SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND : DCM PART 6

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MYMOENA DAVIDS, by her parent and natural guardian MIAMONA DAVIDS, ERIC DAVIDS, by his parent and natural guardian MIAMONA DAVIDS, ALEXIS PERALTA, by her parent and natural guardian ANGELA PERALTA, STACY PERALTA, by her parent and natural guardian ANGELA PERALTA, LENORA PERALTA, by her parent and natural guardian ANGELA PERALTA, ANDREW HENSON, by his parent and natural guardian CHRISTINE HENSON, ADRIAN COLSON, by his parent and natural guardian JACQUELINE COLSON, DARIUS COLSON, by his parent and natural guardian JACQUELINE COLSON, SAMANTHA PIROZZOLO, by her parent and natural guardian SAM PIROZZOLO, FRANKLIN PIROZZOLO, by her parent and natural guardian SAM PIROZZOLO, IZAIYAH EWERS, by his parent and natural guardian KENDRA OKE,	:	**NOTICE OF STATE DEFENDANTS' MOTION TO DISMISS** Index No. 101105/14 (Minardo, J.S.C.)
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.

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. :

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PLEASE TAKE NOTICE that upon the Amended Verified Complaint filed by plaintiffs Mymoena Davids, Eric Davids, Miamona Davids, Alexis Peralta, Stacy Peralta, Lenora Peralta, Angela Peralta, Andrew Henson, Christine Henson, Adrian Colson, Darius Colson, Jacqueline Colson, Samantha Pirozzolo, Franklin Pirozzolo, Sam Pirozzolo, Izaiyah Ewers, and Kendra Oke in this consolidated action; the Complaint for Declaratory and Injunctive Relief filed by plaintiffs John Keoni Wright, Ginet Borrero, Tauana Goins, Nina Doster, Carla Williams, Mona Pradia, and Angeles Barragan in this consolidated action; the Affirmation of Assistant Attorney General Steven L. Banks, dated October 28, 2014, and the exhibits annexed thereto; the Memorandum of Law in Support of State Defendants' Motion to Dismiss the Consolidated Complaints, dated October 28, 2014; and upon all other papers and proceedings herein, the undersigned on behalf of defendants THE STATE OF NEW YORK; THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK (also sued here as "THE NEW YORK STATE BOARD OF REGENTS"); MERRYL H. TISCH, in her official capacity

as Chancellor of the Board of Regents; THE NEW YORK STATE EDUCATION DEPARTMENT; and JOHN B. KING, JR., in his official capacity as the Commissioner of Education of the State of New York (collectively the "State Defendants") will move this Court on the 14th day of January 2015, at 10:00 a.m., or as soon thereafter as counsel may be heard, at the Courthouse, 10 Richmond Terrace, Staten Island, New York, in DCM Part 6, for an order dismissing the respective consolidated complaints pursuant to CPLR Rules 3211(a)(2), (a)(3), and (a)(7) for lack of standing, lack of justiciability, and failure to state a cause of action, and for such other and further relief as the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that, pursuant to the briefing schedule approved by the Court, opposition papers are to be served by December 5, 2014, and reply papers are to be served by December 15, 2015.

Dated: New York, New York
October 28, 2014

ERIC T. SCHNEIDERMAN
Attorney General of the
State of New York
Attorney for State Defendants
By:

STEVEN L. BANKS
Assistant Attorney General
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(212) 416-8621

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(518) 782-0600

COUNTY OF RICHMOND

MYMOENA DAVIDS, by her parent and natural guardian MIAMONA DAVIDS, ERIC DAVIDS, by his parent and natural guardian MIAMONA DAVIDS, et al., Plaintiffs,

- against -

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

- and -

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

- and -

SETH COHEN, et al., -and- PHILIIP A. CAMMARATA AND MARK MAMBRETTI, Intervenors-Defendants.

JOHN KEONI WRIGHT; et al., Plaintiffs,

- against -

THE STATE OF NEW YORK; et al., Defendants,

- and -

SETH COHEN, et al., -and- PHILIIP A. CAMMARATA AND MARK MAMBRETTI, Intervenor-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.

NOTICE OF STATE DEFENDANTS' MOTION TO DISMISS

ERIC T. SCHNEIDERMAN

Attorney General of the State of New York

ATTORNEY FOR STATE DEFENDANTS

BY: STEVEN L. BANKS, Assistant Attorney General

120 Broadway, 24TH Floor. New York, New York 10271

Tel. No.: (212) 416-8621; Fax Nos.: 212-416-6009 (Not for Service of Papers)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND : DCM PART 6

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MYMOENA DAVIDS, by her parent and natural guardian MIAMONA DAVIDS, et al.,

Plaintiffs,

- against -

THE STATE OF NEW YORK, et al.,

Defendants,

- and -

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

Intervenor-Defendant,

- and -

SETH COHEN, et al.,

Intervenors-Defendants,

- and -

PHILIP A. CAMMARATA and MARK MAMBRETTI,

Intervenors-Defendants.

----------X

AFFIRMATION OF ASSISTANT ATTORNEY GENERAL STEVEN L. BANKS IN SUPPORT OF STATE DEFENDANTS' MOTION TO DISMISS

Index No. 101105/14

(Minardo, J.S.C.)

----------X

JOHN KEONI WRIGHT; et al.;

Plaintiffs,

- against -

THE STATE OF NEW YORK; et al.;

Defendants,

- and - :

SETH COHEN, et al., :

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. :

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STEVEN L. BANKS, an attorney duly admitted to practice in the Courts of the State of New York, hereby affirms under penalty of perjury:

1. I am an Assistant Attorney General in the office of ERIC T. SCHNEIDERMAN, the Attorney General of the State of New York, attorney for defendants THE STATE OF NEW YORK; THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK (also sued here as "The New York State Board of Regents"); MERRYL H. TISCH, in her official capacity as Chancellor of the Board of Regents; THE NEW YORK STATE EDUCATION DEPARTMENT; and JOHN B. KING, JR., in his official capacity as the Commissioner of Education of the State of New York (collectively the "State Defendants"). I

submit this affirmation in support of State Defendants' motion to dismiss the complaints filed in this consolidated action, for the limited purpose of providing the Court with true and accurate copies of documents previously filed in this action and copies of documents in the public record that are cited in the accompanying memorandum of law.

2. Attached hereto as Exhibit A is a copy of the Amended Verified Complaint filed in this action by the Davids plaintiffs, dated July 24, 2014.

3. Attached hereto as Exhibit B is a copy of the Complaint for Declaratory and Injunctive Relief filed by the Wright plaintiffs, dated July 28, 2014, and consolidated into this action by Order dated September 18, 2014.

4. Attached hereto as Exhibit C is a copy of the Order, dated September 18, 2014 and entered September 25, 2014, consolidating the separate actions commenced by the Wright plaintiffs and commenced by the Davids plaintiffs.

5. Attached hereto as Exhibit D is a copy of the Judgment and Decision of the Superior Court of the State of California, County of Los Angeles, in Vergara v. State of California, entered August 27, 2014.

For the reasons set forth in the accompanying memorandum of law, State Defendants' motion to dismiss the respective complaints in this consolidated action should be granted.

Dated: New York, New York
October 28, 2014

STEVEN L. BANKS
Assistant Attorney General
120 Broadway - 24th Floor
New York, New York 10271
(212) 416-8621

SUPREME COURT OF THE STATE
COUNTY OF RICHMOND

MYMOENA DAVIDS, by her parent and natural guardian MIAMONA DAVIDS, ERIC DAVIDS, by his parent and natural guardian MIAMONA DAVIDS, et al., Plaintiffs,

- against -

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

- and -

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

- and -

SETH COHEN, et al., -and- PHILIIP A. CAMMARATA AND MARK MAMBRETTI, Intervenors-Defendants.

JOHN KEONI WRIGHT; et al., Plaintiffs,

- against -

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- and -

NEW YORK CITY DEPARTMENT OF EDUCATION, Intervenor-Defendant.

-and-

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

AFFIRMATION OF ASSISTANT ATTORNEY GENERAL STEVEN L. BANKS IN SUPPORT OF STATE DEFENDANTS' MOTION TO DISMISS

ERIC T. SCHNEIDERMAN

Attorney General of the State of New York

ATTORNEY FOR STATE DEFENDANTS

BY: STEVEN L. BANKS, Assistant Attorney General

120 Broadway, 24TH Floor. New York, New York 10271

Tel. No.: (212) 416-8621; Fax Nos.: 212-416-6009 (Not for Service of Papers)

[illegible] day of [illegible] 2014

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for State Defendants
120 Broadway – 24th Floor
New York, New York 10271
STEVEN L. BANKS
Assistant Attorney General, of Counsel

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND : DCM PART 6

----------X

MYMOENA DAVIDS, by her parent and natural guardian MIAMONA DAVIDS, et al.,

Plaintiffs,

- against -

THE STATE OF NEW YORK, et al.,

Defendants,

- and -

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

Intervenor-Defendant,

- and -

SETH COHEN, et al.,

Intervenors-Defendants,

- and -

PHILIP A. CAMMARATA and MARK MAMBRETTI,

Intervenors-Defendants.

----------X

MEMORANDUM OF LAW IN SUPPORT OF STATE DEFENDANTS' MOTION TO DISMISS THE CONSOLIDATED COMPLAINTS

Index No. 101105/14

(Minardo, J.S.C.)

(Caption continued on next page)

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JOHN KEONI WRIGHT; et al.; :

Plaintiffs, :

- against - :

THE STATE OF NEW YORK; et al.; :

Defendants, :

- and - :

SETH COHEN, et al., :

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. :

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Defendants THE STATE OF NEW YORK; THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK ("Board of Regents"); MERRYL H. TISCH, in her official capacity as Chancellor of the Board of Regents; THE NEW YORK STATE EDUCATION DEPARTMENT ("SED"); and JOHN B. KING, JR., in his official capacity as the Commissioner of Education of the State of New York (collectively the "State Defendants") respectfully submit this memorandum of law in support of their motion to dismiss each respective complaint filed in this consolidated action, pursuant to CPLR Rules 3211(a)(2), (a)(3), and (a)(7) for lack of standing, lack of justiciability, and failure to state a cause of action. Also submitted in support of the present motion, for the limited purpose of providing the Court with copies of the complaints and other documents entered in this action that are referenced herein, is the Affirmation of Assistant Attorney General Steven L. Banks ("Banks Aff."), dated October 28, 2014.

PRELIMINARY STATEMENT

The Court of Appeals has held that New York's teacher 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." Ricca v. Bd. of Educ. of the City Sch. Dist. of the City of New York, 47 N.Y.2d 385, 391 (1979). Despite the Court of Appeals' prior recognition of the legitimate and rational purposes behind tenure protections for public school teachers, Plaintiffs[1] in this consolidated action seek to excise those parts of the Education Law that pertain to teacher tenure, discipline, and "last-in-first-out" seniority protections, alleging that these

[1] The plaintiffs in Davids v. State of New York and the plaintiffs in Wright v. State of New York are to be collectively referred to herein as "Plaintiffs."

statutory provisions violate the rights of public school students under the "Education Article" of the New York Constitution. For the reasons set forth below, the allegations in the consolidated complaints[2] fail to provide a basis for Plaintiffs to obtain the extraordinary relief requested.

First, the Court of Appeals has made it clear that in order to state a claim under the Education Article, the Plaintiffs must set forth allegations demonstrating that they have been denied the opportunity for a sound basic education. Plaintiffs here do not state a cognizable claim under the Education Article and do not satisfy the heavy burden placed on litigants seeking to judicially invalidate statutory law as unconstitutional, particularly as New York's teacher tenure system has already been found by the Court of Appeals to be rationally related to the State's educational policy interests. Infra, Pt. I. Second, Plaintiffs have not identified a particular injury to themselves attributable to the challenged statutes, and, thus, they lack the necessary standing to obtain judicial review of these statutes. Infra, Pt. II. Third, the question raised by Plaintiffs, namely whether public school teachers in New York State should continue to receive tenure protection is a nonjusticiable policy question that lies beyond the judiciary's power to decide. Infra, Pt. III.

Finally, if the Court were to decline to dismiss Plaintiffs' respective complaints, because Plaintiffs' claims directly challenge statutory law, dismissal is nonetheless required of the claims asserted against SED, the Board of Regents, Chancellor Tisch, and State Education Commissioner King, who were not involved in the enactment of the challenged statutes and who cannot grant the relief requested by Plaintiffs. Infra, Pt. IV.

Accordingly, the Court should grant State Defendants' motion and dismiss this action with prejudice. Dismissal would not prevent Plaintiffs, or other parents and students in the

[2] Copies of the Amended Complaint filed by the plaintiffs in Davids v. State of New York and the Complaint filed by the plaintiffs in Wright v. State of New York are attached to the Banks Affirmation as Exhibits A and B, respectively.

public school system, from seeking action from the New York State legislature, which is the only proper entity that could make the amendments to the Education Law sought by Plaintiffs.

LEGAL BACKGROUND

New York has enacted a comprehensive statutory and regulatory framework to ensure that only qualified individuals teach in the State's almost 700 public school districts, and to provide procedures governing the actions of local school districts and boards of education with respect to teacher tenure, discipline, and dismissal. As noted below, while the possibility of tenure exists for teachers at any public school district in the State, there are several different statutory provisions that pertain to tenure and tenured public school teachers, any one of which may be relevant to a particular teacher depending on the size and nature of the employing school district or board of education.

As this consolidated action attacks the very concept of tenure protections for public school teachers, Plaintiffs' respective complaints concern multiple provisions of the Education Law. The amended complaint filed by the plaintiffs in Davids specifies that they are challenging the constitutionality of Education Law §§ 1102(3), 2509, 2573, 2590-j, 3012, 3013(2), 3014, and 3020-a. See Banks Aff., Ex. A, p. 3 n. 1. The complaint filed by the plaintiffs in Wright specifies that they are challenging the constitutionality of Education Law §§ 2509, 2510, 2573, 2588, 2590, 3012, 3012-c, 3020, and 3020-a. See Banks Aff., Ex. B, ¶ 6.

Tenure Eligibility for Public School Teachers in New York State (Education Law §§ 1102, 2509, 2573, 3012 and 3014)

The Education Law includes a number of separate, though parallel, statutory provisions that provide for the conferral of tenure on teachers and other members of the teaching staff (as well as principals, administrators and other members of the supervisory staff) of various sizes of school districts and certain other public educational entities. These tenure statutes are § 2573

(for city school districts in cities with more than 125,000 inhabitants), § 2509 (for city school districts in cities with less than 125,000 inhabitants) § 3012 (for school districts other than city districts, i.e., common, union free, central and central high school districts), § 1102(3) (for county vocational education and extension boards ("CVEEB")), and § 3014 (for boards of cooperative educational services ("BOCES")). There are slight differences among these statutes, but, however, all of the tenure statutes provide that, upon certification and appointment, teachers go through a period of probation, which is generally three years for new teachers,[3] during which time they may be terminated for any constitutionally and statutorily permissible reason, and that, upon successful completion of their probationary period, teachers will be granted tenure and can thereafter be removed only for cause, including incompetency, following a hearing as described in § 3020-a. See Educ. Law §§ 1102(3); 2509(2); 2573(5); 3012(2) and 3014(2).

The main tenure provision for teachers within § 3012, which relates to tenure decisions in non-city school districts, is typical and provides in relevant part:

> Teachers and all other members of the teaching staff of school districts . . . shall be appointed by the board of education, or the trustees of common school districts, upon the recommendation of the superintendent of schools, for a probationary period of three years, except that in the case of a teacher who has rendered satisfactory service as a regular substitute for a period of two years . . . the probationary period shall be limited to one year; provided, however, that in the case of a teacher who has been appointed on tenure in another school district within the state, the school district where currently employed, or a board of cooperative educational services, and who was not dismissed from such district or board as a result of charges brought pursuant to subdivision one of section three thousand twenty-a of this chapter, the probationary period shall not exceed two years. The service of a person appointed to any of such positions may be discontinued at any time during such probationary period, on the recommendation

[3] In addition to the shorter probationary periods for certain experienced or substitute teachers, see, e.g., Educ. Law § 3012(1)(a), New York courts have held that "a probationary teacher who is aware that a board of education intends to deny him tenure, may validly waive his right to tenure and be employed for an additional year without acquiring tenure as a quid pro quo for re-evaluation and reconsideration of the tenure determination at the end of the extra year." Mtr. of Juul v. Bd. of Educ. of the Hempstead Sch. Dist. No. 1, 76 A.D.2d 837, 838 (2d Dep't 1980), aff'd, 55 N.Y.2d 648 (1981). Thus, for certain teachers, the probationary period may be as long as four years.

> of the superintendent of schools, by a majority vote of the board of education or the trustees of a common school district.

Educ. Law § 3012(1)(a). At the expiration of the probationary term, tenure will be granted on the recommendation of the superintendent of schools based upon a finding that the candidate for tenure is "competent, efficient and satisfactory." Educ. Law § 3012(2). Teachers recommended for tenure by the superintendent of schools "shall hold their respective positions during good behavior and efficient and competent service, and shall not be removed except for" any of the causes enumerated in the statute, including inefficiency and incompetency, "after a hearing, as provided by [Education Law § 3020-a]." Id.

Statutory Procedures for Removing a Tenured Public School Teacher (Education Law §§ 2590, 2590-j, 3020, and 3020-a)

Tenured teachers, regardless of the size of the school district, have statutory due process protections governing discipline or removal. In particular, under § 3020(1) tenured teachers can only be disciplined or terminated "for just cause and in accordance with the procedures specified in section three thousand twenty-a of this article or in accordance with alternate disciplinary procedures contained in a collective bargaining agreement . . . provided, however, that any such alternate disciplinary procedures contained in a collective bargaining agreement . . . must result is a disposition of the disciplinary charge within the amount of time allowed under such section three thousand twenty-a[.]" Additionally, Article 52-A of the Education Law which applies to "the city school district of the [C]ity of New York," Educ. Law § 2590, includes specific procedures relating to charges brought by community superintendents against teachers in community school districts in New York City. As is relevant to the present litigation, Education Law § 2590-j(7) provides that "[n]o member of the teaching or supervisory staff of schools who has served the full and appropriate probationary period prescribed by, or in accordance with law,

shall be found guilty of any charges except after a hearing a provided by [Education Law § 3020-a]," including charges for "[i]ncompetent or inefficient service." Educ. Law §§ 2590-j(7)(a), (7)(b)(4).

Section 3020-a describes the administrative process for removing a tenured teacher and requires, inter alia, formal written charges be filed with "the clerk or secretary of the school district or employing board;" a determination by the employing board of education "whether probable cause exists to bring a disciplinary proceeding;" and the employee's right to request an administrative hearing to contest the charges before an impartial hearing officer from a list of names supplied by the American Arbitration Association.[4] See Educ. Law §§ 3020-a(1), (2)(a), (2)(c), (3)(a). Firm time limits are set forth in the statute for the completion of each step in the administrative process: (1) the board of education must make a probable cause determination within five days after receipt of the charges; (2) the employee must make known any request for a hearing within ten days after receipt of the statement of charges; (3) the board of education and employee must select a hearing officer within fifteen days after receipt of the list of potential hearing officers; (4) "within ten to fifteen days of agreeing to serve," the hearing officer is required to hold a pre-hearing conference to address the need for subpoenas, motions, and requests for information; (5) "[a]ll evidence" must be "submitted by all parties within one hundred twenty-five days of the filing of charges and no additional evidence shall be accepted after such time, absent extraordinary circumstances beyond the control of the parties;" (6) the hearing officer must render a written decision within thirty days after the last day of the hearing; and (7) either party who wishes to challenge a hearing officer's decision must apply to the Supreme Court of the State of New York within ten days of receipt of the decision. Id. §§ 3020-

[4] In New York City, the collective bargaining agreement with the teachers' union provides that hearing officers are to be selected from a permanent twenty-member arbitration panel whose members are jointly appointed by the New York City Department of Education and the United Federation of Teachers.

a(1), (2)(a), (2)(c), (3)(b)(iii), (3)(c)(ii), (3)(c)(vii), (4)(a), (5)(a).

Seniority Protections Afforded Public School Teachers (Education Law §§ 2510, 2585, 2588, and 3013)

If a local school district decides to eliminate one or more teaching positions, the Education Law mandates the termination of teachers with the least seniority in the position's particular area of instruction. As with the statutory provisions governing appointment with tenure, there are distinct, but similarly worded, statutory provisions governing the abolition of teaching positions based on the size of the city in which the school district is located, or whether the affected position is employed by a BOCES. See Educ. Law § 2510 (for cities with less than 125,000 residents); § 2585 (for cities with more than 125,000 residents); § 2588 (for school districts in cities with more than 1,000,000 inhabitants); § 3013 (for non-city school districts and BOCES).

FACTUAL BACKGROUND

On September 18, 2014, the Court granted the State Defendants' motion and consolidated two separately filed actions pursuant to CPLR § 602: Mymoena Davids, et al., v. The State of New York, et al., which had been commenced in Richmond County, and John Keoni Wright, et al., v. State of New York, et al., which had been commenced in Albany County. See Banks Aff., Ex. C (Order). In their amended complaint, the plaintiffs in Davids are identified as ten students who attend public school in New York City and their parents, and one child, Andrew Henson, who allegedly resides in New York State but for whom no information is provided regarding his school placement. See Banks Aff., Ex. A, ¶¶ 8-18. No other relevant information is provided about the plaintiffs in Davids. Indeed, there is a complete absence of information about the Davids plaintiffs' assigned teachers, their educational environment, and their academic progress. See Banks Aff., Ex. A, passim.

In their complaint, the plaintiffs in Wright are identified as seven parents who have sued on behalf of their children, five of whom are schooled in the New York City public school system, one of whom is schooled in the Rochester public school system, and one of whom attends a private school in Rochester. See Banks Aff., Ex. B, ¶¶ 10-16. As with the plaintiffs in Davids, the complaint filed in the Wright action contains very few allegations about the individually named plaintiffs. Other than for plaintiff John Wright's daughters, Kyler and Kaylah, no information in provided in the complaint about the teachers assigned to teach the children of the other named plaintiffs, or about their educational environment and academic progress. See Banks Aff., Ex. B, passim. Even for Kyler and Kaylah, the complaint simply alleges, without more, that Kaylah was assigned last year to an effective teacher and that Kyler was assigned last year to an ineffective teacher. See Banks Aff., Ex. B., ¶¶ 4-5.

STANDARD OF REVIEW

"On a motion to dismiss pursuant to CPLR Rule 3211, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." Wiesen v. New York Univ., 304 A.D.2d 459, 460 (1st Dep't 2003) (citing Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994)) (quotation and additional citations omitted). See also Mazzei v. Kyriacou, 98 A.D.3d 1088, 1090 (2d Dep't 2012) (finding that the trial court should have dismissed counterclaims because "[e]ven accepting as true the facts alleged in support of the . . . counterclaims, and according the defendants the benefit of every possible inference, the . . . counterclaims are not supported by sufficiently particular allegations that the plaintiff" was liable to the defendants). However, courts are "not required to accept factual allegations that are contradicted by documentary evidence, or legal conclusions that are unsupportable in the face of

undisputed facts." Zanett Lombardier, Ltd. v. Maslow, 29 A.D.3d 495 (1st Dep't 2006) (citation omitted). Further, "claims consisting of bare legal conclusions with no factual specificity--are insufficient to survive a motion to dismiss." Godfrey v. Spano, 13 N.Y.3d 358, 373 (2009) (citation omitted). The actual content of laws, regulations and judicial opinions are subject to judicial notice without request. See CPLR Rule 4511.

ARGUMENT

POINT I

PLAINTIFFS' ALLEGATIONS FAIL TO STATE A MERITORIOUS BASIS FOR CHALLENGING THE CONSTITUTIONALITY OF NEW YORK'S TEACHER TENURE STATUTES.

Both the Davids and Wright plaintiffs seek to strip the current protections for tenured public school teachers from the Education Law. Specifically, the Davids plaintiffs seek a judgment declaring as unconstitutional, and an order enjoining the State of New York from enforcing or implementing, the current statutes that pertain to the dismissal of tenured teachers (identified in the Davids amended complaint as Education Law §§ 1102(3), 2509, 2573, 2590-j, 3012, 3014, and 3020-a) and "last-in-first-out" seniority protection (identified in the Davids amended complaint as Education Law § 3013(2)). See Banks Aff., Ex. A, ¶¶ 37, 44 & p. 18. The Davids plaintiffs seek to have this Court compel the State to provide public school teachers with no greater procedural rights than are provided to New York civil service employees. Id., p. 18.

The Wright plaintiffs seek a judgment declaring as unconstitutional, and an order enjoining the State of New York from enforcing or implementing, the current statutes that govern the appointment of a teacher with tenure (identified in the Wright complaint as Education Law §§ 2509, 2573, 3012, 3012-c), the dismissal of tenured teachers (identified in the Wright

complaint as Education Law §§ 2590, 3020, 3020-a), and "last-in-first-out" seniority protection for public school teachers (identified in the Wright complaint as Education Law §§ 2510, 2585, 2588). See Banks Aff., Ex. B, ¶¶ 6, 34, 49, 66 & pp. 22-23. While their complaint is not clear, it appears that the Wright plaintiffs would have this Court remove all procedural protections for public school teachers resulting in an universal "at will" employment status for public school teachers in New York State. Id., ¶¶ 32-33.

Not surprisingly, judicial action striking down statutory law is an extraordinary remedy available only when the statute clearly violates the constitution, see Peo. v. Borriello, 155 Misc. 2d 261, 262 (Sup. Ct. Kings Co. 1992), and "only as a last unavoidable result," Mtr. of Van Berkel v. Power, 16 N.Y.2d 37, 40 (1965) (citations omitted). Indeed, "[i]t is well settled that 'legislative enactments enjoy a strong presumption of constitutionality,'" Mtr. of N.Y. Charter Schs. Ass'n, Inc. v. Dinapoli, 13 N.Y.3d 120, 130 (2009) (quoting LaValle v. Hayden, 98 N.Y.2d 155, 161 (2002)), and courts must avoid, if possible, interpreting a presumptively valid statute in a way that might "needlessly render it unconstitutional," LaValle, 98 N.Y.2d at 161. Parties seeking, as here, to mount a facial challenge to statutory law must rebut the presumption of validity "by proving that the invalidity of the law is beyond a reasonable doubt." N.Y. Charter Schs. Ass'n, Inc., 13 N.Y.3d at 130 (citations omitted). See also Mtr. of State of New York v. Enrique T., 93 A.D.3d 158, 167 (1st Dep't 2012) (reversing lower court's order that had found statute providing for civil detention of sex offenders to be unconstitutional and specifically noting that the "heavy burden of a challenger is to establish that 'no set of circumstances exists under which the statute would be valid.'") (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)).

This appears to be one of only two cases in which the constitutionality of a tenure statute has been challenged under the New York Constitution's Education Article. In the other, Brady v. A Certain Teacher, 166 Misc. 2d 566 (Sup. Ct. Suffolk Co. 1995), the Patchogue-Medford Union Free School brought a declaratory judgment action against one of its teachers asserting, inter alia, that Education Law §§ 3012 and 3020-a "violate [the Education Article] in that the burden of proof set forth therein and imposed upon boards of education which seek to terminate employment of a tenured teacher acts to limit the rights of students of such a teacher to obtain public education and instruction within the meaning" of the Education Article, id. at 574. In finding that the plaintiff school district had "failed to meet their heavy burden of demonstrating the constitutional infirmity of section 3020-a of the Education Law beyond a reasonable doubt," the court observed that:

> [T]he Court of Appeals having rendered decisions in the area of each constitutional challenge to section 3020-a of the Education Law and having implicitly upheld the validity of the present version of section 3020-a by virtue of such version being a codification of some 20 years of developing, affirming and reaffirming the principle that the pay of a tenured teacher suspended pursuant to section 3020-a(2) of the Education Law pending hearing and determination of disciplinary charges may not be withheld, this court was presented with a substantial basis to find that section 3020-a could withstand each constitutional challenge.

Id. at 574-575.

As Plaintiffs in the present action also fail to allege facts which state a cause of action under the Education Article, and as the tenure protections for public school teachers are long-standing and previously recognized as having a rational basis, their constitutionality claims should be dismissed.

A. Plaintiffs must set forth specific factual allegations demonstrating the denial of the opportunity for a sound basic education.

The Education Article of the New York Constitution, states, in part, 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." See N.Y. Const. Art. XI, § 1. The Court of Appeals has held that the Education Article "requires the State to offer all children the opportunity of a sound basic education." Campaign for Fiscal Equity, Inc. v. State of New York, 86 N.Y.2d 307, 316 (1995) ("CFE I").

> The State must assure that some essentials are provided. Children are entitled to minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn. Children should have access to minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks. Children are also entitled to minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subject areas.

Id. at 317. According to the Court of Appeals, the State's obligation under the Education Article is to systemically provide the opportunity to obtain "the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury." Id. at 316.

The Court of Appeals has recognized that, under the Education Article, "students have a constitutional right to a 'sound basic education' and could prove a violation of this right by demonstrating 'gross and glaring inadequacy' in their schools." Paynter v. State of New York, 100 N.Y.2d 434, 439 (2003) (quoting Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 57 N.Y.2d 27, 48 (1982)).

> Fundamentally, an Education Article claim requires two elements: the deprivation of a sound basic education, and causes attributable to the State. As our case law makes clear, even gross educational inadequacies are not, standing alone, enough

> to state a claim under the Education Article. Plaintiffs' failure to sufficiently plead causation by the State is fatal to their claim.

N.Y. Civil Liberties Union v. State of New York, 4 N.Y.3d 175, 178-179 (2005). See also Paynter, 100 N.Y.2d at 440.

The case law makes clear that an entitlement to the opportunity for a sound basic education is not an entitlement to receipt of the education and educational services each student prefers at all times, nor to absolute equality of educational opportunities at all times between all students. See Levittown, 57 N.Y.2d at 47-48 ("There is, of course, a system of free schools in the State of New York. The Legislature has made prescriptions . . . with reference to the minimum number of days of school attendance, required courses, textbooks, qualifications of teachers and of certain nonteaching personnel, pupil transportation, and other matters. If what is made available by this system (which is what is to be maintained and supported) may properly be said to constitute an education, the constitutional mandate is satisfied."); N.Y. Civil Liberties Union, 4 N.Y.3d at 178 (noting that "the Constitution does not require equality of educational offerings throughout the state"). Because rights under the Education Article concern the educational system provided by the State, and not a student's individual educational experience, courts have held that to state a cause of action, the allegations of deficient educational inputs and outputs must be sufficiently detailed and specific to the school district represented by the plaintiff. See N.Y. State Ass'n of Small City Sch. Dists. v. State of New York, 42 A.D.3d 648, 652 (3d Dep't 2007) (affirming dismissal of complaint for failure to state a cause of action under the Education Article).

> [While] the amended complaint alleges deficiencies in the quality of teaching, facilities and resources in small city school districts, that these deficiencies have resulted in poor outputs, such as low standard test results and low high school completion rates, and that such failings are caused by the funding of small city schools at a lower per-student rate than noncity schools, it fails to include any

> factual allegations which are specific to the four school districts represented by the remaining plaintiffs. To state a cause of action under the Education Article, it is not enough to allege inequalities in the educational opportunities offered by different school districts. Further, even where--as here--deficiencies in both [educational] inputs and outputs are alleged, the allegations must demonstrate that plaintiffs are harmed by some district-wide failure.

Id. (citations omitted). See also N.Y. Civil Liberties Union, 4 N.Y.3d at 181-182 (finding that plaintiffs failed to state a cause of action under the Education Article because "plaintiffs do not allege any district-wide failure" but "instead seeks to mandate that the State provide money or other resources directly to individual schools").

Therefore, in order to state a claim under the Education Article, Plaintiffs are required to set forth factual allegations of systemic gross and glaring deficiencies which deny them the opportunity for a sound basic education as a result of the teacher tenure and seniority laws that they challenge. As set forth below, they have utterly failed to carry this burden.

B. Plaintiffs' allegations fail to state a cause of action under the Education Article, or a legal basis for uprooting New York's statutory tenure protections.

1. The tenure provisions are rationally related to protecting competent and experienced teachers from "the whim of their supervisors."

To prevail on a facial constitutional challenge, such as is presented here, a plaintiff must demonstrate that the challenged statute "in any degree and in every conceivable application would be unconstitutional." McGowan v. Burstein, 71 N.Y.2d 729, 733 (1988). Facial invalidation is "an extraordinary remedy" that is disfavored. Enrique T., 93 A.D.3d at 167.

The Court of Appeals has already had occasion to review issues involving teacher tenure and has unreservedly found that tenure protection 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." Ricca, 47 N.Y.2d at 391. Plaintiffs' requests that the Court declare the range of New York's tenure statutes unconstitutional and enjoin their enforcement cannot conceivably succeed. Quite simply, the statutes have a judicially recognized, rational purpose of ensuring that tenured teachers are protected from dismissal decisions based on favoritism or other improper motivations. Similarly, courts have found that the "last-in-first-out" seniority preferences for teachers are rationally related to protecting such teachers from abuse. See Mtr. of Madison-Oneida Bd. of Cooperative Educ. Servs. v. Mills, 4 N.Y.3d 51, 60 n. 9 (2004) (discussing legislative history of seniority preferences contained in Education Law § 3013 including the need to "prevent the use of favoritism" and to prevent "school boards from abolishing a position as means for disposing of unwanted tenured personnel, when in fact, no savings in cost or increase in efficiency is expected to be realized.").

Even if Plaintiffs could establish the factual allegations in their complaints that the present tenure protections hinder efforts to remove some ineffective teachers, at most Plaintiffs would establish that the tenure system is not perfect, far short of satisfying the "heavy burden" placed on plaintiffs making a facial challenge "to establish that no set of circumstances exists under which the statute would be valid." Enrique T., 93 A.D.3d at 167 (citation and quotation omitted).

2. Plaintiffs' allegations do not establish that the statutory tenure protections deprive students in the represented school districts of a sound basic education.

The focus of a claim under the Education Article is on ensuring that the state has in place a system to provide a minimal, constitutionally sufficient education, and determining whether there is a "gross and glaring inadequacy" in the provision of educational services by the relevant school district. Paynter, 100 N.Y.2d at 439. The Education Article, as explained by the courts,

does not require that the State provide every student with an optimal education, or that educational opportunities be uniform throughout the State. See Levittown, 57 N.Y.2d at 48.

Here, Plaintiffs' complaints make only the barest, generalized assertions that New York's system of tenure protections deprives students of the opportunity for a sound basic education. See, e.g., Banks Aff., Ex. A, ¶¶ 29-31; Ex. B, ¶ 23. The amended complaint in Davids even acknowledges that "the majority of teachers in New York are providing students with a quality education[.]" Banks Aff., Ex. A, ¶ 4. To the extent that Plaintiffs' complaints discuss the provision of a sound basic education at all, the allegations are conclusory or based on information from years ago that cannot possibly be used as evidence of educational quality today. For example, the amended complaint in Davids cites a 2003 opinion of the Court of Appeals in the Campaign for Fiscal Equity litigation as support for the allegation that "some New York K-12 public school students are being taught by teachers who fail to provide their students with the knowledge and skills necessary to be meaningful civic participants and competitive job applicants." Banks Aff., Ex. A, ¶ 4 (citing Campaign for Fiscal Equity, Inc. v. State of New York, 100 N.Y.2d 893, 905 (2003) ("CFE II")). However, the Court in CFE II was addressing data from the 1997-1998 school year, more than 16 years before the commencement of Davids. See Campaign for Fiscal Equity, Inc. v. State of New York, 8 N.Y.3d 14, 20 (2006) ("CFE III").

Likewise, the complaint in Wright merely alleges that "the Challenged Statutes deprive New York students of a sound basic education, providing no true means for administrators to remove teachers with track record of ineffectiveness, and causing too many students to remain in the classroom with ineffective teachers." See Banks Aff., Ex. B, ¶ 33. While the complaint in Wright also cites a number of scholarly articles and studies that purportedly show that teaching

quality generally affects student achievement, id. at ¶¶ 28-31, these allegations fail to satisfy the burden placed on litigants seeking to state a cause of action under the Education Article of presenting specific factual allegations of a "district-wide failure" specific to the school districts represented by the plaintiffs. See N.Y. State Ass'n of Small City Sch. Dists., 42 A.D.3d at 652.

Neither set of plaintiffs have set forth the specific factual allegations of the deprivation of a sound basic education in their particular school districts that are necessary to state a cause of action under the Education Article. Compare with CFE I, 86 N.Y.2d at 318-319 (finding that the plaintiffs had stated a cause of action under Education Article by alleging that "New York City students are not receiving the opportunity to obtain an education that enables them to speak, listen, read, and write clearly and effectively in English, perform basic mathematical calculations, be knowledgeable about political, economic and social institutions and procedures in this country and abroad, or to acquire the skills, knowledge, understanding and attitudes necessary to participate in democratic self-government" and "support[ing] these allegations with fact-based claims of inadequacies in physical facilities, curricula, numbers of qualified teachers, availability of textbooks, library books, etc.").

While Plaintiffs also contend that ineffective teachers--a term that Plaintiffs do not define--remain in classrooms because of tenure protections, and that these ineffective teachers do not educate their students as well as effective teachers, see, e.g., Banks Aff., Ex. A, ¶ 3, comparisons between the effectiveness of individual teachers or between the academic progress of individual students is irrelevant in determining whether the State has met its obligation under the Education Article to provide a sound basic education. The case law makes clear that the State is obligated only to ensure that school districts are able, on a district wide basis, to teach "basic literacy, calculating, and verbal skills necessary to enable children to eventually function

productively as civic participants capable of voting and serving on a jury." CFE I, 86 N.Y.2d at 316. As Plaintiffs fail to allege that their school districts, New York City and Rochester, fail to deliver a sound basic education, as defined by the Court of Appeals, their Education Article claims are subject to dismissal.

3. Plaintiffs' allegations do not establish that the tenure statutes cause a deprivation of a sound basic education.

"Fundamentally, an Education Article claim requires two elements: the deprivation of a sound basic education, and causes attributable to the State." N.Y. Civil Liberties Union, 4 N.Y.3d at 178-179. In the present action, even if the Court were to find that Plaintiffs had adequately plead a deprivation of a sound basic education, their own allegations and the plain language of the tenure statutes show that such deprivation is not caused by the State's tenure statutes.

Significantly, public school teachers are employees of local school districts or boards of education, that are responsible for hiring teachers, evaluating teachers, making decisions on tenure, and, if necessary, initiating administrative action to remove teachers. If there are ineffective tenured public school teachers in the classrooms in New York State, their employment has far more to do with the actions of the local school district or board of education than State statute. This is particularly true since the statutes at issue compel local school districts at every turn to consider teacher effectiveness and competency when making employment decisions. In particular, the Education Law: (1) provides local school districts and boards of education three years to evaluate probationary teachers, with the possibility of a fourth probationary year, Juul, 76 A.D.2d at 838, during which time the teacher may be terminated for any lawful reason, and authorizes them to grant appointment with tenure to those teachers who have demonstrated "competent, efficient and satisfactory" performance during the probationary

period, see §§ 2509(2), 2573(5), 3012(2), 3014(2); (2) mandates that school districts and BOCES conduct annual professional performance evaluations that identify public school teachers as "highly effective," "effective," "developing," or "ineffective," § 3012-c(2)(a)(1); and (3) permits school districts to remove a tenured teacher for incompetency following a hearing, see §§ 2590-j(7)(b)(4), 2509(2), 2573(5), 3012(2), 3014(2). Under § 3012-c(1), the annual professional performance reviews are to be a "significant factor" in tenure, retention, and other employment decisions.

Plaintiffs appear to acknowledge that the plain language of the Education Law does not immunize ineffective teachers from removal, since they can only assert that the tenure statutes "effectively prevent the removal of ineffective teachers," see Banks Aff., Ex. A, ¶ 5, and that tenure protections "hamstring" school administrators and gives tenured public school teachers "essentially permanent employment," see Banks Aff., Ex. B, ¶¶ 3, 24. In other words, if there is a problem with ineffective teachers in New York public schools, the problem is a result of school districts and boards of education not making use of the administrative process set forth in the Education Law and not the statutes themselves. See Donnelly v. Greenburgh Cent. Sch. Dist. No. 7, 691 F.3d 134, 148-149 (2d Cir. 2012) (noting that tenured public school teachers are removable for cause under Education Law § 3012, and finding that "it is . . . not clear that the 'tenure' offered to teachers . . . offers materially more job protection than is common to unionized public sector employees outside the educational context").

Further, the State has taken positive action to enhance the quality of teachers in New York State, and to expedite the administrative procedures for addressing charges of teacher incompetence and inefficiency. Notably, New York State requires public school teachers, before they enter the classroom, have demonstrated certain minimum knowledge, skills and abilities

through education, experience and the State's certification examinations. See, e.g., 8 N.Y.C.R.R. §§ 80-1.5(a); 80-3.3; 80-3.4. Once a public school teacher receives a professional certificate, the teacher must satisfy "the professional development requirement prescribed by" state regulations, id., § 80-3.4(a)(1), including, most significantly, 175 hours of professional development during a five-year period.[5] Id., § 80-3.6(b)(1)(i).

In the last few years, New York State has made significant changes to the Education Law to better evaluate public school teachers and to improve the efficiency of the administrative hearing process when a teacher is charged with incompetency, including the introduction of annual professional performance evaluations for teachers, see Educ. Law § 3012-c; the establishment of firm timelines for the administrative teacher discipline/removal procedure set forth in Education Law § 3020-a; and the use of greater oversight by SED over the individual hearing officers who conduct the administrative hearings required by Education Law § 3020-a. See, e.g., L. 2010, Ch. 103; L. 2012, Ch. 21; L. 2012, Ch. 57. As a result of these recent enactments, the Education Law provides for an expedited hearing process on charges of incompetence that are brought based on a pattern of ineffective teaching as defined in §3012-c, see Educ. Law § 3020-a(3)(c)(i-a), and requires that collectively bargained, alternate disciplinary procedures provide for such an expedited hearing in cases based on a pattern of ineffective teaching, see Educ. Law § 3020 (4). The expedited hearing process requires charges to be heard by a single hearing officer instead of a three-member panel, see Educ. Law § 3020-a(2)(c), a firm sixty-day deadline to complete the hearing process with limitations on the granting of adjournments, see Educ. Law § 3020-a(3)(C)(i-a)(A), and a requirement that the Commissioner of Education notify hearing officers of their obligation to strictly follow the time periods for an

[5] This exceeds the continuing education requirements of other professions. For example, experienced attorneys are required to complete 24 hours of continuing legal education for each biennial registration period. See 22 N.Y.C.R.R. § 1500.22.

expedited hearing, and authorizes the Commissioner to remove hearing officers from the list of eligible hearing officers for continued failure to comply with those expedited timelines, see Educ. Law §§ 3020-a(3)(c)(i)(B), (3)(c)(i-a)(C). Given these recent changes to the Education Law, and the State's continuing efforts to enhance teacher quality, the studies that Plaintiffs cite in their complaints are not relevant or applicable. See, e.g., Banks Aff., Ex. A, ¶ 39 (citing 2007 study concerning the cost and length of time to complete administrative dismissal process).

Accordingly, for the foregoing reasons, Plaintiffs cannot satisfy the causation element of a claim under the Education Article.

C. Plaintiffs cannot rely upon Vergara v. State of California to support their claims.

On June 10, 2014, in Vergara v. State of California, the Superior Court of California, Los Angeles County, issued a tentative decision invalidating five California tenure-related statutes as violative of the Equal Protection Clause of the California State Constitution. The tentative decision is embodied in a final judgment and decision entered August 27, 2014. See Banks Aff., Ex. D (Vergara decision). That decision is unavailing in this case for a number of reasons. First, the decision from the lower court is on appeal and has been stayed pending the outcome of that appeal. Additionally, Vergara was decided on the basis of the Equal Protection Clause of the California State Constitution, under which the right to an education is fundamental, and, thus, the court found that the challenged statutes would be subject to strict scrutiny. Here, no party asserts an equal protection claim and, in any event, education is not recognized as a fundamental right under New York law and, thus, any statute challenged under the Equal Protection Clause of the New York Constitution would be subject to rational basis review. See, e.g., Paynter, 100 N.Y.2d at 449; CFE I, 86 N.Y.2d at 319; Levittown, 57 N.Y.2d at 44. As stated above, affording teachers tenure protections has already been found to be rational by the Court of Appeals. See

Ricca, 47 N.Y.2d at 391. Further, the tenure provisions challenged here are much different than those challenged in Vergara. New York's tenure review period is significantly longer than California's, as the Vergara decision noted, and New York has revised its procedures for teacher discipline, which have reduced the costs and length of disciplinary hearings. Therefore, to the extent that Plaintiffs presume to assert a challenge to teacher tenure based upon the Vergara decision, such argument must fail.

Accordingly, for all of the foregoing reasons, the State Defendants' motion should be granted and the Plaintiffs' respective complaints dismissed for failure to state a cause of action.

POINT II

PLAINTIFFS LACK STANDING TO CHALLENGE THE CONSTITUTIONALITY OF NEW YORK'S TEACHER TENURE STATUTES.

The complainant's standing "is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation." Soc'y of Plastics Indus., Inc. v. County of Suffolk, 77 N.Y.2d 761, 769 (1991) (citation omitted). A motion to dismiss for lack of standing is properly brought pursuant to CPLR Rule 3211(a)(3). See Brach v. Harmony Servs. Inc., 93 A.D.3d 748, 750 (2d Dep't 2012); Sterling v. Minskoff, 226 A.D.2d 125 (1st Dep't 1996). Once defendants raise the issue of plaintiffs' standing, plaintiffs bear the burden of demonstrating that they have standing to raise each of the issues for which they seek judicial review. See N.Y. State Ass'n of Nurse Anesthetists v. Novello, 2 N.Y.3d 207, 211 (2004); Soc'y of Plastics Indus., Inc., 77 N.Y.2d at 773; Uhlfelder v. Weinshall, 47 A.D.3d 169, 181 (1st Dep't 2007).

New York courts apply a two-part test to determine whether a plaintiff has standing. "A plaintiff has standing to maintain an action upon alleging [1] an injury in fact that [2] falls within his or her zone of interest." Silver v. Pataki, 96 N.Y.2d 532, 539 (2001). See also N.Y. State

Ass'n of Nurse Anesthetists, 2 N.Y.3d at 211 (discussing test for standing and finding that professional association representing certified registered nurse anesthetists lacked standing to challenge Department of Health guidelines concerning that the administration of anesthesia in doctors' offices). Even assuming that Plaintiffs' educational interests fall within the zone of interests protected by the Education Article of the New York Constitution, Plaintiffs nonetheless lack standing because none of them has alleged a specific injury as a result of the challenged tenure statutes that is more than conjectural. See Soc'y of Plastics Indus., Inc., 77 N.Y.2d at 772.

A. Plaintiffs' status as students in the public school system is insufficient in itself to give them standing to challenge the tenure statutes.

"The existence of an injury in fact--an actual legal stake in the matter being adjudicated--ensures that the party seeking review has some concrete interest in prosecuting the action which casts the dispute 'in a form traditionally capable of judicial resolution.'" Soc'y of Plastics Indus., Inc., 77 N.Y.2d at 772 (quoting Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 220-221 (1974)). Most relevant to the present action, "the constitutionality of a State statute may be tested only by one personally aggrieved thereby, and then only if the determination of the grievance requires a determination of constitutionality." St. Clair v. Yonkers Raceway, Inc., 13 N.Y.2d 72, 76 (1963). In other words, to have standing the injury suffered by the plaintiff must be "distinct from that of the general public." Mtr. of Transactive Corp. v. N.Y. State Dep't of Soc. Servs., 92 N.Y.2d 579, 587 (1998).

Even without addressing the heavy burden Plaintiffs face in pleading a claim under the Education Article, none of the Plaintiffs have alleged a specific injury traceable to the tenure statutes that they are challenging in this lawsuit. Crucially, while Plaintiffs' theory is that "students taught by ineffective teachers who continue teaching as a result of the Challenged Statutes are denied" a sound basic education, Banks Aff., Ex. A, ¶ 7, and that New York's tenure

statutes "hamstring school administrators from making employment decisions based on student need and obstruct them from restoring the quality of the New York public education system," Banks Aff., Ex. B, ¶ 3, there are no allegations whatsoever in either Davids or Wright that a plaintiff or a plaintiff's child has been instructed by a teacher whom the local school district had identified as being incompetent but then failed to remove because of the perceived time and expense necessary to comply with the administrative hearing process set forth in Education Law § 3020-a. See Banks Aff., Ex. A, ¶¶ 8-18; Ex. B, passim. Nor are there are any allegations that any plaintiff or plaintiff's child has been taught by an incompetent teacher who retained his or her teaching position because of the seniority protections set forth in Education Law §§ 2510, 2585, 2588, 3013.

Indeed, there is only one student identified by Plaintiffs, plaintiff John Keoni Wright's daughter Kyler, who is alleged to have been "assigned to an ineffective teacher." See Banks Aff. Ex. B, ¶ 4. However, the relationship between Kyler's allegedly ineffective teacher and the challenged tenure statutes or the relief requested in this lawsuit is not articulated. No information is provided whatsoever about the teacher's tenure status, the reasons for plaintiff Wright's conclusion that the teacher is ineffective, any complaints by plaintiff Wright to the New York City Department of Education about this allegedly incompetent teacher, or any action considered by the New York City Department of Education to remove Kyler's teacher. As noted, because Plaintiffs' claim is that incompetent tenured teachers remain employed because local school districts are reluctant to expend the time and effort to pursue the administrative hearing process required by Education Law § 3020-a, to be aggrieved by the challenged statutes and possibly have standing, it is not enough for a plaintiff or a plaintiff's child to be taught by an allegedly ineffective teacher, but rather there must be an allegation that the child's assignment to

an ineffective teacher was caused by the challenged statute. None of the plaintiffs, including plaintiff Wright, can meet this initial threshold requirement.

At most, Plaintiffs contend that, because of the statutory protections afforded tenured public school teachers, they or their children face the possibility in the future of being assigned to a class taught by an ineffective teacher. See Banks Aff., Ex. A, ¶ 54; Ex. B, ¶ 33. However, even if having an allegedly ineffective teacher were sufficient to confer standing under the Education Article, which it is not, it is black letter law that a conjectural injury is insufficient to satisfy the "injury in fact" element for standing, and thus the mere chance of assignment to such a teacher is not sufficient to establish injury. See N.Y. State Ass'n of Nurse Anesthetists, 2 N.Y.3d at 211, 213-214; Mtr. of Gym Door Repairs Inc. v. New York City Dep't of Educ., 112 A.D.3d 1198, 1199 (3d Dep't 2013) (finding that petitioner, an installer of electric partitions used in school gymnasiums, lacked standing to sue local school districts for an alleged failure to comply with state law regarding the installation of electric partitions because petitioner's articulated injury, namely risks "that their employees might get hurt working on improperly maintained safety devices, [and] they are potentially exposed to litigation if a device installed by them is not properly maintained by respondents and causes injury," was "too speculative and conjectural to satisfy the injury-in-fact requirement"); Roberts v. N.Y. City Health & Hosps. Corp., 87 A.D.3d 311, 320 (1st Dep't 2011) (no standing where the alleged injury is "potential, not actual"); Mtr. of McAllan v. New York State Dep't of Health, 60 A.D.3d 464 (1st Dep't 2009) (petitioner lacked standing to challenge changes to the way New York City deploys its paramedics finding that petitioner's "concern that the Health Department's determination might adversely affect him, as a citizen, if he requires an ambulance or a fire engine in the future, is too speculative"). Thus, Plaintiffs' stated concern that they or their children may at some point in

the future be assigned to an ineffective teacher who retained his or her job due to the challenged laws is insufficient to permit this lawsuit to continue. See also Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992) ("'some day' intentions--without any description of concrete plans, or indeed even any specification of when the some day will be--do not support a finding of the 'actual or imminent' injury that our cases require" for standing) (citation omitted) (emphasis in original); L.A. v. Lyons, 461 U.S. 95, 105-106 (1983) (finding that plaintiff lacked standing to seek injunction against the use of chokeholds by Los Angeles police because plaintiff could not "establish a real and immediate threat that he would again be stopped for a traffic violation . . . by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part").

In any event, even if one of the Plaintiffs could allege an assignment to an ineffective teacher as a result of one of the tenure statutes being challenged in this lawsuit, that would not be sufficient to state an injury under the Education Article. The law is clear that in order to have standing to assert this constitutional challenge, Plaintiffs must demonstrate that the alleged unconstitutional statutes have had an "adverse impact" upon their rights. See, e.g., Islip v. Cuomo, 147 A.D.2d 56, 66-67 (2d Dep't 1989) (citing Ulster County Court v. Allen, 442 U.S. 140, 154 (1979) ("As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations."); Broadrick v Oklahoma, 413 U.S. 601, 611 (1973) (holding that a "person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court[.] These principles . . . reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on

the validity of the Nation's laws.")). As already noted, to state a claim under the Education Article requires that the plaintiff allege that there exist significant and district-wide deficiencies in the educational opportunities present in the plaintiff's school district. See CFE I, 86 N.Y. 2d at 318-319; N.Y. State Ass'n of Small City Sch. Dists., 42 A.D.3d at 652. It has never been held, and would be incongruous with the language of the Education Article, that a student's individual educational experience can give rise to a facial constitutional challenge under the Education Article. As Plaintiffs have failed to allege individual injuries attributable to the tenure statutes, and have failed to alleged district-wide failures in the educational opportunities offered to students in the school districts of New York City and Rochester, they lack the standing necessary for this lawsuit to proceed.

B. Plaintiffs lack standing to challenge any statute that does not affect either the New York City or Rochester public school districts.

As more fully described above, supra, the Education Law contains different tenure statutes applicable to large city school districts and smaller school districts. Thus, even if any of the Plaintiffs could allege a specific injury traceable to New York's tenure system, because none of the Plaintiffs are alleged to be schooled outside of New York City or Rochester, they would nonetheless lack standing to challenge any of the identified statutes that pertain only to non-city school districts, small city school districts, CVEEBs, or BOCES, including Education Law §§ 1102, 2509, 2510, 3012, 3013, 3014. Quite simply, because Plaintiffs are schooled in two of the largest school districts in the State, and do not receive educational services from a CVEEB or BOCES, whatever injuries they may articulate are certainly not traceable to statutory provisions that only pertain to smaller school districts, CVEEBs or BOCES.

C. The two plaintiffs who are not enrolled in the public school system lack standing to challenge any tenure statute.

Similarly, the tenure protections set forth in the Education Law and challenged in this consolidated lawsuit only pertain to teachers employed by a public school district, a CVEEB, or BOCES. Therefore, the child of a named plaintiff in Wright who is alleged to attend a private school, Adia-Jendayi Pradia, and the named plaintiff in Davids who is not alleged to attend public school at all, Andrew Henson, see Banks Aff., Ex. A, ¶ 13; Ex. B, 15, clearly lack standing to challenge statutory provisions on tenure that only pertain to public school teachers.

Accordingly, for all of the foregoing reasons, Plaintiffs' claims challenging the constitutionality of statutory provisions in the Education Law that pertain to teacher tenure, teacher discipline, and teacher dismissal should be dismissed for lack of standing.

POINT III

PLAINTIFFS' BROAD CHALLENGE TO NEW YORK STATE'S TENURE STATUTES PRESENTS NONJUSTICIABLE POLICY QUESTIONS THAT ARE PROPERLY IN THE PURVIEW OF THE LEGISLATURE AND EXECUTIVE BRANCHES.

The subject matter jurisdiction of New York State courts extends only to justiciable controversies. See Jonas v. Beame, 45 N.Y.2d 402, 408-409 (1978). Although it is recognized that justiciability is a "nebulous" concept, Klostermann v. Cuomo, 61 N.Y.2d 525, 535 (1984), justiciable controversies exclude "political questions." Jonas, 45 N.Y.2d at 408 (citing Flast v. Cohen, 392 U.S. 83, 95 (1968)). Additionally, within the concept of justiciability is the "paramount concern . . . that the judiciary not undertake tasks that the other branches are better suited to perform." Klostermann, 61 N.Y.2d at 535. "[T]he 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." Jonas, 45 N.Y.2d at 408-409 (dismissing two separate complaints, one in which the plaintiffs challenged the way in which municipal zoos were operated by New York City and the other in which the plaintiffs challenged the manner in which the State discharged mental patients, finding that "the courts are the wrong forum for resolution of the disputes" and that "[t]he proper forums are the Legislature and the elected officials of the State and local government").

When addressing claims asserted under the Education Article, the role of the courts is limited to determining whether the plaintiffs can show that students in the relevant school district are being denied the opportunity to receive a sound basic education, and not to formulate educational policy, determine the best way to provide a sound basic education, or consider strategies for optimizing the educational services provided to school children. See CFE III, 8 N.Y.3d at 27 (in an educational funding case, holding that the role of the courts "is not . . . to determine the best way to calculate the cost of a sound basic education in New York City schools, but to determine whether the State's proposed calculation of that cost is rational"). The law dictates that once a court has determined that a school district is providing a sound basic education, the minimum required under the Education Article, then the court's inquiry is complete. See Levittown, 57 N.Y.2d at 48.

In this action, while Plaintiffs' complaints include conclusory references to a sound basic education, see, e.g., Banks Aff., Ex. A, ¶ 4, they make no real attempt to connect the tenure protections afforded New York public school teachers to the deprivation of a sound basic education in their representative school districts, as it has been defined by the Court of Appeals. See CFE I, 86 N.Y.2d at 316. Rather, Plaintiffs' assertion is that ineffective teachers, again, a term they do not define, remain in classrooms because of tenure protections, and that these

ineffective teachers do not educate their students as well as effective teachers. See Banks Aff., Ex. A, ¶¶ 3 ("Students taught by effective teachers are more likely to attend college, attend higher-quality colleges, earn more, live in higher socioeconomic status neighborhoods, save more for retirement, and are less likely to have children during their teenage years"), 29 (effective teachers "get an entire year's worth of additional learning out of their students"), 30 ("a student in New York who is taught by a single ineffective teacher misses out on six or more months of learning in a single school year") (emphasis in original); Ex. B, ¶¶ 5 (because of alleged ineffective teacher "Kyler fell behind and is still struggling to catch up with her twin"), 29 ("effective teachers provide tangible educational results in the form of higher test scores and higher graduation rates"), 30 ("students taught by effective teachers are . . . less likely to become teenage parents and more likely to progress in their education, attending college and matriculating at colleges of higher quality"). Plaintiffs fail to appreciate the nature of the educational opportunities that the Court of Appeals has held is required under the Education Article for the State to meet its obligations to provide a sound basic education. The State is obligated only to ensure that school districts are able to teach "basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury." CFE I, 86 N.Y.2d at 316. Under the relevant case law, the Education Article does not require the State to optimize student educational opportunities, or take measures to ensure that students attend college, save for retirement, or avoid teenage pregnancy.

Thus, in the absence of any showing that tenure protections have denied students of a sound basic education, Plaintiffs are asking the Court to make decisions regarding New York's educational policy, and the role of tenure in that policy, that are properly left to the legislature

and the executive. If this action was to go forward, this Court would necessarily have to consider the soundness of New York's tenure system, including a balancing the recognized benefits of tenure to the quality of education in New York's public school system with any detrimental effects shown by Plaintiffs to be caused by New York's tenure system. See Ricca, 47 N.Y.2d at 391 (tenure is "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"); Peo. ex rel. Callahan v. Bd. of Educ. of the City of New York, 174 N.Y. 169, 178 (1903) ("[w]e think . . . that the purpose of section 1117 [of the Greater New York charter (L. 1897, ch. 378), providing tenure protections to teachers in New York City including the need for 'charges to be preferred against a teacher,' and 'a formal trial'] was to get the best work from all teachers by assuring them of safety and protection, without resort to outside influence, so long as they maintain a high standard of conduct and efficiency"). This is a quintessential policymaking decision that is reserved to the legislative and executive branches. See Peo. v. Parilla, 109 A.D.3d 20, 29 (1st Dep't 2013) ("[I]n assessing the constitutionality of a statute, this Court does not review the merits or wisdom of the legislature's decisions on matters of public policy") (citation omitted); Roberts, 87 A.D.3d at 323 ("[C]ourts at all levels are enjoined not to substitute their judgment for that of the coordinate branch of government to whom such judgment has been . . . primarily entrusted") (quotation and citation omitted).

Accordingly, for these reasons, Plaintiffs' claims challenging the constitutionality of statutory provisions in the Education Law that pertain to teacher tenure, teacher discipline, and teacher dismissal should be dismissed as nonjusticiable.

POINT IV

PLAINTIFFS HAVE IMPROPERLY BROUGHT SUIT AGAINST SED, THE BOARD OF REGENTS, CHANCELLOR TISCH, AND COMMISSIONER KING, AND THE CLAIMS AGAINST THEM SHOULD BE DISMISSED.

Declaratory judgment actions require the joinder of "all persons who may be affected thereby and who may question in a court the existence and scope of the rights declared[.]" Cadman Mem. Congregational Soc'y of Brooklyn v. Kenyon, 279 A.D. 1015, 1016 (2d Dep't 1952). In the present action, State Defendants do not dispute that the State of New York is a proper and necessary party. See Cass v. State of New York, 58 N.Y.2d 460, 463 (1983) (State of New York is a proper party to a declaratory judgment action challenging the constitutionality of a statute "because of its obvious interest in and right to be heard on matters concerning the constitutionality of its statutes"). However, none of the other named State Defendants are necessary to this litigation and should be dismissed. Notably, the Board of Regents, Chancellor Merryl H. Tisch, State Education Commissioner John B. King, Jr., and the State Education Department, did not enact the challenged statutes, could not enact any successor statutes, and are not authorized to implement a system of teacher employment by contract. See Banks Aff., Ex. A, p. 18 (¶ "3"). As such their presence in this lawsuit is not necessary if Plaintiffs were to receive the relief requested, which solely involves declaratory and injunctive relief relating to the challenged tenure statutes. Moreover, because Chancellor Tisch and Commissioner King are sued in their official capacities only, and because the Board of Regents and State Education Department cannot enforce or implement tenure provisions that are inconsistent with the tenure statutes, any relief Plaintiffs may recover against the State of New York would bind them and their future actions as well.

Accordingly, should the Court decide not to dismiss Plaintiffs' complaints in their entirety, the Court should nonetheless dismiss the claims asserted against defendants SED, the Board of Regents, Chancellor Merryl H. Tisch, and State Education Commissioner John B. King, Jr.

CONCLUSION

For the foregoing reasons, State Defendants respectfully request that the Court grant their motion and dismiss Plaintiffs' claims, with prejudice, in their entirety, together with such other and further relief as the Court deems just and proper.

Dated: New York, New York
October 28, 2014

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