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To be argued by: Jennifer L. Carlson
10 Minutes

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

MYMOENA DAVIDS, by her parent and natural guardian MIAMONA DAVIDS, *et.al.,* and JOHN KEONI WRIGHT, *et. al.,*

Plaintiffs-Respondents,

-against-

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

Defendants-Appellants,

-and-

MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO, SETH COHEN, DANIEL DELEHANTY, ASHIL SKURA DREHER, KATHLEEN FERGUSON, ISRAEL MARTINEZ, RICHARD OGNIBEBE, JR., LONNETTE R. TUCK, and KAREN E. MAGEE, Individually and as President of the New York State United Teachers; PHILLIP A. CAMMARATA, MARK MAMBRETTI, and THE NEW YORK CITY DEPARTMENT OF EDUCATION,

Intervenor-Defendants-Appellants.

Appellate Division Docket No.
2015-03922

APPELLANTS' REPLY BRIEF

SCHOOL ADMINISTRATORS ASSOCIATION OF NEW YORK STATE
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POINT I

THE CHALLENGED STATUTES CLEARLY FALL WITHIN THE DOCTRINE OF POLITICAL QUESTIONS, AS EVINCED BY THEIR CONTINUOUS EVOLUTIONS.

A matter is deemed justiciable when there exists a case or controversy that can be finally decided by a judicial entity as opposed to a political entity, such as a legislative or executive branch. Aetna Life Ins. Co. v. Haworth, 300 U.S.227 (1937); Sedita v. Board of Ed. of City of Buffalo, 43 N.Y.2d 827 (1977). As a matter of policy, the courts will abstain from hearing cases if the allegations are such that the judiciary would be ill-equipped to undertake and other branches of government are better suited to the task. Jones v. Beame, 45 N.Y.2d 402, 408-09 (1978). When "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." New York State Inspection, Sec. & Law Enforcement Employees, Dist. Council 82, AFSCME, AFL-CIO v. Cuomo, 64 N.Y.2d 233, 239-40, 475 N.E.2d 90, 93 (1984), *citing* James v. Board of Educ., 42 N.Y.2d 357, 367.

The courts particularly acknowledge the non-justiciability of cases involving political questions, as they involve "controversies which revolve around

policy choices and value determinations constitutionally committed for resolution to the legislative and executive branches." Roberts v. Health & Hospitals Corp., 87 A.D.3d 311, 323 (1st Dep't., 2011), *citing* 16A Am. Jur. 2d, Constitutional Law § 268. Specifically, the Court of Appeals has been very clear that matters pertaining to the maintenance and standards within a school district are largely not justiciable. James v. Bd. of Ed. of City of New York, 42 N.Y.2d 357, 366-68 (1977).

Moreover, there is a strong presumption as a matter of law that legislation is valid and "...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." Iannucci v. Bd. of Supervisors, 20 N.Y.2d 244, 253 (1967); Federal Comm. Com'n. v. Beach Communications, Inc., 508 U.S. 307, 314 (1993). *See also,* Brady v. A Certain Teacher, 166 Misc.2d 566, 574-575 (Sup. Ct. Suffolk Co. 1995).

With the extensive revisions to the Challenged Statutes in April 2015, there can be no doubt as a matter of law that the issue of public education is a political question that is best left to the Legislature. The Legislature has taken affirmative steps to address the issues contained within the Complaints and a decision by the Court would be an impermissible advisory opinion. In fact, the evaluation statute is still in a state of constant revision through the regulatory process. Should the need arise for further adjustments in the Education Law, the Legislature has had

no qualms about amending statutes. Accordingly, the Challenged Statutes, in any form are the subject of a non-judiciable political question and the Complaints must be dismissed as a matter of law.

POINT II:
THE LEGISLATIVE CHANGES TO THE CHALLENGED STATUTES HAVE RENDERED THE COMPLAINTS MOOT

Dismissal of an action on the ground of mootness is appropriate when the rights of the parties are no longer affected by the alleged statute or regulation due to an intervening change in law because a ruling by the courts on the validity of the original statute "would have no practical effect and would merely be an impermissible advisory opinion." NRG Energy, Inc. v. Crotty, 18 A.D.3d 916 (3d Dept. 2005). Courts are prohibited from rendering such advisory opinions because the doctrine of separation of powers "forbids courts to pass on academic, hypothetical, moot, or otherwise abstract questions." Hearst Corp. v. Clyne, 50 N.Y.2d 707 (1980).

The simple fact of the matter is that the statutes respondents challenged when this litigation commenced no longer exist thanks to the legislative process. In fact, as repeatedly pointed out by the appellant at all stages of this matter, the majority of the Challenged Statutes, as they existed at the time of the data speciously used to create a claim, were no longer in existence within the same capacities at the time the Complaints were filed. As detailed at great length in the

March 23, 2016 brief of Appeallants Cammarata and Mambretti, there were multiple revisions of the Challenged Statutes that had direct impacts upon the allegations within the Complaints that rendered the complaints moot from the outset and with each legislative cycle, the alleged constitutional injuries become further out of reach. The Challenged Statutes at issue here in many cases have been rendered moot several times over by the Legislature based upon the factual allegations in the Complaints, which are based almost exclusively on conclusory allegations and stale data. Most recently, on April 13, 2015, as part of the 2015 Budget Bill, the Legislature enacted extensive revisions to the Education Law, which render Plaintiffs' claims moot as a matter of law.

Plaintiffs acknowledge the changes to the Challenged Statutes, but try to defeat the fact that the claims are moot by trying to minimize the breadth of the changes and repeatedly rely on the concept that the stale data is sufficient to state a claim and the validity of such is a topic for another day. These arguments completely ignore the well settled legal principle that a cause of action can no longer exist when the complained of circumstances cease to exist. Hearst Corp., 50 N.Y.2d 707.

POINT III

PLAINTIFFS HAVE FAILED TO STATE A CAUSE OF ACTION FOR A VIOLATION OF THE EDUCATION ARTICLE.

In their opposition briefs, Plaintiffs criticize the various Defendants for addressing the constitutional claims on both a facial and an as-applied basis. Addressing both legal theories of consititutional challenges has been necessary throughout the course of this litigation because the Plaintiffs have never clearly articulated the legal basis for the challenge, only the faulty rationale as to why the Challenged Statutes are undesireable.

Plaintiffs' finger pointing is merely a weak attempt to distract from the fact that bare legal conclusions, which are the entirety of the Complaints herein, are not entitled to the benefit of the presumption of truth and are not accorded every favorable inference in a motion to dismiss. Doria v. Masucci, 230 A.D.2d 764 (2d Dep't., 1996). Unwarranted inferences, baseless conclusions of law, sweeping legal conclusions cast in the form of factual allegations, or factual claims that are either inherently incredible or contradicted by documentary evidence are not legally sufficient to state a cause of action. Ulmann v. Norma Kamali, Inc., 207 A.D.2d 691 (1st Dep't. 1994); EBC I, Inc. v. Goldman Sachs & Co., 5 N.Y. 3d 11, 27 (2005).

Plaintiffs blatantly ignore this well established law, instead relying on a steadfast insistence that their contradictory inferences about the state of the

educational system are sufficient to implicate the constitutionality of the Education Article. As noted above and in Respondents' March 23, 2016 brief, due to statutory changes, the stale statistics used by the Plaintiffs to try to cobble together some semblance of a complaint are no longer applicable. They use these out of date studies to support their contradictory allegations that it is too easy for new and ineffective educators to obtain tenure, yet they are the ones who supposedly should be retained over more senior educators because younger equals better. These vague allegations are simply insufficient as a matter of law to support a cause of action.

Moreover, Plaintiffs allege that the various Defendants inappropriately analyze their constitutional challenges under the rational relationship test. This claim is incorrect because under both a facial and an as-applied challenge of the constitutionality of a statute, the Court of Appeals has acknowledged that the rational basis test must be utilized. Affronti v. Crosson, 95 N.Y.2d 713, 719 (2001); Hernandez v. Robles, 7 N.Y.3d at 367 (2006). The individuals challenging constitutionality of a statute have the burden to demonstrate "the statute's invalidity beyond a reasonable doubt." People v. Cintron, 13 Misc. 3d 833, 843-46 (Sup. Ct. 2006), aff'd, 46 A.D.3d 353 (1st Dep't., 2007) aff'd sub nom, *quoting* Dalton v. Pataki, 5 N.Y.3d 243 (2005). The burden of proving there is no rational basis rests solely with the Plaintiffs. *Id.* "A legislative choice *is not subject to courtroom factfinding* and may be based on *rational speculation* unsupported by evidence or

empirical data." *Id., quoting* Affronti, 95 N.Y.2d at 719. Thus, a statute will be upheld as constitutional unless the harm caused is "so unrelated to the achievement of any combination of legitimate purposes that ... [it is] irrational." *Id.*

Defendants Cammerata and Mambretti detailed the legitimate purposes of the Challenged Statutes in their March 23, 2016 brief. It is clear beyond a shadow of a doubt that the Challenged Statutes serve important functions for the maintance of the educational system in New York. Plaintiffs' vague allegations of inefficiency and speculative injury due to the existence of these statutes are insufficient as a matter of law to have them declared unconstitutional. Accordingly, it is respectfully submitted that the Complaints must be dismissed as a matter of law.

POINT IV:

IN LIGHT OF THE FACT THAT THERE IS NO INJURY TO THE PLAINTIFFS STEMMING FROM THE AMENDED/NEW STATUTES, THE PLAINTIFFS DO NOT HAVE STANDING.

Standing is a threshold requirement for a plaintiff seeking to challenge governmental action. New York State Ass'n of Nurse Anesthetists v. Novello, 2 N.Y.3d 207, 211 (2004); Dairylea Coop., Inc. v. Walkley, 38 N.Y.2d 6, 9 (1975); VTR FV, LLC v. Town of Guilderland, 101 A.D.3d 1532, 1533 (3d Dep't 2012). There is a two-part test for determining standing. First, it must be shown that there is an "injury in fact" and a speculative injury is insufficient to establish harm. *Id.*

Second, the parties must fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision being challenged. *Id.*

The Court of Appeals has very clearly held that an injury in fact is necessary in order to avoid the judiciary rendering advisory opinions. Soc'y of Plastics Indus., Inc. v. Cnty. of Suffolk, 77 N.Y.2d 761, 773 (1991), *citing* Cuomo v. Long Is. Light. Co., 71 N.Y.2d 349, 354. As set forth above, the courts have also made it quite clear that there is no injury when laws or regulations challenged in a litigation are subsequently replaced by an intervening change in law. NRG Energy, 795 N.Y.S.2d 129. As the Challenged Statutes have all been radically changed through either amendments or entirely altered in new statutes to address the areas of alleged weakness in the Education Law, there cannot be any remaining injury to the Plaintiffs under those statutes as a matter of law. Further, Plaintiffs were afforded the opportunity by this Court to amend their Complaints to reflect any new injuries as a result of the statutory revisions, but they declined to do so. Accordingly, without injury under the current statutes, the Plaintiffs do not have standing as a matter of law and the Complaints must, therefore, be dismissed.

CONCLUSION

For the foregoing reasons, the Intervenors-Defendants respectfully submit that the lower court erred when it declined to dismiss the Amended Complaints both at the motion to dismiss stage and at the motion to renew stage, after the Challenged Statutes were radically altered to reflect the more stringent standard the Plaintiffs are seemingly seeking herein. Accordingly, it is respectfully requested that the Amended Complaints be dismissed in their entireties, along with such other relief as the court may deem appropriate, as a matter of law.

Dated: Latham, New York

August 8, 2016

SCHOOL ADMINISTRATORS
ASSOCIATION OF NEW YORK STATE,
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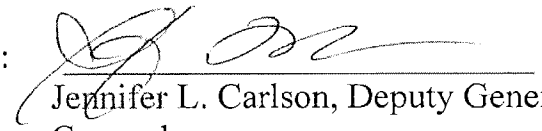
By: 

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CERTIFICATE OF COMPLIANCE
PURSUANT TO 22 NYCRR § 670.10.3(f)

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