SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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.

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

CITY DEFENDANTS' 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 upon all the pleadings and proceedings heretofore had herein and the memorandum of law in support of the motion to dismiss served by Defendants City of New York and New York City Department of Education ("City Defendants"), the City Defendants will move this Court, located at 10 Richmond Terrace, Staten Island, New York 10301, before the Hon. Philip G. Minardo, J.S.C., on January 14, 2015, at 10:00 a.m., or as soon thereafter as counsel may be heard, for a Judgment pursuant to Rules 3211(a)(2), (a)(7), and (a)(10) of the New York Civil Practice Law and Rules dismissing the above consolidated actions because the Court lacks subject matter jurisdiction, the complaints in the consolidated actions fail to state a cause of action upon which relief may be granted, and the Court should not proceed in the absence of persons who should be made parties, and for such other and further relief as the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that pursuant to the briefing schedule in this matter, answering or opposition affidavits, if any, shall be served on the undersigned on or before December 5, 2014, and reply papers, if any, shall be served on counsel for all parties on or before December 15, 2014.

PLEASE TAKE FURTHER NOTICE that in the event of denial by the Court of the City Defendants' motion to dismiss, the undersigned reserves the right to answer the complaints filed in the consolidated litigation, and respectfully requests 30 days in which to serve the answer(s).

Dated: New York, New York
October 28, 2014

ZACHARY W. CARTER
Corporation Counsel of the City of New York
Attorney for City Defendants
100 Church Street, Room 2-195
New York, New York 10007
(212) 356-2085

By: _____
Janice Birnbaum
Senior Counsel
jbirnbau@law.nyc.gov

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

MYMEONA DAVIDS, *et al.*, Plaintiffs,
- against -
THE STATE OF NEW YORK, *et al.* Defendants,
-and-
MICHAEL MULGREW, as President of the UFT,
Intervenor-Defendant,
-and-
SETH COHEN, *et al.*, Intervenor-Defendants,
-and-
PHILIP A. CAMMARATA, *et al.*,
Intervenor-Defendants.

JOHN KEONI, *et al.*, Plaintiffs,
-against-
THE STATE OF NEW YORK, *et al.*, Defendants,
-and-
SETH COHEN, *et al.*, Intervenors-Defendants,
-and-
PHILIP A. CAMMARATA, *et al.*,
Intervenors-Defendants,
-and-
NEW YORK CITY DEPARTMENT OF EDUCATION,
Intervenor-Defendant,
-and-
MICHAEL MULGREW, as President of the UFT,
Intervenor-Defendant.

CITY DEFENDANTS'
NOTICE OF MOTION TO DISMISS

ZACHARY W. CARTER
Corporation Counsel of the City of New York
Attorney for City Defendants
100 Church Street
New York, N.Y. 10007

Of Counsel: Janice Birnbaum, 212-356-2085
NYCLIS No. 2014-026935

Due and timely service is hereby admitted.

New York, N.Y. ....., *200*.....

..... *Esq.*

Attorney for.....

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

MYMEONA DAVIDS, *et al.*, Plaintiffs,
- against -
THE STATE OF NEW YORK, *et al.* Defendants,
-and-
MICHAEL MULGREW, as President of the UFT,
Intervenor-Defendant,
-and-
SETH COHEN, *et al.*, Intervenor-Defendants,
-and-
PHILIP A. CAMMARATA, *et al.*,
Intervenor-Defendants.

JOHN KEONI, *et al.*, Plaintiffs,
-against-
THE STATE OF NEW YORK, *et al.*, Defendants,
-and-
SETH COHEN, *et al.*, Intervenors-Defendants,
-and-
PHILIP A. CAMMARATA, *et al.*,
Intervenors-Defendants,
-and-
NEW YORK CITY DEPARTMENT OF EDUCATION,
Intervenor-Defendant,
-and-
MICHAEL MULGREW, as President of the UFT,
Intervenor-Defendant.

CITY DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS

ZACHARY W. CARTER
Corporation Counsel of the City of New York
Attorney for City Defendants
100 Church Street
New York, N.Y. 10007

Of Counsel: Janice Birnbaum
Tel: (212) 356-2085
NYCLIS No. 2014-026935

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — Page

NEW YORK CONSTITUTION AND STATUTES

NEW YORK REGULATIONS

PRELIMINARY STATEMENT

By their complaints, twenty public school students and their parents from New York City and Rochester ("plaintiffs") seek to overturn the long-standing statutes concerning the awarding of tenure to public school teachers, the dismissal of tenured teachers, and the seniority-based order for teachers layoffs. Plaintiffs argue that these statutes violate Article XI, § 1 of the New York constitution ("Education Article") because they might leave some number of ineffective teachers in place (which plaintiffs concede is a small number). They allege that this violates the Education Article, which requires the State legislature "to provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated," by depriving these children of the opportunity to be offered a sound, basic education – the constitutional mandate in this State.

Defendants City of New York ("City") and New York City Department of Education ("DOE") agree with plaintiffs that every school-aged child who resides in the State of New York (obviously, including the City) is entitled to the opportunity to obtain a free, publicly-financed sound basic public school education. *Hussein v. State,* 81 A.D.3d 132, 914 N.Y.S.2d 464 (3d Dep't 2011), *aff'd,* 19 N.Y.3d 899, 950 N.Y.S.2d 342 (2012); *Campaign for Fiscal Equity v. State of New York,* 100 N.Y.2d 893, 769 N.Y.S.2d 106 (2003) and 8 N.Y.3d 14, 828 N.Y.S.2d 235 (2006). However, the courts are not the proper forum in which to bring these claims. Rather, plaintiffs' grievances should be brought to their State legislators who may properly address them through the legislative process. This is not novel. Indeed, as the Court of Appeals has repeatedly cautioned:

> There is one recurrent theme: the court as a policy matter, even apart from principles of subject matter jurisdiction, will abstain from venturing into areas if it is ill-equipped to undertake the

> responsibility and other branches of government are far more suited to the task.
>
> . . . .
>
> [T]he courts are the wrong forum for resolution of the disputes. The proper forums are the Legislature and the elected officials of the State and local government. It is there that the accommodations can be made in determining priorities and allocating resources.

Jones v. Beame, 45 N.Y.2d 402, 408-9, 408 N.Y.S.2d 449, 452-3 (1978); *see also, Campaign for Fiscal Equity, Inc. v. State,* 8 N.Y.3d 14, 33, 828 N.Y.S.2d 235, 246-7 (2006), concurrence of Judge Rosenblatt (the mandate of offering a sound basic education in all New York school districts "requires a statewide approach that is also best left to the Executive and Legislature."). For this reason, the consolidated litigation before this Court should be dismissed.

Further, as discussed in this memorandum, the consolidated litigation should be dismissed for two additional reasons. First, neither complaint states a viable claim for relief under the Education Article. Second, this consolidated litigation should not go forward absent joinder of all school districts across the state. Each district utilizes the challenged statutes as to teacher tenure, teacher discipline, and teacher layoff to structure its own school district and attract and retain qualified teachers as best befits it. Notwithstanding this case's terminal deficiencies, which require dismissal, nonetheless, every district that conceivably may be affected by the judgment in this matter must be joined.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Allegations in the Amended Verified Complaint in Davids v. State

The plaintiffs in *Davids v. State* are eleven children who reside in New York. Ten[1] are alleged to attend public school in the City of New York (the "City").[2] None is alleged to have

[1] The allegations concerning plaintiff Andrew Henson fail to identify where he attends school.

been taught by an ineffective teacher. None is alleged to have been affected by a teacher layoff. None is alleged to have been personally deprived of a sound basic education.

The Amended Verified Complaint in the *Davids* action (the "*Davids* Complaint") asserts two broad challenges to the statutory scheme concerning the rights of public school teachers in the events of dismissal and layoff. The first challenge concerns the statutes that govern the procedural due process rights of tenured teachers when a school district seeks to remove them because they are ineffective. The *Davids* Complaint challenges the following statutes: N.Y. Education Law §§ 1102(3), 2509, 2573, 2590(j), 3012, 3014 and 3020-a and labels them the "Dismissal Statutes" (although this is a misnomer). The second challenge concerns N.Y. Education Law § 3013(2), which governs which teacher is laid off first. The *Davids* Complaint refers to this statute as the "last in, first out" statute or the "LIFO Statute." The foundation for all of the *Davids* plaintiffs' causes of action is that the challenged statutes cause ineffective teachers to be retained, who otherwise would be dismissed for poor performance, thereby depriving New York public school students of a sound basic education in violation of Article XI, §1 of the New York constitution, the "Education Article."

The *Davids* plaintiffs assert three causes of action. Claim One alleges that the Dismissal Statutes violate the Education Article by depriving New York public school students taught by ineffective teachers of a sound basic education. Absent the Dismissal Statutes, plaintiffs allege that these teachers would be dismissed for poor performance. *Davids* Complaint, ¶¶ 36-43, 52-58. These statutes are alleged to provide teachers with "super" due process rights (*id.*, ¶37), including "an inordinate number of hurdles" that result in a costly and time-consuming "labyrinthine dismissal process" that ensures that a certain number of ineffective teachers retain

[2] The *Davids* Complaint does not identify whether plaintiffs attend public schools operated by the New York City Department of Education ("DOE") or charter schools. Both are public schools located in the City. Notwithstanding this pleading deficiency, DOE confirms that all of the *Davids* plaintiffs are students who attend DOE public schools.

their employment and substantially reduces the overall quality of the teacher workforce in New York public schools. *Id.*, ¶¶38-43.

Claim Two alleges that the LIFO Statute violates the Education Article (a) by denying a sound basic education to New York public school students taught by more senior, ineffective teachers who would otherwise be laid off for poor performance, absent the LIFO Statute; and (b) by depriving New York public school students of an education by less senior, effective teachers who lost their jobs because of the LIFO Statute. *Id.*, ¶¶44-54, 59-62. Essentially, plaintiffs challenge a layoff system that takes seniority into account. *Id.*, ¶¶44-47.

Claim Three seeks a declaration that the Dismissal Statutes and the LIFO Statute, separately and together, violate the right to a sound basic education protected by the Education Article. *Id.*, ¶¶52-54, 64-65.

B. The Allegations in the Complaint for Declaratory and Injunctive Relief in Wright v. State

The plaintiffs in *Wright v. State* are seven parents who sue on behalf of themselves and their nine children. Seven of nine of the children are alleged to be students at public schools operated by DOE. The other two are alleged to be children who attend public schools operated by the Rochester City School District.

The Complaint for Declaratory and Injunctive Relief in the *Wright* action (the "*Wright* Complaint") raises similar challenges to those raised in the *Davids* Complaint, although they are organized somewhat differently. The *Wright* plaintiffs challenge the statutory scheme by which teachers obtain tenure and specifically allege that three years is an insufficient amount of time within which to make this determination. *Wright* Complaint, ¶46. They also allege that the relatively new annual professional performance review ("APPR") mandated by N.Y. Education Law § 3012-c for evaluating teacher performance is a deficient and superficial means of

assessing teacher effectiveness. They allege that § 3012-c lacks a uniform definition of ineffective teaching since 60% of the evaluation is based on locally determined evaluation methods and 20% is based on locally selected measures of student achievement. Thus the *Wright* plaintiffs posit that the APPR does not adequately identify teachers who are less than effective teachers, thereby denying public school students the opportunity to obtain a sound basic education. *Wright* Complaint, ¶¶ 39-47.

The *Wright* plaintiffs also challenge the statutory due process rights of tenured teachers in the event of dismissal. Specifically, they allege that N.Y. Education Law §§ 3020 and 3020-a make it prohibitively expensive and time-consuming, and effectively impossible, to dismiss an ineffective tenured teacher. *Id.*, ¶¶51-65.

Finally, the *Wright* plaintiffs allege that the seniority-based, "last-in, first-out" structure of layoffs required by N.Y. Education § 2585 violates the Education Article. This cause of action appears to be substantively identical to Claim Two asserted by the *Davids* plaintiffs, although the *Wright* plaintiffs direct their cause of action to the Rochester City School District. *Id.*, ¶84.

The *Wright* plaintiffs assert three causes of action. The first cause of action alleges that the statutes that govern the conferring of tenure (N.Y. Education Law §§ 2509. 2573, 3012 and 3012-c), denominated the "Permanent Employment Statutes," violate the Education Article because they fail to provide all New York public school students with a sound basic education. These statutes are referred to herein as the "Teacher Tenure Statutes." Further, they allege that teacher effectiveness cannot be determined within three years. Thus notwithstanding having been granted tenure, they allege that tenured teachers *may* fail to provide students with an effective education. *Id.*, ¶¶78-79.

The second cause of action alleges that the statutes under which tenured teachers may be disciplined and discharged for incompetency, N.Y. Education Law §§ 3020 and 3020-a (the "Teacher Discipline Statutes") violate the Education Article because they are too difficult and costly to use thereby resulting in ineffective teachers being kept in the classroom, which in turn deprives students taught by them of the opportunity to obtain a sound basic education. *Id.*, ¶¶81-82.

The *Wright* plaintiffs' third cause of action alleges that the statutory scheme for teacher layoffs deprives the children attending public schools operated by the Rochester City School District of a sound basic education because the statute prohibits school administrators from taking teacher quality into account when conducting layoffs. This is alleged to result in the retention of ineffective, more senior teachers, and the dismissal of effective (presumably less senior) teachers. *Id.*, ¶¶ 84-85.

C. Procedural History

The *Davids* plaintiffs sued the State of New York, the New York State Board of Regents and the New York State Education Department ("State Defendants"), as well as the City of New York ("City") and the New York City Department of Education ("DOE"; collectively, "City Defendants"), seeking (a) a declaration that the Dismissal Statutes and LIFO Statute violate the Education Article of the New York constitution, and (b) a permanent injunction enjoining the defendants from the enforcement, application or implementation of these statutes. They also seek a permanent injunction that prevents the defendants from implementing at any time in the future, by law or by contract, any system of teacher employment, retention or dismissal that is substantially similar to the framework in the challenged statutes. The City Defendants were served with the *Davids* Verified Amended Complaint on or about July 28, 2014.

The *Wright* plaintiffs named as defendants the State of New York, the Regents of the University of the State of New York, Merryl H. Tisch, Chancellor of the Board of Regents (sued in her official capacity), and John B. King, Commissioner of Education and President of the University of the State of New York (sued in his official capacity).

By order dated September 18, 2014, the *Davids* and the *Wright* actions were consolidated. In addition, the following parties have been permitted to intervene as defendants and/or have filed motions concerning intervention as defendants in these actions:

(a) The United Federation of Teachers ("UFT") has been permitted to intervene as a defendant in the *Davids* action. In addition, after consolidation was ordered, the UFT moved to have the caption amended to reflect one action, as opposed to two consolidated actions, by which it seeks, in effect, to intervene in the *Wright* action. This latter motion is pending.

(b) Seth Cohen, Daniel Delehanty, Ashki 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, have been permitted to intervene in the *Wright* action. They have also joined the UFT's pending motion concerning the caption.

(c) The DOE has moved to intervene in the *Wright* action; its motion is pending;

(d) Philip A. Cammarata and Mark Mambretti have moved to intervene in the *Wright* action,, and their motion is pending. .

On October 27, 2014, the parties submitted a proposed Stipulation and Order ("stipulation") pursuant to which all parties consented to the intervention of the intervenors as defendants in both consolidated actions and other procedural matters.

In October 2014, the Court ordered that all defendants serve dispositive motions or answers by October 28, 2014. On that date, the City Defendants served this motion to dismiss this consolidated litigation.

THE CHALLENGED STATUTORY SCHEME

The *Davids* plaintiffs and the *Wright* plaintiffs raise materially similar challenges to the New York statutes that pertain to tenure for public school teachers, discipline and dismissal of

tenured teachers, and seniority-based layoffs of teachers. Both sets of plaintiffs allege that these statutes are unconstitutional because they allegedly violate the Education Article. *See* Article XI, § 1 of the New York Constitution.

A. The Education Article

The Education Article was adopted at the 1894 Constitutional Convention to provide for a state-wide system for assuring minimal acceptable public school facilities and services. *Board of Educ., Levittown Union Free School Dist. v. Nyquist,* 57 N.Y.2d 27, 48, 453 N.Y.S.2d 643, 653 (1982). The Educational Article specifically states:

> The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.

The Court of Appeals has ruled that the Education Article imposes a duty on the New York legislature to provide all children in New York with the opportunity for a sound, basic education. *Campaign for Fiscal Equity v. State of New York,* 100 N.Y.2d 893, 631 N.Y.S.2d 565 (2003); *Levittown,* 57 N.Y.2d at 39, 453 N.Y.S.2d at 648.

B. The Teacher Tenure Statutes

Under N.Y. Education Law §§ 2573, 3012 and 3012-c,[3] a teacher is appointed for a probationary term of three years, and that person's service may be discontinued at any time during the probationary period on the recommendation of the superintendent, by a majority vote of the board of education. At the expiration of the probationary term, the superintendent must make a written report to the board of education recommending for appointment on tenure those persons who have been found competent, efficient and satisfactory. *Id.* at § 3012(2). The

[3] Plaintiffs also include N.Y. Education Law §§ 1102(3) and 2509 in their challenge to the Teacher Tenure statutory scheme. Section 1102(3) governs the awarding of tenure to BOCES teachers. Section 2509 governs the award of tenure to public school teachers in city school districts with less than 125,000 residents.

statutory scheme concerning tenure for teachers in city school districts, including the New York City School District, dates back to 1917. In 1937, tenure protection was extended to public school teachers in other types of school districts in the State. The statutory scheme concerning teacher tenure was substantially revised in 1947, and has been amended thereafter, including the 2012-2013 amendments to N.Y. Education Law § 3012-c mandating the standards for evaluating teacher effectiveness.

Each classroom teacher is statutorily required to receive an annual professional performance review ("APPR") of the teacher's effectiveness. N.Y. Education Law § 3012-c. The APPR statute was substantially and materially amended in 2012 and 2013. Under the newly amended statute, a teacher's APPR must include measures of student achievement and be a significant factor for employment decisions, including promotion, retention, tenure, termination and supplemental compensation. *Id.* at § 3012-c(1). Pursuant to the statute, a classroom teacher will receive one of the following four ratings: highly effective, effective, developing or ineffective. The APPR is composed of (i) 20% or 25% of state-developed measures of student growth, such as state assessments, (ii) 20% or 15% of locally developed measures of student achievement, and (iii) 60% of locally determined evaluation measures of teacher effectiveness, such as classroom observations and the like. *Id.* at § 3012(2)(a)(1). Under § 3012-c(2)(g)(4), the locally developed measures of student achievement must be determined through collective bargaining, and under § 3012-c(2)(h), the 60% of locally determined evaluation measures of teacher effectiveness are to be negotiated between local school districts and their teachers' unions pursuant to Article 14 of the Civil Service Law (a/k/a the Taylor Law, codified as N.Y. Civil Service Law § 200, *et seq.*). The APPR provisions of the statute went into full effect throughout the state with the 2013-2014 school year.

C. The Teacher Discipline Statutes

N.Y. Education Law §§ 3012, 3020, 3020-a and 2590-j(7) (the "Teacher Discipline Statutes") set out the standards and procedures concerning discipline and removal of tenured teachers. In the New York City School District, a tenured teacher may be removed for just cause, if s/he is found guilty at a § 3020-a hearing on charges alleging one or more of the following offenses:

> (i) unauthorized absence from duty or excessive lateness;
>
> (ii) neglect of duty;
>
> (iii) conduct unbecoming the teacher's position, or conduct prejudicial to the good order, efficiency, or discipline of the services;
>
> (iv) incompetent or ineffective service;
>
> (v) violation of the bylaws, rules or regulations of the DOE, its chancellor or the community school board; or
>
> (vi) any substantial cause that renders the teacher unfit to perform her/his obligations properly to the service.

Id. at § 2590-j(7); *accord,* N.Y. Education Law §§ 3012(2). See also, N.Y. Education Law § 3020(3) and (4)(a), which permit modification of the procedures set forth in N.Y. Education Law §§ 2590-j(7) and 3020-a, for the New York City School District. Under N.Y. Education Law § 3020-a, a tenured teacher is entitled to written notice of the charges. The charge of incompetency must be brought within three years after the occurrence of the alleged incompetency. *Id.* at § 3020-a(1). Upon receipt of the charges, the secretary of the board of education must immediately notify the board, which must determine within five days whether probable cause exists to bring a disciplinary proceeding against the teacher. *Id.* at § 3020-a(2)(a). If the board so finds, it will issue a written statement of the charges, the maximum penalty sought, and the teacher's rights, which is sent to the accused teacher. The teacher may be suspended with pay pending a hearing, unless s/he pleads guilty or has been convicted of certain

felonies. *Id.* at § 3020-a(2)(b). The teacher must notify the board in writing within ten days whether s/he wants a hearing, which decision is communicated within three days by the board's secretary to the Commissioner of the State Education Department (the "Commissioner"). In school districts outside New York City, the Commissioner requests the American Arbitration Association to provide a list of names of possible arbitrators to serve as the hearing officer, together with relevant biographical data, which is then forwarded to the board and the teacher, along with information about each candidate's record for his/her last five cases, including the length of time that each case took to complete. Within 15 days, the board and teacher must notify the Commissioner of their mutually agreed-on arbitrator (or the Commissioner selects the arbitrator if the parties cannot agree or if they default). *Id.* In the New York City School District, the arbitrator is selected from a panel of arbitrators who hear City School District cases.

The Commissioner has the power to set necessary rules for the conduct of hearings, and he has promulgated regulations requiring § 3020-a hearings to be completed within 125 days from the filing of the charges. *Id.* at § 3020-a(3)(c)(1)(A); 8 NYCRR 82-1.10(f). An expedited hearing is required to be held when the charge is incompetence based on a pattern of ineffective teaching. N.Y. Education Law § 3020-a(3)(c)(i-a)(A). For an expedited hearing, the arbitrator is required to issue a written decision within 10 days of the last day of the hearing. The decision must including factual findings for and disposition of each charge, and for each charge where guilt is found, the penalty. The decision is sent to the Commissioner, the teacher and the board's secretary. *Id.* at § 3020-a(4)(a); 8 NYCRR 82-1.10(i). The arbitrator's decision may be judicially appealed within ten days of its receipt. Regardless of the pendency of an appeal, the board must implement the decision within fifteen days of receipt. N.Y. Education Law §§ 3020-a(5)(a), -a(5)(b).

D. The Teacher Layoff Statutes

N.Y. Education Law § 2588 governs teacher layoffs in city school districts of cities with over 1,000,000 inhabitants, like New York City.[4] That statute provides that when a teaching position is abolished, the services of the least senior person holding a position within the tenure area of the abolished position shall be discontinued. *Id.* at § 2588(3)(a). In addition, the services of a teacher tenured in the affected area shall not be discontinued if another teacher in the affected area has not acquired tenure, regardless of seniority. *Id.*

N.Y. Education Law § 3013 concerns the abolition of a teaching position. It functions similarly to § 2588, which governs teacher layoffs. Specifically, N.Y. Education Law § 3013(2) provides for the discontinuance of the services of a teacher having the least seniority in the system within the tenure of the abolished position.

LEGAL ARGUMENT

POINT ONE

THIS CONSOLIDATED LITIGATION SHOULD BE DISMISSED BECAUSE PLAINTIFFS' CAUSES OF ACTION ARE NONJUSTICIABLE

The nub of plaintiffs' causes of action is their disagreement with the State statutory scheme for attracting and retaining effective public school teachers (i.e., the Teacher Tenure statutes) and discharging ineffective tenured teachers (i.e., the Teacher Discipline statutes). They also challenge the state statutes governing teacher layoffs to the extent that they are based on tenure and seniority. Plaintiffs argue that these statutes are unconstitutional because they allegedly violate the Education Article of the New York constitution. They seek a declaration that the statutes are unconstitutional and an injunction barring their enforcement statewide. This

[4] N.Y. Education Law § 2585 governs teacher layoffs in city school districts of over 125,000 inhabitants. N.Y. Education Law § 2510 applies to teacher layoffs in city school districts of under 125,000 inhabitants.

Court should deny plaintiffs' request and dismiss their complaints because the controversy they present is nonjusticiable.

The heart of the doctrine of nonjusticiability is the "jurisprudential canon that the power of the judicial branch may only be exercised in a manner consistent with the 'judicial function,' upon the proper presentation of matters of a 'Judicial Nature.'" (Cites omitted.) *Matter of New York State Inspection, Security and Law Enforcement Employees, Dist. Council 82 v. Cuomo,* 64 N.Y.2d 233, 238, 485 N.Y.S.2d 719, 721 (1984); *see also, Jones v. Beame,* 45 N.Y.2d 402, 408, 408 N.Y.S.2d 449, 452 (1978); *Abrams v. New York City Transit Auth.,* 39 N.Y.2d 990, 992, 387 N.Y.S.2d 235, 236 (1976). Each of the three branches of government -- the executive branch, the legislature, and the judiciary – "should be free from interference, in the lawful discharge of duties expressly conferred, by either of the other branches." *NYS Inspection,* 64 N.Y.2d at 240, 485 N.Y.S.2d at 722. Thus, the Court of Appeals has repeatedly ruled that the judiciary is not permitted to usurp the authority conferred on a coordinate branch of government. *Id.,* 64 N.Y.2d at 238, 485 N.Y.S.2d at 721; *James v. Board of Education,* 42 N.Y.2d 357, 364, 368-9, 397 N.Y.S.2d 934, 941-2 (1977); *Abrams v. New York City Transit Auth.,* 39 N.Y.2d 990, 992 (1976).

In *Jones v. Beame,* the judiciary heard two appeals that shared a "common quality." In the *Jones v. Beame* appeal, the judiciary was asked to reorganize municipal priorities and allocations in regard to maintenance of the City's zoos during the fiscal crisis of the 1970s to prevent animal cruelty, in violation of applicable statutes. In the other appeal, *Bowen v. State,* the judiciary was asked to enjoin the State defendants from "dumping" mentally ill patients on local communities (i.e., the City of Long Beach), allegedly in violation of the Mental Health Law, and to weigh competing theories and programs for deinstitutionalization of such patients.

After hearing the two cases together, the Court of Appeals ruled that both cases should be dismissed because neither presented a justiciable controversy. It found:

> There is one recurrent theme: the court as a policy matter, even apart from principles of subject matter jurisdiction, will abstain from venturing into areas if it is ill-equipped to undertake the responsibility and other branches of government are far more suited to the task.
>
> . . . .
>
> [T]he courts are the wrong forum for resolution of the disputes. The proper forums are the Legislature and the elected officials of the State and local government. It is there that the accommodations can be made in determining priorities and allocating resources.

45 N.Y.2d at 408-9, 408 N.Y.S.2d at 452-3.

Similarly in *Retired Employees Association, Inc. v. Cuomo,* the New York Supreme Court reiterated the limitations on its jurisprudence in rejecting plaintiffs' invitation to either invalidate or in effect, rewrite, Civil Service Law § 167(8) concerning the State's contribution limits for health insurance premiums for retired public employees:

> The doctrine of separation of powers bars courts from legislating, rewriting, or extending legislation (In re Adoption of Malpica-Orsini, 36 NY2d 568, 570, 331 N.E.2d 486, 370 N.Y.S.2d 511 (1975)). **Courts are not permitted to substitute their judgment for that of a legislative body as to the wisdom and expediency of the legislation** (In re Adoption of Malpica-Orsini, 36 NY2d 568, 570, 331 N.E.2d 486, 370 N.Y.S.2d 511 (1975)). There is a further presumption that the legislative body has investigated and found facts necessary to support the legislation, as well as the existence of a situation showing or indicating its need or desirability. Thus, if any state of facts, known or to be assumed, justify the law, the court's power of inquiry ends (In re Adoption of Malpica-Orsini, 36 NY2d 568, 571, 331 N.E.2d 486, 370 N.Y.S.2d 511 (1975)).

2012 N.Y. Misc. LEXIS 5714 at *15 (Sup. Ct. Dec. 17, 2012), *aff'd,* 2014 N.Y. App. Div. LEXIS 7030 (3d Dep't, Oct. 16, 2014) (emphasis added).

A. The challenge to the Teacher Tenure Statutes is nonjusticiable.

The same logic applies to the statutory scheme concerning teacher tenure. The Education Article dates back to 1894. *Board of Education, Levittown Union Free School District v. Nyquist,* 57 N.Y.2d 27, 47, 453 N.Y.S.2d 643, 653 (1982). Tenure for public school teachers in city school districts dates back to 1917. *See,* former N.Y. Education Law § 368. The tenure laws were expanded between 1937 and 1947 to cover public school teachers in all other school districts in the State. N.Y. Education Law §§ 2509, 2510, 2573, 3012. Thus the Education Article and Teacher Tenure laws have co-existed harmoniously for decades.

Further, the statutory scheme concerning teacher appointment and tenure has not remained static. It has been repeatedly amended over the years, including the 2012 and 2013 amendments to N.Y. Education Law § 3012-c, which instituted new comprehensive standards for a teacher's annual professional performance review – a review that must, by statute, include measures of student achievement and be a significant factor for employment decisions, including, *inter alia,* retention, tenure and termination. N.Y. Education Law § 3012-c(1). Thus the State legislature has responded to the evolving educational needs and standards for the State's public schools.

The teacher tenure statutes serve several salutary purposes. First they are the "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 teacher from the abuses they might be subjected to if they could be dismissed at the whim of their supervisors." *Ricca v. Board of Education,* 47 N.Y.2d 385, 391, 418 N.Y.S.2d 345, 249 (1979). Second, they help school districts attract and retain effective teachers – a fact that is conceded by plaintiffs, since they seek only to challenge the retention of

ineffective teachers who they acknowledge constitute a minority of all tenured teachers. *Davids Complaint,* ¶¶4, 30, 51, 52; *Wright Complaint,* ¶¶65, 81.

Thus plaintiffs' challenge to the teacher tenure statutes should be dismissed for lack of justiciability because this Court is the wrong forum for resolution of plaintiffs' disputes. To the extent that plaintiffs seek to abolish the Teacher Tenure statutes or have them rewritten to provide for a 4-year probationary period, rather than a 3-year period, those arguments should be made by plaintiffs to their State legislators. "Courts are not permitted to substitute their judgment for that of a legislative body as to the wisdom and expediency of the legislation" since that resolution is one that is committed to the legislature. *Retired Employees,* 2012 N.Y. Misc. LEXIS 5714 at *11; *see also, Courtroom Television Network LLC v. State,* 5 N.Y.3d 222, 235, 800 N.Y.S.2d 522, 529 (2005), in which the Court of Appeals rejected plaintiffs' First Amendment and State constitutional challenge to Civil Rights Law § 52 banning audiovisual coverage of most court proceedings. The Court ruled:

> We will not circumscribe the authority constitutionally delegated to the Legislature to determine whether audiovisual coverage of courtroom proceedings is in the best interest of the citizens of this state. "A state constitutional rule expanding the rights of the media in New York to include the right to photograph and broadcast court proceedings would derail what is, and always has been, a legislative process."

Id., 5 N.Y.3d at 235, 800 N.Y.S.2d at 529.

Moreover, the teacher tenure statute for city school districts has been in place for almost a century and for over three-quarters of a century in all other school districts. If teacher tenure laws deprived students of the opportunity for a sound basic education in violation of the Education Article, which predates all teacher tenure statutes, the legislature would have — and could have — addressed, and redressed, any palpable deficiency long ago. The conclusion to be

drawn is that the Education Article and the challenged statutes have and continue to co-exist harmoniously. *See Ricca,* 47 N.Y.2d at 391, 418 N.Y.S.2d at 249.

B. The challenge to the Teacher Discipline statutes is nonjusticiable.

N.Y. Education Law §§ 3012, 3020, 3020-a and 2590-j(7) are the four statutes concerning discipline of tenured teachers that plaintiffs seek to challenge. Due process protections for tenured teachers date to 1947, and additional protections have been added over the years. Broadly speaking, these statutes provide that a tenured teacher may only be discharged for cause as statutorily prescribed, and that the teacher is entitled to written notice of the charges, a hearing before an impartial hearing officer, a written determination by the officer on each charge, outlining the evidence and reasoning used to reach a determination, and an appeal. This statutory scheme is the exclusive method for disciplining a tenured teacher in New York. Courts have determined that the dual purposes served by this scheme, including N.Y. Education Law § 3020-a, are "protection to tenured teachers from official and bureaucratic caprice" and a "means of assessing the fitness of a teacher to carry out his or her professional responsibilities." *Flota v. Sobol,* 210 A.D.2d 857, 858, 621 N.Y.S.2d 136, 137 (3d Dep't 1994); *see also, Holt v. Board of Education,* 52 N.Y.2d 625, 632, 439 N.Y.S.2d 839, 842-3 (1981) (§ 3020-a is "a critical part of the system of contemporary protections that safeguard tenured teachers from official and bureaucratic caprice"); *McElroy v. Board of Education,* 5 Misc.3d 321, 323, 783 N.Y..S.2d 781, 783 (Sup. Ct. Aug. 30, 2004).

Plaintiffs argue that the teacher dismissal statutes provide teachers with "super" due process rights, are prohibitively costly and time-consuming, create a labyrinthine dismissal process that is often futile, and as applied, result in administrators leaving ineffective teachers in place. *Davids* Complaint, ¶¶37-43; *Wright* Complaint, ¶¶50-65. Moreover, as the dismissal

scheme may be modified by contract, plaintiffs allege that it is more difficult and time-consuming to remove ineffective teachers. Plaintiffs pray for a declaration that the dismissal statutes violate the Education Article and a statewide injunction enjoining defendants from implementing or enforcing the dismissal statutes, whether by law or contract.

For the reasons outlined above in plaintiffs' challenge to the Teacher Tenure statutes, plaintiffs' challenge to the Teacher Dismissal statutes should be dismissed for lack of justiciability. This Court is an improper forum for resolution of plaintiffs' disputes, because the due process protections afforded to teachers is a matter committed in the first instance to the State legislature on which it has authoritatively spoken – as the courts of this state have repeatedly recognized. Thus, this court is not permitted to substitute its judgment for that of the State legislature as to the wisdom and expediency of the teacher dismissal statutes. *Retired Employees,* 2012 N.Y. Misc. LEXIS 5714 at *11. Plaintiffs' challenge to the teacher dismissal statutes should be dismissed as nonjusticiable.

C. The challenge to the Teacher Layoff statutes is nonjusticiable.

Plaintiffs raise challenges to N.Y. Education Law § 2588, which governs teacher layoffs in city school districts of cities with over 1,000,000 inhabitants, like New York City, and to N.Y. Education Law § 3013, which concerns the abolition of a teacher position. Both statutes provide that when a teaching position is eliminated, the services of the least senior person holding a position within the tenure area of the abolished position shall be discontinued, and that the services of a teacher tenured in the affected area cannot be discontinued if another teacher in the affected area has not acquired tenure, regardless of seniority. The premise of plaintiffs' argument is that seniority is not an accurate predictor of teacher effectiveness. *Davids*

Complaint, ¶46, *Wright* Complaint, ¶69. The *Wright* plaintiffs limit their complaint to the Rochester city school district, since only it has incurred teacher layoffs in recent years.

As the Second Department explained in *Avila v. Board of Education,* 240 A.D.2d 661, 662, 658 N.Y.S.2d 703, 704 (2d Dep't 1997), the purpose of Education Law § 3013 is:

> to provide a mandatory preference in rehiring for teachers who have lost their positions as a result of "excessing" *(see, Matter of Brewer v Board of Educ.,* 51 NY2d 855, 857). The statute reflects the public policy that qualified teachers "should generally be preferred for purposes of re-employment", subject to the similarity of position restriction *(see, Matter of Leggio v Oglesby,* 69 AD2d 446, 449).

Thus, once again, this Court is being asked to substitute its judgment for that of the State Legislature and enjoin legislation that plaintiffs find offensive. Such a course is outside the jurisdiction of this Court. Hence, plaintiffs' causes of action challenging the Teacher Layoff Statutes are nonjusticiable and should be dismissed.

In conclusion, this court should dismiss this matter because the relief that plaintiffs seek would require this court to substitute its judgment for that of the State Legislature by (a) declaring unconstitutional the state statutory scheme for teacher tenure, dismissal of tenured teachers, and layoff of teachers, and (b) issuing a statewide injunction enjoining the enforcement and implementation of these statutes. These statutes have co-existed harmoniously with the Education Article for many years, and as shown by the enunciated purposes for these statutes, they were enacted, in part, to protect the "public's acute interest in maintaining a corps of qualified teachers." *Folta,* 210 A.D.2d at 858, 621 N.Y.S.2d at 137. Moreover, as Judge Rosenblatt noted in his concurrence in the last of the three Court of Appeals decisions in *Campaign for Fiscal Equity, Inc. v. State,* 8 N.Y.3d 14, 33, 828 N.Y.S.2d 235, 246-7 (2006), the mandate of offering a sound basic education in all of the State's school districts "requires a

statewide approach that is also best left to the Executive and Legislature." Because the proper branches of government to address the statewide relief sought by plaintiffs are the State legislature and the Executive branch, this consolidated litigation should be dismissed as nonjusticiable.

POINT TWO

THE COMPLAINTS FAIL TO STATE VIABLE EDUCATION ARTICLE CLAIMS

The Education Article provides that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." N.Y. Constitution, Article XI, § 1. An Education Article cause of action requires two elements: "first, that the State fails to provide [the plaintiff students] 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, 765 N.Y.S.2d 819, 822 (2003); *Campaign for Fiscal Equity v. State,* 100 N.Y.2d 893, 909-18, 769 N.Y.S.2d 106, 113-120 (2003); *NYS Ass'n of Small City School Districts, Inc. v. State,* 42 A.D.3d 648, 652, 840 N.Y.S.2d 179, 183 (3d Dep't 2007). In addition, the complaint's allegations must show that plaintiffs are harmed by some district-wide failure. *ACLU v. State,* 4 N.Y.3d 175, 181, 791 N.Y.S.2d 507, 511 (2005); *NYS Ass'n,* 42 A.D.3d at 652, 840 N.Y.S.2d at 184. Neither the *Davids* complaint, nor the *Wright* complaint, meets this standard.

Both the *Davids* complaint and the *Wright* complaint fail to state viable Education Article claims for the same reasons. First, neither alleges that the failure to offer a sound basic education to New York's public school children is causally connected to the state funding system for public education. This is fatal to plaintiffs' complaints because the crux of an Education

Article claim is a failure by the State to "provide for the maintenance and support" of the State's public school system. *Paynter,* 100 N.Y.2d at 440, 769 N.Y.S.2d at 1228; *see also, ACLU,* 4 N.Y.3d at 178-9, 791 N.Y.S.2d at 509.

Second, both complaints fail because neither alleges that plaintiffs were aggrieved by a district-wide failure of one or more particular school districts. Rather, both complaints allege statewide defalcations in regard to assuring that all teachers, statewide, meet minimum teacher competency standards. Thus, like the complaint in *NYS Ass'n*, the complaints here are legally deficient. 42 A.D.3d at 651, 840 N.Y.S.2d at 184; *see also, ACLU,* 4 N.Y.3d at 175, 181, 791 N.Y.S.2d at 511. Hence, they should be dismissed because they fail to assert viable Education Article claims.

POINT THREE

PLAINTIFFS HAVE FAILED TO JOIN ALL NECESSARY PARTIES

CPLR 1001 and 1003 govern the joinder of necessary parties. CPLR 1001(a) provides for the mandatory joinder of all persons who might be inequitably affected by the judgment. The nonjoinder of a party who should be joined is a ground for dismissal of any action without prejudice. CPLR 1003.

In this case, the relief plaintiffs seek is a declaration and statewide injunction enjoining enforcement and implementation of the Teacher Tenure laws, the Teacher Discipline laws, and the Teacher Layoff laws. This relief will affect all school districts across the state. At a minimum, the relief sought has the potential to impair the ability of New York school districts to attract and retain competent teachers, since the modicum of job security offered by the challenged statutory scheme is one of the benefits offered to public school teachers in this State – and one in which each tenured teacher has a property interest. Thus, like the joinder ordered for

the school districts at issue in *Paynter v. State,* this court should either order the joinder of school districts statewide or dismiss this action without prejudice. 270 A.D.819, 704 N.Y.S.2d 763 (4th Dep't 2000); *see generally, Hussein v. State,* 81 A.D.3d 132, 134, 914 N.Y.S.2d 464, 465 (3d Dep't 2011), *aff'd,* 19 N.Y.3d 899, 950 N.Y.S.2d 342 (2012) and concurrence of Judge Ciparick, 19 N.Y.3d at 903, 950 N.Y.S.2d at 344-5 (Education Article litigation affects more than just the school districts named in particular lawsuits and has the potential to rise to the level of civil actions commenced on behalf of students in every school district across the state).

CONCLUSION

For the reasons set forth in the memorandum of law, the *Davids* complaint and the *Wright* complaint should be dismissed and the defendants should be granted judgment and such other and further relief as this court deems just and proper.

Dated: New York, New York
October 28, 2014

ZACHARY W. CARTER
Corporation Counsel for the City of New York
Attorney for Defendants City of New York and New York City Department of Education
100 Church St., Room 2-195
New York, NY 10007

By: _____
Janice Birnbaum
Senior Counsel
jbirnbau@law.nyc.gov