SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

---------- x

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 ANGELA PERALTA, STACY PERALTA, by her parent and natural guardian ANGELA PERALTA, LENORA PERALTA, by her parent and natural guardian ANGELA PERALTA, ANDREW HENSON, by his parent and natural guardian CHRISTINE HENSON, ADRIAN COLSON, by his parent and natural guardian JACQUELINE COLSON, DARIUS COLSON, by his parent and natural guardian JACQUELINE COLSON, SAMANTHA PIROZZOLO, by her parent and natural guardian SAM PIROZZOLO, FRANKLIN PIROZZOLO, by his 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.

----------x

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

NOTICE OF MOTION TO DISMISS

---------- 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,

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

PLEASE TAKE NOTICE, that upon the Affirmation of Robert T. Reilly, Esq., of counsel to Richard E. Casagrande, Esq., attorney for Intervenors-Defendants, 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, will move this Court at 10 Richmond Terrace, Staten Island, New York 10301 on the 14th day of January, 2015 at 10:00 a.m., or as soon thereafter as counsel may be heard, to dismiss the consolidated action pursuant to CPLR Rule 3211(a)(2), (7) and (10) for lack of subject matter jurisdiction, failing to state a cause of action, and for failing to name necessary parties together with such other and further relief as the Court deems just and proper, including the costs and disbursements of this motion.

PLEASE TAKE FURTHER NOTICE that pursuant to CPLR § 2214(b), answering papers, if any, must be served upon the attorney for the Intervenors-Defendants no later than seven (7) days prior to the return date of this motion or otherwise as stipulated by the parties or ordered by the Court.

Dated: October 27, 2014
Latham, New York

Respectfully submitted,

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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Intervenors-Defendants.

----------x

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

ATTORNEY AFFIRMATION IN SUPPORT OF MOTION TO DISMISS

---------- x

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

Plaintiffs,

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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

STATE OF NEW YORK :
: ss.:
COUNTY OF ALBANY :

ROBERT T. REILLY, at attorney duly admitted to practice law in the State of New York affirms, under penalties of perjury, pursuant to CPLR Rule 2106, that:

Introduction

1. I am of counsel to Richard E. Casagrande, Esq. the attorney for the intervenors-defendants in these consolidate actions

2. I submit this affirmation in support of the intervenors-defendants' motion to dismiss pursuant to CPLR Rule 3211(a)(2), (7) and (10) for lack of subject matter jurisdiction, failing to state a cause of action, and for failing to name necessary parties.

The Consolidated Action

3. This consolidated action involves an amended complaint filed by the *Davids* plaintiffs in Richmond County on July 24, 2014 and a complaint filed by the *Wright* plaintiffs in Albany County on July 28, 2014. Those two actions were consolidated into this one by order of the court dated September 18, 2014. For the court's convenience, a copy of the *Davids* amended complaint is attached to this affirmation as Exhibit "A" and a copy of the *Wright* complaint is attached as Exhibit "B".

4. The complaints of both sets of plaintiffs are substantially similar, with both challenging sections of the New York Education Law conferring tenure and seniority rights on public school teachers. Both complaints allege that teachers somehow have too much due process, such that ineffective teachers cannot be dismissed from employment. Both complaints allege that because ineffective teachers cannot be dismissed, students are being denied the constitutionally mandated sound basic education.

The Grounds for Dismissal

5. Both complaints, however -- as is more fully set forth in the accompanying memorandum of law – should be dismissed because plaintiffs lack standing to bring their claims, not suffering injury-in-fact. Similarly, Plaintiffs fail to present a justiciable controversy, as their policy arguments are for the Legislature, not the courts. Likewise, plaintiffs' claims are not yet ripe, as they allege no real, present or imminent harm. Alternatively, their claims are already moot, given the change in circumstances resulting from the recent amendments to the challenged statutes, amendments made after the statistical data upon which plaintiffs rely was collected.

6. Plaintiffs also fail to state a cause of action under the Education Article because the challenged statutes are rational and because the plaintiffs' factual allegations are merely conclusory and speculative.

7. Finally, plaintiffs should not be allowed to proceed in the absence of persons who should be a party: those local unions which have negotiated alternative procedures to the challenged 3020-a statute. For each of those reasons, the court should grant the intervenors-defendants' motion to dismiss.

Judicial Notice

8. A motion to dismiss, of course, attacks the plaintiffs' pleadings. Nonetheless, the court can take judicial notice of certain facts outside the pleadings in the course of making its decision and order on this motion where doing so shows why the facts plead by the plaintiffs fail to state a claim. For example, Intervenors-defendants respectfully submit that the bill jackets for the statutes the Plaintiffs seek to declare unconstitutional are relevant and material with respect to this motion to dismiss, as they reflect the debate before the Legislature on matters such as tenure, seniority, and probation and, thus, show that the matter before the court is not justiciable.

Accordingly, for the court's convenience, intervenors-defendants attached copies of excerpts of the relevant bill jackets to this affirmation. Materials from the bill jacket for L. 1971, c. 116 are attached as Exhibit "C." Materials from the bill jacket for L. 1974, c. 735 are attached as Exhibit "D". Materials from the bill jacket for L. 1980, c. 442 are attached as Exhibit "E".

9. In addition, with respect to the probationary periods the plaintiffs challenge, the court can take judicial notice of County Civil Service Rules as a point of comparison for the probationary period for tenured teachers set forth in the education law, the probationary period challenged by Plaintiffs in this case. For the court's convenience, a copy of the provisions of the Albany County Civil Service Rules regarding probationary periods is attached to this affirmation as Exhibit "F". Considering the county civil service rules, the State Civil Service rules set forth in the New York Code of Rules and Regulations, and the Civil Service Rules in the New York City Administrative Code will allow the court to see that the probationary periods for teachers actually are among the longest probationary periods of all public employees.

10. And, with respect to seniority, there have been a number of recent bills introduced, but not enacted, by the Legislation that the court can take judicial notice of, again on the issue of justiciablity. For the courts convenience, a copy of A.4425 is attached as Exhibit "G". A copy of A.4893 is attached as Exhibit "H". A copy of A.6738 is attached as Exhibit "I". A copy of A.8588 is attached as Exhibit "J". Clearly, the question of whether teachers should be laid off by seniority is a question for the Legislature, not the court.

11. With respect to tenure, the court can take judicial notice of collective bargaining agreements containing provisions in lieu of the disciplinary procedures found in section 75 of the Civil Service Law, as a point of comparison for the due process set forth in section 3020-a of the Education Law, due process the plaintiffs challenge in this case. For the court's convenience, the

disciplinary procedures in the agreement between the Public Employee's Federation and the State of New York for the Professional, Scientific and Professional Services Unit is attached to this affirmation as Exhibit "K" and the disciplinary procedures in the agreement for the Civil Service Employees Association and the State of New York for the Administrative Services Unit is attached as Exhibit "L." These PEF and CSEA agreements are illustrative of the other such State employee collective bargaining agreements, all of which are published at the web page of the Governor's Office of Employee Relations (http://www.goer.ny.gov/Labor_Relations/Contracts/). The disciplinary procedures for the other Statewide negotiating units, including those for the Operational Services Unit (CSEA), Institutional services Unit (CSEA), Division of Military and Naval Affairs (CSEA), the State University Professional Services Negotiating Unit (United University Professions), Security Services Unit (New York State Correction Officers and Police Benevolent Association) are similar to the PEF and CSEA agreements attached as exhibits to this affirmation. All of these collective bargaining unit agreements provide for final and binding disciplinary arbitration, with procedures similar to those in the PEF and CSEA agreements, for tenured employees.

12. Well-established treatises on labor law and practice have addressed the importance of tenure, due process, and seniority. Of particular relevance is the discussion of "just cause" in Elkouri & Elkouri:, How Arbitration Works, 7th Ed., 2012, p. 15-4, attached as Exhibit "M," and the discussion of seniority in Harry T. Edwards, Seniority Systems in Collective Bargaining, Arbitration in Practice, at 121-22 (Arnold M. Zach Ed. (1984), attached as Exhibit "N," where he says that seniority "allows older workers, who otherwise might be less employable, a measure of job security."

13. Information on-line from the web will also assist the court. With respect to probation, the Education Commission of the States published a 50-state analysis regarding the time it takes a teacher to complete probation in each state. A copy of that report is attached as Exhibit "O."

14. Similarly, a report published on-line by Imig and Smith, Listening to Those on the Front Lines: North Carolina Teachers and Administrators Respond to State Legislature Changes, attached as Exhibit "P," addresses the impact on teachers and administrators regarding legislative changes similar to the changes proposed by plaintiffs in this case.

15. And the United States Department of Labor, Bureau of Labor Statistics data, has published a database that will assist the court. That interactive database is not amenable to being printed and used as an exhibit, but we summarize it here and refer to it in the memorandum of law. According to the U.S. Department of Labor, Bureau of Labor Statistics, as of May 2013, the National mean annual wage for preschool, primary, secondary and special education school teachers was $54,750. *See* May 2013 National Occupational Employment and Wage Estimates, released April 1, 2014, available at http://www.bis.gov/oes/current/oes_nat.htm (last visited Oct. 22, 2014). In contrast, the National mean annual wage for architects and engineers generally was $80,100; for lawyers, $131,990; for dentists, $168,870; and for physicians, $191,880. *Id.* In New York, the annual mean wage range for teachers in elementary, secondary and technical school is $61,380 to $75,470. *See* May 2013 State Occupational Employment and Wage Estimates, released April 1, 2014, available at http://www.bis.gov/oes/current/oes_ny.htm last visited Oct. 22, 2014). For other professions in New York, the annual mean wages are for engineers was $78,050; for lawyers, $153,490; for dentists, $160,950; and for physicians (general and family practice $181,150).] It is perhaps no coincidence that teaching also remains

a female-dominated profession. According to the Women's Bureau of the U.S. Department of Labor, more women are employed as elementary and middle school teachers than in other occupations. *See* http://www.dol.gov/wb/stats/leadoccupations.htm (last visited Oct. 22, 2014). Based on the 2013 National averages, 98% of pre-school and kindergarten teachers are women and 81% of elementary and middle school teachers are women.

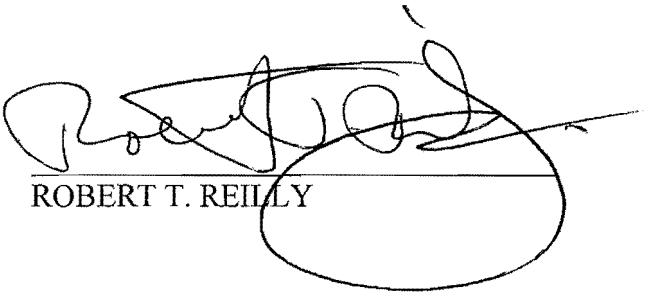
The Intervenors-Defendants

16. The intervenors-defendants (collectively referred to in the brief as the "teacher defendants") are seven public school teachers and NYSUT through its president, Karen Magee. With their earlier motion to intervene, granted by the court, each of the intervenors-defendants submitted an affidavit. While those affidavits supported the motion to intervene, their descriptions of the intervenors-defendants will provide valuable background information to the court on this motion to dismiss, highlighting the importance of the seniority and tenure laws to the intervenors-defendants, as well as to school districts and students. For the convenience of the court, the affidavits of the intervenors-defendants in support of the motion to intervene are attached as exhibits to this affirmation. Seth Cohen's affidavit is attached as Exhibit "Q". Daniel Delehanty's affidavit is attached as Exhibit "R". Ashli Skura Dreher's affidavit is attached as Exhibit "S". Kathleen Ferguson's affidavit is attached as Exhibit "T". Isreal Martinez's affidavit is attached as Exhibit "U". Richard Ognibene Jr.'s affidavit is attached as Exhibit "V." Lonette Tuck's affidavit is attached as Exhibit "W." And, Karen Magee's affidavit, made as president of NYSUT, is attached as Exhibit "X." The intervenors-defendants submit that these affidavits can assist the court on this motion to dismiss.

Conclusion

17. This affirmation and the exhibits attached to it do not contest the facts alleged in the plaintiffs' complaints, but they do help show why the facts alleged in the complaints fail to state a cause of action. The accompanying memorandum of law also addresses plaintiffs' failure to state a cause of action and addresses why the court lacks subject matter jurisdiction over plaintiffs' claims and why the case should not proceed in the absence of necessary parties. Accordingly, the complaints should be dismissed pursuant to CPLR Rule 3211 (a) (2), (7) and (10).

Dated: October 27, 2014
Latham, New York



ROBERT T. REILLY

116966/CWA1141

STATE OF NEW YORK
SUPREME COURT COUNTY OF RICHMOND

MYMOENA DAVIDS, et al.,

Plaintiffs,

-against-

Index No. 101105-2014
Hon. Phillip G. Minardo

THE STATE OF NEW YORK, et al.,

Defendants,

-and-

MICHAEL MULGREW, et al.,

Intervenors-Defendants.

JOHN KEONI WRIGHT, et al.,

Plaintiffs,

-against-

THE STATE OF NEW YORK, et al.,

Defendants,

-and-

SETH COHEN, et al.,

Intervenors-Defendants.

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

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SETH COHEN, DANIEL DELEHANTY,
ASHLI SKURA DREHER, KATHLEEN FERGUSON,
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STATE OF NEW YORK
SUPREME COURT COUNTY OF RICHMOND

MYMOENA DAVIDS, et al.,

Plaintiffs,

-against-

THE STATE OF NEW YORK, et al.,

Defendants,

-and-

MICHAEL MULGREW, et al.,

Intervenors-Defendants.

JOHN KEONI WRIGHT, et al.,

Plaintiffs,

-against-

STATE OF NEW YORK, et al.,

Defendants,

-and-

SETH COHEN, et al.,

Intervenors-Defendants.

PRELIMINARY STATEMENT

This brief is submitted on behalf of seven public school teachers and NYSUT (collectively referred to in this brief as "teacher defendants"), in support of their motion to

dismiss the complaints pursuant to CPLR Rule 3211 (a)(2), (7) and (10) for lack of subject matter jurisdiction, failure to state a cause of action, and for failure to name necessary parties.

A. THE COMPLAINTS

The complaints[1] ask this Court to rewrite New York's tenure laws – laws that have been carefully crafted by the Legislature, over more than a century, to attract and retain qualified teachers; to protect academic freedom; to safeguard educators' right to speak on behalf of their students concerning sound educational practices and student safety; and to protect good teachers from arbitrary or wrongful dismissal. The plaintiffs' case rests on the fundamentally flawed and legally unsupportable proposition that because there may be *some* ineffective school teachers, *all* teachers should lose their basic employment safeguards. As we will show, our Legislature has wisely rejected the perverse notion that it can help students by harming their teachers.

Specifically, the *Wright* plaintiffs[2] ask the Court to strike down New York's statutory three-year probationary term as too short, even though it is the same length as that adopted by most states, and even though it is considerably longer than that served by almost every other New York public servant. New York's probationary requirement for teachers rationally protects local school boards' right to carefully evaluate teachers before deciding whether to grant tenure.

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[1] This consolidated action involves an amended complaint filed by the *Davids* plaintiffs in Richmond County on July 24, 2014 and a complaint filed by the *Wright* plaintiffs in Albany County, a few days later, on July 28, 2014. Those two actions were consolidated into one by order of this Court dated September 18, 2014. The complaints of both sets of plaintiffs are substantially similar. The *Davids* Amended Complaint is annexed to the Reilly Affirmation as Ex. "A" and the *Wright* Complaint is annexed to the Reilly Affirmation as Ex. "B"

[2] The *Wright* plaintiffs are backed by the "Partnership for Educational Justice." Through its spokesperson, former CNN anchor Campbell Brown, it has sought considerable publicity for its claims against New York's public school teachers, much of it based on stale, unsubstantiated data and the repeated misrepresentation that New York's tenure laws guarantee "lifetime employment" for teachers. Ms. Brown has refused to identify the partnership's financial backers. *See generally* Gabriel Arana, *Campbell Brown's transparency problem: Why won't she say who funds her "ed. Reform" group?*, SALON, August 7, 2014, (available at htttp:// www.salon.com/ 2014/08/07/ campbell_browns_ transparency_ problem__ why_won't_she_ say_who_funds_her-ed_reform_group/# (last visited October 24, 2014)).

Second, plaintiffs attack the State's basic tenure laws, disingenuously calling them "permanent" or "lifetime" employment laws. (*Wright* ¶ 78-79).[3] There is no basis for this claim. New York's tenure laws, accurately described, merely provide that teachers who have *earned* tenure after meeting New York's stringent teacher qualification requirements and at least three years of rigorous evaluation are entitled to a fair hearing if accused of misconduct or pedagogical, physical or mental incompetence. Plaintiffs seek to strip this basic safeguard from all teachers, even though the right to due process has been repeatedly upheld by the U.S. Supreme Court and our Court of Appeals, and is provided to most other public servants and to millions of other Americans through statutes, collective bargaining agreements or private employment contracts.

Finally, plaintiffs attack teachers' statutory seniority protections. Like tenure, seniority is a basic safeguard that promotes the long term commitment of *qualified* teachers by providing an *objective* method for reducing staff when economically necessary. Seniority is a protection enjoyed by most public servants in New York, and by millions of other private and public sector employees, throughout the United States.

Notably, the complaints do not acknowledge the fact that the challenged laws apply equally in New York's highest and lowest performing school districts, or that the highest performing States provide similar employment safeguards to their teachers. The complaints also fail to note that education spending in New York is highly unequal, with the fewest resources

[3] References to the *Wright* Complaint will be cited as ("*Wright* ¶___"). References to the *Davids* Amended Complaint will be cited as ("*Davids* ¶____").

being provided to children in our poorest school communities, where the majority of our poor, minority and special needs students are concentrated.[4]

B. TEACHER DEFENDANTS

The complaints seek relief which, if granted, would eliminate the basic employment safeguards of more than 250,000 New Yorkers who teach our school children. This includes the individual teacher defendants, each of whom is a public school teacher who has dedicated his or her professional life to their school districts and to the students they teach.

Seth Cohen has been a high school Science teacher in the Enlarged City School District of Troy for twenty-seven years. He serves as his school district's Curriculum Leader (Science Department Chair) for grades Kindergarten through 12 and the local president of the Troy Teachers Association. (Cohen Aff., 8/28/14) (the individual teacher intervenor-defendants' affidavits, filed in support of their motion to intervene are annexed to the Reilly Affirmation as Exs. Q-X).

Daniel Delehanty is a Nationally Board Certified Social Studies teacher in the Rochester City School District. He has taught in Rochester since September 2000, and, from 1997-2000, he taught Social Studies in the suburban East Irondequoit Central School District. As a teacher of U.S. History, Mr. Delehanty covers many controversial topics in his classroom. (Delehanty Aff., 8/27/14).

Ashli Skura Dreher was the 2014 New York State Teacher of the Year. She holds National Board Certification and has taught Special Education in the Lewiston Porter Central

[4] Poverty is strongly correlated with low performing schools (*see, e.g.,* Brendan Chaney, *Mapping Poverty and Test Scores in New York State*, Capital Pro, Sept. 26, 2014, *available* at http://www.capitalnewyork.com/article/Albany/2014/09/8551205/mapping-poverty-and-test-scores-new-york-state (last visited October 23, 2014)). New York's education funding system, based largely on local property wealth, continues to fund our schools unequally, providing the least resources to our students in our poorest communities. *See Levittown Union Free School Dist. v. Nyquist*, 57 N.Y.2d 27 (1982). These students are the ones with the greatest educational needs. *See Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, Micahel A. Rebell, 85 N.C.L. Rev. 1467, 1471-1476 (2007).

School District since 1998. From 1996-1998, Ms. Skura Dreher was a Resource Room and Special Education Consultant Teacher for students in grades Kindergarten-6 in the Franklinville Central School District, and, additionally taught a GED prep for students on probation and/or parole. Over the years, Ms. Skura Dreher has advocated for her students with special needs, both inside and outside the classroom. (Skura Dreher Aff., 8/27/14).

Kathleen Ferguson was the 2012 New York State Teacher of the Year and the 2010 Schenectady City School District Teacher of the Year. She has been an Elementary Education teacher in the Schenectady City School District since 1998. Schenectady is a high-needs, severely underfunded school district. (Ferguson Aff., 8/27/14).

Since 1989, Israel Martinez has been employed by the Niagara Falls City School District as a Spanish and French teacher. Mr. Martinez has coached wrestling in his district for twenty-two years, and he has also coached cross-country and track. The Niagara Falls City School District is a city school district with approximately 6,800 students, more than half of whom are economically disadvantaged. (Martinez Aff., 8/27/14).

Richard Ognibene, Jr. was the 2008 New York State Teacher of the Year. He has been employed by the Fairport Central School District as a Chemistry and Physics teacher since 1992. Prior to teaching in Fairport, Mr. Ognibene taught Science for three years in the Perry Central School District and Chemistry for two years in the Caledonia-Mumford Central School District. Mr. Ognibene is an advisor to the Gay Straight Alliance at Fairport Senior High School. Mr. Ognibene founded and currently serves in a leadership role in Fairport's Brotherhood-Sisterhood week, which focuses on civility, awareness, respect and embracing differences. (Ognibene Aff., 8/26/14).

Lonnette R. Tuck served in the United States Navy as a Judge Advocate General prior to becoming a teacher. She has taught Social Studies in the White Plains City School District since 1988 and she is in her 5th year as the District-wide Mentor Facilitator for the Mentoring Program in White Plains. The White Plains-Greenburgh chapter of the NAACP named Ms. Tuck the 2014 Teacher of the Year. Ms. Tuck is an outspoken advocate for her profession and her students. (Tuck Aff., 8/27/14).

Karen Magee is President of NYSUT. Before she was elected president of NYSUT in April of this year, she worked as a classroom teacher in the Harrison Central School District for 28 years, as an Elementary school teacher, a special education teacher, and in providing Academic Intervention Services to students with special learning needs. (Magee Aff., 8/28/14).

Finally, NYSUT is a statewide labor federation that represents over 600,000 retired and in-service public and private employees in New York, including over 266,000 of New York's public school teachers, teaching assistants, school counselors, school social workers and school psychologists, all of whom are protected by the statutes plaintiffs challenge.[5] *NYSUT v. Bd. of Regents*, 33 Misc.3d 989, 992 n.1 (Alb. Co. Sup. Ct., 2011); Magee Aff., 8/28/14, ¶3.

C. MOTION TO DISMISS

Plaintiffs' sweeping, misleading claims are fatally defective. First, plaintiffs lack standing to bring their claims because they have not alleged injury-in-fact. Second, plaintiffs' complaints are non-justiciable, because plaintiffs have raised nothing more than policy disagreements with our Legislature.

Third, plaintiffs' claims are not yet ripe, as they allege no real, present or imminent harm. Fourth, plaintiffs' claims are already moot, given several recent amendments to the challenged

[5] Teacher defendants note that school principals, and many other school administrators are also protected by the tenure laws. See, Education Law § 2509(1)(a), (1)(b) and (2). NYSUT does not represent school principals or other school administrators. Two such principals have moved to intervene in these consolidated actions as defendants.

statutes. Because of these amendments, at least as to the challenged tenure/due process laws, plaintiffs are attacking laws that no longer exist.

Fifth, the complaints utterly fail to state a constitutional claim because the challenged statutes at issue are rationally related to a legitimate state interest, and because plaintiffs' conclusory, outdated, and speculative factual allegations are insufficient to state any cause of action.

Finally, if the complaints are not dismissed outright, plaintiffs should not be allowed to proceed in the absence of the local unions and school districts that have negotiated alternative disciplinary procedures to those contained in Education Law § 3020-a.

In the interest of judicial economy, teacher defendants will cite undisputed facts, as necessary, in the argument sections of this brief. Additionally, because the United Federation of Teachers (UFT), which represents New York City's teachers and other New York City pedagogues, has separately intervened, teacher defendants will not address the challenged statutes to the extent they are different for New York City. Teacher defendants join in the arguments submitted by the UFT, and simply note that the challenged statutes, as they apply to New York City, are in all respects constitutional.

ARGUMENT

POINT I

PLAINTIFFS LACK STANDING BECAUSE THEY HAVE FAILED TO ALLEGE INJURY IN FACT.

To establish standing to challenge governmental action, a plaintiff must demonstrate injury in fact: that he or she will actually be harmed; that the claimed injury is more than conjectural; and that the injury suffered is personal to the party, distinct from the general public.

New York State Ass'n of Nurse Anesthetists v. Novello, 2 N.Y.3d 207, 211-212 (2004) (finding that the possibility of harm, and no certainty that any plaintiff would be injured, was not enough to establish standing). *See also The Society of the Plastics Industry, Inc. v. County of Suffolk,* 77 N.Y.2d 769 (1991) (stating "[T]hat an issue may be one of 'vital public concern' does not entitle a party to standing"); *Roberts v. Health and Hosp. Corp.*, 87 A.D.3d 311 (1st Dep't 2011), *lv den.* 17 N.Y.3d 717 (2011).

To establish standing to challenge the constitutionality of a statute, the statute must have an adverse impact on the plaintiff's rights. *Town of Islip v. Cuomo*, 147 A.D.2d 56 (2d Dep't 1989). "[A]s a general rule, if there is no constitutional defect in the application of a statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations." *Id.* at 66-67.

Here, despite their sweeping claims about allegedly ineffective teachers, one (and only one) of the *Wright* plaintiffs, John Keoni Wright alleges that one of his twin daughters was assigned to an ineffective teacher last year, (*Wright* ¶¶ 4,5). He does not, however, allege whether the teacher was tenured or whether any steps were taken, through the teacher disciplinary process (*i.e.*, Education Law §3020-a), the annual professional performance review ("APPR") process or otherwise, to address that teachers' alleged ineffectiveness. *See Id.* Further, when the *Wright* complaint was filed, the 2013-2014 school year was completed, and plaintiff Wright's daughter was no longer in the purportedly ineffective teacher's class. Thus, he lacks standing to challenge this teacher's alleged ineffectiveness. *See Matter of Muka v. Cornell*, 48 A.D.2d 944 (3d Dep't 1975) (finding that petitioner lacked standing to challenge a teacher's competence because her daughter was no longer a student in his class).

Also, while Wright alleges that one daughter "excelled" while the other fell behind her sister in reading skills, he does not allege that either daughter is not reading at or above grade level, is not proficient on State tests, or is in any other way being harmed - - all that is alleged is that one child is not doing as well as the other. (*Wright* ¶¶ 4, 5) Moreover, his allegations fail to say how the unnamed teacher's purported ineffectiveness resulted in one student falling behind her sister. This broad allegation utterly fails to allege specific harm attributable to a teacher and to the protections afforded to that teacher under the challenged statutes. No other *Wright* plaintiff alleges *any* specific, personal harm.

Instead of alleging personal harm, the *Davids* plaintiffs assert that they are championing the rights of all New Yorkers.[6] (*Davids* ¶¶ 7 and 31). The *Davids* plaintiffs generally allege that "[a]s students in New York public schools each and every one of the plaintiffs has been harmed or is at substantial risk of being harmed, as a result of the challenged statutes" (*Davids* ¶ 54). Such conclusory allegations demonstrate that plaintiffs are in no different position than any student or member of the public. Further, even if the allegations are construed to allege that harm could occur if the statutes remain in place, potential future harm is not enough to establish standing. *See Novello*, 2 N.Y.3d at 214-215.

The State's constitutional obligation to provide a "sound basic education" is to provide an education such that children will be able "to eventually function productively as civic participants capable of voting and serving on a jury." *Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 316 (1995). Thus, even if a plaintiff had expressly alleged that he or she had an ineffective teacher, such an allegation would not confer standing to maintain a claim under

[6] Plaintiffs can hardly claim to speak for all public school children or parents. At a minimum, they certainly do not speak for teacher defendants Magee, Cohen, Delehanty and Skura Dreher, all of whom, as noted in their affidavits in support of intervention, are parents of public school children. Among New York's more than 250,000 teachers, there are certainly tens of thousands of other public school parents. And *all* public school parents have elected representatives who have crafted the challenged laws on their behalf.

Article XI, § 1 of the New York Constitution because no plaintiff has alleged that due to the actions of the State, their children will not be able to function productively as civic participants.

Finally, parents of public school students have "no general power of supervision over school officials," and must demonstrate some continuing or threatened injury to the interests of their children to establish standing. *Shanks v. Donovan*, 32 A.D.2d 1037, 1038 (2d Dep't 1969). *See also Oliver v. Donovan*, 32 A.D.2d 1036, 1037 (2d Dep't 1969) (holding that plaintiffs who challenged a school district's failure to bring charges against school employees lacked standing because parents have no general power of supervision over school authorities, and that complaints relating to "matters within the administrative expertise of the educational officials are not judicially cognizable").

As plaintiffs fail to allege any injury in fact, the complaints should be dismissed for lack of standing.

POINT II

THE COMPLAINTS MUST BE DISMISSED BECAUSE THEY ALLEGE ONLY NON-JUSTICIABLE POLICY DISAGREEMENTS WITH THE LEGISLATURE.

The *Wright* plaintiffs claim that "[b]ecause of the Challenged Statutes, New York schoolchildren are taught by ineffective teachers who otherwise would not remain in the classroom." (*Wright* ¶ 25). The *Davids* plaintiffs claim that the challenged statutes ". . . effectively prevent the removal of ineffective teachers from the classroom, and, in economic downturns, require layoffs of more competent teachers." (*Davids* ¶ 5). These claims have no legal merit or factual basis, but that failure is almost beside the point. It is the *Legislature*, not the courts, which sets public policy regarding teacher probation, tenure and seniority. Both complaints must be dismissed because they present only non-justiciable policy disputes.

A. JUSTICIABLITY STANDARDS

"CPLR 3001 requires that parties seeking a declaratory judgment present a 'justiciable controversy.'" *Hodgkins v. Cent. Sch. Dist. No. 1*, 78 Misc. 2d 91, 94 (Sup. Ct., Broome Co. 1974), *aff'd*, 48 A.D.2d 302 (3d Dep't 1975), *lv. den.*, 42 N.Y.2d 807 (1977). Because non-justiciability implicates the subject matter jurisdiction of the court, CPLR 3211(a)(2) is the proper vehicle to dismiss non-justiciable claims. *New York State Inspection, Sec. and Law Enforcement Employees, Dist. Council 82 v. Cuomo*, 64 N.Y.2d 233, 241 n.3 (1984).

The basic concept of justiciability is that the "judiciary [should] not undertake tasks that the other branches [of government] are better suited to perform." *Klostermann v. Cuomo*, 61 N.Y.2d 525, 535 (1984). Courts may not "usurp the authority conferred upon a coordinate branch of government . . .." *New York State Inspection*, 64 N.Y.2d at 238-39.

Courts, ". . . as a policy matter, even apart from principles of subject matter jurisdiction, will abstain from venturing into areas if [they are] ill-equipped to undertake the responsibility and other branches of government are far more suited to the task." *Jones v. Beame*, 45 N.Y.2d 402, 408-09 (1978). *See also Roberts*, 87 A.D.3d at 323 (citation omitted). "This is particularly true in those cases that involve political questions -- 'those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the legislative and executive branches.'" *Roberts*, 87 A.D.3d at 323 (citation omitted). When the courts "review the acts of the Legislature and the Executive, [they] do so to protect rights, not to make policy." *Campaign for Fiscal Equity, Inc. v. State*, 8 N.Y.3d 14, 28 (2006).

In *New York State Inspection,* a case where individuals sought to "vindicate their legally protected interest in a safe workplace," the Court of Appeals explained that justiciability:

> . . . is a fundamental principle of the organic law that each department of government should be free from interference, in the

> lawful discharge of duties expressly conferred, by either of the other branches. With respect to the distribution of powers within our system of government, it has been said that no concept has been "more universally received and cherished as a vital principle of freedom." . . . The lawful acts of executive branch officials, performed in satisfaction of responsibilities conferred by law, involve questions of judgment, allocation of resources and ordering of priorities, which are generally not subject to judicial review. This judicial deference to a coordinate, coequal branch of government includes one issue of justiciability generally denominated as the "political question" doctrine (64 N.Y.2d at 239) (citations omitted).

The Court of Appeals held that the applicable "statutory right to a safe workplace may not be enforced by means of a remedy at law which would require the judiciary to preempt the exercise of discretion by the executive branch of government." *Id.* at 237. The Court explained:

> . . . petitioners call for a remedy which would embroil the judiciary in the management and operation of the State correction system...While it is within the power of the judiciary to declare the vested rights of a specifically protected class of individuals, in a fashion recognized by statute, the manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the political branches of government. Where, as here, policy matters have ***demonstrably and textually been committed to a coordinate, political branch of government***, any consideration of such matters by a branch or body other than that in which the power expressly is reposed would, absent extraordinary or emergency circumstances, constitute an *ultra vires* act (*Id.* at 239-40) (emphasis supplied)(citations omitted).

Here, the State's duty to provide a sound basic education has been "demonstrably and textually committed" to the Legislature. That commitment appears on the face of the Education Article, which specifically identifies the "legislature" as having the duty "to provide for the maintenance and support of a system of free common schools . . .." NY Const. Art. XI §1. And, as in *New York State Inspection*, the plaintiffs clearly call for a remedy that would "embroil" the

courts in the day to day operation of New York's public education system.

Justiciability also requires an actual controversy. "A party may challenge the validity of a governmental act only in a genuine controversy arising between the litigants affecting his private rights." *Hodgkins*, 78 Misc. 2d at 94-95. "Where the harm sought to be enjoined is contingent upon events which may not come to pass, the claim to enjoin the purported hazard is nonjusticable as wholly speculative and abstract." *New York State Inspection,* 64 N.Y.2d at 240 (citing *New York Public Interest Research Group v. Carey,* 42 N.Y.2d 527 (1977)).

B. THE COMPLAINTS FAIL TO PRESENT A JUSTICIABLE CONTROVERSY.

Plaintiffs' sweeping claims, made without any showing of personal harm, clearly do not present a justiciable controversy. General claims such as "[t]eacher effectiveness cannot be determined within three years," (*Wright* ¶ 79); that "disciplinary procedures are time-consuming, costly and unlikely to result in removal of teachers," (*Wright* ¶ 82); and that "[seniority] prohibits administrators from taking teacher quality into account when conducting layoffs," (*Wright* ¶85) are claims about policy, not an actual controversy between the parties.

The consolidated complaints allege three general claims: 1) that the three year probationary period for teachers is too short (*Wright* ¶¶ 38, 79); 2) that tenured teachers accused of misconduct or incompetence are provided too much due process (*Wright* ¶ 3; *Davids* ¶ 37);[7] and 3) that layoffs should not be determined by seniority (*Wright* ¶ 85; *Davids* ¶ 62). Specifically, plaintiffs challenge Education Law §§ 1102(3), 2509, 2510, 2573, 2585, 2588, 2590, 3012, 3012-c, 3013(2), 3014, 3020, and 3020-a (*Wright* ¶ 6; *Davids* ¶ 5).

[7] As discussed below at page 45-46, if the challenged statutes are struck down, teachers would be stripped of their property interest in continued employment and lose *all* procedural due process rights with respect to that employment.

Thus, plaintiffs are essentially claiming that the Legislative and Executive branches, acting as a sovereign government and as a public employer, cannot establish the terms of employment of public servants. Clearly, plaintiffs are misusing the Education Article to dispute policy judgments made by the Legislature, over the course of more than a century.[8] Such policy claims ***have already been addressed*** by the Legislature, and our courts have repeatedly held that they cannot disturb these policy decisions.

1. PROBATION

The *Davids* plaintiffs do not challenge New York's three-year probationary term. The *Wright* plaintiffs do not challenge the Legislature's authority to require a probationary term for teachers. Rather, citing "most studies" (*Wright* ¶ 46), they seek a probationary term of at least four years, and ask this Court to overrule the Legislature's policy judgment on a matter over which it has clear authority. *See, e.g., Union Free Sch. Dist. No. 22 v. Wilson,* 281 A.D. 419, 424 (3d Dep't 1953), *lv. den.* 306 N.Y. 979 (1953) (the "power of the Legislature over the educational system of the State is plenary").

The Legislature has made its policy judgment as to teacher probation. Indeed, it has amended the challenged teacher probation statutes at least eight times since 1917, each time taking into account the policy choices important at the time: in 1917, 1937, 1945, 1950, 1955, 1971, 1974 and 1980. (L. 1917, c. 786); (L. 1937, c. 314); (L. 1945, c.833); (L. 1950, c. 762); (L. 1955, c. 583); (L. 1971, c.116); (L. 1974, c. 735); (L. 1980, c. 442).

First, under Education Law § 872, teachers employed in cities had a "probationary term [that] was to be fixed by the board of education at not less than one, nor more than three years." *See Carter v. Kalamejski*, 255 A.D. 694, 697-98 (4th Dep't 1939), *aff'd*, 280 N.Y. 803 (1939); L.

[8] Statutes protecting tenured teachers' right not to be removed except for cause have been in existence in one form or another since 1897. *See, e.g., People ex rel. Murphy v. Maxwell*, 177 N.Y. 494, 497 (1904).

1917, c. 786. In 1937, the Legislature extended the statutory tenure system with a law effective July 1, 1937 – the former Education Law § 312-a, now Education Law § 3012 – which established a three-year probationary period for teachers "appointed by the board of education of a union free school district having a population of more than [4,500] inhabitants and employing a superintendent of schools... ." *See* L. 1937, c. 314; L. 1947, c. 820 (replacing Education Law § 312-a with Education Law § 3012).

In 1945, the Legislature added the former Education Law § 312-b – which became Education Law § 3013 (now § 3012) – extending tenure to teachers, principals, and other school professionals of school districts employing eight or more teachers. L. 1945, c. 833 (specifying "a probationary period of not to exceed five years"); L. 1947, c. 820 (substituting Education Law § 3013 for Education Law § 312-b).

When the Education Law was renumbered in 1947, Education Law § 2523 incorporated the same probationary provisions previously contained in Education Law § 872. *See* L. 1947, c. 820; L. 1917, c. 786. The Education Law was again renumbered and amended in 1950 to reflect "a probationary period of not less than one year and not to exceed three years" for teachers covered by Education Law §§ 2509 and 2573. *See* L. 1950, c. 762 (adding Education Law § 2509 and renumbering Education Law § 2523 as Education Law § 2573); *Bd. of Educ. v. Allen*, 52 Misc. 2d 959 (Sup. Ct., Albany Co. 1967), *aff'd*, 30 A.D.2d 742 (3d Dep't 1968), *lv. den.*, 22 N.Y.2d 646 (1968) (stating that under Education Law § 2509 "a teacher's probationary period may not exceed three years").

From 1945 to 1971, the maximum probationary period for teachers working in school districts covered by Education Law § 3013 -- and its predecessor Education Law § 312-b -- continued to be five years. *See* L. 1945, c. 833; L. 1947, c. 820. Further, in 1955 the Legislature

added Education Law § 3014 to establish "a probationary period of not to exceed five years" for teachers employed by "the board of cooperative educational services ("BOCES")." L. 1955, c. 583, §11.

The Legislature in 1971 mandated a five-year probationary period for all teachers covered by Education Law §§ 2509, 2573, 3012, and 3013. L. 1971, c. 116. There was opposition to the 1971 amendment, which did not just extend teachers' probationary periods, but also removed tenure from principals.[9] In an April 5, 1971 memorandum in opposition, the Legislative Counsel for the New York State Association of Secondary School Administrators and New York State Association of Elementary School Principals argued:

> The abolition of tenure for principals and the unreasonable extension of tenure for teachers have a similar negative [e]ffect on the quality of education in this State. They both cause the educational system to be subjected to the daily whims of a constituency whose concerns are not necessarily for the quality of education of our young. The executive's historical prerogative of guaranteeing a continuum of sound educational opportunity for all students is thus forfeited (*See* excerpt from Bill Jacket for L. 1971, c. 116, annexed to Reilly Affirm. as Ex."C").

Similarly, the New York State AFL-CIO stated:

> . . . excessive postponement of academic tenure can only turn young people away from the teaching profession. The currently common three year probationary period is quite adequate to test a teacher's potential. An extension to five years merely weakens the security of the position and the confidence of the employees, all to no positive purpose.
>
> In addition, this bill unfairly and drastically changes the rights...of supervisors from minority groups, currently being appointed in increasing numbers, who would be denied tenure and kept in an inferior status.
>
> Tenure is no assurance of a job for an incompetent teacher. It is essential however in assuring job security for those teachers rendering good service. This bill not only removes this security

[9] Tenure for principals has since been restored. *See* Education Law §§ 2509, 2573, 3012.

> but opens wide the potentiality for abuse by school employers who might find attractive the temptation for dismissal of teachers just prior to completion of five years [of] service and their replacement by newcomers at the first salary step. (*See Id.*)

Just three years later, the Legislature revisited its policy determinations and concluded that a three-year probationary period was appropriate. L. 1974, c. 735. Education Law §§ 2509, 2573, 3012, 3013, and 3014 were amended to decrease "the teacher tenure probationary period from 5 years to 3 years. . .." *See Pavilion Cent. Sch. Dist. v. Pavilion Faculty Ass'n*, 51 A.D.2d 119, 121 (4th Dep't 1976); L. 1974, c. 735. Thereafter, in 1980 the Legislature amended Education Law § 3012 to provide a probationary period of three years for teachers employed by school districts with fewer than eight teachers. L. 1980, c. 442.

The Bill Jacket for the 1974 amendment shows that the matter of a three-year probationary period is a non-justiciable policy issue. *See* Reilly Affirm. at Ex. "D". Included is a memo from Jerome Lefkowitz, Deputy Chairman of the Public Employment Relations Board ("PERB"), in which PERB indicates:

> The difference between a 3 and 5-year statutory probationary period is relatively insignificant in terms of its impact on collective negotiations and thus involves policy questions that are not of concern to this agency. *Id.*

Furthermore, Governor Malcolm Wilson's Memorandum approving the 1974 legislation reveals an informed and logical policy basis for setting a teacher's probationary period at three years:

> The five-year probationary period, which has been in effect since May 9, 1971, is, as I have stated in the past, unreasonably long when compared with the probationary terms served by other employees and when viewed in the context of the amount of time needed by school districts to assess teacher competence.

> The bills which I am approving today will provide more equitable treatment for teachers in New York State, while continuing to provide school officials with sufficient time to observe on-the-job performance and to make intelligent and informed tenure decisions.

See L. 1974, c. 735, Governor's Memorandum, at p. 2108.

Notably, in dealing with public employee probation, the Legislature has made different policy choices for different classes of employees. The three-year probationary period for teachers is, in fact, considerably longer than the probation required of most State and local government employees.

Under Civil Service Law § 63, the State Civil Service Commission and municipal civil service commissions "provide by rule for the conditions and extent of probationary service." The State Civil Service Commission sets the probationary periods applicable in its jurisdiction in section 4.5 of its rules. Those periods vary widely, but most initial probationary periods are in the 26 to 52 week range. 4 NYCRR § 4.5. Similarly, the City Personnel Director of the City of New York, at Rule V of the Personnel Rules and Regulations of the City of New York, provides for probationary terms. In the City service, the initial probationary term, unless otherwise provided, is one year. N.Y. Rules, Title 55, §A. Each county civil service commission generally has its own rules. While such rules may differ from county to county, the Albany County Civil Service Rules serve as an example. *See* Reilly Affirm. at Ex. "F". Under the Albany County rules most initial probationary terms are between eight and 52 weeks. *Id.* Accordingly, state and municipal employees usually serve a probationary period that is generally much shorter than that for teachers.[10]

[10] Additionally, due process rights for civil servants may be conferred by collective bargaining. For instance, under Civil Service Law §75(1)(c), certain non-competitive class employees do not earn the right to a hearing under Section 75 until after five years of continuous service. For professional employees in the State's Professional,

This history shows that the Legislature understands its duty to make the policy decisions about the length of teacher probation and has determined that three years is the appropriate length. The *Wright* plaintiffs' demand for a four-year term is non-justiciable.

2. TENURE

The plaintiffs, after arguing that because teachers are so important to public education they must be evaluated for at least four years before earning *any* due process protection (*Wright* ¶ 46), next claim that the Legislature is constitutionally prohibited from providing these essential professionals, even after they have earned tenure, any procedural protections beyond the bare minimum required by the Due Process Clauses of the State and Federal Constitutions. There is simply no legal basis for a claim that the Legislature cannot make the policy decision that teachers who have *earned*[11] tenure should be provided more than minimal due process.

Of course, our Legislature has made that precise policy decision: that earned tenure and the procedural due process protection that comes with it is an appropriate way to attract and

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Scientific and Technical Bargaining Unit, however, this five year period has been reduced to one (1) year for employees hired after April 1, 1979. *See* Article 33.1 of 2011-2015 PEF/STATE Collective Bargaining Agreement, published at http://www.goer.ny.gov/Labor_Relations/contracts, annexed to the Reilly Affirm. as "Ex. "K".

[11] In addition to the requirement that they pass probation in order to earn tenure, New York's teachers must comply with a certification regime that is itself very rigorous. In New York, only teachers holding State certification are permitted to teach in the public schools. Education Law § 3009. For virtually all classroom teachers, the "initial" certification to teach requires completion of a teacher education program and a bachelor's degree, including 30 credits in general education, liberal arts and science, (8 NYCRR § 52.21(b)(2)(ii)(a)), and 30 credits in the content area of the particular certificate (8 NYCRR § 52.21(b)(2)(ii)(b)). In addition, candidates for initial certification must achieve satisfactory scores on the NYS Teacher Certification Examination, which includes testing in the content area of the certificate (8 NYCRR §§ 80-1.5(a) and 80-3.3(c)(1)(2)), and undertake at least 40 days of student teaching (8 NYCRR § 52.21(b)(2)(ii)(c)). A new teacher has five years to complete all requirements for permanent ("professional") certification (8 NYCRR § 80-3.3(a)) unless the teacher applies for and SED grants an extension, which must be based on specifically enumerated grounds (*see* NYCRR § 80-1.6)).

The requirements for permanent certification for most teachers include earning a master's degree in the content area, and three years of teaching experience, the first of which must be in a mentored program. 8 NYCRR § 80-3.4(a), (b)(1), (2); § 100.2(dd)(2)(iv). New York also requires teachers to engage in 175 hours of professional development every five years in order to maintain permanent certification. 8 NYCRR § 80-3.6; § 100.2(dd)(2)(ii)(a). This is almost three times the number of continuing education hours that New York attorneys must earn in order to maintain their license to practice law. 22 NYCRR § 1500.22 (24 hours every two years).

retain an independent, professional corps of qualified public school teachers. As one court has explained:

> The Legislature has delegated to boards of education broad power to hire and fire teachers (see Education Law, §§ 2503, 2554). This power was formerly exercised by employment contracts between the board and the individual teacher which were renewed annually, if they were renewed at all. The tenure statutes (Education Law, §§ 3012, 3013) were enacted to alter this practice . . .. **The primary purpose of the legislation was to assure security to competent teachers in positions to which they have been appointed** *(Matter of Boyd v Collins*, 11 NY2d 228; *Matter of Monan v Board of Educ., supra).*
> *(Moritz v. Bd. of Educ.,* 60 A.D.2d 161, 166 (4th Dep't 1977) (emphasis supplied).

Indeed, in *Moritz,* 60 A.D.2d at 167, the court noted that the tenure laws were enacted in derogation of the common law right of contract.

The Court of Appeals has said of Education Law § 3020-a that:

> Clearly, the statute...form[s] a critical part of the system of contemporaneous protections that safeguard tenured teachers from official or bureaucratic caprice...[and together with] the regulations promulgated thereunder by the Commissioner of Education attempt[s] to harmonize the method of removing tenured teachers with the dictates of procedural due process.
>
> * * *
>
> **We do not gainsay the importance of these standards both in terms of their role in protecting the rights of individual teachers whose years of satisfactory service have earned them this security and in fostering an independent and professional corps of teachers.**

Abramovich v. Bd. of Educ., 46 N.Y.2d 450, 454-455 (1979) (citations omitted) (emphasis supplied).

Despite this precedent, plaintiffs want the Court to provide a forum to debate the wisdom of laws carefully designed by the Legislature and upheld by our Court of Appeals. But, it is simply not for the courts to pass judgment on the Legislature's sound policy decision to institute a tenure system for teachers, in lieu of individual employment contracts. While plaintiffs will presumably say that their anti-tenure claims are novel, the Legislature has long rejected such claims.

For example, in 1980 the Legislature considered a bill to extend tenure to teachers in school districts with fewer than eight teachers. The New York State School Boards Association opposed the measure, urging "...that teacher tenure should be replaced by a system of renewable contracts." *See* excerpt from Bill Jacket for L. 1980, c. 442, annexed to Reilly Affirm. as Ex. "E". In rejecting this request, a Senate memorandum eloquently summarized the critical policy justifications for teacher tenure, while specifically rejecting the *Wright* plaintiffs' misrepresentation that tenure guarantees lifetime employment:

> The purpose of tenure is to provide the best possible teaching service for our youth by protecting the employment of the professional staff. Such protection should extend to all teachers regardless of the size of the school district that employs them. **Contrary to popular belief, tenure is not the right to hold a job for life, but rather it is the right to continued employment during good behavior and efficient and competent service, and guards against dismissal for arbitrary and personal or political reasons.** Tenure provides the climate for academic freedom. Without tenure, teachers are subject to whimsical dismissal and academic freedom cannot survive. Teachers should be free to teach the truth and be protected from being dismissed for doing so. In the absence of such protection, the suppression of free and honest conviction and the parroting of the views of those in political power would prevail.

Id. (emphasis supplied).

Plaintiffs' policy dispute with the Legislature's judgment about how much procedural protection teachers should have is not only non-justiciable, it is disingenuous. Notably missing from either complaint is any real effort to alert the Court to the Legislature's very recent amendments to the challenged statutes. These amendments were enacted *after* the statistical data upon which plaintiffs rely were published. These amendments created a refined statutory scheme, different from the one plaintiffs inaccurately describe.

Plaintiffs' claims about how lengthy the 3020-a process is relies primarily on unsubstantiated data collected between 1995 and 2008. (*Wright* ¶¶ 54-57; *Davids* ¶ 39). The Legislature, however, amended and streamlined Education Law § 3020-a in 2008, in 2010, and again in 2012.

In 2008, the Legislature provided for the automatic termination of a teacher's employment - - without any of the due process protections plaintiffs complain about - - for certain criminal convictions. L. 2008, c. 296.

In 2010, the Legislature, among other things, established an expedited 60 day hearing process for teachers who receive two annual performance ratings of "ineffective." L.2010, c. 103; Education Law § 3020-a (a)(3)(c)(i-a)(A).

In 2012, the Legislature created a process where all other due process hearings for tenured teachers must be completed, barring extraordinary circumstances beyond the control of the parties, within 155 days of the filing of charges.[12] L. 2012, c. 57, pt. B, §1.

The 2010 amendments were part of New York's federal Race to the Top application, through which almost $700 million in federal education aid was secured for New York. *See*

[12] Additionally, if a teacher were to obstruct the proceeding, she may forfeit her salary for the period of delay. *Belluardo v. Bd. of Educ.*, 68 A.D.2d 887 (2d Dep't 1979); *Marconi v. Bd. of Educ.*, 215 A.D2d 659 (2d Dep't 1995), *lv. den.* 90 N.Y.2d 811 (1997).

NYSUT v. Bd. of Regents, 33 Misc.3d at 992. The primary purpose of that statute is to enhance student learning and teacher effectiveness by implementing a statewide, comprehensive teacher evaluation system, designed to measure teacher effectiveness based on multiple measures of teacher performance, including measures of student achievement. *Id*; Education Law § 3012-c(1). As noted, this recent law provides expedited hearings for teachers rated as pedagogically "ineffective" in consecutive years. *See* Education Law § 3012-c(6); Education Law §§ 3020(1) and (3); and Education Law §§ 3020-a(2)(c) and 3020-a(3)(c)(i-a)(A)-(B). In fact, the Board of Regents and the State Education Department, *together with NYSUT*, jointly developed the proposed legislation that became Education Law § 3012-c.[13] *NYSUT v. Bd. of Regents,* 33 Misc.3d at 992.

In sum, plaintiffs do not seem to contend[14] that teachers who earn tenure may not be afforded any due process, they simply disagree with the quantum of due process the Legislature has determined appropriate to protect these essential professionals from unjust dismissal. The recent amendments to the Education Law's tenure provisions demonstrate the Legislature's active attention to this policy issue, and hammer home that plaintiffs' claims are nothing more than non-justiciable political questions.

3. SENIORITY PROTECTION

Similarly, the courts have appropriately declined to interfere with the Legislature's determination, expressed in Education Law § 2510, that teacher layoffs should be made according to seniority. *See Cole v. Bd. of Educ.*, 90 A.D.2d 419 (2d Dep't 1982), *aff'd*, 60

[13] As will be discussed in Point III, any concerns with the teacher effectiveness provisions in Education Law §§ 3012-c and 3020-a are not only non-justiciable but premature, as most New York school districts will first be able to employ the expedited disciplinary procedure in the fall of 2014.

[14] Again, as will be discussed at page 45-46, the relief sought by plaintiffs would, if granted, strip teachers of *all* their procedural due process rights.

N.Y.2d 941 (1983). Like Education Law §§ 2585(3) and 3013(2), Education Law § 2510(2) provides that "[w]henever a board of education abolishes a position under this chapter, the services of the teacher having the least seniority in the system within the tenure of the position abolished shall be discontinued." Regarding these challenged sections of the Education Law, the *Cole* court explained why it could not modify the Education Law provisions:

> **That another statutory scheme would be more equitable or would facilitate the task of the school district is a matter for the Legislature, not the courts (*cf. Matter of Brewer v Board of Educ.*, 51 N.Y.2d 855, *supra*).** (*Cole*, 90 A.D.2d at 432 (emphasis added)).

Further, the Court of Appeals commented in *Brewer v. Board of Education*, 51 N.Y.2d 855, 857 (1980), that it could not interfere with the Legislative intent of Education Law § 2510:

> We recognize, as did the Appellate Division, that school employees such as [the current teacher] may be somewhat hesitant to accept provisional promotions if they know that they will not be given preferred access to vacancies in their former tenure areas in the event that their provisional appointments are terminated. That this potential difficulty exists, however, does not furnish a sound basis for disrupting the operation of a legislative measure that was designed specifically to protect "excessed" school employees. **A solution to the problem identified by the Appellate Division, if indeed such a problem exists, must come directly from the Legislature in the form of a separate enactment.** We may not, under the guise of our judicial authority to interpret legislation, permit school districts to utilize . . . section 2510 to benefit a class of employees not contemplated by that statute at the expense of those employees who were clearly the intended beneficiaries of the measure.

The legislative policy encompassed in Education Law §§ 2510(2), 2585(3), 2588, and 3013(2) is designed to protect experienced teachers. But what plaintiffs advocate is a layoff system that benefits less experienced and less highly paid teachers (*Wright* ¶ 71). As the court

explained in *Leggio v. Oglesby*, 69 A.D.2d 446, 448-49 (2d Dep't 1979), "[t]o a large extent tenure, like seniority, is a means of providing job security" and "the concept of tenure was never contemplated to be used as a means of diminishing a teacher's right to employment in favor of one who has less seniority within the school district who would perform the same duties as the dismissed employee."

It is evident that the Legislature by enacting Education Law §§ 2510, 2585, 2588, and 3013 made a policy decision to protect more senior, experienced teachers. While plaintiffs question[15] the merits of this decision, a court cannot use its judicial authority to create a layoff system that benefits individuals "not contemplated by [the] statute" and does away with the Legislature's reasoned policy choice. *See Brewer*, 51 N.Y.2d at 857. *Accord, Lapolla v. Bd. of Educ.*, 172 Misc. 364 (Sup. Ct., NY Co. 1939), *aff'd*, 258 A.D. 781 (1st Dep't 1939), *aff'd*, 282 N.Y. 674 (1940).

As with probation and tenure, the Legislature has been active in the area of seniority. Over the last five years, there have been various legislative efforts to modify the seniority-based layoff system specified in Education Law §§ 2510, 2585, and 3013. *See, e.g.*, A.4425, 2013 Leg., 236th Sess. (N.Y. 2013); A.4893, 2013 Leg., 236th Sess. (N.Y. 2013); A.6738, 2012 Leg., 235th Sess. (N.Y. 2012); A.8588, 2011 Leg., 234th Sess. (N.Y. 2011) (copies of the aforementioned bills are annexed to the Reilly Affirmation as Exs. "G-J"). Such legislative proposals sought to, *inter alia*, remove seniority as the sole criteria for teacher layoffs and consider teacher performance in layoff decisions. *See* A.4425, 2013 Leg., 236th Sess. (N.Y. 2013); A.4893, 2013 Leg., 236th Sess. (N.Y. 2013) (Reilly Affirm. at Exs. "G-J"). The proffered justification for such

[15] The *Wright* plaintiffs flatly allege that a teacher's effectiveness cannot be determined in three years (*Wright* ¶78). Apparently, plaintiffs see no contradiction in their assertion that such junior teachers can, in layoff situations, not only be deemed effective, but can also be given superior retention rights over senior teachers who have been adjudged effective through successful completion of probation and the award of tenure.

legislative proposals mirrors plaintiffs' concerns here. *See, e.g.*, A.4893, 2013 Leg., 236th Sess. (N.Y. 2013) (Reilly Affirm. at Ex. "H") (asserting that "the educational needs of the students take a subordinate role in staffing decisions"). Nevertheless, the Legislature has determined that the current protection should remain in place.

In sum, the plaintiffs do not like the challenged statutes. Based on their claim that there are *some* ineffective teachers, they want *all* teachers to serve a longer probation; they want *all* teachers to have less (or no) due process protection once tenure is earned; and they want *all* teachers to have less job security with every year of dedicated service and with every salary increase.[16] It is difficult to see how such policies would do anything but make teaching a less attractive, less effective profession and significantly damage public education.[17] In any case, each of the plaintiffs' policy arguments ***has already been considered and rejected*** by the Legislature. Therefore, plaintiffs' claims should be dismissed as non-justicable.

POINT III

THE MOTION TO DISMISS SHOULD BE GRANTED BECAUSE PLAINTIFFS'CLAIMS ARE NOT YET RIPE OR, ALTERNATIVELY, ARE ALREADY MOOT.

A. PLAINTIFFS' CLAIMS ARE NOT RIPE.

For a claim to be ripe, there must be an actual controversy, and the plaintiffs must allege harm to themselves that is real and present or imminent. Here, there is no actual controversy, nor have plaintiffs alleged personal harm.

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[16] Again, the *Wright* plaintiffs contend a teacher's salary should be a factor in layoffs, because laying off more highly compensated teachers would be more economical. (*Wright* ¶ 71).

[17] The recent action of the North Carolina Legislature to abolish tenure has led to extreme dissatisfaction among teachers there, with 74% saying this action would make them less likely to continue working as an educator in North Carolina; and 90% of teachers and school administrators saying that the removal of tenure would have a negative effect on the quality of public education. Scott Imig & Robert Smith, *Listening to Those on the Front Lines: North Carolina Teachers and Administrators Respond to State Legislative Changes 4 (2013)*, available at http://people.uncw.edu/imigs/documents/SmithImigReport.pdf (last visited Oct. 27, 2014).

"The ripeness doctrine and the related rule that there must be 'an actual controversy between genuine disputants with a stake in the outcome' serve the same purpose: 'to conserve judicial machinery for problems which are real and present or imminent, not to squander it on abstract or hypothetical or remote problems.'" *Church of St. Paul and St. Andrew v. Barwick*, 67 N.Y.2d 510, 518 (1986) (citations omitted). "Where the harm sought to be enjoined is contingent upon events which may not come to pass, the claim to enjoin the purported hazard is nonjusticiable as wholly speculative and abstract," and not ripe for judicial review. *New York State Inspection,* 64 N.Y.2d at 240. When the " . . . anticipated harm is insignificant, remote or contingent . . . [or] if the claimed harm may be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party," the matter is not ripe, *Barwick*, 67 N.Y.2d at 520; *Adirondack Council, Inc. v. Adirondack Park Agency*, 92 A.D.3d 188 (3d Dep't 2012).

Similarly, a claim is not ripe if plaintiffs fail to allege "concrete injuries sufficient to state a justiciable claim." *New York Blue Line Council, Inc. v. Adirondack Park Agency,* 86 A.D.3d 756 (3d Dep't 2011). For instance, in *Blue Line Council,* the petitioners challenged regulations that would have negatively impacted their ability to develop the shoreline, to obtain variances, subdivide or to expand their lot. *Id.* at 761. None of the petitioners, however, alleged any actions they intended to take but for the new regulations. The Court held that the anticipated harm may have been prevented by further administrative action and therefore the "alleged injuries are merely hypothetical." *Id.* Accordingly, the Court dismissed the declaratory challenge.

Here, plaintiffs do not allege that any of their children's teachers have been, will be, or should be charged with incompetence pursuant to Education Law § 3020-a. Furthermore,

plaintiffs do not allege that they have suffered any concrete injury as the result of the challenged statutes. The closest they come, as noted, is an anecdote that plaintiff Wright's twin daughters progressed at different levels last school year. (*Wright* ¶¶ 4-5). There is, however, no allegation that a teacher should have been brought up on disciplinary charges pursuant to Education Law § 3020-a, but the school district failed to do so because of the challenged statutes.[18] Not one other plaintiff in *Wright* or *Davids* even attempt to establish a concrete injury they have suffered as the result of the challenged statutes.

Further, Education Law § 3012-c was enacted in 2010. It is, therefore, premature to review the effects of that statute, which provided expedited § 3020-a proceedings for teachers who receive consecutive ineffective performance ratings. This is because teachers were first evaluated under the new Education Law § 3012-c evaluation procedure during the 2012-2013 school year, and as such, the 2013-2014 school year is the second year under the updated Education Law. *See* Education Law § 3012-c(2)(k). As teacher ratings for the 2013-2014 school year must have been completed by September 1, 2014, pursuant to Education Law § 3012-c(2)(c)(2), school districts and principals may now utilize the expedited Education Law § 3020-a process for the first time in the fall of 2014 to seek the removal of allegedly ineffective teachers.[19]

Anticipated injury is not ripe for judicial review. *Town of Islip,* 147 A.D.2d at 66. School districts across the state have the dismissal statutes at their disposal and could invoke

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[18] The discretion whether to charge a teacher under Education Law § 3020-a is vested in local boards of education, but parents can ask the Commissioner of Education to review that exercise of discretion if they can allege facts to show that a board has arbitrarily failed to commence charges. *See, e.g., Appeal of Magee*, Decision No. 12,541, 30 Ed. Dep't Rep. 479 (1991); *Oliver,* 32 A.D.2d at 1037.

[19] In NYC, the expedited procedure will be available in the fall of 2015, as the 2014-2015 school year is the second year under which teachers are being evaluated pursuant to the new Education Law § 3012-c. *See* L. 2013, c. 57, § 7-a; June 1, 2013 Commissioner's Decision, *available at* http://usny.nysed.gov/rttt/teachers-leaders/plans/docs/new-york-city-appr-plan-060113.pdf (last visited Oct. 24, 2014).

them at any time to remove allegedly ineffective teachers from the classroom. Plaintiffs have failed to allege any concrete injury and, instead have presented this Court with merely hypothetical issues.

B. PLAINTIFFS' CLAIMS ARE ALREADY MOOT.

Alternatively, even if plaintiffs' claims may have once been ripe, they are now moot. A case becomes moot when the circumstances relied upon by the plaintiffs have changed. *Hearst Corp. v. Clyne,* 50 N.Y.2d 707, 714 (1980). Indeed, counsel has an obligation to inform the court of changed circumstances which render a matter moot. *Gabriel v. Prime*, 30 A.D.3d 955 (3d Dep't 2006).

"It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal. This principle, which forbids courts to pass on academic, hypothetical, moot, or otherwise abstract questions, is founded both in constitutional separation-of-powers doctrine, and in methodological strictures which inhere in the decisional process of a common-law judiciary." *Hearst Corp,* 50 N.Y.2d at 713–14 (internal citations omitted); *see also Albino v. New York City Hous. Auth,* 78 A.D.3d 485 (1st Dep't 2010); *People v. Grasso,* 54 A.D.3d 180, 206 fn. 19 (1st Dep't 2008).

The Education Law's teacher disciplinary provisions were amended and streamlined in 2008, 2010, and 2012. (*See* above at pp. 21-23). Plaintiffs inexplicably make their non-justiciable claim that due process hearings for teachers are too lengthy without citing any data about how long such cases take under the revised statutes.[20] Instead, as noted, plaintiffs cite data

[20] As plaintiffs' counsel are no doubt aware, such data are readily available from the New York State Education Department. Yet, the complaints make no attempt to present such data to the Court.

that was collected many years prior to the amendment of the statute in 2012 (*Wright* ¶¶ 56-57; *Davids* ¶ 39). The informal survey plaintiffs cite was published in March 2007 and was based on data going back to 1995. *Id.* But now, under the revised statues, barring extraordinary circumstances all evidence must be submitted and the case decided within 155 days of the filing of charges. This 155-day time limit is conspicuously absent from the *Wright* plaintiffs' flow chart purporting to detail the disciplinary process (*See Wright* ¶ 60). Clearly, to the extent plaintiffs rely on the 2007 study, their claims are moot.

Because plaintiffs' claims are not ripe or, alternatively are already moot, they can and should be dismissed pursuant to CPLR 3211(a)(2) and (7).

POINT IV

PLAINTIFFS HAVE FAILED TO STATE A CAUSE OF ACTION UNDER THE EDUCATION ARTICLE BECAUSE THE CHALLENGED STATUTES ARE RATIONAL AND BECAUSE PLAINTIFFS' FACTUAL ALLEGATIONS ARE MERELY CONCLUSORY AND SPECULATIVE.

Both complaints are based entirely on Article XI, §1, the Education Article of the New York State Constitution. Under existing, binding judicial precedent in order to state a claim under this article, a plaintiff must allege:

> [F]irst, that the State fails to provide them a sound basic education in that it provides deficient inputs -- teaching, facilities and instrumentalities of learning -- which lead to deficient outputs such as test results and graduation rates; and second, that this failure is causally connected to the funding system. (*Paynter v. State*, 100 N.Y.2d 434, 440 (2003)).

In addition, plaintiffs must allege facts that are more than conclusory and speculative in support of this claim. Plaintiffs have failed to state a claim, legally or factually.

A. PLAINTIFFS CANNOT MEET THEIR BURDEN OF ESTABLISHING UNCONSTITUTIONALITY BECAUSE THE CHALLENGED STATUTES RATIONALLY RELATE TO LEGITIMATE STATE INTERESTS.

A plaintiff who alleges that a statute is unconstitutional bears a heavy burden, because "legislation is presumed to be valid." *City of Cleburne, Texas v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *see also Federal Communications Com'n. v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993) (noting that the presumption of validity is "strong"); and *Iannucci v. Bd. of Supervisors*, 20 N.Y.2d 244, 253 (1967) (". . . legislation should not be declared unconstitutional unless it clearly appears to be so; all doubts should be resolved in favor of the constitutionality of an act" [quotation marks and quoted case omitted]). *Accord Lavalle v. Hayden*, 98 N.Y.2d 155 (2002); *Bobka v. Town of Huntington*, 143 A.D.2d 381 (2d Dep't 1988), *lv. den.*, 73 N.Y.2d 704 (1989).

"Simply stated, 'the invalidity of the law must be demonstrated beyond a reasonable doubt.'" *People v. Tichenor*, 89 N.Y.2d 769 (1997), *quoting People v. Pagnotta*, 25 N.Y.2d 333 (1969). "[C]ourts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional." *LaValle v. Hayden*, 98 N.Y.2d 155, 161 (2002). In this matter, adding to plaintiffs' already heavy burden is the fact at least two of the main statutes plaintiffs challenge - - Education Law §§ 3012 and 3020-a - - already have been found to be constitutional under Article XI of the State Constitution, in a thorough and well-reasoned decision of Justice Alan D. Oshrin. *Brady v. A Certain Teacher*, 166 Misc.2d 566, 574-575 (Sup. Ct. Suffolk Co. 1995).

Here, the *Wright* plaintiffs make no allegation that the right to a sound basic education under Article XI § 1 is "fundamental." The *Davids* plaintiffs do so allege. (*Davids* ¶¶ 5, 56). Our courts, however, have not recognized education as a fundamental right. *See Campaign For*

Fiscal Equity v. State of New York, 86 N.Y.2d 307, 319 (1995) ("CFE I"); *Board of Educ., Levittown Union Free School Dist. v. Nyquist*, 57 N.Y.2d 27, 41-43 (1982).[21] Thus, under authoritative precedent, to establish the unconstitutionality of duly enacted statutes plaintiffs must show that the challenged statutes are not rationally related to a valid state objective. *People v. Knox*, 12 N.Y.3d 60, 67 (2009).

Plaintiffs say school teaching would be improved if teachers served a longer probation; if earned tenure carried attenuated or no due process rights; and if teachers lost the protection of seniority. Our Legislature has made different and wiser judgments. Thus, even assuming this policy disagreement is justiciable, plaintiffs must overcome the heavy burden of demonstrating that the judgments of the Legislature have no rational basis. There can be no question that there exist rational, indeed compelling, bases for the challenged probationary, tenure and seniority laws. These bases have been repeatedly explained by the Legislature and our courts, over many decades.

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[21] The *Davids* complaint at paragraph 56 misstates the holding in *CFE I*. Our Court of Appeals has *not* recognized that education is a fundamental right under the State or federal Constitutions. *See CFE I*, 86 N.Y.2d at 319.

The Court is advised that NYSUT has asked, in pending litigation challenging the State's recently enacted property tax cap (Education Law § 2023-a) that the courts reconsider the holding that education is not a fundamental right, so far without success. *See New York State United Teachers v. State of New York*, 2014 NY Slip. Op. 24282 (Sup. Ct., Albany County 2014). NYSUT, in its challenge to the Tax Cap, has asked the court to consider whether the cap, which limits local school districts' ability to raise school property taxes, unlawfully interferes with local control of school *funding*, in derogation of the local control guaranteed by the Education Article. *See Board of Educ., Levittown Union Free School Dist.*, 57 N.Y.2d at 45-46. Unlike the *Wright* and *Davids* claims, NYSUT's claim addresses the ability of local school districts to provide adequate school *funding*, and is thus within the jurisprudence of all previous Education Article cases. *See e.g., New York Civ. Liberties Union v. State of New York,* 4 N.Y.3d 175, 179-181 (2005) and *Campaign for Fiscal Equity v. State of New York*, 100 N.Y.2d 893, 919 (2003) ("CFE II") (claim under Education Article must assert the State has failed in its obligations to provide adequate educational resources). NYSUT's tax cap challenge was dismissed, but its motion to amend the complaint has been granted. The case remains pending in the Albany County Supreme Court.

1. THE THREE YEAR PROBATIONARY TERM

Teacher defendants, of course, agree that teachers are essential to providing students with a sound basic education. As the Supreme Court noted more than 90 years ago, in *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923):

> Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable, essential, indeed, to the public welfare.

The tenure laws vest in local school boards the right to hire, evaluate and, when appropriate, terminate the employment of these essential professionals. Under Education Law §§ 2509, 2573, 3012 and 3014 a three-year probationary term has been established. A majority of other states have adopted a three year probationary term for teachers.[22]

During this three year probation, teachers are essentially employees at will, who can be fired for any reason or no reason, absent illegal motivation. *See Matter of Frasier v. Board of Educ. of City School Dist. of City of N.Y.*, 71 N.Y.2d 763, 765 (1988); *James v. Board of Educ.*, 37 N.Y.2d 891, 892 (1975). Probationary teachers are subject to rigorous evaluation under Education Law § 3012-c. Where a Board determines it needs additional time to evaluate a probationary teacher, probation may be extended. *Matter of Juul v. Board of Educ., Hempstead School Dist. No. 1, Hempstead*, 76 A.D.2d 837 (2d Dep't 1980), *aff'd* 55 N.Y.2d 648 (1981). A board of education's discretion to grant or deny tenure, as a matter of public policy expressed in the Education Law, cannot be diminished through collective bargaining. *Matter of Cohoes City School Dist. v. Cohoes Teachers Assn*, 40 N.Y.2d 774, 775 (1976).

[22] Education Commission of the States, 50 States Analysis (May 2014), at http://www.ecs.force.com/mbdata/mbquestRTL?rep=TT01. *See* Reilly Affirm. at Ex. "O".

The *Wright* plaintiffs counter that "[m]ost studies" demonstrate it takes at least four years to determine the effectiveness of a teacher.[23] (*Wright* ¶ 46). As noted in Point II, however, law in New York is not made by judicial review of competing academic studies. The debate over the length of teachers' probation has been argued for decades, and the Legislature has made the considered judgment that three years is sufficient to enable a Board of Education to make the tenure decision, but not so long as to discourage prospective teachers from joining the profession. *See* pp. 14-18, above. The *Wright* plaintiffs have alleged nothing to demonstrate that there is not a rational basis for the Legislature's determination that teachers should serve a three year probation.

2. TENURE/DUE PROCESS

Plaintiffs want to limit or eliminate[24] teachers' due process rights, claiming teachers receive "extraordinary" (*Wright* ¶ 36) or "super" (*Davids* ¶ 37) due process. Together, they seek to invalidate Education Law §§ 1102, 2509, 2510, 2573, 2585, 2588 2590, 2590(j), 3012, 3012-c, 3013, 3014, 3020, and 3020-a (*Wright* ¶ 6; *Davids* ¶ 36, fn. 1).

Under Education Law § 3020, a teacher can be disciplined for "just cause." Such causes include pedagogical incompetence; physical or mental disability; lack of certification; insubordination, immoral character or conduct unbecoming a teacher. Education Law § 3012(2)(a) - (c). Charges are filed with a board of education, which determines whether there is probable cause to bring a disciplinary proceeding. Education Law § 3020-a(1)-(2)(a). If probable cause is found, written charges are served, and the teacher may request a hearing.

[23] Incongruously, as noted, the *Wright* plaintiffs also say that for purposes of layoff an effectiveness determination *can* be made, so as to retain newly hired teachers over experienced ones. (*Wright* ¶¶ 68, 69, 74).

[24] Indeed, as explained at page 45-46, if plaintiffs are successful teachers would be left with no procedural due process rights at all.

Education Law § 3020-a(2)(a),(c). If a hearing is requested, the charges are heard by an impartial hearing officer mutually selected from a list maintained by the American Arbitration Association. Education Law § 3020-a(3)(a),(b)(ii). Thereafter, a hearing is held and a record of the hearing is made. Education Law § 3020-a(3)(c)(i)(D). After the hearing is closed, the hearing officer issues a decision. Education Law § 3020-a(4)(a). The process is to be complete, barring extraordinary circumstances, within 155 days. Education Law § 3020-a(3)(c)(vii),(4). In cases involving consecutive ineffective ratings, an even more expedited 60-day process is required. Education Law § 3020-a(3)(c)(i-a)(A).

These due process protections certainly do *not* guarantee "lifetime" or "permanent" employment, as the *Wright* plaintiffs so misleadingly allege.[25] (*Wright* ¶¶ 6, 24, 34, 40, 48, 63, 78 and 79) These laws only ensure that an educator who, in the unfettered discretion of her employing board of education has successfully completed her probation and *earned* tenure, is given a fair chance to defend herself if she is accused of misconduct, pedagogical incompetence or physical or mental disability.[26]

a. THERE IS A RATIONAL BASIS FOR TENURE

Despite its importance, teaching remains a moderately paid profession.[27] It is, therefore, entirely rational for the Legislature, in order to attract and retain effective teachers, to provide

[25] This is the same mistaken "popular belief" discredited in the 1980 Senate Memorandum cited above at p. 21.

[26] Similar legal rights are broadly accorded to teachers in most states and to most working people in much of the rest of the developed world. Most states provide tenure due process protection to educators. Education Commission of the States, 50 States Analysis May 2014, http://ecs.force.com/mbdata/mbquestRTL?rep=TT01. *See* Reilly Affirm. at Ex. "O". And, "America is unique in its adherence to the at-will rule." Kenneth G. Dau-Schmidt, Promoting Employee Voice in the American Economy: A Call for Comprehensive Reform, 94 Marq. L. Rev. 765, 826 (2011).

[27] According to the U.S. Department of Labor, Bureau of Labor Statistics, as of May 2013, the National mean annual wage for preschool, primary, secondary and special education school teachers was $54,750. *See* May 2013 National Occupational Employment and Wage Estimates, released April 1, 2014, available at http://www.bls.gov/oes/current/oes_nat.htm (last visited Oct. 22, 2014). In contrast, the National mean annual wage

teachers who have demonstrated effectiveness through years of competent service with significant due process protection against whimsical, arbitrary or retaliatory dismissal. It is entirely rational for the Legislature to conclude that ordinary working people, teachers included, desire a measure of employment security for themselves and their families. And, it is entirely rational for the Legislature to conclude that any employee who is accused of misconduct or incompetence deserves a fair chance to defend the charges.

More important, the tenure laws are a rational way to foster good education and to protect school children. Safeguarding good teachers from arbitrary dismissal or from undue political pressure protects and promotes academic freedom - - a cherished value in our State. Tenure also enables teachers to speak, on behalf of their students, about unsound educational practices or unsafe school conditions. Each of these rational and indeed compelling bases for tenure have been repeatedly emphasized by our Legislature and by our courts.

The due process protections of Education Law § 3020-a are a central part of a "comprehensive statutory tenure system," enacted in recognition of the need for "stability in the employment relationship between teachers and the school districts which employ them." *Holt v. Board of Educ. of Webutuck Cent. School Dist.,* 52 N.Y.2d 625, 632 (1981). The Court in *Holt* noted:

> One of the bulwarks of that tenure system is section 3020-a of the Education Law which protects tenured teachers from arbitrary

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for architects and engineers generally was $80,100; for lawyers, $131,990; for dentists, $168,870; and for physicians, $191,880. *Id.* In New York, the annual mean wage range for teachers in elementary, secondary and technical school is $61,380 to $75,470. *See* May 2013 State Occupational Employment and Wage Estimates, released April 1, 2014, available at http://www.bls.gov/oes/current/oes_ny.htm (last visited Oct. 22, 2014). For other professions in New York, the annual mean wages for engineers was $78,050; for lawyers, $153,490; for dentists, $160,950; and for physicians (general and family practice $181,150).] Teaching also remains a female-dominated profession. According to the Women's Bureau of the U.S. Department of Labor, more women are employed as elementary and middle school teachers than in other occupation. *See* http://www.dol.gov/wb/stats/leadoccupations.htm (last visited Oct. 22, 2014). Based on the 2013 National averages, 98% of pre-school and kindergarten teachers are women and 81% of elementary and middle school teachers are women.

> suspension or removal. **The statute has been recognized by this court as 'a critical part of the system of contemporary protections that safeguard tenured teachers from official or bureaucratic caprice.'** *Matter of Abramovich v. Board of Educ. of Cent. School Dist. No. 1 of Towns of Brookhaven & Smithtown,* 46 N.Y.2d 450, 454 (1979). (Emphasis supplied).

The Court of Appeals has also warned that the tenure system must be vigilantly protected against strategies that attempt to circumvent the will of the Legislature, and that the tenure statutes must be broadly construed in favor of teachers who have successfully completed their probationary periods. As stated in *Ricca v. Board of Educ. of City School Dist. of City of New York*, 47 N.Y.2d 385, 391 (1979):

> **[The tenure system] is a legislative expression of a firm public policy determination that the interests of the public in the education of our youth can best be served by a system designed to foster academic freedom in our schools and to protect competent teachers from the abuses they might be subjected to if they could be dismissed at the whim of their supervisors.** In order to effectuate these convergent purposes, it is necessary to construe the tenure system broadly in favor of the teacher, and to strictly police procedures which might result in the corruption of that system by manipulation of the requirements for tenure. (Emphasis supplied)

*Accord Costello v. Board of Educ. of E. Islip Union Free School Dist.,*250 A.D.2d 846, 846-847 (2d Dep't 1998). Commenting on the procedural guarantees set forth in the statute, the Court of Appeals stated:

> We do not gainsay the importance of these standards both in terms of their role in protecting the rights of individual teachers whose years of satisfactory service have earned them this security **and in fostering an independent and professional corps of teachers**. [*Abramovich, supra,* 46 N.Y.2d at 455 (Emphasis supplied)].

The *Wright* plaintiffs denigrate New York's tenure laws as "outdated." (*Wright* ¶ 3). The truth is that these laws are more important than ever. The due process protections of the tenure

laws safeguard teachers from dismissal for advocating for students' educational rights, or for exposing unsound educational practices or safety problems within the schools.

In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), a sharply divided Supreme Court held that a public employee has *no* First Amendment protection when speaking as an employee, rather than as a private citizen speaking about a matter of public concern. *Id.* at 421. The *Garcetti* holding has since been frequently applied to public school teachers, with the courts consistently holding that a teacher speaking in her employment capacity is not entitled to First Amendment protection. *See e.g., Massaro v. New York City Dept. of Educ.*, 481 Fed. Appx. 653 (2d Cir. 2012) (holding that a teacher's complaints about the unsanitary conditions of her classroom were not protected); *Weintraub v. New York City Dept. of Educ.*, 593 F.3d 196 (2d Cir. 2010) (teacher's complaint concerning school's failure to enforce classroom discipline not protected); *Woodlock v. Orange Ulster B.O.C.E.S*, 281 Fed. Appx. 66 (2d Cir. 2008) (holding that a school counselor's complaints that the school was in violation of state education department's recommendations was not protected); *Palmer v. Penfield Cent. School Dist.*, 918 F.Supp.2d 192 (W.D.N.Y. 2013) (upholding a district's denial of tenure for a probationary teacher who raised concerns about the disparate treatment of minority students because speech not protected); *Stahura-Uhl v. Iroquois Cent. School Dist.*, 836 F.Supp.2d 132 (W.D.N.Y. 2011) (finding that a teacher who spoke publicly about the inadequacy of special education programs was speaking in an employment capacity and thus not protected by the First Amendment). *See also O'Connor v. Huntington Union Free School Dist.*, 2014 WL 1233038 at pp. 8-9 (E.D.N.Y. 2014) (compiling similar cases and noting that teacher reports of student cheating, testing improprieties, disciplinary problems, fraud with respect to student files, school trip safety, improper tutoring, or

abuse of students by another teacher are all within a teacher's duties and therefore unprotected by the First Amendment).

Thus, in light of *Garcetti* and its progeny, it is entirely rational for the Legislature to protect teachers who alert school officials to unsound educational practices, discrimination, safety hazards, bullying or child abuse. For the good of students and public education, not only is this rational, it is *compellingly* so.

b. THE DUE PROCESS PROTECTIONS OF EDUCATION LAW § 3020-a ARE NOT EXCESSIVE

Plaintiffs may say that they do not oppose due process *per se,* only that teachers get "extraordinary" or "super" due process (*Wright* ¶ 36; *Davids* ¶ 37). But, in making this claim, plaintiffs have alleged neither a legally cognizable claim nor stated facts, even if deemed true, that support such a claim.

Legally, there is no basis for a claim that the Education Article limits the Legislature's authority to establish public school teachers' terms and conditions of employment, including the quantum of due process protection for teachers who have earned tenure. Indeed, plaintiffs' claim is radical - - the State through labor laws even has the authority to regulate *private* employment. *See McKinney's Labor Law*. The State's authority to regulate public employment is unquestionably even greater. *See e.g., Garcetti,* 547 U.S. at 418, noting that "[t]he government as employer, indeed has far broader powers than does the government as sovereign (internal citation and quotation marks omitted)."

Our courts have never limited the Legislature's authority to provide statutory employment safeguards[28] to public employees. Rather, the courts have ruled only that the constitution sets a

[28] The courts have ruled that the *imperative* provisions of the tenure laws, which are in derogation of the common law right of contract (*see Moritz*, 60 A.D.2d at 167), limit the right of school districts and unions to alter those

procedural due process *floor* for public employees who have an objective expectancy of continued employment, whether that expectancy is created by law, individual contract or a collective bargaining agreement. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577-78 (1972); *Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532, 542-43 (1985). There is no legal basis for plaintiffs' claim that the Legislature cannot provide greater procedural protection to employees than that which is minimally required by constitutional guarantee. In light of the importance of protecting qualified, effective teachers from unjust firing, it is entirely rational for the Legislature, and well within its power, to provide more due process than the constitutional minimum.

Moreover, there is every reason for the Legislature to provide substantial due process protections to public employees -- teachers included. The Legislature has recognized what plaintiffs clearly do not - - that taking away a person's employment, and perhaps the ability to pursue a chosen profession and to support one's family - - is a major deprivation of liberty and property.

An individual teacher who has been appointed on tenure has a constitutionally protected property interest in her continued employment. *Matter of Gould v. Board of Educ. of Sewanhaka Central High School Dist.*, 81 N.Y.2d 446, 451 (1992). To ordinary working people - - including school teachers - - the property interest in one's employment is critically important. As the Supreme Court has noted:

> . . . the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood. [citations omitted] While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the

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provisions - - a prominent example being the inability to bargain away a board of education's authority to make the tenure decision. *See Matter of Cohoes City School Dist.*, 40 N.Y.2d at 777-78.

> questionable circumstances under which he left his previous job (*Loudermill,* 470 U.S. at 543).

The right to teach is also a constitutionally protected liberty interest. *Meyer,* 262 U.S. at 400; *accord Matter of Knutsen v. Bolas*, 114 Misc. 2d 130, 132 (Sup. Ct., Erie Co. 1982), *aff'd* 96 A.D.2d 723 (4th Dep't 1983), *lv. denied*, 60 N.Y.2d 557 (1983) (explaining that "[l]iberty under the Fourteenth Amendment . . . includes the right of an individual to engage in any of the common occupations of life"). Given the importance of these interests, it is rational for the Legislature to provide more due process than the bare minimum required by the Constitution.

Plaintiffs next assert that teachers are provided more due process than other public servants. (*Wright* ¶ 36; *Davids* ¶¶ 37, 42) This claim has no merit.

First, there is no legal basis for a claim that the Legislature may not rationally provide different disciplinary procedures for different classes of employees, so long as those differences are rationally based. Given the importance of attracting and retaining good teachers[29] – something the plaintiffs can hardly dispute[30] – it is entirely rational for the Legislature to establish a process that guarantees a fair hearing before teachers who have earned tenure are discharged.

Second, plaintiffs are simply wrong when they assert that teachers have more due process protection than other public employees. By statute, and through collective bargaining, hundreds of thousands of other public employees in New York are entitled to substantially similar and, in some respects, even superior due process rights.

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[29] A North Carolina court recently found that the Legislature's action in eliminating tenure "hurt North Carolina public schools by making it harder for school districts to attract and retain qualified teachers. *See North Carolina Educators Ass'n v. State*, 2014 WL 4952101 (p. 4). While this Court is not required to follow or even note out-of-state precedent, teacher defendants submit that most working people, especially in today's uncertain economy, understand that reasonable employment security is an important protection for themselves and for their families.

[30] Both complaints acknowledge a valid state interest in the recruitment of qualified teachers. (*Wright* ¶ 73; *Davids* ¶ 50).

Pursuant to Civil Service Law §§ 75 and 76, most civil servants who have successfully completed probation are entitled to a due process hearing if they are accused of incompetence[31] or misconduct. Unlike 3020-a, which has a 155-day time limit for hearings, and a 60-day limit for certain pedagogical incompetency hearings, under section 75 there are no time limits for completion of the hearing.

Similarly, the *Wright* plaintiffs challenge as too short 3020-a's three year statute of limitations for bringing charges (*Wright* ¶ 54), but fail to note that Civil Service Law § 75 has a much shorter eighteen month statute of limitations, and a one-year statute of limitations for certain employees. Civil Service Law § 75(4).[32]

Further, under Section 75, the final administrative decision is judicially reviewable through CPLR Article 78, which has a four month statute of limitations (Civil Service Law § 76(1)), as opposed to the 10-day statute of limitations to challenge a 3020-a decision. Education Law § 3020-a(5).

More important, Section 75's procedures may be replaced by collectively bargained procedures. Civil Service Law § 76 (4); *Antinore v. State of New York*, 49 A.D.2d 6 (4th Dep't 1975), *aff'd* 40 N.Y.2d 921 (1976). Disciplinary procedures are, in fact, a mandatory subject of bargaining under New York's Taylor Law. Civil Service Law §§ 200 *et seq.* *See Matter of New York City Tr. Auth. v. Public Empl. Relations Bd.*, 276 A.D.2d 702, 703 (2d Dep't 2000); *Matter of Patrolmen's Benevolent Assn of City of N.Y., Inc. v. New York State Public Empl. Relations Bd.*, 6 N.Y.3d 563, 571 (2006) (disciplinary procedures are a mandatory subject of bargaining absent legislation specifically committing discipline to the discretion of the employer). Most

[31] Civil servants accused of job or non-job related mental or physical disability are entitled to a panoply of due process protections under Civil Service Law §§ 71-73. Tenured teachers so accused are entitled to request a 3020-a hearing.

[32] Both 3020-a and Civil Service Law §75 exempt acts that would constitute a crime from their limitation provisions.

state employees, and many county and municipal employees, are covered by collective bargaining agreements that contain disciplinary procedures that are substantially equivalent to Education Law § 3020-a.

The collective bargaining agreements between the State of New York and the unions representing state workers are public records, are filed with the Public Employment Relations Board (4 NYCRR 214.1), and are publicly available on the website of the Governor's Office of Employee Relations. *See* http://www.goer.ny.gov/Labor_Relations/Contracts/ (last visited October 24, 2014. The contract between the State and the Public Employees Federation (PEF) is a good example of how plaintiffs' claim that teachers have extraordinary due process rights is demonstrably false.

PEF represents New York's professional, scientific and technical services unit, which includes doctors, lawyers, nurses, teachers in state institutions, environmental scientists, parole officers, and countless other professional employees. *Id.* The procedure under Article 33 of the PEF-State agreement covers discipline in lieu of Civil Service Law §§ 75-76. *See* Reilly Affirm. Ex. "K" at Article 33.1.

Article 33.5(a) provides that employees may not be disciplined except for "just cause."[33] This is the exact standard found in Education Law § 3020 - - and the standard challenged by the *Wright* plaintiffs. (*Wright* ¶50). The statute of limitations for Article 33 charges is *one* year (Reilly Affirm. Ex. "K" at Article 33.5(h)), as opposed to the *three* year statute in 3020-a, which, again, the *Wright* plaintiffs attack as too short. (*Wright* ¶ 54).

[33] "Just Cause" is a well-known disciplinary standard, prevalent in most private and public sector collective bargaining agreements. *See* ELKOURI AND ELKOURI, How Arbitration Works, 15-4 7th Ed. 2012, annexed to Reilly Affirm. at Ex. "M". The allegation in the *Davids* complaint (*Davids*, ¶36) that private sector workers do not have due process protections is not true, at least with respect to workers under collective bargaining agreements.

As in 3020-a, the burden of proving the charges is on the employer. *See* Reilly Affirm. Ex. "K" at Article 33.3(d). Charged employees may be suspended without pay,[34] but only if the State can demonstrate that the accused's presence at work would disrupt operations or represent a serious threat to persons or property. *Id.* at Article 33.4(a)(i). A suspension without pay is reviewable by a neutral arbitrator. *Id.* at Article 33.4(c)(1).

The charges themselves are subject to final and binding arbitration before a neutral arbitrator, just as in 3020-a. *Id.* at Article 33.5(f). The arbitrator's decision as to guilt and penalty is "final and binding" and subject to limited review under CPLR Article 75, just as in § 3020-a. *Id.* at Article 33.5(f)(5). Notably, unlike 3020-a, there are no time limits under Article 33 requiring that a case be completed within a certain time frame. *See e.g., Ford v. PEF*, 175 A.D.2d 85 (1st Dep't 1991) (testimony in disciplinary arbitration involving a physician employed at Manhattan Psychiatric Center lasted four years).

Likewise, the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO ("CSEA") represents New York State public employees in state and local government as well as school districts.[35] *See, e.g., Barnes v. Pilgrim Psychiatric Center*, 860 F.Supp.2d 194 (E.D.N.Y. 2013). CSEA members, pursuant to a collective bargaining agreement, also have substantially similar due process protections, including the right to have notice of charges, investigation and a due process hearing before a neutral arbitrator. *See* Reilly Affirm. Ex. "L" at

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[34] Again, while generally teachers charged under 3020-a are suspended with pay, if a teacher were to obstruct or delay the process, the teacher could forfeit his or her salary for the period of delay. *Belluardo,* 68 A.D.2d at 887; *Marconi,* 215 A.D2d at 660.

[35] The Administrative Services Unit pertains to office support staff and administrative personnel including keyboard specialists, clerks, and computer operators. The Operational Services unit includes craft workers, maintenance and repair personnel, and machine operators, including maintenance assistants, cleaners, and highway maintenance workers. The Institutional Services Unit includes therapeutic and custodial care workers for clients including mental health therapy aides, developmental aides, licensed practical nurses, food service workers, and youth division aides. The Division of Military and Naval Affairs Unit includes civilian administrative employees of the NYS National Guard and Air Guard including armory maintenance workers, armory mechanics, clerks, and keyboard specialists. *See* http://goer.ny.gov/Labor_Relations/Contracts/ (last visited October 24, 2014).

Article 33 of each CSEA unit's CBA at http://www.goer.ny.gov/Labor_Relations/Contracts/ (last visited October 24, 2014).

Even the most cursory review of case law demonstrates that it is not just professionals employed by the State who have these protections. Many local government employees also enjoy collectively bargained due process rights. *See e.g., Matter of New York City Tr. Auth. v. Transport Workers of Am.*, 14 N.Y.3d 119 (2010) (NYC Transit Workers); *Matter of Shenendehowa Cent. Sch. Dist. Bd. of Educ. (Civil Serv. Empls. Assn. Inc., Local 100, AFSCME, AFL-CIO, Local 864)*, 20 N.Y.3d 1026 (2013) (school bus drivers).

Plaintiffs next claim that if the challenged statutes are struck down, teachers would retain the due process rights of other public employees. (*Davids* ¶ 42). This is simply not true. Pursuant to Civil Service Law § 35(g), teachers are "unclassified" public employees and thus not covered by Civil Service Law § 75. Further, the *Wright* plaintiffs challenge the right of teacher unions to collectively bargain alternative disciplinary procedures. (*Wright* ¶ 61). Accordingly, if the challenged statutes are struck down, teachers would be without any statutory or contractual due process protections at all.

Even more important, if the plaintiffs are successful, teachers would also be left without any *constitutional* due process rights. It is the objective expectancy of continued employment - - an expectancy that is created by the challenged statutes' guarantee that teachers will not be terminated but for "just cause" - - that creates a property interest in employment protected by the Constitution's guarantee of due process. *See Loudermill*, 470 U.S. at 539. In New York, that objective expectancy is created by the just cause protections contained in Education Law §§ 2573, 3012 and 3020 - - statutes the plaintiffs specifically ask this Court to strike down. (*Wright*

¶ 6, *Davids* ¶ 39). If these statutes are struck down, the teachers and other pedagogues now protected by the tenure laws would have *no* right to procedural due process before being stripped of their employment. Nowhere do plaintiffs acknowledge that they seek such a radical outcome.

Clearly then, there is no legal basis for the claim that teacher due process rights under New York Law are superior to those enjoyed by other public servants, either under law or under collective bargaining agreements. Indeed, as noted, the law imposes unique limitations *solely* on teachers with respect to the length of such hearings.

The weakness of plaintiffs' claims about teacher due process is perhaps best illustrated by their hyperbolic assertions that section 3020-a establishes "dozens of hurdles" to firing an ineffective teacher (*Wright* ¶ 50), or provides teachers an "astounding array" of rights and privileges. (*Davids* ¶ 37). These "dozens of hurdles" and "astounding" privileges are then identified as investigations, hearings, improvement plans, arbitration processes and administrative appeals. (*Wright* ¶ 50; *Davids* ¶ 38). Of course, except for the improvement plans required in some cases under Education Law § 3012-c, these so-called "hurdles" and "astounding" privileges (investigation/hearing/appeal) are the fundamentals of procedural due process. Our Court of Appeals has long held that in administrative hearings, no element of a fair trial can be dispensed with unless waived by the party whose rights are at stake. *See e.g., Matter of Hecht v. Monaghan*, 307 N.Y. 461, 470 (1954). When a teacher is accused of misconduct or incompetence, should there be no investigation? If the accusation is denied, should there be no hearing? Our constitution protects due process because people are sometimes wrongly or falsely accused, and because not every infraction warrants discharge. *See Loudermill,* 470 U.S. at 542-

43.[36] The plaintiffs' claim that the Legislature has violated the Constitution by providing such basic safeguards to essential public servants is utterly without legal merit.

Finally, the plaintiffs' claim that 3020-a hearings take too long is specious. First, our courts have consistently prioritized due process over the speed of adjudicatory proceedings. As the U.S. Supreme Court noted in *Stanley v. Illinois,* 405 U.S. 645, 656 (1972):

> [T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of vulnerable citizenry from the overbearing concern for efficiency and efficacy . . .

New York courts have also held that "the mere passage of time in rendering an administrative determination" is insufficient to "demonstrate actual and substantial prejudice." *Matter of Board of Educ. of New Paltz Cent. School Dist., v. Donaldson*, 41 A.D.3d 1138, 1139 (3d Dep't 2007); *see also Matter of Diaz Chem. Corp. v. New York State Div. of Human Rights*, 91 N.Y.2d 932, 933 (1998) (finding that an eleven year delay in the processing of a discrimination complaint was not "per se prejudicial"); *Matter of Corning Glass Works v. Ovsanik*, 84 N.Y.2d 619, 623 (1994) (rejecting claim that an eight-and-a-half year delay in the processing of a discrimination complaint was, on its face, "substantially prejudicial as a matter of law"). Thus, the lengthy duration of a disciplinary hearing does not render it facially invalid.

Second, as noted above, recent changes to New York law have streamlined the disciplinary process for tenured teachers, ensuring the prompt resolutions of these cases. Again, one must question why the plaintiffs' counsel made no effort to supply the Court with data under

[36] Indeed, the First Department recently held that public policy favors the retention of a good teacher who has a proven record of making a positive impact on students, even when the teacher may be guilty of certain disciplinary infractions. *See Matter of Principe v. New York City Dept. of Educ.,* 94 A.D.3d 431, 433 (1st Dep't 2012), *aff'd* 20 N.Y.3d 963 (2012).

the amended statutes, given that such data are maintained by and readily available from the New York State Education Department.

Clearly, tenure is a rational way to attract and retain good teachers, to promote academic freedom, and to enable teachers to speak on behalf of students without fear of unjust reprisal - - all legitimate state interests.

3. SENIORITY BASED LAYOFFS

The plaintiffs complain that "only" ten states use seniority to determine teacher layoffs; then ask the Court to declare that New York may not constitutionally do so. (*Wright* ¶67). While, again, this is a non-justiciable policy matter, it is certain that New York's statutory seniority provisions easily meet the test of rationality.

Pursuant to the Education Law, qualified teachers are laid off and recalled to work based on seniority. *See* Education Law §§ 2510, 2585, 2588 and 3013. Specifically, when a board of education abolishes a position, "the services of the teacher having the least seniority in the system within the tenure of the position abolished shall be discontinued." *See e.g.,* Education Law § 2510(2).

Seniority promotes continuity of service and protects qualified teachers who might be targeted based on age, rate of pay, cronyism or other improper, subjective motivation. When economic layoffs are required, it provides an *objective* mechanism for determining which employee is excessed. In terms of fairness, seniority recognizes that when an employee remains with one employer for many years, that employee may become less valuable to other employers and would find it difficult to find another job if laid off. Harry T. Edwards, *Seniority Systems in Collective Bargaining*, Arbitration in Practice, at 121-22 (Arnold M. Zack Ed., 1984).

As described by one arbitrator, seniority "provides an objective standard of selection, thus eliminating the possibility of favoritism and discrimination in various phases of the employment relation." *Armstrong Cork Co.*, 23 LA 366, 367 (Williams, 1954). A New York court echoed this principle:

> The tenure and seniority provisions serve a firm public policy to protect the interests of the public in the education of our youth which can "best be served by a system designed to foster academic freedom in our schools and to protect competent teachers from the abuses they might be subjected to if they could be dismissed at the whim of their supervisors." *Ricca*, 47 N.Y.2d at 391 (1979). Academic freedom is the goal for those to whom the minds of our children are entrusted. (*Matter of Lambert v. Board of Educ. of Middle Country Cent. School Dist.*, 174 Misc.2d 487, 489 (Sup. Ct., Nassau Co. 1997)).

The United States Supreme Court has also weighed in on the issue of seniority, explaining how a seniority system avoids the use of "subjective evaluations." *California Brewers Ass'n v. Bryant*, 444 U.S. 598, 606 (1980). Seniority as a criterion for determining layoffs and other elements of employee compensation and protection are so well-established that they are exempted from our Nation's anti-discrimination laws. 42 U.S.C. § 2000e-2(h) provides:

> (h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions.
>
> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . .

Since 1951, the Education Law has required that seniority be used for teacher layoffs in New York. L. 1950, c. 782, §3. But teachers are not the only public employees who have seniority protection. The Civil Service Law has required that seniority be the basis for layoffs

since 1909. L. 1909, c. 15, § 31. Competitive class employees in the state and municipal services are laid off and recalled to work based on seniority. Civil Service Law § 80(1).

The courts have recognized that the Education Law's seniority and layoff provisions do not just address teachers' interest, but also those of school districts:

> When a position is abolished, the teacher with the least seniority in the tenure area of the abolished position must be excessed (Education Law, § 2510, subd 2). This system gives effect to both the employees' interest in job security in their particular area of educational appointment and to the school board's interest in efficient administration. (*Leggio,* 69 A.D.2d at 448-49).

Thus, the Legislature's policies delineated by Education Law §§ 2510, 2585, 2588, and 3013 serve a practical purpose for school districts.

Similarly, in *Matter of Silver v. Board of Educ. of W. Canada Val. Cent. School Dist., Newport*, 46 A.D.2d 427, 431-32 (4th Dep't 1975), a case concerning Education Law § 2510(2), the court stated:

> To prevent the use of favoritism and personal preference in the retention of teachers, the statutes are designed to protect tenured teachers within their respective areas, in the order of their seniority, from dismissal without regard for the comparative abilities of the teachers. To enable it to maintain a high level of ability in its staff of teachers within the above rule [a] Board [of Education] must be alert to the capabilities of its teachers during their probationary periods and determine then whether to retain or release them. It cannot thereafter change the employment rules and eliminate a teacher whom it deems less capable than a junior teacher or does not like, without following the usual statutory procedures. Any change in the method of determining area of tenure and employment must be prospective and made according to standards established by the Legislature or the Board of Regents. (*citing Matter of Baer v. Nyquist*, 34 N.Y.2d 291 (1974)).

Our Legislature has had many recent opportunities to revise seniority laws, but has made the policy decision not to do so. *See* pp. 25-26 above. Seniority based layoffs are objective and

have a rational basis. In the context of plaintiffs' legal challenge, that is sufficient to end the inquiry.[37]

B. PLAINTIFFS' CONCLUSORY AND SPECULATIVE FACTUAL ALLEGATIONS ARE INSUFFICIENT TO STATE A CAUSE OF ACTION.

Both the *Wright* complaint and the *Davids* complaint contain legal assertions that are premised on wholly conclusory and speculative factual allegations. Thus, plaintiffs have failed to state a claim and the motion to dismiss should be granted.

It is well-settled that the factual allegations in support of a cause of action must not be merely speculative. In *Beka Realty LLC v. JP Morgan Chase Bank, N.A.*, 41 Misc.3d 1213(A)(Sup. Ct., Kings Co. 2013), the court explained:

> While the complaint need not contain detailed factual allegations, the factual allegations must be sufficient to raise the claimed right to relief above the level of mere speculation and to state a claim for relief that is, at least, plausible on its face. Conclusory allegations or legal conclusions masquerading as factual allegations will not suffice . . . A court is not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.

"While it is axiomatic that a court must assume the truth of the complaint's allegations, such an assumption must fail where there are conclusory allegations lacking factual support." *Elsky v. KM Ins. Brokers*, 139 A.D.2d 691 (2d Dep't 1988). As the court stated in *Matter of Mazur v. Ryan*, 98 A.D.2d 974, 976 (4th Dep't 1983), *appeal dismissed,* 61 N.Y.2d 832 (1984),

[37] The *Wright* plaintiffs allege the layoff of 572 teachers in the Rochester City School District from 2010-2012. (*Wright* ¶ 70). The *Davids* plaintiffs allege the statewide layoff of more than 7,000 teachers in 2011 alone. (*Davids* ¶ 48). The plaintiffs could perhaps frame a proper Education Article claim if they alleged that Rochester City School District, or any other adversely affected district, is not providing enough qualified teachers because the lack of adequate funding has led to so many teacher layoffs. *See e.g., Paynter,* 100 N.Y.2d at 440. But, plaintiffs pointedly do not ask the Court to ensure that school districts have enough funding to retain an adequate number of teachers. Apparently, with respect to economic layoffs, plaintiffs are not concerned with returning these teachers to their classrooms, or with adequate school staffing or reasonable class size. Plaintiffs only seek to diminish teachers' employment safeguards.

"mere conclusory allegations are not deemed to be true when examining the sufficiency of a petition against a motion to dismiss on an objection on a point of law." *See also Riback v. Margulis*, 43 A.D.3d 1023 (2d Dep't 2007) (holding that the complaint was properly dismissed because the Surrogate's Court properly determined that the speculative and conclusory allegations of the complaint failed to state a cause of action); *O'Riordan v. Suffolk Ch. Local No. 852, Civ. Serv. Empls. Assn.*, 95 A.D.2d 800 (2d Dep't 1983) (affirmed lower court's grant of a motion to dismiss pursuant to CPLR § 3211 (a)(7) on grounds that complaint failed to state a cause of action as plaintiff's vague and conclusory allegations were too speculative).

Here, neither complaint cites a single specific instance where an ineffective teacher has been retained because of the challenged laws. For example, the *Wright* plaintiffs' main premise in claiming that Education Law § 3020-a is unconstitutional is that the "[d]isciplinary [s]tatutes result in the retention of ineffective teachers." (*Wright* ¶ 50). This conclusory statement is entirely based on speculation. Additionally, the *Wright* plaintiffs make the bald assertion that "the standard for proving just cause to terminate a teacher is nigh impossible to satisfy," and that "[d]isciplinary proceedings are rarely initiated." (*Wright* ¶¶ 50, 52). Even more egregious are the unsupported claims that "administrators are deterred from giving an Ineffective rating" and that "[o]n information and belief, principals and other administrators may be inclined to rate teachers artificially high because of the lengthy appeals process for an ineffectiveness rating and because they must partake in the development and execution of a teacher improvement plan ("TIP") for Developing and Ineffective teachers." (*Wright* ¶ 53).[38]

[38] The plaintiffs ignore the fact that public school principals are also safeguarded by the tenure laws. *See* Education Law §§ 2509(2), 2573 and 3012. For all the reasons tenure is appropriate for teachers, it is likewise appropriate for principals.

The *Wright* plaintiffs also speculate that "it may be difficult for school districts to collect enough evidence for a 3020-a hearing within the three-year period." (*Wright* ¶ 54). The *Wright* plaintiffs assert, with no factual support, that Education Law §3020-a proceedings are "futile" and that "dismissals are so rare not because there are no incompetent teachers, but because the Permanent Employment and Disciplinary Statutes make it impossible to fire them." (*Wright* ¶¶ 62-63). Plaintiffs conclude, with no foundational support, that "[t]he result of these proceedings is that ineffective teachers return to the classroom, and students are denied the adequate education that is their right." (*Wright* ¶ 65). The *Wright* plaintiffs' entire argument is premised such on hyperbole and speculation.

Like the *Wright* complaint, the *Davids* amended complaint rests on sweeping, purely speculative allegations. For instance, the *Davids* complaint asserts that "most ineffective teachers are not dismissed for their poor performance, instead remaining as teachers in New York classrooms" (*Davids* ¶ 32), and "New York principals and school district administrators believe that attempting to dismiss ineffective teachers is futile and prohibitively resource-intensive, and that the dismissal process established by the Challenged Statutes is unlikely to result in dismissal of those teachers." (*Davids* ¶ 33). The *Davids* plaintiffs additionally assert "[t]he Challenged Statutes prevent school administrators from meaningfully considering their students' need for effective teachers when making teacher employment and dismissal decisions" and that "[o]n information and belief, in the absence of the Challenged Statutes, school administrators would make teacher employment and dismissal decisions based, in larger part and/or entirely, on their students' need for effective teachers." (*Davids* ¶ 35). These claims are entirely without factual basis.

Both complaints should be dismissed for failure to state a cause of action.

POINT V

ALTERNATIVELY, THE MOTION TO DISMISS SHOULD BE GRANTED BECAUSE THE COURT SHOULD NOT PROCEED IN THE ABSENCE OF PERSONS WHO SHOULD BE PARTIES.

The complaints should be dismissed on the grounds discussed in Points I-IV but, if for any reason they are not, then they must be dismissed for failure to join necessary parties. This is because the *Wright* plaintiffs, in addition to their attack on the statutory due process and seniority safeguards, also attack the right of employee organizations representing teachers to negotiate alternative disciplinary procedures under Education Law § 3020(1). (*Wright* ¶ 61). Yet, the *Wright* plaintiffs have not joined the parties to these allegedly illegal agreements.

The *Wright* plaintiffs complain that "collective bargaining agreements make it even more difficult to remove ineffective teachers and add conditions that delay the process even further." *Id.* And yet, save a single inaccurate allegation about the contract between the UFT and City of New York,[39] the complaint identifies no collective bargaining agreements and no contractual provisions that supposedly run afoul of the Education Article. If the *Wright* plaintiffs wish to challenge the right of the teacher unions and school districts to collectively bargain alternative disciplinary procedures, they should identify the agreements they challenge and join the parties to those agreements.[40]

In New York, collective bargaining is an important right. The Education Article guarantees New York's school children a sound basic education. But, New York does not abandon them when they become adults and join the workforce. To the contrary, Article I §17 of New York's Bill of Rights provides that:

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[39] The UFT is a separate intervenor-defendant and has separately and accurately addressed its collective bargaining agreement.

[40] Such agreements are filed with PERB (4 NYCRR 214.1) and are thus readily accessible to plaintiffs.

> Labor of human beings is not a commodity . . . Employees shall have the right to organize and bargain collectively through representatives of their own choosing.

Thus, under the New York Constitution, the labor of ordinary working people is respected,[41] and the right of working people to bargain over their terms and conditions is protected as a *fundamental* right. *Domanick v. Triboro Coach Corp.*, 18 N.Y.S.2d 650, 653 (Sup. Ct., New York Co., 1940). Indeed, this right is "consonant" with the First Amendment protected rights of speech and association. *Board of Educ., Cent. School Dist. No. 1, Town of Grand Is. v. Helsby*, 37 A.D.2d 493, 497 (4th Dep't 1971), *aff'd* 32 N.Y.2d 660 (1973).

This right is also strongly supported by New York public policy and statutory law. Civil Service Law § 200 declares it to be New York's public policy to promote public sector collective bargaining, and disciplinary procedures are, as noted, a mandatory subject of bargaining.

Not content with their attack on the statutory safeguards developed by the Legislature to promote the employment of qualified public school teachers, the *Wright* plaintiffs also want to strip teachers of their already limited collective bargaining rights.[42] This would leave teachers without the common law right to contract, s*ee Matter of Moritz,* 60 A.D.2d at 167, without statutory safeguards, without constitutional due process protections that flow from those statutes, and without collective bargaining rights. But, if the *Wright* plaintiffs seek to challenge the right to collectively bargain, or to attack individual collective bargaining agreements, they should

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[41] The *Davids* complaint disparagingly describes allegedly ineffective teachers as "lemons." (*Davids* ¶ 33). There are procedures in place to identify, remediate and, if need be, remove ineffective teachers. Such disrespectful language has no place in a pleading.

[42] The right to bargain alternatives to 3020-a procedures is not unfettered. All agreements that first become effective after July 1, 2010, must result in the disposition of cases within the statutory time limits provided by section 3020-a. *See* Education Law § 3020(1). No similar restriction applies to alternative disciplinary procedures negotiated under Civil Service Law § 75.

identify the contracts they are attacking; specify how those contracts allegedly violate the constitution; and join the parties to those agreements so that they may be heard.

CPLR § 1001(a) provides that "[p]ersons who ought to be parties" shall be made plaintiffs or defendants if (1) "complete relief is to be accorded between the persons who are parties to the action" or (2) the judgment may in some way inequitably affect the person who ought to be a party. This provision is intended "'not merely to provide a procedural convenience but to implement a requisite of due process - - the opportunity to be heard before one's rights or interests are adversely affected.'" *Matter of 27th St. Block Assn. v. Dormitory Auth. of State of N.Y.*, 302 A.D.2d 155, 160 (1st Dep't 2002), (*quoting Matter of Martin v. Ronan*, 47 N.Y.2d 486, 490 (1979)); *see also Scarlino v. Fathi*, 107 A.D.3d 514, 515 (1st Dep't 2013) (finding that a national labor union and its regional governing body were necessary parties because they may be inequitably affected by the judgment). In an action to set aside a contract, all parties to the contract are indispensable. *Stanley v. Amalithone Realty, Inc.*, 31 Misc.3d 995, 1000-1001 (Sup. Ct., NY Co. 2011), *aff'd* 94 A.D.3d 140 (1st Dep't 2012), *lv. den.*, 20 N.Y.3d 857 (2013). Here, although the plaintiffs do not allege a breach of contract, one result of the relief they are seeking is that terms of the indispensable parties' contracts likely would be voided. Thus, those parties are indispensable in much the same way that a party to a contract allegedly breached is indispensable.

The local teachers' unions and school districts who are parties to collective bargaining agreements that contain alternate procedures to Education Law §3020-a are indispensible parties to this action, as a judgment granting the relief plaintiffs seek would likely void those agreements. Accordingly, the Court should not proceed in the absence of persons who should be a party. CPLR § 3211(a)(10); *See Amalithone Realty*, 31Misc.3d at 1000-1001.

CONCLUSION

Ultimately, this case boils down to plaintiffs' desire to judicially impose a harsh new ideology on public education. The plaintiffs say they want more effective teachers for their children, but nothing in either complaint seeks relief that would elevate the teaching profession or attract or protect good teachers. Indeed, given plaintiffs' invitation to the Court to rewrite New York's Education Law, plaintiffs could just as easily ask this Court to require smaller class sizes; more classroom assistants or aides; increased special education services; more reading teachers or counselors; better technology; or universal pre-Kindergarten. Plaintiffs could ask the Court to restore funding to struggling school districts that have been decimated by teacher layoffs, or to address New York's unequal educational funding system, under which our poor and minority students – students with the greatest educational need – are provided the fewest resources. All such resource claims, if factually supported, would be proper under the Education Article. But plaintiffs ask for none of these things.

Instead, plaintiffs posit the radical, utterly counterproductive notion that public education will be improved by depriving *every* teacher of the safeguards they are provided under the tenure laws. Fortunately, our Legislature, over more than 100 years of constant legislative refinement, has made better policy choices.

The challenged statutes require teachers to serve on probation for considerably longer than most other public employees. They require that teachers be rigorously evaluated during that probation. They give school boards virtually unfettered discretion whether to grant tenure. Once tenure is *earned*, these laws provide prompt, reasonable due process protection to safeguard good teachers from unjust dismissal, to promote academic freedom, and to enable teachers to speak on

behalf of students' educational and safety needs without fear of unjust reprisal. The challenged laws encourage long-term stability and dedicated service through seniority safeguards.

If plaintiffs' claims are successful, each of these dedicated teacher defendants, and over 250,000 other devoted school teachers, will be stripped of long-standing statutory safeguards that are a crucial part of their terms and conditions of employment, that promote public education, and that protect their students.

The motion to dismiss should be granted.

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