To be argued by: Jennifer L. Carlson
10 Minutes

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

MYMOENA DAVIDS, by her parent and natural guardian MIAMONA DAVIDS, *et.al.*, and JOHN KEONI WRIGHT, *et. al.*,

Plaintiffs-Respondents,

-against-

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

Defendants-Appellants,

-and-

MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO, SETH COHEN, DANIEL DELEHANTY, ASHIL SKURA DREHER, KATHLEEN FERGUSON, ISRAEL MARTINEZ, RICHARD OGNIBEBE, JR., LONNETTE R. TUCK, and KAREN E. MAGEE, Individually and as President of the New York State United Teachers; PHILLIP A. CAMMARATA, MARK MAMBRETTI, and THE NEW YORK CITY DEPARTMENT OF EDUCATION,

Intervenor-Defendants-Appellants.

Appellate Division Docket No.
2015-03922

APPELLANTS' BRIEF

SCHOOL ADMINISTRATORS ASSOCIATION OF NEW YORK STATE
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Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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

Plaintiffs-Respondents,

- against –

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

Defendants- Appellants,

-and-

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

Intervenor-Defendant-Appellant,

-and-

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

-and-

PHILIP A. CAMMARATA and MARK MAMBRETTI,

Intervenors-Defendants-Appellants

JOHN KEONI WRIGHT; GINET BORRERO; TAUANA GOINS; NINA DOSTER; CARLA WILLIAMS; MONA PRADIA; ANGELES BARRAGAN; LAURIE TOWNSEND; DELAINE WILSON,
Plaintiffs-Respondents,
- against –
THE STATE OF NEW YORK; THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK; MERRYL H. TISCH, in her official capacity as Chancellor of the Board of Regents of the University of the State of New York; JOHN B. KING, in his official capacity as the Commissioner of Education of the State of New York and President of the University of the State of New York;
Defendants-Appellants,
-and-

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

-and-

PHILIP A. CAMMARATA and MARK MAMBRETTI,

Intervenors-Defendants-Appellants,

-and-

NEW YORK CITY DEPARTMENT OF EDUCATION,

Intervenor-Defendant-Appellant,

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

Intervenor-Defendants- Appellants.

STATEMENT PURSUANT TO CPLR 5531

1. The Consolidated Index Number in the trial court was 101105/14

2. The full names of the parties are set forth above. There have been no changes.

3. The action was commenced in the Supreme Court, Richmond County.

4. The summons and Complaint in *Wright, et.al. v. State* were served on or about July 28, 2014 and the Amended Complaint was served on or about November 13, 2014. The summons and Complaint in *Davids, et.al. v. State* was served on or about July 7, 2014 and the Amended Complaint was served on July 24, 2014. A motion to dismiss was served on October 24, 2014 and a motion to renew was served on May 26, 2015. An Answer has yet to be served in this matter.

5. The object of the action is to declare several sections of the Education Law unconstitutional pursuant to Article XI §1 of the New York State Constitution.

6. The appeal is from an order of the Supreme Court, Richmond County dated March 12, 2015, and entered March 24, 2015, made by Justice Minardo, as well as an order of the Supreme Court, Richmond County dated October 22, 2015, and entered on October 28, 2015, also made by Justice Minardo.

7. The appeal is being perfected on the full record method.

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STATEMENT OF FACTS

Plaintiffs in the consolidated action herein are parents and school age children attending public schools in New York City, Albany and Rochester. (R 34, 68) Using vague and conclusory statements and outdated data referring to early versions of statutes that have been repeatedly amended since their enactment, plaintiffs alleged that the statutes relating to tenure, discipline, evaluations, and layoffs/seniority (collectively referred herein as "the Challenged Statutes"), are inexplicably violating the students' constitutional rights to a sound basic education. (See generally, R. 34-58, 59-460)

The Amended Complaints only refer to the alleged impact the Challenged Statutes have vis-à-vis teachers. (See generally, R. 34-58, 59-460) This position shortsightedly misses the fact that declaring the Challenged Statutes unconstitutional will not just negatively impact ineffective teachers, but will also create significant harm to school administrators, such as principals, assistant principals, directors, and deans of students, all of whom also fall within the purview of the Challenged Statutes. (R. 464) Intervenor-Defendants Phillip Cammarata and Mark Mambretti are building principals and have intervened in the consolidated action to provide a voice to school administrators across the state and provide the Courts with the unique historical perspective on the Challenged

Statutes, and particularly those relating to tenure, that have occurred to school administrators in New York State.

Each of the defendants in this consolidated action, including Intervenor-Defendants Cammarata and Mambretti, filed pre-Answer Motions to Dismiss. Oral argument took place on January 14, 2015 and on March 12, 2015 Hon. Phillip Minardo issued a Decision and Order, denying the motions, except insofar as to dismiss the cases against Commissioner of Education John King and Chancellor Merryl Tisch, on the basis that the Plaintiffs successfully alleged a cause of action. (R. 17) The Decision and Order was entered on March 20, 2015 and each of the defendants timely filed notices of appeal. (R. 1-33)

Subsequent to the issuance of the Decision and Order, as part of the 2015 Budget Bill, the Legislature enacted radical amendments to each of the Challenged Statutes. (R. 986-1035) These amendments, and one new statute, specifically address the crux of Plaintiffs' contentions. Namely, that the statutes are unconstitutional because there was a lack of accountability for teacher performance, leading to ineffective educators being hired and retained. While Intervenor-Defendants Cammarata and Mambretti absolutely disagreed with this assertion in the first place, as demonstrated below, there can be no doubt that in light of the April 13, 2015 amendments to the Challenged Statutes, the gravamen within the Complaints are moot.

At a status conference May 6, 2015, Hon. Phillip G. Minardo granted the defendants until May 27, 2015 to file motions to renew in light of these new statutory changes, which the defendants did. Oral arguments on the motions to renew were held on August 25, 2015. On October 23, 2015, the Hon. Phillip G. Minardo issued a Decision and Order, denying the motions in their entirety on the basis that the changes were "marginal". (R. 954-58)

It is respectfully submitted that both of Judge Minardo's ruling were in error, as the continually evolving nature of the Challenged Statutes clearly demonstrate that these matters are non-justiciable political questions. In fact, as recently as December2015, the New York State Board of Regents amended the regulations relating to the Challenged Statute Education Law §3012-c, which was superseded in large part in April 2015 by Education Law §3012-d, thereby changing the evaluation processes and procedures for teachers and building principals across the state. The numerous changes to the Challenged Statutes after the Amended Complaints were filed further renders the consolidated actions moot as a matter of law. Thus, the Amended Complaints must be dismissed as a matter of law.

STATEMENT OF QUESTIONS RAISED

1. Did the lower court incorrectly deny the defendants-appellants' motions to dismiss the amended complaints, when said motions correctly set forth that plaintiffs-respondents' claims that sections of the New York State Education Law relating to educator retention were unconstitutional pursuant to Article XI § 1 of the New York State Constitution were improper due to lack of justiciability and failed to state a cause of action?

   Yes.

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

   Yes.

ARGUMENT

POINT I

IN LIGHT OF THE REPEATED STATUTORY AMENDMENTS THAT HAVE TAKEN PLACE SINCE THE DATA RELIED UPON IN THE COMPLAINTS, PLAINTIFFS' COMPLAINTS ARE MOOT.

A cause of action can no longer exist when the complained of circumstances cease to exist. *Hearst Corp. v. Clyne,* 50 N.Y.2d 707 (1980). This is particularly true when the rights of the parties are no longer affected by the alleged statute or regulation due to an intervening change in law because a ruling by the courts on the validity of the original statute "would have no practical effect and would merely be an impermissible advisory opinion." *NRG Energy, Inc. v. Crotty*, 18 A.D.3d 916 (3d Dept. 2005) (Challenged regulations were rendered moot by the implementation of emergency and, subsequently, final new regulations. Since the challenged regulations no longer existed, the parties were no longer subject to alleged injury by the defunct statutes.). Courts are prohibited from rendering such advisory opinions because the doctrine of separation of powers "forbids courts to pass on academic, hypothetical, moot, or otherwise abstract questions." *Hearst Corp.,* 50 N.Y.2d at 713-14.

The Challenged Statutes at issue here in many cases have been rendered moot several times over by the Legislature based upon the factual allegations in the Complaints, which are based almost exclusively on conclusory allegations

and stale data. Most recently, on April 13, 2015, as part of the 2015 Budget Bill, the Legislature enacted extensive revisions to the Education Law, which render Plaintiffs' claims moot as a matter of law.

A. Statutes conferring tenure upon educators (Education Law§§ 2509, 2573, 3012).

The gravamen of the plaintiffs' complaints concerning the statutory process surrounding the granting of tenure was that the three-year probationary period was too short for a proper evaluation of incoming educators. Plaintiffs alleged that these timeframes, combined with a supposed lack of accountability relating to educator performance during probationary periods, in essence amounted to "ineffective" educators being granted tenure by default and that a four-year probationary period is necessary. (Wright ¶¶38, 46, 79)

With the April 2015 Legislative amendment, Plaintiffs receive precisely what they wanted. Any educated appointed to a new position effective July 1, 2015 must now serve a four year probationary period before they are eligible for tenure. In the cases of teachers and building principals, the ability to obtain tenure, which was previously granted or denied at the whim of the employing Board of Education, have been further restricted. The ability to obtain tenure for such individuals is now tied to their evaluation ratings under the Annual Professional Performance Review ("APPR"), which is codified under Education Law §§3012-c

Performance Review ("APPR"), which is codified under Education Law §§3012-c and 3012-d. Pursuant to the new requirements, any teacher or building administrator appointed on or after July 1, 2015 must now be rated "Effective" or "Highly Effective" in three out of four of their probationary years and will be ineligible for tenure if they are rated as "Ineffective" in the final year of probation. This new performance based requirement not only addresses Plaintiffs' alleged concerns that ineffective educators are being granted tenure, but also prevents ineffective educators from obtaining tenure early for political reasons or by estoppel due to the inaction of the Board of Education[1].

With the lengthened period of time to evaluate administrators and new stringent requirements for obtaining tenure that Plaintiffs were seeking as potential remedies to the alleged problems being legislatively enacted, plaintiffs' alleged deprivations no longer exist as they pertain to the tenure system and the Complaints fail to state a cause of action under the current statutory scheme. Accordingly, the Complaints must be dismissed as a matter of law.

[1] Tenure by estoppel is theoretically still possible if the educator in question meets the statutory performance criteria during his/her probationary period and the Board of Education fails to take action concerning his/her employment.

B. **Statutes providing guidelines in the event of layoffs (Education Law §§ 2510, 2585, 2588[2]).**

Layoff and recall rights in New York State public education operate under a "last in, first out" ("LIFO") system, that mirrors New York Civil Service Law. In this consolidated action, according to the plaintiffs, the statutes enabling this system are unconstitutional because they permit newer, more competent, teachers and administrators to be laid off in favor of retaining older, less competent, educators. This argument actually runs counterintuitive to their other contention that ineffective educators are receiving tenure. While the Plaintiffs offered no legitimate data in support of their "newer equals better" theory of educator effectiveness, they nonetheless allege that a system that does not take educator effectiveness into account when conducting layoffs is de facto unconstitutional.

Notwithstanding that defendants maintain that changing the system is both unnecessary and liable to have unintended consequences throughout public sector, the Legislature did enact as a part of the 2015 budget bill a new statute addressing the very issues cited to be problems by the Plaintiffs for failing schools. The new Education Law §211-f provides that schools designated to be either failing or persistently failing may be handed over to a receiver, who will be in control of curriculum and staffing decisions within the failing school. These are the schools

[2] Although not specifically challenged in the Complaints, Education Law § 3013 also deals with layoffs and seniority.

potentially in the most need for intervention. Depending on how long the school has been designated by the state to be a failing school, the receiver may be the superintendent of schools or an outside third party. In either case, the designated receiver has the sole authority to, without approval of the Board of Education, abolish positions, change salaries to entice and hire qualified educators, and/or fire ineffective educators. In the event that the receiver decides to abolish positions, layoffs are designated by tenure area; however, the person laid off is controlled by their evaluation ratings within the tenure area and not their length of service, which remedy is precisely what the Plaintiffs seek. Education Law §211-f (7) (b), (c). In other words, ineffective educators will be the first ones to be laid off in the schools. Those who are laid off are entitled to be placed on the preferred eligibility list; however they cannot be recalled back to the failing school. *Id.* Further, if an educator has two consecutive ineffective ratings prior to their position being abolished, they are not considered to have been an employee in "good standing" pursuant to the statute and are ineligible to be recalled to any position within the district. *Id.*

Thus, as the statutory scheme concerning the topic of layoffs and recall have been radically altered in a manner that conforms with the relief sought by the Plaintiffs, the Complaints fail to state a viable cause of action upon which relief can be obtained as a matter of law and must be dismissed as moot.

C. **Statutes providing for due process prior to the termination of tenured administrators (Education Law §§ 3020, 3020-a).**

Relying on unreliable data from 2000 to 2009 that does not even account for the recent 2012 enactment and amendments to the disciplinary statutes or the subsequent reports on the impact of these legislative changes issued by the New York State Education Department, Plaintiffs collectively allege that the statues providing for due process procedures prior to the removal of a tenured educator, either for ineffective performance or misconduct, violates their constitutional rights to a sound basic education. The plaintiffs aver school district simply refuse to seek the removal of ineffective educators because they find the procedures too lengthy, expensive and/or otherwise cumbersome to bother commencing the process. This supposedly results in ineffective educators, who would otherwise be terminated, remaining employed in schools.

Prior to the April 2015 amendments, Education Law §3020-a was radically amended in 2012 to expedite the disciplinary arbitration process so that the hearings now would be completed within 125 days of the charges against the tenured educators being filed. Data compiled by the State in 2013-14 school year up to April 30, 2014, which is at least seven years more recent than any alleged support cited by either set of Plaintiffs in their Complaints, statistically demonstrated a marked decrease in the length of time that disciplinary hearings were taking to complete. (R. 479-80) Moreover, with the creation of Education

Law §3012-c in 2010, which specifically addressed Plaintiffs' concerns about the removal of ineffective educators, a school district was given the right to charge any educator who received two consecutive ineffective ratings with incompetency and the hearing needed to be completed within a mere 30 days after charges are issued.

Nevertheless, the Legislature recently engaged in further substantial revisions to these disciplinary statutes. (R. 986-1035) As part of the 2015 Budget Bill, the Legislature enacted legislation that where teachers and administrators are charged with pedagogical incompetence, they will no longer have the option to have a panel hear the charges against them, but are instead limited to a single hearing officer, which will significantly speed up the hearing.

Additionally, a new statute, Education Law § 3020-b, has created streamlined removal procedures for teachers who have been rated Ineffective for two or more consecutive years. Specifically, §3020-b permits school districts to file disciplinary charges based upon incompetence for classroom teachers who have been rated ineffective for two consecutive years and *requires* the filing of charges for classroom teachers who have been rated ineffective for three consecutive years. It further provides that either two consecutive ineffective ratings or three consecutive ineffective ratings constitute prima facie proof of incompetence. Such prima facie proof can only be overcome by clear and

convincing evidence in the event of two consecutive ineffective ratings and may only be overcome through a showing of fraud in the case of three consecutive ratings.

Finally, in disciplinary charges involving the sexual or physical abuse of a student brought on or after July 1, 2015, the Legislature has now allows school districts to issue unpaid suspensions pending the disciplinary hearing. If an unpaid suspension is issued, a probable cause hearing must be held within ten days and the charges will be subject to an expedited hearing. Expedited hearings must be completed within 60 days of a pre-hearing conference.

With these significant hurdles to overcome and streamlined changes to the processes, the Legislature has clearly paved the way for an expeditious and economical method of removing tenured educators while still providing a modicum of due process. Since school districts no longer have the discretion to allow ineffective educators to continue working after demonstrating a pattern of ineffectiveness, Plaintiffs' allegations are moot as a matter of law.

D. Statute relating to the evaluations of teachers and principals (Education Law § 3012-c).

Plaintiffs also contend that the soon to be phased out evaluation statute, Education Law §3012-c, violates their constitutional rights insofar as it leaves too much power in the hands of districts and unions to negotiate higher ratings than

ineffective educators should otherwise receive. It is also alleged that the removal process for ineffective educators within this statute were inefficient.

Initially, it should be remembered that Education Law §3012-c was only enacted in 2010 and had been amended four times prior to when Defendant-Intervenors Cammarata and Mambretti filed their motion to dismiss on October 23, 2014. As part of the 2015 budget cycle, Education Law §3012-c was once again radically revised and the bulk of the substance of the statute has now been replaced by Education Law §3012-d and is subject to a plethora of new regulations promulgated by the State Education Department, which have changed as recently as December 2015. See 8 NYCRR §§ 30-2.14 and 30-3.17. School district must successfully implement the new, more rigorous, Education Law §3012-d process no later than July 1, 2016, or lose increases in state aid. Hence, the Plaintiffs' challenge to Education Law 3012-c is moot by school districts mandated compliance with its successor statute, 3012-d.

Some of the changes under the revisions include, but are not limited to, reducing the number of subcomponents from three to two to calculate the educator's composite score and restricting the discretion of districts and unions to negotiate the formulation of annual professional performance review plans. The Commissioner of Education must develop regulations that (1) set the weights and scoring ranges of each APPR component and subcomponent; (2) establish goal

setting procedures; (3) set parameters for appropriate SLO targets; and, (4) establish the parameters for teacher and principal observations. Under the new statutory scheme, at least one observation is to be performed by an outside evaluator. Further, if the teacher/principal receives a rating of "Ineffective" on either the student performance (testing) or the observation component, he/she will be ineligible to receive an overall rating of "Effective" or "Highly Effective." Additionally, as detailed above, districts are now required to proceed with an expedited termination hearing if an educator receives three consecutive ineffective ratings, with an enhance burden of proof being placed squarely on the educator's shoulders. Finally, Education Law §3012-d(8) provides that no student will be taught in two consecutive years by any teachers who received a rating of ineffective in the previous school year.

Additionally, due to the fact that teacher and principal evaluations were closely tied to growth within the highly controversial Common Core tests, in December 2015, the New York State Board of Regents amended the regulations implementing the APPR scoring. See 8 NYCRR §§ 30-2.14 and 30-3.17. According to the changes, the student growth portion of the APPR relating to the Grades 3- 8 ELA and Math Examinations and Regents examinations shall be used for data collection purposes only and that that actual scoring of the APPRs shall be based upon Student Learning Objectives ("SLOs") or non-common core

examinations; however, as of the date of this brief, the standards and guidelines for these criteria have not been established by the Commissioner of Education. Id.

Thus, the recent statutory changes have eviscerated Plaintiffs' allegations and the Complaints are now moot as a matter of law.

POINT II

THE VALIDITY OF THE CHALLENGED STATUTES IS A POLITICAL QUESTION, AS EVINCED BY THE FACT THAT THE LEGISLATURE HAS REPEATEDLY ADDRESSED PLAINTIFFS' CONCERNS.

A matter is deemed justiciable when there exists a case or controversy that can be finally decided by a judicial entity as opposed to a political entity, such as a legislative or executive branch. *Aetna Life Ins. Co. v. Haworth*, 300 U.S.227 (1937); *Sedita v. Board of Ed. of City of Buffalo*, 43 N.Y.2d 827 (1977). As a matter of policy, the courts will abstain from hearing cases if the allegations are such that the judiciary would be ill-equipped to undertake and other branches of government are better suited to the task. *Jones v. Beame*, 45 N.Y.2d 402, 408-09 (1978). When "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." *New York State Inspection, Sec. & Law Enforcement Employees, Dist. Council 82,*

AFSCME, AFL-CIO v. Cuomo, 64 N.Y.2d 233, 239-40, 475 N.E.2d 90, 93 (1984) (Claim not justiciable because, "[b]y seeking to vindicate their legally protected interest in a safe workplace, petitioners call for a remedy which would embroil the judiciary in the management and operation of the State correction system."), *citing James v. Board of Educ.,* 42 N.Y.2d 357, 367.

The courts particularly acknowledge the non-justiciability of cases involving political questions, as they involve "controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the legislative and executive branches." *Roberts v. Health & Hospitals Corp.*, 87 A.D.3d 311, 323 (1st Dep't., 2011), *citing* 16A Am. Jur. 2d, Constitutional Law § 268. The justiciability of a political question is primarily a function of the separation of powers. *Baker v. Carr,* 369 U.S. 186, 210-11, (1962).

Courts are obliged to decline involvement in a case where accepting such responsibility would violate the constitutional scheme for the distribution of powers among the three branches of government and involve the judicial branch in responsibilities it is ill-equipped to assume. *Jones v. Beame*, 45 N.Y.2d 402 at 406 (1978). Plaintiffs, however sincerely motivated, may not interpose themselves and the courts into "the management and operation of public enterprises." *Id.* at 407 (1978), *citing In Matter of Abrams v. New York City Tr. Auth.,* 39 N.Y.2d 990, 992

(1976). There are "questions of judgment, discretion, allocation of resources and priorities inappropriate for resolution in the judicial arena", the responsibility for which is "lodged in a network of executive officials, administrative agencies and local legislative bodies." *Id.*

Where 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 reposed would, absent extraordinary or emergency circumstances (*James,* 42 N.Y.2d at 357, 367), constitutes an *ultra vires* act. See *District Council 82,* supra 64 N.Y.2d at 239. Furthermore, "[t]o warrant judicial intervention, the threat to petitioners' legally protected interest in a safe workplace must be of sufficient immediacy and reality, and the remedy sought must not seek judicial action which would necessarily impinge upon the prerogative and authority of a coordinate branch of government." *Id.*, at 241.

Specifically, the Court of Appeals has been very clear that matters pertaining to the maintenance and standards within a school district are largely not justiciable. *James*, 42 N.Y.2d at 366-68.

Neither Complaint at issue has alleged any immediate threat to the safety of the plaintiffs as a result of the continued presumptive constitutionality of the Challenged Statutes. Further, declaring the Challenged Statutes unconstitutional

would most assuredly impinge upon the authority of the Legislature, the Commissioner of Education, the Board of Regents as well as the rights of the local governing bodies (school boards of education) to properly and effectively maintain a sound basic education, especially given the recent legislative changes in the Education Law.

A) The State Legislature is constantly revising the Education Law to accurately reflect the political climate.

The New York State Board of Regents was established by the State Legislature in 1784 to exercise legislative functions over the state educational system, determine its educational policies, and, except for the judicial functions of the Commissioner of Education, establish rules for carrying out the state's laws and policies relating to education and the functions, powers, duties, and trusts granted to or authorized by the University of the State of New York and the NYS Education Department (See Education Law §207.) The Board of Regents establishes and enforces educational and professional standards in the interests of the people of the State. Here, the Plaintiffs are claiming that the Challenged Statutes as applied violate the constitutional rights of New York schoolchildren. The complainants seek judicial intervention in a field that is governed by a co-branch of government without any showing of an immediate threat to the schoolchildren.

1. Brief history of tenure and the abolishment of administrative tenure in the 1970s illustrates this matter is a nonjusticiable political question.

In 1917, New York enacted its first public school tenure law, but it only applied to teachers in city school districts. *See* L. 1917, c. 786. Twenty years later, the forerunner to Education Law §3012, Education Law §872 was enacted and expanded the availability of tenure to cover all educational professionals, not just teachers, employed in Union Free School Districts, and by extension central school districts[3]. *See* L. 1937, c. 314. Tenure was finally given a statewide application for all instructional and non-instructional public school employees in 1945. *See* L. 1945.

The Legislature actually considered the political question of tenure in 1971, when it revised the tenure laws to abolish tenure for school district and BOCES administrators and supervisory personnel. *See* L. 1971, c.116. This commenced a four-year period of continual political revisions to the Challenged Statutes that was widely recognized by the Legislature as an unmitigated disaster when it ultimately reinstated tenure for administrators in 1975. *See* L. 1971, c.116; L. 1974, c. 735.

Only one year into the elimination of administrative tenure, the Legislature amended the statutes to permit boards of education to enter into contracts of up to

[3] A Union Free School District ("UFSD") is defined as one with a population of 4,500 or more and employs a superintendent. A Central School District is one that is formed by combining any number of common, union free and Central School Districts and has the authority to operate a high school.

five years with principals and supervisory staff. This statutory authorization did not have the intended effect of providing some protection to administrators from political influences on the local level, as it was noted that more than fifty percent (50%) of administrators were working without the protection of an employment contract and subject to termination at a moment's notice two years after the Legislature authorized employment contracts. In 1974, the Legislature attempted to correct the unwillingness of local school districts to enter into contracts with administrators by mandating that each school administrator be given an employment contract with a duration of one to three years. *See* L. 1974, c. 735. In May, 1975, administrative tenure was reinstated due to the clear demonstration that political determinations, as opposed to the best interests of children, took over public education when given the opportunity. *Moritz v. Bd. of Educ.,* 60 A.D.2d 161, 166 (4th Dep't 1977) (Legislature intentionally created tenure system instead of former system of discretionary employment contracts in order to provide competent educators with security.)

Since administrative tenure was reinstated in 1975, there have been other unsuccessful political challenges to tenure through the legislative process. Notably, in 1999, Governor Pataki called for the elimination of tenure for all principals and assistant principals. This rally was ultimately unsuccessful. In 2010, with the enactment of APPR, the ability to achieve and retain tenure was significantly

modified by the Legislature through a mandatory evaluation system that "shall be a significant factor" in tenure determinations and provided for an expedited hearing process to remove educators who receive "ineffective" ratings two years in a row based upon incompetency.

In April 2015, subsequent to the Supreme Court's denial of the motion to dismiss in the instant action, the Legislature again adopted radical changes to the tenure process for both teachers and administrators. *See* L. 2015, c. 56. These changes included increasing the duration of probationary periods for three years to four years and, in the cases of teachers and building principals, predicating an award of tenure upon achieving evaluation ratings under Education Law §§3012-c and/or 3012-d of "Effective" or better in three out of the four years, as discussed in Point I, *supra*.

Thus, regardless of whether Plaintiffs agree or disagree with status of the law, it is clear that the State Legislature is continuously and actively shaping the tenure law and it is unquestionably a political question that precludes judicial involvement as a matter of law.

2. Due Process Rights for Tenured Educators.

Education Law §3020-a, which provides a tenured educator with a hearing prior to dismissal, was not enacted until 1970. Prior to this time, disciplinary hearings for tenured educators were held by the local Boards of Education, giving

little meaning to the protections from political retribution that comes with tenure. The creation of Education Law §3020-a provided tenured educators with a neutral hearing officer, minimal due process rights and a clearly defined penalty provision. Under this process the hearing officer's decision was discretionary and could either be accepted or rejected by the employing board of education. The statute was amended in 1977 to make the decision of the hearing officers final and binding. This amendment was enacted because in the seven (7) years that Education Law §3020-a was in effect, over seventy percent (70%) of the decisions were overturned by the local boards of education, reflecting the political dynamics associated with public education.

In 1994, the New York Legislature overhauled Education Law §3020-a by providing accused educators with basic due process rights during the disciplinary process. One of the notable additions in the1994 Amendment was that the Legislature recognized the political nature of public education and gave hearing officers the right to sanction school districts that sought to discipline tenured educators based upon frivolous charges.

Moreover, both Complaints ignore that the State Legislature further streamlined the disciplinary process contained in Education Law §3020-a in 2012 (See L. 2012, c. 57) to address many of the concerns raised in the instant consolidated action. Notably, the 2012 Amendment now requires an expedited

timeframe of 155 days from the filing of disciplinary charges in which to complete a hearing and receive a decision. Compliance with these deadlines is left to the hearing officer, whose compensation is directly tied to the adherence to the deadlines. Deviations from the statutory deadlines are only upon good cause shown.

Thus, the time and associated expenses for attempting to remove a tenured teacher or administrator has been addressed by the Legislature and now is no longer an obstacle in proceeding with hearings to remove tenured teachers or administrators. In fact, according to State Education Department, the average time for a 3020-a hearing has decreased to about one hundred ninety (190) days in New York City and one hundred seventy-seven (177) in the rest of the State. (R. 479-80) Moreover, since the implementation of the 2012 amendments, there have been eight (8) 3020-a hearings for administrators, all of which have either received a decision or settled, post-charges, within the revised statutory timeframes. (R. 480)

As addressed in Point I, above, in April 2015, the Legislature further revised the statutes relating to the discipline and discharge of tenured educators. These changes were designed to further expedite the process, saving employing school districts more time and money. When it comes to Education Law §3020-a, the Amended Complaints and the expired data they rely upon mistakenly intertwine the process with the concept of ineffective educators. Education Law §3020-a

covers much more than pedagogical incompetence, as it also pertains to disciplinary charges based upon allegations of "insubordination, immoral character or conduct unbecoming a teacher" (Education Law §3012(2) (a)) and "inefficiency, incompetency, physical or mental disability or neglect of duty" (Education Law §3012(2) (b)). Oftentimes, a disciplinary hearing will be based on more than professional incompetency, thereby complicating the process. This being said, the Legislature has fully addressed Plaintiffs' concerns with the April 2015 statutory amendment, wherein it created Education Law §3020-b. This new disciplinary statute permits the filing of charges for teachers and principals who have been rated "Ineffective" for two or more consecutive years and *requires* the filing of charges for classroom teachers or principals who have been rated "Ineffective" for three consecutive years. These expedited hearings must be completed within sixty days and carry the almost insurmountable burden of proving that the evaluations forming the basis of the charges are invalid pursuant to either clear or convincing evidence in the event of two consecutive ineffective ratings or, in the event of three consecutive ratings, through a showing of fraud. Education Law §3020-b.

Given the changes to Education Law §3020-a and the enactment of Education Law §3020-b, it is clear that the Legislature is actively revising the disciplinary process for tenured educators to resolve many of the concerns raised

in the complaint. Accordingly, this present lawsuit involves a political question that is not a permissible subject to review by the Judiciary as a matter of law.

3. Seniority and Recall Rights

The New York Legislature has established certain seniority and layoff statutes as a further measure to protect public employees from arbitrary, capricious or politically motivated dismissals, demotions, layoffs or other adverse employment action. The Legislature has enacted specific statutory schemes for both civil service employees and certified public educators. Only the Education Law seniority and layoff laws are challenged in this litigation; however, the legislative history when administrative tenure was reinstated in 1975 clearly acknowledged that the two seniority systems were similar in structure and purpose. This being said, a brief comparison of the statutory schemes is merited here to demonstrate how the instant challenge is a political question and to elucidate the broader impact of granting the Plaintiffs' requested relief.

New York Civil Service Law §§80 and 81 govern layoff procedures for all public employees who are not licensed by the State Education Department. The New York Education Law governs seniority for certificated public educators. The Plaintiffs challenge the seniority statutes "in whole or in part" of Education Law §§2510, 2585, 2588 and all of §2590 relating exclusively to New York City, neglecting however to include the companion statute located within Education Law

§3013. (R. 69 ¶6) The State Legislature implemented these statutes so that public employers would have a reasonably objective procedure in meeting their staffing needs when annual fiscal, budgetary or service restraints mandate that they implement layoffs by abolishing or excessing positions.

The basic structure of the layoff and seniority statutes for both certificated (professional educators) and civil service employees[4] are based upon the same premises. Layoffs made pursuant to legitimate governmental purposes, such as efficiency or economics, are made based upon seniority. In the Civil Service system, it is seniority based upon title. Civil Service Law §80(1). For certificated educators, it is seniority within a tenure area. Education Law §§2510, 2585, 2588, 2590-J, 3013. Laid off employees are placed upon a Preferred Eligibility List ("PEL") for a statutorily set period of time (Four years for civil servants and seven years under the Education Law), during which time they are subject to recall in the event that a position is recreated by the employing agency. Civil Service Law §80(1); Education Law §§2510, 2585, 2588, 2590, 3013.

In the certificated realm, tenure areas for teachers are specifically regulated by the Commissioner of Education. 8 NYCRR §30 *et seq.* However, for administrators like Defendants Cammarata and Mambretti, there is no such

[4] In fact, the School Administrators Association of NYS, which represents defendants Cammarata and Mambretti, represents several bargaining units that contain both certificated and civil service school district administrators.

regulation and no defined tenure areas. See, *Bell v Bd. of Educ. of Vestal Cent. School Dist.* 61 N.Y.2d 149 (1984). It is left to the discretion of the local boards of education to create administrative tenure areas.

Further, as noted in Point I *supra* the Legislature has provided greater discretion and leeway for the removal of allegedly ineffective educators in the buildings where the Plaintiffs are most concerned. Pursuant to the new Education Law §211-f , schools designated by the New York State Department of Education to be either failing or persistently failing will be subject to an internal restructuring at the hands of a receiver. Layoffs within a school in receivership are to be based upon evaluation scores, as opposed to seniority, and those laid off from a receivership school may not bump another within the employing district with less seniority, but rather must wait until there is an opening in the district to regain employment. Education Law §211-f (7)(b), (c). Moreover, if a teacher or principal is let go from a receivership school with two consecutive ineffective ratings prior to their position being abolished, they are deemed not to be an employee in "good standing" pursuant to the statute and are ineligible to be recalled to any position within the district. *Id.* Thus, despite minor differences in how layoffs are categorized between systems and positions, declaring the seniority and layoff statutes within the Education Law will have broader consequences throughout the entire New York public sector that would clearly infringe on the rights of the

Legislature. Accordingly, the seniority and layoff Education statutes are not appropriate for judicial review as a matter of law because they implicate political questions that are better left for the Legislature to address.

4. The Constant Evolution of Education Law §3012-c and its Accompanying Regulations.

The newest of the Challenged Statutes, Education Law §3012-c was signed by Governor Patterson in May 2010. This statute established a comprehensive evaluation system for classroom teachers and building principals. Each classroom teacher and building principal shall receive an APPR single composite effectiveness score with a corresponding rating of "highly effective," "effective," "developing," or "ineffective." The composite score is based on: 20% student growth on State assessments or other comparable measures of student growth, 20% on locally-selected measures of student achievement that are determined to be rigorous and comparable across classrooms as defined by the Commissioner, and 60% on other measures of teacher/principal effectiveness consistent with standards prescribed by the Commissioner in regulation. The APPR is required to be a significant factor in employment decisions such as promotion, retention, tenure determinations, termination, and supplemental compensation, as well as a significant factor in teacher and principal professional development. Further, the school district or BOCES is required to develop and implement a teacher or

principal improvement plan if a teacher or principal is rated "developing" or "ineffective." Tenured teachers and principals with a pattern of ineffective teaching or performance, defined by law as two consecutive "ineffective" ratings, may be charged with incompetence and considered for termination through an expedited hearing process pursuant to Education Law §3020 and §3020-a.

Since its enactment in 2010, Education Law §3012-c (annual professional performance review, or APPR) has be amended multiple times. *See,* 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 very creation and subsequent amendments to this statute are reflective of the Legislature's knowledge of, and desire to change, a number of the areas of improvement cited within both of the Complaints.

As a part of the April 2015 budget bill, Education Law §3012-c was radically altered yet again and large portions of the statute have been replaced by the new Education Law §3012-d. The law now places greater emphasis on student growth and takes much of the control over the process and procedure out of the hands of educators and their employing districts by subjecting the process to

further guidance and regulations that are to be issued by the Commissioner of Education and the State Education Department. *Id.* The new process was not even given a chance to be implemented for a single year before the Board of Regents issued new regulations, changing the implementation of the student growth portion of evaluations to use data from the controversial Common Core examinations for data purposes only until 2019. 8 NYCRR §§ 30-2.14 and 30-3.17. These changes are subject to further guidance that has yet to be issued. Hence, the law is under constant review and is subject to active, political debate that cannot be addressed by the courts as a matter of law.

POINT III

IN LIGHT OF THE FACT THAT THERE IS NO INJURY TO THE PLAINTIFFS STEMMING FROM THE AMENDED/NEW STATUTES, THE PLAINTIFFS DO NOT HAVE STANDING.

Standing is a threshold requirement for a plaintiff seeking to challenge governmental action. *New York State Ass'n of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211 (2004); *Dairylea Coop., Inc. v. Walkley*, 38 N.Y.2d 6, 9 (1975); *VTR FV, LLC v. Town of Guilderland*, 101 A.D.3d 1532, 1533 (3d Dep't 2012). There is a two-part test for determining standing. First, it must be shown that there is an "injury in fact" and a speculative injury is insufficient to establish harm. *Id.* Second, the parties must fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision being challenged. *Id.*

The Court of Appeals has very clearly held that an injury in fact is necessary in order to avoid the judiciary rendering advisory opinions. *Soc'y of Plastics Indus., Inc. v. Cnty. of Suffolk,* 77 N.Y.2d 761, 773 (1991), *citing Cuomo v. Long Is. Light. Co.,* 71 N.Y.2d 349, 354. As set forth above, the courts have also made it quite clear that there is no injury when laws or regulations challenged in litigation are subsequently replaced by an intervening change in law. *NRG Energy,* 795 N.Y.S.2d at129. As the Challenged Statutes have all been radically changed through either amendments or entirely altered in new statutes to address the areas of alleged weakness in the Education Law, there cannot be any remaining injury to the Plaintiffs under those statutes as a matter of law. Further, Plaintiffs were afforded the opportunity by this Court to amend their Complaints to reflect any new injuries as a result of the statutory revisions, but they declined to do so. Accordingly, without injury under the current statutes, the Plaintiffs do not have standing as a matter of law and the Complaints must, therefore, be dismissed.

POINT IV

THE PLAINTIFFS HAVE REPEATEDLY FAILED TO STATE A CAUSE OF ACTION UNDER THE NEW YORK STATE CONSTITUTION, ARTICLE XI §1, AS A MATTER OF LAW.

When determining a motion to dismiss, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible

favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Leon v. Martinez,* 84 N.Y.2d 83, 87–88 (1994). This being said, bare legal conclusions are not entitled to the benefit of the presumption of truth and are not accorded every favorable inference. *Doria v. Masucci,* 230 A.D.2d 764 (2d Dep't., 1996). Thus, courts are not to accept unwarranted inferences, baseless conclusions of law, sweeping legal conclusions cast in the form of factual allegations, or factual claims that are either inherently incredible or contradicted by documentary evidence. *Ulmann v. Norma Kamali, Inc.,* 207 A.D.2d 691 (1st Dep't. 1994) (unsupported allegations and attempts to circumvent traditional at-will employment laws insufficient to withstand motion to dismiss); *EBC I, Inc. v. Goldman Sachs &Co.*, 5 N.Y. 3d 11, 27 (2005).

Moreover, there is a strong presumption as a matter of law that legislation is valid and "...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." *Iannucci v. Bd. of Supervisors*, 20 N.Y.2d 244, 253 (1967); *Federal Comm. Com'n. v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993). *See also, Brady v. A Certain Teacher*, 166 Misc.2d 566, 574-575 (Sup. Ct. Suffolk Co. 1995).

A. Through the use of out of date statistics, Plaintiffs are challenging the constitutionality of statutes that no longer exist due to applicable statutory amendments.

Plaintiffs' oppositions to the various motions to dismiss broadly claimed that a cause of action under the Education Article of the New York State Constitution was properly pleaded because each of the two Complaints uses the phrases "systemic failure" and "denial of a sound basic education." The use of these catchphrases, gleaned from other Education Article cases, is insufficient to state a cause of action in and of itself because they are merely legal conclusions.

The Complaints in question are riddled with inherently irrelevant information and conclusions of law disguised as facts.

Initially, it is once again pointed out that there have been major revisions to the Challenged Statutes and data derived therefrom is more recent than the articles and studies cited by Plaintiffs in support of their specious claims. (R. 479-80) Despite these revisions being pointed out in the multiple motions to dismiss, Plaintiffs still present out-of-date, arguably invalid, studies as "facts." For example, Plaintiffs in *Wright* still continue to cite an unscientific 2009 survey speculating that school districts may have declined to pursue 3020-a charges to remove a tenured teacher because the process was purportedly "too cumbersome or expensive." (R. 81 ¶55). It is beyond cavil that the Plaintiffs would dare to use that survey in opposition of dismissal, given that Education Law §3020-a was revised

to streamline the process in 2012 that has resulted in a demonstrably reduced amount of time and expense associated with such a hearing. (R479-80 ¶¶ 88-91) This process was revised yet again in 2015 to provide for even a more streamline process. Additionally, the APPR process within Education Law §3012-c, which is the gravaman of Plaintiffs' complaint about teacher competency contains an expedited due process hearing for the removal of a tenured educator after two ineffective ratings, was not even enacted until 2010- one year after the cited study. This process was significantly modified further in 2015 with the creation of Education Law §3020-b, which **mandates** a hearing to remove a tenured educator after three consecutive Ineffective ratings and enhanced standards to overcome in order to prove professional effectiveness.

In addition to the reliance on out-of-date data, the Complaints are replete with unsubstantiated legal conclusions and specious theories masquerading as facts. None of the Plaintiffs herein are alleged to be involved in the field of education, other than as students/parents. Accordingly, any statements or data contained within the Complaints are completely speculative because there is no authority that would tie these out-of-date conclusions of law to the new and/or revised statutes.

B. The Complaints cannot survive dismissal under the rational relationship test.

Legislative enactments, such as the Challenged Statutes, are strongly presumed to be constitutional and "the court must not substitute its judgment for that of the Legislature." *People v. Cintron*, 13 Misc. 3d 833, 843-46 (Sup. Ct. 2006), aff'd, 46 A.D.3d 353 (1st Dep't., 2007) aff'd sub nom. *People v. Knox,* 12 N.Y.3d 60 (2009) (Constitutionality of Sex Offender Registration Act analyzed under the "rational relationship" test and upheld.) This strong presumption of constitutionality exists whether a statute is challenged on its face or as applied. *Id.*

Under both theories of challenging the constitutionality of a statute, the Court of Appeals has acknowledged that the rational basis test must be utilized. *Id., citing Affronti v. Crosson,* 95 N.Y.2d 713, 719 (2001); *Hernandez v. Robles,* 7 N.Y.3d at 367 (2006). Upon such review, a statute will be upheld as constitutional unless the harm caused is "so unrelated to the achievement of any combination of legitimate purposes that ... [it is] irrational." Id., *quoting Affronti,* 95 N.Y.2d at 719. The individuals challenging constitutionality of a statute the have the burden to demonstrate "the statute's invalidity beyond a reasonable doubt." *Id., quoting Dalton v. Pataki*, 5 N.Y.3d 243 (2005). The burden of proving there is no rational basis rests solely with the Plaintiffs and "the State has no obligation to produce evidence to sustain the rationality of a statutory classification. A legislative choice *is not subject to courtroom factfinding* and may be based on *rational speculation*

unsupported by evidence or empirical data." *Id., quoting Affronti,* 95 N.Y.2d at 719.

1. Statutes conferring tenure upon educators (Education Law§§ 2509, 2573, 3012).

The challenged statutes relating to tenure for teachers, administrators and other school supervisors and personnel set forth that such professional educators may, upon the written recommendation of the Superintendent or Chancellor of schools and affirmative vote of the Board of Education or Trustees, be granted tenure after the successful completion of a probationary period of four years after July 1, 2015. For teachers and building principals who were appointed after July 1, 2015, achieving tenure is also contingent upon receiving ratings of at least "Effective" in three out of four probationary years and not receiving an ineffective rating in their last year of employment. Contrary to the Plaintiffs' assertions, these statutes do not confer "permanent employment", but merely gives the promise of continued employment during periods of "good behavior and efficient and competent service", as well as a due process hearing prior to termination of employment. Education Law § 3012(2). There are two main components to these statutes: a probationary period and an award of tenure.

As set forth by the Court of Appeals, probationary periods are required by statute "so that school districts may ascertain which teachers are 'competent,

efficient and satisfactory' (Education Law §§ 2509(2), 3012(2), 3014(2)) prior to appointing them to tenure." *Weinbrown v. Bd. of Ed. of Union Free Sch. Dist. No. 15, Town of Hempstead,* 28 N.Y.2d 474, 476-77 (1971). This protects school districts, as it clearly enables them to make informed staffing decisions based not only on the pedagogical competency of the teacher or administrator, but also based upon climate and culture of the district as a whole or individual building without restriction. There are no requirements that a district award tenure to an educator under its employ. In fact, districts are authorized by law to extend probationary periods with the educator's consent if more time for evaluation is necessary. See *Juul v. Bd. of Educ. of Hempstead Sch. Dist. No. 1, Hempstead*, 76 A.D.2d 837 (2nd Dept. 1980) *aff'd* 55 N.Y.2d 648 (1981). Educators who do not consent to the extended probationary period are subject to dismissal. Thus, the probationary period aspect of the challenged statutes is designed for the rational basis of the protection and use of school districts and the plaintiffs.

The rationale for the second aspect of these statutes, tenure, has been explained by the Court of Appeals as follows:

> "...it 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. In

> order to effectuate these convergent purposes, it is necessary to construe the tenure system broadly in favor of the teacher, and to strictly police procedures which might result in the corruption of that system by manipulation of the requirements for tenure ... Even 'good faith' violations of the tenure system must be forbidden, lest the entire edifice crumble from the cumulative effect of numerous well-intentioned exceptions." *Ricca v. Board of Educ. of City School Dist. of City of N.Y.*, 47 N.Y.2d 385, 391 (1979).

While the Court of Appeals' decision in *Riccia* may be over thirty-five years old, the necessities for the protections have not changed. School districts are highly political entities, oftentimes run by well-intentioned individuals who would be willing to please a zealous parent over permitting educators to utilize new and creative means to expand the minds of the children within their care. Moreover, the Legislature has continued to recognize these dangers to educators when it amended Education Law to reinstitute administrative tenure in 1975 and in overhauling Education Law § 3020-a in 1994 to allow for sanctions against a school district that chooses to impose frivolous disciplinary charges against a tenured educator.

Thus, it is abundantly clear that the purpose of tenure is to permit educators to perform their duties without fear of political repercussions and are based upon rational bases that require the dismissal of the Amended Complaints as a matter of law.

2. Statutes providing guidelines in the event of layoffs (Education Law §§ 2510, 2585, 2588[5]).

In analyzing the applicability of Education Law § 3013, which is a companion statute to those challenged on the basis of layoff order, to Teaching Assistants, the Court of Appeals cited to the Legislative Bill Jacket, which provides:

> "The bill aims to prevent the use of favoritism by a school board or BOCES in the retention of staff and to protect tenured personnel by clarifying the process by which staff are dismissed and subsequently rehired. In addition, the bill prevents school boards from abolishing a position as means for disposing of unwanted tenured personnel, when in fact, no savings in cost or increase in efficiency is expected to be realized.
>
> "Identical language appears in Article 51 of the Education Law, which governs small city school districts. However, the courts and the Commissioner of Education have interpreted this provision to apply to school districts and boards of cooperative educational services generally. This bill will clarify that these provisions apply to all school districts." *Madison-Oneida Bd. of Co-op. Educ. Servs. v. Mills*, 4 N.Y.3d 51, 60 (2004), *quoting* Budget Report on Bills, Bill Jacket, L 1992, ch 737.

Thus, based upon the clear legislative intent for these statutes, as recognized as valid by the Court of Appeals, the purpose of the challenged layoff and retention

[5] Although not specifically challenged in the Complaints, Education Law § 3013 also deals with layoffs and seniority.

statutes is to protect *school district employees* from arbitrary termination through a layoff scheme. There is no reasonable interpretation of these statutes that they were enacted to protect the general public or students.

Contrary to the assertions in the Complaints, the challenged layoff and seniority statutes do not automatically ensure that ineffective educators remain entitled to a position for a period of seven (7) years. Notably, these Challenged Statutes require placement upon a preferred eligibility list and recall to newly created positions *"...provided the record of such person has been one of faithful, competent service in the office or position he has filled."* N.Y. Educ. Law § 2510(3)(a) (*Emphasis added).* Just as there is a mechanism for removing ineffective tenured educators, a school district need not forestall upon recreating and hiring an abolished position just because an allegedly incompetent educator is on the Preferred Eligibility List. Specifically, a district may still proceed with a due process hearing pursuant to Education Law § 3020-a to remove a tenured educator from a Preferred Eligibility List. The fact that the tenured teacher or administrator is no longer employed by the district is of no consequence because there is the potential of a continued employment relationship. *Matter of Rubtchinsky v. Moriah CSD, et al.*, 82 A.D.2d 960 (3d Dep't 1981) (School district could not be compelled to abort an Education Law § 3020-a proceeding when a position was abolished because, absent an unqualified resignation or settlement, tenured teacher

still retained a statutory right to re-employment while on the Preferred Eligibility List); *Middleton v. Bd. of Ed. of S. Jefferson Cent. Sch. Dist.*, 109 Misc. 2d 1015, (Sup. Ct. 1981) ("That the petitioner is facing charges questioning her competency, and is under suspension in the interim, does not bar her rights under section 2510(3). State certification of her right to teach indicates her competency until it has been established to the contrary by the procedures set forth in section 3020–a." *Citing, Matter of Allen*, 19 Ed.Dept.Rep. 389, 391 (1980)). Accordingly, the disciplinary mechanism may be used to remove an ineffective senior teacher on a recall list thereby enabling the school district to hire of qualified newer educator.

3. Statutes providing for due process prior to the termination of tenured administrators (Education Law §§ 3020, 3020-a).

Education Law § 3020-a protects tenured administrators and teachers from arbitrary suspension or removal and has repeatedly been recognized by the Court of Appeals as "a critical part of the system of contemporary protections that safeguard tenured teachers from official or bureaucratic caprice". *Holt v. Bd. of Ed. of Webutuck Cent. Sch. Dist.*, 52 N.Y.2d 625, 632 (1981), *quoting Matter of Abramovich v. Board of Educ.*, 46 N.Y.2d 450, 454 (1979).

It is important to note that tenured educators have a constitutional property and liberty interests in their continued employment and good names that require due process. *Matter of Gould v. Board of Educ. of Sewanhaka Central High School Dist.*, 81 N.Y.2d 446, 451 (1993). The Challenged Statutes relating to discipline

provide the necessary due process to ensure that those charged with the most important jobs of educating our youth are able to do so in a secure environment, free from threats of termination for political reasons.

Contrary to the assertions made by the plaintiffs, tenured educators in New York do not receive some sort of due process that exceeds that received by other public employees. (R. 75 ¶ 36; R. 46-7 ¶¶ 37, 42) The most noticeable comparison would be with the due process protections afforded to permanent Civil Service employees pursuant to Civil Service Law §75.

Civil Service Law §75 does not contain a time limit in which a hearing must be completed. While such employees may be suspended without pay for the first thirty days after being charged, thereafter they must receive salary and benefits until there is a final disposition, which may go on for more than a year. This has the potential for being much more costly than Education Law §3020-a, which requires that a decision be entered by the hearing officer within 155 days, or as little as 30 days if the charge is based on multiple consecutive years of pedagogical incompetency. Education Law §§3020-a, 3020-b.

Additionally, Plaintiffs allege that the three year statute of limitations for bringing disciplinary charges against tenured educators is not long enough. (R. 75¶ 54). In actuality, this statute of limitations is twice that which Civil Service employees may be charged pursuant to Civil Service Law §75.

Moreover, tenured educators are at a significant disadvantage compared to other public employees should they wish to appeal the results of their disciplinary proceeding. Pursuant to Civil Service Law §75, the determination of the hearing officer may be appealed via a proceeding pursuant to CPLR Article 78, which has a four month statute of limitations. Education Law §3020-a decisions must be appealed to the prevailing Supreme Court within 10 days of receipt of the decision. Education Law § 3020-a(5).

Thus, it is clear that the Challenged Statutes relating to public educator discipline and discharge not only serve a rational purpose, but have also been intentionally drafted by the Legislature to provide a rational measure of protection in comparison to other disciplinary systems within New York.

4. Statute relating to the evaluations of teachers and principals (Education Law § 3012-c).

In response to the nationwide trend and in order to receive Federal Race to the Top funding, the New York Legislature enacted Education Law § 3012-c to provide a mandatory evaluation system for classroom teachers and building principals. This system has been continuously revised by the Legislature and the Board of Regents to reflect the ever changing social and political values when it comes to educational standards and accountability.

In addition to requiring annual evaluations, the statute provides for mandatory improvement plans for those rated developing or ineffective in order to assist the educators with the areas in need of improvement. If a tenured teacher or administrator has two consecutive ineffective ratings, the employing District has the right to commence an expedited hearing to remove them for incompetence. This hearing is to be completed within thirty (30) days. Untenured teachers and administrators are still legally considered at will employees, despite the fact that the evaluations are to be a significant factor in determining whether tenure should be granted. Due to the newness of the law, it is unknown at this time what impact APPR ratings will have on tenure determinations.

However, what is clear thus far is that this new evaluation system will assist educators to monitor and improve upon their performances, as evinced by the fact that it mandates a school district to place all educators that are rated "ineffective" or "developing" on an improvement plan within ten (10) days of the start of the following school year. These improvement plans require measurable goals, follow-up by the district, as well as resources, such as trainings or mentors, that will be made available for the educator to improve from one year to the next.

CONCLUSION

For the foregoing reasons, the Intervenors-Defendants respectfully submit that the lower court erred when it declined to dismiss the Amended Complaints both at the motion to dismiss stage and at the motion to renew stage, after the Challenged Statutes were radically altered to reflect the more stringent standard the Plaintiffs are seemingly seeking herein. Accordingly, it is respectfully requested that the Amended Complaints be dismissed in their entireties, along with such other relief as the court may deem appropriate, as a matter of law.

Dated: Latham, New York
March 23, 2016

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CERTIFICATE OF COMPLIANCE
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Name of typeface: Times New Roman
Point size: 14
Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 10,107.