SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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

Plaintiffs,

- against -

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

Defendants,

-and-

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

Intervenor-Defendant,

-and-

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

Intervenors-Defendants,

-and-

PHILIP A. CAMMARATA and MARK MAMBRETTI,

Intervenors-Defendants.

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

**REPLY MEMORANDUM OF LAW IN SUPPORT OF UNITED FEDERATION OF TEACHERS' MOTION TO RENEW AND, UPON RENEWAL, DISMISS**

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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,

-and-

NEW YORK CITY DEPARTMENT OF EDUCATION,

Intervenor-Defendant,

-and-

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

Intervenor-Defendant.

----------X

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## ISSUE PRESENTED ON RENEWAL

Whether this Court should allow an action to go forward seeking a declaratory judgment finding unconstitutional a statutory scheme that (a) has been materially changed with (b) replacement provisos that have not yet been implemented. Such effort not only would implicate an unwarranted burden on limited judicial resources, but also would be without basis in law or logic.

## PRELIMINARY STATEMENT

When the group led by Campbell Brown initiated this lawsuit challenging tenure, it was her express hope that it would "force a new legislative process" and provide an "opportunity for lawmakers to do" what, in her opinion "they've failed to do up until now."[1] In fact, she told the press, "that's the whole reason we're doing this, because [the Legislature] wouldn't do anything." She wanted the lawsuit to be "a hammer that finally forces them to take action and at least wake people up" to what she perceived as "the problem." When this Court denied Defendants' motion to dismiss in March 2015, again Ms. Brown reiterated that "we would be thrilled to see these changes take place at the legislative level" and "nothing would make me happier than to see Albany finally move forward."[2]

The executive and legislative branches, which, as we previously noted, had been reassessing the applicable laws before this lawsuit, have now revisited them and, in the process,

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[1] Eliza Shapiro, "Brown: Tenure suit could force 'new legislative process,'" Capital New York, June 24, 2014, *available at http://www.capitalnewyork.com/article/albany/2014/06/8547836/brown-tenure-suit-could-force-%E2%80%98new-legislative-process%E2%80%99*

[2] Eliza Shapiro, "Campbell Brown calls for Albany to follow Plaintiffs' lead," Capital New York, March 13, 2015, *available at http://www.capitalnewyork.com/article/city-hall/2015/03/8564031/campbell-brown-calls-albany-follow-plaintiffs-lead*

granted the wish of Ms. Brown and Plaintiffs by amending the Challenged Statutes. Evidently, Plaintiffs want more.

What is clear from Plaintiffs' continuance of this action and their opposition to Defendants' motions to renew is that they do not really seek re-examination of the applicable Education Law statutes and regulations or the attention of the Legislature and Governor; they had and have that. Instead, what Plaintiffs seek is an education system entirely conceived of, designed and enforced according to their own political agenda and policy preferences. Yet, the constitutional mandate of a "sound basic education" is not a mandate for special interests groups to use the judiciary to strike down legislation until the Legislature is coerced into fashioning a system that fits their political preferences.

Instead, the Education Article, Article XI of the State Constitution is, by its terms, addressed to action by the Legislature, establishing a "constitutional floor" with respect to educational adequacy. The Legislature has now acted and prescribed a new set of educational guidelines that extend beyond the "floor"—some of which necessitated application of pedagogical expertise by the executive branch through the State Department of Education ("SED") prior to implementation. And that legislative deferral to the executive branch is significant as it reflects, yet again, a recognition of the necessity for pedagogical expertise if an educational system is to work.

Certainly at this stage, Plaintiffs' claims are political questions, properly reserved to the other (political) branches of government, and not justiciable by this Court. Further, even if they are justiciable, they are premature. Perhaps most apt here, the statutes and regulations challenged in the pleadings before this Court and to which this Court's attention was previously

directed no longer are the same—a fundamental concern for this Court and one largely ignored by Plaintiffs.

Plaintiffs mostly focus on carefully selected debate remarks of a handful of dissenting Members of the State Assembly, who, at the time the Budget Bill was passed, did not believe it went far enough. But the Bill passed by a wide margin—a count of 92 to 54 in the State Assembly. Thus, the comments that Plaintiffs cling to in order to try to demonstrate that the revisions did not effectuate sufficient change were actually in the minority, as were those who thought it went too far. In no way are these dissenting comments probative of the Bill's effectiveness, ineffectiveness or constitutionality.[3]

Rather astonishingly, Plaintiffs suggest that Defendants have mischaracterized their constitutional claim as a policy debate (Br. 24) while at the same time extensively quoting *the legislative policy debate in the State Assembly* in support of their opposition to dismissal. This is a policy debate. The legislative and executive branches extensively reviewed the at-issue statutes at a time when all sides were advancing their respective viewpoints; they then made the changes they deemed warranted, while, at the same time, concluding that other changes simultaneously advanced were unwarranted. Such action underscores that Plaintiffs' claims are political questions and therefore non-justiciable. It also is a hallmark of our democratic processes, under which consideration and debate often generate a result that, though considered, is not to the liking of both sides of a divide. The separation of powers sensitivities that underpin the non-justiciability doctrine are heightened where the political branches actively engage in

[3] The Court of Appeals has long recognized that dissenting views, while often interesting, have no legally controlling value. *See Knight-Ridder Broadcasting Co. v. Greenberg*, 70 N.Y.2d 151 (1987); *Woollcott v. Shubert*, 217 N.Y. 212, 221 (1916) ("statements and opinions of legislators uttered in the debates are not competent aids to the court in ascertaining the meaning of statutes."); *Ont. County v. Capital Dist. Reg'l Off-Track Betting Corp.*, 144 Misc. 2d 893 (N.Y. Sup. Ct. 1989), *aff'd* 162 A.D.3d 865 (3d Dep't 1990) (recognizing that relying on legislative debates is disfavored and "more importantly" that the debate showed the "Legislature became aware of petition's position but failed to act to change the law").

what they believe to be considered, good-faith reform. That is particularly so where, as here, a truly effective reform must focus holistically on the multi-faceted matters facing our educational system—that is, issues of underlying inadequate funding, class size, poverty and the like. That Plaintiffs disagree with the wisdom of the legislation or even that they may lack confidence in the abilities of the SED Commissioner does not create a constitutional question. To the contrary, it reinforces the point that the judicial process is being used as a platform to espouse a political cause. Whatever its merit, it does not rise to a justiciable controversy, much less warrant judicial interdiction in the functions properly and historically exercised by the legislative and executive branches.

Moreover, like the carefully selected quotations from dissenting legislators during the debate to the Budget Bill, Plaintiffs conveniently describe the teacher evaluation process as having ratings of only "effective," "highly effective" or "ineffective," and cite the 1% of teachers rated as "ineffective" as evidence that the process does not work. There are, however, more than 4,000 teachers in New York City alone who have been deemed "developing" by the evaluation system (and new teachers cannot receive tenure if they receive such ratings twice) and thousands more who quit or retire before being removed on account of ineffectiveness. There are also thousands of teachers for whom no standardized test in their subject even exists as well as numerous students for whom traditional standardized tests are inappropriate. These varied and complex issues cannot be addressed either in a vacuum in the courthouse or without a measure of the pedagogical expertise that awaits application as the changes emerging from the Budget Bill are considered and implemented.

Finally, Plaintiffs concede, as they must, that significant changes have been enacted. Thus, one of the central allegations of their Complaint—that the probationary period should be

four years, not three—has been remedied (if indeed a "remedy" was required) by the new law. They also recognize that the evaluation system will be governed going forward by a separate statutory provision (3012-d). Yet, in a transparent attempt to ensure their claims survive dismissal, they assert, without any support, that there "is no indication that the number of teachers rated 'ineffective' will rise or that the number of teachers awarded tenure will fall." (Br. 17). Of course, that *ipse dixit* (wrongfully) presumes that, on the merits, there *must per se* be an increase in numbers. Mere speculation and animus toward teachers is not sufficient to plead a constitutional claim. It is, of course, impossible to predict the outcome of these legislative changes. But it is not Plaintiffs' own opinion (actually, guess) of the likely efficacy of the legislation that controls (particularly when they have not alleged any actual and particularized injury). Plaintiffs cannot simply describe the extensive and contentious Budget Bill debate, the changes enacted (*e.g.*, the evaluation process) and then decide on their own that the Bill will not be effective even before it is implemented. In the final analysis, one fact is indisputable: perhaps more than any other legislative change, the result of these changes will be watched and monitored by an array of interested parties. When implemented and tested, reasoned opinion will emerge as to efficacy. Until then, speculation is presumptuous.

1. The Changes to the Challenged Statutory Scheme Underscore The Non-Justiciable Nature of Plaintiffs' Claims

Plaintiffs contend that this action does not amount to a non-justiciable, political question. Yet, boiled down to their basic premise, Plaintiffs believe that students are not performing well enough on State administered proficiency exams. (Br. 7). Whether these high stakes tests provide accurate or even useful information, however, is the subject of national controversy. Indeed, the entire "opt-out" movement is predicated on the belief that these tests and their results, when used in this way, are wholly "ineffective" for a variety of reasons. Plaintiffs are

asking this Court to wade into this local and national political debate on student achievement and standardized tests. It should not.

Neither have Plaintiffs, to date, disputed the well-settled law in this area. Simply stated, while the courts have intervened to ensure adequate financial appropriation for education, it is not the role of the courts to make substantive pedagogical policy. The judiciary must take a "disciplined perception of the proper role of the courts in the resolution of our State's educational problems," since "primary responsibility for the provision of fair and equitable educational opportunity within the financial capabilities of our State's taxpayers unquestionably rests with that branch of government [the Legislature]. *Board of Educ. Levittown Union Free School Dist. v. Nyquist*, 57 N.Y.2d 27 (1982).

As previously stated, the space between the State's provision of a "sound basic education"—the minimal guarantee provided by the State constitution—and the highest quality education that every child deserves is filled with political decisions, policy determinations and administration at every level, from the executive branch, to the Legislature, SED, teachers' unions, principals' unions, school boards, superintendents, and even individual parents, schools and teachers. The vested stakeholders labored during this past legislative session (and continue to work) to advance their vision of how best to better our State's education system. In fact, *one of the named Plaintiffs* was involved in the debates regarding the teacher evaluation regulations resulting from the Budget Bill. The pulling and tugging from a variety of viewpoints produced a legislative mandate that required refinement by the executive branch through SED. This is the process that our system dictates, one that frequently produces compromise that may not be to the complete liking of all, but reflects the best judgment of the legislative and executive branches that, after reviewing all concerns and options, provides the best result for the time. As the Court

of Appeals has wisely concluded, the judiciary should not attempt to entertain or second-guess these "questions of broad legislative and administrative policy [] beyond the scope of judicial correction." *Jones v. Beame*, 45 N.Y.2d 402 (1978). The Education Article was never meant to make the judiciary, rather than its co-equal branches, the arbiter of substantive pedagogical determinations.

Take, for example, the teacher evaluation system and consider only the process by which teachers are observed in the classroom (one of a multitude of considerations necessary for teacher evaluation). For the Court to decide the evaluation system is unconstitutional, the first order of business would be to determine the number of times a teacher must be observed. More observations may provide more meaningful information to both the teacher and the supervisor, but require more resources. Then the length of each observation must be determined. Is a 15 or 20 minute observation sufficient or is a full period necessary? Perhaps some mix of these options is best. From there, the list of policy decisions multiply. Must all of the elements of classroom instruction be observed in each observation or just some? Will there be a pre-observation conference between the observer and teacher to discuss expectations and allow for the principal to understand the context in which the observation occurs? A post observation conference to provide actionable feedback? Will an observation report be written and, if so, balancing the demands on principals' time with the desire to provide teachers with the information they need to improve, what will the reports contain and how detailed will they be? What rubric will be used to assess teachers classroom performance? Can the observations be done by video, which can ease the strain on limited resources but often does not capture all that occurs in the class? Will each element of a teacher's job be given equal weight or are some worth more and, if so, how much? Should all the observations be done by the principal or should

some of them be done by impartial evaluators? The list goes on and on, and we have only addressed observations, never mind measures of student performance that have so frequently confounded educational experts, statisticians, and psychometricians.

The Legislature itself recognized the special expertise required to design a system that is rigorous and fair. Thus, they left many of the technical decisions to the Board of Regents who, during the hearings on teacher evaluations, heard testimony from no fewer than seven national experts as well as school administrators, school superintendents, parents, teachers, and school board representatives. Surely, Plaintiffs do not seriously suggest that this Court should take up each one of these decisions.

The ultimate irony, of course, is that Plaintiffs take pains to assure the Court that it need not embroil itself in formulating, managing and operating educational policy in the State and that it has the ability to simply declare the statutes unconstitutional. What then? As Plaintiffs would readily admit, the very same political actors who have now performed their respective functions in debating and setting educational policy, and who Plaintiffs now wish to second-guess, would be charged with amending the very same statutes that they have just changed and do so *before* those changes have even been implemented. Does it not make sense that the changes, thus adopted, should not at least be implemented and an opportunity afforded to demonstrate their impact?

Moreover, Plaintiffs unsurprisingly insist that this Court already passed on the justiciability of this dispute. Again, Plaintiffs' inexact argument, while beneficial for their position, does not reflect the Court's holding. The Court's precise holding on justiciability was that it had the power to issue a declaratory judgment. Defendants have never disputed that point. But what Defendants have asserted, as borne out by these recent legislative and executive acts, is

that the exceedingly complex and purely pedagogical question of what makes for an "effective" teacher—an essential predicate determination for the Court if it is to issue a declaratory judgment as urged by Plaintiffs—is the proper province of other branches of government.

Finally, Plaintiffs assert that "[a]n amendment to a statute, no less than the original statute itself, is subject to constitutional review." (Br. 25). Of course, that is also true. But the amended statutes are not the subject of *this* action, nor have Plaintiffs accepted the Court's invitation to amend their complaint. Instead, they insist that this Court must proceed on the basis of a pleading that charges that changed or superseded statutes are, supposedly, unconstitutional. That defies logic. The political process has mooted their claims. An already burdened judiciary should not engage in a pointless act of statutory review—a theoretical exercise—based solely on Plaintiffs' speculative argumentation concerning the future effectiveness of statutory provisions. *See Saratoga County Chamber of Commerce, Inc. v. Pataki,* 100 N.Y.2d 801 (2003) (claim challenging an amendment to casino gaming law that expired was moot because the Court was prohibited from giving advisory opinions or ruling on "academic, hypothetical or otherwise abstract questions" and because changed circumstances in the law meant the Court would not be deciding an actual controversy involving the actual rights of the parties).

2. Plaintiffs Self-Servingly Mischaracterize The Legislative Change As "Tweaks" To The Existing System To Avoid Dismissal On Mootness Grounds

The gravamen of Plaintiffs' response to this motion to renew is that the changes to the Challenged Statutes amount to mere "tweaks" to the tenure system. That claim is negated by the chart at paragraph 5 of the Affirmation of Charles G. Moerdler in support of the UFT's motion to renew and, upon renewal dismiss, dated May 27, 2015("Moerdler Aff.") (a copy of which is attached for the Court's convenience), which demonstrates that the legislative changes to the Challenged Statutes are anything but "tweaks." The Budget Bill enactments considered many

portions of the Education Law, including every statutory provision challenged by the Plaintiffs, and made those changes that both the legislative and executive branches thought were merited.

To begin with, the standard teachers must meet to earn due process protections has been heightened. New teachers must demonstrate, for three out of four years, that they are "Effective" or "Highly Effective" (*i.e.*, not "Ineffective" or "Developing") as measured by the re-vamped teacher evaluation system. Plaintiffs themselves have directed this Court's attention to research that they claim indicates teachers who are effective after four years (the length of time it will now take new teachers to be granted tenure in New York) tend to remain relatively effective. (Wright Amended Complaint, ¶ 36). Thus, if one were to adopt Plaintiffs' own logic, the new statute addresses the very premise upon which Plaintiffs' claims were predicated, *viz.*, by providing that only deserving teachers are granted tenure. In turn, under Plaintiffs' thesis, that will result in a workforce of only competent teachers.

The Budget Bill, however, does not stop there. It includes a provision that states, where practicable, no student shall be taught by two teachers in a row that have been rated "Ineffective" and, for those teachers who are rated "Ineffective" for two years in a row, there will be new expedited disciplinary procedures that requires teachers with those ratings to produce clear and convincing evidence of competence. Moreover, all those who hold a teaching certificate are now required to register with SED every five years, assuring that during the five-year period they engaged in the requisite amount of professional development (100 hours), further ensuring a workforce that is maintaining current skills for effective instruction. Budget Bill, Subpart C, amending Education Law § 3006.

Even if this Court were to accept Plaintiffs' characterization of the legislative amendments as "tweaks" to the Education Law (which it should not), the interaction of the

Challenged Statutes, which forms the basis of Plaintiffs' Complaint (*see* Wright Amended Complaint at ¶34; Davids Amended Complaint at ¶34), has been significantly altered. Given the depth and breadth of the Education Law amendments, it is clear that the Challenged Statutes cease to operate in the fashion presented by Plaintiffs (assuming for the moment that they ever did). Thus, any judicial decision that now opines upon the constitutionality of an altered statutory scheme would be academic. Similarly, it would be premature to address the new law by not even permitting implementation and testing of the new statutory regimen.

Plaintiffs' reliance on the Court of Appeals' decision in *Hussein v. State of New York*, 19 N.Y.3d 899 (2012), is misplaced. There, plaintiffs challenged only the level of State funding of the New York City School District, not the substance or operation of educational statutes. In his concurrence, Justice Smith explained that the case was not moot, as defendants argued, because the case involved increased funding for public schools and "if plaintiffs prevail here, large sums of taxpayer money would be directed to the public schools..." *Id.* at 908. That, of course, is not the case at bar. If Plaintiffs prevail, the Court would, in essence be striking down statutory provisions that are no longer controlling law. Accordingly, this Court should dismiss Plaintiffs' claims as moot.

3. On These Pure Legal Issues, A Stay Pending Appeal Should Be Granted To Avoid Costly, Burdensome and Potentially Needless Discovery

Assuming, *arguendo,* dismissal is not granted (as we urge), it makes little sense to engage in costly and burdensome discovery pertaining to the operation of an outdated statute. Plaintiffs do not dispute that this Court may, in its discretion, grant a stay of the proceedings. Instead, they argue that Plaintiffs will suffer continued constitutional harm for another school year if a stay is granted. The argument is without merit for two reasons: first, Plaintiffs have not shown any individualized actual or cognizable injury under the prior statute let alone anything which would

suggest that their harm is ongoing. They certainly have not shown any harm under the current, as yet unimplemented versions of the Challenge Statutes. To suggest, as Plaintiffs seemingly do, that students are continuously being deprived of a "sound basic education" under the new statute is pure guesswork. Second, and more practically, Plaintiffs seem to think that they can (i) conclude discovery, (ii) brief and succeed on motions for summary judgment, (iii) proceed to trial, (iv) convince the Court to strike down the Challenged Statutes, and (v) have the Legislature revise the entire evaluation, disciplinary, probation and tenure statutes before the next school year, which begins in some two months. To list these necessary steps is to realize the absurdity of the supposition. The resolution of this case (and any changes to the Challenged Statutes) will not occur before the next school year. It thus makes little sense to waste time and substantial resources (including precious resources from the public fisc) in the interim period, when the Appellate Court may (and we believe *will*) obviate the need for further proceedings.

## CONCLUSION

For the foregoing reasons, together with those detailed in the UFT Defendants' moving and reply submissions on the underlying motion to dismiss, Defendants respectfully requests that the Court grant its motion for leave to renew and dismiss the Complaints as moot.

Dated: New York, New York
July 7, 2014

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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

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Intervenors-Defendants.

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

**AFFIRMATION OF CHARLES G. MOERDLER**

---------- x

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,

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-and-

NEW YORK CITY DEPARTMENT OF EDUCATION,

Intervenor-Defendant,

-and-

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

Intervenor-Defendant.

----------x

**CHARLES G. MOERDLER**, an attorney duly admitted to practice before the courts of the State of New York, affirms under penalty of perjury that the following is true and correct:

1. I am a member of the firm Stroock & Stroock & Lavan LLP, co-counsel for Intervenor-Defendant United Federation of Teachers ("UFT") in this action. I submit this affirmation in support of the UFT's motion, pursuant to CPLR 2221(a) and 3211(a), to renew and, upon grant of renewal, to dismiss these actions and, alternatively, for a stay pending appeal pursuant to CPLR 5519(c). I am familiar with the proceedings and documents related to the above-captioned matter.

2. Defendants the State of New York, The New York State Board of Regents and the New York State Education Department (the "State Defendants") have simultaneously moved for renewal to dismiss these actions. Rather than burden this Court with repetition, we respectfully call the Court's attention to the State Defendants' arguments respecting justiciability and mootness, as well as to the requests for a continued stay of discovery until this Court determines the instant motions.

3. As this Court is well aware, Plaintiffs here challenge specific provisions of the Education Law pertaining to teacher probation, tenure and discipline or removal (*see* Wright Amended Complaint ¶ 6, Davids Amended Complaint ¶ 5)("the Challenged Statutes") on the ground that they purportedly abridge Article XI of the State Constitution (the Education Article), which addresses the Legislature's obligation to provide what the Court of Appeals has termed a "sound basic education." *See Campaign for Fiscal Equity*, 86 N.Y. 2d 307 (1995). All Defendants moved for dismissal. By Decision and Order, dated March 12, 2015, and entered March 24, 2015, this Court denied Defendants' motions. (Exhibit 1).[1] On April 1, 2015, the State Legislature, pressed by the Governor, enacted a budget bill (which the Governor promptly signed) that included not only substantial changes to the statutory scheme challenged herein by

[1] All Defendants have timely appealed to the Appellate Division, Second Department.

Plaintiffs (including material changes to the very statutes being challenged by the Plaintiffs in this action), but also reflected a decision, in the course of review and change, to measure the changes it would make in other parts of the Challenged Statutes. ((L. 2015, Ch. 56); hereinafter the "Budget Bill," a copy of relevant portions of which is annexed hereto as Exhibit 2). The State Defendants maintain that these actions of the Legislature warrant dismissal of the present claims, a conclusion in which the UFT concurs. The comprehensive changes to the Challenged Statutes, whether or good or bad, emphasize the lack of justiciability of the claims asserted by Plaintiffs and have rendered the controversy moot.[2] Simply stated, Plaintiffs' Amended Complaints challenge the constitutionality of a statutory scheme that is no longer law.

4. Importantly, this Court afforded Plaintiffs an opportunity to amend their Complaints. Indeed, even though Plaintiffs' counsel advised the Court, at the status Conference held May 6, 2015, that they did not intend to amend, the Court, by Order dated May 6, 2015 (Exhibit 3), still accorded Plaintiffs two weeks to amend, which time period has now lapsed. The non-justiciability and mootness of these actions thus is clear and dismissal should follow.

5. Plaintiffs assert that it is the interaction of the Challenged Statutes that forms the basis for their Complaint. *See* Wright Amended Complaint at ¶34; Davids Amended Complaint at ¶34. The following chart summarizes, however, that all of the Challenged Statutes, with limited exceptions, have been either directly amended by the Budget Bill, their implementation has been impacted in some significant way, or they were considered and the Legislature declined to act.

[2] The UFT reserves the right to separately challenge relevant portions of the Budget Bill or the implementation thereof. While the UFT joins in the State Defendants' arguments regarding mootness, justifiability and stay pending appeal, there may be differences, not pertinent to the present motion, in how the UFT interprets certain aspects of the Budget Bill, as compared with the State's reading.

| Topic | Statutes Challenged by Wright Plaintiffs[3] | Statutes Challenged by Davids Plaintiffs | Treatment in Budget Bill |
|---|---|---|---|
| Probation | §§ 2509, 2573, 3012 | §§ 1102(3), 2509, 2573, 2590-j, 3012, 3014 | Amended §§ 2509, 2573, 3012, 3014 by, among other things, prospectively extending the standard probationary period to 4 years and putting in place specific rating requirements for earning tenure[4] |
| Evaluation | § 3012-c | | Added new § 3012-d that, among other things, amends the processes for determining both the student growth and observation components of the APPR, gives the State a greater role in the evaluation system and delineates rules for determining a teacher's overall APPR rating[5] |
| Discipline | §§ 3020, 3020-a | § 3020-a | Amended § 3020-a by providing for the possibility of suspension without pay pending now expedited charges of misconduct constituting physical or sexual abuse of a student<br><br>Added new § 3020-b that prospectively creates an expedited removal process for certain teachers who have received consecutive ratings of Ineffective. In the circumstances set forth in the law: (i) two consecutive "I" ratings will constitute prima facie evidence of incompetence that can be overcome only by clear and convincing evidence that employee is not incompetent, and (ii) three "I" ratings will constitute |

[3] The Wright Plaintiffs also purport to challenge Education Law § 2590 (*see* Wright Amended Complaint, ¶6), but this statute is not mentioned anywhere in the factual section of the Wright Amended Complaint nor is it relevant to the issues presented. Education Law § 2590 simply states that Article 52-A of the Education Law shall apply to New York City. To the extent the Wright Plaintiffs intended to include Education Law §2590-j, that statutory provision is addressed in footnote 4.

[4] In addressing the challenged statutory scheme, the Legislature chose in the Budget Bill to not address Education Law § 2590-j (dealing with the appointment and removal of teachers in NYC). This Section, however, does not set terms for probation, it simply references the "probationary period," which, in turn, is governed by Education Law § 2573 as amended by the Budget Bill. Similarly, the Legislature chose not to specifically address in the Budget Bill Education Law § 1102(3) (dealing with the appointment of teachers by vocational boards).

[5] The Legislature determined in creating the newly added Education Law § 3012-d to make some provisions self-executing, while others will (or may) require negotiations with the local collective bargaining representative.

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|---|---|---|---|
| | | | prima facie evidence of incompetence that can be overcome only by clear and convincing evidence that one or more of the underlying components of the evaluation was "fraudulent." If these evidentiary determinations are not overcome, absent extraordinary circumstances, they shall be just cause for removal.[6] |
| Seniority | §§ 2510, 2585, 2588 | § 3013(2) | In enacting this sweeping legislation, the Legislature, despite language in the Governor's proposed bill, affirmatively chose to retain the long-established policy of the State with regard to seniority-based layoffs[7] |

6. Not only does the Budget Bill render Plaintiffs' Complaints moot, it serves to provide further evidence that the claims asserted by Plaintiffs are non-justiciable. The *Levittown* decision, upon which all the succeeding Court of Appeals Education Article decisions rest, "cogently pointed to the 'enormous practical and political complexity' of deciding upon educational objectives and providing funding for the them which, under our form of government,

[6] The newly added § 3020-b defines what would constitute "just cause" in the case of certain teachers who receive consecutive Ineffective ratings, but did not alter the "just cause" standard set forth in N.Y. Education Law § 3020. Aspects of § 3020-b and its construction remain to be resolved, including, but not limited to, the appeals processes set forth §§ 3012-c(5) and (5-a).

[7] The Legislature determined, in enacting the Budget Bill, that a new Education Law § 211-f would be included to provide for the potential takeover and restructuring of failing schools, in certain circumstances, by a receiver. The receiver's authority may include, among other things, the ability to abolish positions within a school as part of a school intervention plan. Moreover, the law provides a mechanism for the receiver to potentially abolish positions pursuant to which the teacher with the "lowest" APPR rating in the tenure area shall be the first to be affected, and seniority will only be used as a tie-breaker if needed. In enacting this new section, the Legislature expressly rejected the provision in the Governor's Bill that provided for the takeover and restructuring of purportedly failing *school districts*, in addition to failing schools. The Governor's Bill would have granted the receiver of a school district the authority to abolish positions across the district, with APPR ratings as the initial sorting factor and seniority to be used only in the event of a tie. Governor's Budget Bill, S. 2010/A. 2010, Subpart D. In rejecting this portion of the Governor's Bill, the Legislature reaffirmed its commitment to the long-standing policy of this State, thereby providing further evidence that this is a non-justiciable political question (*see infra*, at ¶¶ 6-8).

*are legislative and executive prerogatives upon which courts should be especially hesitant to intrude."* *CFE I,* 86 N.Y.2d at 330 (quoting *Levittown*, 57 N.Y.2d at 39).

7. The UFT emphasized in its opening and reply briefs on its motion to dismiss that striking the appropriate balance between the longstanding benefit to the public of due process for teachers and ensuring students have effective teachers in the classrooms (and deciding what makes for an "effective" teacher in the first instance) is precisely the type of "practical and politically complex" question that the Legislature has been trying to address and a question upon which the Court, with respect, should be hesitant to intrude.

8. The recent Budget Bill confirms this. It reflects that, right or wrong, the Legislature—expressly charged under the Education law with responsibility for action in this area—and the Executive had concluded that a series of changes were to be made. As we previously noted, there had been prior extensive deliberation with executive branch officials, legislators, State Education Department personnel, educational policy experts and union representatives on the Teacher Evaluation Law (Education Law § 3012-c), and there now will be continuing discussions with these same groups on the meaning and implementation of the Budget Bill. The proper forum for these discussions is the Legislature, where an effective solution can focus holistically on what truly ails our educational system—that is the underlying inadequate funding, class size, poverty and the like. The Budget Bill and the Legislature's continuing efforts focused on the very issues raised herein reaffirms that the Court should not accept Plaintiffs' invitation to embroil itself in the entirely political and pedagogical policy question of who is an effective teacher and how to address the handful that are not.

9. One final point merits brief mention here. The Court correctly pointed out in its ruling (p. 15) that a declaratory judgment is a "well suited" instrument for the judiciary to

safeguard constitutional rights. Defendants do not dispute this. What Defendants contend, and what has been borne out in the recent legislative acts, is that deciding to issue a declaratory judgment, in this case, involves making the pedagogically complex and politically sensitive determination of what constitutes an effective teacher (unlike the easily quantifiable measures formerly addressed in Court of Appeals jurisprudence of whether, for example, teachers are appropriately certified). That is, as a matter of law, a non-justiciable political question. Indeed, that the Budget Bill refers many issues to the State Board of Regents (*see e.g.,* Budget Bill, Subpart D, adding new Section 3012-d, leaving to the Commissioner of Education, with the approval of the Board of Regents, the development of regulations around the implementation of the teacher evaluation process) clearly reflects the Legislature's own view of its lack of sufficient expertise.

10. Finally, the UFT also joins in the State Defendants' alternative request for a stay pending appeal. The terms of CPLR 5519(c) afford litigants in civil judicial proceedings the opportunity, at the discretion of the court, to obtain a court ordered stay of an order pending appeal. While the language in CPLR 5519(c) does not provide any criteria for issuing a discretionary stay, courts frequently consider the merits of the appeal (*see Rosenbaum v. Wolff,* 270 A.D. 843 (2d Dep't 1946), as well as the exigency or hardship confronting a party without the stay (*see McKinney's Cons Laws of NY*, Book 7B, CPLR C5519:4 (2015)).

11. Stays are also granted where the litigants intend to expeditiously seek appeal. *In re Cohen,* 10 A.D.2d 581 (2d Dep't 1960); *see also In re Roel,* 3 N.Y.2d 754 (1957) (stay granted on condition that the record on appeal be perfected and served on a date certain), and where it will prevent the disbursement of public funds pending an appeal, which may be determined in the government's favor. *Summerville v. City of New York*, 97 N.Y.2d 427 (2002).

12. The reasons for a stay pending appeal here are self-evident. While this Court has granted an interim stay, the legal issues tendered herein are ones that may well require appellate resolution (*e.g.*, absent a finding of mootness as here urged). Intervening discovery and procedural processes will only add considerable burden, which would be wasted in the event the issues are decided—as we submit they should be—as a matter of law. Moreover, discovery will not advance resolution of legal issues already framed by the Record of the prior proceedings before this Court and the instant motions.

13. Importantly, all parties have represented to the Appellate Division that an expedited appeal may well be warranted after this Court has ruled and there is no prejudice to plaintiffs from a stay. Yet, the commencement of discovery will force all Defendants, including the government, to expend a deal great resources, when the expedited appeal (dealing strictly with legal issues) may obviate the need for discovery.

14. Accordingly, based on the foregoing and the UFT's prior submissions in support of its motion to dismiss, the UFT respectfully requests that this Court grant the UFT's Motion to Renew, Dismiss and Stay Pending Appeal.

Dated: New York, New York
May 27, 2015

CHARLES G. MOERDLER