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

----------X

JOHN KEONI WRIGHT; et al.;

Plaintiffs,

- against -

THE STATE OF NEW YORK; et al.;

Defendants,

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

Index No. 101105/14

(Minardo, J.S.C.)

- 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. :

----------X

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 supplemental affirmation in further support of State Defendants' motion to dismiss the complaints filed in this consolidated action, for the limited purpose of providing the Court with a true and accurate copy of a document previously filed in this action that is cited in the accompanying reply memorandum of law.

2. Attached hereto as Exhibit A is a copy of Exhibit 14 to 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.

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

Dated: New York, New York
December 15, 2014

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

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

MYMOENA DAVIDS, by her parent and natural guardian MIAMONA DAVIDS, et al.,	:	
Plaintiffs,	:	
- against -	:	
THE STATE OF NEW YORK, et al.,	:	**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF STATE DEFENDANTS' MOTION TO DISMISS THE CONSOLIDATED COMPLAINTS**
Defendants,	:	
- and -	:	
MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO,	:	Index No. 101105/14
Intervenor-Defendant,	:	(Minardo, J.S.C.)
- and -	:	
SETH COHEN, et al.,	:	
Intervenors-Defendants,	:	
- and -	:	
PHILIP A. CAMMARATA and MARK MAMBRETTI,	:	
Intervenors-Defendants.	:	

(Caption continued on next page)

----------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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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

ARGUMENT 2

POINT I CONCLUSORY STATEMENTS AND RHETORIC CANNOT BE USED BY PLAINTIFFS TO STATE A CAUSE OF ACTION UNDER THE EDUCATION ARTICLE OR TO OBTAIN A DECLARATION STRIKING DOWN PROVISIONS OF THE EDUCATION LAW. 2

POINT II THE COMPLAINTS RAISE A FACIAL CHALLENGE, NOT AN AS-APPLIED CHALLENGE, TO THE CONSTITUTIONALITY OF THE CHALLENGED STATUTES, AND PLAINTIFFS' ALLEGATIONS FAIL TO MEET THE RIGOROUS REQUIREMENTS TO MOUNT SUCH A CHALLENGE. 9

POINT III PLAINTIFFS' VAGUE AND CONCLUSORY ALLEGATIONS ARE INSUFFICIENT TO CONFER STANDING TO BRING A CLAIM UNDER THE EDUCATION ARTICLE OF THE NEW YORK CONSTITUTION. 12

POINT IV PLAINTIFFS' COMPLAINTS RAISE NONJUSTICIABLE EDUCATIONAL POLICY QUESTIONS THAT ARE UNRELATED TO A COURT'S ROLE UNDER THE EDUCATION ARTICLE TO DETERMINE WHETHER A SCHOOL DISTRICT IS PROVIDING THE OPPORTUNITY TO RECEIVE A SOUND BASIC EDUCATION. 16

CONCLUSION 18

TABLE OF AUTHORITIES

Cases **Page(s)**

Aqua NY of Sea Cliff v. Buckeye Pipeline Co., L.P.,
119 A.D.3d 829 (2d Dep't 2014) 4

Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist,
57 N.Y.2d 27 (1982) 5, 12, 16-17

Brady v. A Certain Teacher,
166 Misc. 2d 566 (Sup. Ct. Suffolk Co. 1995) 2, 12

Campaign for Fiscal Equity, Inc. v. State of New York,
86 N.Y.2d 307 (1995) ("CFE I") 4-5, 11

Campaign for Fiscal Equity, Inc. v. State of New York,
100 N.Y.2d 893 (2003) ("CFE II") 12

Campaign for Fiscal Equity, Inc. v. State of New York,
8 N.Y.3d 14 (2006) ("CFE III") 16

Flushing Nat'l Bank v. Municipal Assistance Corp.,
40 N.Y.2d 731 (1976) 11

L.A. v. Lyons,
461 U.S. 95 (1983) 14

Mtr. of Moran Towing Corp. v. Urbach,
99 N.Y.2d 443 (2003) 3

Mtr. of N.Y. Charter Schs. Ass'n, Inc. v. Dinapoli,
13 N.Y.3d 120 (2009) 2

N.Y. State Ass'n of Nurse Anesthetists v. Novello,
2 N.Y.3d 207 (2004) 14

Paynter v. State of New York,
100 N.Y.2d 434 (2003) 12

Peo. v. Stuart,
100 N.Y.2d 412 (2003) 10

Ricca v. Bd. of Educ. of the City Sch. Dist. of the City of New York,
47 N.Y.2d 385 (1979) 12

Soc'y of Plastics Indus., Inc. v. County of Suffolk,
77 N.Y.2d 761 (1991) 12

St. Clair v. Yonkers Raceway, Inc.,
13 N.Y.2d 72 (1963) 12

Tenn. Gas Pipeline Co. v. Urbach,
96 N.Y.2d 124 (2001) 11

United States v. Arzberger,
592 F. Supp. 2d 590 (S.D.N.Y. 2008) 9

United States v. Karper,
847 F. Supp. 2d 350 (N.D.N.Y. 2011) 9

United States v. Salerno,
481 U.S. 739 (1987) 11

Vt. Right to Life Committee, Inc. v. Sorrell,
758 F.3d 118 (2d Cir. 2014) 10

New York Constitution

N.Y. Const., Art. VIII, § 2 10

N.Y. Const., Art. XI, § 1 ("Education Article") ..... passim

State Statutes

CPLR Rule 3211 1

Civil Service Law
§ 201 10

Education Law
§ 3012-c 8
§ 3020-a 6-8

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 reply memorandum of law in further 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 reply, for the limited purpose of providing the Court with a copy of a document attached as an exhibit to the complaint filed by the Wright plaintiffs and referenced herein, is the Supplemental Affirmation of Assistant Attorney General Steven L. Banks ("Banks Supp."), dated December 15, 2014.

PRELIMINARY STATEMENT

State Defendants advance three main arguments in support of their motion to dismiss this consolidated action: (1) Plaintiffs have not alleged a denial of a sound basic education caused by the statutes challenged in this action and, thus, have not stated a claim under the Education Article (N.Y. Const., Art. XI, § 1), see Memorandum of Law in Support of State Defendants' Motion to Dismiss the Consolidated Complaints ("State Mem."), dated October 28, 2014, Pt. I, at 9-22; (2) Plaintiffs lack the necessary standing to obtain judicial review of these statutes, id., Pt. II, at 22-28; and (3) Plaintiffs' criticisms of the current statutes governing the employment of public school teachers constitute nonjusticiable policy questions, id., Pt. III, at 28-31. Additionally, State Defendants assert that, if this action were to continue, the inclusion as defendants of SED, the Board of Regents, Chancellor Tisch, and the State Education

Commissioner is unnecessary and these defendants should be dismissed, id., Pt. IV., at 32.

In their opposition briefs, Plaintiffs engage in a great deal of rhetoric and hyperbole, but as noted below fail to offer a meritorious legal argument or cite specific factual allegations in their complaints that would defeat State Defendants' dismissal motion. Moreover, the argument regarding dismissal of defendants SED, the Board of Regents, Chancellor Tisch, and the Commissioner of Education is not seriously controverted by Plaintiffs. See Wright Plaintiffs' Memorandum of Law in Opposition to Defendants' and Intervenors-Defendants' Motions to Dismiss the Action ("Wright Mem."), dated December 5, 2014, at 39 n. 10. Accordingly, this action must be dismissed.

ARGUMENT

POINT I

CONCLUSORY STATEMENTS AND RHETORIC CANNOT BE USED BY PLAINTIFFS TO STATE A CAUSE OF ACTION UNDER THE EDUCATION ARTICLE OR TO OBTAIN A DECLARATORY JUDGMENT STRIKING DOWN PROVISIONS OF THE EDUCATION LAW.

As State Defendants have already addressed in their moving brief, the requirements for a litigant to obtain relief in an action under the Education Article are high, as are the requirements for a litigant, under any constitutional provision, seeking judicial action striking down statutory law. See State Mem. at 10, 12-14. Thus, to succeed in this action and receive a judgment declaring as unconstitutional and enjoining the enforcement or implementation of any of the statutes challenged in this action, Plaintiffs will need to overcome a presumption of constitutionality and demonstrate that each statute violates the Education Article beyond a reasonable doubt. See Mtr. of N.Y. Charter Schs. Ass'n v. Dinapoli, 13 N.Y.3d 120, 130 (2009); Brady v. A Certain Teacher, 166 Misc. 2d 566, 574 (Sup. Ct. Suffolk Co. 1995). In other words,

Plaintiffs will have to show that they are being deprived of the opportunity to receive a sound basic education (as defined by the Court of Appeals), that the deprivation of the opportunity to receive a sound basic education is caused by the challenged statutes, and that there are no set of circumstances under which their school districts can provide students with the opportunity to receive a sound basic education and still comply with the challenged statutes. See Mtr. of Moran Towing Corp. v. Urbach, 99 N.Y.2d 443, 445 (2003) (rejecting facial[1] constitutional challenge to taxing statute because there were "circumstances under which the statutes at issue could be constitutionally applied").

Plaintiffs' opposition briefs do not effectively controvert the State Defendants' demonstration that each of the complaints filed by Plaintiffs fail to allege facts which, if true, could state a cause of action under the Education Article or entitle Plaintiffs to the extraordinary relief of striking down statutory law. See State Mem., Pt. I, at 9-22. To the contrary, Plaintiffs' opposition papers only serve to highlight the fact that the "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 State Mem. at 16, far short of the quality of factual allegations necessary for this lawsuit to continue. Notably, the opposition brief filed by the Wright plaintiffs merely repeats the same circular and conclusory statements contained in their complaint, without factual allegations upon which the Court could conclude that students in the represented school districts are being denied the opportunity to receive a sound basic education. See, e.g., Wright Mem. at 12 ("As Plaintiffs allege, and as Defendants cannot seriously contest, public school students on the whole are not receiving an adequate public school education."). Plaintiffs cannot avoid dismissal of their complaints by merely offering, as they do here, a legal

[1] Plaintiffs' assertion that this action is an "as-applied" challenge and not a facial constitutional challenge is addressed below. Infra, Pt. II.

conclusion. See Aqua NY of Sea Cliff v. Buckeye Pipeline Co., L.P., 119 A.D.3d 829 (2d Dep't 2014).

The opposition brief filed by the Davids plaintiffs is similar, baldly stating that "Plaintiffs plead a systemic failure by the State to provide a sound basic education through the State's application of the Challenged Statutes." Davids Plaintiffs' Memorandum of Law in Opposition to Defendants' and Intervenors-Defendants' Motions to Dismiss the Action ("Davids Mem."), dated December 5, 2014, at 13. In lieu of identifying meaningful factual allegations from which the Court could evaluate whether the school districts in New York City, Rochester, and Albany are providing the opportunity for students to a obtain a sound basic education, the Davids plaintiffs' opposition brief includes outlandish statements unrelated to any factual allegation in their complaint. See, e.g., Davids Mem. at 6 n. 4 ("The electoral process is historically wrought with chicanery and subterfuge by political operators. How can any election results be certified if the same are shown to be substantially related to the action or inaction of illiterates?").

In any event, Plaintiffs' contention that some number of alleged "ineffective teachers" are employed in public schools in New York State cannot state a cause of action under the Education Article. The case law is clear that the Education Article obligates the State to act 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." Campaign for Fiscal Equity, Inc. v. State of New York, 86 N.Y.2d 307, 316 (1995) ("CFE I"). Plaintiffs do not and cannot show that a student's assignment to an ineffective teacher deprives the student of the opportunity to obtain a sound basic education under this definition. As already noted, see State Mem. at 12-13, even if Plaintiffs can show that the effectiveness of an individual teacher affects student achievement,

the Education Article, as interpreted by the relevant case law, does not mandate that students be instructed by those they perceive to be the "best" teachers or under the educational policy they view as preferable, or obtain an education that they believe will maximize future achievement.

Plaintiffs' fundamental misapprehension of the nature of the Education Article is demonstrated by their assertion that the State Defendants are "disclaim[ing] responsibility to provide students an optimal education." Wright Mem. at 12. In fact, it is beyond cavil that SED and the State of New York aspire to provide the highest quality of educational services throughout the State, far above the constitutional mandate. However, the decisional law is clear that the Educational Article does not require that the State provide every student with that student's view of an "optimal" education and any suggestion otherwise is legally unsound. Instead, the law is clear that constitutionally sufficient educational opportunities is a low threshold, and does not require the State to ensure that every student receives an education that he or she believes is optimal or give litigants a vehicle to seek judicial review of State statutes or educational policies with which they disagree. CFE I, 86 N.Y.2d at 316; Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 57 N.Y.2d 27, 48 (1982).

The lack of the most basic factual allegations about the educational situation in the relevant school districts is compounded by Plaintiffs' failure to define the term "ineffective teacher" as it relates to this lawsuit. The Davids plaintiffs appear to define ineffective teachers as "those in approximately the bottom five percent of educators in New York" on some unidentified, hypothetical state-wide ranking of effectiveness. See Affirmation of Assistant Attorney General Steven L. Banks ("Banks Aff."), dated October 28, 2014, Ex. A, ¶ 30. Thus, the definition proffered by the Davids plaintiffs is a completely abstract notion.

Similarly, the Wright plaintiffs do not seriously attempt to define what they mean by the

term "ineffective teacher." See Banks Aff., Ex. B, passim. At most, it could be inferred from their complaint that that the Wright plaintiffs would deem as ineffective any teacher that a school district has considered removing, but then chose not to remove purportedly because of the time and expense involved in bringing charges under Education Law § 3020-a. See Banks Aff., Ex. B, ¶ 55. However, not only is this definition vague and subjective, the information supplied by Plaintiffs strongly suggests the number of "ineffective teachers" that would exist under this definition is exceeding small. Notably, the Wright plaintiffs attach to their complaint as Exhibit 14 a description of 2009 survey in which forty-eight percent of the 400 responding school districts in New York reported that they had "considered bringing 3020-a charges at least once but did not." See Banks Supp., Ex. A. The reported survey is not useful to the present claims as it is several years old and predates the recent changes to the Education Law to improve the efficiency of the removal process. See State Mem. at 20-21. Nonetheless, to the extent that it is considered at all, the report appears to counter Plaintiffs' theory as it states that only fifteen percent of those same districts reported that they declined to press charges because the procedure set forth in § 3020-a was too cumbersome, and only seventeen percent claimed that the § 3020-a process was too expensive. In all other cases where a school district chose not to bring charges, either the school district determined that its case was not strong enough or the teacher voluntarily left the school without charges being filed. Therefore, based on the information contained in this survey, perhaps only as few as 33[2] allegedly "ineffective teachers" are employed throughout

[2] This number assumes that each school district had only one occasion where it considered filing charges against a teacher, but then decided not to, and is derived by multiplying the number of school districts that responded to the survey (400) by the percentage of school districts that reported they considered bringing § 3020-a charges but then did not (.48) and by the percentage of those school districts that cited the costs associated with a § 3020-a hearing as a reason for not filing charges (.17). It is clear from the report of the survey that school districts were permitted to identify more than one reason for not bringing charges, and it is assumed that the same school districts that reported the § 3020-a hearing process before the recent changes to the Education Law was too cumbersome also reported that it was too expensive. However, even if there was no overlap between the school districts that identified the procedures as cumbersome and those that identified the procedures as costly, the number of teachers who had no

New York State because the employing school district was intimidated by the requirements of § 3020-a. Indeed, the number may be significantly lower as the report itself notes "the most common type of charges" against public school teachers involve allegations of "improper sexual remarks, improper physical contact or improper relationships with students," and not allegations of incompetence or inefficiency. See Banks Supp., Ex. A. As there are approximately 700 school districts in the State, and more than 200,000 public school teachers, the results of this outdated survey strongly suggest that the tenure statutes are not an impediment to school districts removing teachers that engage in misconduct or who are believed to be incompetent, and completely refutes Plaintiffs' bald assertion that there are "huge numbers of inadequate teachers" employed because of the challenged statutes. See Wright Mem. at 14.

Equally deficient are Plaintiffs' arguments on the element of causation. Relying on circular reasoning, Plaintiffs simply contend that they "adequately pleaded causation by alleging that the State's enforcement of the Challenged Statutes impedes school districts from hiring effective teachers and removing ineffective ones[.]" Wright Mem. at 14. However, as already noted, the assertion that the State in enacting the challenged statutes--which include a three-year probationary period for public school teachers and due process protections for public school teachers who earn tenure--has caused a deprivation of the opportunity for a sound basic education is belied by the language in these statutes which directs school districts to consider teacher effectiveness and competency when making employment decisions, including the determination whether a teacher should be employed after the conclusion of the probationary period.[3] See State Mem. at 18-19. Further evincing the reality that the tenure statutes do not

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charges filed against them because the employing school district believed the process too cumbersome or costly may be as few as 62.

[3] In this regard, the Wright plaintiffs argue that really only two years of evaluations are used in making tenure decisions. See Wright Mem. at 4-5. This is inaccurate. While formal evaluations of teachers' third year of teaching

prevent school districts from removing teachers that they determine are ineffective are the results of the 2009 survey described above. See Banks Supp., Ex. A. The vast majority of the school districts in that survey either reported no problems in complying with the statutory procedures under § 3020-a, or reported that they were able to remove a teacher through voluntary resignation or retirement without having to bring charges. There is simply no support in the language of the statutes or in the allegations in the complaints for Plaintiffs' hyperbolic mischaracterizations of the statutory administrative hearing requirements as "labyrinthine," Davids Mem. at 10, or that they "impose dozens of hurdles to dismiss or discipline an ineffective teacher," Wright Mem. at 6. And, again, that survey, upon which they rely, was issued before statutory changes which streamlined the teacher discipline and removal process. Plaintiffs simply fail to show that the statutes cause a denial of constitutionally sufficient educational opportunities.

Accordingly, Plaintiffs' failure to offer more than conclusory assertions in support of the elements of a claim under the Education Article is fatal to their complaints, and, for reasons set forth above and in State Defendants' moving brief, the complaints should be dismissed for failure to state a cause of action.

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may not be due before the teacher tenure decision is communicated to the teacher at the end of the third year (the deadline for written evaluations is September 1, see Educ. Law § 3012-c (2)(c)) there are still three years of teaching performance used in the evaluation.

POINT II

THE COMPLAINTS RAISE A FACIAL CHALLENGE, NOT AN AS-APPLIED CHALLENGE, TO THE CONSTITUTIONALITY OF THE CHALLENGED STATUTES, AND PLAINTIFFS' ALLEGATIONS FAIL TO MEET THE RIGOROUS REQUIREMENTS TO MOUNT SUCH A CHALLENGE.

As evident in the motion papers filed in this action, there is a disagreement among the parties as to whether Plaintiffs are mounting a facial challenge to the constitutionality of the challenged statutes or an "as-applied" challenge. See State Mem. at 10 (facial challenge); Wright Mem. at 18 n. 5 (as-applied challenge); Memorandum of Law in Support of United Federation of Teacher's Motion to Dismiss ("UFT Mem."), dated October 28, 2014, at 39 (as-applied challenge). The difference between the two approaches is "consequential." United States v. Karper, 847 F. Supp. 2d 350, 356 (N.D.N.Y. 2011). "If a facial constitutional challenge is granted, the Government cannot enforce [the statute] under any circumstances, unless a court narrows the application; whereas, if it held that a statute is unconstitutional as applied to a particular set of facts, the Government can enforce it differently in dissimilar situations." Id. (citing United States v. Arzberger, 592 F. Supp. 2d 590, 598 (S.D.N.Y. 2008)). In the present action, Plaintiffs' challenge to those portions of the Education Law that pertain to teacher tenure, discipline, and seniority-based protections for public school teachers, can best (and only) be described as a facial constitutional challenge.

Notably, Plaintiffs are seeking to have the Court completely uproot the long-standing statutes that govern the employment relationship between public school teachers and all school districts across the State, including the boards of cooperative educational services and county vocational education and extension boards.[4] Plaintiffs do not argue that the challenged statutes

[4] If the Court were to grant the relief requested by the Plaintiffs, the Court would also be abrogating an unknown

violate their constitutional rights as applied in regard to certain teachers, or certain schools or even certain school districts. Instead, they argue generally that the statutes must be struck because they allegedly violate the rights of all New York school children to have the opportunity for a sound basic education. See Banks Aff., Ex. A, ¶ 5; Ex. B, ¶ 7. This is incongruent with the elements of an as-applied challenge. See Peo. v. Stuart, 100 N.Y.2d 412, 421 (2003) ("an as-applied challenge calls on the court to consider whether a statute can be constitutionally applied to the defendant under the facts of the case"). Further, as already noted in the discussions regarding standing, see, e.g., State Mem. at 23-27, Plaintiffs have failed to allege any facts showing that they have been affected personally by the tenure statutes, or that their particular school districts are not providing an opportunity for students to receive a sound basic education because of the statutes. There is simply no particular "case" in this action from which the Court can engage in an as-applied constitutional analysis.

Rather, because Plaintiffs seek to enjoin statutory tenure protections and seniority-based layoff preferences throughout the State and in their entirety, this action constitutes a facial challenge to the constitutionality of the statutes. See Stuart, 100 N.Y.2d at 421 ("facial challenge means that the law is 'invalid in toto--and therefore incapable of any valid application'") (citation omitted); Vt. Right to Life Committee, Inc. v. Sorrell, 758 F.3d 118, 126-127 (2d Cir. 2014) (in determining whether a facial challenge standard applies, the "inquiry is whether plaintiffs' claim and the relief that would follow reach beyond the particular circumstances of these plaintiffs.") (quotation and citation omitted). The Court of Appeals precedent cited by Plaintiffs in support of their argument that this action should be deemed an as-applied constitutional challenge, see Wright Mem. at 17, are inapposite, as in those cases the Court

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number of collective bargaining agreements that contain provisions relating to tenure and probation. See Civil Serv. Law § 201(4) (defining "terms and conditions of employment" as "salaries, wages, hours and other terms and conditions of employment provided").

scrutinized the constitutionality of the particular statute under attack by examining the language of the statute itself and not its application. See Tenn. Gas Pipeline Co. v. Urbach, 96 N.Y.2d 124, 129-130 (2001) (finding that a tax was "facially discriminatory" and examining whether the State could show that the tax "advances a legitimate local purpose that cannot adequately be served by reasonable nondiscriminatory alternatives" such that it could survive "Commerce Clause scrutiny") (citations omitted); Flushing Nat'l Bank v. Municipal Assistance Corp., 40 N.Y.2d 731, 734 (1976) (determining the constitutionality of the 1975 Emergency Moratorium Act for the City of New York by examining the language of the statute against the faith and credit provision of the state constitution (N.Y. Const., Art VIII, § 2)).

Thus, under the well-established principles of constitutional interpretation, the Court in the present action should examine each one of the challenged statutes to determine whether there are "no set of circumstances exists under which the [statute] would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). "The fact that the [statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." Id.

Plaintiffs have not, and cannot, meet this standard. As a fundamental matter, Plaintiffs have not and cannot allege that having one, or even more than one, allegedly ineffective teachers systemically deprives students of 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." CFE I, 86 N.Y.2d at 316. Further, there is no dispute whatsoever that these statutes do not, on their face, require school districts to hire or retain ineffective teachers, and have, in the vast majority of cases, operated to extend due process protections to effective and competent teachers. See Banks Aff., Ex. A, ¶ 4. Indeed, there is significant and long-standing case law upholding the tenure protections for public school

teachers as an expression of rational public policy. See Ricca v. Bd. of Educ. of the City Sch. Dist. of the City of New York, 47 N.Y.2d 385, 391 (1979); Brady, 166 Misc. 2d at 566.[5]

Accordingly, the Court should evaluate Plaintiffs' claims as a facial constitutional challenge, and, for the reasons stated, grant State Defendants' motion to dismiss.

POINT III

PLAINTIFFS' VAGUE AND CONCLUSORY ALLEGATIONS ARE INSUFFICIENT TO CONFER STANDING TO BRING A CLAIM UNDER THE EDUCATION ARTICLE OF THE NEW YORK CONSTITUTION.

As was explained in State Defendants' moving brief, see State Mem., Pt. II, New York law requires that plaintiffs satisfy the elements for standing to ensure they have a "concrete interest in prosecuting" an action. See Soc'y of Plastics Indus., Inc. v. County of Suffolk, 77 N.Y.2d 761, 772 (1991). Thus, for a constitutional challenge to a State statute, outside of certain taxpayer standing actions, the injury-in-fact element of standing requires that the plaintiff be "personally aggrieved" by the statute under consideration. St. Clair v. Yonkers Raceway, Inc., 13 N.Y.2d 72, 76 (1963). For claims under the Education Article, the Court of Appeals has made clear that public school students may only assert claims for alleged inadequacies in their own schools. See Paynter v. State of New York, 100 N.Y.2d 434, 439 (2003). Indeed, given the range of inputs and outputs that may be considered when assessing whether a sound basic education is being provided, see Campaign for Fiscal Equity, Inc. v. State of New York, 100 N.Y.2d 893, 909-919 (2003) ("CFE II"), and the differences in pupils, funding, and instructional programs among New York's approximately 700 school districts, see Levittown, 57 N.Y.2d at 44-45, it would violate the prudential purposes of standing if students in one school district could bring suit under the Education Article about the quality of educational services in another

[5] Nor can Plaintiffs meet the requirements for an as-applied challenge. See UFT Mem. at 39-40.

district.

Plaintiffs' opposition briefs on the issue of standing lay bare an uncomfortable truth, namely that neither the individually named plaintiffs in Davids nor the children of the named plaintiffs in Wright have been aggrieved by the statutes that they seek to strike down. As was already noted in the moving brief, see State Mem. at 24, neither complaint in this action alleges that a plaintiff or a plaintiff's child has been instructed by an allegedly ineffective teacher who retained a teaching position because of the statutory protections challenged in this lawsuit. See Banks Aff., Ex. A, ¶¶ 8-18; Ex. B, passim. The opposition papers simply ignore the lack of any factual allegations to connect the individual Plaintiffs to the challenged tenure statutes, choosing instead to make the bare assertions that "Plaintiffs' children have all been assigned to an ineffective teacher and risk being assigned to one each year," and that "every one of the Plaintiffs has been harmed, or is at substantial risk of being harmed, as a result of the Challenged Statutes." See Wright Mem. at 1; Davids Mem. at 8. Without any specific factual allegations in the complaints to support these assertions, there is utterly no basis for the Court to find that Plaintiffs have standing.[6]

With no allegations that Plaintiffs are presently being harmed by the challenged statutes, each set of plaintiffs vainly attempts to avoid dismissal of its respective complaint by baldly asserting that they are at "imminent risk of being assigned to an ineffective teacher." See Davids Mem. at 18; Wright Mem. at 3, 35. However, there are no factual allegations in the complaints to support the contention that any of the Plaintiffs face an "imminent risk" of being assigned to an ineffective teacher. Indeed, as it is still the first half of the school year, the term "imminent"

[6] Indeed, as was previously noted, the bare allegation that Kyler Wright was "assigned to an ineffective teacher" is insufficient to establish standing. See State Mem. at 24. Not only is there no information connecting Kyler's assignment to this teacher to the challenged statutes, but there is no allegation that the assignment to this teacher has denied her basic literacy, calculating and verbal skills necessary by case law to state a claim under the Education Article.

seems misplaced as presumably Plaintiffs will not be assigned a new teacher until next September. In any event, there are no allegations in the complaints whatsoever about the educational opportunities in their school districts or the quality of teachers to which Plaintiffs may be assigned next year, see Banks Aff., Ex. A, ¶¶ 8-18; Ex. B, passim, and thus no basis to find that Plaintiffs have stated more than a speculative risk of future harm that cannot satisfy the injury-in-fact element of standing. "The plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical." L.A. v. Lyons, 461 U.S. 95, 101-102 (1983) (quotations and citations omitted). See also N.Y. State Ass'n of Nurse Anesthetists v. Novello, 2 N.Y.3d 207, 214 (2004) (finding that plaintiff lacked standing where "there is no certainty whatsoever that any [of the members of the plaintiff not-for-profit corporation] would in fact be injured.").

Plaintiffs' other arguments on standing are easily dismissed. First, Plaintiffs contend the two named plaintiffs that do not attend public school (Henson and Pradia) nonetheless have standing to challenge the tenure statutes for public school teachers because the Education Article makes reference to "all the children of this state." See Wright Mem. at 33. However, this argument ignores the inclusion of the word "may" in the Education Article, which permits students to opt out of the public school system. Because plaintiffs Henson and Pradia have opted out of the public school system, they are not being taught by public school teachers and, thus, cannot be personally aggrieved by any of the challenged statutes. See State Mem. at 23, 28. In other words, they lack standing.

Second, Plaintiffs contend that the State Defendants' position that a plaintiff be personally aggrieved by the challenged tenure statutes in order to have standing to bring a

constitutional challenge under the Education Article is inconsistent with State Defendants' position that a plaintiff needs to show "there exist significant and district-wide deficiencies in the educational opportunities present in the plaintiff's school district" to state a claim under the Education Article (State Mem. at 27). See Wright Mem. at 34. However, these pleading requirements are not inconsistent and, indeed, are compelled by the relevant case law. See State Mem. at 12-14, 23. Thus, it follows that to have standing to maintain this action under the Education Article and obtain the requested relief striking down New York's tenure protections, Plaintiffs must demonstrate both that the statutory tenure protections have caused a district-wide deprivation of the opportunity to receive a sound basic education and that they themselves have been denied the opportunity to receive a sound basic education by assignment to an ineffective teacher. If both these elements were not required then public school students could bring Education Article claims against the State challenging individual educational experiences (contrary to the nature of the rights enshrined in the Education Article), or bring suit to challenge the constitutionality of a statute that has not injured them (contrary to the well-established principles of standing). In any event, Plaintiffs' argument is academic as they have alleged neither personal injury traceable to the statutes they now challenge nor the existence of systemic deprivations of the opportunity to receive a sound basic education in the districts that they represent.

Accordingly, for the preceding reasons and the reasons set forth in State Defendants' moving brief, the complaints in this consolidated action should be dismissed for lack of standing.

POINT IV

PLAINTIFFS' COMPLAINTS RAISE NONJUSTICIABLE EDUCATIONAL POLICY QUESTIONS THAT ARE UNRELATED TO A COURT'S ROLE UNDER THE EDUCATION ARTICLE TO DETERMINE WHETHER A SCHOOL DISTRICT IS PROVIDING THE OPPORTUNITY TO RECEIVE A SOUND BASIC EDUCATION.

As was previously explained in State Defendants' moving brief, it is well-established that, 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. See State Mem., Pt. III, at 28-31.

> What appears to have been contemplated when the education article was adopted at the 1894 Constitutional Convention was a State-wide system assuring minimal acceptable facilities and services in contrast to the unsystematized delivery of instruction then in existence within the State. [ ] The enactment mandated only that the Legislature provide for maintenance and support of a system of free schools in order that an education might be available to all the State's children. There is, of course, a system of free schools in the State of New York. The Legislature has made prescriptions (or in some instances provided means by which prescriptions may be made) with reference to the minimum number of days of school attendance, required courses, textbooks, qualifications of teachers and of certain non-teaching 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.

Levittown, 57 N.Y.2d at 47-48. The Court of Appeals has expressly stated that the judicial function of the courts under the Education Article is quite limited and does not extend to an examination of the quality of educational services beyond the constitutional minimum, id., or even "to determine the best way to calculate the cost of a sound basic education in New York City schools[.]" Campaign for Fiscal Equity, Inc. v. State of New York, 8 N.Y.3d 14, 27 (2006) ("CFE III").

In the present action, while Plaintiffs cast their claims as being a constitutional challenge under the Education Article, see Wright Mem. at 27, the allegations in their complaints, and the relief that Plaintiffs seek, reveal these actions for what they truly are, an attempt to have the Court engage in educational policymaking that is reserved to the executive and legislative branches. See State Mem. at 30-31. Quite simply, Plaintiffs have not alleged facts which would show that the representative school districts, or any other school district for that matter, are not meeting the constitutional floor established by Education Article. See Levittown, 57 N.Y.2d at 48. Instead, Plaintiffs allege in the abstract that, if the Court were to strike down the statutory tenure protections, there would be fewer allegedly ineffective teachers and more students would, e.g., "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." See Banks Aff., Ex. A, ¶ 3. Even if these allegations were true, these types of improvements in education quality and future outcomes are clearly beyond what is constitutionally mandated, and cannot therefore be the subject of an action under the Education Article. While espousing the goal of seeking to make their preferred policy changes to the State's education policy, Plaintiffs ignores the legal truth that State educational policy cannot be established in this way without violating the separation of powers and the concept of justiciability. 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.

CONCLUSION

For the foregoing reasons and for the reasons previously set forth in the moving brief, State Defendants respectfully request that the Court grant their motion and dismiss the complaints, with prejudice, in their entirety, together with such other and further relief as the Court deems just and proper.

Dated: New York, New York
December 15, 2014

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
(212) 416-8621
Steven.Banks@ag.ny.gov

EXHIBIT 14
TO
COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

3020-a process remains slow, costly

On Board Online • NYSSBA News • May 11, 2009

NYSSBA survey

By Patricia Gould
Assistant Counsel

School districts in New York State spend an average of $216,588 to pursue disciplinary charges against tenured teachers or administrators, according to a NYSSBA survey covering 2004 through 2008.

That's up from $128,941 in 2004 – an increase of 70 percent.

Even after adjusting for inflation, that's an increase of more than 49 percent.

The single most common type of charges involved improper sexual remarks, improper physical contact or improper relationships with students. Allegations involving insubordination and pedagogical incompetence were also common charges brought under the disciplinary statute, Section 3020-a of the state Education Law.

The survey was sent to all NYSSBA member districts and BOCES. Responses were received from 400 districts, a 59 percent response rate. The results do not include New York City, where disciplinary cases are handled through a negotiated process that is an alternative to 3020-a.

Other findings:

- Middle school and high school teachers were the personnel most frequently accused of misconduct under 3020-a (52 percent of reported cases). Elementary teachers were accused in 18 percent of cases while cases against administrators represented 6 percent.
- The largest expense of responding districts was the salary and fringe benefits paid to the suspended employee (52 percent of costs). The 400 responding districts spent a totaled of $7.4 million on salary and fringe benefits for individuals suspended while their 3020-a case was pending – a combined average cost of $136,676 per case.
- Paying salary and benefits to substitutes represented 30 percent of 3020-a costs, while legal expenses represented 12 percent of costs associated with 3020-a proceedings.
- Other expenses include other staff costs (5 percent) and miscellaneous costs, such as paying for outside investigators, expert witnesses, transcription, photocopying and travel (1 percent).

Lengthy process

It took an average of 502 days to conclude a full 3020-a hearing, from the date charges were levied to the date a decision was issued by a hearing officer or panel. Although this represents a drop of 18 days from the average of 520 days between 1997 and 2004, it still constitutes an alarming increase from the low of 319 days between 1994 and 1997.

The most time consuming part of the process occurred from the first to last day of hearing – an average of 176 days. In addition, there was an average of 136 days between the last hearing day and the date of a decision.

Forty-eight percent (48 percent) of districts responding to NYSSBA's survey considered bringing 3020-a charges at least once but did not. Their stated reasons for not filing charges were as follows:

- Employee resigned **49 percent**
- Employee retired **12 percent**
- 3020-a process too cumbersome **15 percent**
- 3020-a too expensive **17 percent**
- District case not strong enough **21 percent**
- Not enough documentation **15 percent**

When charges were filed, 46 percent were either settled or discontinued prior to a final decision. Hearing officers (or panels) issued a decision in only 18 percent of the cases reported in this survey. Thirty cases (36 percent) were pending at the time the survey was concluded in March 2009.

Penalties and appeals

In 37 cases reported, districts filed charges but reached a settlement with the employee without a hearing. In those cases, 20 teachers resigned or retired, six agreed to suspensions, five were fined, and three were terminated without a hearing because they did not demand one. Three other cases were resolved in other ways not further specified by the responding district.

In cases where a decision was rendered by a hearing officer, only three teachers were fully acquitted by the hearing officer. Among those found guilty of at least one charge, seven teachers were terminated, five were suspended without pay, two were reprimanded, and one fined.

Appeals were uncommon; only three reported cases were appealed to a court. Under the limited grounds for appeal prescribed by statute, a 3020-a hearing officer's decision can only be reversed on very narrow grounds and it is unusual for a court to reverse a decision under these standards. Thus, the decision of the hearing officer is likely to be final in most cases.

The state Legislature last revised the 3020-a law in 1994. When asked

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