STATE OF NEW YORK
SUPREME COURT   COUNTY OF RICHMOND

MYMOENA DAVIDS, et al.,

Plaintiffs,

-against-

Index No. 101105-2014

Hon. Phillip G. Minardo

THE STATE OF NEW YORK, et al.,

Defendants,

-and-

MICHAEL MULGREW, et al.,

Intervenors-Defendants.

JOHN KEONI WRIGHT, et al.,

Plaintiffs,

-against-

THE STATE OF NEW YORK, et al.,

Defendants,

-and-

SETH COHEN, et al.,

Intervenors-Defendants.

REPLY MEMORANDUM OF LAW IN SUPPORT OF
INTERVENORS-DEFENDANTS' MOTION TO DISMISS THE ACTION

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PRELIMINARY STATEMENT

It is clear from plaintiffs'[1] response that they have stated no legal claim. No plaintiff has alleged facts to demonstrate that his or her child has been denied a sound basic education. No

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[1] References to the amended complaints appear as *Davids*, ¶___ and *Wright*, ¶ ____. References to the plaintiffs' memoranda of law appear as *Davids*, p. ____ and *Wright*, p. ____.

allegation is made that any school district is, *district-wide*, failing to provide a sound basic education. As plaintiffs say the challenged statutes are now challenged only "as applied," no claim against the State can be asserted because these statues are *applied* by local officials. There is no clear articulation of what replacement statutes the plaintiffs would find constitutional. All of these deficiencies are *pleading requirements* for Education Article claims, under Court of Appeals precedent.

Plaintiffs assert nothing more than a non-justiciable policy dispute, based on the discredited, popular myth that the challenged due process and seniority protections guarantee lifetime employment. Plaintiffs' policy claim is supported by academic studies which can easily be contested by competing studies in an appropriate non-judicial forum; and by an old, unscientific survey that bears no relevance to the challenged tenure laws as they were amended in 2008, 2010 and 2012.

Nor can the complaints be salvaged by a claim that discovery or a trial is needed. It is no accident that neither complaint alleges facts about the length of tenure cases under the tenure laws as amended since 2008. More current, relevant facts were readily available to plaintiffs, when they filed their complaints, through FOIL or by simple request of the State Education Department. It is far more likely that current facts are not alleged because they do not support plaintiffs' preferred narrative about these laws. Of course, even if the Court deems the facts as alleged by plaintiffs to be true, the complaints must still fail because, again, the pleaded facts are irrelevant to the laws as they have been amended.

Plaintiffs want this Court to strip away the due process, seniority and collective bargaining protections public school teachers and principals have long been promised. From an education policy standpoint this would, to say the least, be wrong-headed, because harming teachers and the

teaching profession cannot possibly help school children or improve public education. Plaintiffs' policy claims have been and can be debated in an appropriate forum. Plaintiffs' legal claims should be dismissed.

A. *Plaintiffs' Memoranda Contain Inaccurate Statements of Fact That Are Outside the Pleadings.*

Many of the "facts" contained in plaintiffs' memoranda are not alleged in their respective complaints or are refuted by their complaints' own exhibits. These "facts" cannot be used to salvage a deficiently pleaded complaint.

For example, these are *not* class actions. Plaintiffs do *not* represent all parents of schoolchildren, despite their attempt to speak for all "schoolchildren" in their briefs (*see Davids*, pp. 4-5; *Wright*, pp. 1-3). Rather, both the *Davids* and *Wright* plaintiffs state that this is an "as-applied" challenge to the laws in dispute. (*Davids*, p. 7; *Wright*, pp. 6, 15, 18, fn. 5). Accordingly, the assertions that the challenged statutes "threaten[]the social order and the very fabric of our civil society" (*Davids*, p. 5) and create a "constitutional crisis of statewide magnitude and national importance" (*Wright*, p. 1) should be wholly disregarded by the Court.

The *Davids* plaintiffs concede that the vast majority of New York's teachers (95%) are effective. (*Davids*, ¶¶ 4, 30) The *Wright* plaintiffs, on the other hand, claim that the New York education system is in "crisis," based on a single allegation that student performance on State standardized tests in 2013 is inconsistent with the State's annual professional performance review ("APPR") results for teachers, which rated well over 90% of the State's teachers as effective or highly effective. (*Wright*, ¶ 41). The alleged disconnect between student performance and teacher ratings, they argue, shows that the APPR statute is unconstitutional. (*Wright*, ¶ 78)

In this regard, the Court of Appeals 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 who have a causal bearing on test results . . . ." [*CFE I*, 86 N.Y.2d at 317].

This admonition is particularly apt here because, according to the *Wright* 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*" (Wright, ¶ 41, Ex. 8 at 1, *citing* John B. King, Jr., Commissioner of the State Education Department [emphasis added]). This report goes on to state that "[e]stimating the student growth component was especially tricky this year because this 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" (*Wright*, ¶ 41, Ex. 8 at 2).[2] Accordingly, a "flurry of charts, Excel worksheets, tables and guidance" were necessary to interpret the data (*Wright*, ¶ 41, Ex. 8 at 2). In fact, "[w]ithout comparisons, raw test results are virtually worthless for judging teacher performance" (*Wright*, ¶ 41, Ex. 8 at 2). Notably, no such comparisons were provided by the *Wright* plaintiffs.

Incredibly, this shred of inconclusive data, applicable to a very small percentage of teachers and undermined by the document itself, is used as the foundation for the *Wright* plaintiffs' claim that "New York's students *statewide* are not receiving an "adequate education";[3] that there are "huge" numbers of ineffective teachers; and that "tens of thousand" of public school students have

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[2] Indeed, because the 2013 tests were aligned to brand new curriculum, the Legislature was so concerned about the potentially misleading 2013 standardized test results that it enacted a moratorium, prohibiting the use of such results as the sole basis for high stakes decisions for students, teachers and principals. (2014 NY Senate-Assembly Bill S6356, A8556 [student moratorium]; 2014 NY Senate-Assembly Bill S7921, A10168 [teacher moratorium]) The student moratorium bill was signed. The teacher bill is awaiting the Governor's signature.

[3] As the Court is aware, "adequate" education is not the Constitutional standard under Article XI §1.

ineffective teachers. (*Wright*, pp. 12, 14, 15) These conclusions are not factual allegations. The complaints, in fact, do not identify even a *single* ineffective teacher - - even though the performance ratings of the plaintiffs' children's teachers were, by law, at all times available to plaintiffs, upon request. Education Law § 3012-c(10)(b).

The *Wright* plaintiffs say that the teacher defendants do not "seriously contest" that New York's public school students on the whole are not receiving an adequate public education (*Wright*, p. 12). This assertion is not factually supported in the complaints. Worse, it is a regrettable aspersion on hundreds of thousands of parents, local school board members, teachers and principals who do provide New York's schoolchildren with a sound basic education, as well as on the academic achievements of New York's school children. Although the complaints do not plead credible evidence that there is a statewide failure of New York's public education system, there is substantial publicly available information showing that New York's parents, teachers and children can be proud of their continuing achievements.[4]

Next, without even trying to define what "ineffective" means, the *Wright* plaintiffs contend

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[4] Hundreds of districts perform exceedingly well under the challenged statutes. (*see e.g.*, NYS Report Card 2012-2013 [latest version available] *available at* http://data.nysed.gov/lists.php?type=district, yet plaintiffs claim that it is these statutes that deprive schoolchildren from across the state the opportunity for a sound basic education. For instance, publicly available data demonstrate that the overall current statewide graduation rate has increased by more than 10 percentage points since 2006. (*See* NYSED Press Release dated June 23, 2014, *available at* http://www.nysed.gov/press/2009cohortgraduationrate.html[last visited December 11, 2014]); NYSED Press Release dated February 13, 2006, available atd http:///www.nysed.gov/press/2009CohortGraduationRate.html [last visited December 11, 2014]). The teacher defendants do not dispute that some local school districts may be in crisis, due to high need student populations, inadequate and inequitable funding, cuts in staff and academic programs and services, and the state's failure to meet its funding commitments. The effects of poverty on student need and academic performance are well known. See *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, Michael A. Rebell, 85 N.C. L. Rev. 1467, 1471-1476 (2007), indicating that students from poor households have increased educational needs. Parents in such school districts, armed with well-pleaded, fact-based complaints concerning resource failures caused by inadequate funding, have stated Education Article claims. *See e.g.*, *Hussein v. State of New York*, 81 A.D.3d 132 (3d Dep't 2011), *aff'd*, 19 N.Y.3d 899 (2012). This has no bearing on the case at bar, where plaintiffs seek to prosecute a statewide challenge without pleading facts to support a claim that the tenure laws have any negative impact on education in any of New York's school districts.

that "ineffective teachers are being promoted and kept in schools at alarming rates" (*Wright*, p. 1). This is purportedly because "the hands of administrators and school districts are tied" (*Wright*, p. 1). Yet, the plaintiffs did not plead a single factual allegation that any administrator from any school their children attend considered bringing disciplinary charges, but opted not to do so because of the challenged statutes. In fact, the only two school principals who are parties to this case are *defendants,* who joined the case to *defend* the challenged laws.

At best, plaintiffs rely on an unscientific and stale survey conducted well *prior to the amendments of the challenged laws* (*Wright*, Ex. 14). They also rely on an exaggerated cartoon for the proposition that the disciplinary process is irreparably broken. (*Wright*, Ex. 13). But again, the *Wright* plaintiffs cherry-pick from their own exhibit and fail to point out that, according to that exhibit, the single most important reason administrators chose to not pursue teacher disciplinary charges was that the teacher resigned (*Wright*, Ex. 14, p. 1).

None of this creates a factual dispute that necessitates denial of the motion to dismiss. Plaintiffs mount a statewide challenge to the application of New York's tenure and seniority laws, but have pleaded not a shred of credible evidence that, *statewide* or in *any* specific school district, these laws cause a failure to provide a sound basic education.

B. *Plaintiffs Misstate How the Challenged Statutes Operate*.

Plaintiffs have misapprehended or misstated how many of the challenged statutes actually operate.

First, as to the probationary laws, the plaintiffs argue that a decision whether to grant tenure must be made *after* the teacher has received only two annual performance ratings. (*Wright*, ¶47)

The inference is that, under the challenged statutes, as in California's *Vergara*[5] case, school districts only have two years to make a decision whether to grant tenure. In fact, the law clearly requires a probationary decision to be made at the end of a teacher's third year of service (Education Law § 3012(2)), and there is nothing in the law that prohibits a school district from considering the probationary teacher's performance during her third year of teaching in making that decision. Additionally, if a school district wishes to wait until it has received the probationary teacher's third year APPR score before making a determination, it has the option of asking the teacher to extend her probation. *Juul v. Bd. of Educ., Hempstead School Dist. No. 1, Hempstead,* 76 A.D.2d 837 (2d Dep't 1980), *aff'd,* 55 N.Y.2d 648 (1981). If the teacher refuses, the board has virtually unfettered discretion to deny tenure.

The plaintiffs say that principals must build their case against an ineffective teacher over two years, during which time the teacher must be left in the classroom. (*Wright*, ¶54, *Wright*, p. 7; *Davids*, p. 11, n.6) This is not so. Consecutive ineffective ratings are a requirement for charges of pedagogical incompetency under the expedited hearing process set forth in Education Law §§ 3012-c(6) and 3020-a(3)(c)(i-a)(A). School boards, however, are not prohibited from bringing Section 3020-a charges under the normal 155-day procedure for pedagogical incompetency or for any other cause, whenever there is evidence that a teacher is not teaching effectively, suffers from mental or physical disability, or is guilty of misconduct. Moreover, contrary to plaintiffs' assertion, a tenured teacher does *not* have a right to any particular assignment, including a classroom teaching assignment. A teacher can be reassigned by the Board of Education within her tenure area - - but

[5] *Vergara* is, teacher defendants submit, in no way binding or even instructive concerning legal claims raised under the New York Constitution.

outside of a classroom - - while 3020-a charges are pending. *Adlerstein v. Bd. of Educ., City of New York*, 64 N.Y.2d 90 (1984). In addition, a teacher can be assigned to appropriate non-teaching duties outside the classroom even absent 3020-a charges. *See, Van Heusen v. Bd. of Educ., City School Dist., City of Schenectady*, 26 A.D.2d 721 (3d Dep't 1966); *see also, Mishkoff v. Nyquist*, 57 A.D.2d 649 (3d Dep't 1977), *lv. denied* 43 N.Y.2d 641 (1977).

The *Wright* plaintiffs say that *Brady v. A Certain Teacher*, 166 Misc.2d 566 (Sup. Ct., Suffolk Co. 1995), is irrelevant, asserting that the *Brady* matter dealt with "the merits of a different Article XI claim . . .." (*Wright*, p. 30, fn. 8) This is incorrect. As here, the *Brady* plaintiff sought a declaration that "sections 3012 and 3020-a of the Education Law violate the Education Article in that the burden of proof for terminating the employment of tenured teachers limits the right of students to obtain public education and instruction . . .." *Brady*, 166 Misc.2d at 568. This is the identical claim raised here. (*Wright*, ¶¶ 49-65; *Davids*, ¶¶ 37-43)

Plaintiffs reiterate the legal conclusion, which in their complaint masquerades as a factual assertion, that the challenged statutes make it "impossible" to remove ineffective teachers. (*Wright*, p. 22) Of course, even a cursory review of the challenged statutes and published case law shows that this assertion is simply untrue.[6]

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[6] Because Education Law §3020-a(5) gives parties only 10 days to seek strictly limited judicial review of a 3020-a hearing officer decision, only a small fraction of teacher dismissal cases ever reach the courts. Still, the published cases reveal that the "impossibility" of firing a tenured teacher is a myth. *See, e.g., Asch v. New York City Bd./Dep't of Educ.*, 104 A.D.3d 415 (1st Dep't 2013); *Denhoff v. Mamaroneck Union Free Sch. Dist.*, 101 A.D.3d 997 (2d Dep't 2012); *Gongora v. New York City Dep't of Educ.*, 98 A.D.3d 888 (1st Dep't 2012); *Myers v. City of New* York, 99 A.D.3d 415 (2d Dep't 2012); *Douglas v. New York City Bd./Dep't of Educ.*, 87 A.D.3d 856 (1st Dep't 2011); *In re Watt (East Greenwich Cent. Sch. Dist.)*, 85 A.D.3d 1357 (3d Dep't 2011); *Awaraka v. Bd. of Educ. of City of New York*, 59 A.D.3d 442 (2d Dep't 2009); *Saunders v. Rockland BOCES*, 62 A.D.3d 1012 (2d Dep't 2009); *Lackow v. Dep't of Educ. of City of New* York, 51 A.D.3d 563 (1st Dep't 2008); *In re Mazur (Genesee Valley BOCES)*, 34 A.D.3d 1240 (4th Dep't 2006); *Watkins v. Bd. of Educ. of Port Jefferson Union Free Sch. Dist*, 26 A.D.3d 336 (2d Dep't 2006); *Hegarty v. Bd. of Educ. of City of New York*, 5 A.D.3d 771 (2d Dep't 2004); *Roemer v. Bd. of Educ. of City Sch. Dist. of City of New York*, 268 A.D.2d 560 (2d Dep't 2000); *Fischer v. Smithtown Cent. Sch. Dist.*, 262 A.D.2d 560 (2d Dep't 1999); *Abreu v. New York City Dep't of Educ.*, 990 N.Y.S.2d 436 (Sup. Ct. 2014); *Baptiste v. New York City Dep't of Educ.*,

The plaintiffs also claim that New York's layoff system, which bases layoffs on seniority within a teacher's tenure area, mandates that children be taught by ineffective teachers. (*Wright*, ¶¶75-76; *Davids,* ¶51) This is not true. Seniority does *not* protect a teacher who is not competent or who is guilty of misconduct. Such a teacher can be subjected to charges under Education Law § 3020-a no matter how long they have been teaching. Also, as to seniority, plaintiffs incorrectly say that less senior employees are "fired." (*Wright*, p. 14) Actually, in a layoff situation, excessed employees are placed on a preferred eligible list and are eligible for recall for seven years. (*See* Education Law § 3013(3))

The plaintiffs say the "State grants tenure" (*Wright*, p. 15) and that the "State" enforces the challenged statutes. (*Wright*, p.14) This is untrue. Local school boards grant or deny tenure (*see, e.g., Cohoes City Sch. Dist. v. Cohoes Teachers Assn.*, 40 N.Y.2d 774, 777 (1976) and local school boards, not the State, bring and prosecute teacher disciplinary cases. (Education Law § 3020-a)

Next, although the plaintiffs do not say what level of due process they would find acceptable for teachers, they suggest that Civil Service Law §§ 75/76 might be a better alternative because it allows a hearing before an officer with authority to remove the employee, such as a supervisor. (*Wright*, pp. 6, 25) This is an inaccurate and incomplete statement of New York law for three reasons.

First, under Civil Service Law § 75, an employer, including a school board, can appoint a hearing officer to hear the case, but the hearing officer only makes a recommendation as to whether

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983 N.Y.S.2d 201 (Sup. Ct. 2013); *Sang v. New York City Dep't of Educ.*, 30 Misc.3d 1208(A) (Sup. Ct. 2010); *Cohen v. Middletown Enlarged Sch. Dist.*, 11 Misc.3d 1054 1054(A) (Sup. Ct. 2006)(all upholding 3020-a dismissals of tenured teachers).

the charges have been sustained and what the appropriate penalty should be. (Civil Service Law § 75(2)) The employer then makes a decision, which is subject to judicial review under Article 78 of the CPLR. (Civil Service Law § 76) Second, the plaintiffs ignore the fact that charges under Education Law § 3020-a may include allegations of mental or physical disability. (Education Law § 3012(2)) Under the Civil Service Law, charges of this type are subject to a full panoply of due process protections under Civil Service Law §§ 71-73. Third, and most notably, the plaintiffs completely ignore the fact that under the Civil Service Law public employees covered by Sections 75-76 are entitled, through their collective bargaining representatives, to negotiate alternate and more robust due process protections, as teacher defendants detail in their main brief at pp. 42-45. Here, the plaintiffs want to deprive teachers of the right to collectively bargain alternative disciplinary procedures. (*Wright*, ¶ 46; *Davids*, pp. 18-19)

C. *The Evidence Plaintiffs Say They Need Was Publicly Available When These Actions Were Filed.*

Plaintiffs say that information about ineffective teachers and how many teachers are charged or fired under Education Law § 3020-a is not available to them. (*Wright*, ¶ 61) Again, a teacher's annual effectiveness rating *is* specifically available, upon request, to parents. Education Law § 3012-c(10)(b). Despite the ready availability of this information, none of the plaintiffs allege that any of their children are being taught by ineffective teachers. As to tenure cases, 3020-a decisions and settlements are subject to FOIL. See Point I(C), below. Additionally, as noted by SAANYS, the State Education Department, in April 2014, did publicly provide data about the frequency and result of 3020-a cases under the statute as it was amended effective April 1, 2012. (SAANYS main brief at 30-31). Thus, the assertion that such data are unavailable to plaintiffs without discovery is simply

not true.

ARGUMENT

POINT I

THE PLAINTIFFS HAVE FAILED TO SUFFICIENTLY PLEAD A CAUSE OF ACTION UNDER THE EDUCATION ARTICLE.

Plaintiffs characterize their constitutional claims as an "as applied" challenge. (*Wright*, pp. 6, 15, 18, fn.5; *Davids*, p. 7). Whether plaintiffs' claims are characterized as a "facial" or "as applied" challenge, plaintiffs have failed to state a claim.

A. *A Facial Challenge to These Statutes Fails Because The Statutes Rationally Promote Public Education.*

In a facial challenge, a party alleges a statute is unconstitutional against *all* individuals and "bear[s] the burden to demonstrate that 'in any degree and in every conceivable application,' the law suffers a wholesale constitutional impairment." *Cohen v. State*, 94 N.Y.2d 1, 8 (1999) (quoting *McGowan v. Burstein*, 71 N.Y.2d 729, 733 (1988)). A court reviewing a facial challenge does not examine the particular relationship of the statute to the challenging party, because that party is alleging that statute is unconstitutional in *all* its potential applications. *People v. Stuart*, 100 N.Y.2d 412, 421 (2003). *See also*, *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982). Further, with respect to a facial challenge, the Court of Appeals has made clear that if there is *any* realistic set of circumstances under which the statute is valid, then a facial challenge must fail. *Matter of Moran Towing Corp. v. Urback*, 99 N.Y.2d 443, 451 (2003). *See also*, *Stuart*, 100 N.Y.2d at 421. A party defending a statute's constitutionality must, therefore, demonstrate only one constitutional and realistic application of the statute in order to defeat the

challenge. In recognition of this reality, facial challenges have been identified as involving a "heavy burden" in order to succeed. *Wood v. Irving*, 85 N.Y.2d 238, 244-45 (1995). Despite plaintiffs' characterization, it is hard to see their claims as other than a facial attack on the challenged statutes.

As to teacher probation, the challenged laws mandate a three year probationary term. Plaintiffs flatly allege that a teacher's effectiveness cannot be determined in three years. (*Wright*, ¶ 79). If, as plaintiffs say, three years is *per se* too short a time to evaluate a teacher's effectiveness, then, according to plaintiffs, the statute itself must fall.

As to Education Law § 3020-a, outside the City of New York, every tenured teacher or principal charged with incompetence or misconduct is entitled to elect the statutory procedure, even if an alternative procedure has been collectively bargained. (Education Law § 3020(1); *Matter of Kilduff v. Rochester City Sch. Dist.*, ___ N.Y.3d ___, 2014 Slip Op. 05056, 2014 WL 6473636). The plaintiffs allege that the statute, on its face, provides an unconstitutional level of due process. (*Davids*, ¶¶ 36-43, 57-58; *Wright*, ¶¶ 49-61, 81-82). Clearly then, it is not the statute's application that the plaintiffs find objectionable, but the very quantum of due process provided on the statute's face.

As to seniority-based layoffs, the challenged statutes *direct* the order of layoffs by seniority. Plaintiffs flatly allege that this violates the Education Article. (*Davids*, ¶ 61; *Wright*, ¶ 79) This too is a facial challenge, because school boards are *required* to adhere to the statute.

Any facial challenge to these statutes must fail. To succeed in a facial challenge, the plaintiffs would have to overcome a presumption of constitutionality and allege that these statutes do not rationally relate to a legitimate state interest. As explained at pages 14-26 of teacher defendants' main brief, this plaintiffs cannot do. The challenged statutes, as demonstrated by decades of

legislative and judicial history, rationally advance the State's duty to provide a sound basic education by helping to attract and retain good teachers; by promoting an independent teaching corps and academic freedom; and, when layoffs are necessary, by protecting the most experienced, qualified educators.[7] Indeed, as recently as November 20, the Court of Appeals reaffirmed the importance of the tenure laws for public education (*see, Matter of Kilduff v. Rochester City Sch. Dist., supra)*.

This is why the plaintiffs now characterize their claim as an "as applied" challenge, and this is why the plaintiffs want the Court, in deciding this motion, to ignore the Legislature's considered policy judgments. This is also why the whole foundation of plaintiffs' case collapses. Unlike every other reported Education Article case where plaintiffs challenged the State's failure to address resource issues, these plaintiffs attack the very *rationality* of the State's legislative efforts to *promote* good teaching. Thus, in *CFE II*, the Court's concern with allegedly inadequate teaching in New York City focused on teacher qualification (certification), experience, low salaries and high teacher turnover. 100 N.Y.2d at 909. Here, the plaintiffs attack the rationality of laws enacted to address these very issues: how to attract and keep qualified, experienced teachers. Again, for plaintiffs to survive a motion to dismiss a facial challenge to these laws, plaintiffs must plead that these statutes do not rationally advance these interests. (*See*, Teacher Defendants main brief at 32) The plaintiffs do not even try to meet this burden. To the extent the Court finds plaintiffs' challenge to be a facial one, it must be dismissed.

B. *Plaintiffs Have Not Pleaded an "As Applied" Challenge.*

"[A]n as-applied challenge calls on the court to consider whether a statute can be

[7] The Court of Appeals in *CFE II*, 100 N.Y.2d 893, 910, 957 (2003), noted the importance of experienced educators, especially in low-wealth districts.

constitutionally applied to the [party] under the facts of the case." *Stuart*, 100 N.Y.2d at 421. Such a challenge alleges the statute is unconstitutional as it specifically relates to the party bringing the challenge. "In determining whether a statute is unconstitutional as applied, the court must consider only whether the statute can be constitutionally applied to the [challenging party] under the particular facts of the case." *People v. Voltaire*, 852 N.Y.S.2d 649, 651 (Crim. Ct., New York Co. 2007). A party must assert a "bona fide justiciable controversy." *T.V. v. New York State Dept. Of Health*, 88 A.D.3d 290, 306 (2d Dep't 2011). It is "not sufficient for [a party] to demonstrate that the statute 'might operate unconstitutionally under some conceivable set of circumstances.'" *Texas Eastern Transmission Corp. v. Tax Appeals Tribunal*, 260 A.D.2d 127, 129-130 (3d Dep't 1999) (quoting *Matter of Allied-Signal Inc. v. Tax Appeals Tribunal,* 229 A.D.2d 759 (3d Dep't 1996)). Instead, the party must establish that the "law has in fact been (or is sufficiently likely to be) unconstitutionally applied to him." *McMullen v. Coakley*, 134 S.Ct. 2518, 2534, n.4 (2014).

Because an as-applied challenge involves a *specific application* of the law to a *specific party*, a party bringing such a challenge need only meet the lesser burden of demonstrating the unconstitutionality of the statute against the party itself and the surrounding facts and circumstances. *Stuart*, 100 N.Y.2d at 421. It is unsurprising, therefore, that plaintiffs have attempted to cast their challenge as an "as-applied." (*Wright* at 18, fn. 5) But, they misinterpret the cases they cite in support of that position.

In *Boddie v. Connecticut*, the Supreme Court held that "a statute or rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question." 401 U.S. 371, 379 (1971). The plaintiffs contend this decision supports their assertion

that they are bringing an as-applied challenge. (*Wright*, at p. 18, fn. 5)

A careful reading of *Boddie* and plaintiffs' complaints, however, makes clear that the complaints lodge a *facial* challenge to the challenged statutes. Plaintiffs do not concede the "general validity" of the challenged statutes, but have instead characterized them as violating the constitutional rights of *all* New York students. *(Wright,* ¶ 76; *Davids*, ¶52) Plaintiffs' prayer for relief addresses not only the application of the statutes to the plaintiffs or a specific class of students, but instead asks the Court to strike down the laws as they apply to *all* students. (*Wright,* ¶¶ 77, 81; *Davids*, ¶¶ 58, 62)

Similarly, plaintiffs do not, as required in an as-applied challenge, plead facts to demonstrate how the challenged statutes specifically affect them. Instead, they make general allegations about the allegedly unconstitutional effects on unspecified, hypothetical students. For example, the *Davids* complaint at paragraph 58 alleges:

> The Dismissal Statutes violate the Education Article because they have a substantially negative impact on those New York public school students taught by ineffective teachers who, absent the Dismissal Statutes, would be dismissed for poor performance. The Dismissal Statutes deprive those students of a sound basic education. [*See also Davids,* ¶¶ 30, 31, 35, 51, 52, 56, 62]

Nowhere in the *Davids* complaint, however, are there any factual allegations that any plaintiff's child has an ineffective teacher or has otherwise been adversely affected by the operation of this statute.

The *Wright* complaint has the same defect. For instance, at paragraphs 80-81, the *Wright* complaint alleges that ineffective teachers are kept in the classroom, because disciplinary proceedings are "time consuming, costly and unlikely to result in the removal of an ineffective teacher." Nowhere in the complaint, however, is it alleged that any plaintiff's child is taught by an

ineffective teacher; that any plaintiff sought the removal of that teacher; or that an administrator failed to act because of the challenged statutes.

Further, it follows that a successful as-applied challenge, which is brought only against certain applications of a statute, would only result in the invalidation of those applications, and not the entire statute itself. Indeed, this remedy-based distinction between the two types of challenge has been identified in legal scholarship. *See*, Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 Wm. & Mary Bill Rts. J. 657, 661 (2010). The U.S. Supreme Court has recognized that the appropriate remedy for an as-applied challenge is to only invalidate those parts or those applications of a statute that are unconstitutional, and not a complete invalidation. *See, e.g., Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 323-24 (2006).

These plaintiffs, however, are seeking to have the lower burden of bringing an as-applied challenge, while at the same time asking the Court to strike down these statutes for *all* students, statewide, a remedy typical of a facial challenge. There is no law supporting such a request.

C. *Even If the Court Reviews the Complaints Under "As-Applied" Standards, They Must Be Dismissed.*

Even under the "as-applied" standard of review, the complaints are deficient for at least five reasons.

First, to state an Education Article claim, a plaintiff *must* allege the deprivation of a sound basic education, caused by a failure attributable to the State. *NYCLU v. State*, 4 N.Y.3d 175, 178-179 (2005). In an as-applied challenge, as noted above, the plaintiff must allege that the statute is unconstitutional as specifically applied to him. No plaintiff in this case has alleged that his or her child is not receiving a sound basic education, or pleaded facts to support such a claim. Indeed, no

plaintiff has even alleged that his/her child is currently assigned to an ineffective teacher.

Second, if the statutes enacted by the State are facially constitutional (they are), then plaintiffs have failed to demonstrate how any action *by the State* has caused a resource failure. The plaintiffs attempt to bridge this gap by claiming that it is the "State" that applies or enforces these statutes (*Wright*, p. 14, 40), and that the "State" "grants tenure." (*Wright*, p. 15)

Of course, this is not true, as a matter of law. Under the Education Article, local control of public education is vested in school boards. *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 45-46 (1982); *Paynter v. State of New York*, 100 N.Y.2d 434, 442 (2003); Accordingly, local school boards retain the right to hire teachers who meet State standards; have the right and responsibility to evaluate probationary teachers (Education Law § 3012-c); have the right to grant or deny tenure (Education Law §§ 2509, 2573, 3012); have the right to initiate termination proceedings (Education Law § 3020-a); and have the right to adopt budgets and to determine whether layoffs should be imposed. It is local school boards and administrators, not the *State*, that apply and enforce the challenged statutes.

Clearly, if the challenged statutes are facially valid (they are), their allegedly unconstitutional misapplication or non-enforcement by local school boards does not give rise to an Education Article claim. Again, such a cause of action *must* be based on a violation caused by the *State*. (*NYCLU*, 4 N.Y.3d at 180-182) Analogously, as the Court of Appeals explained in *Benson Realty Corp. v. Beame*, 50 N.Y.2d 994, 995-996 (1980):

> 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. [Emphasis supplied]

Third, a valid Education Article claim "requires that a district-wide failure [to provide a sound basic education] be pleaded." *NYCLU*, 4 N.Y.3d at 182. Neither complaint pleads a "district-wide failure," by any of the State's nearly 700 school districts, to provide a sound basic education. Indeed, as plaintiffs hail from only three school districts, and do not seek class certification, they are in no position to allege and have *not* factually alleged a claim that students in other school districts are not being provided a sound basic education. As the Court of Appeals has explained:

> Courts deal with actual cases and controversies, not abstract global issues, and fashion their directives based on the proof before them. Here the case presented to us, and consequently the remedy, is limited to the adequacy of education financing for the New York City public schools, though the State may of course address statewide issues if it chooses. [*CFE II*, 100 N.Y.2d 893, 928 (2003).]

Even as to their own districts (New York City, Rochester and Albany), plaintiffs nowhere allege a *district-wide* failure to provide students with a sound basic education. Read most liberally, the complaints allege that "some" New York public school students had, have, or may some day have an ineffective teacher. (*Davids*, pp. 8, 18; *Wright*, p. 35)

A claim that one or more students has an ineffective teacher - - here alleged without any specific or credible factual basis -- is clearly insufficient to meet the requirement that a district-wide failure be pleaded. Even a pleaded failure of entire schools within a district to provide a sound basic education is insufficient to state a valid Education Article claim. *NYCLU*, 4 N.Y.3d at 180-182. Clearly, if the State has no obligation to intervene based on allegations that a local school is not providing a sound basic education, it certainly has no obligation to intervene based on the allegation that some individual teachers may not be providing an "adequate" education.

Fourth, as the Court of Appeals stressed in *NYCLU*, 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." 4 N.Y.3d at 180. Here, the plaintiffs challenge no less than 13 separate statutes (*Davids*, ¶5, fn. 1; *Wright*, ¶6), which together comprise a major part of the Legislature's effort to regulate and promote the employment and retention of qualified public school teachers and principals. But, the plaintiffs never clearly articulate what, if these statutes are struck down, should replace them.

The *Wright* plaintiffs do not like the Education Law's three year probationary term. They apparently want the Court to direct the Legislature to impose a longer probationary term (*Wright*, ¶ 79), but never specify what an appropriate length would be. As noted in the teacher defendants' main brief, the Legislature has thoroughly considered this issue (pp. 14-19).

Plaintiffs next say that teachers should not get "super" or "extraordinary" due process, but concede that it is legitimate for the Legislature to provide due process protection for tenured teachers. (*Wright*, pp. 6-8; *Davids*, pp. 10-11; *Davids*, ¶ 37) Plaintiffs, however, fail to articulate just what due process they would find acceptable. The plaintiffs variously say that the statute's just cause standard is too high (*Wright*, p. 6; *Wright*, ¶ 50); that hearings take too long (*Wright*, pp. 7-8; *Wright*, ¶ 54); that investigating charges is time-consuming *(id.)*; that the three year statute of limitations is too short (*Wright*, p. 7; *Wright*, ¶ 54); and suggest that impartial hearing officers are a problem. (*Wright*, p. 8; *Wright*, ¶ 62) But, as to each of these alleged shortcomings, the plaintiffs fail to clearly articulate what alternative process would pass muster. Instead, the plaintiffs simply ask the Court to remove defendants' protected property interest in their public employment and to strike down *all* due process protections for all teachers, even though not a single plaintiff has alleged that his or her

child was denied a sound basic education due to an ineffective teacher who was retained in the classroom because of the challenged statutes.

As to seniority, again, no plaintiff has made any factual allegation that his or her child had an ineffective teacher because New York lays off civil servants, including teachers, based on seniority. And, as with probation and due process, plaintiffs nowhere clearly articulate what should replace seniority-based layoffs. True, plaintiffs say that in layoff situations, the most "effective" teachers should be retained.[8] In terms of pleading, however, the plaintiffs' failure to articulate what layoff system would be acceptable, requires dismissal.

Determining a teacher's effectiveness is something the Legislature has addressed, most recently in 2010 by enacting Education Law § 3012-c. Of course, the plaintiffs also ask the Court to strike down Education Law § 3012-c, saying that the *Legislature* has failed to properly identify what constitutes effective teaching. (*Wright,* p. 5) But, plaintiffs themselves fail to articulate what teacher effectiveness is, or how it should be measured, and plaintiffs themselves fail to say what layoff criteria should replace the objective criterion of seniority. Once again, plaintiffs themselves have failed to meet the Education Article pleading requirement that they clearly articulate what the State must do if plaintiffs succeed. *NYCLU,* 4 N.Y.3d at 184.

Fifth, and finally, here, as in *NYCLU,* 4 N.Y.3d at 182-184, the State has created processes for the removal of ineffective teachers. Under Education Law § 3020-a, any person may file a complaint against a tenured teacher. There is not a single allegation in either complaint that any of

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[8] Notably, plaintiffs suggest that even *effective*, more experienced teachers should give way to "more effective" junior teachers (*Wright*, ¶68). Plaintiffs are apparently unconcerned with the effect that such meddling might have, especially on a low-wealth school district's ability to attract and retain experienced teachers. This was a major concern discussed by the Court of Appeals in *CFE II*, 100 N.Y.2d at 909.

the plaintiffs ever sought the removal of a tenured teacher who he or she claimed to be ineffective. Plaintiffs cannot allege that these remedies would be futile, because they have never sought to exercise these remedies.

D. *The Plaintiffs' Request for Discovery Does Not Defeat the Motion to Dismiss.*

The plaintiffs generally assert that the motions to dismiss should be denied because plaintiffs should be entitled to discovery. (*Davids*, pp. 14, 18; *Wright*, pp. 2, 18) Although not specifically requested, plaintiffs' assertion could be loosely construed as a request for the Court to deny the motion to dismiss and order defendants to produce discovery in accordance with CPLR § 3211(d).

When affidavits submitted in opposition to a motion to dismiss allege that "facts essential to justify opposition" to the motion may exist, but cannot be stated at that time, a court may deny or stay the motion and permit disclosure. CPLR § 3211(d). "When facts are necessary for a party to properly oppose a motion to dismiss, and those facts are within the *sole knowledge or possession* of the movant, discovery is sanctioned if it has been demonstrated that such facts may exist." *Glassman v. Catli*, 111 A.D.2d 744 (2d Dep't 1985)(quoting *Cosmos v. Mason Supplies, Inc. v. Lido Beach Associates, Inc.*, 95 A.D.2d 818 (2d Dep't 1983))(emphasis added); *see also Peterson v. Spartan Indus.*, 33 N.Y.2d 463 (1974); *Rochester Linoleum and Carpet Center, Inc. v. Cassin*, 61 A.D.3d 1201 (3d Dep't 2009)(noting that a plaintiff is required to provide some evidentiary basis for its claim that further discovery would yield material evidence and demonstrate how such discovery would reveal facts in the movant's exclusive knowledge).

Plaintiffs submit no affidavits and fail to specifically allege the requirements set forth in CPLR § 3211(d) and relevant case law. At best, the *Davids* plaintiffs allege that defendants will not stipulate to or admit facts alleged by plaintiffs, and thus that any questions of fact must be resolved

through discovery. (*Davids*, p. 14) The *Davids* plaintiffs further allege that the development of the facts will entail discovery of materials that are in the sole possession of defendants. *Id.* Such broad assertions fail to show what additional facts plaintiffs deem necessary to oppose the motion to dismiss and fail to demonstrate that any specific facts are solely within the possession of any defendant.

The *Wright* plaintiffs inaccurately state that they have "limited access and resources to the State's comprehensive data about teacher retention and promotion." (*Wright*, p. 18) Under Education Law § 3012-c(10)(a), however, the State Education Department is required to make public this very data. Moreover, hearing officer decisions following Section 3020-a proceedings, and settlement agreements of Section 3020-a cases, are publicly available through FOIL. *See LaRocca v. Bd. of Educ. of the Jericho Union Free Sch. Dist.*, 220 A.D.2d 424 (2d Dep't 1995); *Anonymous v. Bd. of Educ. of the Mexico Cent. Sch. Dist.*, 221 A.D.2d 1028 (4th Dep't 1995). Clearly, all of the data plaintiffs needed to properly plead their complaints was readily available to them. It is telling then, plaintiffs chose to instead rely on outdated, unscientific surveys that better fit the false narrative that teacher tenure is a lifetime guarantee.

In sum, no liberal construction of these complaints can save them from their legal and factual pleading deficiencies. The complaints fail to state a claim under the Education Article, and should be dismissed.

POINT II

THE COMPLAINTS RAISE ONLY A NON-JUSTICIABLE POLICY DISPUTE ABOUT THE WISDOM OF THE TENURE LAWS.

Plaintiffs say that their case is "not a policy crusade against tenure or due process protections for teachers." (*Wright*, p. 3; *Davids*, p. 7). But, this assertion is belied by the complaints themselves, complaints asking the Court to strike down the very statutes that provide teachers with tenure and due process protections. (*Wright*, ¶ 7; *Davids*, ¶ 58).

In truth, these actions are designed *solely* to deprive teachers of statutory safeguards designed not only to protect teachers, but also to further good education. While plaintiffs refer to the "inputs" needed for a sound basis education, of which there are many, plaintiffs chose to limit their challenge to attacking the employment safeguards for teachers and principals – without ever mentioning inputs such as adequate education funding for low-wealth districts, growing class sizes, academic program cuts, and other factors the Court would need to consider were a justiciable Education Article claim before it for review. *CFE I*, 86 N.Y.2d 301, 317 (1995); *CFE II*, 100 N.Y.2d 893, 907-08 (2003); *CFE III*, 8 N.Y.3d 14, 21 (2006). Indeed, all such inputs should be examined as a whole. *Id.*; *Bd. of Educ., Levittown Union Free School Dist. v. Nyquist*, 57 N.Y.2d 27, 48 (1982). Nonetheless, plaintiffs have constructed their complaints to falsely and invidiously pit the tenure and due process rights of teachers against the sound basic education rights of students they teach.

The allegations in the complaints are, for the most part, merely plaintiffs' opinions and conclusions, supported by the opinions and conclusions of economists in academic papers. (*Wright*, ¶¶ 27-33; *Davids*, ¶¶ 3, 39) But, "[a]cquiring data and applying expert advice to formulate broad

programs cannot be economically done by the courts[;] thus, "the manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the legislative and executive branches." *Klostermann v. Cuomo*, 61 N.Y.2d 525, 535-36 (1984). And, of course, the economists' academic articles attached as exhibits to the complaints cannot be cited as *factual* allegations, as the economists in the articles are themselves simply making inferences, giving opinions and drawing conclusions 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, opinion or conclusion; the Court can only draw a reasonable inference from a factual allegation in a complaint and, as to these complaints, except for the unsupported allegation that one twin had an ineffective teacher last year (*Wright*, ¶¶ 4-5), such factual allegations are non-existent.

Such generalized conclusions cannot form the basis of a justiciable controversy. In *Benson Realty Corp.*, *supra*, 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." (*Id.*, 50 N.Y.2d at 995) Though plaintiffs asserted a constitutionally-protected right, the Court of Appeals held that the constitutional challenge must fail because it relied on "generalized conclusions" and dealt with political questions the judiciary could not address. *Id.* at 996. In reaching its decision, the Court of Appeals discussed circumstances quite similar to the instant complaints:

> 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.*

Here, as in *Benson*, it is fair to characterize plaintiffs' challenge as a claim, based on general conclusions, that the Education Law's tenure provisions are being maladministered or non-administered. The *Davids*' plaintiffs allege that "New York principals and 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." (*Davids*, ¶ 33) Similarly, the *Wright* plaintiffs claim that "[d]isciplinary proceedings are rarely initiated" because of "cumbersome, lengthy, and costly due process protections . . . ." (*Wright*, ¶¶ 51-52) But merely couching this alleged application or administration of the Education Law provisions as a constitutional challenge is insufficient to create a justiciable action. Similarly, plaintiffs claim that 3020-a cases are too long and too complicated. (*Wright*, ¶¶ 49-65; *Davids*, ¶¶ 36-43) Plaintiffs, however, cite no authority for the proposition that a due process procedure, designed to adjudicate important property rights, is unconstitutional because it has a five-month time frame. In fact, it is difficult to cite any other civil procedure that must be completed so quickly. And, in any event, based on recent amendments, the statute mandates

that such cases be completed in 155 days, absent circumstances beyond the parties' control. (Education Law § 3020-a(3)(c)(vi) and (4)).

Indeed, the recent amendments to 3020-a further show that plaintiffs' claims are not justiciable. In *Benson Realty Corp.*,[9] the Court of Appeals stressed that "the need for rent control had been re-examined legislatively at intervals of three years" – akin to the recent re-examination and amendments of the Education Law in 2008, 2010 and 2012. *Id.* at 995.

Without acknowledging *Benson*, the *Wright* plaintiffs rely on *Cohen v. State*, 94 N.Y.2d 1 (1999), for the proposition that it is the judiciary's role to determine whether a statute offends the New York State Constitution. The *Cohen* case, however, concerned "whether the challenged statute [was] intrinsically a constitutional affront to the separation of powers doctrine." *Cohen*, 94 N.Y.2d at 15. And, the Court of Appeals declared in *Cohen*, as it had elsewhere:

> . . . that it is unwise for the courts "to substitute our own determination for that of the Legislature even if we would have struck a slightly different balance on our own," for it "is not the role of this, or indeed any, court to second-guess the determinations of the Legislature, the elective representatives of the people, in this regard." That wisdom remains a compelling injunction for this Court to honor and be guided by in this instance.

While the Court of Appeals did recognize in *Cohen* that courts review the constitutionality of legislation, the Court also recognized that "the courts have their limitations, too, either doctrinally imposed or self-imposed." 94 N.Y.2d at 11-12. According to the Court, "[t]he restraints have evolved for prudential reasons, from an appreciation of the prescribed and proportioned role of the

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[9] *Benson Realty Corp.* demonstrates that plaintiffs are wrong when they say that defendants "cannot identify a single case where a constitutionally-protected right was at issue, but the court nevertheless concluded that the matter was non-justiciable on political question grounds." (*Wright* p. 29) *Benson* is Court of Appeals precedent for dismissing a case as non-justiciable where a constitutionally-protected right is alleged.

Judiciary, and out of an acknowledged interdependency in the fulfillment of plenary governmental responsibility." 94 N.Y.2d at 11-12

For these reasons, courts apply the doctrine of justiciablity and the related doctrine of exhaustion of administrative remedies. Indeed, if plaintiffs believe that section 3020-a is not being implemented properly, they have administrative remedies at their disposal. *See Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 445 (1979)(recognizing the right of plaintiffs to file appeals to the Commissioner of Education pursuant to section 310 of the Education Law); and *NYCLU, supra*, 4 N.Y.3d at 182-184 (plaintiffs challenging individual schools' alleged failure to provide a sound basic education dismissed because there exists an administration process "for accomplishing the very relief plaintiffs seek"). As *Donohue* illustrates, plaintiffs' individual, as applied, challenge under Article XI, § 1 must fail. In *Donahue*, the Court dismissed plaintiff's Article XI, § 1 cause of action, which alleged a failure to educate plaintiff's child, noting that "students and their parents had the right "to take advantage of the administrative processes provided by statute to enlist the aid of the Commissioner of Education in ensuring that such students receive a proper education." *Donohue*, 47 N.Y.2d at 445.[10] Thus, defendants submit, *Benson*, *Donohue* and a proper read of *Cohen*, compel the dismissal of plaintiffs' claims as being non-justiciable.

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[10] It is also noteworthy that the decision in *Donohue* recognized the "practical problems raised by a cause of action sounding in educational malpractice," including "the practical impossibility of proving that the alleged malpractice of the teacher proximately caused the learning deficiency of the plaintiff student," since "[f]actors such as the student's attitude, motivation, temperament, past experience and home environment may all play an essential and immeasurable role in learning." *Donohue*, 47 N.Y.2d at 445-46 (Wachtler, J., concurring).

POINT III

THE PLAINTIFFS LACK STANDING

Despite plaintiffs' failure to plead any injury in fact, or allege any concrete and specific future harm, plaintiffs aver that they have standing because they fall within the "zone of interest" of the Education Article of the New York Constitution. (*Wright*, pp. 32-36; *Davids*, pp. 7-8, 17-18) And, while the teacher defendants have not asserted that plaintiffs fall outside the zone of interest that Article XI of the New York Constitution was designed to protect, defendants assert that in order to establish standing, plaintiffs must also demonstrate an injury in fact. *New York State Ass'n of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207 (2004). They must show actual harm and the injury alleged must be more than conjecture. *Id.* at 211-212. Being within the zone of interest is not enough.

No doubt realizing their pleading failures, plaintiffs now assert that pleading allegations of a "systemic failure in the state education system" affecting all New York schoolchildren is sufficient to meet standing requirements. (*Wright*, pp. 32-34, 38-39; *Davids*, p. 17-18) It is clear, however, that plaintiffs did not file these actions on behalf of all New York schoolchildren. (*Wright*, ¶¶ 10-16; *Davids*, ¶¶ 8-18). In any even, plaintiffs plead no support to show, as they claim, that plaintiffs will suffer "imminent" harm by possible assignment to an ineffective teacher's classroom. (*Wright*, p. 34) The purported "inevitability" that a student in New York State will have an ineffective teacher is pure conjecture and does not meet the required showing of harm to establish standing. (*See Novello*, 2 N.Y.3d at 211-212; *Wright*, p. 35) Further, the complaints fail to allege that any plaintiff is assigned to an ineffective teacher.

Plaintiffs rely on *Assoc. for a Better Long Island, Inc. v. New York State Dep't of Environmental Conservation*, 23 N.Y.3d 1 (2014), for the premise that future harm is sufficient to

confer standing. (*Wright*, p. 35) As plaintiffs concede, however, a sufficient allegation of future harm must be "more than an amorphous allegation of potential future injury." *Assoc. for a Better Long Island, Inc.*, 23 N.Y.3d at 7. Plaintiffs' complaints are rife with speculative and conclusory allegations that have a minimal probability of occurrence. (*Wright*, ¶¶ 24-33) The reliance on broad and out-dated studies pertaining to effective teaching is not sufficient to demonstrate any actual existing, or future, harm of plaintiffs who are students in specific schools in New York State. (*Wright*, ¶¶ 27-33; *Davids*, p. 18).

Plaintiffs rely on *New Yorkers for Students' Educational Rights ("NYSER") v. State of New York*, New York County Index No. 650450/14 (Mendez, J., November 17, 2014), to support their claim that parents of New York schoolchildren automatically have standing to bring a constitutional claim under Article XI of the New York Constitution. (*Wright*, p. 33) The *NYSER* decision, however, does not help plaintiffs because the Court in *NYSER* ruled that parent plaintiffs had standing based solely on the potential effect of specific legislation, following a similar legal challenge, on the state's funding of schools derived from Article XI. *NYSER*, Index No. 650450/14 at p. 2. The Court in *NYSER* noted that plaintiffs specifically alleged causes of action relating to the state's failure to comply with decisions of the Court of Appeals in the three *Campaign for Fiscal Equity v. State* cases (citations omitted) that relate to the minimal level of constitutional funding necessary to provide a sound basic education. *Id.* at p. 3-4. Plaintiffs seek to apply *NYSER* entirely out of context.

Nonetheless, the claims in *NYSER* are concrete and measurable, not speculative, as the plaintiffs' claims are here. The *NYSER* case does not adequately support plaintiffs' notion that an alleged and speculative "system-wide failure" of the New York education system is sufficient to

confer standing. Plaintiffs fail to cite any other authority to support this claim, and it is clear that alleged systemic harm is not sufficient to establish standing.

Plaintiffs claim disingenuously that, though the standing requirements may not be satisfied, denying plaintiffs standing would result in barring a constitutional issue from judicial review. (*Wright*, p. 39) Yet, the cases plaintiffs cite for this proposition all consider the standing of state taxpayers to challenge the expenditure of state funds. *See e.g.*, *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801 (2003)(finding that citizen-taxpayers had standing to challenge an unlawful expenditure of state funds for a casino gambling compact with an Indian tribe, so long as their claims had a sufficient nexus to fiscal activities of the state; and noting that the casino would remain open indefinitely if standing were denied); *Boryszewski v. Brydges*, 37 N.Y.2d 361 (1975)(granting standing to citizen taxpayers to challenge the constitutionality of state legislative and executive retirement plan and budget statutes because the only other individuals who would have standing to challenge the statutes would be those who benefit from them, thus increasing the likelihood that the statutes would never be subject to judicial review if standing was denied to the citizen taxpayer plaintiffs); *New York State United Teachers ex. rel. Iannuzzi v. State of New York*, 993 N.Y.S.2d 475, 480-481 (Sup. Ct. Albany Co., 2014)(relying on *Boryszewski* and *Saratoga Chamber of Commerce, supra,* to find taxpayer standing to challenge the constitutionality of the expenditure of State funds). In contrast to those cases, plaintiffs here fail to demonstrate how their lack of standing would prevent any other plaintiff from demonstrating the requisite harm to establish standing to consider issues relating to the Education Article of the New York Constitution.

Plaintiffs cite *People v. Parker*, 41 N.Y.2d 21 (1976), for the assertion that even if an individual lacks standing, a court may consider the claim on behalf of others if it is a claim of

"sufficient public importance." In *Parker*, the Court of Appeals considered a challenge to a criminal sentencing statute, despite lack of standing on the plaintiff's part, because there may have been other incarcerated defendants affected by the statute, and the Appellate Division was split over the constitutionality of the statute. *Parker* is clearly inapposite to the instance matter.

Finally, as teacher defendants noted in their main brief (p. 10), certainly parents can establish standing to bring Education Article claim, if they properly allege injury in fact. *See, e.g., Hussein v. State of New York*, 81 A.D.3d 132 (3d Dep't 2011), *aff'd*, *Hussein v. State of New York*, 19 N.Y.3d 899 (2012). In *Hussein*, unlike here, parents of children attending school in 11 school districts outside of New York City challenged inadequate education funding as a violation of Article XI of the New York Constitution. *Id.* The Court found that plaintiffs' complaint was 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.* at 467. The Court also noted the importance of plaintiffs' submission of "evidence of factors that will allegedly continue to keep their districts underfunded . . . ." *Id.*

Plaintiffs here could have plead similar claims to those in *Hussein*, *i.e.*, asserting, for instance, the need for additional funding to hire more teachers in Rochester schools. *(See Wright*, ¶ 70). If plaintiffs want to establish standing to bring a claim challenging the Education Article, they must demonstrate an injury in fact. *See Novello*, 2 N.Y.3d at 211-212. They have failed to do so.

POINT IV

THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO JOIN LOCAL UNIONS AND SCHOOL DISTRICTS WHOSE COLLECTIVE BARGAINING AGREEMENTS MAY BE VITIATED SHOULD PLAINTIFFS SUCCEED.

All plaintiffs are now attacking the right of teachers to collectively bargain disciplinary procedures with their school districts. (*Wright*, ¶ 46; *Davids*, p. 19) The *Wright* plaintiffs casually brush off the need to join such unions and school districts that have entered into such agreements, saying that plaintiffs are only interested in their Education Article claim and any ancillary effect on collective bargaining agreements does not make unions necessary parties. (*Wright*, p. 39-40) The Davids plaintiffs more harshly dismiss the need to join parties whose contract rights may be affected as "absurd." (*Davids*, p. 19)

The plaintiffs' position is legally incorrect. These cases should be dismissed outright for all the reasons set forth above but, if for any reason they are not, parties whose rights may be affected should be joined.

The right to collectively bargain is constitutionally guaranteed and protected by statute. (Teacher defendants main brief, pp. 54-55) Contracts so negotiated are also protected from impairment by the Contract Clause (Article I, §10) of United States Constitution. *See, e.g., Condell v. Bress*, 983 F.2d 415, 418 (2d Cir. 1993)

The plaintiffs broadly ask the Court to hold that collectively bargained alternative disciplinary procedures violate the Education Article. (*Wright*, ¶ 46) Clearly, such a holding might vitiate existing contracts that were lawfully entered under Civil Service Law §§200 *et seq*, and Education Law §3020(1). The parties to such agreements may have made bargaining concessions to obtain the

contractual provisions and may rely on those agreements as central parts of their local labor relations.

It may be inconvenient for plaintiffs to actually investigate what those contractual agreements say; to explain to the Court why they are allegedly illegal; and to give the parties to those contractual agreements an opportunity to be heard. Still, it was plaintiffs who decided to make a statewide challenge; to broadly allege that collective bargaining agreements make it even harder to dismiss ineffective teachers; and to ask that the statute authorizing such bargaining be struck down. (*Wright*, ¶ 61) That being so, plaintiffs should be required to give all persons whose rights may be affected an opportunity to be heard.

CONCLUSION

The complaints should be dismissed.

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Respectfully submitted,

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