SUPREME COURT FOR THE STATE OF NEW YORK
COUNTY OF RICHMOND

MYMEONA 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, 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; PHILIP A. CAMMARATA, MARK MAMBRETTI, and THE NEW YORK CITY DEPARTMENT OF EDUCATION,

Intervenors-Defendants.

Index No.: 101105/2014

JUSTICE: Hon. Philip G. Minardo

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' AND INTERVENORS-DEFENDANTS' MOTIONS FOR LEAVE TO RENEW, TO DISMISS, AND FOR A STAY OF THE PROCEEDINGS PENDING APPEAL

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Introduction

Defendants seek to renew their motions to dismiss on the pretext that the Education Law has been amended so substantially as to render this case moot and nonjusticiable. But far from being new, these arguments have been made before. Defendants claimed with respect to their original motions to dismiss that, for example, "[P]laintiffs' claims are already moot, given several recent amendments to the challenged statutes," and it "is the *Legislature*, not the courts, which sets public policy regarding teacher probation, tenure and seniority."[1] But none of the amendments to the Education Law unsettles this Court's conclusive rejection of Defendants' litany of claims about why Plaintiffs should be refused their day in court. The Court emphatically held that the Plaintiffs' allegations:

> are sufficient to state a cause of action for a judgment declaring that the challenged sections of the Education Law operate to deprive students of a "sound basic education" in violation of Article XI of the New York State Constitution, *i.e.*, that the subject tenure laws permit ineffective teachers to remain in the classroom; that such ineffective teachers continue to teach in New York due to statutory impediments to their discharge; and that the problem is exacerbated by the statutorily-established "LIFO" system dismissing teachers in response to mandated lay-offs and budgetary shortfalls.[2]

By renewing their motions to dismiss, Defendants thus seem to be following the old adage, "if at first you don't succeed, try, try again." Notwithstanding Defendants' persistence, nothing has changed to merit a second bite at the apple. Although the Legislature tweaked the length of the tenure probationary period and made minor adjustments to the disciplinary process, it left intact a series of laws that—as Plaintiffs allege—together ensure that ineffective teachers

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1 NYSUT MTD at 6-7, 10. Note that this brief adopts the citation method used in *Wright* Plaintiffs' Memorandum of Law in Opposition to Defendants' and Intervenors-Defendants' Motions to Dismiss the Action ("*Wright* Mem.") to cite the five original motions to dismiss and accompanying memoranda of law filed in response to Plaintiffs' Complaint. *See Wright* Mem. at p. 10 n.2.

2 Decision & Order denying Mots. to Dismiss 14, Mar. 12, 2015 (Minardo, J.S.C.) ("Decision and Order").

will remain in the classroom at the expense of children's constitutional right to an adequate education. Defendants offer nothing to suggest that the modest changes to the Education Law have radically transformed the education landscape to miraculously provide Plaintiffs all of the relief that they seek or to rectify the persistent constitutional injury being inflicted on New York's schoolchildren.

Thus, whereas Defendants previously were unable to meet the demanding threshold to sustain a motion to dismiss, it is even more apparent that they cannot meet the higher burden to renew the very same arguments already once made and lost. Defendants must persuade this Court that the motion for leave to renew is "based upon new facts not offered on the prior motion *that would change the prior determination*" or that "there has been a change in the law *that would change the prior determination.*" N.Y. C.P.L.R. § 2221(e).[3] They cannot meet this standard, and the Court should deny the motions to renew, because the unconstitutional status quo persists. And because New York's schoolchildren face an ongoing risk of constitutional injury due to the enforcement of the Education Law, the Court should also deny a stay of discovery while Defendants pursue their appeal of this Court's original Decision and Order.

Standard of Review

A motion for leave to renew "shall be based upon new facts not offered on the prior motion *that would change the prior determination*" or "shall demonstrate that there has been a change in the law *that would change the prior determination.*" N.Y. C.P.L.R. § 2221(e). Such motions are "addressed to the sound discretion of the court," *Lardo v. Rivlab Transportation Corp.*, 46 A.D.3d 759, 759 (2d Dep't 2007), but they are "granted sparingly," *Matter of*

[3] All emphasis added and internal citations omitted throughout unless otherwise noted.

Weinberg, 132 A.D.2d 190, 210 (1st Dep't 1987), because the moving party must persuade the court that "there is a legitimate basis for the court to expend its and the opposing party's resources to consider the case again." *Alta Apts., LLC v. Wainwright,* 4 Misc. 3d 1009(A) (N.Y. Civ. Ct. 2004) (Table).

The State Defendants also suggest that they are permitted to file a successive motion to dismiss.[4] But, according to what courts refer to as the "single motion rule," section 3211(e) of the C.P.L.R. specifies that "no more than one ... motion [to dismiss] is permitted." N.Y. C.P.L.R. § 3211(e); *see also Bailey v. Peerstate Equity Fund, L.P.*, 126 A.D.3d 738-44 (2d Dep't 2015) ("[T]his 'single motion rule prohibits parties from making successive motions to dismiss a pleading' pursuant to CPLR 3211(a)."). As relevant here, section 3211(e) notes a limited exception to this rule, stating that a motion for lack of subject matter jurisdiction "may be made at any subsequent time or in a later pleading, *if one is permitted.*" N.Y. C.P.L.R. § 3211(e). The case law makes clear that a successive motion may be permitted *only* to raise a jurisdictional ground for dismissal *not* previously raised. In *Matter of Anstey v. Palmatier*, for example, the court permitted the respondent to file a belated dismissal motion because the jurisdictional argument had *not* previously been raised in the initial motion to dismiss. 23 A.D.3d 780, 803 (3d

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[4] State Mem. at 2. Five motions, accompanying memoranda of law, and affirmations were filed in response to the recent changes in the Education Law seeking leave to renew the motion to dismiss, to dismiss the action, or a stay of all proceedings pending the appeal before the Second Department Appellate Division: Memorandum of Law in Support of the State of New York, et al., Defendants' Motion for Leave to Renew the Motion to Dismiss, to Dismiss the Action, or to Stay the Proceedings ("State Mem."); Memorandum of Law in Support of Seth Cohen, et al., Intervenors-Defendants' Motion for Leave to Renew the Motion to Dismiss ("NYSUT Mem."); Memorandum of Law in Support of Philip A. Cammarata and Mark Mambretti, Intervenors-Defendants' Motion for Leave to Renew the Motion to Dismiss and to Dismiss the Action ("SAANYS Mem."); Affirmation of Janice Birnbaum in Support of the New York City Department of Education, Intervenor-Defendant's Motion for Leave to Renew the Motion to Dismiss, to Dismiss the Action, or to Stay the Proceedings ("DOE Aff."); and Affirmation of Charles G. Moerdler in Support of Michael Mulgrew, as President of the United Federation of Teachers, Intervenor-Defendant's Motion for Leave to Renew the Motion to Dismiss, to Dismiss the Action, or to Stay the Proceedings ("UFT Aff.").

Dep't 2005). And in *Lemburg v. John Blair Communications, Inc.*, 258 A.D.2d 291 (1st Dep't 1999), the defendant filed a second Rule 3211 motion only after plaintiffs added two new causes of action to their complaint.

Here, however, Defendants only rehash jurisdictional arguments raised in their initial motions to dismiss and already rejected by this Court, without invoking any new jurisdictional basis for dismissal.[5] They thus have no cause to file a successive motion to dismiss, and must satisfy the demanding standard of a motion to renew under section 2221(e). *See B.S.L. One Owners Corp. v. Key Int'l Mfg.*, 225 A.D.2d 643, 643 (2d Dep't 1996) ("Because the defendants' previous challenge to the fraud and breach of fiduciary duty causes of action was denied, the defendants were barred by the 'single motion rule' from challenging these causes of action in a second motion pursuant to CPLR 3211(a)."); *Ramos v. City of New York*, 51 A.D.3d 753, 754 (2d Dep't 2008) ("[A] party may not make a second motion pursuant to CPLR 3211 based on [the same] ground [as the original motion], but must raise the ground 'in another form.'"); *Wallace v. Merrill Lynch Capital Servs., Inc.*, 12 Misc. 3d 1153(A) (N.Y. Cnty. Sup. Ct. 2006) (Table) ("However, a second motion cannot seek dismissal of the same claim on the same grounds raised during a prior motion.") (citing *B.S.L. One Owners Corp.*, 225 A.D.2d at 643).

In any event, under either N.Y. C.P.L.R. § 2221(e) or § 3211(a), and as with the original motion to dismiss, this 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

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[5] For example, compare NYSUT MTD at 6-7 ("[P]laintiffs' claims are already moot, given several recent amendments to the challenged statute"), with NYSUT Mem. at 6 ("The motion for leave to renew should be granted because the ... legislative amendments render [P]laintiffs' claims moot.") *See also* Chart, *infra*, at p. 24 (comparing ripeness and justiciability arguments made in the original motions to dismiss and again here).

alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). Defendants cannot meet their burden under this standard.

Background

I. The Legislature's Failure to Cure Constitutional Deficiencies in the Education Law

The New York State Legislature recently passed changes to the Education Law as part of the 2015-16 budget bill. Defendants argue that because the "Legislature's amendments to [the Education Law] significantly changed tenure and probation for teachers, disciplinary proceedings for tenured teachers and the evaluation of teachers (Annual Professional Performance Review)," Plaintiffs' claims are now moot.[6] That is not the case. The *Wright* Plaintiffs' Amended Complaint (the "Complaint") challenges the constitutionality, in whole or in part, of the Challenged Statutes: Education Law §§ 2509, 2510, 2573, 2585, 2588, 2590, 3012, 3012-c, 3020, and 3020-a. In addition to amending these provisions, the Legislature added §§ 3012-d and 3020-b, which govern teacher evaluations and disciplinary procedures for teachers with consecutive "Ineffective" ratings.[7] Despite amendments to the Education Law, the allegations in the Complaint still stand and the reasoning in this Court's denial of the motion to dismiss endures.

While the Legislature modestly modified sections of the Education Law, it left a system in place that enables the rubber-stamping of teachers as "Highly Effective" or "Effective," paving the way to the lifetime job protections of tenure, even while their students continue to

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6 NYSUT Mem. at 6.

7 The revised sections of the Education Law have been or will be made effective at different times. N.Y. Educ. Law §§ 2509, 2573, 3012, 3012-c, 3012-d were made effective April 13, 2015; and N.Y. Educ. Law §§ 3020, 3020-a, and 3020-b will be made effective July 1, 2015. N.Y. Educ. Law §§ 2510, 2585, 2588, and 2590 were not altered.

perform at substandard levels. Members of the Legislature themselves acknowledged the limited effect of the reforms. As Assemblyman Thiele stated in the legislative debates, "This is called education reform, in my opinion it's anything but. All we're doing tonight is rearranging the deck chairs on the Titanic."[8] A survey of the amendments reveals that Assemblyman Thiele was right—there is little cause for hope that the ship is not still sinking. A brief examination of the modest adjustments to the Tenure Laws, Disciplinary Statutes, and LIFO, confirms that the Complaint's allegations continue to state a claim that "[c]umulatively, these laws make it nearly impossible to dismiss and discipline teachers with a proven track record of ineffectiveness or misconduct" and "Plaintiffs, and other New York State schoolchildren, are the primary victims of this failing system." Compl. ¶ 3.

A. The Legislature Did Not Cure Constitutional Deficiencies in the Tenure System

The statutory provisions authorizing the award of tenure to teachers within school districts of different sizes remain largely unchanged. Under the revised statutes, new teachers are now appointed for a probationary period of four years rather than three. *See* N.Y. Educ. Law §§ 3012(1)(a)(ii), 2573(1)(a)(ii), 2509(a)(ii). To receive tenure, a teacher must be rated "Highly Effective" or "Effective" in three out of the four probationary years, and a teacher receiving an "Ineffective" rating in the fourth year may not be awarded tenure. *See id.* at §§ 3012(2)(b), 2573(5)(b), 2509(2)(b).

The extension of the probationary period from three years to four does nothing to change the fact that tenure will be granted as a matter of course, irrespective of merit, because nearly

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[8] Session Proceedings Transcript, New York State Assembly 210 (March 31, 2015), http://nystateassembly.granicus.com/DocumentViewer.php?file=nystateassembly_dd590db2672c4de39a134270d82ad9d6.pdf&view=1 [hereinafter Session Proceedings Transcript].

every teacher receives the rubber stamp of a "Highly Effective" or "Effective" rating. *See, e.g.*, Compl. ¶ 41 (in 2012, only 1% of teachers were rated "Ineffective" under the APPR, even though only 31.5% of students met the State proficiency standards); ¶¶ 37, 42 (97% of tenure-eligible New York City teachers receive tenure even though fewer than 97% of teachers are effective). Defendants make it sound as though the method for evaluating teachers has been dramatically improved. But the APPR under the statute continues to operate in the same dysfunctional way as before.

The method for evaluating teacher effectiveness is now governed by § 3012-d. But § 3012-d maintains the former rating scale under which teachers are rated "Highly Effective," "Effective," "Developing," or "Ineffective." *See* N.Y. Educ. Law § 3012-d(3); *see also* Compl. ¶ 40. Teachers will be rated based on two components: student performance and teacher observations. *See* N.Y. Educ. Law § 3012-d(4). Each school district, however, must negotiate the specific terms of its evaluation system in much the same way that they had to negotiate the terms of the APPR in prior years. *See id.* at § 3012-d(10); Compl. ¶ 40. As stated by Assemblyman Edward Ra, "[W]e're doing the same exact thing we did three years ago or two years ago, whenever it was, when we approved APPR the first time. . . Because *we're going to get the same results, we're going to get the same problems we've seen in the current system.*"[9] The revised statutes also do not alter the fact that inaction by the superintendent or an administrator results in de facto tenure for a teacher whose probationary period is expiring and who has not been either notified of a recommendation against tenure or has not already been dismissed. *See Ricca v. Bd. of Educ. of City Sch. Dist. of N.Y.*, 47 N.Y.2d 385, 391 (1979).

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9 Session Proceedings Transcript, *supra* note 8, at 20.

What is more, the statute delegates to the Commissioner of Education the responsibility to adopt guidance about evaluations, even though that existing strategy has thus far yielded limited success. *Compare* N.Y. Educ. Law § 3012-c(2)(a)(8) (effective May 1, 2014 to April 12, 2015) ("[T]he elements comprising the composite effectiveness score and the process by which points are assigned to subcomponents shall be locally developed, consistent with the standards prescribed in the regulations of the commissioner and the requirements of this section ....") *with* N.Y. Educ. Law § 3012-d(7) (effective April 13, 2015) ("The commissioner shall ensure that the process by which weights and scoring ranges are assigned to subcomponents and categories is transparent and available to those being rated before the beginning of each school year."). The Commissioner has until June 30, 2015 to adopt regulations and guidelines about how to weigh the different evaluation components. *See* 2015 Sess. Law News of N.Y. Ch. 56 (S. 2006-B) Subpart E Section 1 (McKinney's); N.Y. Educ. Law § 3012-d. To receive funding under the budget bill, school districts must then implement standards and procedures for conducting evaluations by November 15, 2015. N.Y. Educ. Law § 3012-d(12). Several members of the Board of Regents have called for delays of the implementation timeline.[10]

Many have questioned the Commissioner's and the Department of Education's ability to promulgate effective regulations, when they have failed to do so in the past. Assemblyman Peter Lopez cautioned, "[W]e are . . . giving [this responsibility to] the Commissioner's office, which has proven, in the last two years at least, that they are incapable of doing anything other than being a rubber stamp."[11] Assemblywoman Janet Duprey also expressed her concerns before

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[10] *See* Jessica Bakeman, *Seven regents call for evaluation system delay*, Capital New York, June 9, 2015 *available at* http://www.capitalnewyork.com/article/albany/2015/06/8569768/seven-regents-call-evaluation-system-delay.

[11] Session Proceedings Transcript, *supra* note 8, at 43.

voting against the bill: "I wish I had more confidence in the State Education Department and the Board of Regents to develop a good evaluation system. I don't."[12] Other legislators expressed general concern that the amendments maintained the status quo and did not do enough to reform the teacher evaluation process. Assemblyman Peter Lopez stated:

> Nothing has changed. So, we're giving it back to the very same agents who were incapable of delivering reasonable, reasoned policy the first time. ... There's no defense for saying that we can give it back to the Regents and step aside from our responsibility to protect children and teachers and ensure that our schools are places of learning and advancing the needs of our children as they become citizens. This is disgraceful. We can do better.[13]

Assemblyman Anthony Palumbo expressed similar regret about the Legislature's failure to pioneer reform:

> We have punted the evaluations to State Ed, who will absolutely, in my opinion, make a disaster of this as well. ... [W]e may have to force ourselves to somehow try and revamp this because we didn't have the guts to take it on right now. So, during this negotiation, we should have told the Governor, Enough. Let's slow it down and let's do it the right way. But instead, we've unfortunately just passed the buck, and I believe we're going to be back here again.[14]

At one point, Assemblyman Chad Lupinacci asked, "So, there have been no changes with this update, so everything is status quo in terms of actual evaluation," to which Assemblywoman and Education Chairwoman Catharine Nolan simply replied, "Yes."[15]

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12 *Id.* at 181.

13 *Id.* at 15.

14 *Id.* at 144-45.

15 *Id.* at 65.

B. The Legislature Did Not Cure Constitutional Deficiencies in the Disciplinary System

Once a teacher receives tenure, he or she still cannot be removed except for just cause and in accordance with the disciplinary process prescribed in §§ 3020-a or 3020-b, as applicable. *See* N.Y. Educ. Law §§ 3020, 3020-a, 3020-b, and 2590-j (same for New York City) (collectively the "Disciplinary Statutes"). A teacher may be removed or disciplined for insubordination, immoral character or conduct unbecoming a teacher, inefficiency, incompetency, physical or mental disability, neglect of duty, or a failure to maintain required certification. *Id.* at § 3012(2)(a). Defendants argue that the newly enacted section 3020-b makes it easier to dismiss an ineffective teacher by, among other things, accelerating the process to dismiss a teacher receiving consecutive "Ineffective" ratings.[16] *See id.* at § 3020-b. But these changes are purely academic within a statutory scheme that fails to identify ineffective teachers in the first place—without demonstrating a real possibility that ineffective teachers will in fact receive such consecutive "Ineffective" ratings on a consistent basis, Defendants leave little doubt that the revised Disciplinary Statutes will continue to result in the retention of ineffective teachers. *See, e.g.*, Compl. ¶ 41 (in 2012, only 1% of teachers were rated "Ineffective" under the APPR, even though only 31.5% of students met the State proficiency standards).

Plaintiffs have already adequately alleged that ineffective teachers are rarely rated as such, which means that the expedited process for dismissing a teacher with *two* "Ineffective" ratings will rarely be triggered. Compl. ¶ 58. Administrators rate teachers artificially high to avoid the lengthy appeals process for an ineffectiveness rating and the obligation to develop and execute a teacher improvement plan ("TIP") for the "Ineffective" teacher. N.Y. Educ. Law

[16] *See, e,g.*, State Mem. at 6-8.

§ 3012-c(4); Compl. ¶ 53. This laborious and complicated process, and the workload imposed when a teacher receives an "Ineffective" rating, deters administrators from trying to remove ineffective teachers under § 3020-a, or from issuing consecutive "Ineffective" ratings. *See* Compl. ¶ 53 (citing Compl. Ex. 13, John Stossel, *How to Fire an Incompetent Teacher*, Reason (Oct. 2006), http://cloudfrontassets.reason.com/assets/db/12639308918768.pdf.).

When disciplinary proceedings are initiated for an ineffective teacher who has *not* received consecutive "Ineffective" ratings, the largely unchanged processes from § 3020-a still control. *See* N.Y. Educ. Law at §§ 3020-b(1), b(6). The Disciplinary Statutes still impose dozens of hurdles to dismiss or discipline a teacher, including investigations, multiple years of evaluations and observations, hearings, improvement plans, arbitration processes, and administrative appeals. *See* Compl. ¶ 50. Administrators will continue to have difficulty complying with the truncated timeline for bringing disciplinary charges given the evidentiary hurdles to initiate those proceedings and the three-year limit for bringing charges against a teacher under §§ 3020-a and 3020-b. Before bringing charges, administrators must meticulously build a trove of evidence that includes extensive observation, detailed documentation, and consultation with the teacher. *See* Compl. ¶ 54. Moreover, although § 3020-b now provides expedited timelines to resolve proceedings against those teachers receiving two or more "Ineffective" ratings, in the mine run of cases the sluggish existing regime will govern. *See* N.Y. Educ. Law § 3020-b(1), b(6). From 2004 to 2008, § 3020-a disciplinary proceedings took an average of 502 days from the time charges were brought until a final decision, *see* Compl. ¶ 56, and incompetency proceedings *took even longer*. From 1995 to 2006, those proceedings took an average of 830 days, costing $313,000 per teacher. *Id.* at ¶ 57. All the while, ineffective teachers continued to receive pay even while suspended. *See id.* at ¶ 59 (citing N.Y. Educ. Law

§ 3020-a(2)(b)); *see also* N.Y. Educ. Law § 3020-a(2)(c). One can therefore expect that the disciplinary process will remain impractically long and costly.

Even in the rare case where a teacher receives two consecutive "Ineffective" ratings, an administrator cannot bring charges without alleging "that the employing board has developed and substantially implemented a teacher or principal improvement plan ... following the first evaluation in which the employee was rated ineffective, and the immediately preceding evaluation if the employee was rated developing." *Id.* at § 3020-b(2)(d). Moreover, the Legislature did not override the standard of proof that hearing officers have adopted for these proceedings. Even once it is established that a teacher is incompetent, in order to *dismiss* an ineffective teacher, administrators must prove that they have undertaken sufficient remediation efforts and that such efforts have and will continue to fail. *See* Compl. ¶ 64; *see also, e.g.*, *deSouza v. Dep't of Educ. of City Sch. Dist. of N.Y.*, 28 Misc. 3d 1201(A) (N.Y. Sup. Ct. 2010) (Table) (despite arbitrator finding that nine of ten charges against a teacher were valid, because the arbitrator "felt that petitioner could be rehabilitated" she was "merely docked one month's salary and ordered ... to enroll in classes."). The obstacles to removing ineffective teachers from the classroom thus remain firmly in place.

C. The Legislature Did Not Cure Constitutional Deficiencies in LIFO

Defendants make conspicuously little mention of LIFO, because the same rule protecting ineffective teachers remains untouched: The Legislature did not change the requirement that when layoffs are conducted, teachers with the least seniority in a position's particular area of instruction must be terminated first, regardless of their effectiveness relative to other, more senior, teachers. *See* N.Y. Educ. Law §§ 2510, 2585, 2588 (collectively, the "LIFO Statutes"). As Plaintiffs' well-pleaded complaint alleges, while these teachers are lost to the classroom,

senior, low-performing, and more highly-paid teachers continue to provide poor instruction to their students. *See* Compl. ¶¶ 68-70. There are no new facts to undermine these allegations.

The 2015 budget bill did add § 211-f, which created a narrow exception to the LIFO statute, allowing a failing or persistently failing school's receiver to dismiss teachers based on their effectiveness rating, without regard to seniority. *See* N.Y. Educ. Law § 211-f(7)(b). Under § 211-f(1), however, only the "lowest achieving five percent of public schools in the state" shall be designated as failing and will thus be eligible for receivership. N.Y. Educ. Law § 211-f(1). Initially, Governor Cuomo proposed a much broader change to the LIFO system, whereby failing districts, not just schools, would be allowed to take into account a teacher's § 3012-d evaluation when conducting layoffs.[17] But the Legislature rejected that broader proposal, and as it stands, in at least 95% of schools across New York, the LIFO statutes will apply unchanged, and ineffective senior teachers will remain in the classroom while junior effective teachers are dismissed.[18]

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[17] 2015-16 New York State Executive Budget, The Education Opportunity Agenda Article VII, N.Y. Educ. Law § 211-g(5)(f) (proposed Jan. 21, 2015) *available at* https://www.budget.ny.gov/pubs/executive/eBudget1516/fy1516artVIIbills/EducationReform_ArticleVII.pdf ("Notwithstanding any other provision of law, rule or regulation to the contrary, upon designation of a school district as a failing school district pursuant to section two hundred eleven-q of this part . . . [w]hen a position of a classroom teacher or building principal is abolished, the services of the teacher or administrator or supervisor within the tenure area of the position with the lowest score on the state growth and other comparable measures subcomponent of the most recent annual professional performance review shall be discontinued, provided that seniority within the tenure of the position shall be used solely to determine which position should be discontinued in the event of a tie.").

[18] Defendants argue that "judicial review of the seniority-based layoff system is foreclosed by an earlier Court of Appeals decision finding seniority-based preferences to be rational," State Mem. at 19 (citing *Matter of Madison-Oneida Bd. of Coop. Educ. Servs. v. Mills*, 4 N.Y.3d 51, 60 n.9 (2004)). But Defendants commit the same error they did in their original motions to dismiss, where they argued that the tenure statutes are constitutional because a court once remarked that the tenure statutes had a rational objective. *See Ricca*, 47 N.Y.2d at 391; *see also* State MTD at 21-22, 31. As Plaintiffs already explained, a rational government objective alone does not defeat an Article XI claim. *See Wright* Mem. at 24-27. *Mills* was a statutory interpretation case and did not consider or decide the constitutional question presented here.

The Legislature did not give the need for constitutional reform the consideration it deserved. During the Assembly debate regarding these changes, Assemblyman Edward Ra stated, "Instead of taking the time to do this right, we're just going to push forward because somebody thinks that's the way to go because they want to just plow through with the budget and not have the conversations that need to take place to do this right."[19] Assemblyman Steven McLaughlin agreed, asking, "Why are we once again rushing through this gigantic stack of paper that hardly anybody has had time to read? ... The people of New York deserve more than this."[20] Assemblyman Anthony Palumbo also expressed his dissatisfaction with the short time frame the Assembly had to review the budget bill, stating: "[T]his budget that landed on our desks a few hours ago and is due in about three hours, three hours and 15 minutes, we still have two more new bills to conference, is not the way good government should operate ... And to have us scramble like this and not be part of the conversation is why we have the problems that we have when it comes to the education in our community."[21]

Argument

I. Defendants Have Failed to Show Any New Facts or Law "That Would Change the Prior Determination" that the Case is Not Moot

Defendants assert that the Legislature "transformed the standards and procedures for evaluating public school teachers and removing ineffective teachers,"[22] but the modesty and

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19 Session Proceedings Transcript, *supra* note 8, at 20-21 (March 31, 2015).

20 *Id.* at 169 170.

21 *Id.* at 143-44.

22 State Mem. at 16.

inefficacy of the recent amendments give the lie to this characterization.[23] This is not the first time the Legislature has made a half-hearted effort to reform the Education Law. Indeed, in their original motions to dismiss, Defendants documented a series of changes to the law as far back as 1980,[24] and insisted the most recent of those amendments made "[P]laintiffs' claims already moot" because "[P]laintiffs are attacking laws that no longer exist."[25] This Court rejected that argument then, in apparent agreement with Plaintiffs that "Defendants would hide behind the new law, but a new coat of paint cannot mask an already-crumbling structure."[26] *See also* Session Proceedings Transcript, *supra* note 8, at 210 ("This is called education reform, in my opinion it's anything but. All we're doing tonight is rearranging the deck chairs on the Titanic.") (Assemblyman Thiele). This Court should reject that very same argument again now. As education research fellow Katharine Stevens put it in a recent article, "[w]e've been down this road to nowhere before," with past changes to the Education Law "hailed at the time ... as a 'sweeping overhaul,'" but with little measurable practical result.[27] Defendants rely on a series of mootness cases, which fall into two categories that are both readily distinguishable.

A. There has Been No Wholesale Change in the Law to Render the Claims Moot

This case is unlike those on which Defendants rely where a wholesale change in the law rendered a party's claim moot. For example, in *Matter of NRG Energy, Inc. v. Crotty*, 18 A.D.3d

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23 State Mem. at 9.

24 NYSUT MTD at 21-23; *see also* UFT MTD at 26-29.

25 NYSUT MTD at 6-7.

26 *Wright* Mem. at 37.

27 Katherine B. Stevens, *The tenure lawsuit still matters: Recently passed reforms don't change the fact that it's virtually impossible to remove a ineffective veteran teacher*, N.Y. Daily News (May 28, 2015, 5:00 AM), http://www.nydailynews.com/opinion/katharine-b-stevens-tenure-lawsuit-matters-article-1.2237967.

916, 919 (3d Dep't 2005), a challenge to certain regulations was rendered moot because the regulations at issue were repealed, and it was "unquestionabl[e]" that newly enacted regulations "supercede[d] ... the original ... regulations." Because it was clear that the "rights of the parties [were] no longer affected by the original ... regulations," the court reasoned that "any ruling by th[e] Court regarding the validity of those regulations would have no practical effect[.]" *Id.* The same was true in *Flanders Associates v. Town of Southampton*, 198 A.D.2d 328 (2d Dep't 1993), where a local law exempted plaintiff's property from a moratorium on development that plaintiff was challenging. *See also Stato v. Squicciarini*, 59 A.D.2d 718, 719 (2d Dep't 1977) (challenge to planning board's permit issuance as in violation of Town Law was rendered moot when Legislature amended the law to explicitly allow planning board's actions). As when two parties settle their dispute, *see, e.g.*, *Amherst & Clarence Insurance Co. v. Cazenovia Tavern*, 59 N.Y.2d 983 (1983), these changes in the law left the plaintiffs with no relief left to seek.

By contrast, all of the laws that Plaintiffs challenge remain in place, albeit with slight modifications. A ruling in Plaintiffs' favor, in sharp contrast with *Amherst*, would have a significant "practical effect." As Plaintiffs alleged, the Challenged Statutes force school districts to offer permanent employment, through tenure, to nearly all junior teachers without giving school districts sufficient time to determine which teachers will be minimally effective, and then impede school districts from dismissing the worst performing teachers after they are prematurely awarded tenure. *See, e.g.*, Compl. ¶ 41 (in 2013, only 1% of teachers were rated "Ineffective" under the APPR, even though only 31.5% of students met the State proficiency standards); ¶¶ 37, 42 (97% of tenure-eligible New York City teachers receive tenure even though fewer than 97% of teachers are effective); ¶ 60 (school must pass through a tedious nine step process involving several hearings and adjudicatory entities to bring disciplinary charges against a teacher); ¶ 70

(school districts are forced to lay off top-performing teachers with lower seniority, while retaining low-performing teachers with greater seniority).

There is no hope of preventing ineffective teachers from receiving tenure if they are not identified as such. While the probationary period has been extended from three years to four, that extension is meaningless when the evaluation system on which it relies fails to distinguish ineffective teachers. And although the method for evaluating teacher effectiveness is now governed by N.Y. Educ. Law § 3012-d, there is no indication that the number of teachers rated "Ineffective" will rise, or that the number of teachers awarded tenure will consequently fall. On the contrary, as several legislators observed, this is just another iteration of prior "changes" that did not move the needle. *See* Section I.B *supra*, pp. 10-12 (discussing modest changes to the Disciplinary Statutes). It is noteworthy that Defendants previously argued that the Legislature "has been actively involved in monitoring its implementation and refining the provisions [of the Teacher Evaluation Law] to ensure the best possible implementation," amending the law "three times" since 2010.[28] That series of amendments did not suffice to moot Plaintiffs' claims, and the same is true here.

If history is any indication, we can thus expect business as usual under section 3012-d. Defendants even concede as much, stating that:

> [The] effect that the amendments to the Education Law, and in particular the new provisions concerning teacher evaluations and the removal procedure for teachers rated Ineffective, will have on the quality of education in New York's public schools *will not be known for many years, and certainly cannot be known now.*[29]

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[28] UFT MTD at 27.

[29] State Mem. at 18.

These are hardly the words of a party that has met its burden that there has been a "change in the law *that would change the prior determination*" of this Court that this case is not moot. N.Y. C.P.L.R. § 2221(e). Indeed, Defendants' position is no different than the defendant's failed argument in *Hussein v. State*, 81 A.D.3d 132 (3d Dep't 2011), *aff'd*, 19 N.Y.3d 899 (2012). There, plaintiffs' Article XI claim relied on data that predated the enactment of education aid reform legislation. The State Defendants argued that because the new legislation "had not yet been fully implemented, the factual record is incomplete and the effects of the legislation cannot be measured." *Id.* at 135. The court roundly rejected that logic, finding that plaintiffs nonetheless stated a justiciable claim. Without any nonspeculative demonstration that the legislative changes moot this case, the Defendants have not met their burden. As this Court already once found, dismissal is inappropriate because "none of the defendants or intervenor-defendants have demonstrated that any of the material facts alleged in the complaints are untrue." Decision and Order at 12.

Moreover, even if there were assurances that ineffective teachers would be identified as such, there are additional signs that under the new legislation children's constitutional rights will continue to suffer at the hands of ineffective teachers. The law, for example, prohibits children from being assigned to an ineffective teacher two years in a row.[30] This then presupposes that it is tolerable, and even expected, that children will have ineffective teachers for at least one year, and that those teachers will remain in the classroom, just with a different student body in the class.[31] Similarly, the new law requires that an ineffective teacher remain in the classroom for

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30 N.Y. Educ. Law § 3012-d(8).

31 Stevens, *supra* note 28 ("In practice, the law actually now condones sticking a child with up to seven ineffective teachers over 13 years—so long as they're alternated with effective ones.").

two years before a school can initiate dismissal, and the standard to justify a dismissal remains unduly difficult to meet.[32] Defendants have thus not demonstrated that the revisions to the statute solved the constitutional crisis alleged in the Complaint.

B. There has Been No Intervening Court Decision to Render the Claims Moot

This case is also unlike those where a change in decisional law resolved the dispute at issue, rendering the original legal claim moot. *See Dinallo v. DAL Elec.*, 60 A.D.3d 620, 621 (2d Dep't 2009) (citing *Roundabout Theatre Co. v. Tishman Realty & Const. Co.*, 302 A.D.2d 272, 272-73 (1st Dep't 2003) ("With respect to plaintiff's cause of action for negligence, plaintiffs' motion to renew was properly based on an intervening clarification of the law.")). Defendants cite *Matter of Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 714 (1980), which observed that a case may become moot "by passage of time or change in circumstances."[33] But there, the plaintiff's free trial and free press claim had been resolved by an intervening court decision in another case. The court in *Hearst* therefore reasoned:

> inasmuch as the principles governing fair trial- free press issues which might have been developed by consideration of the instant case have already been largely declared by our decisions in *Gannett* and *Leggett*, in this instance there is no sufficient reason to depart from the normal jurisprudential principle which calls for judicial restraint when the particular controversy has become moot.

Hearst, 50 N.Y.2d at 716. The Court here determined that Plaintiffs stated a justiciable claim that the Education Law deprives children of their right to a sound basic education by keeping ineffective teachers in the classroom. By contrast with *Hearst*, however, this Court has yet to adjudicate the merits of that claim, and neither has any other court. Defendants are thus hard

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[32] *Id.* ("[T]eachers with two proven years of ineffective teaching may keep their job under 'extraordinary circumstances.' What extraordinary circumstances do lawmakers believe justify the violation of children's constitutionally guaranteed rights?").

[33] State Mem. at 9-10.

pressed to argue that Plaintiffs' claims are moot because the changes to the Education Law satisfy some as-of-yet to be declared constitutional standard. Because Plaintiffs have adequately pleaded a claim for relief, it remains appropriate to resolve after discovery whether the Education Law in its current form complies with the New York State Constitution.

This case is therefore also unlike *Londonderry School SAU #12 v. New Hampshire*, 157 N.H. 734, 958 A.2d 930 (2008), where the New Hampshire Supreme Court dismissed a challenge to the constitutionality of the state's education funding statute. Defendants suggest that the case was dismissed purely because the state legislature enacted a new education funding law.[34] But in fact, the legislature had amended the statute *in response to guidelines issued by the court*. The appellate court had affirmed a ruling that the state had failed to define a constitutionally adequate education and the legislature responded by enacting laws that defined an adequate education, determined its cost, and funded it. *Londonderry*, 157 N.H. at 742. The state argued that the case was moot because it had taken sufficient steps toward satisfying its constitutional duty. *Id.* at 736. The court agreed, presuming that "the legislature acted in good faith and crafted a responsive mandate intended to address the constitutional infirmities of the prior legislation." *Id.* at 737. Unlike in *Londonderry* where the legislature addressed constitutional infirmities diagnosed by the court, here there is still no guidance from this Court (or any other) to measure whether the new legislation is meeting the requirements of the New York State Constitution. That guidance is precisely what Plaintiffs hope a trial in this case will yield.

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[34] State Mem. at 16.

C. Before the Court Reaches the Merits of Plaintiffs' Constitutional Claims, Defendants Cannot Show Any Constitutional Deficiencies have been Cured

Defendants' submissions give the impression that the legislative amendments provided Plaintiffs with all of the relief that they seek. They assert that, "[t]his legislative action changed the Education Law in ways advocated by Plaintiffs,"[35] and that the "Legislature and Governor have shortcut this entire process and enacted significant and far-reaching changes to the Education Law that systematically address the concerns raised by Plaintiffs and others about the need to identify and remove ineffective tenured teachers from the public schools."[36] But Plaintiffs were not seeking specific policy prescriptions, such as a four year probationary period for tenure, or a particular timetable for disciplinary proceedings. They asserted a constitutional injury, identified enforcement of the Education Law as the cause, and asked this Court to declare the constitutional minimum when it comes to providing children with effective teachers and an adequate education. For all the Legislature's cosmetic "fixes," Defendants have not satisfied their burden to show that any constitutional infirmity has been cured. There has been no intervening case that has resolved what the constitutional minimum is with respect to teacher effectiveness, tenure, and discipline, let alone any change in the law that has made clear that the Education Law satisfies the constitutional minimum. Only once the Court clarifies the constitutional standard can one even begin to evaluate whether amendments to the law remedy constitutional deficiencies.

This highlights the fundamental inconsistency of Defendants' renewed motions. At the same time they want this Court to determine immediately that Plaintiffs' constitutional claims

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35 State Mem. at 1-2.

36 *Id.* at 11.

have been sufficiently addressed, Defendants want to prevent this Court from ever actually declaring what the constitutional minimum is. But as the Court held in denying Defendants' original motions to dismiss, "the state may be called to account when it fails in its obligation to meet minimum constitutional standards of educational quality[.]" Decision and Order at 15. This Court cannot measure whether the Legislature has satisfied the constitutional standard without reaching the merits of Plaintiffs' claims. Defendants' argument that the Education Law, as amended, does not violate the New York State Constitution, is thus inappropriate for resolution on a renewed motion to dismiss.

D. The Complaint Raises Important Issues that are Likely to Recur

Finally, even assuming for the sake of argument that amendments to the Education Law could otherwise render this case moot, this case falls squarely within the well-recognized exception to the mootness doctrine, where: "(1) [there is] a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues." *Hearst*, 50 N.Y.2d at 714-15. Because thousands of children enter the New York school system each year and are at risk of being assigned to an ineffective teacher, this is precisely the type of case whose importance extends well beyond the parties. As the Complaint alleges: "Cumulatively, these laws make it nearly impossible to dismiss and discipline teachers with a proven track record of ineffectiveness or misconduct. Plaintiffs, *and other New York State schoolchildren*, are the primary victims of this failing system." Compl. ¶ 3.

The reasoning of *East Meadow Community Concerts Ass'n v. Board of Education of Union Free School District No. 3,* 18 N.Y.2d 129, 135 (1966), is similarly on point. There, the court considered an appeal about the constitutionality of a school board's decision to bar a folk singer's concert in one of its school buildings. Even though the scheduled date for the concert

had passed by the time of the appeal, the court concluded that was "no basis for declining to review the important constitutional issues presented." *Id.* In a statement that could just as easily have been describing this case, the court explained that "[i]t is settled doctrine that an appeal will, nevertheless be entertained where, as here, the controversy is of a character which is likely to recur not only with respect to the parties before the court but with respect to others as well." *Id.* Similarly, in *Matter of Rosenbluth v. Finkelstein,* 300 N.Y. 402, 404 (1950), the court held that although an appeal pertaining to the administration of emerging housing legislation in New York City had "become moot and academic" the court would "refrain from dismissing it because of the importance of the issue presented." The court concluded that the case "invite[d] immediate decision" because "the question is one of major importance" that "will arise again and again." *Id.* The same holds true here. The longer these constitutional issues go unresolved, the greater the number of New York schoolchildren who will receive a constitutionally inadequate education, again and again. *See also Hearst*, 50 N.Y.2d at 715 n.1 (citing more cases).

II. Plaintiffs' Constitutional Claims Remain Poised for Judicial Resolution

Only months ago, this Court found this "matter before it to be justiciable since a declaratory judgment action is well suited to, *e.g.*, interpret and safeguard constitutional rights and review the acts of the other branches of government, not for the purpose of making policy decisions, but to preserve the constitutional rights of its citizenry[.]" Decision and Order at 15. Nothing has changed. Defendants have presented no new facts that make Plaintiffs' constitutional claim any less justiciable, but they proceed anyway to renew several failed arguments from their original motions, set forth in the chart below:

Argument	Motion to Dismiss	Motion to Renew
Ripeness:	"Education Law § 3012-c was enacted in 2010. It is, therefore, **premature** to review ... Anticipated injury is **not ripe** for judicial review."[37]	"[T]he enactment of Chapter 56 and its changes to the Education Law occurred only recently, and a constitutional challenger under the Education Article to the modified section ... at this moment would be **premature**."[38]
Political Question:	"[T]he question raised by Plaintiffs, ... is **a nonjusticiable policy question that lies beyond the judiciary's power to decide**."[39] "Justiciability is not decided by whether the cause of action is couched as constitutional or not."[40] "The **recent amendments** ... demonstrate the Legislature's active attention to this policy issue..."[41]	"Framing [P]laintiffs' complaints as a constitutional challenge **is not enough for the courts to involve themselves in a matter like this, which ... deals with political questions that the judiciary cannot address.**"[42] "The legislature's **recent amendments** to the challenged statutes demonstrate that [P]laintiffs' claims are not justiciable."[43]

Once again, the Court should see these arguments for what they are: an effort to mischaracterize a constitutional claim as a policy debate, and to strip this Court of its power "to preserve the constitutional rights of its citizenry." Decision and Order at 15; *see also Wright* Mem. at 27-30.

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37 NYSUT MTD at 28.

38 State Mem. at 18.

39 State MTD at 2; *see also* NYSUT MTD at 10.

40 DOE MTD Reply at 4.

41 NYSUT MTD at 23; *see also* DOE MTD at 50; NYSUT MTD Reply at 25-26; SAANYS MTD Reply at 4.

42 NYSUT Mem. at 5.

43 NYSUT Mem. at 4.

First, the claims remain ripe. Defendants cite *Furlong v. New York State Workers' Compensation Board*, 97 A.D.2d 357, 358 (1st Dep't 1983) for the proposition that where a dispute "is dependent upon the possible happening of a future event, which may not occur, the request for declaratory judgment relief is at best premature."[44] In *Furlong*, however, petitioner's adversary, the chairman of the Workers' Compensation Board, *died* and his successor indicated he had no intention of similarly seeking to remove the petitioner's authorization to render treatment in workers' compensation cases. Because the new chairman "had neither threatened nor intended to take any action against" the petitioner, there was no controversy ripe for adjudication and "declaratory judgment relief" was "at best premature." 97 A.D.2d at 358. Here, by contrast, the Court concluded that a "declaratory judgment is well suited to ... interpret and safeguard [the] constitutional rights" asserted. Decision and Order at 15. The Complaint is not contingent on any future event: New York students are harmed each year through placement in the classrooms of ineffective teachers who would otherwise be removed from their positions but for the Challenged Statutes. Comp. ¶ 25. The harm is existing and ongoing, and the claim is therefore ripe.[45]

Second, a justiciable constitutional claim does not become a political question simply because the Legislature amends a statute. An amendment to a statute, no less than the original statute itself, is subject to constitutional review. Plaintiffs will not belabor arguments they have

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44 State Mem. at 9.

45 One of the Defendants renews the argument, already made in the original motions to dismiss, that Plaintiffs lack standing. SAANYS at 11. That argument has no merit—indeed, it is telling that the State Defendant does not renew it here. The Court's analysis of standing still holds, because Plaintiffs' children are "students attending various public schools within the State of New York who have been or are being injured by the deprivation of their constitutional right to receive a 'sound basic education,' which injury, it is claimed, will continue into the future so long as the subject statutes continue to operate in the manner stated." Decision and Order at 16.

already articulated, which this Court has already accepted and which are equally applicable here. *See Wright* Mem. at 27-30. But it is worth noting that some of the most significant judicial decisions have coincided with coordinate activity of another branch of government, where courts were unwilling to accept a glacial pace of change in the face of ongoing constitutional violations. In the very context of education, the U.S. Supreme Court not only held that desegregation was unconstitutional, but it also continued to monitor legislative compliance with that determination. Almost fifteen years after *Brown v. Board of Education*, 349 U.S. 294 (1955), the U.S. Supreme Court in *Green v. County School Board of New Kent County*, held that New Kent County's freedom of choice plan did not adequately comply with the desegregation mandate and that the county was required to formulate new plans to realistically convert to a desegregated system. 391 U.S. 430 (1968). New York urged the court to defer to the legislature, but the court disagreed, explaining: "The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation ... It is incumbent upon the district court to weigh th[e] claim[s] in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness." *Id.* at 439.

Moreover, the Legislature's failed attempt to meaningfully address constitutional deficiencies in the Education Law only highlights the judicial branch's precise advantage in the realm of constitutional rights. As Assemblyman Anthony Palumbo said, "[W]e may have to force ourselves to somehow try and revamp this because we didn't have the guts to take it on right now. ... [W]e've unfortunately just passed the buck, and I believe we're going to be back here again."[46] This Court may interpret the Constitution free of political gridlock and is

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[46] Session Proceedings Transcript, *supra* note 8, at 144-45 (emphasis in original).

therefore the "ultimate arbiter[] of our State Constitution." *Campaign for Fiscal Equity, Inc. v. State*, 8 N.Y.3d 14, 28 (2006) ("*CFE III*"). Plaintiffs are not asking the Court to "enjoin the legislative process,"[47] but to fulfill the judicial function to "define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them." *CFE III*, 8 N.Y.3d at 28.[48]

III. The Court Should Deny Defendants' Motion for a Stay Pending Appeal

Defendants argue in the alternative that the Court should grant a stay of proceedings pending appeal.[49] But the seriousness of the constitutional harm that New York students will continue to suffer throughout the appeal process justifies moving forward to discovery and outweighs the State Defendants' interest in saving resources. Moreover, this Court can easily address the State Defendants' concern that discovery will be onerous by regulating the discovery process pending the decision of the Appellate Division.

A. This Court Should Deny Defendants' Motion for a Stay Under CPLR § 2201

Under CPLR § 2201, the Court, in its discretion, "may grant a stay of proceedings in a proper case, upon such terms as may be just." *Zonghetti v. Jeromack*, 150 A.D.2d 561, 562 (2d Dep't 1989). But it has denied a stay where "[p]etitioner will be subject to ongoing harm if the court grants the stay and delays the trial." *Allen v. Rosenblatt*, 5 Misc. 3d 1014(A), (N.Y. Civ. Ct. 2004) (Table). Here, granting a stay would prolong constitutional injuries that inflict serious

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47 State Mem. at 11 (citing *Pospisil v. Anderson*, 140 A.D.2d 317 (2d Dep't 1988)).

48 *Benson Realty Corp. v. Beame*, 50 N.Y.2d 994 (1980), which is relied on by Defendants, does not say otherwise. *See* NYSUT Mem. at 5. Contrary to Defendants' suggestion, *Benson* did not hold that the plaintiffs' claims were nonjusticiable. Instead, the court reached the merits of their constitutional challenge and held that they had failed to prove that the New York City Rent Control Law enacted an unconstitutional taking. *Benson Realty*, 50 N.Y.2d. at 996.

49 State Mem. at 20-21; DOE Aff. ¶ 1; UFT Aff. ¶¶ 10-14.

and long-lasting harm on students. This Court already concluded that Plaintiffs' allegations of harm to students are sufficient to withstand a motion to dismiss.[50] As alleged in the Complaint, there is a systemic crisis of educational performance that is the result of promoting and retaining ineffective teachers under the Challenged Statutes. *See* Compl. ¶¶ 25-26. As Plaintiffs allege, and as Defendants cannot seriously contest, public school students on the whole are not receiving an adequate public school education. That much is clear from extremely poor student outputs. For example, the Complaint cites data that in 2013, 69% of students taking English Language Arts and Math standardized tests failed to meet the State's own standard for proficiency. *See id.* at ¶ 41. If this Court were to grant a stay, the longer it will take for these constitutional deficiencies to be resolved, and the greater the number of students who will suffer further unnecessary harm.

The appellate process is poised to delay resolution of this case substantially. Defendants are not required to perfect their appeal until October 23, 2015.[51] Plaintiffs filed a motion for preference in the Second Department Appellate Division in an effort to expedite that timeline, which Defendants opposed. In a decision and order dated June 2, 2015, the Appellate Division denied Plaintiffs' motion. The appellate process will thus likely take at least another year from the time of perfection before a decision is issued,[52] in which time another school year will have

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50 *See* Decision and Order at 13.

51 Under the Rules of the Second Department, Defendants must perfect their appeal "within six months after the date of the notice of appeal." N.Y. Comp. Codes R. & Regs. tit. 22, § 670.8(e)(1) (2004). The UFT Defendants were last to serve their Notice of Appeal on April 23, 2015, and so must perfect that appeal no later than October 23, 2015.

52 Based on Plaintiffs' discussion with the clerk of the Second Department Appellate Division, the Appellate Division is currently hearing argument on a fifteen month schedule after briefing is completed and typically issues decisions within six weeks to three months after argument.

begun, placing yet another set of New York students in those ineffective teachers' classrooms. In the time it will take to decide the appeal, students throughout New York will be placed into the classrooms of thousands of ineffective teachers, where they will be forced to remain for another school year.

Defendants claim that the burden on the State justifies deferring the benefits of discovery that generally flow to a plaintiff who survives a motion to dismiss.[53] This Court, however, has broad powers to direct the discovery process so as to ensure that no party is unduly burdened. Under CPLR § 3103(a), this Court may issue a protective order "limiting, conditioning or regulating" the discovery process. If the Court is concerned that the costs of discovery may be too onerous, it may limit the scope of discovery pending the resolution of the appeal under § 3103, and need not impose a complete stay in order to protect scarce government resources. *See Diaz v. City of N.Y.*, 117 A.D.3d 777, 777 (2d Dep't 2014) ("[T]he court may deny, limit, condition, or regulate the use of any disclosure device to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."). Defendants' fears about undue discovery burdens are thus misplaced and do not outweigh the interest of avoiding unnecessary delay, which will only compound the harm to students.

Defendants rely on *Zonghetti v. Jeromack* for the proposition that a court may impose a § 2201 stay "in order to avoid the risk of inconsistent adjudications, application of proof and potential waste of judicial resources."[54] But that case is not on point. In *Zonghetti*, the Second Department Appellate Division affirmed the Supreme Court's imposition of a stay of a civil

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53 State Mem. at 20-21.

54 State Mem. at 20 (citing *Zonghetti*, 150 A.D.2d at 563).

proceeding pending the resolution of a separate criminal proceeding related to the same facts. Here, the appeal pending before the Appellate Division is not a separate action which may lead to separate, conflicting decisions. It is merely an interlocutory appeal, and should the Appellate Division either affirm or overturn this Court's March 12, 2015 decision, this Court will be bound by that decision, and no injustice will occur.

B. The Court Should Also Deny Defendants' Motion for a Stay Pending Appeal Under CPLR § 5519(c).

Defendants also argue that the Court should grant a stay under CPLR § 5519(c).[55] But such a stay would have no effect, because a stay under section 5519(c) would not extend to a stay of discovery in this case. Under CPLR § 5519(c), a court "may stay all proceedings to enforce the judgment or order appealed from pending an appeal." In the Second Department, however, courts have long held that a stay under CPLR § 5519(c) is coextensive with the stay authorized by subdivision (a),[56] which applies only to "the executory directions of the judgement or order appealed from which command a person to do an act, and that the stay does not extend to matters which are not commanded but which are the sequelae of granting or denying relief." *Matter of Pokoik v. Dep't of Health Servs. of Cnty. of Suffolk*, 220 A.D.2d 13, 15 (2d Dep't 1996). For example, "where an order merely denies a motion for summary judgment or to strike the case from the calendar, an appeal from that order *will not stay a trial which is a consequence of the order but is not directed by it.*" *Id.*

Here, the Court's March 12, 2015 order reads in relevant part:

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55 *See* UFT Aff. ¶¶ 10-14.

56 *Schwartz v. N.Y. City Hous. Auth.*, 219 A.D.2d 47, 48 (2d Dep't 1996) ("The scope of the stay authorized by subdivision (c) is thus coextensive with the stay authorized by subdivision (a), namely, a stay of enforcement proceedings only, not a stay of acts or proceedings other than those commanded by the order or judgment appealed from.").

> ORDERED that the motion (No. 3598-012) of defendant-intervenors MERRYL H. TISCH, in her official capacity as Chancellor of the Board of Regents of the University of the State of New York, and 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 is granted; and it is further
>
> ORDERED that the causes of action against said individuals are hereby severed and dismissed; and it is further
>
> ORDERED that the balance of the motions are denied; and it is further
>
> ORDERED that the clerk shall enter judgment accordingly.[57]

Notably, the Decision and Order does not direct Defendants either to answer the Complaint, or to proceed to trial. While such steps might be the natural consequences of the order,[58] that alone does not bring them within the scope of any stay under CPLR 5519(c). *See Pokoik*, 220 A.D.2d at 15; *Shorten v. City of White Plains*, 216 A.D.2d 344, 345 (2d Dep't 1995) ("Since the trial of this action is not a proceeding to enforce the order which denied the City's motion for summary judgment, the statutory provisions of CPLR 5519(a)(1) clearly do not operate to prevent the trial from going forward."); *Matter of Kar-McVeigh, LLC v. Zoning Bd. of Appeals of Town of Riverhead*, 93 A.D.3d 797, 799 (2d Dep't 2012) ("T]he automatic stay of CPLR 5519(a) is restricted to the executory directions of the judgment or order appealed from which command a person to do an act, and ... does not extend to matters which are not commanded but which are the sequelae of granting or denying relief.").

The cases cited by Defendants in their motion are outdated and off point.[59] None addresses the proper scope of a stay under CPLR § 5519(c), nor even cites that provision. *See*

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57 Decision and Order at 16-17.

58 *See* CPLR § 3211(f).

59 UFT Aff. ¶¶ 10-11.

Matter of Rosenbaum v. Wolff, 270 A.D. 843, 843 (2d Dep't 1946) (stating merely that "[t]he motion for a stay pending such appeal is denied for lack of a meritorious showing"); *Summerville v. City of N.Y.*, 97 N.Y.2d 427 (2002) (extending an automatic stay to a further appeal of a final judgment without addressing § 5519(c), or the natural consequences of a non-executory order). Defendants claim that two cases stand for the proposition that "[s]tays are also granted where the litigants intend to expeditiously seek appeal," and they intend to promptly pursue an appeal here.[60] But in the cases cited by Defendants, the courts did not grant a stay *because* defendants intended to expeditiously pursue the appeal, but *conditioned* the granting of the stay on such expedience. *Matter of Cohen*, 10 A.D.2d 581, 581 (2d Dep't 1960); *In re Roel*, 3 N.Y.2d 754, 754 (1957). Defendants have thus offered no persuasive authority to prolong the redress of constitutional claims that are properly alleged and presented for this Court's resolution.

Conclusion

For the foregoing reasons, the Defendants' motions should be denied.

Dated: June 26, 2015

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60 UFT Aff. ¶ 11.