SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

MYMEONA DAVIDS, by her parent and natural guardian, MIAMONA DAVIDS, ERIC DAVIDS, by his parent and natural guardian MIAMONA DAVIDS, ALEXIS PERALTA, by her parent and natural guardian ANGELA PERALTA, STACY PERALTA, by her parent and natural guardian ANGELA PERALTA, LENORA PERALTA, by her parent and natural guardian ANGELA PERALTA, ANDREW HENSON, by his parent and natural guardian CHRISTINE HENSON, ADRIAN COLSON, by his parent and natural guardian JACQUELINE COLSON, DARIUS COLSON, by his parent and natural guardian JACQUELINE COLSON, SAMANTHA PIROZZOLO, by her parent and natural guardian SAM PIROZZOLO, FRANKLIN PIROZZOLO, by his parent and natural guardian SAM PIROZZOLO, IZAIYAH EWERS, by his parent and natural guardian KENDRA OKE,

Plaintiffs,

- against -

THE STATE OF NEW YORK, THE NEW YORK STATE BOARD OF REGENTS, THE NEW YORK STATE EDUCATION DEPARTMENT, THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION, JOHN AND JANE DOES 1-100, XYZ ENTITIES 1-100,

Defendants,

-and-

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

Intervenor-Defendant,

-and-

SETH COHEN, DANIEL DELEHANTY, ASHLI SKURA DREHER, KATHLEEN FERGUSON, ISRAEL MARTINEZ, RICHARD OGNIBENE, JR., LONNETTE R. TUCK, and KAREN E. MAGEE, Individually and as President of the New York State United Teachers,

Intervenor-Defendants,

-and-

PIDLIP A. CAMMARATA and MARK MAMBRETTI,

Intervenor-Defendants.

Index No. 101105-2014

Phillip G. Minardo, J.S.C.

NOTICE OF MOTION FOR LEAVE TO RENEW

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

Plaintiffs,

- against –

THE STATE OF NEW YORK; THE BOARD OF REGENTS OF THE UNNERSITY 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,

Intervenor-Defendants,

-and-

PHILIP 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.

PLEASE TAKE NOTICE, that upon the Affirmation of Richard E. Casagrande, Esq., dated May 26, 2015, and exhibits annexed thereto, Intervenor-Defendants, Seth Cohen, Daniel Delehanty, Ashli Skura Dreher, Kathleen Ferguson, Israel Martinez, Richard Ognibene, Jr., Lonnette R. Tuck, and Karen E. Magee, Individually and as President of the New York State United Teachers, will move this Court at 18 Richmond Terrace, Staten Island, New York 10301 on the 11th day of August, 2015 at 10:00 a.m., or as soon thereafter as counsel may be heard, for an order and judgment pursuant to section 2221 of the Civil Practice Law and Rules:

(a) granting Intervenor-Defendants leave to renew their motion to dismiss the Amended Complaints based upon amendments to the laws challenged by plaintiffs that were enacted by the New York State Legislature on April 1, 2015;

(b) dismissing the Amended Complaints as moot and non-justiciable as a result of the amendments to the laws challenged by plaintiffs that were enacted by the New York State Legislature on April 1, 2015;

(c) ordering such other, further and different relief as this Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that pursuant to the Order of Hon. Philip G. Minardo, dated May 6, 2015, any papers in opposition to the motion for leave to renew shall be served on or before June 26, 2015, and all reply papers must be served on or before July 7, 2015.

Dated: May 26, 2015
Latham, New York

Respectfully submitted,

.. ICHARDE:CA fu}RANDE,SQ.
Attorney for Intervenors-Defendants Cohen,
Delehanty, Skura Dreher, Ferguson, Martinez,
Ognibene, Tuck and Magee
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Counselfor Intervenor-Defendants Cammarata and Mambretti

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

MYMEONA DAVIDS, by her parent and natural guardian, MIAMONA DAVIDS, ERIC DAVIDS, by his parent and natural guardian MIAMONA DAVIDS, ALEXIS PERALTA, by her parent and natural guardian ANGELA PERALTA, STACY PERALTA, by her parent and natural guardian ANGELA PERALTA, LENORA PERALTA, by her parent and natural guardian ANGELA PERALTA, ANDREW HENSON, by his parent and natural guardian CHRISTINE HENSON, ADRIAN COLSON, by his parent and natural guardian JACQUELINE COLSON, DARIUS COLSON, by his parent and natural guardian JACQUELINE COLSON, SAMANTHA PIROZZOLO, by her parent and natural guardian SAM PIROZZOLO, FRANKLIN PIROZZOLO, by his parent and natural guardian SAM PIROZZOLO, IZAIYAH EWERS, by his parent and natural guardian KENDRA OKE,

Plaintiffs,

- against -

THE STATE OF NEW YORK, THE NEW YORK STATE BOARD OF REGENTS, THE NEW YORK STATE EDUCATION DEPARTMENT, THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION, JOHN AND JANE DOES 1-100, XYZ ENTITIES 1-100,

Defendants,

-and-

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

Intervenor-Defendant,

-and-

SETH COHEN, DANIEL DELEHANTY, ASHLI SKURA DREHER, KATHLEEN FERGUSON, ISRAEL MARTINEZ, RICHARD OGNIBENE, JR., LONNETTE R. TUCK, and KAREN E. MAGEE, Individually and as President of the New York State United Teachers,

Intervenor-Defendants,

-and-

PHILIP A. CAMMARATA and MARK MAMBRETTI,

Intervenor-Defendants.

Index No. **101105-2014**

Phillip G. Minardo, J.S.C.

AFFIRMATION

JOHN KEONI WRIGHT; GINET BORRERO; *TAVANA* GOINS; NINA DOSTER; . CARLA WILLIAMS; MONA PRADIA; ANGELES BARRAGAN;

Plaintiffs,

- against –

THE STATE OF NEW YORK; THE BOARD OF REGENTS OF THE UNNERSITY 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,

Intervenor-Defendants,

-and-

PHILIP 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.

RICHARD E. CASAGRANDE, an attorney duly admitted to practice law in the Courts of the State of New York affirms as follows under penalty of perjury pursuant to CPLR § 2106:

1. I am the attorney of record for Intervenor-Defendants Seth Cohen, Daniel Delehanty, Ashli Skura Dreher, Kathleen Ferguson, Israel Martinez, Richard Ognibene, Jr., Lonnette R. Tuck, and Karen E. Magee, Individually and as President of the New York State United Teachers ("Intervenor-Defendants"). I am fully familiar with the pleadings, facts and circumstances in this matter.

2. I submit this affirmation in support of the motion for leave to renew Intervenor-Defendants' motion to dismiss Plaintiffs' Amended Complaints pursuant to CPLR § 2221(e).

3. Intervenor-Defendants filed their motion to dismiss the Amended Complaints pursuant to CPLR § 3211(a)(2), (7) and (10) on or about October 29, 2014. Copies of all papers served and filed by Intervenor-Defendants in support of their motion to dismiss are annexed hereto as Exhibit "A" and include: (1) Notice of Motion to Dismiss (Dated October 27, 2014); (2) Affirmation of Robert T. Reilly in Support of Motion to Dismiss (Dated October 27, 2014); (3) Memorandum of Law in Support of Intervenor-Defendants' Motion to Dismiss (Dated October 27, 2014); (4) Reply Memorandum of Law in Support of Intervenor-Defendants' Motion to Dismiss (December 15, 2014); (5) Response Letter to Sur-Reply by Richard E. Casagrande with attached Affirmation (Dated January 13, 2015).

4. The motion to dismiss asserted several grounds for dismissal, including failure to allege facts sufficient to support a constitutional claim; failure to state a cause

of action under New York Constitution Article 11 §1; lack of standing; non-justiciability; mootness; and failure to join necessary parties.

5. By Decision and Order dated March 12, 2015, Hon. Philip G. Minardo, J.S.C., denied the motions to dismiss made by all defendants in this matter. A copy of the March 12, 2015 Decision and Order is annexed hereto as Exhibit "B".

6. After Justice Minardo issued the Decision and Order, the New York State Legislature, on April 1, 2015, enacted Chapter 56 of the Laws of 2015 as part of the 2015-2016 New York State Budget.

7. Chapter 56 of the Laws of 2015 amended many sections of the Education Law, a majority of which are laws challenged by plaintiffs, including: Education Law §§ 305, 2509, 2573, 3012, 3012-c, 3020 and 3020-a. The Legislature's amendments to these laws significantly changed tenure and probation for teachers, disciplinary proceedings for tenured teachers and the evaluation of teachers (Annual Professional Performance Review). Further, the Legislature added new sections to the Education Law, including Education Law § 211-f (receivership for "failing" schools), which drastically alters the tenure and seniority rights of teachers in these schools, and Education Law § 3020-b (new process for removal of tenured teachers).

8. These legislative amendments raise serious, new questions of whether the amended complaints are now moot or non-justiciable and would likely change the prior determination on the motions to dismiss.

9. Plaintiffs challenge numerous provisions of the Education Law, which broadly impact four areas of teachers' terms and conditions of employment:

A. Length of Teacher Probation: The amended complaints challenge the statutory three-year probationary term for teachers, generally alleging that three years is too short to evaluate the effectiveness of the teacher before a teacher is appointed on tenure. While Intervenor-Defendants assert that the amended complaints are not supported by any factual basis and are legally deficient on various grounds, under the April 1, 2015 legislative amendments, the probationary term has now been extended to four years for any teacher hired after July 1, 2015. Further, other limitations have been placed on a school district's ability to award tenure. These legislative amendments raise a substantial question of whether the amended complaints are moot or non-justiciable as to the length of teachers' probationary periods.

B. Tenure/Due Process: The amended complaints also challenge the statutory and collectively negotiated due process procedures under which teachers may be stripped of their protected property interests m continued employment, based on alleged incompetence, misconduct, physical or mental disability or failure to maintain certification. The amended complaints allege that such procedures are too complicated, protracted and expensive, thus discouraging school districts from seeking to remove tenured teachers for cause.

Intervenor-Defendants asserted in their motion to dismiss that the amended complaints fail to allege a sufficient legal or factual basis for such a claim and, additionally, that such claim is subject to dismissal based on other affirmative defenses.

As with probation, however, this cause of action is affected by the new legislative amendments. These legislative amendments alter the challenged due process procedures in several significant ways including: expediting hearings for teachers accused of

physical or sexual abuse of students; providing for the automatic termination of teachers convicted of certain crimes; shifting the burden of proof from the school district to the teacher in certain cases of alleged pedagogical incompetence; expediting hearings and altering the standard of proof in such cases; and providing for payless suspensions of teachers, pending a hearing, in certain cases.

C. Teacher Evaluation: The amended complaints contain a broad, vague attack on teacher evaluation under Education Law § 3012(c). Plaintiffs generally claim that the teacher evaluation statute does not properly identify ineffective teachers. Under the April 1, 2015 legislative amendments, Education Law § 3012(c) has been substantially replaced by a new Section 3012-d, and the Board of Regents has been directed to issue new regulations for teacher evaluations by June 30, 2015. Again, this raises a new issue of whether the amended complaints are moot, non-justiciable or premature.

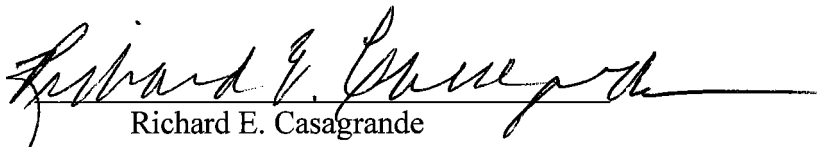
D. Seniority: The amended complaints also seek a declaration that teacher seniority laws are unconstitutional. These laws generally provide that when economic or programmatic reductions in force are necessary, teachers who have rendered competent and efficient service are to be laid off by seniority within their tenure area. These seniority laws, which are common to most civil servants in New York, provide an objective method of determining layoffs among competent teachers, and promote stability and long term service, particularly in low wealth school districts. While the recent legislative amendments did not alter seniority laws in all schools, the legislative amendments do provide that in schools that have been designated as failing, teachers

under certain circumstances can be removed without regard to their tenure or seniority rights.

10. As can be seen, the legislative amendments have substantially altered the challenged statutes. Thus, Intervenor-Defendants' motion for leave to renew their motion to dismiss should be granted, and the amended complaints dismissed as moot and non-justiciable.

11. To the extent the State defendants, in conjunction with their motion for leave to renew, also move to dismiss pursuant to CPLR § 3211(a)(2) for lack of justiciability and mootness, Intervenor-Defendants join in that motion.

Dated: May 26, 2015
Latham, New York



Richard E. Casagrande

120154

STATE OF NEW YORK
SUPREME COURT COUNTY OF RICHMOND

MYMOENA DAVIDS, et al.,

Plaintiffs,

-against-

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

THE STATE OF NEW YORK, et al.,

Defendants,

-and-

MICHAEL MULGREW, et al.,

Intervenors-Defendants.

JOHN KEONI WRIGHT, et al.,

Plaintiffs,

-against-

THE STATE OF NEW YORK, et al.,

Defendants,

-and-

SETH COHEN, et al.,

Intervenors-Defendants.

MEMORANDUM OF LAW IN SUPPORT OF
INTERVENORS-DEFENDANTS' MOTION FOR LEAVE TO RENEW

RICHARD E. CASAGRANDE, ESQ.
Attorney for Intervenors-Defendants
SETH COHEN, DANIEL DELEHANTY,
ASHLI SKURA DREHER, KATHLEEN FERGUSON,
ISRAEL MARTINEZ, RICHARD OGNIBENE, JR.,
LONNETTE R. TUCK, and KAREN E. MAGEE,
Individually and as President of the
New York State United Teachers,
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Keith J. Gross, Esq.
Jacquelyn Hadam, Esq.
Of Counsel

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

MYMEONA DAVIDS, by her parent and natural guardian, MIAMONA DAVIDS, ERIC DAVIDS, by his parent and natural guardian MIAMONA DAVIDS, ALEXIS PERALTA, by her parent and natural guardian ANGELA PERALTA, STACY PERALTA, by her parent and natural guardian ANGELA PERALTA, LENORA PERALTA, by her parent and natural guardian ANGELA PERALTA, ANDREW HENSON, by his parent and natural guardian CHRISTINE HENSON, ADRIAN COLSON, by his parent and natural guardian JACQUELINE COLSON, DARIUS COLSON, by his parent and natural guardian JACQUELINE COLSON, SAMANTHA PIROZZOLO, by her parent and natural guardian SAM PIROZZOLO, FRANKLIN PIROZZOLO, by his parent and natural guardian SAM PIROZZOLO, IZAIYAH EWERS, by his parent and natural guardian KENDRA OKE,

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Phillip G. Minardo, J.S.C.

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Intervenor-Defendants,

-and-

PHILIP 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.

PRELIMINARY STATEMENT AND STATEMENT OF FACTS

This brief is submitted on behalf of Intervenor-Defendants Seth Cohen, Daniel Delehanty, Ashli Skura Dreher, Kathleen Ferguson, Israel Martinez, Richard Ognibene, Jr., Lonnette R. Tuck, and Karen E. Magee, Individually and as President of the New York State United Teachers ("Intervenor-Defendants"), in support of their motion for leave to renew their motion to dismiss the amended complaints pursuant to CPLR § 2221(e). On or about October 29, 2014, Intervenor-Defendants filed their motion to dismiss the amended complaints pursuant to CPLR § 3211(a)(2), (7) and (10) for lack of subject matter jurisdiction, failure to state a cause of action, and for failure to name necessary parties. By Decision and Order dated March 12, 2015, Hon. Philip G. Minardo, J.S.C., denied, in their entirety, the motions to dismiss the amended complaints made by defendants in the instant matter.

After Justice Minardo issued the Decision and Order, the New York State Legislature, on April 1, 2015, enacted Chapter 56 of the Laws of 2015 as part of the 2015-2016 New York State Budget. Chapter 56 of the Laws of 2015 amended many sections of the Education Law, a majority of which are laws challenged by plaintiffs, including: Education Law §§ 305, 2509, 2573, 3012, 3012-c, 3020 and 3020-a. The Legislature's amendments to these laws radically changed tenure and probation for teachers, disciplinary proceedings for tenured teachers and the evaluation of teachers (Annual Professional Performance Review). Further, the Legislature added new sections to the Education Law, including Education Law § 211-f (receivership for "failing" schools), which drastically alters the tenure and seniority rights of teachers in these schools, and Education Law § 3020-b (new process for removal of tenured teachers).

As discussed below, these legislative amendments raise serious, new questions of whether the amended complaints are now moot or non-justiciable and would likely change the prior determination on the motions to dismiss. Thus, this Court should grant Intervenor-Defendants' motion for leave to renew their motion to dismiss.

ARGUMENT

POINT I

THE LEGISLATURE'S RECENT AMENDMENTS TO THE CHALLENGED STATUTES DEMONSTRATE THAT PLAINTIFFS' CLAIMS ARE NOT msTICIABLE.

With the ink still wet on the Legislature's significant amendments to the Education Law, the proof is strong and convincing that plaintiffs' claims present non-justiciable policy questions. The Legislature's actions just months ago once again show that it is the Legislature – not the courts – that has the authority and ability to address plaintiffs' policy dispute manifested in the amended complaints.

The consolidated, amended complaints allege four general claims regarding teachers' probationary period, due process rights, teacher evaluation and seniority-based layoffs. The new legislation significantly alters the law in all these areas. Thus, after revisions to the Education Law in 2008, 2010, and 2012, the Legislature has once again amended the Education Law in 2015, for a fourth time in seven years. The Legislature's actions over the last seven years leave no doubt that the Legislature has the authority to address plaintiffs' claims, rather than the courts.

Framing plaintiffs' complaints as a constitutional challenge is not enough for the courts to involve themselves in a matter like this, which relies on "generalized

conclusions" and deals with political questions that the judiciary cannot address. *See Benson Realty Corp. v. Beame,* 50 N.Y.2d 994, 996 (1980). The Court of Appeals' decision to refrain from issuing a judgment on the constitutional rights in *Benson Realty* is a guiding light for the Court's action here. Therefore, with the new legislative changes and the Court of Appeals' logical decision in *Benson Realty,* it is appropriate for the Court to dismiss plaintiffs' non-justiciable complaints.

Here, plaintiffs have asserted a facial challenge to the Education Law sections at issue.[1] Accordingly, plaintiffs' conclusory allegations of misuse of the statutes or poor administration of the statutes are irrelevant to this Court's analysis. The Court of Appeals in *Benson Realty,* 50 N.Y.2d at 996, notably stated:

> We know of no authority, appellants cite none, recognizing any proposition that proof of maladministration or nonadministration of a statute may serve as the predicate for a judicial declaration that the statute is unconstitutional. The role of the judiciary is to enforce statutes and to rule on challenges to their constitutionality either on their face or as applied in accordance with their provisions. Any problems that result from pervasive nonenforcement are political questions for the solution of which recourse would have to be had to the legislature or executive branches; the judiciary has neither the authority nor the capabilities for their resolution.

For a complete discussion of Intervenor-Defendants' arguments pertaining to the justiciability of plaintiffs' claims, the Court is respectfully referred to the Memorandum of Law in Support of Intervenor-Defendants' Motion to Dismiss (dated October 27,

[1] Although plaintiffs have argued that the statutes are unconstitutional as applied to them, they have failed to offer any particularized facts as to why the law is unconstitutional as applied to them; however, they argue that these statutes should be declared unconstitutional with regard to all public school students in New York State. As such, it is clear that their challenge is one of facial validity. "[A]n as-applied challenge calls on the court to consider whether a statute can be constitutionally applied to the [party] under the facts of the case." *People v. Stuart,* 100 N.Y.2d 412, 421 (2003). It is "not sufficient for [a party] to demonstrate that the statute 'might operate unconstitutionally under some conceivable set of circumstances.'" *Texas Eastern Transmission Corp. v. Tax Appeals Tribunal,* 699 N.Y.S.2d, 560, 562 (3d Dep't 1999) (quoting *Matter of Allied-Signal Inc. v. Tax Appeals Tribunal,* 645 N.Y.S.2d 895, 899 (3d Dep't 1996). Instead the party must establish that the "law has in fact been, or is sufficiently likely to be, unconstitutionally applied to him." *McCullen v. Coakley,* 134 S.Ct. 2518, 2534, n.4 (2014).

2014) at pages 10-26, and the Reply Memorandum of Law in Support of Intervenor-Defendants' Motion to Dismiss (dated December 15, 2014) at pages 17-18 and 23-27.

POINT II

THE MOTION FOR LEAVE TO RENEW SHOULD BE GRANTED BECAUSE THE APRIL 1,2015 LEGISLATIVE AMENDMENTS RENDER PLAINTIFFS' CLAIMS MOOT.

A case becomes moot when the circumstances relied upon by the plaintiffs have changed. *Hearst Corp. v. Clyne,* 50 N.Y.2d 707, 714 (1980). "It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal. This principle, which forbids courts to pass on academic, hypothetical, moot, or otherwise abstract questions, is founded both in constitutional separation-of-powers doctrine, and in methodological strictures which inhere in the decisional process of a common-law judiciary." *Hearst Corp.,* 50 N.Y.2d at 713-14 (internal citations omitted); *see also Albino v. New York City Haus. Auth.,* 78 A.D.3d 485 (1st Dep't 2010); *People v. Grasso,* 54 A.D.3d 180, 206 fn. 19 (1st Dep't 2008).

On April 1, 2015, the New York State Legislature enacted Chapter 56 of the Laws of 2015 as part of the 2015-2016 New York State Budget. Chapter 56 of the Laws of 2015 amended many sections of the Education Law, a majority of which are laws challenged by plaintiffs, including: Education Law §§ 305, 2509, 2573, 3012, 3012-c, 3020 and 3020-a. The Legislature's amendments to these laws significantly changed tenure and probation for teachers, disciplinary proceedings for tenured teachers and the evaluation of teachers (Annual Professional Performance Review). Further, the

Legislature added new sections to the Education Law, including Education Law § 211-f (receivership for "failing" schools), which drastically changes tenure and seniority rights of teachers in these schools, and Education Law § 3020-b (new process for removal of tenured teachers).

For clarity, the April 1, 2015 changes to the Education Law by the Legislature are addressed below by the areas of teachers' terms and conditions of employment that are impacted.[2]

A. Length of Teacher Probation: The amended complaints challenge the statutory three-year probationary term for teachers set forth in Education Law §§ 2509, 2573, and 3012, generally alleging that three years is too short to evaluate the effectiveness of the teacher before a teacher is appointed on tenure and noting that a four year probationary period would be ideal. *See Wright* Amended Compl.,3 ¶¶ 38, 46 and 79. While Intervenor-Defendants assert that the amended complaints are not supported by any factual basis and are legally deficient on various grounds, under the April 1, 2015 legislative amendments, the probationary term has now been extended to four years for any teacher hired after July 1, 2015. L. 2015, c. 56, pt. EE, subpt. D, §§ 1-5 (eff. July 1, 2015). Further, other limitations have been placed on a school district's ability to award tenure that relate to effective evaluations and the possibility of a one year extension of probation for teachers who have not achieved three effective ratings or who are ineffective in their last year of probation. *Id.* As the Legislature increased the length of

[2] Nothing contained within this Memorandum of Law or any other papers filed in support of Intervenor-Defendants' motion for leave to renew the motion to dismiss are an indication of any agreement or disagreement with the laws enacted on April 1, 2015. Intervenor-Defendants assert solely that the April 1, 2015 amendments demonstrate that plaintiffs' claims under Article XI of the New York Constitution are non-justiciable and moot.

[3] References to the Amended Complaints appear as *Wright,* ¶__ and *Davids,* ¶__.

probation, to the number of years plaintiffs requested, and added more requirements for a teacher to obtain tenure based upon annual ratings, plaintiffs' claims relating to the length of teacher probationary periods and earning tenure are moot.

B. Tenure/Due Process: The amended complaints also challenge the statutory and collectively negotiated due process procedures under which teachers may be stripped of their protected property interests m continued employment, based on alleged incompetence, misconduct, physical or mental disability or failure to maintain certification. *See Wright,* ¡ï! 49-65; *Davids,* ¡ï! 37-43. The amended complaints allege that such procedures are too complicated, protracted and expensive, thus discouraging school districts from seeking to remove tenured teachers for cause. *Id.*

Intervenor-Defendants asserted in their motion to dismiss that the amended complaints fail to allege a sufficient legal or factual basis for such a claim and, additionally, that such claim is subject to dismissal based on other affirmative defenses.

As with probation, however, this cause of action is affected by the new legislative amendments. The statutory due process protections are set forth in Education Law §§ 3020 and 3020-a. The Legislature amended these laws, which were recently amended in 2012, and added a new Education Law § 3020-b. L. 2015, ch. 56, pt. EE, subpt. G, §§ 1-4 (eff. July 1, 2015). These legislative amendments alter the challenged due process procedures in several substantive ways.

First, Education Law § 3020-a was amended to provide for expedited hearings for teachers charged with allegations of physical or sexual abuse of students after July 1, 2015 and allowing for suspensions without pay for up to 120 days. *Id.* at § 3. All § 3020-a proceedings initiated after July 1, 2015 will be heard before a single hearing

officer and there is no longer an option for a 3-person panel to consider charges of pedagogical incompetence. *Id.* Education Law § 305 was amended to provide for the automatic termination and license revocation of teachers convicted of a violent felony against a child pursuant to section 70.02 of the Penal Law, when the intended victim was a child. *Id.* at § 1. Education Law § 3020-a was amended to mandate that two consecutive ineffective ratings on an Annual Professional Performance Review ("APPR") will be *prima facie* evidence of incompetence, and the burden of proof is now shifted from the school district to the teacher to rebut such evidence only by clear and convincing evidence. *Id.* at § 3.

The Legislature added a new Education Law § 3020-b that outlines "streamlined removal procedures for teachers rated ineffective" which applies to tenured teachers and principals who receive two or more consecutive ineffective ratings. *Id.* at subpt. G, § 4. This new section mandates that school boards bring section 3020-a charges for three consecutive ineffective ratings and provides for expedited hearings. *Id.* Further, § 3020-a was amended to permit fraud or mistake as the only available defense to three consecutive ineffective ratings. *Id.* at § 3.

These significant changes to Education Law §§ 3020 and 3020-a, and the addition of Education Law § 3020-b, a mere three years after these same laws were last amended, show that plaintiffs' claims in regard to discipline of tenured teachers are moot.

C. Teacher Evaluation: The amended complaints contain a broad, vague attack on teacher evaluation (APPR) under Education Law § 3012(c), and plaintiffs generally claim that the teacher evaluation statute does not properly identify ineffective teachers. *See Wright,* ¶¶ 39-47; *Davids,* ¶ 52. Under the April 1, 2015 legislative

amendments, Education Law § 3012(c) has been substantially replaced by a new section 3012-d, and the Board of Regents has been directed to issue new regulations for teacher evaluations by June 30, 2015. L. 2015, c. 56, pt. EE, subpt. E. The new legislation significantly transforms the APPR procedures and raises a new issue of whether the amended complaints are moot.

D. Seniority: The amended complaints also seek a declaration that teacher seniority laws are unconstitutional. *See Wright,* 66-75; *Davids,* 44-51. These laws generally provide that when economic or programmatic reductions in force are necessary, teachers who have rendered competent and efficient service are to be laid off by seniority within their tenure area. Education Law §§ 2510, 2585 and 2588. These seniority laws, which are common to most civil servants in New York, provide an objective method of determining layoffs among competent teachers, and promote stability and long term service, particularly in low wealth school districts. It is important to note that layoffs under strained economic conditions are not the time, as plaintiffs argue, to eliminate ineffective teachers. Boards of education should take steps to eliminate those teachers they consider to be ineffective well before any potential layoff situation.

While the April 1, 2015 legislative amendments did not alter seniority laws in all schools, the legislative amendments added a new section 211-f providing that in schools that have been designated as "failing", teachers under certain circumstances can be removed without regard to their tenure or seniority rights. L. 2015, ch. 56, pt. EE, subpt. H (eff. April 1, 2015).

Because plaintiffs' claims are moot, a motion for leave to renew the motion to dismiss should be granted and plaintiffs' claims can and should be dismissed pursuant to CPLR 3211.

CONCLUSION

For these reasons, and those set forth in the Affirmation, Intervenor-Defendants' motion for leave to renew their motion to dismiss should be granted.

Dated: May 26, 2015
Latham, New York

Respectfully submitted,

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EXHIBIT "3"

STATE OF NEW YORK
SUPREME COURT COUNTY OF RICHMOND

MYMOENA DAVIDS, et al.,

Plaintiffs,

-against-

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

THE STATE OF NEW YORK, et al.,

Defendants,

-and-

MICHAEL MULGREW, et al.,

Intervenors-Defendants.

JOH1;J KEONI WRIGHT, et al.,

Plaintiffs,

-against-

THE STATE OF NEW YORK, et al.,

Defendants,

-and-

SETH COHEN, et al.,

Intervenors-Defendants.

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

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OTHER

STATE OF NEW YORK
SUPREME COURT COUNTY OF RICHMOND

MYMOENA DAVIDS, et al.,

Plaintiffs,

-against-

THE STATE OF NEW YORK, et al.,

Defendants,

-and-

MICHAEL MULGREW, et al.,

Intervenors-Defendants.

JOHN KEONI WRIGHT, et al.,

Plaintiffs,

-against-

STATE OF NEW YORK, et al.,

Defendants,

-and-

SETH COHEN, et al.,

Intervenors-Defendants.

PRELIMINARY STATE:MENT

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

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

A. THE COMPLAINTS

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

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

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

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

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

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

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

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

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

B. TEACHER DEFENDANTS

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

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

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

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

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

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

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

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

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

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

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

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

C. MOTION TO DISMISS

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

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

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

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

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

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

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

ARGUMENT

POINT I

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

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

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

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

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

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

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

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

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

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

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

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

POINT II

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

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

A. WSTICIABLITY STANDARDS

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

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

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

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

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

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

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

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

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

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

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

B. THE COMPLAINTS FAIL TO PRESENT A JUSTICIABLE CONTROVERSY.

Plaintiffs' sweeping claims, made without any showing of personal harm, clearly do not present a justiciable controversy. General claims such as "[t]eacher effectiveness cannot be determined within three years," *(Wright* 179); that "disciplinary procedures are time-consuming, costly and unlikely to result in removal of teachers," *(Wright* 182); and that "[seniority] prohibits administrators from taking teacher quality into account when conducting layoffs," *(Wright* 185) are claims about policy, not an actual controversy between the parties.

The consolidated complaints allege three general claims: 1) that the three year probationary period for teachers is too short *(Wright* 138, 79); 2) that tenured teachers accused of misconduct or incompetence are provided too much due process *(Wright* 13; *Davids* 137);[7] and 3) that layoffs should not be determined by seniority *(Wright* 185; *Davids* 162). Specifically, plaintiffs challenge Education Law §§ 1102(3), 2509, 2510, 2573, 2585, 2588, 2590, 3012, 3012-c, 3013(2), 3014, 3020, and 3020-a *(Wright* 16; *Davids* 15).

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

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

1. PROBATION

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

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

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

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

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

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

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

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

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

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

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

Similarly, the New York State AFL-CIO stated:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. TENURE

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

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

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

[11] In addition to the requirement that they pass probation in order to earn tenure, New York's teachers must comply with a certification regime that is itself very rigorous. In New York, only teachers holding State certification are permitted to teach in the public schools. Education Law § 3009. For virtually all classroom teachers, the "initial" certification to teach requires completion of a teacher education program and a bachelor's degree, including 30 credits in general education, liberal arts and science, (8 NYCRR § 52.21(b)(2)(ii)(a)), and 30 credits in the content area of the particular certificate (8 NYCRR § 52.2 l(b)(2)(ii)(b)). Inaddition, candidates for initial certification must achieve satisfactory scores on the NYS Teacher Certification Examination, which includes testing in the content area of the certificate (8 NYCRR §§ 80-1.5(a) and 80-3.3(c)(1)(2)), and undertake at least 40 days of student teaching (8 NYCRR § 52.21(b)(2)(ii)(c)). A new teacher has five years to complete all requirements for permanent ("professional") certification (8 NYCRR § 80-3.3(a)) unless the teacher applies for and SED grants an extension, which must be based on specifically enumerated grounds *(see* NYCRR § 80-1.6)).

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

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

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

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

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

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

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

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

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

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

Id. (emphasis supplied).

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

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

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

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

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

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

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

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

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

3. SENIORITY PROTECTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

POINT III

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

A. PLAINTIFFS' CLAIMS ARE NOT RIPE.

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

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

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

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

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

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

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

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

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

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

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

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

B. PLAINTIFFS' CLAIMS ARE ALREADY MOOT.

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

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

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

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

that was collected many years prior to the amendment of the statute in *2012 (Wright 11* 56-57; *Davids* 139). The informal survey plaintiffs cite was published in March 2007 and was based on data going back to 1995. *Id.* But now, under the revised statues, barring extraordinary circumstances all evidence must be submitted and the case decided within 155 days of the filing of charges. This 155-day time limit is conspicuously absent from the *Wright* plaintiffs' flow chart purporting to detail the disciplinary process *(See Wright* 160). Clearly, to the extent plaintiffs rely on the 2007 study, their claims are moot.

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

POINT IV

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

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

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

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

A. PLAINTIFFS CANNOT MEET THEIR BURDEN OF ESTABLISHING UNCONSTITUTIONALITY BECAUSE THE CHALLENGED STATUTES

RATIONALLY RELATE TO LEGITIMATE STATE INTERESTS.

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

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

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

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

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

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

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

1. THE THREE YEAR PROBATIONARY TERM

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

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

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

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

[22] Education Commission of the States, 50 States Analysis (May 2014), at http://www.ecs.force.com/mbdata/mbquestRTL?rep=TIO1. *See* Reilly Affirm. at Ex. "0".

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

2. TENURE/DUE PROCESS

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

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

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

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

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

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

a. THERE IS A RATIONAL BASIS FOR TENURE

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

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

[26] Similar legal rights are broadly accorded to teachers in most states and to most working people in much of the rest of the developed world. Most states provide tenure due process protection to educators. Education Commission of the States, 50 States Analysis May 2014, http://ecs.force.com/mbdata/mbquestRTL?rep=TTO l. *See* Reilly Affirm. at Ex. "0". And, "America is unique in its adherence to the at-will rule." Kenneth G. Dau-Schmidt, Promoting Employee Voice in the American Economy: A Call for Comprehensive Reform, 94 Marq. L. Rev. 765, 826 (2011).

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

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

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

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

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

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

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

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

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

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

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

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

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

In *Garcetti v. Ceballos,* 547 U.S. 410 (2006), a sharply divided Supreme Court held that a public employee has *no* First Amendment protection when speaking as an employee, rather than as a private citizen speaking about a matter of public concern. *Id.* at 421. The *Garcetti* holding has since been frequently applied to public school teachers, with the courts consistently holding that a teacher speaking in her employment capacity is not entitled to First Amendment protection. *See e.g., Massaro* v. *New York City Dept. of Educ.,* 481 Fed. Appx. 653 (2d Cir. 2012) (holding that a teacher's complaints about the unsanitary conditions of her classroom were not protected); *Weintraub* v. *New York City Dept. of Educ.,* 593 F.3d 196 (2d Cir. 2010) (teacher's complaint concerning school's failure to enforce classroom discipline not protected); *Woodlock* v. *Orange Ulster B.0.C.E.S,* 281 Fed. Appx. 66 (2d Cir. 2008) (holding that a school counselor's complaints that the school was in violation of state education department's recommendations was not protected); *Palmer* v. *Penfield Cent. School Dist.,* 918 F.Supp.2d 192 (W.D.N.Y. 2013) (upholding a district's denial of tenure for a probationary teacher who raised concerns about the disparate treatment of minority students because speech not protected); *Stahura-Uhl* v. *Iroquois Cent. School Dist.,* 836 F.Supp.2d 132 (W.D.N.Y. 2011) (finding that a teacher who spoke publicly about the inadequacy of special education programs was speaking in an employment capacity and thus not protected by the First Amendment). *See also O'Connor* v. *Huntington Union Free School Dist.,* 2014 WL 1233038 at pp. 8-9 (E.D.N.Y. 2014) (compiling similar cases and noting that teacher reports of student cheating, testing improprieties, disciplinary problems, fraud with respect to student files, school trip safety, improper tutoring, or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Plaintiffs next claim that if the challenged statutes are struck down, teachers would retain the due process rights of other public employees. *(Davids* ii 42). This is simply not true. Pursuant to Civil Service Law § 35(g), teachers are "unclassified" public employees and thus not covered by Civil Service Law § 75. Further, the *Wright* plaintiffs challenge the right of teacher unions to collectively bargain alternative disciplinary procedures. *(Wright* ii61). Accordingly, if the challenged statutes are struck down, teachers would be without any statutory or contractual due process protections at all.

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

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

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

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

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

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

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

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

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

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

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

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

3. SENIORITY BASED LAYOFFS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

POINT V

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

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

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

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

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

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

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

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

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

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

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4-1 The *Davids* complaint disparagingly describes allegedly ineffective teachers as "lemons." *(Davids* 33). There are procedures in place to identify, remediate and, if need be, remove ineffective teachers. Such disrespectful language has no place in a pleading.

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

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

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

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

CONCLUSION

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

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

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

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

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

The motion to dismiss should be granted.

Dated: October 27, 2014
Latham, New York

Respectfully submitted,

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Latham, New York 12110-2455
Tel. (518) 213-6000

By: 
Richard E. Casagrande

116500/CWA1141

EXHIBIT "A"

EXHIBIT "1"

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

MYMEONA DAVIDS, by her parent and natural guardian, MIAMONA DAVIDS, ERIC DAVIDS, by his parent and natural guardian MIAMONA DAVIDS, ALEXIS PERALTA, by her parent and natural guardian ANGELA PERALTA, STACY PERALTA, by her parent and natural guardian ANGELA PERALTA, LENORA PERALTA, by her parent and natural guardian ANGELA PERALTA, ANDREW HENSON, by his parent and natural guardian CHRISTINE HENSON, ADRIAN COLSON, by his parent and natural guardian JACQUELINE COLSON, DARIUS COLSON, by his parent and natural guardian JACQUELINE COLSON, SAMANTHA PIROZZOLO, by her parent and natural guardian SAM PIROZZOLO, FRANKLIN PIROZZOLO, by his parent and natural guardian SAM PIROZZOLO, IZAIYAH EWERS, by his parent and natural guardian KENDRA OKE,

Plaintiffs,

- against -

THE STATE OF NEW YORK, THE NEW YORK STATE BOARD OF REGENTS, THE NEW YORK STATE EDUCATION DEPARTMENT, THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION, JOHN AND JANE DOES 1-100, XYZ ENTITIES 1-100,

Defendants,

-and-

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

Inteivenor-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 MAMBREm,

Intervenors-Defendants.

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

NOTICE OF MOTION
TO DISMISS

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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 UNNERSITY 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 DEPAR1MENT OF EDUCATION,

Intervenor-Defendant,

-and-

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

Intervenor-Defendant.

----------X

PLEASE TAKE NOTICE, that upon the Affirmation of Robert T. Reilly, Esq., of counsel to Richard E. Casagrande, Esq., attorney for Intervenors-Defendants, Seth Cohen, Daniel Delehanty, Ashli Skura Dreher, Kathleen Ferguson, Israel Martinez, Richard Ognibene, Jr., Lonnette R. Tuck, and Karen E. Magee, individually and as President of the New York State United Teachers, will move this Court at 10 Richmond Terrace, Staten Island, New York 10301 on t!?-e 14th day of January, 2015 at 10:00 a.m., or as soon thereafter as counsel may be heard, to dismiss the consolidated action pursuant to CPLR Rule 321 l (a)(2), (7) and (10) for lack of subject matter jurisdiction, failing to state a cause of action, and for failing to name necessary parties together with such other and further relief as the Court deems just and proper, including the costs and disbursements of this motion.

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

Dated: October 27, 2014
Latham, New York

Respectfully submitted,

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Attorney for Intervenors-Defendants
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Latham, New York 1211455 "1,
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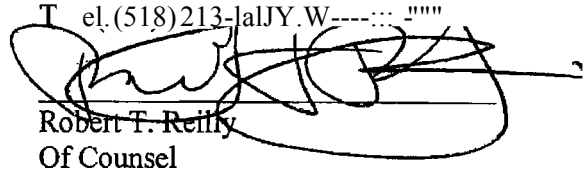
By: 
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EXHIBIT "B"

SUPREME COURT OF' THE S'TAT.E Of NEW YORK
COlJNn·Of RJCJ:IMQND

DCM VART 6

MYMOENA DAVIDS..I",-hct pattnt and n lural gWJ.rdian
MlAMONA DAVlDS; ·*ef al.*. and JOHN KEONI WR10HT.
er al.,

HON. PHILIP 0. MiNAROO

Plairrtitf!i,

-against·

DEC lSJON & Oltll.E'R

THE STATR Of NEW \'ORK. *et al,*

Defendants.

Index No. 101105/14

MlCHA:EL MULGREW. as Presidm uflhe lJNJTfill FEDERA"rtON OP TEACHERS.LtlCat 2:. Anierkan f\-dcrati.o.n uf Teacbrs.t\f L Cl(). SETIJ COHEN. DA:NlEL Of.L EHANTY, ASHLI SKURA DREHER. KAlllLEEN FERGUSON. t.SRAEt. M\RTJNFZ. RICf lAllD OGNlDHNE, JR,. LONNETTE R:. 'flJCK and KAREN R. MAGF,iE, lndlvidua.lly und as President of the New Vt>tk Staie United Teachers PHIUP A. CAMMARATA, MARK MAMBRtrrn.and THE NEW YORK CITY OltPARTMENT OF EDUCATION.

Intervenor-Defendants.

Motion Nos.[1] 3580 - 008
3581 - 009
3593 - 010
3595 - 011
3598 - 012

[1]The motions have been consolidated for purposes of disposition.

MYMOENA OAVIDS. tel v,. IBE STATE OF NEW YOR:K, et at

The following papetli numbered I 'b 12 were fuUysUhti:titled 01i_the l4dt oo,Y of fanunry, 2015.

Papers
Numb

Notie of fotion lo Dismiss bv Defdtmt THE CITY OF NEW YORK:and THE NEW YORK CITY DEPARTMINt OF EDUCAIlON.
with Exhibi1s and Memorandum of luw.
(dated Ootober 2-&t 2014} _ _____ 1

Notice- of f..otion to Di<tmtss by lntervcnor..-Defendant MICHAEL MULOREW.as:Pre:Sfdie-rit of the UNITED FEDERATION OF TEACHERS.Lue!I 2.American Federaii(tll of - Teachers. AFlCTO,
v.lth Exhibits and Memorar1dum of Law.
(daled October 28. 2014) :t

Notice of Moti()fi lo Dismlss by fntcrvenol'Defendants PHILIP CAMMARATA at'1'.i MARK MAM8RE1TI.
wnh Exhibits and Memonmdum of Law•
.{daied Octobcr23, 2014}_____

NoHcc of Motion to Dismiss by ln-.tenrenotDefcndanu SETH COHHN. *erul.*
v.ith -Exbfbits and Memorandum of Law,
(dated October 27. 20141_____ 4,

Nodcc of Motion t\'> Dismiss by Defendants STATE OF NEW YORK. *e/ al.•*
with AffirmsJion and Supplemcn-laJ Affimuition of Assi.stant Aftomey General Ste¥en'L. .Banks, Exhibits amd Memorandum of Law.
{dated October 28. 2014)_____

Affi:rmutiou in Opposition-of Plaintiffs MYOMENA DAVIDS,et *al,* to Defentund: lnt<tn'e-OOt--Dt'foJU.!Bn1S' Motions ,t.o Disnris-s:,
\\>itb Exhibits and Mernorandwn <if l..aw:
(dined December *5,* 2:0 J4)_____

Affinnatitln in Opposition by PhtlrttHT-s JOHN KEONl WRlGHT. *el,11,* to Deiendw:rts: and In:tervenors Dcfendant.s' Motions to rnmiss.
w:ifu Exhibits nnd Memonmdum of Lav/,
(dated December S.2014)_____

MYMO &Nfl. DAV!QS, kl al.vi.rm SJ8Tf:tlf t;iEW YQRI);. et at

Reply Memommh1m of.Law by Defendant THE CITY OF NEW YO.RK and THE NEW YORK CITY DEPARTMENT Of EDUC:A"J10N.
{dated December 16.2014)

Reply Memorandum of Law by tntervenor.:Defondant MICHAEL .MULGREW, us. Pre$ideat Of \he UNITED FEDERAn()N OF TEACHERS. Local 2, Art)etfoan Federation of Teachers, AFL-ClO,
{dated December 1.5, 2fJ14)

Reply Memorandum of Law by Inli::f'i•enors Oefendants PHIUP CA.MJ'iAARATA and MARK MAMBRETil.
(dated Dt-.-ce.ntber 15, 2014} 1

Reply Memorandum of Law by latcnotzi- DefcndanL'i SE.Tit COHHN *ti al.*.
(da.ted Dec:ember 1$, 2014).. .....

Reply Memorandum *co(* Law by Defendants STATE OF NITTV YO *eraL*
{datedJ.>ccember 15.2014) . -– -.....

Upon the foregoing papers, the above-enumerated motions to dismiss the complaint pursuant to CPLR 3211(a)(2), (l). (7}, and (HJ), by the defondaats.und intenieoor-dclendants irn eaclt action are. denied. as betcinafl'er provi<led..

This consolidated action, brought on the behalf of certain representative public school chi.ldtefl in the State and City of Ncw Yor:k,, seeks, *iluer alia.* a deelaration that varim,t.. seetfonipof the Educution Law with :rejatd to· teacher W"4mfe; td.acher distiipUne.i teaC'hct fayoff;<;·,nnd 1h¢f evaluations are violative ttf the r ucation Article (.<uticle XI, §I) of the New ¥{.lfk State Constitution. The foregoing provides, in relevant part, that "[t]he legtslatttre .shall provide for·the maintenance und suppo.n o(a system uf free corrtmll!:l :hools., wtmrein art ilie chJ!dten ofthis state· rnay be e.ducmed:'{NY Const. Art. XI. §I), As construed by plintitrs.. lhe EduootiPn Ard.cfo· guarantees to all students in New York Stau a "sound basic education", which is alleged to be the

key to n promising future insoiar a$ it adequately prepares !itttdenti lNifh thi:: ability to realize their potential, become productive citizens, and contribute to society. Mm:e spee.ific.a!ty ,pfa:linttffs m:gue tlun tlw State is.eonstitutionaUy ohlited to, *e.g.* syslemica!fy provide itspupils ·with the opportunhy to {lhtahi "'the basi Uteraty. cakulntlng lind verbal sklllsnect:S$UQ' to ·enable ftbeml t>Q eyenruat:ty function pmductivtly as cirvic partitipanis eapable of votin@. and serving on ajurf '(C'mnuld,n f u fi@Dl Equity, Inc; v. SWe pf New ¥Qtk (86 NYld 307'• .316), *i.e.;* ,o$peak, Usiet"Lt read attd write clearly and effectively in En;glisb. perform basic mathematical cak:ulations.be!knowledgeable about political, ecc.nomic and social institutions and procedures in I.his country Md :ihroad,-l-'r to acquire· - the skills.knowledge. understanding und rtitudes necessary l'O partiolpure in dmocrnti-c self. govemmentt• *(id.* at JllJ). More recent1y .. lhc Court of Appeals has renned &he consdfotionally .. mandate.cl minimum to require the teac.hing of skHls that enable students to undertnke iVie responsibili-ties ningfuf.ty; to functfon productivelylt. ei"ic participants (Cm;!pairn_fqr fj@l Eg;uiw. Jnc. y. Slate bf New Turk. s NY3d 14.2Cl..21). Plaintiffs furtht'.rm-gue- that the Court of Appeals b&s n,,-cognized that tbe Education Miele requires adequate tem:hlng by·effeetivc petSOn!Wl '1$ the "most imponant" fuctor in the emnt lo ptm'ide c1 Uld¢:n. with a 'St)und *basfo:* edueation--i *(tee* Cpmpniwi foe fis l EQnizy. tnc. *v.* Stat&'. gf QW Yv)rk,. 100 NY2d g93, 909}. Wltb thi$ tts bac.kgroond, piain:t.iffi;mafoiam thai certain fdcmifiable- sections of me Eduootio'n Law-Coster the: continued, per1l11Ulent emp.loyrnem of foeffi:ctive lcachers, thereby fa!lir.ig out of eompUam.:e W4th

the e-0nstitutiorud mandate ttmt students itl New York be provided whha "s.ol:l:nd basic edion", Finally, it is claimed .that the judiciary has been vested with the legal arid mural authority tO- ePS'ure that this constitutional mandate is hMMcd *(see* C!ltnPI!iM· f.otfiscal Equlty•. IJ;lC:. y. St@pf Ne.w XQrk, 100NY2<l902J.

At bar.the· statutes c.ball:cnged by ptaintift":s a:s. impni.ritlg bompfomce v.lth the Edncation Article include Education Law §§1102(3), 2509, 2510, 2573, 2588, 2590-j, 3012, 3013(2), 3014, and 3020. To the extent relevant, these statutes provide, *inter alia*, for (1) the award of, *e.g.*, tenure of public school teachers after a probationary period of only three years; (2) the procedures required to discipline and/or remove tenured teachers for ineffectiveness; and (3) the statutory procedure governing teacher lay-offs and the elimination of a teaching positions} ln short.. It is claimed dmt these statutes, both individually and collectively, have been proven to have a negative impact on the quality of education in New Y 1rk, thereby violating the srudl.'lnts' i;:on", {tituth)nal tight \(l- a . sound basic tdlK!ation" *(ree* NY Const, Art XI. §I).

As alleged in the respective cornpbdnts, seetio11s §§2$09, 25731 30li and 3012(.c) of the Education Law, referred to by plaintiffs as the "permanent employment statutes", formally provide, *inter alia*, for the appointment to tenure of those probationary teachers who have been found to be competent, c:ffioient and sailsfactnry. under !he nppHcabJe rules *of* the beta.rd uf regeut.s Cidop:ted purSl.lttttll to fal ucation Law §30I2(h) tif this article:... Ho\\tever.since these tem::hett are :typicaify granted tenure after only three years on probation, plaintiffs argue that when viewed in conjunction with the statutory provisions for their removal, tenured teachers are virtually guaranteed lifetime employment regardless of their in-class performance or effectiveness. In this regard, it is alleged by plaintiffs that thre(! ye.an; is :an inadequate pc.':tiod of time to- assess. whether a teacer ha. demonstrated or crune<l the rigln to avail him or herself of the Ulelong benefits ot"'tenure. Al!iO

2. lliepresent sta.tmes require: that pmbabnll!)'tea,Cber8. be lwl.oughed firSt,•d the ng positions be fif ed on a seniority basis, i.e., the teachers with the greates(tenure befog- the l85lto be terminated For e of refor<:nce, this manner of proct':Cding is knoWn a. "'iaS\fo. firi;:.,out*' or "UFO".

dnl'wn into qucsrion arc the method,s employed for evaluating tcacher.s during I.heir probationacy period.

In support of these allegations. plaintiffs rely on studies which have shown that it is unusual for a teacher to be dell ied tenure at lhc end of the probif!lionazy period1 and that the gnmt.ing of tenure in most school dHtricts is mo:re of a forfl'udity rather lban lhe result of MY meimingful. apprai:sal of their performance orability, f?orstatiStic.al SUppi.1rt, pJai ntiffiHligue, e.g., that m 2007.97%offenUTC,,; eligible teacbets in the New Y(}:rk City sehool distticts tt\\wtled tenure. and that l'ecimt legislation intended to implement reforms in the evaluation proooss mw had a minhnal impact -on thi state ofa:ffairs. In addition, they note thnHo 201t and 2012.oril;3%o:f t.enutt';.eligjblt•hera were denied tenure.

With regard to the methods for evaluating teacher etlctiveness prior to nn It\Wird .ofien plainriffs maintain that the n."Cently-implerncn1ed Annual Professional Pmormanee :R.iew ("APPR"), n.a.w 0$ed t<)evale teachers and principals is-an unti:tinhle t.tnd, indirect menf teacher effectiveness, since 'it is based on studi.'"ftts• perfonn11nCC on st:andi-zed tts, other locnUy selected (i.e., non-standardized) measures of student achievement, and classroom observations by adm inistnttiVt staff. whkh art- cletuly subjectjvc *in* nature. On 'th.is issue, plaintiffs note that 6G% of the scored review on an APPR is based on this final criterion, making for a non-uniform, superficial and deficient review of effective teaching that generally fails to identify ineffective teachers. As. support oflhis postulate. plaintiffs refer to sl'ttd.ies t.hat ba:ve shown th.at io2Pl2. only 1% of teachers were rated "ineffective" in New York (as compared to the 91.5% who were rated as "highly effective" or "effective"), while only 31% of students taking the standardized tests in English Loogua:ge Atfs and Marh me!tbe minimum .1andard *fer* p,roficieney. As a further eple.

plaintiffs allege that on,ly 2J% ofteacht!rs eligible for te111,1re between20W d2013 m:l!i\!ed ,annal rating of '!ine1 lecti-ve"' even though &% of teachers had k,w llitendanec. and 12% received low Kvaluc added" ratings. Notably, these aUegntlo ns are nterely repre5entative of ·(hepurported fact5· plt1aded in support ofpla:bitiffS' challenge to too tenure laws,..and ate·intended simply to illustrate the starntes' reliance on some of the more superficial and arlifldal means of asses:S1:11g effectiveness, leading to an aWBrd ofk>nurc vitlu.iU1 a, sufficient demonstratfon ofnw;it. Each:ofthe above are atleged to operate to the detriment of New York studenrst

With regard to plaintiffs' challenge to those sections of the Education Laws which address the matt-et" of d isdplining or obtaining the dismissal of a tenured teacher.h 1S !i.Ueged that they•.tO(s; operate IO dny chlldren their onstitu:tiooal right to a ••sourtd bask education... As pkadt:d .these. 'tatutcs are churned tu prevent school administrators in New York from dls.tillssing teacrsfot pout performance, thereby forcing the retention of ineffective teachers to the detriment of their students. Among other Impediments,. these statutes arc tlairned to afford New York reac:bers super"' due process rights before they may be terminated for unsatisfactory performance by requiring an inordinate number of procedural steps before any action can be taken. Among the barriers cited are the lengthy investigation periods, protracted hearings, and antiquated grievance procedures and appeals, all of which are claimed to be costly and time-consuming, with no guaranty that an underperfunning teachC'f will actually be dismissed. As: a result. dismissal proceedings. ml to be rare when based on unsatisfactory performance alone, with scant chance of success. According to plaintiffs, the cumbersome nature of dismissal proceedings operates as a strong disincentive for

[1] Also ·\vrthy of nuttc fo this regard is plaintiffs' allegation that mo&\ofthe. leacbers unabte to satistactoriJy complete probation are :asked to extend their: pri:1 tim rerm.

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adminrstrntors anempting tCJ obtain the dismissal of i,noffe¢tive tea;chm•. the result Qr'lllc:h is that their rc.tention is vinuaUy .aJt'.S'Urod.

Pertinent to this cause of ac::tion, plaintiffs rely upon. the results of a survllo/ indicniing that.· · 48% of districts which hnd considcrtl bringing disdpHnary charges at least once, 4ootined:to do so. Jn addition, it was reported lll at betweera 2004 and 2008, each diseipli.nary pmg took an average of 502 days to complete, and between 1995 and 2006, dismissal proceedings based on aUcgatioris of ncCImpetcne took .an 1.rverage of 8.30 days to eomplete.. at. a cpst nf SlUOO() te.acher. It is funher alleged that more often than not thes¢ ptt)ceedings allow the ineff®ttve· teachers lQ tum to th classroom, which deprives stude11ts of th:eiirc-0<nstiUttiouaf rigbHcHi"SQuncf basic education".

Finafly, plaintiffs allege that th¢ sc)-eatled "UFO" statutes (Bduc.atfon Low §,§2515 ?51O 2588 and 3013) violate the Education lrticle of 1hc Ne'W' York State Coastitudi.m in that they mwe foiled. and will continue to f:a.H lo provide thildroo 'lhrougbout the SWe with a "'S()und bas,ic education". In particular, plafafiiJs mafntafo tlutl the foregoing sectfous of lhe Educaifon Laws create a seniority-based layoff system which operates without regard to a teacher's performance, effectiveness or quality, and prohibits administrators from taking teacher quality into account when implementing layoffs and budget cuts. In combination, these statutes are alleged to permit ineffective teachers with greater seniority to be retained without any consideration of the needs of the students, who are collectively disadvantaged. It is also claimed that the LIFO statutes hinder the recruitment. and retenlio" of new teacher-S, a failure which was *cited* by the Court Of Appeti:t.$(aftJcit; on other grounds) as having a negative impact on the constitutional imperative (Campaign for Fiscal &ruizy. lm:. v, $ntte of lJew)'Qfi, 100 NY2d at 909-911).

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h1 n1oving ɒ dismiss the eomp!Ui.nts, deJendants and inre:f\"ellot-&lndants fbemnfter coUc-ctiveJ y referred to as the "movants") singly and jointly, seek dismisSat of r:bc ct.lmplaint8 :on the grounds (1) that the c-0ims are nor the proper fornm in wbitb to bring these claims,. *i.e.,* that they nonjustkiablc; (2} that tbe stated grievR®es should be brought before the state legislmure; and (3) that the cou1 1s are not pemlitt'Cd 10 substitute their judgment for tbnt of a kgistative body ai; to l:h:e wisdom and expediency of legislation (*see e.g.* Matter of Retired Pub Empl Assoc, Inc. v. Cuomo, -Misc'.Jd , 2012 NY Slip Op 32979 [UJ(Sup Cl Albany CoJ). In brief, it ls a:tg4.led·tlutt teacher ten ure nm! lhe other statutes rcprcseill ll "fogis !tuive expression of a firm public polfoy dett'fitli llation thatthc int1.ofthf' public in lhe education of (Hr yout:h can best be served by [the present} system {which is] desi,gnttl to foster academic ·freedom ia our schools and to prtect com:petenu*hers from the tthuses they might be· stlbjected to ff they could be dismissed at the whbn of tbe&:t .stiJX'rvisors.. tBk-tii v Board 6f Ettu, 47 NY2d 385.3·91). Thu?!. it is claimed that the poticy-disions made by the Legislature are beyond the scope of the Judicial Branch of gove

1t is further daitned 1hat rf these siatut.es viola.led the lillUQatkm Artk:Je of the Con.stitution,, tht: Legislalure would have redressed th is-sue long ago. To the c.ootmcy, tenure laws: ha'le·btltm expanded throughout the years, and have been amended on several occasions in order to impose new comprehensive standards for measuring a teacher's performance, by, *e.g.*, measuring student achievement, while fiilfilling the prrtldpru purpose of these $tatutes,. *i.e.,* lo prt"Jt wmi teadmrs from official and bureaucratic:: caprice. lrJ bficf, ilis movants' positfon iliat "lobbyinby litigation" for changes in educationnl policy represents .an incursi:r;>i'I 'n the province of rile Legfala.tlve an.d Executive branches of the government, and is an improper vehicle through which to obtain changes in cduc:ruion policy. Atcord.ingJy, while conceding that there may *be* !!()11e room *for* Judi-cfat

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encroai:hment. educational policy is.said ll; rest wi.th tb Legislature.

Movants also nrgue that tbe .cornphrin.ts fail to Stftle a cause of action. ln thiS r.egnrd, it is claimed that in order to stale n vlllid <-.ausc of action undr Article XIpllttimiff must allege two-elements: (I) ihe deprivation o:fa Wld bask education, 1snd (2) causes alitributablet:<;l dl¢State {.see New York Cjy UbS!.rties Union v. S1atc of New York.., 4 NY3d 177, 17&-179). Moreover the erux of a dai.n under tht Education Article is. sa:id to the failure of the Stat¢ to. •provide *fbt* lhe rnainienam:e and support" of the publ.ic sch<Kil !!ystem {fi\Ynter v; Stttte gf }fow Ysnt. 100 NY2d 434, 439 [internal quotation marks omitted]; New York State Assn of Small City School Dists Inc. ,.. Sta u(New)'g.rk. 42 ADJd 64&. 652). Mere, it is claimed that the rospect1vc complaints devoid of any facts tendfng to show thut the failure to offer a ..sound basic educaHxm" is causally (:Onnccted lo !htState, rather thaa as d:aimcd, administered locuUy.

Thl"' movants also argue tht the Sta1c's responsibility uodet the Educadon Mi¢ is to· provide minimally adequate funding, resources, and educational supports to make basic learning possible, *;,e,* the requisite fonding and n:sourcc:.s *w* make possible "'a s<lund basic eduoo.tiett consis1(ingJ of the basic literacy, cakula[ing and verbal skills necessary m e:nable chlldtJ."ri:'to eventually function productively as civic participants capable of voting and serving on a jury" cPavnter v. State o:(Ncw York., 100 NY2d at 439-440). On t.b£s .aruilysis, it is alleged to be the ultima1e re:t>ponsibilhy of the local scht'K)1 ilistricts to reg,ulte their currkulae in nrde to dfoot compliance with the Educatiou Article while respecting "constitutional principle that districts make lhc basic decision on ...opC!mting their own schools" (Nw York Cjv Li!mrties llnion v. Slate of New York, 4 NY3d at 182). Thus, it is the local districts rather than the State which is responsible for recntlfing, hiring, tlis:cipJining and othen.\fat.> mam lging *iw* teachers. For emunple. the APP'fl

rn

implemented to me.a-;ure the dfecti veness of lenchers and ptindpals, res-e.rv¢,$ 80%()fthc evahmtitm criteria for negotiation between the local school distriet and its relevant adm:ini!i1tator und unions. Movants argue that the detcm1il 1ations do not tori.stituie state acc:km.

ln addition. movams urgue that both complain!S fail t() s:ta le a cause of octioo br:ease they are riddled with vague and conclusory allegations regarding their claim that the tenure and other laws i:ornbine to vi:nla-te the EJ.ucatfon Article. basing their cnuse5 of acri'on on (tJ alleged - ious statistics" regarding the mi.mber of teachers receiving tcnur.e, (2.) the lJegt-d cost ,nf terminating teachers for ineffectiveness, (3) inconclusive surveys of school administrators on the reasons why charges aften an: not pu:rg,ued, and (4) a sboing thi1t tbe challenged statutes result in n dnial oh "sound basic education". According to the movants, none of these allegations are sufficient to establish the unconstitutionality \tf tile subject statutes, *U!.,* thai there exist. rm r.ltio-nal and compeHing buses for the challenged probationnry. icnure and stniority statiites.

Also said to be problematic are plaintiffs' conclusory statements that students in New York are somehow recel ving an inadequate educaiion due to the relentkm of ineffective educators of the challenged statutes. Mt1reover, while plaintiffs argue that public education i;g plaued *by* an indeterminate number of "ineffective teachers", they fail to identify any such teachers; the actual percentage of ineffective educators; or the relationship between the presence of these allegedly ineffective teachers and the failure to provide school children with a minimally adequate education. /\c.Cl"1rdingly. mov-ams claim that mcrety bf.>causc .::pm of the 250,000 teachers Ueensed to teach il New York may be ineffective, is not a viable basis for eliminating these basic safeguards for the main.ing teachers. I.n brlef, movam:s nmlntain that aside from vague references to in:effecth-e teachers and "cherry-picked" statistics widmu1 widtr signHkan:ce.. tht :plaintiffs have dcne littlet<>

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demonstrate that the aUcged problem is llne of<:Mt:tltutioncl dimeusitm.

Mll'.lvants. also argue thaihe action sbm.tlc:l be d.ismis.. rl for d:ie l'llilure cojc,in.neces5acy parties as required by CPLR 1001 and 1003. ln ihi!:i regard, iiis daimed that since the re.liefwhich plaintiffs 11eek would affoc.t ell >choi'.ll districts across the stale., this Court should either order thej.oinde.r of. every school distrkt statewide, i)r dismfas the actkin. ln addition. the movant$ urgur: that plaittiifls have foiled to itllcg injury-i.n-Jkt, and that the claims w'.b.ich they do mtlke ate e:ither not ripe or fail m plead any imminent or :-petific harm. More importantly. tbe complaitirs fail lo tak ioto t'-Ounl the recent runendments to these mm;;.ies. whic.h ore ch1imed to rend al! of their claims lriOOt(•it:e *genert1lly* Hu$Sd11y_ Suite. <>:fNew York. 81 AD3d IJ:2). ln the auemat.ive, rt.is aUc.ged thai the stibje<'1 statuies are mt-4lllt. *inlrr a/hi.* Hprot1'.l:t :St.hool district empluyc:es from arbitrl1.ry tctmimlti(ln rather than the g,encral l'uhl:ic or i!Sc stu.dents *(btll wt* Chigi:n.y.tg\vn of Ni;;w CJ.1$tit-AOJ:d -,2015 NY Sfip(>p 00326, •21 22 {2d Depl]t

Finally, dcfendanbi the ST;ATE of NEW YORK. the BOARD OF REGENrs *OF* ·nrE UNIVERSITY OF THE 'TA'ff OFNEW YORK. MERRYL 1'L TISCH. i.n her otlidakapaeily as Chancd!ot ofthe Boru'd of Regents uf!hc University t)fthe State ofNcw Y-0tk and JOHN $,K.lNG, in his utlkini clpady as 1JH;Conmilssioncr of Education ofthe Stte-Of New York and ?n-st.derit of lhc VnivC"rsity ufthc Sttic:ufNew York, aqiuc that c(1mplainrsilS against them ,sliould heiHsmisscd s:ince they wt:TI: not involved in the cna.ctmenL lif thc challengi:d statutes and tannot grant tl1erdief requested by pla:intiff.

Thcmotlcms to dismiss urc grant«! m the cx:1cnt that the causes of uc::fion a;Qainsf MERRYL H. TISCH ®d JOHN It KINO. in 1heir otliciaJ .capacities as Cbanc,ellpr and Commtsskmer llfC'.

severed and <lismissed, 1be balnnoe of the motions are denied.

The law i well settled that when reviewing o mntkm Lo diisspursi.umt to CPLR.321 J{i){7) for fuilure to staii:a cause of action. a-court • must accept as true the facts as alleged in the compla.int and any submissions in opposhJon to the rno1iori, acttlrd plaintif's the benciit of eivery pqssible favoruble inference and :[withmi:t exp.res.sing any opinion as IO \l.!helhe<rtbe truth of the al:leati-O'm@n be establisbed at trial], determine only whether the facts as alleged fit within any cognizable legal theory" (Sokoloff v, Harriman Estp:tes.Dey. Corp..% NY2d 409. 414; :ee Sandm v; Wimbfp•..51 NY2d 391.194,). Accordingly, ..the *sole* criterion is whetherthe pleading states.a oousc of nctkm. and if from its four corners factual allegations [can be] discerned which taken together manifest any cause of action cognizable at law the motion ... will fail" (Guggenheimer v. Ginzburg, 43 NY2d 268, 275). However, where evidentiary material is considered on the motion, "the criterion [becomes] whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one, and. unless it has been shown that a m11terlut fact as claimed by the pleader th be one is nota fttt all and, unless it can be said that no significant dispute exists regarding it", the motion must be denied *(itl* }. Hen; it is the opinin of this Ctiurt that the complaints nre silh.dently pladed to avoid dismissal.

n lc core of plnintitYs' rg:umcnt 111 bar is that school cltHdren in New York Stint are mg denied the i:lpportun1ty for a "sound basic ed ucation" M a resulL of teacher tenure, discipline and seniorit)' laws *(see* Edcation Laws §§2573. 3012, !HJ3(3).:!<01-4. 3012, 3020, 2510, 2i8S•. 2588.

• Claims against municipal otlicials in their officbl capaciti.es are really clmms a.:gt!inst. the munkipallty and fife tlicrefor:e rcditn.dant whtn the municipality *is* a!so oonitd: *as* a.defendmu *(see* Frank v. Sta\-e ()fNY{)ff. fMental Retardnlit11) & Dev; DisabiUties, 86 ADJd 1 3 18 S)..

:JO1 3). While the papers submitted on the mothms 10tlismJss undoubtedly ei;;plam thM the pnroaey purpose of these statules is to pro vi de tmployment S\'.7Curity. protecneaehers from urhiirary dismissal, and anract and keep younger le4!c:hers, when afforded a libe:ml constrot:tion,. the tacti alleged in me re.speetive compiaints nre sufficiem to state .u cause of action for ll judgment declaring that the. challenged sections of the Education Law operate to deprive students of a "sound basic education" in violation of ArtideXf of the New York Stntc Constitution, ,il',! that the subjecttcnure lawsper;mh incffe.-tive teachers to remain if1 the classroom; that such ineffective teachers comhiue to te3cb in New York due to s.tatu1ory impedi ments 10 their discharge and that the problem i'Se;<:ed by the statutorily-established "LIFO" system dismissing teachers in response to mandated lay-offs and budgetary shortfalls. In opposition, none of the defendants or intervenor-defendants have demonstrated that any of the material facts alleged in the complaints are untrue.

h is undisputed !J1il t the Educat.ion Artide requires "ft]he legislature [toJ provide for *the:* maintenance and support of a system of free common schools, wherein all the children of this state may be educa1ed..,., (NY Const Art XI. §J}. Moreover. tfab Article bas been held to guarantee all smdcnts wilhin the state a • sound basic education\ which hueogruzed by all to be key to a promising future, pf:eparing children to reaJiz their poti!'ttlial bet:ome productive citizens; and contribute to society. h1 rhls regard, it is r ll c state's responsibility to provide minimally adequaw funding, resmm:es. and L l'ational supports tu mukc basic teaming pt:;ssible, i.i!,"' the bl).Sie lneracy; calcu!:ning.and verbal sk lUs ncces:sary to enable children to evcn:tuaUy fhnt.lion productlVclyes dv.ie participants capable of voting and serving on a jury" (Paynter v. State of New York, 100 NY2d at 440), which bas bct-n judicfally recogni zed 1o entitle children *w* "'mirt!mall)'adequat.e teaching of rea¥Jnubly up-lodate bask curricula ".. by suflkient rso.nnel adequatdy uained ,\o teach those

subject areas-..tCa:mpaign for Fiscal brnHy, lmt. v. Sm:te of New Yotk. *86* NYld at J17).. Further, .it has bi.":t'.n heJd that the sil!le may be eal kd lo aci\Ount when it fails in its obfigilion to meet minimum c.onstituti.onal standards of educational qualiiy *(scee* Ne:w York Ch' Liberties Union"·Smteqof Ngw .4NY3d at 178). wh1cnJs capublc c)fn;cuurcmcnt, as alleged. by, *t11rtalh?, stib.s-tat1dtttd* test results and falling gmduatfon rates *(id.)* thal plaintiffs have attributed 10 the impact orttrt:al.a legisf atfon,

More to the point, accepting as true plafotitls' a.Uegatfons of serious defideneies ln teacher quality: its negative impacl on the pertbtmance- of students; the role ptayecl by subject statute!!. in: enabling ineffective teachers to be granted tenure and in allowing them to continue teaching despite ineffective ratings and poor job performance; a legislatively prescribed rating system that is inadequate to identify the truly ineffective teachers; the direct effect that these deficiencies have on a student's right to re.ccive a •sound basic education"' plus ihcstatistical stud1t-!!! and ,su:rveyscite.d in suppon tbcrei.if are lnfficient to make .out .a prima fade case of C.t)n;!ititutionat dimeos-iot1 connecting the retention of ine:tlb::dvc- tehc:rs t) the low perfomumce te"-cts i:xhlbited by New Yurk studcmtsj; *t'.g.*• a lack of prtlficiency in math and <lngli:sh ,w i' C'IP)paign for Fiscal Eqirity lnc. v. State of fiew York, I OO NY2d at 9-1<n. Once it *i$* dtermined that plmntifl"N may be emitled to· relief under miy reasonnbl<: vii:'.w of the facts stated. the i:ourrs inquiry is ompltte aild me complaint must be dec:lnred legally sufficient (*see* Campaign for Fiscal Equity, Inc. v. State of New York, 86 NY2d at 318).

The Court also finds th matter before it to be justiciab 1e since a <lda.rawcy}udRffie-.ntaction is wd] suited to, *e.g.,* in!erpret and safoguard c:-c)nstit1.Jtfonal rights Md revtew the acts of t.ht other branches of government, not for the J>UfP\ISC)f mt1king policy decfaion:s, but to µreserve t.he corutilutional rights ofits citizenry {st:e Cttmoojgn for fiscal Equitv.lnc.v. Stint pf:Ngw Turk. 100

MYMO£NA QAVU)S, ct ;if, v.]JIE.STAIE QF N&W YORK. cl 1!1.

NY2d 1u 93l).

With regard to the issue of standing, in the opinion of this Court, the individually-named plaintiffs clearly have standing to assert their claims as students attending various public schools within the State of New York who have been or are being injured by the deprivation of their constitutional right rn receive :.i "sound basic educationwhich injury. it *is* claimed wUto:ontmue inlo the future so long as the subjec1 statules conhnul! to upenne in the manner sta:ted. Fet d!?tails: regarding the indhid uat plaintiffs' purported injuries c-;an ·Ct>rtainly be ascertained during discovery. Mi1reover sithese chiJdrcrratc the intended benefidaries of the Eductfam Artie\£, in the opinion of this Court, rhy ar clcl!rry within the zone of protected hnertst.

Only recently have the courts recognized the right of plaintiffs to seek redress and not have the t:ourt:house doors doSJ;.';ti at. \.he very inceplion ()f fill action vih the pleading .meet$ tht'!' minimal standard to avoid dismissal (*see* Campaign for Fiscal Equity, Inc. v. State of New York, 86 NY2d at 31). This Court is in complete :tgrecme-nrwith this sentiment ;a;nd •v,,-fU oot clk>se the courthouse doo.r to parents and children. with viable constitutional dn1ms *(see* Hua$i'A v SU1teufNe\\·York• t9NY3d 899). Manifestly. movcmL11' attcmp'ed challtmge to the merits of plaintiftS' lawsuit. including any constitutional challenges to the sections of the Education Law that are the subject of this lawsuit, is a matter for another day. following a further development of the record.

The balaneofthe argumems tendered *in* support of dismismd, h:1ctuding tbejolndc::t.ofc1her parties, have been coHsidered and rttiec1*1.

Accordingly. i1 is

ORDERED tlrnt the mtiiion cNo. JS9i • O12) of defendant·intcrvenot!i MERRYt U. 'Tl.SCH. i n ht'f official capacity *as* Chancelkit of the Board of Regen ls of the 1.Jmwrsny fiftbe State of New

1'.1YMQt A WSID$, e1 Al·"· D1E SIAIE OF NEW YORK. ct at

York. and JOff. N B. KING, io his ofl kial capa:dry a» the Com:tn:issioner of Edu.ation of the Suf

New·York and President of the University of the Srnre-of New York is granted and it is f\mher

ORDERED thut 1he causes of uctlon againc;t said individuals a.re hereby severed mid dismissed; nnd iL ifurther

ORDERED that the balance of the motfons :ire denied; ·tmd it is further

ORDERED thnt the clerk shall emt-f judgment acc.oiiingly.

ENTER,

J.S.C.

Dated fV/4.(.17 1 3 o I<

GRANTED

MAR t 7 2015

STEPHEN J. FIALA

EXHIBIT "4"

STATE OF NEW YORK
SUPREME COURT COUNTY OF RICHMOND

MYMOENA DAVIDS, et al.,

Plaintiffs,

-against-

lndex No. 101105-2014

Hon. Phillip G. Minardo

THE STATE OF NEW YORK, et al.,

Defendants,

-and-

MICHAEL MULGREW, et al.,

[ntervenors-Defendants.

JOHN K EONI WRIGHT, et al.,

Plaintiffs,

-against-

THE STATE OF NEW YORK, et al.,

Defendants,

-and-

SETH COHEN, et al.,

Jntervenors-Defendants.

REPLY MEMORANDUM OF LAW lN SUP PORT OF
INTERVENORS-DEFENDANTS' MOTION TO DISMISS THE ACTION

RICHARD E. CASAGR.4.N DE, ESQ.
Attorney for Intervenors-Defendants
SETH COHEN, DANIEL DELEHANTY,
ASHU SKURA DREHER, KATHLEEN FERGUSON,
ISRAEL MARTI NEZ, RICHARD OGNIBENE, J R.,
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Of Counsel

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STATE OF NEW YORK
SUPREME COURT COUNTY OF RICHMOND

MYMOENA DAVIDS, et al.,

Plaintiffs,

- against -

THE STATE OF NEW YORK, et al.,

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MICHAEL MULGREW. et al.,

Intervenor-Defendants.

JOHN KEONI WRIGHT, et al.,

Plaintiffs,

- against -

THE STATE OF NEW YORK, et al.,

Defendants,

- and-

SETH COHEN,

Intervenor-Defendants.

PRELIMINARY STATEMENT

It is clear from plaintiffs' [1] response that they have stated no legal claim. No plaintiff has alleged facts to demonstrate that his or her child has been denied a sound basic education. No

[1] References to the amended complaints appear as *David,* ____ and *Wright,* ____. References to the plaintiffs' memoranda of law appear as *Davids,* p.__ and *Wright,* p. _ __.

allegation is made that any school district is, *district-wide,* failing to provide a sound basic education. As plaintiffs say the challenged statutes are now challenged only "as applied," no claim against the State can be asserted because these statues are *applied* by local officials. There is no clear articulation of what replacement statutes the plaintiffs would find constitutional. All of these deficiencies are *pleading requirements* for Education Article claims, under Court of Appeals precedent.

Plaintiffs assert nothing more than a non-justiciable policy dispute, based on the discredited, popular myth that the challenged due process and seniority protections guarantee lifetime employment. Plaintiffs' policy claim is supported by academic studies which can easily be contested by competing studies in an appropriate non-judicial forum; and by an old, unscientific survey that bears no relevance to the challenged tenure laws as they were amended in 2008, 2010 and 2012.

Nor can the complaints be salvaged by a claim that discovery or a trial is needed. It is no accident that neither complaint alleges facts about the length of tenure cases under the tenure la\VS as amended since 2008. More current, rdevant facts were readily available to plaintiffs, when they filed their complaints, through FOIL or by simple request of the State Education Department. It is far more likely that current facts are not alleged because they do not support plaintiffs' preferred narrative about these laws. Of course, even if the Court deems the facts as alleged by plaintiffs to be true, the complaints must still fail because, again, the pleaded facts are irrelevant to the laws as they have been amended.

Plaintiffs want this Court to strip av.ray the due process, seniority and collective bargaining protections public school teachers and principals have long been promised. From an education policy standpoint this would, to say the least, be wrong-headed, because harming teachers and the

teaching profession cannot possibly help school children or improve public education. Plaintiffs' policy claims have been and can be debated in an appropriate forum. Plaintiffs' legal claims should be dismissed.

A. *Plaintiffs' Memoranda Contain Inaccurate Statements of Fact That Are Outside the Pleadings.*

Many of the "facts" contained in plaintiffs' memoranda are not alleged in their respective complaints or are refuted by their complaints' own exhibits. These "facts" cannot be used to salvage a deficiently pleaded complaint.

For example, these are *not* class actions. Plaintiffs do *not* represent all parents of schoolchildren, despite their attempt to speak for all "schoolchildren" in their briefs *(see Davids,* pp. 4-5; *Wright,* pp. 1-3). Rather, both the *Davids* and *Wright* plaintiffs state that this is an "as-applied" challenge to the Laws in dispute. *(Davids,* p. 7; *Wright,* pp. 6, 15, 18, fn. 5). Accordingly, the assertions that the challenged statutes "threaten[]the social order and the very fabric of our civil society" *(Davids,* p. 5) and create a "constitutional crisis of statewide magnitude and national importance" *(Wright,* p. 1) should be wholly disregarded by the Court.

The *Davids* plaintiffs concede that the vast majority of New York's teachers (95%) are effective. *(Davids,* ¶4, 30) The *Wright* plaintiffs, on the other hand, claim that the New York education system is in 'crisis," based on a single allegation that student performance on State standardized tests in 2013 is inconsistent with the State's annual professional performance review ("APPR") results for teachers, which rated well over 90% of the State's teachers as effective or highly effective. *(Wright,* 41). The alleged disconnect between student performance and teacher ratings, they argue, shows that the APPR statute is unconstitutional. *(Wright,* 78)

In this regard, the Court of Appeals has warned:

> Performance levels on [standardized tests] are helpful [to measure minimum educational skills] but should also be used cautiously as there are a myriad of facts who have a causal bearing on test results . . .." *[CFE I,* 86 N.Y.2d at 317).

This admonition is particularly apt here because, according to the *Wright* plaintiffs' own exhibits, "trying to resolve the apparent paradox of good teacher ratings despite disappointing test scores for their students is a lot like the folly of *trying to compare apples to oranges"* (Wright, 41, Ex. 8 at 1, *citing* John B. King, Jr., Commissioner of the State Education Department [emphasis added]). This report goes on to state that "[e]stimating the student growth component was especially tricky this year because this year's tests measured students against the new Common Core standards, while state tests in previous years were designed to measure perfonnance based on standards set in 2005" *(Wright,* if 41, Ex. 8 at 2).[2] Accordingly, a "flurry of charts, Excel worksheets, tables and guidance" \Vere necessary to interpret the data *(Wright,* 41, Ex. 8 at 2). In fact, "[w]ithout comparisons, raw test results are virtually worthless for judging teacher performance" *(Wright,* if 41, Ex. 8 at 2). Notably, no such comparisons were provided by the *Wright* plaintiffs.

Incredibly, this shred of inconclusive data, applicable to a very small percentage of teachers and undermined by the document itself, is used as the foundation for the *Wright* plaintiffs' claim that "New York's students *statewide* are not receiving an "adequate education";[3] that there are ';huge" numbers of ineffective teachers; and that "tens of thousand" of public school students have

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[2] [ndeed, because the 2013 tests were aligned to brand new curriculum, the Legislature was so concerned about the potentially misleading 2013 standardized test results that it enacted a moratorium, prohibiting the use of such results as the sole basis for high stakes decisions for students, teachers and principals. (2014 NY Senate-Assembly Bill S6356, A8556 [student moratorium]; 2014 NY Senate-Assembly Bill S7921, A I0168 [teacher moratorium]) The student moratorium bill was signed. The teacher bill is awaiting the Governor's signature.

[3] As the Court is aware, "adequate" education is not the Constitutional standard under Article Xl § l.

ineffective teachers. *(Wright,* pp. 12, 14, 15) These conclusions are not factual allegations. The complaints, in fact, do not identify even a *single* ineffective teacher - - even though the performance ratings of the plaintiffs' children's teachers were, by law, at all times available to plaintiffs, upon request. Education Law § 3012-c(lO)(b).

The *Wright* plaintiffs say that the teacher defendants do not "seriously contest" that New York's public school students on the whole are not receiving an adequate public education *(Wright,* p. 12). This assertion is not factually supported in the complaints. Worse, it is a regrettable aspersion on hundreds of thousands of parents, local school board members, teachers and principals who do provide New York's schoolchildren with a sound basic education, as well as on the academic achievements of New York's school children. Although the complaints do not plead credible evidence that there is a statewide failure of New York's public education system, there is substantial publicly available information showing that New York's parents, teachers and children can be proud of their continuing achievements.[4]

Next, without even trying to define what "ineffective" means, the *Wright* plaintiffs contend

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Hundreds of districts perfonn exceedingly well under the challenged statutes. *(see e.g.,* NYS Report Card 2012-20 l 3 [latest version available] *available at* http://data.nysed.gov/lists.php?type=district yet plaintiffs claim that it is these statutes that deprive schoolchildren from across the state the opportun ity for a sound basic education. For instance, publicly avai lable data demonstrate that the overall cuJTent statewide graduation rate has increased by more than 10 percentage points since 2006. (See NYSED Press Release dated June 23, 2014, *available at* http://www.nvsed.gov1press/2009cohortgraduationrate.html[last visited December 1 1, 2014]); NYSED Press Release dated February 13, 2006, available atd http:///www.nysed.gov/press/2009CohortGraduationRate.htm l [last visited Decem ber 1 1, 2014]). The teacher defendants do not dispute that some local school districts may be in crisis, due to high need student populations, inadequate and inequitable funding, cuts in staff and academic programs and services, and the state's fai lure to meet its funding commitments. The effects of poverty on student need and academ ic performance are wel l known. See *Po·erty, "Meaning/id " Educational Opportunity, and the Necessary Role of the Courts,* Michael A. Rebell, 85 N.C. L. Rev. 1467, 1471-1476 (2007), indicating that students from poor households have increased educational needs. Parents in such school districts, armed with well-pleaded, fact-based complaints concerning resou rce failures caused by inadequate funding, have stated Education Article claims. *See e.g., Hussein v. Slate of New York,* 81 A.D.3d 1 32 (3d Dep't 20 l l), *ajf'd,* 19 N.Y.J d 899 (2012). This has no bearing on the case at bar, where plaintiffs seek to prosecute a statewide challenge without pleading facts to support a claim that the tenure laws have any negative impact on education in any of New York's school districts.

that "ineffective teachers are being promoted and kept in schools at alarming rates" *(Wright,* p. 1). This is purportedly because "the hands of administrators and school districts are tied" *(Wright,* p. 1). Yet, the plaintiffs did not plead a single factual allegation that any administrator from any school their children attend considered bringing disciplinary charges, but opted not to do so because of the challenged statutes. In fact, the only two school principals who are parties to this case are *defendants,* who joined the case to *defend* the challenged laws.

At best, plaintiffs rely on an unscientific and stale survey conducted well *prior to the amendments of the challenged lmvs (Wright,* Ex. 14). They also rely on an exaggerated cartoon for the proposition that the disciplinary process is irreparably broken. *(Wright,* Ex. 13). But again, the *Wright* plaintiffs cherry-pick from their own exhibit and fail to point out that, according to that exhibit, the single most important reason administrators chose to not pursue teacher disciplinary charges was that the teacher resigned *(Wright,* Ex. 14, p. 1).

None of this creates a factual dispute that necessitates denial of the motion to dismiss. Plaintiffs mount a statewide challenge to the application of New York's tenure and seniority laws, but have pleaded not a shred of credible evidence that, *statewide* or in *any* specific school district, these laws cause a failure to provide a sound basic education.

B. *Plaintifl"s Alisstate Holl' the Challenged Statutes Operate.*

Plaintiffs have misapprehended or misstated how many of the challenged statutes actually operate.

First, as to the probationary laws. the plaintiffs argue that a decision whether to grant tenure must be made *after* the teacher has received only two annual performance ratings. *(Wright,* il47)

The inference is that, under the challenged statutes, as in California's *Vergara*[5] case, school districts only have two years to make a decision whether to grant tenure. In fact, the law clearly requires a probationary decision to be made at the end of a teacher's third year of service (Education Law § 3012(2)), and there is nothing in the law that prohibits a school district from considering the probationary teacher's performance during her third year of teaching in making that decision. Additionally, if a school district wishes to wait until it has received the probationary teacher's third year APPR score before making a determination, it has the option of asking the teacher to extend her probation. *Juul* v. *Bd. of Educ., Hempstead School Dist. No. I , Hempstead,* 76 A.D.2d 837 (2d Dep't 1980), *aj(d,* 55 N. Y.2d 6-1-8 (1981). If the teacher refuses, the board has virtually unfenered discretion to deny tenure.

The plaintiffs say that principals must build their case against an ineffective teacher over two years, during which time the teacher must be left in the classroom. *(Wright,* 54, *Wright,* p. 7; *Davidr;,* p. 1 l , n.6) This is not so. Consecuti ve ineffective ratings are a requirement for charges of pedagogical incompetency under the expedited hearing process set forth in Education Law §§ 3012-c(6) and 3020-a(3)(c)(i-a)(A). School boards, however, are not prohibited from bringing Section 3020-a charges under the normal 155-day procedure for pedagogical incompetency or for any other cause, whenever there is evidence that a teacher is not teaching effectively, suffers from mental or physical d isability, or is guilty of misconduct. Moreover, contrary to plaintiffs' assertion, a tenured teacher does *not* have a right to any particular assignment, including a classroom teaching assignment. A teacher can be reassigned by the Board of Education within her tenure area - - but

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; *Vergara* is, teacher defendants submit, in no way binding or even instructive concerning legal claims raised u nder the New York Constitution.

outside of a classroom - - while 3020-a charges are pending. *Adlerstein v. Bd of Educ., City of New York,* 64 N.Y.2d 90 (1984). In addition, a teacher can be assigned to appropriate non-teaching duties outside the classroom even absent 3020-a charges. *See, Van Heusen v. Bd of Educ., City School Dist., City of Schenectady,* 26 A.D.2d 721 (3d Dep't 1966); *see also, Mishkoff v. Nyquist,* 57 A.D.2d 649 (3d Dep't 1977), *Iv. denied* 43 N.Y.2d 641 (l977).

The *Wright* plaintiffs say that *Brady v. A Certain Teacher,* 166 Misc.2d 566 (Sup. Ct., Suffolk Co. 1995), is irrelevant, asserting that the *Brady* matter dealt with "the merits of a different Article XI claim . . .." *(Wright,* p. 30, fn. 8) This is incorrect. As here, the *Brady* plaintiff sought a declaration that "sections 3012 and 3020-a of the Educatio n Law violate the Education Article in that the burden of proof for terminating the employment of tenured teachers limits the right of students to obtain public education and instruction . . .." *Brady,* 166 Misc.2d at 568. This is the identical claim raised here. *(Wright,* iii! 49-65; *Davids,* ii! 37-43)

Plaintiffs reiterate the legal conclusion, which in their complaint masquerades as a factual assertion, that the challenged statutes make it "impossible" to remove ineffective teachers. *(Wright,* p. 22) Of course, even a cursory review of the challenged statutes and published case law shows that this assertion is simply u ntrue.[6]

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[6] Because Education Law §3020-a(5) gives parties on ly lO days to seek strict ly limited judicial review of a 3020-a hearing officer decision, only a small fraction of teacher dism issal cases ever reach the courts. Still, the published cases reveal that the "impossibility" of firing a tenured teacher is a myth. *See, e.g.. Asch v. New York City Bd.!Dep '/ of Educ.,* 104 A.D.3d 415 (l" Dep't 2013); *Denhoff v. Mamaroneck Union Free Sch. Dist.,* L O I A.D.Jd 997 (2d Dep't 2012); *Gongora v. New York City Dep 't o/ Educ.,* 98 A.D.3d 888 (l" Dep't 2012); *Myers v. City of New* York, 99 A.D.3d 41 5 (2d Dep't 2012); *Douglas v. New York City Bd./Dep 't of Educ.,* 87 A.D.3d 856 (L" Dep't 201 l); *In re Watt (East Greenwich Cent. Sch. Dist.),* 85 A.D.3d 1 357 (3d Dep't 20 l l); *Awaraka v. Bd. of Educ. o/ City o/ New York,* 59 A.D.3d 442 (2d Dep't 2009); *Saunders v. Rockland BOC ES,* 62 A.D.Jd L O 12 (2d Dep't'.2009); *lackow v. Dep 't of Educ. of City o/ New* York, 51 A.D.3d 563 (l" Dep't 2008); *In re Mazur (Genesee Valley BOCESJ ,* 34 A.D.3d 1240 (4'0 Dep't 2006); *Watkins v. Bd. of Educ. of Port Jefferson Union Free Sch. Dist,* 26 A.D.3d 336 (2d Dep't 2006); *Hegarty '" Bd. of Educ. o/ City of Nen• York,* 5 A.D.3d 771 (2d Dep't 2004); *Roemer v. Bd. of Ed11c. o/ City Sch. Dist. of City of New York,* 268 A.D.2d 560 (2d Dep't 2000); *Fischer v. Smithtown Cent. Sch. Dt·t.,* 262 A.D.2d *560* (2d Dep't 1999); *Abreu '" New York City Dep 't of Educ.,* 990 N.Y.S.2d 436 (Sup. Ct. 2014); *Baptiste v. New York City Dep 't of Educ.,*

The plaintiffs also claim that New York's layoff system, which bases layoffs on seniority within a teacher's tenure area, mandates that children be taught by ineffective teachers. *(Wright,* 75-76; *Davids,* 51) This is not true. Seniority does *not* protect a teacher who is not competent or who is guilty of misconduct. Such a teacher can be subjected to charges under Education Law § 3020-a no matter how long they have been teaching .. Also, as to seniority, plaintiffs incorrectly say that less senior employees are "fired." *(Wright,* p. 14) Actually, in a layoff situation, excessed employees are placed on a preferred eligible list and are eligible for recall for seven years. *(See* Education Law § 3013(3))

The plaintiffs say the "State grants tenure" *(Wright,* p. 15) and that the "State" enforces the challenged statutes. *(Wright,* p.14) This is untrue. Local school boards grant or deny tenure *(see, e.g., Cohoes City Sch. Dist. v. Cohoes Teachers Assn.,* 40 N.Y.2d 774, 777 (1976) and local school boards, not the State, bring and prosecute teacher disciplinary cases. (Education Law § 3020-a)

Next, although the plaintiffs do not say what level of due process they would find acceptable for teachers, they suggest that Civil Service Law §§ 75176 might be a better alternative because it allows a hearing before an officer with authority to remove the employee, such as a supervisor. *(Wright,* pp. 6, 25) This is an inaccurate and incomplete statement of New York law for three reasons.

First, under Civil Service Law § 75, an employer, including a school board, can appoint a hearing officer to hear the case, but the hearing officer only makes a recommendation as to whether

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983 N.Y.S.2d 201 (Sup. Ct. 20!3); *Sang v. New York City Dep 'to/ Educ.,* 30 Misc.Jd 1208(A)(Sup. Ct. 2010); *Cohen v. Middletown Enlarged Sch Dist.,* 1 1 Misc.3d I 054 I 054(A) (Sup. Ct. 2006)(all upholding 3020-a dismissals of tenu red teachers).

the charges have been sustained and what the appropriate penalty should be. (Civil Service Law § 75(2)) The employer then makes a decision, which is subject to judicial review under Article 78 of the CPLR. (Civil Service Law § 76) Second, the plaintiffs ignore the fact that charges under Education Law § 3020-a may include allegations of mental or physical disability. (Education Law § 3012(2)) Under the Civil Service Law, charges of this type are subject to a full panoply of due process protections under Civil Service Law §§ 71-73. Third, and most notably, the plaintiffs completely ignore the fact that under the Civil Service Law public employees covered by Sections 75-76 are entitled, through their collective bargaining representatives, to negotiate alternate and more robust due process protections, as teacher defendants detail in their main brief at pp. 42-45. Here, the plaintiffs want to deprive teachers of the right to collectively bargain alternative disciplinary procedures. *(Wright,* 1[46; *Davids,* pp. 18-19)

C. *The Evidence Plaintiffs Say They Need Was Publicly Available When These Actions Were Filed.*

Plaintiffs say that information about ineffective teachers and how many teachers are charged or fired under Education Law § 3020-a is not available to them. *(Wright,* 1[61) Again, a teacher's annual effectiveness rating *is* specifically available, upon request, to parents. Education Law § 3012-c(10)(b). Despite the ready availability of this information, none of the plaintiffs allege that any of their children are being taught by ineffective teachers. As to tenure cases, 3020-a decisions and settlements are subject to FOIL. See Point I(C), below. Additionally, as noted by SAANYS, the State Education Department, in April 2014, did publicly provide data about the frequency and result of 3020-a cases under the statute as it was amended effective April 1, 2012. (SAANYS main brief at 30-31). Thus, the assertion that such data are unavailable to plaintiffs without discovery is simply

not true.

ARGUMENT

POINT I

THE PLAINTIFFS HAVE FAILED TO SUFFICIENTLY PLEAD A CAUSE OF ACTION UNDER THE EDUCATION ARTICLE.

Plaintiffs characterize their constitutional claims as an "as applied" challenge. *(Wright,* pp. 6, 15, l 8, fn.5; *Davids,* p. 7). Whether plaintiffs' claims are characterized as a "facial" or "as appl ied" challenge, plaintiffs have failed to state a claim.

A. *A Facial Challenge to These Statutes Fails Because The Statures Rationallv Promote Public Education.*

Ina facial challenge, a party alleges a statute is unconstitutional against *all* individuals and "bear[s] the burden to demonstrate that 'in any degree and in every conceivable application,' the law suffers a wholesale constitutional impairment." *Cohen v. State ,* 94 N.Y.2d l, 8 (1999) (quoting *ivfcGowan v. Burstein,* 71 N. Y.2d 729, 733 (1988)). A court reviewi ng a facial challenge does not examine the particular relationship of the statute to the challenging party, because that party is allegi ng that statute is unconstitutional in *all* its potential applications. *People v. Stuart ,* l 00 N. Y.2d 412, 421 (2003). *See also. Village </ Roffman Estates v. Flipside, Hoffman Estates. lnc.,* 455 U.S. 489, 494-95 (1982). Furt her, with respect to a facial challenge, the Court of Appeals has made clear that if there is *any* realistic set of circumstances under which the statute is valid, then a facial challenge must fail. *Matter of Moran Towing Corp. v. Urback,* 99 N.Y.2d 443, 451 (2003). *See also, Stuart,* 100 N. Y.2d at 42 I. A party defending a statute's constitutionality must, therefore, demonstrate only one constitutional and realistic appl ication of the statute in order to defeat the

challenge. In recognition of this reality, facial challenges have been identified as involving a "heavy burden" in order to succeed. *Wood v. Irving,* 85 N.Y.2d 238, 244-45 (1995). Despite plaintiffs' characterization, it is hard to see their claims as other than a facial attack on the challenged statutes.

As to teacher probation, the challenged laws mandate a three year probationary term. Plaintiffs flatly allege that a teacher's effectiveness cannot be determined in three years. *(Wright,* 79). If, as plaintiffs say, three years is *per se* too short a time to evaluate a teacher's effectiveness, then, according to plaintiffs, the statute itself must fall.

As to Education Law § 3020-a, outside the City of New York, every tenured teacher or principal charged with incompetence or misconduct is entitled to elect the statutory procedure, even if an alternative procedure has been collectively bargained. (Education Law § 3020(**l**); *Matter cf Kilduff v. Rochester City Sch. Dist.,* ___ N.Y.3d __, 2014 Slip Op. 05056, 2014 WL 6473636). The plaintiffs allege that the statute, on its face, provides an unconstitutional level of due process. *(Davids,* 36-43, 57-58; *Wright,* 49-6**l,** 81-82). Clearly then, it is not the statute's application that the plaintiffs find objectionable, but the very quantum of due process provided on the statute's face.

As to seniority-based layoffs, the challenged statutes *direct* the order of layoffs by seniority. Plaintiffs tlatly allege that this violates the Education Article. *(Davids,* 61; *Wright,* 79) This too is a facial challenge, because school boards are *required* to adhere to the statute.

Any facial challenge to these statutes must fail. To succeed **in** a facial challenge, the plaintiffs would have to O\'ercome a presumption of constitutionality and allege that these statutes do not rationally relate to a legitimate state interest. As explained at pages 14-26 of teacher defendants' main brief, this plaintiffs cannot do. The challenged statutes, as demonstrated by decades of

legislative andjudicial history, rationally advance the State's duty to provide a sound basic education by helping to attract and retain good teachers; by promoting an independent teaching corps and academic freedom; and, when layoffs are necessary, by protecting the most experienced, qualified educators.[7] Indeed, as recently as November 20, the Court of Appeals reaffirmed the importance of the tenure laws for public education *(see, Matter of Kilduff v. Rochester City Sch. Dist., supra).*

This is why the plaintiffs now characterize their claim as an "as applied" challenge, and this is why the plaintiffs want the Court, in deciding this motion, to ignore the Legislature's considered policy judgments. This is also why the whole foundation of plaintiffs' case collapses. Unlike every other reported Education Article case where plaintiffs challenged the State's failure to address resource issues, these plaintiffs attack the very *rationality* of the State's legislative efforts to*promote* good teaching. Thus, in *CFE II,* the Court's concern with allegedly inadequate teaching in New York City focused on teacher qualification (certification), experience, low salaries and high teacher turnover. 100 N. Y.2d at 909. Here, the plaintiffs attack the rationality of laws enacted to address these very issues: how to attract and keep qualified, experienced teachers. Again, for plaintiffs to survive a motion to dismiss a facial challenge to these laws, plaintiffs must plead that these statutes do not rationally advance these interests. *(See,* Teacher Defondants main brief at 32) The plaintiffs do not even try to meet this burden. To the extent the Court finds plaintiffs' challenge to be a facial one, it must be dismissed.

B. *Plaintiffs Have Not Pleaded an "As Applied" Challenge.*

"[A]n as-applied challenge calls on the court to consider whether a statute can be

[7] The Court of Appeals in *CFE ll,* I00 N.Y.2d 893, 910, 957 (2003), noted the importance of experienced educators, especially in low-wealth districts.

constitutionally applied to the [party] under the facts of the case." *Stuart,* 100 N.Y.2d at 421. Such a challenge alleges the statute is unconstitutional as it specifically relates to the party bringing the challenge. "In determining whether a statute is unconstitutional as applied, the court must consider only whether the statute can be constitutionally applied to the [challenging party] under the particular facts of the case." *People v. Voltaire,* 852 N.Y.S.2d 649, 651 (Crim. Ct., New York Co. 2007). A party must assert a "bona fide justiciable controversy." *T. V. v. New York State Dept. Of Health,* 88 A.D.3d 290, 306 (2d Dep't 2011). It is "not sufficient for [a party] to demonstrate that the statute 'might operate unconstitutionally under some conceivable set of circumstances.'" *Texas Eastern Transmission Corp. v. Tax Appeals Tribunal,* 260 A.D.2d 127, 129-130 (3d Dep't 1999) (quoting *Matter of Allied-Signal Inc. v. Tax Appeals Tribunal,* 229 A.D.2d 759 (3d Dep't 1996)). Instead, the party must establish that the "law has in fact been (or is sufficiently likely to be) unconstitutionally applied to him." *McMullen v. Coakley,* 134 S.Ct. 2518, 2534, n.4 (2014).

Because an as-applied challenge involves a *specific application* of the law to a *specific party,* a party bringing such a challenge need only meet the lesser burden of demonstrating the unconstitutionality of the statute against the party itself and the surrounding facts and circumstances. *Stuart,* 100 N.Y.2d at 421. It is unsurprising, therefore, that plaintiffs have attempted to cast their challenge as an "as-applied." *(Wright* at 18, fn. 5) But, they misinterpret the cases they cite in support of that position.

In *Boddie v. Connecticut,* the Supreme Court held that "a statute or rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question." 401 U.S. 371, 379 (1971). The plaintiffs contend this decision supports their assertion

that they are bringing an as-applied challenge. *(Wright,* at p. 18, fn. 5)

A careful reading of *Boddie* and plaintiffs' complaints, however, makes clear that the complaints lodge a *facial* challenge to the challenged statutes. Plaintiffs do not concede the "general validity" of the challenged statutes, but have instead characterized them as violating the constitutional rights of *all* New York students. *(Wright,* if 76; *Davids,* if52) Plaintiffs' prayer for relief addresses not only the application of the statutes to the plaintiffs or a specific class of students, but instead asks the Court to strike down the laws as they apply to *all* students. *(Wright.* ml 77, 81; *Davids,* if,58, 62)

Similarly, plaintiffs do not, as required in an as-applied challenge, plead facts to demonstrate how the challenged statutes specifically affect them. Instead, they make general allegations about the allegedly unconstitutional effects on unspecified, hypothetical students. For example, the *Davids* complaint at paragraph 58 alleges:

> The Dismissal Statutes violate the Education Article because they have a substantially negative impact on those New York public school students taught by ineffective teachers who, absent the Dismissal Statutes, would be dismissed for poor performance. The Dismissal Statutes deprive those students of a sound basic education. *[See also Davids,* ifif 30, 31, 35, 51, 52, 56, 62]

Nowhere in the *Davids* complaint, however, are there any factual allegations that any plaintiff's child has an ineffective teacher or has otherwise been adversely affected by the operation of this statute.

The *Wright* complaint has the same defect. For instance, at paragraphs 80-81, the *Wright* complaint alleges that ineffective teachers are kept in the classroom, because disciplinary proceedings are "time consuming, costly and unlikely to result in the removal of an ineffective teacher." Nowhere in the complaint, however, is it alleged that any plaintiff's child is taught by an

ineffective teacher; that any plaintiff sought the removal of that teacher; or that an administrator failed to act because of the challenged statutes.

Further, it follows that a successful as-applied challenge, which is brought only against certain applications of a statute, would only result in the invalidation of those applications, and not the entire statute itself. Indeed, this remedy-based distinction between the two types of challenge has been identified in legal scholarship. *See,* Alex Kreit, *Making Sense of Facial and As-Applied Challenges,* 18 Wm. & Mary Bill Rts. J. 657, 661 (2010). The U.S. Supreme Court has recognized that the appropriate remedy for an as-applied challenge is to only invalidate those parts or those applications of a statute that are unconstitutional, and not a complete invalidation. *See, e.g.. Ayotte v. Planned Parenthood of N New England,* 546 U.S. 320, 323-24 (2006).

These plaintiffs, however, are seeking to have the lower burden of bringi ng an as-applied challenge, while at the same time asking the Court to strike down these statutes for *all* students, statewide, a remedy typical of a facial challenge. There is no law supporting such a request.

C. *Even ![the Court Reviews the Complaints Under "As-Applied" Standard<;, They Must Be Dismissed.*

Even under the "as-applied" standard of review, the complaints arc deficient for at least five reasons.

First, to state an Education Article claim, a plaintiff *must* allege the deprivation of a sound basic education, caused by a failure attributable to the State. *NYCLU v. State,* 4 N.Y.3d 175, 178-179 (2005). In an as-applied challenge, as noted above, the plaintiff must allege that the statute is unconstitutional as specifically applied to him. No plaintiff in this case has alleged that his or her child is not receiving a sound basic education, or pleaded facts to support such a claim. Indeed, no

plaintiff has even alleged that his/her child is currently assigned to an ineffective teacher.

Second, if the statutes enacted by the State are facially constitutional (they are), then plaintiffs have failed to demonstrate how any action *by the State* has caused a resource failure. The plaintiffs attempt to bridge this gap by claiming that it is the "State" that applies or enforces these statutes *(Wright,* p. 14, 40), and that the "State" "grants tenure." *(Wright,* p. 15)

Of course, this is not true, as a matter of law. Under the Education Article, local control of public education is \'t:stcd in school boards. *Bd. of Educ. , Levittown Union Free Sch Dist. v. Nyquist,* 57 N.Y.2d 27, 45-46 (1982); *Paynter v. State of New York,* 100 N.Y.2d 434, 442 (2003); Accordingly. loca l school boards retain the right to hire teachers who meet State standards; have the right and responsibility to evaluate probationary teachers (Education Law § 3012-c); have the right to grant or deny ten ure (Education Law §§ 2509, 2573, 301 2); have the right to initiate termination proceedings (Education Law § 3020-a); and have the right to adopt budgets and to determine whether layoffs should be imposed. Itis local school boards and administrators, not the *State,* that apply and enforce the challenged statutes.

Clearly, ifthe challenged statutes are facially valid (they are), their allegedly unconstitutional misapplication or non-enforcement by local school boards does not give rise to an Education Article claim. Again, such a cause of action *must* be based on a violation caused by the *State. (NYCLU,* 4 N. Y.3d at 180-182) Analogously, as the Court of Appeals explained in *Benson Realty Corp. v. Beame,* 50 N.Y.2d 994, 995-996 (1980):

> The role of the judiciary is to enforce statutes and to rule on challenges to their constitutionality either on their face *or as applied in accordance with their provisions.* Any problems that result from pervasive non-enforcement are political questions for the solution of which recourse would have to be had to the legislative or executive

> branches; the judiciary has neither the authority nor the capabilities for their resolution. [Emphasis supplied]

Third, a valid Education Article claim "requires that a district-wide failure [to provide a sound basic education] be pleaded." *NYCLU,* 4 N.Y.3d at 182. Neither complaint pleads a "district-wide failure," by any of the State's nearly 700 school districts, to provide a sound basic education. Indeed, as plaintiffs hail from only three school districts, and do not seek class certification, they are in no position to allege and have *not* factually alleged a claim that students in other school districts are not being provided a sound basic education. As the Court of Appeals has explained:

> Courts deal with actual cases and controversies, not abstract global issues. and fashion their directives based on the proof before them. Here the case presented to us, and consequently the remedy, is limited to the adequacy of education financing for the New York City public schools, though the State may of course address statewide issues if it chooses. *[CFE II,* 100 N.Y.2d 893, 928 (2003).]

Even as to their own districts (New York City, Rochester and Albany), plaintiffs nowhere allege a *district-wide* failure to provide students with a sound basic education. Read most liberally, the complaints allege that "some" New York public school students had, have, or may some day have an ineffective teacher. *(Davids,* pp. 8, 18; *Wright,* p. 35)

A claim that one or more students has an ineffective teacher - - here alleged without any specific or credible factual basis -- is clearly insufficient to meet the requirement that a district-wide failure be pleaded. Even a pleaded failure of entire schools within a district to provide a sound basic education is insufficient to state a valid Education Article claim. *NYCLU,* 4 N.Y.3d at 180-182. Clearly, if the State has no obligation to intervene based on allegations **that** a local school is not providing a sound basic education, it certainly has no obligation to intervene based on the allegation that some individual teachers may not be providing an "adequate" education.

Fourth, as the Court of Appeals stressed *in NYCLU,* an Education Article claim "... requires a clear articulation of the asserted failings of the State, sufficient for the State to know what it will be expected to do should the plaintiffs prevail." 4 N.Y.3d at 180. Here, the plaintiffs challenge no less than 13 separate statutes *(Davids,* 'if5, fn. 1; *Wright,* 'if6), which together comprise a major part of the Legislature's effort to regulate and promote the employment and retention of qualified public school teachers and principals. But, the plaintiffs never clearly articulate what, if these statutes are struck down, should replace them.

The *Wright* plaintiffs do not like the Education Law's three year probationary term. They apparently want the Court to direct the Legislature to impose a longer probationary term *(Wright,* 'if 79), but never specify what an appropriate length would be. As noted in the teacher defendants' main brief, the Legislature has thoroughly considered this issue (pp. 14-19).

Plaintiffs next say that teachers should not get "super" or "extraordinary" due process, but concede that it is legitimate for the Legislature to provide due process protection for tenured teachers. *(Wright,* pp. 6-8; *Davids,* pp. 10-11; *Davids,* 'if 37) Plaintiffs, however, fail to articulatejust what due process they would find acceptable. The plaintiffs variously say that the statute'sjust cause standard is too high *(Wright,* p. 6; *Wright,* 'if 50); that hearings take too long *(Wright,* pp. 7-8; *Wright,* 'if 54); that investigating charges is time-consuming *(id);* that the three year statute of limitations is too short *(Wright,* p. 7; *Wright,* 'if 54); and suggest that impartial hearing officers are a problem. *(Wright,* p. 8; *Wright,* 'if 62) But, as to each of these alleged shortcomings, the plaintiffs fail to clearly articulate what alternative process would pass muster. Instead, the plaintiffs simply ask the Court to remove defendants' protected property interest in their public employment and to strike down *all* due process protections for all teachers, even though not a single plaintiff has alleged that his or her

child was denied a sound basic education due to an ineffective teacher who was retained in the classroom because of the challenged statutes.

As to seniority, again, no plaintiff has made any factual allegation that his or her child had an ineffective teacher because New York lays off civil servants, including teachers, based on seniority. And, as with probation and due process, plaintiffs nowhere clearly articulate what should replace seniority-based layoffs. True, plaintiffs say that in layoff situations, the most "effective" teachers should be retained.[8] In terms of pleading, however, the plaintiffs' failure to articulate what layoff system would be acceptable, requires dismissal.

Determining a teacher's effectiveness is something the Legislature has addressed. most recently in 2010 by enacting Education Law § 3012-c. Of course, the plaintiffs also ask the Court to strike down Education Law § 3012-c, saying that the *Legislature* has failed to properly identify what constitutes effective teaching. *(Wright,* p. 5) But, plaintiffs themselves fail to articulate what teacher effectiveness is, or how it should be measured, and plaintiffs themselves fail to say what layoff criteria should replace the objective criterion of seniority. Once again, plaintiffs themselves have failed to meet the Education Article pleading requirement that they clearly articulate what the State must do if plaintiffs succeed. *NYCLU,* 4 N.Y.3d at 184.

Fifth, and finally, here, as in *NYCLU,* 4 N.Y.3d at 182-184, the State has created processes for the removal of ineffective teachers. Under Education Law § 3020-a, any person may file a complaint against a tenured teacher. There is not a single allegation in either complaint that any of

[8] Notably, plaintiffs suggest that even *effective,* more experienced teachers should give way to "more effective" junior teachers *(Wright,* 68). Plaintiffs are apparently unconcerned with the effect that such meddling might have, especially on a \ow-wealth school district's ability to attract and retain experienced teachers. This was a major concern discussed by the Court of Appeals in *CFE II,* 100 N.Y.2d at 909.

the plaintiffs ever sought the removal of a tenured teacher who he or she claimed to be ineffective. Plaintiffs cannot allege that these remedies would be futile, because they have never sought to exercise these remedies.

D. *The Plaintiffs' Request for Discovery Does Not Defeat the Motion to Dismiss.*

The plaintiffs generally assert that the motions to dismiss should be denied because plaintiffs should be entitled to discovery. *(Davids,* pp. 14, 18; *Wright,* pp. 2, 18) Although not specifically requested, plaintiffs' assertion could be loosely construed as a request for the Court to deny the motion to dismiss and order defendants to produce discovery in accordance with CPLR § 3211(d).

When affidavits submitted in opposition to a motion to dismiss allege that "facts essential to justify opposition" to the motion may exist, but cannot be stated at that time, a court may deny or stay the motion and permit disclosure. CPLR § 3211(d). "When facts are necessary for a party to properly oppose a motion to dismiss, and those facts are within the *sole knowledge or possession* of the movant, discovery is sanctioned if it has been demonstrated that such facts may exist." *Glassman v. Cat/i,* 111 A.D.2d 744 (2d Dep't 1985)(quoting *Cosmos v. Mason Supplies, Inc.* v. *Lido Beach Associates, Inc.,* 95 A.D.2d 818 (2d Dep't 1983))(emphasis added); *see also Peterson v. Spartan Indus.* , 33 N.Y.2d 463 (1974); *Rochester Linoleum and Carpet Center, Inc.* v. *Cassin,* 61 A.D.Jd 1201(Jd Dep't 2009)(noting that a plaintiff is required to provide some evidentiary basis for its claim that further discovery would yield material evidence and demonstrate how such discovery would reveal facts in the movant's exclusive knowledge).

Plaintiffs submit no affidavits and fail to specifically allege the requirements set forth in CPLR § 3211(d) and relevant case law. At best, the *Davids* plaintiffs allege that defendants will not stipulate to or admit facts alleged by plaintiffs, and thus that any questions of fact must be resolved

through discovery. *(Davids,* p. 14) The *Davids* plaintiffs further allege that the development of the facts will entail discovery of materials that are in the sole possession of defendants. *Id.* Such broad assertions fail to show what additional facts plaintiffs deem necessary to oppose the motion to dismiss and fail to demonstrate that any specific facts are solely within the possession of any defendant.

The *Wright* plaintiffs inaccurately state that they have "limited access and resources to the State's com prehensive data about teacher retention and promotion." *(Wright,* p. 18) Under Education Law §3012-c(1O)(a), however, the State Education Department is required to make public this very data. Moreover. hearing officer decisions following Section 3020-a proceedings. and settlement agreements of Section 3020-a cases, are publicly available through FOIL. *See LaRocca v. Bd of Educ. of the Jericho Union Free Sch Dist.,* 220 A.D.2d 424 (2d Dep't 1995);*Anonymous* v. *Bd. of Educ. of the Mexico Cent. Sch Dist.,* 221 A.D.2d 1028 (4th Dep't 1995). Clearly, all of the data plaintiffs needed to properly plead their complaints was readily available to them. It is telling then, plaintiffs chose to instead rely on outdated, unscientific surveys that better fit the false narrative that teacher tenure is a lifetime guarantee.

In sum, no liberal construction of these complaints can save them from their legal and factual pleading deficiencies. The complaints fail to state a claim under the Education Article, and should be dismissed.

POINT II

THE COMPLAINTS RAISE ONLY A NON-JUSTICIABLE POLICY DISPUTE ABOUT THE WISDOM OF THE TENURE LAWS.

Plaintiffs say that their case is "not a policy crusade against tenure or due process protections for teachers." *(Wright,* p. 3; *Davids,* p. 7). But, this assertion is belied by the complaints themselves, complaints asking the Court to strike down the very statutes that provide teachers with tenure and due process prot<.:<.:tions. *(Wright,* if 7; *Davids,* 58).

In truth, these actions are designed *solely* to deprive teachers of statutory safeguards designed not on ly to protec t teachers, but also to further good education. While plaintiffs refer to the "'inputs" needed for a sound basis education, of which there are many, plaintiffs chose to limit their challenge to attacking the employment safeguards for teachers and principals -without ever mentioning inputs such as adequate education funding for low-wealth districts, growing class sizes, academic program cuts, and other factors the Court would need to consider were ajusticiable Education Article claim before it for review. *CFE I,* 86 N.Y.2d 301, 317 (1995); *CFE II,* 100 N.Y.2d 893, 907-08 (2003); *CFE III* 8 N.Y.3d 14, 21 (2006). Indeed, all such inputs should be examined a'i a whole. *Id.; Bd. of Educ., Levittown Union Free School Dist. v. Nyquist,* 57 N.Y.2d 27, 48 (1982). Nonetheless, plaintiffs have constructed their complaints to falsely and invidiously pit the tenure and due process rights of teachers against the sound basic education rights of students they teach.

The allegations in the complaints are, for the most part, merely plaintiffs' opinions and conclusions, supported by the opinions and conclusions of economists in academic papers. *(Wright,* lir 27-33; *Davids,* irir 3, 39) But, "[a]cquiring data and applying expert advice to formulate broad

programs cannot be economically done by the courts[;] thus, "the manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the legislative and executive branches." *Klostermann v. Cuomo,* 61 N.Y.2d 525, 535-36 (1984). And, of course, the economists' academic articles attached as exhibits to the complaints cannot be cited as *factual* allegations, as the economists in the articles are themselves simply making inferences, giving opinions and drawing conclusions by applying statistical analysis, subject to standards of error, to the data they collected. The Court cannot draw a reasonable inference from something that is itself an inference, opinion or conclusion; the Court can only draw a reasonable inference from a factual allegation in a complaint and. as to these complaints. except for the unsupported allegation that one twin had an ineffective teacher last year *(Wright,* ii 4-5), such factual allegations are non-existent.

Such generalized conclusions cannot form the basis of a justiciable controversy. In *Benson Realty Corp., supra,* the plaintiffs challenged a rent control law as an "unconstitutional taking," alleging that "as applied it is confiscatory" and that there had "been such a failure of administration of the law as to mandate its being declared unconstitutional." *(Id., 50* N.Y.2d at 995) Though plaintiffs asserted a constitutionally-protected right, the Court of Appeals held that the constitutional challenge must fail because it relied on "generalized conclusions" and dealt with political questions the judiciary could not address. *Id.* at 996. In reaching its decision, the Court of Appeals discussed circumstances quite similar to the instant complaints:

> On the question of unconstitutional taking it need only be noted that plaintiffs' papers contain only generalized conclusions which, however persuasive in the forum of public opinion, do not establish that the property of any individual property owner has been "taken" or demonstrate, sufficiently to overcome the presumption of

> constitutionality, that rent control is the cause of what plaintiffs claim is the present plight of New York City landlords.
>
> With respect to the claimed collapse in administration, we...know of no authority, and appellants cite none, recognizing any proposition that proof of mat-administration or non-administration of a statute may serve as the predicate for ajudicial declaration that the statute is unconstitutional. The role of the judiciary is to enforce statutes and to rule on challenges to their constitutionality either on their face or as applied in accordance with their provisions. Any problems that result from pervasive non-enforcement are political questions for the solution of which recourse would have to be had to the legislative or executive branches; the judiciary has neither the authority nor the capabilities Cur their rsolulion. *Id*

Here, as in *Benson,* it is fair to characterize plaintiffs' challenge as a claim, based on general conclusions, that the Education Law's tenure provisions are being maladministered or non-administered. The *Davids'* plaintiffs allege that "New York principals and school district administrators believe that attempting to dismiss ineffective teachers is futile and prohibitively resource-intensive, and that the dismissal process established by the Challenged Statutes is unlikely to result in dismissal of those teachers." *(Davids,* 33) Similarly, the *Wright* plaintiffs claim that "[d]isciplinary proceedings are rarely initiated" because of "cumbersome, lengthy, and costly due process protections . . . ." *(Wright,* if 51-52) But merely couching this alleged application or administration of the Education Law provisions as a constitutional challenge is insufficient to create a justiciable action. Similarly, plaintiffs claim that 3020-a cases are too long and too complicated. *(Wright,* if 49-65; *Davids,* if 36-43) Plaintiffs, however, cite no authority for the proposition that a due process procedure, designed to adjudicate important property rights, is unconstitutional because it has a five-month time frame. [n fact, it is difficult to cite any other civil procedure that must be completed so quickly. And, in any event, based on recent amendments, the statute mandates

that such cases be completed in 155 days, absent circumstances beyond the parties' control. (Education Law § 3020-a(J)(c)(vi) and (4)).

Indeed, the recent amendments to 3020-a further show that plaintiffs' claims are not justiciable. In *Benson Realty Corp.,*[9] the Court of Appeals stressed that "the need for rent control had been re-examined legislatively at intervals of three years" – akin to the recent re-examination and amendments of the Education Law in 2008, 2010 and 2012. *Id.* at 995.

Without acknowledging *Benson ,* the *Wright* plaintiffs rely on *Cohen v. State ,* 94 N. Y.2d 1 (1999), for the proposition that it is the judiciary's role to determine whether a statute offends the New York State Constitution. The *Cohen* case, however, concerned "whether the challenged statute [was] intrinsically a constitutional affront to the separation of powers doctrine." *Cohen,* 94 N. Y.2d at 15. And, the Court of Appeals declared in *Cohen,* as it had elsewhere:

> . . . that it is unwise for the courts "to substitute our own determination for that of the Legislature even if we would have struck a slightly different balance on our own," for it "is not the role of this, or indeed any, court to second-guess the determinations of the Legislature, the elective representatives of the people, in this regard." That wisdom remains a compelling injunction for this Court to honor and be guided by in this instance.

While the Court of Appeals did recognize in *Cohen* that courts review the constitutionality of legislation, the Court also recognized that "the courts have their limitations, too, either doctrinally imposed or self-imposed." 94 N.Y.2d at 11-12. According to the Court, "[t]he restraints have evolved for prudential reasons, from an appreciation of the prescribed and proportioned role of the

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[9] *Benson Realty Corp.* demonstrates that plaintiffs are wrong when they say that defendants "cannot identify a single case where a constitutionally-protected right was at issue, but the court nevertheless concluded that the matter was non-justiciable on political question grounds."*(Wright* p. 29) *Benson* is Court of Appeals precedent for dismissing a case as non-justiciable where a constitutionally-protected right is alleged.

Judiciary, and out of an acknowledged interdependency in the fulfillment of plenary governmental responsibility." 94 N.Y.2d at 11-12

For these reasons, courts apply the doctrine of justiciablity and the related doctrine of exhaustion of administrative remedies. Indeed, if plaintiffs believe that section 3020-a is not being implemented properly, they have administrative remedies at their disposal. *See Donohue v. Copiague Union Free School Dist.,* 47 N.Y.2d 440, 445 (l979)(recognizing the right of plaintiffs to file appeals to the Commissioner of Education pursuant to section 310 of the Education Law); and *NYCLU, supra,* 4 N.Y.3d at 182-184 (plaintiffs challenging individual schools' alleged failure to provide a sound basic education dismissed because there exists an administration process "for accomplishing the very relief plaintiffs seek"). As *Donohue* illustrates, plaintiffs' individual, as applied, challenge under Article XI, § 1 must fail. In *Donahue,* the Court dismissed plaintiffs Article XI, § 1 cause of action, which alleged a failure to educate plaintiffs child, noting that "students and their parents had the right "to take advantage of the administrative processes provided by statute to enlist the aid of the Commissioner of Education in ensuring that such students receive a proper education." *Donohue ,* 47 N.Y.2d at 445. [10] Thus, defendants submit, *Benson, Donohue* and a proper read of *Cohen,* compel the dismissal of plaintiffs' claims as being non-justiciable.

[10] It is also noteworthy that the decision in *Donohue* recognized the "practical problems raised by a cause of action sounding in educational malpractice," including "the practical impossibility of proving that the alleged malpractice of the teacher proximately caused the learning deficiency of the plaintiff student," since "[f]actors such as the student's attitude, motivation, temperament, past experience and home environment may all play an essential and immeasurable role in learning." *Donohue,* 47 N.Y.2d at 445-46 (Wachtler, J., concurring).

POINT III

THE PLAINTIFFS LACK STANDING.

Despite plaintiffs' failure to plead any injury in fact, or allege any concrete and specific future harm, plaintiffs aver that they have standing because they fall within the "zone of interest" of the Education Article of the New York Constitution. *(Wright,* pp. 32-36; *Davids,* pp. 7-8, 17-18) And, while the teacher defendants have not asserted that plaintiffs fall outside the zone of interest that Article XI of the New York Constitution was designed to protect, defendants assert that in order to establish standing, plaintiffs must also demonstrate an injury in fact. *New York State Ass 'n of Nurse Anesthetists v. Novello,* 2 N.Y.3d 207 (2004). They must show actual harm and the injury alleged must be more than conjecture. *Id.* at 211-212. Being within the zone of interest is not enough.

No doubt realizing their pleading failures, plaintiffs now assert that pleading allegations of a "systemic failure in the state education system" affecting all New York schoolchildren is sufficient to meet standing requirements. *(Wright,* pp. 32-34, 38-39; *Davids,* p. 17-18) It is clear, however, that plaintiffs did not file these actions on behalf ofall New York schoolchildren. *(Wright,* 'if'il l0-16; *Davids,* i1'i! 8-18). In any even, plaintiffs plead no support to show, as they claim, that plaintiffs will suffer "imminent" harm by possible assignment to an ineffective teacher's classroom. *(Wright,* p. 34) The purported "inevitability" that a student in New York State will have an ineffective teacher is pure conjecture and does not meet the required showing of harm to establish standing. *(See Novello,* 2 N.Y.3d at 211-212; *Wright,* p. 35) Further, the complaints fail to allege that any plaintiff is assigned to an ineffective teacher.

Plaintiffs rely on *Assoc. for a Better Long Island, Inc.* v. *New York State Dep 't of Environmental Conservation,* 23 N.Y.3d I (2014), for the premise that future harm is sufficient to

confer standing. *(Wright,* p. 35) As plaintiffs concede, however, a sufficient allegation of future harm must be "more than an amorphous allegation of potential future injmy." *Assoc. for a Better long Island, Inc.,* 23 N.Y.3d at 7. Plaintiffs' complaints are rife with speculative and conclusory allegations that have a minimal probability of occurrence. *(Wright,* ifif 24-33) The reliance on broad and out-dated studies pertaining to effective teaching is not sufficient to demonstrate any actual existing, or future, harm of plaintiffs who are students in specific schools in New York State. *(Wright,* ifif 27-33; *Davids,* p. 18).

Plaintiffs rely on *Neu' Yorkersfor Students' Educational Rights ("NYSER ") v. State of Ne w York,* New York County Index No. 650450/14 (Mendez, J., November 17, 2014), to support their claim that parents of New York schoolchildren automatically have standing to bring a constitutional claim under Article Xl of the New York Consti tution. *(Wright,* p. 33) The *NYSER* decision, however, does not help plaintiffs because the Court in *NYSER* ruled that parent plaintiffs had standing based solely on the potential effect of specific legislation, following a similar legal challenge, on the state's funding of schools derived from Article XI. *NYSER,* Index No. 650450/14 at p. 2. The Court in *NYSER* noted that plaintiffs specifically alleged causes of action relating to the state's failure to comply with decisions of the Court of Appeals in the three *Campaign/or Fiscal Equity v. State* cases (citations omitted) that relate to the minimal level of constitutional funding necessary to provide a sound basic education. *Id.* at p. 3-4. Plaintiffs seek to apply *NYSER* entirely out of context.

Nonetheless, the claims in *NYSER* are concrete and measurable, not speculative, as the plaintiffs' claims are here. The *NYSER* case does not adequately support plaintiffs' notion that an alleged and speculative "system-wide failure" of the New York education system is sufficient to

confer standing. Plaintiffs fail to cite any other authority to support this claim, and it is clear that alleged systemic harm is not sufficient to establish standing.

Plaintiffs claim disingenuously that, though the standing requirements may not be satisfied, denying plaintiffs standing would result in barring a constitutional issue from judicial review. *(Wright,* p. 39) Yet, the cases plaintiffs cite for this proposition all consider the standing of state taxpayers to challenge the expenditure of state funds. *See e.g., Saratoga County Chamber of Commerce v. Pataki,* l00 N.Y.2d 80 l (2003)(finding that citizen-taxpayers had standing to challenge an unlawful expenditure of state funds for a casino gambling compact with an Indian tribe, so long as their claims had a sufficient nexus to fiscal activities of the state; and noting that the casino would remain open indefinitely if standing were denied); *Boryszewski v. Brydges,* 37 N.Y.2d 361 (1975)(granting standing to citizen taxpayers to challenge the constitutionality of state legislati ve and executive retirement plan and budget statutes because the only other individuals who would have standing to challenge the statutes would be those who benefit from them, thus increasing the likelihood that the statutes would never be subject to judicial review if standing was denied to the citizen taxpayer plaintiffs); *New York State United Teachers ex. rel. Iannuzzi v. State of New York,* 993 N.Y.S.2d 475, 480-481 (Sup. Ct. Albany Co., 2014)(relying on *Boryszewski* and *Saratoga Chamber of Commerce. supra,* to find taxpayer standing to challenge the constitutionality of the expenditure of State funds). In contrast to those cases, plaintiffs here fail to demonstrate how their lack of standing would prevent any other plaintiff from demonstrating the requisite harm to establish standing to consider issues relating to the Education Article of the New York Constitution.

Plaintiffs cite *People v. Parker,* 41 N.Y.2d 21 (l976), for the assertion that even if an individual lacks standing, a court may consider the claim on behalf of others if it is a claim of

"sufficient public importance." In *Parker,* the Court of Appeals considered a challenge to a criminal sentencing statute, despite lack of standing on the plaintiff's part, because there may have been other incarcerated defendants affected by the statute, and the Appellate Division was split over the constitutionality of the statute. *Parker* is clearly inapposite to the instance matter.

Finally, as teacher defendants noted in their main brief (p. I 0), certainly parents can establish standing to bring Education Article claim, if they properly allege injury in fact. *See, e.g., Hussein v. State of New York,* 81 A.D.3d 132 (3d Dep't 2011), *aff'd, Hussein v. State of New York,* 19 N.Y.3d 899 (2012). In *Hussein,* unlike here, parents of children attending school in 11 school districts outside of New York City challenged inadequate education funding as a violation of Article XI of the New York Constitution. *Id.* The Court found that plaintiffs' complaint was replete with "detailed data alleged ly demonstrating, among other things, inadequate teacher qualifications, building standards and equipment, which illustrate glaring deficiencies in the current quality of the schools in plaintiffs' districts and a substantial need for increased aid." *Id.* at 467. The Court also noted the importance of plaintiffs' submission of "evidence of factors that will allegedly continue to keep their districts underfunded . . . ." *Id.*

Plaintiffs here could have plead similar claims to those in *Hussein, i.e.,* asserting, for instance, the need for additional funding to hire more teachers in Rochester schools. *(See Wright,* ,70). If plaintiffs want to establish standing to bring a claim challenging the Education Article, they must demonstrate an injury in fact. *See Novello,* 2 N.Y.3d at 21 1-212. They have failed to do so.

POINT IV

THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO JOIN LOCAL UNIONS AND SCHOOL DISTRICTS WHOSE COLLECTIVE BARGAINING AGREEMENTS MAY BE VITIATED SHOULD PLAINTIFFS SUCCEED.

All plaintiffs are now attacking the right of teachers to collectively bargain disciplinary procedures with their school districts. *(Wright,* 146; *Davids,* p. 19) The *Wright* plaintiffs casually brush off the need to join such unions and school districts that have entered into such agreements, saying that plaintiffs are only interested in their Education Article claim and any ancillary dfect on collective bargaining agreements does not make unions necessary parties. *(Wright,* p. 39-40) The Davids plaintiffs more harshly dismiss the need to join parties whose contract rights may be affected as "absurd." *(Davids.* p. 19)

The plaintiffs' position is legally incorrect. These cases should be dismissed outright for all the reasons set forth above but, if for any reason they are not, parties whose rights may be affected should be joined.

The right to collectively bargain is constitutionally guaranteed and protected by statute. (Teacher defendants main brief, pp. 54-SS) Contracts so negotiated are also protected from impairment by the Contract Clause (Article I, §10) of United States Constitution. *See, e.g., Condell v. Bress,* 983 F.2d 415, 418 (2d Cir. 1993)

The plaintiffs broadly ask the Court to hold that collectively bargained altemative disciplinary procedures violate the Education Article. *(Wright,* 146) Clearly, such a holding might vitiate existing contracts that were lawfully entered under Civil Service Law §§200 *et seq,* and Education Law §3020(1). The parties to such agreements may have made bargaining concessions to obtain the

contractual provisions and may rely on those agreements as central parts of their local labor relations.

It may be inconvenient for plaintiffs to actually investigate what those contractual agreements say; to explain to the Court why they are allegedly illegal; and to give the parties to those contractual agreements an opportunity to be heard. Still, it was plaintiffs who decided to make a statewide challenge; to broadly allege that collective bargaining agreements make it even harder to dismiss ineffective teachers; and to ask that the statute authorizing such bargaining be struck down. *(Wright,* 61) That being so, plaintiffs should be required to give all persons whose rights may be affected an opportunity to be heard.

CONCLUSION

The complaints should be dismissed.

Dated: December 15, 2014
Latham, NY

Respectfully submitted,

RICHARD E. CASAGRANDE, ESQ.
Attorney for Individual Teacher Defendants
and NYSUT
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By: _____
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117644

EXHIBIT "5"

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January 13, 2015

Via E-mail and Overnight Mail

Hon. Philip G. Minardo
18 Richmond Terrace
Staten Island, New York 10301

Attn: Robert Soos, Esq., Principal Law Clerk

Re: Davids, Mymoena et al. v. State of New **York, et al.**
Richmond County Index No. **101105/14**
(Our File No.: **258495-NlOO)**

Dear Justice Minardo:

I represent the teacher defendants and NYSUT in this matter. This letter is in response to Mr. Lefkowitz' letter dated January 12, 2015, and is submitted on behalf of all defendants.

First, the parties agreed to a schedule that was so ordered by the Court, and made further commitments by email exchange, as Mr. Moerdler has noted. Neither the CPLR *(see* Rules 2214(b) and 3011), nor that schedule permitted sur-reply submissions. Final submissions had to be served on December 15, yet the *Wright* plaintiffs waited twenty-eight (28) days from the submission of reply briefs to make this latest submission. Moreover, the exhibits annexed to Mr. Lefkowitz' affirmation were available as early as August. Exhibit C was available on December 19.

Second, teacher-defendants' reply brief did *not* introduce new evidence or make new factual arguments. At page 12 of their brief, the *Wright* plaintiffs asserted that standardized test results show that public school students statewide are not receiving an adequate public education, citing paragraph 41 of their complaint. As the Court can see, at pages 3-4 of our reply brief we merely responded to this argument, citing the Court of Appeals' *CFE I* decision, which warned against the use of standardized tests as a measure of minimal educational skills. (86 N.Y.2d 301, 317 (1995)). We also referred the Court to the very same paragraph 41 and annexed exhibit to the *Wright* complaint, which itself discusses why standardized test results are not a reliable measure of teacher

effectiveness. The footnote on page 4 merely cited the Court to statutory enactments from the Legislature's past session. These legislative enactments are perfectly appropriate to cite in a reply brief.

Third, the argument that student test scores alone are not an indicator of teacher effectiveness and are not sufficient to state a claim under the Education Article is not new. It has been noted by the Court of Appeals and was noted by defendants in their briefs-in-chief. *(See, e.g.,* UFT, main brief at pp. 19 and 41).

Fourth, the documents attached to Mr. Lefkowitz' affirmation, and particularly Mr. Malatras' letter, are inappropriate for judicial notice. That an Executive Branch official is concerned about teacher evaluation is not relevant to whether plaintiffs have stated a claim and not appropriate for judicial notice. "'A court may only apply judicial notice to matters of common and general knowledge, well established and authoritatively settled, not doubtful or uncertain. The test is whether sufficient notoriety attaches to the fact to make it proper to assume its existence without proof" *(Walker v. City of New York,* 46 A.D.3d 278, 282[l st Dep't 2007], *quoting Carter v. Metro N. Assoc.,* 255 AD.2d 251, 251 [1998]).

The plaintiffs clearly want an opportunity to submit new evidence to the Court and delayed their submission to the eve of argument to minimize the opportunity of the defendants to respond. Indeed, their submission of a letter from the Governor's Office, notably without the public responses to that letter, can only be seen as an effort to salvage a complaint that neither states a cognizable legal claim nor alleges facts sufficient to support any cognizable legal claim. Plaintiffs want the Court to be aware that a high ranking state official has concerns about some of the laws at issue. But, this is in no way relevant to the motions before the Court, except perhaps to further demonstrate that plaintiffs' claims are non-justiciable, political issues.

Accordingly, the plaintiffs' submission should be rejected. Ifit is not rejected, defendants respectfully request the opportunity to respond by submission of the attached affirmation. I have discussed this request with counsel for all defendants and they join in this request.

Respectfully submitted,

RICHARD E. CASAGRANDE
Attorney for Teacher Defendants
and NYSUT

REC:lg
Enclosure
118185

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STATE OF NEW YORK
SUPREME COURT COUNTY OF RICHMOND

MYMOENA DAVIDS, et al.,

Plaintiffs,

- against -

THE STATE OF NEW YORK, et al.,

Defendants,

- and -

MICHAEL MULGREW, et al.,

Intervenor-Defendants.

JOHN KEONI WRIGHT, et al.,

Plaintiffs,

- against -

THE STATE OF NEW YORK, et al.,

Defendants,

- and-

SETH COHEN,

Intervenor-Defend ants.

AFFIRMATION OF
RICHARD E. CASAGRANDE

Index No.: A0064/2014

Hon. Philip G. Minardo

RICHARD E. CASAGRANDE, an attorney duly admitted to practice law in the Courts of the State of New York affirms as follows under penalty of perjury pursuant to CPLR 2106:

1. I am an attorney duly admitted to practice law in the State of New York. I represent the teacher defendants and NYSUT in this matter, and I am fully familiar with all of the prior submissions by the parties in this matter.

2. As the Court is aware, pursuant to CPLR §§ 2214(b) and 3011, sur-replies are not permitted without the consent of the Court.

3. I object to the tardy submissions by Mr. Lefkowitz. This submission violates the agreement between counsel for parties and was submitted without notice to or consent of all counsel.

4. Defendants in their reply brief did not introduce new facts into the case. Defendants, in reply to arguments made at page 12 of plaintiffs' brief, merely discussed an exhibit to plaintiffs' complaint and cited Court of Appeals precedent and legislative enactments in support of those arguments.

5. Further, Exhibits A and B to Mr. Lefkowitz' affirmation were available to plaintiffs months before they amended their complaint in November 2014. Exhibit A was published in *August.* The letter attached to Mr. Lefkowitz' affirmation as Exhibit C has been publicly available since December 19.

6. With respect to Exhibit C, Mr. Malatras' expressions of concern and inquiries to the Board of Regents about education policy have no bearing on the pending motion. To the extent the Jetter is considered, it only shows that these education policy matters are under the active and continuing evaluation of the Legislative and Executive branches, and are non-justiciable.

7. In the interest of candor, attached to this affirmation as Exhibits A-C are: (A) Chancellor Tisch's response to Mr. Malatras' letter; (B) the response of New York State Allies for Public Education; and (C) a New York Times Editorial discussing the issue. These statements, like Mr. Malatras' letter, publicly express opinions and concerns about public education policy in this State.

Dated: January 13, 2015

Latham, New Yark

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EXHIBIT "A"

THE BOARD OF REGENTS
THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT

Merryl H. Tisch
Chancellor

89 Washington Avenue
Albany, NY 12234

December 31, 2014

Jim Malatras
Director of State Operations
State of New York
Executive Chamber
Albany, New York 12224

Dear Mr. Malatras:

Thank you for your December 18, 2014 letter. The Board of Regents agrees that one of the State's most important obligations is educating our children. Over the last few years, New York has taken significant steps to improve education in this State, including:

- Raising P-12 academic standards so that New York's students will be ready for college, careers, and life when they graduate;
- Increasing graduation rates by more than ten percentage points in the last decade, while simultaneously raising standards, which means that more than 20,000 additional students graduated in June 2014 than in June 2005;
- Increasing the rigor of certification examinations for teachers and school building leaders and supporting high-quality professional development for preparation of program faculty so that teachers will be well-prepared to teach when they enter the classroom and school leaders will be well-prepared to lead when they enter the school building;
- Introducing a comprehensive Statewide evaluation system for educators to support effective professional development and to ensure that every student has an effective teacher and school leader - recognizing the system needs to be continually strengthened;
- Raising standards for accountability by holding all schools and districts accountable for the performance of all of their students and creating more high-quality district and charter school seats in high-needs communities; and
- Expanding access to strong Career and Technical Education (CTE) programs well aligned to the demands of the 21st century economy and creating multiple pathways to graduation.

While New York State has done much to improve public education in recent years, we continue to face critical challenges: more than a fifth of our students do not graduate from high school after four years; only about two-fifths of our students graduate with the academic skills they need for success in college and careers; and we continue to face deeply

troubling achievement gaps for our students from low-income families, English Language Learners, Students with Disabilities, African·American and Lati no students. This month's announcement of continued graduation rate gains illustrates that we are moving in the right direction, but there is much more to be done.

While the Board of Regents and the State Education Department ("SED" or "the Department'] appreciate the opportunity to opine on the issues raised in your letter, we note, however, that the questions and concerns outlined in the letter relate to issues of State Law, which are under the direct control of the State Legislatu re and the Governor, not the Department or the Board of Regents. Our response details New York's progress in each of the areas you raise and proposes aggressive measures that build on our work to ensure that every child in New York State has a high quality educator at the front of the classroom. Our response proposes reforms to reward excellence in teaching; strengthen teacher evaluation, improve preparation of new teachers; and, when necessary, streamline the a bility to remove ineffective teachers from the classroom. Further, our response proposes additional tools to allow the Department to implement lasting change in failing schools, proposes specific uses of technology to improve student learning, and suggests ways to incentivize regionalization and shared *services* where appropriate. Our response supports the continuance of Mayoral control in New York City and raising the cap on charter schools to meet demand. In addition we propose a focus on the issues of school segregation and local school district mismanagement such as we *have* seen recently in East Ramapo, New York.

In addition, since your letter seeks our input to inform the Governor on reforms that may be considered for introduction in the Executive Budget process, we urge you to look beyond the questions you raised and continue to make education funding a priority by adopting the recommendations for targeted investments contained in the recently approved $2 Billion Regents State Aid Proposal for 2015·l6 (fil http: !/www.regen ts.nysed.gov/meetings/201 4/December2014/121 4bra6.pdQ, which is detailed at the conclusion of this letter. These proposed investments in Improving education for English Language Learners; strengthening Career and Technical Education; continuing to expan d access to high quality pre-kindergarten to a\l four-year-olds; and providing funding to support teaching excellence, among other things, coupled with our proposals below, can be a roadmap for how we can work together to ensure that every child in New York has access to a high quality education.

Our responses to your questions are as follows:

Teacher Evaluation System

1. As you know, as part of the State's successful 2010 Race to the Top (RITr) application, in which the State was awarded nearly $700 million in federal funding, landmark education reform legislation was passed by the Legislature and signed into Jaw by the Governor on May 28, 2010 that created a comprehensive teacher and principal evaluation system providing for annual professional performance reviews (APPRs) aimed at improving educator practices and advancing learning for all students (see Education Law

§3012-c). In 2012, the Board of Regents worked with Governor Cuomo, the State Legislature, and the New York State United Teachers (NYSUT) to resolve litigation over the original APPR statute, and amendments were made to Education Law §3012-c on March 27, 2012 to strengthen the evaluation system.

At its December 2014 meeting, the Board of Regents presented the Statewide evaluation results for the 2013-2014 school year, which revealed that less than 1% of teachers in the State were rated Ineffective and over 95% of teachers were rated either Effective or Highly Effective. Results disaggregated by NYC and the rest of the State showed greater differentiation among the four overall rating categories in NYC, which had an APPR plan imposed by the Commissioner pursuant to Education Law §3012-c(Z](m]. (NYC had 1.2% of its teachers rated Ineffective and 9.2% Highly Effective compared to 0.4% Ineffective and 58.2% Highly Effective in the rest of the State.) Disaggregated results in the other measures subcomponent (i.e., observations, etc.) also varied considerably across districts depending on what was negotiated locally. For example, NYC, which had State-imposed scoring ranges for the other measures subcomponent, had 1.1% of its teachers rated Ineffective, 8.0% Developing, 60.0% Effective, and 30.8% rated Highly Effective. By comparison a Central NY district had 0.9% rated Ineffective, 32.7% Developing, 34.9% Effective, and 31.4% Highly Effective; and a Lower Hudson district had 0% of its teachers rated Ineffective, 0% Developing, 11.3% Effective, and 88.7% rated Highly Effective.

Differentiation ls a necessary component of any evaluation system intended to support professional development and growth. However, as the Governor has previously indicated, changes in State Jaw are necessary in order to achieve better differentiation and to fulfill the goal of a Statewide evaluation system that identifies those who are excelling so that they can be mentors for their colleagues, identifies those who are struggling so they can get support to improve, and informs high-quality professional development for alJ educators.

Currently, evaluations for 80% of New York's teachers are completely determined locally and for the remaining 20% of teachers, 80% of their evaluations are determined locally:

- 20% is based on student growth on State assessments or other comparable measures of student growth determined by districts;
- 20% is based on locally selected measures of student achievement that are established through local collective bargaining; and
- 60% is based on other measures of teacher/principal effectiveness established through local collective bargaining, including observations and surveys.

To make the evaluation system less complex and more effective in differentiating performance, the Governor and Legislature could leverage lessons learned from districts that have effectively differentiated performance and amend Education Law §3012-c to:

- Eliminate the locally selected measures subcomponent, established through local collective bargaining. The data reveal that the locally-negotiated process for assigning points and setting targets in this subcomponent do not differentiate performance in terms of the composite ratings that teachers and principals receive. Instead, assign 40 percentage points to student growth on State assessments and other comparable measures of student growth – including performance-based assessments (like those used in NYC in 2013-14) – determined by districts. Require that for a teacher to be rated "Effective" or better on the other comparable measures of student growth (used for over 80% of teachers that do not have State-provided growth scores), also known as student learning objectives (SLOs), districts must set a rigorous target that a teacher's students achieve at least one year of academic growth. Elimination of the locally selected measures subcomponent could reduce the number of traditional standardized tests students are required to take, thereby addressing the most frequent parent concern with the implementation of this State law, while continuing to allow districts to use locally-selected Indicators of student learning.
- Establish State-prescribed scoring ranges for the other measures of teacher and principal effectiveness (the observation subcomponent) rather than allowing them to be locally-negotiated. The existing requirement that educators whose rating on the student performance subcomponents (State growth or other comparable measures and the locally-selected measures in current system) is Ineffective receive an Ineffective overall rating should be maintained.
- Enhance the expedited disciplinary process to make a pattern of ineffective teaching a rebuttable presumption of incompetence rather than merely a significant factor in incompetence determinations, as is done in Education Law §3012-c(S-a)(j) for NYC, but not in §3020-a(3) for the rest of the State. A teacher who has received two consecutive Ineffective ratings should not be permitted to return to the classroom.

Removal of Poorly Perfopnjag Teachers

2. On May 28, 2010, the Legislature and the Governor made significant changes to the Education Law to address the problem of removing poorly performing educations from the classroom, including the establishment of the APPR and the provision for expedited hearings under Education Law §3020-a where a teacher or principal exhibits a pattern of ineffective teaching by receiving two consecutive Ineffective ratings on the APPR (see Education Law §3020-a(3)(c)(i-a). Under Governor Cuomo's leadership, the evaluation system was then strengthened via the amendments made to Education Law §3012-c on March 27, 2012. The State has also made significant reforms to improve the efficiency of the administrative hearing process when a teacher is charged with incompetency including the estabJishment of firm timelines for the teacher discipline/removal procedure set forth in Education Law §3020-a, and greater oversight by SED over the impartial hearing officers who conduct the administrative hearings required by Education Law §3020-a (ge L. 2010, Ch. 103; L. 2012, Ch. 21; L. 2012, Ch. 57, Part B). On March 30, 2012, the Legislature and Governor Cuomo enacted Part B of Chapter 57 of the Laws of 2012, which made additional reforms directed at shortening the length of hearings commenced on or

after April 1. 201.2, such as imposing a requirement that all evidence be received within 125 days of the filing of charges and authorizing the Commissioner to appoint a hearing officer if the parties do not agree on one within 15 days of receipt of a list of hearing officers. Part B of Chapter 57 of the Laws of 2012 also modified the manner in which hearing officers are compensated and authorized SEO "to monitor and investigate a hearing officer's compliance with statutory timelines" set forth in §3020-a, and exclude from future consideration hearing officers who fail to meet the statutory timelines (Education Law §3020-a (3)(c)(i)(B)).

When these timelines are strictly adhered to, data produced by the Department this spring reveal that hearings are much shorter than has been the case in the past, without impacting the due process rights of the employee. For example, prior to the 3020-a reforms adopted in 2012, termination hearings resulting in a guilty decision could take as long as two years, a not guilty decision averaged one-and-a-half years, and settlements took about a year. Based on data for the 2013-2014 school year as of April 30, 2014, the average length for a decision under the improved 3020-a system was 190 days in NYC and 177 days for the rest of the State, and settlements took approximately 103 days in NYC and 94 days for the rest of the State. Based on these data, the recent changes in statute have resulted in significantly shorter hearings, but more needs to be done.

Under the current system, the section 3020-a hearings are conducted by private labor arbitrators selected by the parties from an American Arbitration Association list. Those private arbitrators serve in other types of labor arbitrations and are not dedicated solely to section 3020-a hearings. That means they have competing priorities with respect to the scheduling and prompt resolution of section 3020-a hearings. As in any hearing, the arbitrator has discretion to grant adjournments, though section 3020·a(3)(c)(i·a) attempts to constrain those extensions for the expedited hearings. Because arbitrators are selected by the parties, if they are overly zealous in regulating extensions and holding consecutive days of hearings, they risk not being selected for future hearings. On the other hand, while the Commissioner can take action to remove arbitrators from the list based on their continued failure to commence and complete hearings within the statutory time lines, policing the granting of extensions that on their face appear legitimate, but serve to lengthen hearings. would be extremely difficult. What is required is a paradigm shift-a move to truly expedited section 3020-a hearings.

The best means to accomplish that, while realizing further cost savings, would be to replace the current group of independent contractors who serve as hearing officers with State employees who will be held accountable for strict adherence to section 3020-a time lines. Accordingly, the Legislature and the Governor could establish a new independent State Office of Administrative Review to conduct these and other administrative hearings for the State. This would eliminate the selection process for hearing officers, with its resulting delays, and would ensure that hearings are conducted by hearing officers who are independent, do not face the competing scheduling issues that hearing officers who are labor arbitrators face, do not have motivation to grant excessive extensions to the parties, and will be answerable to their supervisors for adherence to the section 3020-a time lines. Because the State hearing officers are

salaried, this would also eliminate issues on hearing officer compensation, such as compensation for study days or partial days of hearing and allow the State to control costs. Most importantly, it would give the State control over the conduct of the hearings and avoid the lengthy delays in hearings that have plagued the section 3020-a process. This approach, in conjunction with making a pattern of ineffective teaching a rebuttable presumption of incompetence rather than merely a significant factor in incompetence determinations, would radically reduce the time and cost of the section 3020-a removal process to ensure students are not assigned to the classrooms of ineffective teachers.

In addition, the Governor could propose in State law adopting the policy adopted by the State of Rhode Island in its Race to the Top application (as well as the laws enacted by the State of Indiana and the State of Florida) that no student can be assigned to two teachers in a row with ineffective ratings.[1] This policy would protect students from the lasting negative impact of having multiple ineffective teachers in a row.[2]

Teacher Training and Certificatjon Process

3. Over the past five years, the State has taken several actions to enhance the quality of teachers in New York State:

The State created a more comprehensive evaluation system for teachers and principals. The Board of Regents also used RTTT funds to pilot clinically rich teacher preparation programs that are deeply embedded in classroom practice with extended teaching residencies/internships in schools rather than brief student teaching commitments. These preparation programs partnered with high-need schools to provide clinically rich experiences in return for the candidate's commitment to serve in a high-need school where there is a shortage of well-prepared teachers. New York State invested $20 million in awards to 13 institutions (11 graduate and two undergraduate), followed in 2014-2015 by an additional $3.1 million, to prepare over 530 teachers in clinically rich teacher preparation pilot programs through partnerships with 57 high-need schools across the State. These programs are geared toward increasing the supply of highly effective teachers in high-need subjects such as science, mathematics, special education, or teachers of English to speakers of other languages.

Employment data from the first and second cohorts of graduates indicate that 84 percent have teaching jobs in high-need schools across the State, including NYC, immediately following graduation. Although it is too soon to report retention rates of

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[1] http://www2.ed.'(.OV /proi:rams /racetothetop /state·scope-of-work/rhode· lsland.pdf (last visited December 30. 2014): IND. CODE §20-28-11.5-7 (Ji); FLA. STAT. §1012.2315(6}.

[2] SANDERS, W. 1.,& RIVERS,]. C. CUMULATIVE AND RESIDUAL EFFECTS OF TEACHERS ON FU11.JRE STUDENT ACADEMIC ACHIEVEMENT. KNOXVILLE, TN: UNIVERSITY OF TENNESSEE YALLJE·ADDED RESEARCH AND ASSESSMENT CENTER (1996), available at http://heartland.oq /sjtes /all/modules /custom / heartland_rnir;ration (files/pdfs /3048.pdf (last visited December 30, 2014).

novice teachers as a result of these programs, there is preliminary evidence to suggest a positive impact on student growth and achievement.

Survey data collected by select institutions indicate that P-12 students associated with this program demonstrated increased attendance, frequency of successful homework completion, and on-task student behavior. With strong evidence of the clinically rich preparation programs' ability to prepare teachers and school leaders to meet the instructional needs of students, particula rly in high-need schools, the majority of institutions involved in this work are collaborating with their P-12 partners to develop sustainability plans that would allow the continuation of the program. Among the institutions receiving grants was the American Museum of Natural History (AMNH), making it the first museum in the nation authorized to grant teaching degrees. The AMN H program is producing well-prepared Earth Science teachers with deep content knowledge and strong pedagogical skills who are now teaching in high-needs NYC high schools,3

In addition, the Board of Regents established new, more rigorous teacher and school b uilding leader certification exams. Beginning May 1, 2014, new teachers m ust take and pass the Academic Literacy Skills test, which assesses a teacher's literacy skills; a content specialty test, to ensure that teachers have the content knowledge they need to teach a certa i n subject; the edTPA. a teacher performance assessment that measures a teacher's pedagogical skills; and the Ed ucating All Students exam, which tests a teaching candidate's ability to understand diversity in order to address the needs of all students, including English Language Learners and students with disabilities, and knowledge of working with families and communities. These new certification examinations ensure that teaching candidates have the knowledge, skills and abilities to be effective teachers.

We recently posted institutional pass rates on these exams on the Department's website in an effort to promote transparency and accountability for teacher preparation programs. In New York State, teacher education programs are held accounta ble for the quality of their programs leading to certification in teacher education and their candida tes who complete such programs. Pursuant to the Commissioner's regulations, the Department has the authority to require an i nstitution to submit a corrective action plan if fewer than 80 percent of the institution's students have passed each of the required certification examinations. In order to phase-in the new teacher performance assessment (edTPA), for the 2013-2014 and 2014-2015 years, programs with less than an 80 percent pass rate on the edTPA will be req uired to submit a professional development plan to the Depa rtment that d escribes how the program plans to improve the readiness of the faculty and pass rates for candidates on the edTPA (.s..e.e 8 NYC RR 52.2 l(b)(2)(iv)). The pass rates on these exams reflect the increased rigor of the revised certification process and d emonstrate that New York is fulfilling the commitment in the 2013-2014 budget to develop a "bar exam·for teachers.

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[1]See Douglas Quenqua, *Back to School, Not an a Campµs but in a Beloved Museum, N.Y.*Times, January 12, 2012, available at b!:tp:/ /www nytimes.com /2012 /01/16/ n vreeion /american-museum-of-natural histoi:y· will-i:room-schoo! -teachers.html (last visited December 30, 2014).

A potential budget priority for the Governor could be the creation of a New York State Teacher Residency Program, modeled on the Race to the Top clinically rich teacher preparation grants, with rigorous selection criteria and a focus on development of strong content knowledge, year·long internships In schools and intensive mentoring support during the first year of teaching. In the beginning. candidates could, for example, be required to be certified in high demand subjects (such as Teaching English to Speakers of Other Languages and secondary-level Science, Technology, Engineering, and Math (STEM)) and commit to a minimum of five years teaching in higb·needs schools.

financjal Incentjves For High-Perform jug Teachers

4. Using $83 million from federal RTTT funds, SEO has implemented the Strengthening Teacher and Leader Effecti veness (STLE) grant program. Through STLE, nearly one-third of all districts in New York have shifted their compensation systems to career ladder pathway models that incentivize and rewa rd the most effective teachers taking on leadership roles. In addition, STLE grantees rewarded the most effective teachers and school leaders through the implementation of recruitment and transfer bonuses that provide financial incentives to attract high performing educators into hard-to-staff and specialty subject areas, as well as into high·need or low performing schools. Districts are developing unified programs, informed by evidence gathered th rough the eval uation system, focused on improving the preparation of educators; promoting strategic compensation and innovative staffing models; and ensuring all teachers and school leaders have access to high-quality, targeted coaching and development.

District-wide career ladder pathways under STLE provide recognition and advancement to the most effective educators as they demonstrate increased performance, Using carefully developed selection criteria, districts identify individuals who will fulfill the additional roles and responsibilities associated with the compensated career ladder positions, including curriculu m and instructional coaches, data driven instructional coaches, peer evaluators, professional developers, and home-school liaisons. For example, teacher leaders and instr uctional coaches in Greece Cen tral Schools are working with the districts' most high-need students, while also using evidence of student performance and analysis of instructional strategies to support their peers with implementation of college and career ready standa rds. In addition, Teacher Leaders are using APPR to provide targeted feedback and individ ualized professiona l growth opportunities to colleagues. (Video: The Development of Career Pathways in the Greece Central School District).[4] In H untington Union Free School District, trained academic coaches and teacher mentors are pa rt of a formative peer observation model that incorporates Instructional Focus Walks to support teaching and learning throughout the district. Trained Teacher Leaders serve as

4 https://www.em:aeny.Ore/content/develoDIDeat-career-pathwayNreece-centr:il-scboo!-district

reso u rces for implementation of college and career ready standards, evidence-based instruction, and high-quality evaluations through formative observations, coaching, and co-planning. (Video: "Focus Walks" Foster Professional Growth ju Huntington).[5] Staff i nvolved in these ki nds of programs report satisfaction in being recognized as the most effective ed ucators in their buildings and districts, in being able to contribute to the school vision and provide assistance to one another, and value the feedback and resources gained through these interactions with colleagues who can relate to the complexities of the classroom environment

The Department believes that the Teacher Excellence Fund, which was created in the 2014 Budget (Ch. 56 of the Laws of 2014), can be re-purposed to capitalize on this momentum in our STLE grantees by allowing districts to design innovative compensation models based on educator performance in conjunction with compensated career ladder roles and responsibilities. Having career ladder pathways connected to highly effective and effective educator performance evaluations support the retention of our most effective educators in schools, acknowledge their accomplishments, improve the equitable access to educators, and ensure that students are college and career ready. The Board of Regents has also proposed allocating $80 million in the 2015·2016 State Budget to the continuation of the STLE grant.

Probationary Periods

5. Currently, Education Law §3012-c requires that the APPR constitute a "significant factor" in employment decisions, including but not limited to tenure determinations and termination of probationary teachers and principals. While the law does not require that the APPR be the sole or determiffii.tive factor in tenure or termination decisions, it requires that the APPR be considered in making such determinations.

To address concerns districts *have* expressed about a lack of clarity regarding their legal authority with respect to probationary teachers, Education Law §3012-c should be amended – building on existing Commissioner's regulations – to further clarify that a board of education has unfettered discretion to terminate a probationary teacher or principal, including for performance reasons, until a tenure decision is made at the end of the probationary period, as long as those reasons are statutorily and constitutionally permissible.

In recent years, several states have made changes to their tenure laws to extend the length of a teacher's probationary period in an effort to provide districts with additional time to evaluate a teacher's performance before tenure is acquired and to provide critical supports to teachers in their first years in the classroom. For example, in 2012, New Jersey extended its teacher probationary period from three to four years. New teachers wishing to achieve tenure must complete a rnentorship program during their initial year of employment, and must also receive "effective" or "highly effective" ratings in two

[5] https://www.engageny.org/resource/focus-walks-fostering-leadership-for-growth-looks-and-school-district.

evaluations within the first three years of employment following the year of mentorship to obtain tenure. (NJ STAT. ANN. §18A:28-5 (2012)). In 2011, Michigan also extended its probationary period for teachers to five years if the teacher has been rated as effective or highly effective on his or her three most recent performance evaluations MICH. COMP. LAWS §38.81)).

The New York State probationary teacher process could be further strengthened by the Governor and Legislature by extending the probationary period of teachers and administrators in New York State to five years, so boards of education have additional time to evaluate their performance.

Struggling Schools

6. One key strategy by which the State can address persistent gaps in student achievement among high and low performing groups of students is to intervene successfully in the State's Priority Schools and turn around their low levels of student achievement. Currently there are 178 Priority Schools in the State, heavily concentrated in the Large Five City School Districts and 13 other school districts that enroll primarily low-income students of color. Many of these Priority Schools have been persistently low achieving for many years. In these schools, whole generations of students are left behind, as often fewer than half of the students who attend a Priority School will ultimately graduate on time and, of those who do, almost all will need remediation in order to successfully pursue post-secondary education. We agree with the Governor that if these schools cannot be made to perform, they must be closed and replaced by institutions that are up to the task of ensuring that students graduate from school college- and career-ready. However, the current tools available to the Department present substantial obstacles to working with districts to ensure that low-performing schools will not be replaced by other schools that are almost equally low-performing.

Recognizing the Buffalo City School District's (Buffalo) critical need for intervention and support in improving student performance, in June 2012, pursuant to Education Law §211-b and §211-c, the Commissioner appointed a Distinguished Educator (DE) in Buffalo, effective August 1, 2012. The DE was reappointed to additional one-year terms in both 2013 and 2014. An appointed DE has statutory authority to assess the district's programming; to assist it in planning; and to make recommendations to the board, on which the DE serves as an ex-officio non-voting member.

Further, over the past year, SED has worked extensively with Buffalo and has designated four of Buffalo's schools as "Out of Time" schools. "Out of Time" schools are those that have not met the required academic progress for removal from Priority School status in the three years since identification as Persistently Lowest achieving and/or Schools Under Registration Review and are not implementing a whole school reform model, such as a Federal School Improvement Grant or School Innovation Fund model. SED has directed Buffalo to begin phasing out these schools unless viable intervention plans are submitted and has also required that students in the three "Out of Time" high schools be granted immediate access to high-quality programs offered by a neighboring BOCES. SED

provided a summary of the next steps that must be taken with the named schools, including providing SED with an intervention plan for each of the named schools chosen from the following options: (aJ closure of the schools and relocation of the students; (b) phase-out of the current schools and replacement with new schools such as district-created schools or charter schools; (c) conversion of the schools to charter schools; (d) entering into a contract with SUNY to assume responsibility for the students attending the schools; or, (e) entering into Educational Partnership Organization contracts to take over administration of the schools. Buffalo is required to submit plans to SED in January 2015 for Commissioner approval. The plans must meet all of the requirements for the option chosen, evidence thoughtful planning and resou rce allocation, and make the necessary changes for successful implementation of the plan. The Department has similarly required that Syracuse choose from these options for three of its schools, NYC for two of its schools, and Rochester for one of its schools. Additional schools wlll shortly begin this "Out of Time" process.

The Department has provided extensive resources to Priority Schools to implement whole school reform models through the Federal School Improvement Grant (Title I of the Elementary, Secondary Education Act of l965 §l003(g)) program as well as the RTIT supported Systemic School Support Grants. The Department has also provided extensive technical assistance to Districts with Priority Schools through its Project Management initiative, as well as the Department's on-site visits using the Diagnostic Tool for School and District Effectiveness. For those schools that ha ve failed to demonstrate improvement despite these supports and interventions, the Department has required that districts implement one of the actions listed above. Our experience has been that while we have used the full authority available to the Department to address the Issue of struggling schools, the tools available to the Department need to be expanded so that systemic conditions in districts that result in struggling schools can be fixed. Without such an expansion of the available tools as proposed below, there is little guarantee that the conditions in newly created schools in these districts, or schools that operate under alternative governance structures within these districts, can be organized in ways that result in substantially higher student achievement.

Although you r letter seeks ideas for driving dramatic improvements in priority and struggling schools, such as those in the Buffalo City School District, we note that many districts across the State also struggle with serious challenges in the areas of governance, fiscal management, operations, and providing appropriate programming and services for students, including English Language Learners and students with disabilities. The Department continues to assist these districts in finding a path to stability and success. For example, in June 2014, in an attempt to address the serious fiscal issues facing the East Ramapo Central School District, the Department appointed Henry M. Greenberg to serve the district as a Fiscal Monitor in an advisory capa city in order to ensure that the district is able to provide an appropriate educational program and properly manage and account for State and federal funds received. On November 17, 2014, Mr. Greenberg delivered his findi ngs and recommendations to the Board and the Depa rtment, which made clear that a fiscal, social and hu man crisis exists in the district. His findings and recommendations, particula rly those involving fiscal oversight and available resources, require the

engagement of the Governor and Legislature, and the Department continues to work with the Legislature on this issue.

Mr. Greenberg recognized that additional State funds are needed to avoid future budgetary crises and to put East Ramapo on a path to long-term fiscal stability. However, he also recommended that any additional funds must include an enforceable mechanism to ensure that resources are allocated fairly. Specifically, Mr. Greenberg recommended that "[aJt a minimum, there must be a vehicle to override, in real time, unreasonable decisions by the Board and Superintendent and ensure that the District conducts its affairs in a transparent fashion." The Board and Department fully support this type of multi· faceted approach to the complex probl ems fadng East Ramapo and hope the Governor will propose such an approach in his Executive Budget.

In addition, the Department, in partnership with the Office of the Attorney General (OAG), has taken swift and strong action to address the plight of students across the State, including undocumented and unaccompanied students, whose attempts to enroll in public schools and take advantage of their right to a free public education have been delayed or denied in violation of State and federal law, as well as SED guidance. The Department has issued guidance to districts on their obligations regarding enrolling students and making residency determinations and to specifically address the circumstances of unaccompanied minors who have recently entered the country in larger numbers. In October 2014, the Department also held three regional meetings with school officials, community-based organizations and advocates on Long Island and in Rockland and Westchester Counties to provide technical assistance on the legal obligations of districts around enrollment and the rights of students and parents, and to provide information on the due process rights of impacted students, including the right to appeal district enrollment decisions directly to the Commissioner. On October 23, 2014, OAG and SED announced a review of district enrollment procedures for unaccompanied minors and other undocumented students to examine whether students are being denied their constitutional right to an education. The review initially focused on districts in four counties (Nassau, Suffolk. Westchester, and Rockland) experiencing the largest influx of unaccompanied minors, and has expanded to include districts Statewide about which SEO and OAG have received complaints regarding enrollment. At its December 2014 meeting, the Board adopted amendments to §100.2(y) of the Commissioner's regulations to codify applicable federal and State laws, as well as existing Department guidance to districts, in order to ensure that unaccompanied minors and undocumented youths are provided their constitutional right to a free public education.

Based on the above, it is clear that, when districts face significant challenges in the areas of governance, fiscal management, equity and access, attention is diverted from the critical mission of educating their students and supporting their teachers and leaders. It is our belief that any plan for intervention and support in struggling schools include careful consideration of these issues to ensure that the State develops a comprehensive, effective system for helping districts address these significant challenges, thereby allowing them to focus on preparing all students for success in college and careers.

To enhance the State's ability to require and implement strong interventions in chronically underperforming districts, the Legislature and Governor should consider passing the Regents Priority Bill on Support and Intervention in Chronically Underperforming Schools. Certai n school districts in this State are continually and chronically underperforming and are characterized by yea rs, or even decades of consistently low academic performance, rampa nt fiscal instability, or both. Fiscally, these districts fail to exercise appropriate fiscal management by failing to take the actions necessary to keep the district's budget in balance and/or maintain appropriate and consistent fund balances. Our Regents priority bill would put these chronically underperforming school districts into three levels of academic and/or fiscal restructu ring status, in an effort to provide them with the tools and supports they need to get them back on track and remove them from oversight.

The Governor and Legislature could also implement a model similar to that used in Massachusetts for those districts and schools that have been identified as chronically underperforming. In Massachusetts, the State Legislature authorized in statute the appointment of a receiver for any school or district designated as chronically underperforming. The receiver is authorized to take numerous aggressive actions to increase efficiency and dramatically improve student achievement (see MASS. GEN. LAWS c. 69, §lK (2010)).

Charter Schools

7. Charter schools can be an effective choice for parents and lead to educational innovation if they are held accountable for increases in student achievement and outcomes.

The Board of Regents believes that parents must be afforded the opportunity to have their children educated In a high quality educational program, whether that is in a charter school or a district school. Accordingly. the Board of Regents has supported expanding the number of high quality seats in charter schools. As part of its successful Race to the Top Application, in 2010, the Department worked with the Governor and the Legislature to enact historic legislation that more than doubled the cap on the number of charter schools in the State (Ch. 101 of the Laws of 2010). At this time, the cap on the number of charter schools was also adjusted to allow both SUNY and the Regents to issue 130 charters through a RFP process and Education Law §2852(9) was amended to add a further limitation that in each case, no more than 57 of the 130 charters could be in NYC.

There should be no arbitrary barriers to increasing the number of high quality seats in charter schools. Although NYC has not reached the cap established in the 2010 law, it Is likely that the cap will be reached shortly. To prevent an arbitrary barrier, the Governor and Legislature could eliminate the regional distinctions under the current cap (as high quality charter applications have been greater In NYC than In the rest of the State to date), or raise the cap on charter schools in NYC because there is a strong demand in NYC. Moreover, the Legislature and the Governor could strengthen the law to require charter schools that do not improve student performance to close and any closed charter schools should not be counted toward the cap.

In 2010, the charter school law was further amended to require that enroJlment and retention targets be established for students with disabilities, English Language Learners and students in poverty in charter schools, and to make the repeated failure to meet or exceed those targets a ground for termination of the charter. The Board of Regents remains committed to enforcing these targets to ensure that all students have an equal opportunity to receive a high quality education in charter schools.

Use ofTechnoloif and Virtual Learnini:

8. The Department and the Board of Regents support the use of technology to improve education. In fact, SEO used federal RITT funds to implement a Statewide virtual learning strategy to develop on-demand virtual learning Advanced Placement (AP) courses for low-wealth/high-need students, schools, and districts in New York State. New York is a national leader in the use of technology to provide high quality, college level courses. Every student deserves to be prepared for college and careers. not just those who live in districts that can afford to offer AP classes.

Recognizing the importance of technology in providing a range of quality coursework for students, the Board of Regents has also approved the use of blended online learning in the Commissioner's regulations. Specifically, 8 NYCRR §100.S(d)(lO), effective July 15, 2011, requires school districts, registered nonpublic schools and charter schools that choose to provide their students with instruction by means of online or blended coursework to ensure the rigor and quality of such courses by requiring that they: are aligned with the applicable New York State learning standards for the subject area in which instruction is provided; provide for documentation of student mastery of the learning outcomes for such subjects, including passing the Regents examination in the subject and/or other assessment in the subject if required for earning a diploma; provide for instruction by or under the direction and/or supervision of a certified teacher (if instruction is to be provided by a school district, BOCES, or pursuant to a shared service agreement), or of a teacher of the subject area in which instruction is to be provided (in the case of a registered nonpublic school or charter school); include regular and substantive interaction between the student and the teacher providing direction and/or supervision; and satisfy the unit of study and unit of credit requirements in section 100.l(a) and (b) of the Commissioner's regulations.

Mayoral Control

9. The Board of Regents supported the adoption of mayoral control in NYC. Mayoral control in NYC should be renewed. Whether mayoral control should be extended to other cities is a local issue that should be decided based on local conditions.

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10. Given the fiscal climate and constraints in this State, as well as patterns of declining enrollments, many school districts, particularly small, rural districts, are

threatened by a decline in educational opportunities and high-quality programs for their students. The Board of Regents has long promoted the provision of certain key services on a regional basis to provide school districts new and innovative models to provide higher quality educational opportunities to students through cost-effective and efficient services, including shared business offices, shared transportation, etc.

The Department has a Regents priority bill that has been introduced for the past three legislative sessions seeking to establish regional high schools to provide districts with the opportunity to work together to establish a regional secondary school, to allow for improved educational opportunities and more cost-effective service delivery in 2012, 5.7486; in 2013, 5.4184; in 2014, S.4184-A/A.7149-A). Regional secondary schools have been used in rural areas of other States, including Massachusetts, to ensure that students in rural communities retain access to specialized coursework, such as Advanced Placement course work or Career and Technical Education programs. This regional approach will help rural communities adjust to declining enrollments while maintaining community identity through the continuing role of the local elementary school.

School district reorganization also provides the opportunity for two or more contiguous school districts that meet prescribed criteria to merge into a single district. The State has provided incentives for reorganization through additional Operating and Building Aid. In recent years, multiple efforts to reorganize have failed, with differential tax impacts on the reorganizing districts often cited as a cause for the failure. While the 2014-2015 Enacted Budget included a provision that will make it easier for some school districts to reorganize by phasing-in impact on tax rates of newly reorganized school districts, there are still a number of statutory and fiscal barriers to mergers.

The Governor recently proposed that $500 million of the settlement funding available to the State be provided to local governments to promote shared services and consolidations. In agreement with this concept, and in order to encourage reorganizations that are beneficial to students, the Board of Regents recommended in their 2015-2016 State Aid Proposal that the formulas that are used to incentivize reorganizations be enhanced to help ease changes in tax rates for reorganized school districts. This could include linking the Reorganization Incentive Aid formula to Foundation Aid, rather than the 2006-2007 Operating Aid. In addition, the State could provide additional incentives for regionalization of services in the State budget.

Appointment illld Selection Process for the Board of Rer:ents

11. The Board of Regents has been in continuous existence since 1784, when Alexander Hamilton was a Regent, and was most recently continued in 1938 in Article XI, §2 of the New York Constitution. Under Article V, §4 of the New York Constitution, the Regents are the head of the State Education Department and appoint the Commissioner of Education who serves at their pleasure.

The selection and appointment process for the Board of Regents is within the control of the State Legislature. The Board of Regents does not recommend any changes to the selection and appointment process.

Selection Process for the Replacement of Commissjoner

12. Under Article V, §4 of the New York Constitution, the Board of Regents appoints the Commissioner of Education. At its December 2014 meeting, the Board publicly explained the qualifications needed for the next Commissioner. The Board expressed a desire for the new Commissioner to continue to focus on the Board's overall commitment to raise standa rds for all New Yorkers and close the achievement gap. It was also clear that the qualifications would include continui ng the prioritization ofEnglish Language Learners, immigrants, and students with disabilities; expa nding the work on multiple pathways to grad uation, career and technical education and STEM opportunities; and enhancing pathways in humanities and the arts. The Board further explained that candidates need to u nderstand the importance of access to higher education, rigorous teacher preparation, and high quality professional development.

The Boa rd publicly described the selection process, including the composition of the search committee and their intention to i nterview prospective search firms to ensure that the selected firm will only recniit qualified candidates that meet all of the characteristics d escribed above. The Board explained that the search committee will report back to the full Board with a short list of candidates who will be interviewed and shortly thereafter, the Board hopes to appoint a successor Com missioner that meets all of the qualifications d escribed above.

The Board of Regents welcomes input from stakeholders regarding the selection criteria for the next Commissioner of Education.

School Fundini: to Improve Academic Performance

We believe that for the educa tion reforms implicit in your questions to be effective in improving student outcomes, these reforms must be coupled with investments such as those proposed by the Boa rd of Regents. The use of average per pupil spending to d escribe education in New York obscures deeply d isturbing inequities in resources between the highest-need and lowest-need d istricts - which have only grown in the years since the fiscal crisis. The New York State school finance system needs to be equitable and provide support to our highest-need school districts. The 2015-2016 Regents State Aid Proposal is designed to provide our highest-need districts with support targeted at addressing their needs as well as additional funding to help them overcome the effects of the Great Recession and prepa re their students for college and career success. In it we propose:

- Transition Operating Aid: The funding approach for our public schools must ensure that all districts have the resources necessary to provide enriching academic programs that prepare students for success in college, careers, and life. The Board

recommends a blended State aid approach through a Transition Operating formula that features a combination of Gap Elimination Adjustment (GEA) restoration and new Operating Aid allocated according to the principles underlying Foundation Aid.

- Support for English Language Learner (ELL) Programs: If we truly intend to close the achievement gap, we must increase our support for the estimated 200,000 ELLs in New York State. These students make up a significant percentage of New York's lowest performing students as measured by State tests and are disproportionately represented among students who fail to complete high school within six years. Accordingly, the Board recommends an additional $86 million in aid for districts serving ELLs to support team teaching approaches, instructional resources and supports to improve instructional practice, and substantial and sustained opportunities for all teachers and administrators to participate in meaningful professional development.
- Support for Districts Experiencing Increases in Enrollment: The Board recommends a two-tiered approach to provide relief for school districts that have experienced recent enrollment increases that are not accounted for In existing formulas, including $30 million for districts with new students and an additional $10 million to be provided to districts to address the recent arrival of unaccompanied immigrant children. Without these funding increases, we fear districts will be forced to make troubling cuts in program such as we are already seeing in places like Roosevelt Union Free School District on Long Island. Many of the districts receiving the most unaccompanied minors are high-need districts and should not be forced to choose between providing a quality education to incoming students and preserving core academic programs for the district as a whole.
- Increased Support for Expanding Career and Technical Education (CTE) Programs: One of the best ways we can make more of our children ready for college and career is by expanding access to Career and Technical Education. Programs like PTECH prepare our kids for the jobs of tomorrow, keeping them engaged in the classroom through graduation and preparing them for college. Unfortunately current funding formulas disincentivize many high-needs districts from participating in these programs because they have not been adjusted to reflect inflation since 1990. After voting at its October meeting to provide Multiple Pathways to graduation – including a "4+1" option that will allow students to take four Regents exams and a comparably rigorous CTE exam – the Board recommends enhanced special services aid for CTE Pathways programs operated by the Big Five and non-component school districts and modernized BOCES Aid for CTE Pathways programs.
- Expanded Access to Full-Day Prekindergarten Funds: The Board recommends building on last year's investment in full-day prekindergarten by expanding funding by $251 million as the first step of a multi-year plan to move to a consolidated and truly universal full-day program. The Board's proposal would add $70 million to the $300 million received by New York City last year, and add approximately $180 million to the rest of the State to supplement the $40 million received last year. These funds would allow NYC to continue to expand its historic investment in pre-kindergarten while allowing districts across the State to do the same. This

investment should be part of an alignment of the State's existing pre-kindergarten programs to achieve rigorous quality standards, streamlined data reporting, and consistent regulations regarding staffing and facilities.

- Provide Support for Instructional Improvement Programs: The Board recommends $80 million in targeted funding for instructional improvement programs that leverage the most effective teachers as mentors and coaches for their colleagues, such as expansion of the Strengthening Teacher and Leader Effectiveness (STLE) Program, which has been a central part of the effort to prepare teachers and school leaders to teach college- and career-ready standards.
- Settlement Fund Priorities: The Board recognizes the State's receipt of approximately $4.8 billion in non-recurring legal settlement funds as a unique opportunity to make $678 million in one-time educational expenditures and investments to bring our instructional programs to the world class standard our students deserve. The Board recommends $360 million for payment of existing school aid liabilities to keep the promise on claims already submitted by districts; $238 million to support acceleration of prekindergarten payments related to the new Statewide Universal Full-Day Prekindergarten program, which was structured in such a way that school districts were required to pay for a majority of the first year of the program themselves before receiving any State funds; creation of a $50 million CTE Technology Facility Construction Fund to support upgrades to facilities necessary to support high-tech training programs; and $30 miilion to purchase optical scanning voting machines to support districts' efforts to come into compliance with unfunded mandates in the Election Law.

Additional Issues for Consideration that Effect New York's Stydent Performance

1. School Segreaation

One significant area that is not addressed in your questions is school segregation. The Legislature and Governor should be aware that a 2014 study by The Civil Rights Project at UCLA found that New York State has the most segregated schools in the nation. School segregation leads to unequal opportunity. Studies indicate that low-income and minority students perform better academically in diverse schools than in racially and socioeconomically segregated schools, due in large part to fewer disparities in opportunities and resources, including differing levels of teacher qualifications. teacher experience, and teacher effectiveness among schools. School segregation exacerbates existing patterns of housing segregation as parents with means choose neighborhoods based on the availability of zoned schools with higher proportions of affluent children, often exacerbating gentrification patterns around particular school zones.

Just as the consequences of segregated schools are clear, so are the benefits of diverse schools. They offer all children the opportunity to develop the kind of critical-thinking skills that come from the perspectives expressed by students from different backgrounds and can foster welcoming, safe environments where all people feel valued.

Earlier this week, State Education Commissioner John B. King, Jr announced that Socioeconomic Integration Pilot Program grants of up to $1.25 million each will be used to increase student achievement in up to 25 of the State's low-performing Priority and Focus Schools through increased socioeconomic integration.

Title I Focus Districts with poverty rates of at least 60 percent and at least 10 schools in the district are eligible to apply for the grant. Up to 25 Title Focus or Priority schools will be funded for this pilot program.

A district may apply for grant funds to implement one of several models intended to increase achievement of low socioeconomic status (SES) students and attract higher SED students, including students from other school districts based on Inter-district choice agreements, to voluntarily enroll in the Focus or Priority School Program design may include but is not limited, to:

- Dual Language programs designed to meet the needs and languages of English Language Learners (ELLs) living in proximity to the school;
- School-side Enrichment Model;
- Career pathways programs based in whole or part at local institutions of higher education (IHE);
- STEM programs that include a summer residential experience of no less than 1full week at a post-secondary institution;
- Themes such as the arts, which include the visual arts, dance, music, theater, public speaking and drama; or
- Montessori or other proven, student centered educational models,

There are several successful programs in other states that promote socio-economic integration. For example, controlled choice has had a proven impact on school improvement in Lee County, Florida.[6] In addition, Richard Kahlenberg has studied the significant improvements in achievement for, among others, African-American children in Cambridge, MA and magnet schools in Wake County, North Carolina.[7]

The Governor and Legislature could act to promote greater socioeconomic integration by expanding the Rochester Urban-Suburban program or programs such as those in place in other states to other regions of New York and requiring districts to establish enrollment policies designed to increase socioeconomic integration.[8]

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[6] MICHAEL ALVES, CHARLES WILLIE AND RALPH EDWARDS, STUDENT *DIVERSITY,* CHOICE AND SCHOOLMPROVEMENT, (Greenwood Press, 2002).

[7] RICHARD D. KAHLENBERG, TURNAROUND SCHOOLS THAT WORK: MOVING BEYOND SEPARATE BUT EQUAL, [Century Foundation, 2009).

[8] Geoff Decker, *Jn Brooklyn's District 13, a Task Force Aims to Enolneer Socioeconomic/nte9ration,* February lZ, 2014, available at http·//ny.chalkbeatorg/Z014/02/12/ jn-brook!yns-d jstrict-1 3-a-task-force-aims-to-eogineer-socioeconomic-integration /#.VKG jWJ4AKA (last visited December 30, 2014),

2. DREAMers Act

Current State law, while providing undocumented immigrant students with in-State tuition rates at our public colleges and universities, prohibits these students from receiving State financial aid, which, in effect, equates to a denial of access to higher education. Our society and our economic growth depend on a vibrant, well-educated workforce. Passing the DREAMers Act would ensure that these undocumented immigrants are no longer denied access to the education they need to fully participate in our economy and would ensure that the full range of possibilities are available to our P-12 students as they look beyond high school graduation.

Thank you for the opportunity to share our thinking and recommendations on these critical issues. As we continue our work to ensure that all students in New York State graduate from high school ready for college and careers, we look forward to continuing this critical dialogue with you and with our stakeholders across the State.

Sincerely,

Merry! H. Tisch
Chancellor
Board of Regents

Elizabeth R. Berlin
Acting Commissioner (Effective 1/3/15)
New York State Education Department

EXHIBIT "B"

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The Central Crisis in New York Education

By THE EDITORIAL BOARD JAN. 4, 2015

Gov. Andrew Cuomo's forthcoming State of the State address is expected to focus on what can be done to improve public education across the state.

If he is serious about the issue, he will have to move beyond peripheral concerns and political score-settling with the state teachers' union, which did not support his re-election, and go to the heart of the matter. And that means confronting and proposing remedies for the racial and economic segregation that has gripped the state's schools, as well as the inequality in school funding that prevents many poor districts from lifting their children up to state standards.

These shameful inequities were fully brought to light in 2006, when the state's highest court ruled in Campaign for Fiscal Equity v. State of New York that the state had not met its constitutional responsibility to ensure adequate school funding and in particular had shoitchanged New York City.

A year later, the Legislature and Gov. Eliot Spitzer adopted a new formula that promised more help for poor districts and eventually $7 billion per year in added funding. That promise evaporated in the recession, spawning two lawsuits aimed at forcing the state to honor it.

A lawsuit by a group called New Yorkers for Students' Educational Rights estimates that, despite increases in recent years, the state is still about $5.6 billion a year short of its commitment under that formula.

A second lawsuit was filed on behalf of students in several small cities in the state, including Jamestown, Port Jervis, Mount Vernon and Newburgh. Itsays that per pupil funding in the cities, which have an average 72 percent student poverty rate, is $2,500 to $6,300 less than called for in the 2007 formula, making it impossible to provide the instruction other services needed to meet the State Constitution's definition of a "sound basic education."

These communities and others like them are further disadvantaged by having low property values and by a statewide cap enacted in 2011 that limits what money they are able to raise through property taxes. And last year the New York State United Teachers union said that the cap had been particularly harmful to poorer districts.

These inequalities are compounded by the fact that New York State, which regards itself as a bastion of liberalism, has the most racially and economically segregated schools in the nation. A scathing 2014 study of this problem by the Civil Rights Project at the University of California, Los Angeles, charged that New York had essentially given up on this problem. Itsaid, "The children who most depend on the public schools for any chance in life are concentrated in schools struggling with all the dimensions of family and neighborhood poverty and isolation."

The Cuomo administration seemed not to acknowledge these issues in a letter last month to the chancellor of the New York State Board of Regents and the commissioner of education in which it promised "an aggressive legislative package" to improve education in the state. Among the dozen issues it said it wanted to address were strengthening the teacher evaluation system, improving the process for removing low-performing teachers and improving teacher training.

The regents agreed that these were legitimate issues needing attention. But they also noted that these reforms were unlikely to improve the schools unless they were paired with new investments along the lines of the $2 billion in extra spending that the regents had recommended earlier. No less pointedly, they urged Mr. Cuomo to address the "deeply disturbing inequalities in resources" that exist between poor and wealthy districts, as well as the destructive pattern of segregation. Mr. Cuomo must take on both of these central issues.

Meet The New York Times's Editorial Board »

A version of this editorial appears in print on January 5. 2015. on page A16 of the New York edition witt1 the headline: The Central Crisis in New York Education.

EXHIBIT "C"

NYS ALLIES FOR PUBLIC EDUCATION

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NYS Allies for Public Education

January 5, 2015

Dear Governor Cuomo.

We, the undersigned members of NYS Allies for Public Education (NYSAPE), are writing inreponse to the December 1Bth letter (http:lwww.capitalnewyork.com/sil lils/delault/filesleducation%2520rel orm%25201etter.pdl) to the Commissioner and Chancellor that Mr. Malatras wrote on your behalf. By responding to the questions posed, we want to separate fact from misinformation. We are also very troubled by several qUMlions that were not included in your letter which continues to demonstrate a disconneel between your office and the public.

We strongly believe in the importance and power of public education for all children. VVhile the vast majority of our students are successful, we cannot rest until our struggling students are supported and given the needed resource& to be successful.

Unfortunately, you have based your vision of school reform on a misguided agenda. Tiial agenda inciucles ineffective &tratagies for school improvement. If current policies are not corrected. more slate resources will be wasted and our students' futures will be put at even more risk.

Lei's start al the beginning or the leller. The New York State Education Department (NYSED) has established capricious and inaccurate measures of proficiency and college readiness. The proficiency rates that are quoted in the letter (34.8% and 31.4%) reflect arbitrary cut scores (http://www.washingtonpost.com/blogs/answer-sheetlwp/2014/041 291!he-scary-way-common-core· lest-cut-scores-are-selected/) set by Commissioner King in 2013. In2012. pro6dency rates in ELA and Math were 55% and 65% by the cut scores set by then-Commissioner Steiner. based on a college readiness study that he commissioned in 2010. Priorb 2010, proficiency rates were higher still under commissioner Mills. Inshort, proficiency is an arbitrarily defined standard, and there is good evidence to suggest that NYSED has now set the Common Core standards unreasonably high, for political rather than pedagogical reasons.

We understand that you believe that over the past four years "much has been done to improve public education. ·We disagree. Our high school graduation rate has barely budged since 2011, and the percentage of students earning a Regent& diploma with Advanced Designation has been stagnant for several years and decreased this year. During the past four years.the graduation rate

for !he state's English Language learners has dropped by 6 percentage points.

The Common Core proficiency rates were essentially fiat between *year* one and two of the new tests (as were the rates on the final two years of the prior test) and our state's SAT scores have decreased (hl!p://medla.cottegeboard.com/dlgitalServices/pdf/researchl 20131NY_13_03_03_01.pdf) since 2010. tn short, although we have engaged in four years of market-based corporate reforms-expansion of charter schools, evaluating teachers by student scores, imposing the Common Core standards and more time-consuming, and developmentally lnappropriate tests-there is no evidence !hat New York schools are improVing. and there is some eVidence that resulls are moVing backward instead. We believe that there is sufficient evidence to change course.

Clearly the public agrees. The 2014 Times Union/Siena College poll (hllp:/www.timesunion.comf7dayarchivelitem/Times-Union-Siena-College-Education-Potl-30096.php) indicates that 46% of New Yorkers oppose lhe implemenlation of the Common Core standards. compared only 23% who support them. while 46% oppose the current use of standardized testing, compared to 29% who support il We believe it is time lo listen to your constituents. rather than double-down on damaging policies that are hurting our children. It is our intent, by answering the questions thal your office posed, to help you advocate for a better and wiser course in the months ahead.

Oueslion 1

How is current *teacher evaluation system credible when only* one *percent* of teache are *rat11d ineffective?* The *NYC system was negotiated by Commissioner King d/F11ct/y* and *no* one claims *it is an accurate reflection of* the *reality of the stale of education* in *NYC. IMlat should the percentages be between classroom observations (i.e. subjective measutes} and slate* assessmen/s, *including state tests (i.e. objective measures)? Whal percent should be set in Jaw versus collecUve/y bargained? Currently, the scoring ·bands and "curve•*are *set locally for the 80 percent subjective measvres. What shavld the scaring bands be for* the *subjective measure and should the stale set* a *standard scoring band? In general. how would yau* change *the law* lo *cons/lvct* a *n'gorous slate-of-the-art teacher evaluation system?*

The first question implies that the teacher evaluation system called Annual Professional Performance Review (APPR). which you insisted be quickly adopted, is deeply flawed. We strongly agree. When ii was put in place. over one third of the principals of New York State signed a well-documented letter (http:/lwww.newyorkprincipats.orglappr·paper) explaining why APPR would haw negative consequences for students and harm the profession of leaching. Since that time, the evidence against evaluating teachers by test scores has only increased.

The New York State School Boards Association recently passed a resolution against tha use of sludent test scores for teacller and principal evaluations, and the National Association of Secondary School Principals has also disavowed (http://www.nassp.org/Content.aspx?topic=Value_Added_Measures_in_ Teacher_Evaluation) their use ror this purpose. lh April of 2014. the American Statistical Association clearly outlined how unreliable this methodology is (http;l/www.amslalorg/poticy/pdfs/ASA_VAM_Slalemenl.pdf). Opposilion to !he evaluation of teachers by test scores is growing among parents as well. with only 31% approving of !he practice (htlp:/lpdkinll.org/noindex/PDKGallupPoU_Oct2014. pdf) innational .

Your question implies that test-score based evaluations are good because they are "objecttve"-thal is, generated by an algorithm devised by the New York Slate Education OepartmenL We strongly suggest that you review the evidence-jusl because a number <:an be generated based on other numbers does not make iia valid measure of performance. To revise APPR to give more weight to test scores would be a grave mistake.

You seem troubled that only 1 *in* 100 teachers were found to be incompetent, according to the APPR evaluation system. Do you have research that indlcates that the number should be higher or lower? We strongly suggest that you return the decision on how to evaluate teachers to local education officials and each community's elected school board. Your recent veto (hllp;/lwww.schoolnetl aw.coml2014/121governor-cuomo-vetoes· his-own-common-core-billl) of your own Common Core APPR bill demonstrates that *your* office does not have a clear understanding of teacher evaluation, end the problems associated with Common Core lesling. Albany bureaucrats should not be in the business of designing evaluation systems and arbitrarily determining what acceptable outcomes for each district should be.

Ouestlon 2

How would you address the problem of *removing poor-pefforming educators when lha current 30ZO-a process* makes *it virtually impossible* to do *so? Likewise, how would* you *change Jhe system in New Yori< City where poor-performing educators, with disciplJnary problems, continue to* be *paid in /he absent teacher reserve pool as opposed* lo *being lermlneted?*

No one wants incompetent teachers in the classroom. Tenure assures due process, not a job for life. You have been misinformed if you believe that the removal of teachers using the 3020a process is impossible.

http://www.nysape.org/nysape-response-letter-to-governor-on-public-education.html 1/13/2015

The 3020a proceeding, which was streamlined in2012 (http:l/www.ecs.orglecslecscatnsflccOS2fc585bae58c87257979006e0996/989aclb71 5e19fOb872579d6007447d8?0penOocument), can lead to the termination of a teacher in 125 days or less. Teachers can be terminated for insubOrdination, Immoral character. conduct unbecoming a teacher, inefficiency, incompetency. physical or mental disability, neglect of duty, or the failure tO maintain certification.

Most experts say the real crisis in teacher quality, specifically in our high needs districts, is teachar turnover (http://www.nydailynews.coml opinion/teacher-tenure-wrong-target-artlcle-1. 1983626). According to a study of New Yorll City schools (htlp://cepa.slanlord.edulsiles/defaulVfileS/4.full_.pdf) by researchers Ronfeldt, Loeb, and *WfcoK,* "teacher turnover has a significant and negative impact on student achievement in both math and ELA. Moreover, teacher turnover is particularly harmful b the achievement of students in schools with large populations of low-performing students of color.'

We will not attract and retain the most talented teachers. especially in high-needs schools, by removing their right to due process.

Question 3

What changes would you make to the teacher training and cerfllication process to make *it* more *rigorous*b *ensure* we *recruit the best and brightest teachers?* Do *you agree that there should be "ona-time competency t11st for all teachers currently in the system? What should be done tO improVe teaching education programs across the state?*

We also want "best and the brightesr to be recruited to teaching, which happens by making the profession more attractive to highly talented people who have a desire to commit their lives to guiding and instructing children.

Since 2012 and the onset of "reform", teacher morale is al a 20 year low (http://www.nytimes. com/2012103/08/l!ducationlteacher-morale-sinks-survey-resulls-show.html). New reports have shown that there has been a dramatic drop in enrollment in teacher preparation (http://www.edweek.orgl ewlarticles/2014110122/09enroll.h34.hlml) programs-with a 22% decline in New York State in just the last two years. This suggests that the overwhelmingly negative rhetoric targeted to teachers and the assignment of blame for any and ell problems in the wrry our schools are run have made the profession far less attractive. If the current trends continue, there will soon be a critic.al shortage of teachers, especially in STEM, special education and foreign languages -areas in which itis already very difficult to find sufficient candidates.

If you are interested in advancing teacher education programs. practicing educators should be surveyed, especially recent graduates, to ascertain how their preparation could have been improved. The idea that th11 quality of a teacher education program can be assessed by using the student test scores of Its graduates is even more unreliable than evaluating teacher quality by means of student test scores. Likewise, creating a single high-stakes 'test" to weed out practicing leach<!r& Is a gimmick, not a sound basis for judgment.

Questlon 4

Wllat ffnancial or *other innliVes would you provide* lo *high-perlormirig teachers and would you empower administrators tO make those decisions?*

The idea that teachers should be financially rewarded when their students receive high test scoraa has been proposed for decades. despite the fact that numerous studies have shown that merit pay does not work. induding a recent three year study (http://news.vanderbitt.edu/2010109/teacher-performance-payl) conducted by the National Center on Performance Incentives at Vanderbilt Univeraity.

Merit pay would be a waste of taxpayer dollars that would be far better spent on proven reforms.

Question S

Do *you think the length* of *a teacher's probationary period should be extended and shoukf the stale create a p10gram whereby teachers ha*Veb *be recertili&d every several yea.* ke *lawyero and other professions? What other changes would YoU propose* /o *th11 probationary period before* a *teacher* is *r,;ranted tenure?*

New York State has a rigorous pathway for teacher certification. In order to earn Initial Certification, a candidate must be awarded a bachelor's degree, pass no fewer than three certific.ation exams. spend a semester of mentored student teachrng with a certified educator, pass a written exam, and comple1e the performance -based asseasmant known as the edTPA.

In order to maintain teaching certification and progress to the required Professional Certiflcalion, teachers must have 3 years of satisfactory teaching experience. including one year or mentorin9_ Additionally, they must eam a Master's Degree. Once teacher.> have completed all of these requirements and obtained their Professional Cenificate, they mU&I accrue 175 hours of additional professional development every five years.

A three-year probationary period during which they are frequently observed and given feedbad< from principals and other certified observers provides ample opportunity for a school district 10 assess an educator's professiOnalism, growth and ability to incorporate best pracUces into his or her instrucUon. It is not unusual for that probationary term to be extended to four °''even five years if there are doubts that sufficient progress has not been made. During probation. many struggling teachers leave the profession through the resignation process, so that fewer need to be formally dismissed

Although teachers are not required to undergo recertification, they are required to enga9e in ongoing professional development and yearly evaluations, which is comparable or goes beyond the requirements of other. high level professions. local sdlool districts should be encouraged to continue to develop robust programs and protocols to monrtor and support both *new* and veteran teachers.

Question 6

INhat steps would you *take* b *dramatically improve priority or struggling schools that condsmn* gensralion *of kids* b *poor educations and. thus poor life prospects? Specifically, what should* we *do about /he deplorabls conditions of* /ha *education system in Buffalo'?*

The current practice of shutting down schools that are deemed failing is not an effective long-term strategy. Replacement schools usually do not serve the students in the so-called failing school. These displaced students then remain in a phase-<>ut school with fewer resources, and drop out, or are displaced to another school, with an even higher concentration of at-risk $ludenls. thus continuing the cycle of school failure and closure,

Your question is based on the false assumption that schools are solely responsible for the outcomes of poor and disadvantaged students. Neither high-stakes testing, the Common Core, or the continual closing of schools can fix the systemic problems of our high-needs schools. NY Stale has one of the most inequitable funding systems In the nation (http://schoolfinance101. wordpress. coml2013105/09/ctass·size·funding-ineiiuity·in-ny-state-ny.Qly/). despite the decision of the state's highest court Inthe Campaign for Fiscal Equity lawsuit that the funding system should be reformed. You have refused to address this inequity-schools with the greatest needs continue Lo receive the least resources and support

As a result, class sizes Inour highest need districts have grown each year. Let's take Buffalo as an example. InBuffalo, many kindergarten classes (http://www.bulfalonaws.com/cily-region/bulfalo-schoolboard-approves-proposal-10-cut-kindergarten·class-sizes-20141022) have grown to 30 students or more, compared to a statewide average of twenty (http://www.p12.nysed.govArSlpmf/2011-12/2012-avg-class-slze.pdf) students per class. InNew York City, class sizes have increased sharply since 2007, and last year they ware the largest in 15 years(http://www.wnyc.org/story/opini on-de-blasio·must-put-reducing·class-size-firsll) in kindsrgarten Ihrough third grades. Ilyou are truly interested in improving outcomes in our highest needs schools. these schools must be provided with the resources b reduce class size, a proven reform that benefits all students, but especially thosa most at risk.

In adoition. providing resources for health services, counseling, after school child care and recreational programs Lo reduce truancy and improve at1endance would likely haw a positive Impact on student learning.

QuestIon1

Whal is *your vision for charter schools? As you know, in New York City the CUITl!nl charter cap is* close *to* being *ltlached, so woo/d you Increase the charier school cap? To what? What other* reforms *would* you *mnke* lo *impmve charier schools' ability to* seNe a// *students?*

The char1er cap should not be raised. Many researchers including MaCke Raymond (http;//www.washlngtonpost.com/blogs/answer-sheet/Wpl2014112/12/major·charter-researcher-causes-slir-wilh-comments-about· market·based-school-reforml). head of CREDO, a pro-charter research organization funded by the Walton Family Foundation, now agree that charter expansion and enhanced "competrtion· do not work to improve public schools. Moreover, charters do not enroll their fair share of high needs students – especially English language learners and special needs students, as acknowledged by the NYC Charter Center (http:ltc4258751.r51,cf2,raCkcdn.com/state·Of-the-sector-2012.pdf) and independent researchers (http://schoolfinance 101.wordpress.com/2013102/16/frorn-portfolios-to-parasil es-the·unfortunate·pallH>f-u-s-charter-school-poticyf). According to the 2010 amendment to the New York charter law, before charters are renewed or allowed ID replicate, they must show they enroll and retain equal numbers of al risk students (http://schools.nyc.gov/NR/rdonlyresl BFe40F-47•A2B4-4AB6-B551 - CEEBFF4EC6B3/109596/new_york_state_char1er_schools_act4.pdf) as the districts in which they are located, and yet neither the Board of Regents nor SUNY have ever rejected a charier proposal on these grounds – despite Iha fact that many charters have sky high student suspension and attrition rates (http:1/www.nydailynews.com1new.york/educat1on/success-academy· fire-parents-fight-disciplinary·policy·ar1ide·1.1438753). Neither SUNY nor the Regents have provided adequate financial oversight, and in 95 percent of charter audits, the State Comptroller's Office has found corruption or mismanagement (htlp:l/populardemocraC'f.Orgtnews/risking-public-money·new-york-charter·school-fraud). Yet when the Deputy Comptroller wrote a letlsr to the state's major charter-school regulators (http:ltwww.qualityeharters.org/authorizer·comparisontstate-by·state-overviews-new-york.html) uking for stronger 011ersight, he received no response.

The recenl approval by the Regents of a charter school started by a 22 year old who faked his educational background (http:llwww.washingtonposlcomlblogslanswer-sheeVwpl 20141111 25/22-year-old·wins·approvaf.to-open-n-y-charter-school-bul his-credentials-now-quest!onedl) only further reveals the inability of authorizers to carry out their current responsiblliiles. no less authorize yet more charters that could waste taxpayer ful'lds. Meanwhile, in New York Cy. where the vast majorify of the state's charter schools are located, about two thirds oflhese privately-managed schools receive more public funding (httpsJ!www.google.com/search?ie=utf-B&oe=ulf·B&q=ibo%252520charters%252520more%252520student%252520fundlng&gws_rd=s&l) per pupil lhan district public schools – a disparity that will grow even worse with the new law requiring that charters receive free space paid for by the city or be provided space within the district's already overcrowded publlc schools. This year, NYC charters are siphoning off $1.3 billion in public funds (http://www.capitalnewyorl<.com/article/clty-halll201410518545418/de-blasio-quietly-adds-hundreds-millions-charters) – while leading to the concentration of the most al-risk students In public schools with fewer resources and less space. It is no wonder that more NYC voters (http:llwww.quinnipiac.edu/news-and-evenl$/quinnipiac-university-polll new-york-citylrelease-detail?ReleaseID=2113) believe the number of charters should remain the same or decrease than be raised.

Question 8

Do *JIOU support using technology lo Improve public etluctilion, like offering* on/in& *AP coufSl!ls by coll&ge faculty* lo *high schools students who do not have any such courses* now, *even though these changes hav& been resisted by education* special *interests?*

The push towards using more technology in public education is not being resisted by special interests; as your letter claims, but instead is promoted by special interests – including software companies eager to get a larger share of tha $8 billion (htlp:llwww.techleaming.comldefault.aspx?tabid ›1DD&entryid 6902Jeducation technology market. There is no rigorous research (https: lwww2.ed.govlrschstaVeval/techlevidence-based·practicesl finalreport.pdf) showing thal more exposure to Ol'lline learning improves student learning or outcomes in K12 schools. and many sludles (http:llwww.npr.org/blogsledl2014106126/3437356561kids-and-screen-time-what-does-the-resaarch-say) suggest that expanding the amount of time students spend in front of computer screens has negalive effects.

Question 9

IN/rat would you do *a/Jou/ mayoral control in NYC and do you support mayoral con/rot in oth&r municipalities? What changes and improvements would you make* ID *NYC Maj/Oral control?*

In genarel, mayoral control is an unproven experiment that has NOT worked to improve NYC schools compared to other large urban districts (http://WWW.classsizematterS.orgl nyc-seconcHo-last-among-cities-in-student-progress· on·the-naeps-sinc.e·2003/J across the country, and should not be expanded across the slateh New York City, the mayoral control law should be amended lo give more local control to the city's residents, by giving the City Council the authority to provide checks and balances, s.ince the city lacks an elected school board. Our democratic system of government relies on the separation of powers, and en omnipotent e)(ecutive Inevitably leads to abuse and poor decision-making. At the sam& time, the new state charter law should be amended, with local conlrol retumed to NYC officials. to enable them to determine whether or not privately run charter schools should receive space at city taxpayer expense.

Quest/on 10

There ere approximal9/y 700 school dislricts in New York many of which have declining enrollment. Do you think we *should restruCl.u"' the current system through mergers, consolidations or regionalization? If so, how would you do It?*

This question implies that through mergers, consolidations. and rigionalization we can improve education while reducing costs. The research, however, contradicts that suggestion. Studies show that (http:l/educalionnorthwest. org/resourcelwhal-does-research-say-about-school-dlstrrct-consolldatlon) consolidations and mergers actually increase costs to districts and there Is typically no gain in academic achievement. The following summary is from Penn State College of Education (http://www.ed.psu.edulcrec/topicslccnsolidation):

sctiool consolidation continues lo be a topic of great concern for many small rural school and districts. 'Mlile advocates for consolidation commonly cite flscal Imperatives based upon economies of scale, opponents have responded with evidence undermining this argument (http:llwww.aasa.org/schooladministratorarticle.aspx?id=13218J and pointing out the prominent position of the rural school in the economic and social development of community. Additionally. evidence continues to build demonstrating the advantages of small schools (http://www.ccebos.org/edwksmallschools 112801.html) in attaining higher levels of sludent achievement. Larger schools, in contrast. have been shown to increase transportation costs, raise dropout rates, lower student involvement in e>rtra-curricuiar acllviUes, and harm rural communities' sense of place.

The consolidation of services is already underway and should be incentivizad when imakes $ense and benefrts students. It is interesting that While you have proposed consolidation for school districts, you have also supported c:harter school expansion, each

of which are considered a separate local education authority or :school district -which appears lo be a contradiction.

Question 11

A• you know, the appointment and sectlon *process* of *the Boarrt* of *Regents Is unique in that, unlike other agencies, selections and appointments are made by the Leglslsture. Would you make Changes b the selection arnl appointment process7 /f* so, *what afl!I they?*

We believe the Board of Regents must stay independent of the executive branch and the Governor should not interfere in matters of education policy. The authority should remain with the legislature to inlerVene when necenary.

There is a fair balance of powers In the NYS Constitution Articles *V* (hllps://WWW.dos.ny.govflnfclconsl ilUtion.htm) and XI (hllps: twww.google.coml#qnys+constilulion+article+i) requiring that the Governor and the Senate have the authority to appoint heads of departmental agencies. and the joint legisla!Ule to elect members of the Board of Regents, which in1urn appoint the Commissioner of Education.

We do believe the nomination of Regent candidates $hould be a more transparent, Indusiv11 proeess, and involve stakeholders from each judicial dlstricl, including parents, educators, students, and local legislators. For the et-large Regent seats, there should be a state-wide committee consisting of parents, educators. and legislators to nominate candidates after assessing gaps that may exist in the Board of Regents' ei<perlise, diversity inbackground and geographical balance.

QuesUon *12*

ChanceRor. the Board of Regents is aboul lo *replace Dr. King: can* we *design an open and transparent sefflellon process so pafl!Ints, teachers and legislators have* a *voice?*

We strongly believe there should be a more rigorous, indusive, and transparent process 10 appoint the next Naw York State Commissioner of Education as well. While the appointment process isat the discretion oflhe Board of Regents as per Artide V (hltps:llwww.dos.ny.gov/infQ/constitution.htm) of the NYS Constitution, the overwhelming dissatisfaction of New Yorkers with the current policies •• and the failure of state education officials to listen to parents and teacllhr- has revealed the need for a new Commissioner who is more responsive to stakeholder needs and concerns.

Questions That Should Be Asked

We were disappointed by the omission of important questions that should have been asked in your letter. During the past year, members of the public, especially parents, expressed serious opposition to the current education poldcies during forums that were held across the state. Those concerns, however, were exclUded from your list Hare are three questions, which are very much on the minds of parents and that we would like to be asked of slate officials.

How will the State Education Department review and modify the Common *Core standards* given *the enom10u• public outcry against the standards and their implementation?*

In October of 2014. Governor, you &aid that you were workin11 to roll the standards back (http://dailycaller.com/2014/10/23/cuomo-continues-to-distance-hlmself-from-common-corel). You recognized that implementation had been rushed and Iha\ there were questions regarding whether the Common Core standards were the best standards for the students of New York State. The public has clearly expressed its dissatisfaction (http:/tww,legislativegazette.coml Articies-Top-Stories-c-2014-07-21-88678. 113122· Plurality-<lf-voters-want·to-halt-Common·Core-curriculum.html). A plurality of New Yorkers believes that the implementation of the Common Core should be halted entirety. Many other slates are now engaging in a thorough analysis of the standards as they make revisions, both large and small. New York students desarve the best possible standards. Pleasejoin us in urging lhe State Education Department to provide a dale when an open review of the Common Core standards will begin inNew York.

How will we reduce the lme *students spend on state standardized 1.,sting?*

Polls consistently report that New York parents do not support the grueling and inappropriate Common Core test5. Time 5pent on state testing has dramatically ballooned (hllp:liscfeeney.files.wordpress.com/2013110/adel phi-lecture-oct13.pdf) since 2012. Last year between 55,000 and 60,000 students (http://insideschocls.org/blogfltem/1000663· scores$lale-tests-indl-up..slightly-29-pass-ela·exam) 'opted out" of the grade 3·8 Naw York State exams. Make no mislaka-this was a deliberate decision on the part of parenti to show how displeased they are with the Common Core exams and the way in which these tests have narrowed and diminished the education of their children.

Your support for reducing the elfeds or lei!scores on students was but a small stepin the right direction. Please join us in asking the State Education Department to provide a plan b radically reduce the me spent on state exams, romng it back *to* 2010 levers, as long as yearly testing Is mandated. Please also Inquire as to when teachers will be allowed to author better assessments, so that the

http://www.nysape.org/nysape-response-letter-to-governor-on-public-education.html 1/13/2015

stale is longer spending millions or taxpayer dollars to corporations that have consistently produced shoddy products.

How will personally identifiable student data be protected?

Data privacy of student's personally identifiable information is still not protected. nor is the privacy legislation that was passed last spring being enforced. While the legislation helped to stop sharing with inBloom, it did not address the concerns or parents of the widespread collection and sharing of their children's personal data that is occurring without their knowledge or consent

Moreover, allowing data-mining vendors to access children's personal data has huge risks. Including to student privacy and safety (http: /WWW.edweek.org/ew/articles/2014/10122109/teamerpronies_h34.html). Yet The State Education Department still has not implemented or enforced the new student privacy law (http://nycpublicschoolparents.blogspot.com/2014/09/commissioner· king-and· nysed-have-failed.html), passed last spring, which requires the appointment of a chief privacy officer who will create a parent bill of rights with public input. As a result, numerous districts and schools throughout the state continue to disclose highly sensitive personal student data to vendors without parental knowledge or consent, and are ignoring several federal privacy laws, including FERPA and COPPA, without enforcement or oversight by the state.

In summary, it is apparent that the punitive education agenda of testing and privatization is not working to improve student achievement and instead is having a deleterious impact on our schools. It is time to change course rather than intensify these policies through requiring more school closings, expanding charters, and putting even more emphasis on unreliable test scores.

What New York badly needs is a new Commissioner with a strong background in public education and a deep understanding of how students learn. He or she should have a healthy respect for local autonomy and the need to work collaboratively with stakeholders. The era of top down, bureaucratic, and monopolistic control of our schools by state officials must end.

We believe that the members of the Board of Regents should be thoughtfully selected with input *from* the communities that they represent. Most importantly, parents and teachers demand appropriate learning standards that allow teachers to focus on learning, not testing. With equitable funding, thoughtful standards, sufficient teacher autonomy, local control, and community support, we know public education will better accomplish what we all want--a brighter future for all students. We also urge you to hold public forums, so you can hear directly from parents, teachers, and other stakeholders how they want their schools improved -rather than remain in a bubble up in Albany, separated from the constituents whose interests you should be dedicated to serve.

Sincerely,

NYS Allies for Public Education