process procedures established by the Legislature, and revised in 2008, 2010, 2012, and 2015, are a policy matter, so long as they meet the constitutionally-required minimum. *Loudermill v. Cleveland Bd. of Educ.,* 470 U.S. 532, 538, 541 (1985). There is simply no legal

basis to claim that the Legislature cannot make the policy decision to provide teachers who have *earned*[4] tenure with more than minimal due process.

The Legislature has determined that earned tenure and the attendant due process protection is an appropriate way to attract and retain qualified teachers. As one court explained:

> The Legislature has delegated to boards of education broad power to hire and fire teachers. This power was formerly exercised by employment contracts between the board and the individual teacher which were renewed annually, if they were renewed at all. The tenure statutes were enacted to alter this practice... *The primary purpose of the legislation was to assure security to competent teachers in positions to which they have been appointed. Moritz v. Bd. of Educ. of Gowanda Cent. Sch. Dist.,* 60 A.D.2d 161, 166 (4th Dep't 1977) (emphasis added) (citations omitted).

It is not the courts' role to pass judgment on the Legislature's sound policy decision to institute a tenure system, in lieu of renewable employment contracts.

In 2014, the Court of Appeals strongly reaffirmed the important policy purposes of tenure. *See Kilduff v. Rochester City Sch. Dist.*, 24 N.Y.3d 505, 509-10 (2014). And, in 2015, this Court noted that:

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[4] Teachers must comply with a rigorous certification regime. The "initial" certification requires teachers to meet educational degree requirements; achieve satisfactory scores on the NYS Teacher Certification Examination; and undertake at least 40 days of student teaching. *See* 8 NYCRR §§ 52.21(b)(2)(ii)(a)-(c); 80-1.5(a); 80-3.3(c)(1)(2). A new teacher has five years to complete all requirements for professional (permanent) certification, including earning a master's degree in the content area and three years of teaching experience. *See* 8 NYCRR §§ 80-3.3(a); 80-3.4(a), (b)(1), (2); 100.2(dd)(2)(iv). To maintain permanent certification, teachers must also engage in 100 hours of professional development every five years. Education Law § 3006-a(2)(a).

> The Legislature designed the tenure system "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 ... *Brown v. Bd. of Educ. of Mahopac Cent. Sch. Dist.*, 129 A.D.3d 1067, 1070 (2d Dep't 2015) (citations omitted).

The policy dispute asserted by plaintiffs is not novel. For example, in 1980 the Legislature considered extending the tenure laws to districts with fewer than eight teachers. *See* L. 1980, c. 442. In rejecting opposition to the proposal, a Senate memorandum eloquently summarized the critical policy justifications for tenure:

> The purpose of tenure is to provide the best possible teaching service for our youth by protecting the employment of the professional staff. Such protection should extend to all teachers regardless of the size of the school district that employs them. *Contrary to popular belief, tenure is not the right to hold a job for life, but rather it is the right to continued employment during good behavior and efficient and competent service, and guards against dismissal for arbitrary and personal or political reasons.* Tenure provides the climate for academic freedom. Without tenure, teachers are subject to whimsical dismissal and academic freedom cannot survive. (R. 615) (emphasis supplied).

Plaintiffs' policy dispute with the Legislature's judgment about how much procedural protection tenured teachers should have is not only non-justiciable, it is disingenuous. Missing from both complaints is any real effort to alert the Court to the Legislature's recent amendments to the challenged statutes, which were

enacted *after* the statistical data upon which plaintiffs rely were published. These amendments created a refined statutory scheme, different from the one that plaintiffs so misleadingly describe.

Plaintiffs' claims about the alleged length of the 3020-a process rely on unsubstantiated data collected between 1995 and 2008. (R. 46, 1365-66). The Legislature, however, amended and streamlined Education Law § 3020-a in 2008, 2010, 2012, and again in 2015.

In 2008, the Legislature provided for the *automatic* termination of a teacher's employment for certain criminal convictions. L. 2008, c. 296.

In 2010, the Legislature established an expedited hearing process for teachers who receive two annual performance ratings of "ineffective." L.2010, c. 103; Education Law §§ 3012-c(6); 3020(1), (3); 3020-a (a)(3)(c)(i-a)(A).

In 2012, the Legislature established a process requiring that all hearings for tenured teachers must be completed within 155 days of the filing of charges.[5] L. 2012, c. 57, pt. B, §1.

In 2015, the Legislature further expedited the hearing process for teachers with three consecutive "ineffective" ratings, mandating completion of the hearing within 30 days of the hearing request, and within 90 days for teachers with two

[5] If a teacher obstructs the proceeding, she may forfeit her salary for the period of delay. *Belluardo v. Bd. of Educ. of Commack Union Free Sch. Dist.*, 68 A.D.2d 887 (2d Dep't 1979); *Marconi v. Bd. of Educ. of Seaford Union Free Sch. Dist.*, 215 A.D.2d 659, 660 (2d Dep't 1995), *lv. denied,* 90 N.Y.2d 811 (1997).

consecutive "ineffective" ratings. L. 2015, c. 56; Education Law § 3020-b(3)(c)(i). The plaintiffs failed to supply the lower court with public data about the length of these cases under the amended statutes. Such data is in the record (R. 605-06), and may also be judicially noticed by the Court.[6]

The Legislature has made the policy judgment that teachers should be able to earn due process protection and has established reasonable due process procedures for teachers accessed of misconduct or incompetence. The plaintiffs' demand that the Legislature rewrite those procedures in some unspecified way is a non-justiciable policy dispute.

c. Teacher Evaluation.

Plaintiffs next attack teacher evaluation laws, saying that the Legislature has not provided a proper system for identifying minimally-effective teachers. (R. 1360-63). But, plaintiffs never try to define an "effective" teacher or explain what teacher evaluation system would, in their opinion, be constitutional.

Teacher evaluation is a complex policy issue, as shown by the ongoing legislative and regulatory effort to design a comprehensive teacher evaluation system. Education Law § 3012-c was adopted in 2010 and has since been amended

[6] Courts may judicially notice matters of fact, and "frequently" do so where "the nature of the subject, the issue involved, and the apparent justice of the case so dictate." *Cole Fisher Rogow v. Carl Ally, Inc.*, 29 A.D.2d 423, 426 (1st Dep't 1968), *aff'd*, 25 N.Y.2d 943 (1969); *see also People v. Jones*, 73 N.Y.2d 427, 431-32 (1989). Further, Courts may take judicial notice of government documents. *See Albano v. Kirby*, 36 N.Y.2d 526, 532 (1975); *Kingsbrook Jewish Medical Center v. Allstate Ins. Co.*, 61 A.D.3d 13, 19 (2d Dep't 2009) ("[e]ven material derived from official government websites may be the subject of judicial notice . . .").

several times. L.2010, c. 103; § 1, eff. July 1, 2010. Amended L. 2012, c. 21, §§ 1 to 11, eff. March 27, 2012; L.2012, c. 57, pt. A., § 22-a, eff. March 27, 2012; L.2012, c. 68, § 1, eff. July 1, 2012; L.2013, c. 57, pt. A, §§ 7, 7-a eff. March 29, 2013, deemed eff. April 1, 2013; L.2014, c. 56, pt. AA, subpt. G, §1, eff. March 31, 2014; L.2015, c. 56, pt. EE, subpt. D, §§ 6, 7, eff. April 13, 2015.

The Board of Regents has adopted extensive regulations governing teacher evaluation. 8 N.Y.C.R.R. Part 30. And, under the law, various elements of teacher evaluation are collectively bargained. *See generally*, Education Law § 3012-c, 3012-d. The issue's complexity is particularly evident from Governor Andrew Cuomo's creation of a task force in September 2015 to overhaul curriculum and reduce reliance on student testing, just months after amending the teacher evaluation system. Governor Cuomo praised teachers for "rightfully point[ing] out errors in the program" and recognized that change "in a very complex system ... must be carefully enacted ... [which] did not happen here." Office of Governor Andrew M. Cuomo, Governor Cuomo Announces Launch of Common Core Task Force, Sept. 28, 2015, *available at* https://www.governor.ny.gov/news/governor-cuomo-announces-launch-common-core-task-force (last visited Mar. 15, 2016).

Standards and procedures for teacher evaluation are under continuous review and refinement by the Legislature and the Board of Regents. This Court should reject the plaintiffs' effort to litigate this non-justiciable policy matter.

d. Seniority Protection

Plaintiffs claim the State may not provide seniority protection to teachers who render faithful and competent service. (R. 47-49, 51, 1370-72). Unless the Court is willing to hold that a public employee's seniority cannot constitutionally be given value, the weight given to seniority during layoffs is a policy matter for the Legislature.

Since 1951, the Education Law has required that seniority and teacher tenure area be used for determining teacher layoffs. L. 1950, c. 762, § 3. Similarly, the Civil Service Law has required that seniority be the basis for civil service layoffs since 1909. L. 1909, c. 15, § 31; *see* Civil Service Law § 80(1).

The courts have appropriately declined to interfere with the Legislature's determination that teacher layoffs should be made according to seniority. This Court explained why it could not modify such Education Law provisions:

> That another statutory scheme would be more equitable or would facilitate the task of the school district is a matter for the Legislature, not the courts. *See Cole v. Bd. of Educ. South Huntington Union Free Sch. Dist.*, 90 A.D.2d 419, 432 (2d Dep't 1982), *aff'd*, 60 N.Y.2d 941 (1983).

While plaintiffs question the Legislature's policy decision to protect more senior, experienced teachers,[7] judicial authority cannot be used to create a layoff

[7] The *Wright* plaintiffs apparently see no contradiction in their assertion that a probationary teacher's effectiveness cannot be determined in three years (R. 1372), but that such junior

system that benefits individuals "not contemplated by [the] statute" and does away with the Legislature's reasoned policy choice. *See Brewer v. Bd. of Educ. of Plainview-Old Bethpage Cent. Sch. Dist.*, 51 N.Y.2d 855, 857 (1980); *Silver v. Bd. of Educ. of W. Canada Val Cent. Sch. Dist., Newport*, 46 A.D. 2d 427, 431-32 (4th Dep't 1975) (any changes to tenure and seniority laws must be prospective[8] and made according to standards established by the Legislature or the Board of Regents).

As with probation and tenure, the Legislature has recently been active in the area of seniority. Education Law § 211-f, adopted in 2015, provides that in schools designated as "failing," teachers under certain circumstances can be removed without regard to their tenure or seniority rights. Moreover, various legislative efforts have sought to modify the seniority system in Education Law §§ 2510, 2585, and 3013. (R. 621-58). Such legislative proposals sought to, *inter alia*, remove seniority and tenure area as the sole criteria for teacher layoffs and consider teacher performance in layoff decisions. (R. 621-39). The proffered justification for such proposals mirrors plaintiffs' concerns here (R. 639) (asserting

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teachers *can* be deemed effective and retained in layoff situations over more experienced, tenured teachers. (R. 1370).

[8] The removal of statutorily guaranteed employment protections raises serious constitutional issues. A federal court recently held that Indiana violated the Contract Clause of the United States Constitution by stripping school teachers of their statutory seniority rights. *Elliot v. Bd. of Sch. Trustee of Madison Consol. Schools*, 2015 WL 1125022 (S.D. Ind. 2015) *appeal filed,* 2015 WL 2341226 (S.D. Ind. 2015).

that "the educational needs of the students take a subordinate role in staffing decisions"). Nevertheless, the Legislature has determined that the current seniority system should remain in place, except where Education Law § 211-f applies.

The Legislature has broad authority to set the general terms and conditions of teachers' employment, to attract qualified teachers and to retain them so long as their service is faithful and competent; and to empower them to perform professionally. It is not the role of the judiciary to override the Legislature's policy judgments. Each of plaintiffs' claims should be dismissed as non-justiciable.

POINT II

PLAINTIFFS HAVE NOT MET THE PLEADING REQUIREMENTS FOR AN ARTICLE XI, §1 CLAIM, NOR HAVE THEY ALLEGED FACTS SUFFICIENT TO SUPPORT THE CLAIM THAT EACH OF NEW YORK'S 700 SCHOOL DISTRICTS IS NOT PROVIDING THE OPPORTUNITY FOR A SOUND BASIC EDUCATION.

A claim under the Constitution's Education Article minimally requires: the deprivation of a sound basic education; and causes attributable to the State. *New York Civ. Liberties Union v. State of New York ("NYCLU"),* 4 N.Y.3d 175, 178-79 (2005); *rearg. denied,* 4 N.Y.3d 882 (2005).

Furthermore, "a claim under the Education Article requires that a school district-wide failure be pleaded." *NYCLU,* 4 N.Y.3d at 182; *see also New York City Parents Union v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y.,* 124 A.D.3d

451, 452 (1st Dep't 2015); *New York State Ass'n. of Small City Sch. Dists., Inc. v. State of New York,* 42 A.D.3d 648, 652 (3d Dep't 2007) (complaint dismissed because the alleged facts did not pertain to any particular school district). There must be adequate factual support for the allegation that a particular school district is failing to provide a sound basic education. *Hussein v. State*, 81 A.D.3d 132, 136 (3d Dep't 2011), *aff'd*, 19 N.Y.3d 899 (2012); *NYCLU*, 4 N.Y.3d at 182; *Campaign for Fiscal Equity v. State of New York ("CFE I")*, 86 N.Y.2d 307, 319 (1995); *see also Papasan v. Allain*, 478 U.S. 265, 286 (1986) (absent adequately pleaded facts, court may disregard allegations that plaintiffs have not received a minimally adequate education).

Next, the "failure to sufficiently plead causation by the State is fatal to [an Education Article] claim." *NYCLU,* 4 N.Y.3d at 179. Similarly, an Education Article claim "requires a clear articulation of the asserted failings of the State, sufficient for the State to know what it will be expected to do should the plaintiffs prevail." *Id.* at 180.

Finally, *every* pleading must be supported by more than conclusory or speculative allegations. "While it is axiomatic that a court must assume the truth of the complaint's allegations, such an assumption must fail where there are conclusory allegations lacking factual support." *Elsky v. KM Ins. Brokers*, 139 A.D.2d 691 (2d Dep't 1988); s*ee also New York City Tr. Auth.,* 55 A.D.3d 817, 818

(2d Dep't 2008) (*quoting Morris v. Morris,* 306 A.D.2d 449, 451 (2d Dep't 2003)); *Salvatore v. Kumar,* 45 A.D.3d 560, 563 (2d Dep't 2007), *lv denied,* 10 N.Y.3d 703 (2008) ("allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration . . .") (internal quotation marks omitted); *Accord EBC I, Inc. v. Goldman, Sachs & Co. ("EBC I"),* 5 N.Y.3d 11, 27 (2005).

A. Plaintiffs' reliance on the 2013 State assessments as the sole factual basis for the claim of statewide failure of a sound basic education is fatal to their complaints.

The plaintiffs broadly allege that New York's *entire* public school system is failing. (R. 38, 1352). The factual basis for this sweeping claim is the 2013 Grade 3-8 English Language Arts and Mathematics State assessment scores. (R. 1361). The plaintiffs contend that because a low percentage of students tested as proficient, it must mean that there are "tens of thousands" of ineffective teachers. (R. 1137). The plaintiffs then speculate that the State has so many ineffective teachers because of the challenged statutes. (R. 38-39, 1359-72). These standardized assessments are an insufficient basis for plaintiffs' claims.

The Court of Appeals has equated a sound basic education with a meaningful high school education "which enable[s] [students] to eventually function productively as civic participants capable of voting and serving on a jury." *Campaign for Fiscal Equity v. State,* 100 N.Y. 2d 893, 905-08 (2003). It has not

equated a sound basic education with proficiency on any particular standardized assessment scores.

In fact, the Court has warned: "performance levels on [standardized tests] are helpful [to measure minimum educational skills] but should also be used cautiously as there are a myriad of facts that have a causal bearing on test results ..." *Campaign for Fiscal Equity v. State,* 86 N.Y. 2d 307, 316-17 (1995). This admonition is particularly apt with respect to the 2013 test scores.

Beginning in 2013, State assessment scores were, for the first time, based on the new Common Core curriculum. According to the *plaintiffs' own exhibits*, "trying to resolve the apparent paradox of good teacher ratings despite disappointing test scores for their students is a lot like the folly of *trying to compare apples to oranges*." (R. 352) (emphasis supplied). This report continues: "[e]stimating the student growth component was especially tricky [in 2013] because [that] year's tests measured students against the new Common Core standards, while state tests in previous years were designed to measure performance based on standards set in 2005." (R. 353). Accordingly, a "flurry of charts, Excel worksheets, tables and guidance" were necessary to interpret the data *Id.* Commissioner King noted that, "[w]ithout comparisons, raw test results are virtually worthless for judging teacher performance." *Id.*

Because of the new, higher standards, SED emphasized that: "*the number of students meeting or exceeding Common Core grade-level expectations should not necessarily be interpreted as a decline in student learning or as a decline in educator performance.*" *Id.* emphasis in original. SED fully anticipated the drop in the 2013 Common Core test scores:

> [T]he first New York State tests to measure student progress on the Common Core will be administered in April 2013 for Grades 3-8 ELA and math. Because the new tests are designed to determine whether students are meeting a higher performance standard, we expect that fewer students will perform at or above grade-level Common Core expectations (i.e., proficiency) than was the case with prior-year State tests.[9]

Further, the 2013 tests, for the first time measured:

> *student grade-level expectations against a trajectory of college- and career-readiness as measured by tests fully reflective of the Common Core and, as a result, the number of students who score at or above grade level expectations will likely decrease.* *Id.* emphasis in original.

All of these reports and memoranda demonstrate that the new Common Core standardized assessments are not a reliable measure of teaching or learning. In fact, the Legislature in 2014 enacted a moratorium, *prohibiting* the use of Grade 3-8 State standardized English or Mathematics assessment scores as the sole basis for

[9] Memo from Ken Slentz, Deputy Commissioner, Office of P-12 Education, *Implementation of the Common Core Learning Standards* (Mar. 2013), *available at* https://www.engageny.org/resource/field-memo-transition-to-common-core-assessments (last visited Mar. 2, 2016).

high stakes educational decisions for students, and *prohibiting* the inclusion of individual student scores on these assessments in a student's official transcript or in a student's permanent record. Education Law §§ 305(45), (47).

More recent events eliminate any remaining doubt whether the 2013 Common Core assessments provide an adequate factual basis for plaintiffs' claim of a statewide failure to provide a sound basic education.

Because of widespread public concern about the implementation of the new Common Core curriculum, in 2015 Governor Cuomo convened a task force of parents, business leaders, legislators and educators to "undertake a comprehensive review of the current status and use of the Common Core State Standards in New York, and to recommend potential reforms of the system."[10] Among the Task Force's key findings:

> - The Board of Regents adopted the Common Core in January 2011, but SED did not post the majority of the entire standards-aligned curriculum resources before the start of the 2012-2013 school year, leaving teachers unable to adapt or select curriculum, update their lesson plans and routine assessments of student learning, or rearrange classroom learning to be Standards-aligned. Further, SED required students to take new Common Core-aligned tests in Spring of 2013, the first year of Common Core instruction, before students and teachers had time to adjust to these new standards. *Id.* at 15.

[10] New York State, New York Common Core Task Force *available at* http://www.ny.gov/programs/common-core-task-force (last visited Feb. 29, 2016).

- SED resources were not fully available at the start of [the 2012-2013] school year, with very few curriculum modules posted . . .. This timing means that teachers were asked to implement and teach to an unavailable curriculum -- an impossible task. *Id.* at 13.

- The implementation of the Common Core in New York was rushed and flawed. Teachers stepped into their classrooms in the 2012-2013 school year unfamiliar and uncomfortable with the new standards, without curriculum resources to teach students, and forced to administer new high-stakes standardized tests that were designed by a corporation instead of educators. *Id.* at 35.

As a result, the Task Force recommended, in part:

> . . . until the transition to a new system is complete, i.e., New York State-specific standards are fully developed along with corresponding curriculum and tests, State-administered standardized ELA and Mathematics assessments for grades three through eight aligned to the Common Core or updated standards shall not have consequences for individual students or teachers. Further, any growth model based on these Common Core tests or other state assessments shall not have consequences and shall only be used on an advisory basis for teachers. The transition phase shall last until the start of the 2019-2020 school year. *Id.* at 36.

In January 2016, the Board of Regents adopted this recommendation, meaning that these State assessments can no longer be used to judge teacher effectiveness or make high stakes employment decisions for teachers. 8 NYCRR §§ 30-2.14, 30-3.14.

The Common Core test results have thus been determined by the Legislature and the Board of Regents to be *legally incompetent* for assessing *student* or *teacher*

performance. Yet, these 2013 test results are proffered as the factual foundation for plaintiffs stunning allegation that New York's students *statewide* are not receiving an "adequate education" and that "tens of thousands" of public school students have ineffective teachers. (R. 1137).

Even if the 2013 test results were not worthless for measuring student or teacher performance,[11] *plaintiffs' own exhibits* further illustrate that test results alone are insufficient to evaluate teachers. (*See e.g.*, R. 190) ("Multiple measures also produce more consistent ratings than student achievement measures alone. Estimates of teachers' effectiveness are more stable from year to year when they combine classroom observations, student surveys, and measures of student achievement gains than when they are based solely on the latter."); *See also* R. 195. ("[H]eavily weighting a single measure may incentivize teachers to focus too narrowly on a single aspect of effective teaching and neglect its other important aspects"). And, the Legislature in enacting Education Law § 3012-c and § 3012-d mandated that teacher effectiveness be determined by multiple measures.

Because the Court of Appeals has warned against placing too much reliance on standardized assessments, and because the Legislature and the Board of Regents have specifically rejected the use of the Common Core assessments as a proper

[11] The American Statistical Association has cautioned against using student standardized test scores for measuring teacher performance. *See* American Statistical Association, *ASA Statement on Using Value-Added Models for Educational Assessment*, Apr. 8, 2014, *available at* http://www.amstat.org/policy/pdfs/asa_vam_statement.pdf.

measure of student or teacher performance, plaintiffs' reliance on the 2013 Grade 3-8 State Common Core assessments to assert a statewide failure of our public schools is fatal to plaintiffs' complaints.

B. Plaintiffs' speculative allegations do not meet the pleading requirements for an Education Article claim.

Neither amended complaint cites a single instance where an "ineffective" teacher has been retained because of the challenged statutes. Plaintiffs conclusory and speculative allegations are insufficient to defeat a motion to dismiss. Such allegations should not be accepted by the Court as true. *See EBC I*, 5 N.Y.3d at 27; *Ruffino v. New York City Transit Authority*, 55 A.D.3d 817-18 (2d Dep't 2008).

For example, the *Wright* plaintiffs' main premise in claiming that Education Law §§ 3020 and 3020-a are unconstitutional is that the "[d]isciplinary [s]tatutes result in the retention of ineffective teachers." (R. 1364). The *Wright* plaintiffs baldly assert that "the standard for proving just cause to terminate a teacher is nigh impossible to satisfy," and that "[d]isciplinary proceedings are rarely initiated." (R. 1364-65). Even more egregious are the unsupported claims that "administrators are deterred from giving an Ineffective rating" and that "[o]n information and belief, principals and other administrators may be inclined to rate teachers artificially high because of the lengthy appeals process for an ineffectiveness rating and because

they must partake in the development and execution of a teacher improvement plan ("TIP") for Developing and Ineffective teachers."[12] (R. 1363).

The *Wright* plaintiffs also speculate that "it may be difficult for school districts to collect enough evidence for a 3020-a hearing within the three-year period." (R. 1365). The *Wright* plaintiffs assert, without factual support, that Education Law § 3020-a proceedings are "futile" and that "dismissals are so rare not because there are no incompetent teachers, but because the Permanent Employment and Disciplinary Statutes make it impossible to fire them." (R. 1369). Likewise, the *Davids* plaintiffs assert that "most ineffective teachers are not dismissed for their poor performance . . ." (R. 44).

To support these claims, plaintiffs cite an informal 2008 State School Boards Association Survey (R. 373-74), which concluded that teacher disciplinary cases are time-consuming and expensive. This survey is irrelevant to the constitutionality of the challenged statutes because, as noted in Point I, courts review statutes as they are written, not as they may be maladministered. *Benson*, 50 N.Y.2d at 996. More importantly, the challenged statutes were amended in 2008, 2010, 2012, and 2015, and official statistics from SED about the length of

[12] The plaintiffs ignore the fact that public school principals are also safeguarded by the tenure laws. *See* Education Law §§ 2509(2), 2573, 3012. For all the reasons tenure is appropriate for teachers, it is likewise appropriate for principals.

teacher disciplinary cases are in the record. (R. 479-80, 908). These statistics totally discredit plaintiffs' wildly inflated and inaccurate claims.

Further, plaintiffs' claims about the disparate educational progress of identical twins (R. 1352-53), among New York's 2.65 million public school students, certainly cannot be deemed a sufficient basis for a claim that New York's entire public education system is failing.

The amended complaints should be dismissed because each of plaintiffs' sweeping, speculative claims is pleaded without an adequate factual basis.

C. The amended complaints fail to allege any district-wide failures to provide a sound basic education.

The plaintiffs wholly disregard the requirement that an Education Article claim must allege and factually support a school district-wide failure. *See NYCLU*, 4 N.Y.3d at 182; *New York State Ass'n of Small City Sch. Dists.*, 42 A.D.3d 648, 652 3d Dep't 2007). Indeed, as plaintiffs are from only three school districts and do not seek class certification, they cannot properly allege, and have *not* properly alleged, that each of New York's 700 school districts is failing to provide a sound basic education. Plaintiffs even failed to allege any district-specific facts for their respective districts that could meet the Education Article pleading requirements.

In *Hussein*, parents pleaded an Education Article claim by adequately alleging specific, *district-wide* failures to provide a sound basic education. *See Hussein*, 81 A.D.3d at 134-36. As the Third Department stated:

> ... plaintiffs' complaint is replete with detailed data allegedly demonstrating, among other things, inadequate teacher qualifications, building standards and equipment, which illustrate glaring deficiencies in the current quality of the schools in plaintiffs' districts and a substantial need for increased aid. *Id.* (footnote omitted).

Thus, the *Hussein* complaint survived a motion to dismiss because it contained comprehensive data about *specific* school districts, detailing how deficient educational inputs led to deficient educational outputs. *See Id.* In contrast, the plaintiffs at bar fail to allege any district-wide failure to provide a sound basic education.

Public documents eviscerate any claim every New York school district is failing to provide a sound basic education. These documents show that hundreds of districts perform exceedingly well under the challenged statutes. *See, e.g.,* NYS Report Card 2014-2015 (latest version available) *available http://www.data.nysed.gov* (last visited Mar. 4, 2016). Scarsdale Union Free School District, for instance, had a 99% graduation rate in the 2014-2015 school year.[13] This Report Card also shows that many districts had 90-100% Regents Exam pass rates in Algebra, Trigonometry, Physics, Earth Science, Global History,

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[13] *See* NYSED, *Scarsdale UFSD – School Report Card Data [2014-15], available at* http://data.nysed.gov/reportcard.php?instid=800000034921&year=2015&createreport=1&allchecked=1&enrollment=1&avgclasssize=1&freelunch=1&attendance=1&suspensions=1&teacherqual=1&teacherturnover=1&staffcounts=1&hscompleters=1&hsnoncompleters=1&postgradcompleters=1&38ELA=1&38MATH=1&48SCI=1&lep=1&naep=1&cohort=1&regents=1&nysaa=1&nyseslat=1&elemELA=1&elemMATH=1&elemSci=1&secondELA=1&secondMATH=1&unweighted=1&gradrate=1 (last visited Mar. 4, 2016).

Geography, U.S. History and Government. *Id.* Additionally, publicly available data demonstrate that the statewide graduation rate increased by more than 10 percentage points since 2006.[14]

The plaintiffs' failure to allege facts showing that any New York school district is failing to provide a sound basic education is fatal to plaintiffs' complaints.

D. Plaintiffs failed to adequately plead a causal connection between the challenged statutes and the alleged lack of an opportunity for a sound basic education.

As discussed in Point I, the challenged tenure and seniority statutes represent a century of careful legislative policy-making. If these continually refined statutes are the cause of a *statewide* failure to provide a sound basic education then, according to plaintiffs' logic, New York's public schools have *never* been in compliance with the Constitution.[15]

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[14] *See* NYSED, *Education Department Releases 2015 High School Graduation Rates*, Jan. 11, 2016,http://www.nysed.gov/Press/Education-Department-Releases-2015-High-School-Graduation-Rates (last visited Mar. 7, 2016); NYSED, *School Report Cards Show Progress in Student Achievement But Problems in Current Graduation Rates - and Point to Reforms*, May 3, 2006, http:///www.p12.nysed.gov/irs/pressRelease/20060503/release.htm (last visited Mar. 9, 2016).

[15] In 1982, despite the existence of the challenged statutes, the Court of Appeals stated: " . . . New York has long been acknowledged to be a leader in its provision of public elementary and secondary educational facilities, and services ..." *Bd. of Educ., Levittown Central Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 38 (1982), *appeal dismissed*, 459 U.S. 1139 (1983). More recently, despite the existence of the challenged statutes, *Education Week* ranked New York's public schools second, third and ninth nationally over the last four years. Press Release, Education Week, Report Awards State Grades for Education Performance, Policy (Jan. 11, 2011), *available*

Plaintiffs, however, have failed to allege any facts to support the allegation that the challenged statutes caused the low student scores on the 2013 state assessments, resulted in any district-wide failure, or led to the difference in academic progress between a single set of identical twins. The failure to adequately allege facts supporting the claim that the challenged statutes caused a statewide failure to provide a sound basic education is fatal to plaintiffs' complaints. *See NYCLU,* 4 N.Y.3d at 178-79.

E. Plaintiffs have failed to specify how the State must correct the deficiencies alleged in the complaints.

In *NYCLU*, the plaintiffs alleged that the State failed to correct various deficiencies within 27 individual schools. *Id.* at 178. The plaintiffs sought an injunction "directing defendants to remedy this constitutional violation by creating, implementing and maintaining a statutory and regulatory system that complies with the Education Article . . ." *Id.* at 179. The Court of Appeals dismissed the complaint, holding that an Education Article claim must *specifically* articulate the

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at http://www.edweek.org/media/ew/qc/2011/QualityCounts2011_PressRelease.pdf;State; Education Week, State Report Cards, Vol. 31, Issue 16 (Jan. 9, 2012), *available* at: http://www.edweek.org/ew/qc/2012/16src.h31.html; Press Release, Education Week, State and National Grades Issued for Education Performance, Policy (Jan. 10, 2013), *available at* http://www.edweek.org/media/QualityCounts2013Release.pdf. Education Week, Quality Counts 2015 Press Release http://www.edweek.org/media/QualityCounts2015Release.pdf; Education Week, Quality Counts 2016 Press Release http://www.edweek.org/media/QualityCounts2016Release.pdf.

State's failings so the State will know what it must do to remedy such failings. *Id.* at 180.

Here, plaintiffs broadly attack the Legislature's effort to regulate the employment of qualified educators. But the plaintiffs never say what statutory scheme would pass muster. They never say how long probation should last; what due process disciplinary procedures might be acceptable; what constitutes an effective teacher or how teachers should be evaluated; or, when there are economic layoffs, how teachers should be selected for excessing. Instead, they seek to enjoin "... any system of teacher employment, retention and dismissal that is substantially similar to the framework implemented by the Challenged Statutes ...." (R. 53).

The declaratory relief sought by the plaintiffs would leave an enormous void in the education law, throwing our public schools and the employment of a quarter million New Yorkers into turmoil. The plaintiffs' failure to clearly articulate the failings of the State so that the State will know "what it will be expected to do should the plaintiffs prevail" is fatal to their complaints. *See NYCLU,* 4 N.Y.3d at 180.

POINT III

THE CHALLENGED STATUTES RATIONALLY RELATE TO LEGITIMATE STATE INTERESTS.

A plaintiff alleging that statutes are unconstitutional bears a heavy burden, because "legislation is presumed to be valid." *City of Cleburne, Texas v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *see also Federal Commc'ns Comm'n v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993) (noting that the presumption of validity is "strong"); *Iannucci v. Bd. of Supervisors*, 20 N.Y.2d 244, 253 (1967) ("... legislation should not be declared unconstitutional unless it clearly appears to be so; all doubts should be resolved in favor of the constitutionality of an act.)" (quotation marks omitted) (citation omitted); *Accord Lavalle v. Hayden*, 98 N.Y.2d 155, 161 (2002); *Bobka v. Town of Huntington*, 143 A.D.2d 381, 383(2d Dep't 1988), *lv. denied*, 73 N.Y.2d 704 (1989). "Simply stated, 'the invalidity of the law must be demonstrated beyond a reasonable doubt.'" *People v. Tichenor*, 89 N.Y.2d 769, 773 (1997) (*quoting People v. Pagnotta*, 25 N.Y.2d 333, 337 (1969)). Adding to plaintiffs' heavy burden is the fact that two of the challenged statutes - - Education Law §§ 3012 and 3020-a - - have already been found constitutional under Article XI. *See Brady v. A Certain Teacher*, 166 Misc.2d 566, 574-75 (Sup. Ct. Suffolk Co. 1995).

A. The statutes, as written, are facially constitutional.

As noted in Point I, where the constitutionality of a statute is challenged, the court reviews the statute *as written*, not as it may be allegedly maladministered. *See Benson,* 50 N.Y.2d at 996. *See also Town of N. Hempstead v. Vil. of Westbury,* 182 A.D.2d 272, 282-83 (2d Dep't 1992).

Ignoring this principle, the *Wright* plaintiffs, for example, allege that, "[t]hrough enforcement by the Defendants, the Challenged Statutes confer permanent employment, prevent the removal of ineffective teachers, and result in layoffs of effective teachers in favor of less-effective, more senior teachers." (R. 1357). Similarly, the *Davids* plaintiffs allege that that the challenged statutes are being improperly administered. (R. 44). Such claims about the alleged maladministration of the challenged statutes are not cognizable under *Benson.* 50 N.Y.2d at 996.

Even if such claims were cognizable, plaintiffs allege no facts demonstrating that the statutes are being maladministered. Again, neither amended complaint alleges the current statistics about the length of teacher disciplinary cases challenged laws, which have been amended multiple times since 2008.

B. The challenged statutes rationally relate to valid state interests.

Plaintiffs say education would be improved if teachers served a longer probation; if earned tenure carried attenuated or no due process rights; and if

teachers lost the protection of seniority. The Legislature has made different judgments. Thus, plaintiffs must overcome the heavy burden of demonstrating that the Legislature's judgments have no rational basis. *See People v. Knox*, 12 N.Y.3d 60, 67 (2009). Clearly, there exist rational bases for the challenged laws.

1. Teacher Probation

Though a majority of states have adopted a three year probationary term for teachers (R. 682-85), New York has now established a four-year probationary term. *See* Education Law §§ 2509, 2573, 3012, 3014.

Probationary teachers can be fired for any reason or no reason, absent illegal motivation. *See Frasier v. Bd. of Educ. of City School Dist. of City of N.Y.*, 71 N.Y.2d 763, 765 (1988); *James v. Bd. of Educ.of Cent. Sch. Dist. No. 1,* 37 N.Y.2d 891, 892 (1975). Probationary teachers are subject to rigorous evaluation under Education Law §§ 3012-c and 3012-d. Where a Board needs additional time to evaluate a probationer, probation may be extended. *Matter of Juul v. Bd. of Educ., Hempstead Sch. Dist. No. 1, Hempstead*, 76 A.D.2d 837, 838 (2d Dep't 1980), *aff'd,* 55 N.Y.2d 648 (1981). A board of education's discretion to grant or deny tenure cannot be diminished through collective bargaining. *See Matter of Cohoes City Sch. Dist. v. Cohoes Teachers Ass'n*, 40 N.Y.2d 774, 775 (1976).

The debate over the length of teachers' probation is not new - - the probationary term has been amended at least nine (9) times since 1917 (*see* pp. 13,

above). The Legislature has now made the considered judgment that four years is sufficient to enable an appropriate tenure decision, but not so long as to discourage prospective teachers from joining the profession. The plaintiffs have alleged nothing to demonstrate that there is not a rational basis for the Legislature's determination as to the length of teacher probation.

2. Tenure/Due Process

Plaintiffs want to limit or eliminate teachers' due process rights, claiming teachers receive "extraordinary" (R. 1360) or "super" (R. 46) due process. Plaintiffs posit the radical proposition that procedural due process--a fundamental right enshrined in the Fifth and Fourteenth Amendments to the U.S. Constitution and Art. I, Sec. 6 of the New York Constitution -- is itself, in the context of public school teachers, somehow unconstitutional under the Education Article. There simply is no cognizable legal claim that the State may not statutorily create a property interest in public employment or provide procedural due process before depriving a public employee of that interest. This is self-evident. Any contrary conclusion would ignore decades of careful policy-making by the Legislature and scrutiny by the courts.

Under Education Law § 3020, a teacher can be disciplined for "just cause." This includes pedagogical incompetence; physical or mental disability; lack of certification; insubordination, immoral character or conduct unbecoming a teacher.

Education Law § 3012(2)(a) - (c). This disciplinary process is to be complete, barring extraordinary circumstances, within 155 days. Education Law § 3020-a(3)(c)(vii)(4). In cases involving consecutive ineffective ratings, an expedited 30-day or 90-day process is established. Education Law § 3020-b(3)(c)(i).

These due process protections do *not* guarantee "lifetime" employment, as the plaintiffs so misleadingly allege. (R. 1357, 1372). These laws only ensure that an educator who has *earned* tenure is given a fair chance to defend accusations of misconduct, pedagogical incompetence or physical or mental disability.[16]

a. There is a rational basis for tenure.

Attracting and retaining qualified teachers is a crucial public concern. As noted in *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923):

> Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable, essential, indeed, to the public welfare.

Despite its importance, teaching remains a moderately paid profession.[17] It is rational for the Legislature to enact laws to attract, retain and empower effective

[16] Most states provide due process protection to educators. (R. 682-85).

[17] In New York, the annual mean wage range for teachers in elementary, secondary and technical school is $60,020 to $76,760. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, May 2014 State Occupational Employment and Wage Estimates New York, http://www.bls.gov/oes/current/oes_ny.htm#25-0000 (last visited Feb. 29, 2016). For other professions in New York, the annual mean wages for architects and engineers was $79,750; for

teachers, by providing reasonable due process protection against arbitrary dismissal. It is rational for the Legislature to conclude that ordinary working people, teachers included, desire a measure of employment security for themselves and their families. And, it is rational for the Legislature to provide a fair hearing to employees who are accused of misconduct or incompetence.

Most important, tenure is a rational way to foster strong public education and to protect school children. Safeguarding good teachers from arbitrary dismissal promotes academic freedom - - a cherished value in our State. Tenure also enables teachers to speak on behalf of their students about unsound educational practices or unsafe school conditions. These concerns have been repeatedly emphasized by Legislature and the courts.

Education Law § 3020-a is a central part of a "comprehensive statutory tenure system," enacted in recognition of the need for "stability in the employment relationship between teachers and the school districts which employ them." *Holt v. Bd. of Educ. of Webutuck Cent. Sch. Dist.,* 52 N.Y.2d 625, 632 (1981).

The Court of Appeals has warned that tenure must be vigilantly protected against strategies that attempt to circumvent the will of the Legislature. As stated

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lawyers, $154,340; for dentists, $164,030; and for physicians (general and family practice), $187,140. *See also* R. 608.

in *Ricca v. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 47 N.Y.2d 385, 391 (1979):

> [The tenure system] is a 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. [*Accord Costello v. Bd. of Educ. of E. Islip Union Free Sch. Dist.*, 250 A.D.2d 846, 846-47 (2d Dep't 1998)].

Commenting on the procedural guarantees in Section 3020-a, the Court of Appeals stated:

> We do not gainsay the importance of these standards both in terms of their role in protecting the rights of individual teachers whose years of satisfactory service have earned them this security and in fostering an independent and professional corps of teachers. *Abramovich v. Bd. of Educ. of Cent. Sch. Dist. No. 1 of Towns of Brookhaven and Smithtown,* 46 N.Y.2d 450, 455 (1979).

The *Wright* plaintiffs denigrate New York's tenure laws as "outdated." (R. 1352). The truth is that the tenure laws are more important than ever. Tenure is the primary legal safeguard for teachers who advocate for students' educational rights, or who expose unsound educational practices or safety problems within the schools.

In *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006), the U.S. Supreme Court held that a public employee has *no* First Amendment protection when speaking as

an employee. This holding has been frequently applied to public school teachers. *See, e.g.*, *Massaro v. New York City Dep't. of Educ.*, 481 Fed. Appx. 653, 656 (2d Cir. 2012) (teacher's complaints about the unsanitary school conditions were not protected by the First Amendment); *Weintraub v. New York City Dep't. of Educ.*, 593 F.3d 196, 205 (2d Cir. 2010) (teacher's complaint concerning school's failure to enforce classroom discipline was not protected); *Woodlock v. Orange Ulster B.O.C.E.S*, 281 Fed. Appx. 66, 68 (2d Cir. 2008) (school counselor's complaints about violations of SED's recommendations were not protected); *Palmer v. Penfield Cent. Sch. Dist.*, 918 F.Supp.2d 192, 198 (W.D.N.Y. 2013) (teacher's speech about the disparate treatment of minority students was not protected); *Stahura-Uhl v. Iroquois Cent. Sch. Dist.*, 836 F.Supp.2d 132, 142-43 (W.D.N.Y. 2011) (a teacher who spoke publicly about the inadequacy of special education programs was speaking as an employee and thus not protected by the First Amendment); *Anglisano v. New York City Dep't of Educ.*, 2015 WL 5821786 at *6-7 (E.D.N.Y. 2015) (teacher's alert to her supervisors about her co-teacher's egregious behavior was not protected by the First Amendment because she was trying to protect her own students and thus performing one of her essential duties). *See also O'Connor v. Huntington Union Free Sch. Dist.*, 2014 WL 1233038 at *8-9 (E.D.N.Y. 2014) (compiling similar cases and noting that teacher reports of student cheating, testing improprieties, disciplinary problems, fraud with respect to

student files, school trip safety, improper tutoring, or abuse of students by another teacher are all within a teacher's duties and therefore unprotected by the First Amendment).

In light of *Garcetti* and its progeny, tenure is more important than ever to protect teachers who alert school officials to unsound educational practices, discrimination, safety hazards, bullying or child abuse.

b. The due process protections of Education Law § 3020-a are not excessive.

There is no legal basis for plaintiffs' claim that the Education Article limits the Legislature's authority to establish public employees' terms and conditions of employment, including the quantum of due process protection for tenured teachers. Again, plaintiffs' claim is radical - - the State through its labor laws even has the authority to regulate *private* employment. *See New York Labor Law.* The Legislature's authority to regulate public employment is unquestionably even greater. *See, e.g., Garcetti,* 547 U.S. at 418 (noting that "[t]he government as employer, indeed has far broader powers than does the government as sovereign") (internal citation and quotation marks omitted).

Our courts have never limited the Legislature's authority to provide statutory employment safeguards to public employees. Rather, the courts have ruled only that the constitution sets a procedural due process *floor* for public employees who have an objective expectancy of continued employment, whether that

expectancy is created by law, individual contract or a collective bargaining agreement. *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577-78 (1972); and *Loudermill*, 470 U.S. at 542-43. In light of the State's profound interest in protecting qualified, effective teachers from unjust firing, it is entirely rational for the Legislature, and well within its power, to provide more due process than the constitutional minimum.

Tenured teachers have a constitutionally protected property interest in their continued employment. *Gould*, 81 N.Y.2d at 451. To ordinary working people, this interest is crucial. As noted by the U.S. Supreme Court:

> ... the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood ... While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job. *Loudermill,* 470 U.S. at 543 (citations omitted).

The right to teach is also a constitutionally protected liberty interest. *Meyer,* 262 U.S. at 400; *Knutsen v. Bolas*, 114 Misc. 2d 130, 132 (Sup. Ct., Erie Co. 1982), *aff'd* 96 A.D.2d 723 (4th Dep't 1983), *lv. denied*, 60 N.Y.2d 557 (1983) (explaining that "[l]iberty under the Fourteenth Amendment ... includes the right of the individual to engage in any of the common occupations of life"). Given the importance of these interests, it is rational for the Legislature to provide due process above the bare minimum required by the Constitution.

Plaintiffs counter that teachers are provided more protection than other public servants. (R. 46-47, 1360). This is legally irrelevant. There is no legal basis for a claim that the Legislature may not rationally provide different disciplinary procedures for different classes of employees. Given the importance of attracting and retaining good teachers,[18] it is rational for the Legislature to establish a process that guarantees a fair hearing before tenured teachers are discharged.

Moreover, plaintiffs are wrong when they claim that teachers have more due process protection than other public employees. Most public employees in New York are entitled to substantially similar and, in some respects, even superior due process rights. *See, e.g., Donnelly v. Greenburgh Cent. Sch. Dist. No. 7*, 691 F.3d 134, 148-49 (2d Cir. 2012).

Pursuant to Civil Service Law §§ 75 and 76, most civil servants who have successfully completed probation are entitled to a due process hearing if accused of incompetence or misconduct. Unlike section 3020-a, which has a maximum 155-day time limit for hearings, and a 30 or 90-day limit for certain pedagogical incompetency hearings, there are no time limits for section 75 hearings.

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[18] A North Carolina court recently found that the Legislature's action in eliminating tenure "hurts North Carolina public schools by making it harder for school districts to attract and retain quality teachers." *See North Carolina Ass'n of Educators, Inc. v. State*, 776 S.E.2d 1, 7-8 (2015), *review granted* 775 S.E.2d 831 (Mem) (2015).

Similarly, the plaintiffs claim that section 3020-a's three year statute of limitations for disciplinary charges is too short. (R. 1365). However, Civil Service Law § 75(4) has an eighteen month statute of limitations, and a one-year statute of limitations for certain employees.[19]

Further, under Section 75, the final administrative decision is judicially reviewable through CPLR Article 78, which has a four-month statute of limitations under Civil Service Law § 76(1), as opposed to the 10-day statute of limitations to challenge a 3020-a decision. *See* Education Law § 3020-a(5).

More important, Section 75's procedures may be replaced by collectively bargained procedures. *See* Civil Service Law § 76(4); *Antinore v. State of New York*, 49 A.D.2d 6, 8-9 (4th Dep't 1975), *aff'd,* 40 N.Y.2d 921 (1976). Disciplinary procedures are, generally, a mandatory subject of bargaining under New York's Taylor Law. *See* Civil Service Law §§ 200 *et seq.*; *Matter of New York City Tr. Auth. v. Public Empl. Relations Bd.*, 276 A.D.2d 702, 703 (2d Dep't 2000), *lv denied*, 96 N.Y.2d 713 (2001). Most state employees are protected by contracts containing disciplinary procedures that are substantially equivalent to Education Law § 3020-a.[20]

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[19] Both 3020-a and Civil Service Law §75 exempt acts that would constitute a crime from their limitation provisions.

[20] The collective bargaining agreements between the State of New York and the unions representing state workers are public records, filed with the Public Employment Relations Board (4 NYCRR 214.1), and publicly available. *See* New York State Governor's Office of Employee

Many local government employees also enjoy collectively bargained due process rights. *See, e.g., Matter of New York City Tr. Auth. v. Transport Workers of Am.*, 14 N.Y.3d 119, 122 (2010) (NYC Transit Workers); *Matter of Shenendehowa Cent. Sch. Dist. Bd. of Educ. v. Civil Serv. Emp. Ass'n Inc.*, 20 N.Y.3d 1026, 1027 (2013) (school bus drivers).

Plaintiffs are also wrong when they say that if the challenged tenure statutes are struck down, teachers would retain the due process rights of other public employees. (R. 47). Under Civil Service Law § 35(g), teachers are "unclassified" public employees and are *not* protected by Civil Service Law § 75.

The plaintiffs also seek to strip teachers of *constitutional* due process rights. It is the objective expectancy of continued employment, which is created by a statutory or contractual guarantee that an employee will not be terminated except for "just cause," that creates a constitutionally protected property interest in that employment. *See Loudermill*, 470 U.S. at 539. In New York, that objective expectancy of continued employment is created by the "just cause" protections in Education Law §§ 2573, 3012 and 3020. These are the very statutes the plaintiffs *specifically* ask the courts to *strike down*. (R. 38, 39, 1353). If these statutes are struck down, teachers would have *no* objective expectancy of continued

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Relations, State-Union Contracts, http://www.goer.ny.gov/Labor_Relations/Contracts/index.cfm (last visited Mar. 1, 2016).

employment, no protected property right, and no constitutional right to any procedural due process before being fired.

There is also no basis for plaintiffs' hyperbolic assertions that section 3020-a establishes "dozens of hurdles" to firing an ineffective teacher (R. 1364), or provides teachers an "astounding array" of rights and privileges. (R. 46). These "hurdles" and "privileges" are identified as investigations, hearings, improvement plans, arbitration processes and administrative appeals. (R. 46, 1364). Of course, except for the improvement plans required in some cases under Education Law §§ 3012-c and 3012-d, these "hurdles" and "privileges" are the fundamentals of procedural due process. In an administrative hearing, no element of a fair trial can be dispensed with unless waived by the party whose rights are at stake. *See, e.g., Hecht v. Monaghan*, 307 N.Y. 461, 470 (1954). The Constitution guarantees due process because employees are sometimes falsely accused, and because not every infraction warrants discharge. *See Loudermill,* 470 U.S. at 542-43. The claim that the Legislature acted irrationally by providing such basic safeguards to essential public servants is utterly without merit.

Finally, the plaintiffs' claim that 3020-a hearings take too long is specious. First, as the U.S. Supreme Court noted in *Stanley v. Illinois,* 405 U.S. 645, 656 (1972):

> [T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of

> Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy ...

Second, as noted above, recent amendments to New York law have streamlined the disciplinary process for tenured teachers, ensuring the prompt resolutions of these cases.

Tenure is a rational way to attract and retain good teachers, to promote academic freedom, and to enable teachers to speak on behalf of students without fear of unjust reprisal - - all legitimate state interests.

3. Seniority-Based Layoffs

Under Education Law §§ 2510, 2585, 2588 and 3013, qualified teachers are laid off and recalled based on seniority within the teacher's tenure area. The plaintiffs complain that "only" ten states use seniority to determine teacher layoffs; and ask the Court to declare that New York may not constitutionally do so. (R. 1370). While this is a non-justiciable policy matter (*see* Point I above), New York's seniority statutes easily meet the test of rationality.

Seniority promotes continuity of service and protects qualified teachers who might be targeted based on age, rate of pay, cronyism or other improper, subjective motivations. When economic layoffs are required, seniority provides an *objective* mechanism to determine which employee is excessed. Seniority recognizes that when an employee remains with one employer for many years, she may become

less valuable to other employers and would find it difficult to find another job if laid off. Harry T. Edwards, *Seniority Systems in Collective Bargaining, in Arbitration in Practice*, 121-22 (Arnold M. Zack ed., 1984).

Seniority-based layoffs among competent teachers are also consistent with the State's overall desire to foster education and academic freedom:

> The tenure and seniority provisions serve a firm public policy to protect the interests of the public in the education of our youth which 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." *Matter of Lambert v. Bd. of Educ. of Middle Country Cent. Sch. Dist.*, 174 Misc.2d 487, 489 (Sup. Ct., Nassau Co. 1997).

The U.S. Supreme Court has explained that seniority avoids the use of "subjective evaluations." *See California Brewers Ass'n v. Bryant*, 444 U.S. 598, 606 (1980). Seniority as a criterion for determining layoffs and other employee rights is so well-established that it is exempt from federal anti-discrimination laws. 42 U.S.C. § 2000e-2(h) provides:

> ... it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system ... provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin ...

The Education Law's seniority and layoff provisions do not just secure teachers' interests, but also those of school districts:

> [Seniority] gives effect to both the employees' interest in job security in their particular area of educational appointment and to the school board's interest in efficient administration. *Leggio v. Oglesby,* 69 A.D.2d 446, 448-49 (2d Dep't 1979), *appeal dismissed*, 53 N.Y.2d 704 (1981).

The *Wright* plaintiffs allege the layoff of 572 teachers in the Rochester City School District from 2010-2012. (R. 1371). The *Davids* plaintiffs allege the statewide layoff of more than 7,000 teachers in 2011 alone. (R. 48). The plaintiffs could perhaps frame a proper Education Article claim if they alleged that a specific school district is not providing enough qualified teachers because of teacher layoffs. *See, e.g., Paynter v. State of New York,* 100 N.Y.2d 434, 440 (2003). But, plaintiffs are apparently not concerned with returning displaced teachers to their classrooms, and instead seek only to diminish every teachers' employment safeguards.

Seniority-based layoffs are objective and have a rational basis. In the context of plaintiffs' legal challenge, that is sufficient to end the inquiry.

POINT IV

THE LOWER COURT ERRED IN ITS REFUSAL TO CONSIDER THE PLAINTIFFS' FAILURE TO JOIN NECESSARY PARTIES.

The amended complaints must be dismissed for failure to join necessary parties. (R. 604-05). The lower court failed to examine this issue on the merits. (R. 28 and 32).

Not content with seeking to strip teachers of their constitutional and statutory due process safeguards, the *Wright* plaintiffs contest the right of teacher unions to negotiate alternative disciplinary procedures under Education Law § 3020(1).[21] (R. 1368-69). Despite the fact that public policy strongly favors public sector collective bargaining (*see* Civil Service Law § 200), plaintiffs allege that "collective bargaining agreements make it even more difficult to remove ineffective teachers and add conditions that delay the process even further." (R. 1368). And yet, save a single inaccurate allegation about the contract between the UFT and City of New York, the plaintiffs identify no collective bargaining

[21] The right to bargain alternatives to 3020-a procedures is not unfettered. All agreements that first become effective after July 1, 2010, must result in the disposition of cases within the statutory time limits provided by section 3020-a. *See* Education Law § 3020(1).

agreement and no contractual provision that supposedly run afoul of the Education Article.

Plaintiffs' allegation that collective bargaining agreements provide unconstitutional levels of due process is, as with everything else in their complaints, asserted without factual support. Indeed, alternative disciplinary procedures may provide more streamlined processes than those provided under statute. *See Kilduff*, 24 N.Y.2d at 510. Thus, if the plaintiffs want to eliminate the collective bargaining rights of a quarter million New Yorkers by taking away the authority of unions and school districts to collectively bargain alternative disciplinary procedures, plaintiffs should identify the agreements they assert are unlawful and join the parties to those agreements as defendants.[22]

CPLR § 1001(a) provides that "[p]ersons who ought to be parties" shall be made plaintiffs or defendants if (1) "complete relief is to be accorded between the persons who are parties to the action" or (2) the judgment may in some way inequitably affect the person who ought to be a party. This provision is intended "'not merely to provide a procedural convenience but to implement a requisite of due process - - the opportunity to be heard before one's rights or interests are adversely affected.'" *Matter of 27th St. Block Ass'n. v. Dormitory Auth. of State of N.Y.*, 302 A.D.2d 155, 160 (1st Dep't 2002), (*quoting Matter of Martin v. Ronan*,

[22] Such agreements are filed with PERB (4 NYCRR 214.1) and are thus readily accessible to plaintiffs.

47 N.Y.2d 486, 490 (1979)); *see also, Scarlino v. Fathi*, 107 A.D.3d 514, 515 (1st Dep't 2013) (finding that a national labor union and its regional governing body were necessary parties because they may be inequitably affected by the judgment). In an action to set aside a contract, all parties to the contract are indispensable. *See Stanley v. Amalithone Realty, Inc.*, 31 Misc.3d 995, 1000-1001 (Sup. Ct., NY Co. 2011), *aff'd*, 94 A.D.3d 140 (1st Dep't 2012), *lv. denied*, 20 N.Y.3d 857 (2013).

The local teachers' unions and school districts who are parties to collective bargaining agreements that contain alternate procedures to Education Law § 3020-a are indispensable parties to this action, as a judgment granting the relief plaintiffs seek could void those agreements. It was error for the lower court to disregard intervenor-defendants' argument that plaintiffs failed to join necessary parties. CPLR § 3211(a)(10); *Id.* at 1000-001.

CONCLUSION

The plaintiffs say they want more effective teachers, but nothing in either amended complaint seeks relief that would elevate the teaching profession. Given plaintiffs' invitation to the Court to rewrite the Education Law, plaintiffs could just as easily ask this Court to require smaller class sizes; more classroom assistants or aides; increased special education services; more reading teachers or counselors; better classroom technology; or universal pre-Kindergarten. Plaintiffs could ask

the Court to restore funding to struggling school districts that have been decimated by teacher layoffs, or to address New York's unequal educational funding system, under which students with the greatest educational need are often provided the fewest resources. Such claims, if factually supported, would be proper under the Education Article. But plaintiffs ask for none of these things.

Instead, plaintiffs make the radical claim that because there are *some* ineffective teachers, *all* teachers must serve a longer probation; *all* teachers must have less or no due process protection once tenure is earned; and *all* teachers must have less job security with every year of dedicated service and with every salary increase.[23] It is difficult to see how such harsh policies would do anything but make teaching a less attractive, less effective profession, and significantly damage public education.[24] Fortunately, our Legislature, over 100 years of constant legislative refinement, has made better policy choices.

The challenged statutes require teachers to serve on probation for considerably longer than most other public employees. They give school boards virtually unfettered discretion whether to grant tenure. They require that teachers be rigorously evaluated during and after probation. After tenure is *earned*, these

[23] The *Wright* plaintiffs contend a teacher's salary should be a factor in layoffs, because laying off more highly compensated teachers would be more economical. (R. 1371).

[24] North Carolina's recent legislative abolition of tenure has led to extreme dissatisfaction among teachers, with 90% of teachers and school administrators saying the elimination of tenure would negatively affect public education. (R. 686-702).

laws provide prompt, reasonable due process protection to safeguard good teachers from unjust dismissal, to promote academic freedom, and to enable teachers to speak on behalf of students' educational and safety needs without fear of unjust reprisal. The challenged laws encourage long-term stability and dedicated service through seniority safeguards.

If plaintiffs' claims are successful, each of the teacher defendants, and over 250,000 other devoted New York educators, will be stripped of long-standing statutory safeguards that form a crucial part of their terms and conditions of employment, that promote public education, and that protect their students. There is no legal or factual basis for plaintiffs' extreme claims and the Courts should not entertain them. The amended complaints should be dismissed.

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Latham, New York

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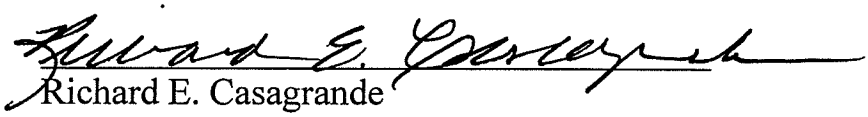
By: 
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