PM 7/1/15
Rec'd 7/7/15

SUPREME COURT FOR THE STATE OF NEW YORK
COUNTY OF RICHMOND

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

Plaintiffs,

-against-

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

Defendants,

-and-

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

HON. PHILIP G. MINARDO
DCM PART 6

Index No. 101105/14

AFFIRMATION IN SUPPORT OF MOTION TO RENEW

SCHOOL ADMINISTRATORS ASSOCIATION OF NEW YORK STATE
Office of General Counsel, Arthur P. Scheuermann
By: Jennifer L. Carlson, Counsel
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PM 7/1/15
Rcd 7/7/15

STATE OF NEW YORK
SUPREME COURT COUNTY OF RICHMOND

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

Plaintiffs,

-against-

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

Defendants,

-and-

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

Intervenor-Defendant.

AFFIRMATION IN SUPPORT OF MOTION TO RENEW

Index No. 101105-2014

Hon. Philip G. Minardo

STATE OF NEW YORK
SUPREME COURT COUNTY OF RICHMOND

JOHN KEONI WRIGHT, GINET BORRERO, TAUANA GOINS, NINA DOSTER, CARLA WILLIAMS, MONA PRADIA, ANGELES BARRAGAN,

Plaintiffs,

-against-

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

Defendants,

-and-

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

Intervenors-Defendants,

-and-

PHILIP A. CAMMARATA and MARK MAMBRETTI,

Intervenors-Defendants.

JENNIFER L. CARLSON, an attorney duly admitted to the practice of law before the courts of the State of New York, affirms the following under the penalty of perjury:

1. I am the Counsel of the School Administrators Association of New York State ("SAANYS"), attorneys for the Intervenor-Defendants Philip Cammarata and Mark Mambretti ("Administrators"). I am fully familiar with pleadings, facts and circumstances of this matter.

2. I submit this affirmation in reply to Plaintiffs' opposition to the pending motions to renew the October 2014 motions to dismiss on the grounds that there were intervening changes in the law.

3. In their October 2014 motions to dismiss, the defendants gave this court a detailed history on the origins, evolutions and necessities of the Challenged Statutes. As a part of the 2015-2016 New York State budget bill, the Challenged Statutes once again faced radical alteration by the Legislature.

4. A motion to renew is appropriate when it is demonstrated "that there has been a change in the law that would change the prior determination." C.P.L.R.§ 2221(e)(2). In the instant action, the 2015 budget bill legislatively edited out the vast majority of the alleged deficiencies plaintiffs complained were contained within the Challenged Statutes, rendering the allegations contained within the Complaints moot.

5. In a case of "too much is never enough", plaintiffs have the gall to characterize the recent amendments as "minimal", yet have no recommendations as to how to remedy the alleged deficiencies. Not only are plaintiffs' characterizations of the amendments as being "minimal" incorrect, as detailed below, they incorrectly summarize the changes in the law and downplay the scope of the changes in a desperate attempt to avoid dismissal on the grounds that the Complaints are now moot.

6. Dismissal of an action on the ground of mootness is appropriate 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). Accordingly, as detailed herein, the Plaintiffs are no longer injured by the Challenged Statutes that were in effect at the commencement of this litigation and the Complaints are now moot as a matter of law.

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

7. Throughout the course of this litigation, plaintiffs' problems with the tenure system boil down to: (1) probationary periods for granting tenure are too short; (2) the granting of tenure is completely subjective and effectiveness is not a factor; and (3) an educator could potentially receive tenure accidentally because the employing district did not provide the statutorily required notice of termination.

8. Each of these complaints have been addressed by the legislature in the April 2015 amendments.

9. Initially, any educator appointed to a probationary position as of July 1, 2015, must now serve out a probationary term of at least four years, instead of a three (3) year term.

10. Not only has the Legislature addressed Plaintiffs' chief complaint that the length of the probationary period is too short, but also the Legislature has taken affirmative action to address Plaintiffs' further allegations that there is a lack of accountability that has allegedly allowed for ineffective educators to gain tenure.

11. The new tenure prerequisite is that a probationary educator must now be rated either "Effective" or "Highly Effective" in at least three out of the four years as a probationary employee in order to receive tenure. Moreover, the statutes now specifically prohibits an

educator from receiving tenure if they were rated "Ineffective" the year immediately preceding the recommendation.

12. Plaintiffs speciously contend that these two noticeable changes of increasing the length of a probationary appointment and the prerequisites to obtaining tenure are irrelevant because educators will merely be "rubber stamped" as effective. (Wright Memorandum of Law, p. 6-7)

13. Interestingly, this desperate attempt at preserving the causes of action are diminished by plaintiffs' own claims that, "...there is no indication that the number of teachers rated "Ineffective" will rise, or that the number of teachers awarded tenure will consequently fall." (Wright Memorandum of Law, p. 17)

14. Conversely, there is no indication that these actions will not occur because the Challenged Statutes are so intrinsically different to such an extent that there is no way of telling the impact these amendments will have on the educational system.

15. Further, it is legally impossible for tenure to be granted "irrespective of merit" under these revisions, as plaintiffs contend because educator effectiveness and proof thereof is now mandatory to achieve tenure. (Wright Memorandum of Law, p. 6)

16. Additionally, plaintiffs' contention that inaction by a superintendent or a board of education may result in tenure by default, known as "tenure by estoppel", is not addressed within the amendments is incorrect. (Wright Memorandum of Law, p. 7)

17. In actuality, the concept of tenure by estoppel has been severely limited under the recent amendments. Since there are now statutory prerequisites to achieving tenure, even if an educator's probationary period expires without formal action by the employing school district, he/she may not automatically gain tenure if three out of the four years did not result in ratings of

either "Effective" or "Highly Effective", nor can tenure be obtained if there was a rating of "Ineffective" in the last year.

18. 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.

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

19. Plaintiffs also contend that the new evaluation statute, Education Law §3012-d, has no practical impact because a number of Legislators testified that they believe that the State Education Department could have done a better job developing the last evaluation system and would have liked a more time spent on this issue, as opposed to rushing changes through.

20. With all deference to the State defendants, defendants Cammarata and Mambretti agree that there were flaws with the last APPR system and also wish that the Legislature would spend more time developing a fully formed system and would go on to add that it should allow the State Education Department more time to develop the rules and regulations associated with this system, as opposed to rushing out a system that must now be implemented by November 2015.

21. However, these positions do not make Education Law §3012-d unconstitutional and, in fact, bolster the point that these are evolving political questions.

22. The simple fact of the matter is that Education Law §3012-d, along with the associated rules and regulations, now control teacher and principal evaluations and was not plead in the Complaints as being unconstitutional. Even if it were, it is significantly different than its predecessor; spelling out the various ways the composite score (overall yearly rating) is

established, thereby taking away the majority of the local control that allegedly resulted in a "rubber stamp" system.

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

c. **Statutes providing guidelines in the event of layoffs (Education Law §§ 2510, 2585, 2588).**

24. Under the new Education Law §211-f, layoffs are now governed by merit, as opposed to seniority, and may result in outright termination without recall rights depending on an educator's evaluation rating, in the lowest performing schools, where such changes are likely to have the greatest impact.

25. Plaintiffs barely pay lip service to this new statute, which does exactly what they were setting out to do in the Complaints, instead choosing to complain that Governor Cuomo proposed a much broader statutory change, but "the Legislature rejected that broader proposal." (Wright Memorandum of Law, p. 13)

26. The very fact that a different proposal was set forth, considered by the Legislature and rejected proves that these issues are a political question. Just because one disagrees with a law and is unhappy that the Legislature rejected a change does not make it unconstitutional.

27. Thus, as the statutory scheme concerning the topic of layoffs and recall have been radically altered in a manner that the Plaintiffs sought relief for, the Complaints fail to state a cause of action under the current schemes as a matter of law and must be dismissed as moot.

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

28. The most recent amendments to the disciplinary statutes make a number of changes to the due process hearing procedures for tenured educators that go beyond merely speeding up the process.

29. 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.

30. It further provides that either two consecutive ineffective ratings or three consecutive ineffective ratings constitute prima facie proof of incompetence that can only be overcome by clear and convincing evidence.

31. Plaintiffs make much of the amount of time that it takes to build and present a case to seek the termination of a tenured educator, in some instances relying on data that is twenty years old. This does not take into account both the expedited timeframes and the fact that incompetence is often just one charge among multiple theories of misconduct in disciplinary hearings. If a district chooses to wait a period of time until it feels confident that it will obtain a finding of termination, it does not make the statute itself unconstitutional.

32. 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.

33. Accordingly, it is respectfully submitted that the Complaints in this consolidated action must be dismissed as a matter of law.

Dated: July 1, 2015
Latham, New York

SCHOOL ADMINISTRATORS ASSOCIATION
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