STATE OF NEW YORK
APPELLATE DIVISION SECOND 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- Appeallants.

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO APPEAL

Richmond County Supreme Court Index No. 101105/14

Intervenor Defendants-Appellants, Phillip A. Cammerata and Mark Mambretti, by their attorneys, School Administrators Association of New York State, respectfully submit this brief in support of their motion for leave to appeal the March 28, 2018 decision and order of the Appellate Division, Second Department, upholding the March 12, 2015 and October 23, 2015 decisions of the

Supreme Court, Richmond County, denying the motion to dismiss and motion to renew after the challenged statutes were amended by the New York Legislature.

PRELIMINARY STATEMENT

Public education is a matter of extreme importance and much debate and New York is no exception to this fact. It is paramount to all that students actually receive the "sound basic education" guaranteed under Article XI § 1 of the New York State Constitution. Ensuring that this guarantee is carried out involves not only pedagogical aspects and the brick and mortar aspects, but also stability within the educational workforce. In order to prevent the stability of the workforce from being corrupted by personal and/or political interests, New York has enacted a series of statutes relating to the granting of tenure, evaluation, termination and layoff/recall of professional educators.[1] Understanding that there is no "one size fits all" model that can work for every school district, the Legislature has specifically designed these statutes so that they are applied by the entities that know the individual needs best - the local school districts, not the courts.

The Plaintiff-Respondents herein have brought two separate actions, seeking to have the Challenged Statutes declared unconstitutional based upon outdated data they allege proves their children, some of whom have already successfully matriculated from public school systems, were or are being taught by ineffective

[1] Education Law§§ 2509, 2573, 2510, 2585, 2588, 3012, 3012-c, 3020, and 3020-a collectively referred throughout as the "Challenged Statutes."

educators. Public education is an ever evolving process and it is important to note that each of the concerns raised by the Plaintiff-Respondents have already been addressed by the Legislature via amendments to the Challenged Statutes and/or the creation of new statutes. Despite the fact that the issues raised are clearly political questions, are moot, and/or do not rise to the level of a constitutional violation, the Supreme Court, Richmond County, and the Appellate Division, Second Department have inappropriately allowed this matter to survive both a motion to dismiss and a motion to renew/reargue. It is respectfully submitted that the appropriate forum for challenging these statutes is with the Legislative branch of government and not the judiciary. Accordingly, Leave to Appeal is respectfully sought in order to address this matter of great public and constitutional importance.

PROCEDURAL HISTORY

On July 3, 2014, the lawsuit *Davids v. New York* was filed by eleven New York City students against the State of New York, the New York State Board of Regents, the New York State Education Department, the City of New York and the New York City Department of Education. On or about July 26, 2014, the matter of *Wright v. New York* was filed against the State of New York, the New York State Board of Regents, the New York State Education Department, the City of New York and the New York City Department of Education in Supreme Court, Albany County. Upon motion of the Attorney General on behalf of the governmental defendants, the cases

were consolidated on or about September 11, 2014 in Supreme Court, Richmond County. Upon information and belief, between September and November 2014, a number of individuals and entities intervened in the action including Appellants Cammarata and Mambretti, who represent school principals throughout the state, as they will be directly impacted by any changes in the aforementioned statutes.

Each of the defendants in this consolidated action, including Intervenor-Defendants Cammarata and Mambretti, filed pre-Answer Motions to Dismiss. Oral argument took place on January 14, 2015 and on March 12, 2015 Hon. Phillip Minardo issued a Decision and Order, denying the motions, except insofar as to dismiss the cases against Commissioner of Education John King and Chancellor Merryl Tisch, on the basis that the Plaintiffs successfully alleged a cause of action. The Decision and Order was entered on March 20, 2015 and each of the defendants timely filed notices of appeal.

Subsequent to the issuance of the Decision and Order, as part of the 2015 Budget Bill, the Legislature enacted radical amendments to each of the Challenged Statutes. These amendments, and one new statute, specifically address the crux of Plaintiffs' contentions. Namely, that the statutes are unconstitutional because there was a lack of accountability for teacher performance, leading to ineffective educators being hired and retained. While Intervenor-Defendants Cammarata and Mambretti absolutely disagreed with this

assertion in the first place, there can be no doubt that in light of the April 13, 2015 amendments to the Challenged Statutes, the gravamen within the Complaints are moot.

At a status conference May 6, 2015, Hon. Phillip G. Minardo granted the defendants until May 27, 2015 to file motions to renew in light of these new statutory changes, which the defendants did. Oral arguments on the motions to renew were held on August 25, 2015. On October 23, 2015, the Hon. Phillip G. Minardo issued a Decision and Order, denying the motions in their entirety on the basis that the changes were "marginal".

On or about November 15, 2015, each of the defendants filed Notices of Appeal with the Appellate Division, Second Department on the adverse renewal motion decision. The two appeals were then consolidated into a single case. Oral argument was held on November 30, 2017. On March 28, 2018 the Appellate Division, Second Department issued a Decision and Order, denying the appeals and affirming the determinations of the trial court that the cases should proceed onto the discovery phase. Intervenor Defendants Cammarata and Mambretti were served with the Notice of Entry via overnight mail postmarked on March 29, 2018.

Appellants hereby request permission for leave to appeal with the Court of Appeals pursuant to CPLR §5602(b).

JURISDICTION

Pursuant to 22 NYCRR §500.22(b)(4), permission to appeal to the Court of Appeals is warranted in situations such as when "the issues are novel or of public importance." It is respectfully submitted that there are fewer topics of greater public importance than the constitutionality of the public education system and the statutes providing protections for those serving in this noble profession.

STATEMENT OF QUESTIONS PRESENTED

1. Did the lower court incorrectly deny the defendants-appellants' motions to dismiss the amended complaints, when said motions correctly set forth that plaintiffs-respondents' claims that sections of the New York State Education Law relating to educator retention were unconstitutional pursuant to Article XI § 1 of the New York State Constitution were improper due to lack of justiciability and failed to state a cause of action?

2. Did the lower court incorrectly deny the defendants-appellants' motions to renew the motions to dismiss the amended complaints as moot, after the Legislature amended the challenged statutes on April 1, 2015?

STATEMENT OF FACTS

Plaintiffs in the consolidated action herein are parents and school age children attending public schools in New York City, Albany and Rochester. Using vague and conclusory statements and outdated data referring to early versions of statutes that have been repeatedly amended since their enactment, plaintiffs alleged that the statutes relating to tenure, discipline, evaluations, and layoffs/seniority (collectively referred herein as "the Challenged Statutes"), are

inexplicably violating the students' constitutional rights to a sound basic education.

The Amended Complaints only refer to the alleged impact the Challenged Statutes have vis-à-vis teachers. This position shortsightedly misses the fact that declaring the Challenged Statutes unconstitutional will not just negatively impact ineffective teachers, but will also create significant harm to school administrators, such as principals, assistant principals, directors, and deans of students, all of whom also fall within the purview of the Challenged Statutes. Intervenor-Defendants Phillip Cammarata and Mark Mambretti are building principals and have intervened in the consolidated action to provide a voice to school administrators across the state and provide the Courts with the unique historical perspective on the Challenged Statutes, and particularly those relating to tenure, that have involved school administrators in New York State.

Each of the defendants in this consolidated action, including Intervenor-Defendants Cammarata and Mambretti, filed pre-Answer Motions to Dismiss. Oral argument took place on January 14, 2015 and on March 12, 2015 Hon. Phillip Minardo issued a Decision and Order, denying the motions, except insofar as to dismiss the cases against Commissioner of Education John King and Chancellor Merryl Tisch, on the basis that the Plaintiffs successfully alleged a

cause of action. The Decision and Order was entered on March 20, 2015 and each of the defendants timely filed notices of appeal.

Subsequent to the issuance of the Decision and Order, as part of the 2015 Budget Bill, the Legislature enacted radical amendments to each of the Challenged Statutes. These amendments, and one new statute, specifically address the crux of Plaintiffs' contentions. Namely, that the statutes are unconstitutional because there was a lack of accountability for teacher performance, leading to ineffective educators being hired and retained. While Intervenor-Defendants Cammarata and Mambretti absolutely disagreed with this assertion in the first place, as demonstrated below, there can be no doubt that in light of the April 13, 2015 amendments to the Challenged Statutes, the gravamen within the Complaints are moot.

At a status conference on May 6, 2015, Hon. Phillip G. Minardo granted the defendants until May 27, 2015 to file motions to renew in light of these new statutory changes, which the defendants did. Oral arguments on the motions to renew were held on August 25, 2015. On October 23, 2015, the Hon. Phillip G. Minardo issued a Decision and Order, denying the motions in their entirety on the basis that the changes were "marginal".

It is respectfully submitted that both of Judge Minardo's rulings were in error, as the continually evolving nature of the Challenged Statutes clearly

demonstrate that these matters raise non-justiciable political questions. In fact, as recently as December 2015, the New York State Board of Regents amended the regulations relating to the Challenged Statute Education Law §3012-c, which was superseded in large part in April 2015 by Education Law §3012-d, thereby changing the evaluation processes and procedures for teachers and building principals across the state. The numerous changes to the Challenged Statutes after the Amended Complaints were filed further renders the consolidated actions moot as a matter of law.

Notwithstanding these clear procedural issues, the Appellate Division, Second Department, determined that the case should proceed to the discovery phase on March 28, 2018. A notice of entry was served upon the defendants via overnight mail on March 29, 2018.

ARGUMENT

PERMISSION TO APPEAL TO THE COURT OF APPEALS SHOULD BE GRANTED.

Pursuant to 22 NYCRR §500.22(b)(4), permission to appeal to the Court of Appeals is warranted in situations such as when "the issues are novel or of public importance." It is respectfully submitted that the issues dealt with on this appeal concerning the constitutionality of educator tenure, evaluations, termination and layoff/recall are both novel and of great public importance. This is the first constitutional challenge to public education outside of funding related cases.

The breadth of the scope of these issues cannot be easily condensed into a simple summary. Each of the defendants in this consolidated action have previously submitted exhaustive briefs on the importance of the Challenged Statutes and the procedural issues that warrant dismissal as a matter of law from the various perspectives of governmental entities, teachers and, in the case of Intervenor Defendants Cammarata and Mambretti, school administrators.

1. **The revisions of the Challenged Statutes is a political question for the Legislature that has rendered the complaints moot and destroyed any potential standing the Plaintiffs may have had.**

A cause of action can no longer exist when the complained of circumstances cease to exist. *Hearst Corp. v. Clyne,* 50 N.Y.2d 707 (1980). This is particularly true 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).

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.

Courts are obliged to decline involvement in a case where accepting such responsibility would violate the constitutional scheme for the distribution of powers among the three branches of government and involve the judicial branch in responsibilities it is ill-equipped to assume. *Jones v. Beame*, 45 N.Y.2d 402 at 406 (1978). Plaintiffs, however sincerely motivated, may not interpose themselves and the courts into "the management and operation of public enterprises." *Id.* at 407 (1978), *citing In Matter of Abrams v. New York City Tr. Auth.,* 39 N.Y.2d 990, 992 (1976). There are "questions of judgment, discretion, allocation of resources and priorities inappropriate for resolution in the judicial arena", the responsibility for which is "lodged in a network of executive officials, administrative agencies and local legislative bodies." *Id.*

Specifically, this Court has been very clear that matters pertaining to the maintenance and standards within a school district are largely not justiciable.

James, 42 N.Y.2d at 366-68. This is because the Challenged Statutes were specifically designed by the Legislature over many years to be controlled at the individual local school district level. Respectfully, the courts are in no position to understand the day to day needs of school districts, especially decisions relating to the Challenged Statutes.

Neither Complaint at issue has alleged any immediate threat to the safety of the plaintiffs as a result of the continued presumptive constitutionality of the Challenged Statutes. Further, declaring the Challenged Statutes unconstitutional would most assuredly impinge upon the authority of the Legislature, the Commissioner of Education, the Board of Regents as well as the rights of the local governing bodies (school boards of education) to properly and effectively maintain a sound basic education, especially given the recent legislative changes in the Education Law.

Further demonstrating the fact that the issues raised within the Amended Complaints are political questions, 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 Amended Complaints, which are based almost exclusively on conclusory allegations and stale data. The last change brought to the courts' attention was 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.

A. Statutes conferring tenure upon educators (Education Law§§ 2509, 2573, 3012).

The gravamen of the plaintiffs' complaints concerning the statutory process surrounding the granting of tenure was that the three-year probationary period was too short for a proper evaluation of incoming educators. Plaintiffs alleged that these timeframes, combined with a supposed lack of accountability relating to educator performance during probationary periods, in essence amounted to "ineffective" educators being granted tenure by default and that a four-year probationary period is necessary.

With the April 2015 Legislative amendment, Plaintiffs receive precisely what they wanted. Any educated appointed to a new position effective July 1, 2015 must now serve a four year probationary period before they are eligible for tenure. In the cases of teachers and building principals, the ability to obtain tenure, which was previously granted or denied at the whim of the employing Board of Education, have been further restricted. The ability to obtain tenure for such individuals is now tied to their evaluation ratings under the Annual Professional Performance Review ("APPR"), which is codified under Education Law §§3012-c and 3012-d. Pursuant to the new requirements, any teacher or building

administrator appointed on or after July 1, 2015 must now be rated "Effective" or "Highly Effective" in three out of four of their probationary years and will be ineligible for tenure if they are rated as "Ineffective" in the final year of probation. This new performance based requirement not only addresses Plaintiffs' alleged concerns that ineffective educators are being granted tenure, but also prevents ineffective educators from obtaining tenure early for political reasons or by estoppel due to the inaction of the Board of Education.

With the lengthened period of time to evaluate administrators and new stringent requirements for obtaining tenure that Plaintiffs were seeking as potential remedies to the alleged problems being legislatively enacted, plaintiffs' alleged deprivations no longer exist as they pertain to the tenure system and the Complaints fail to state a cause of action under the current statutory scheme. Moreover, it is the local school districts that have complete control over whether or not to grant tenure and to determine whether an individual is worthy of tenure based on local community values.

B. Statutes providing guidelines in the event of layoffs (Education Law §§ 2510, 2585, 2588).

Layoff and recall rights in New York State public education operate under a "last in, first out" ("LIFO") system, that mirrors New York Civil Service Law. In this consolidated action, according to the plaintiffs, the statutes enabling this

system are unconstitutional because they permit newer, more competent, teachers and administrators to be laid off in favor of retaining older, less competent, educators. This argument actually runs counterintuitive to their other contention that ineffective educators are receiving tenure.

Notwithstanding that defendants maintain that changing the system is both unnecessary and liable to have unintended consequences throughout public sector, the Legislature did enact as a part of the 2015 budget bill a new statute addressing the very issues cited to be problems by the Plaintiffs for failing schools. The new Education Law §211-f provides that schools designated to be either failing or persistently failing may be handed over to a receiver, who will be in control of curriculum and staffing decisions within the failing school. These are the schools potentially in the most need for intervention. In either case, the designated receiver has the sole authority, without approval of the Board of Education, to abolish positions, change salaries to entice and hire qualified educators, and/or fire ineffective educators. In the event that the receiver decides to abolish positions, layoffs are designated by tenure area; however, the person laid off is controlled by their evaluation ratings within the tenure area and not their length of service, which remedy is precisely what the Plaintiffs seek. See Education Law §211-f (7) (b), (c). Again, the application and control over these decisions are vested with the local school districts, which are in the best positions to make such

determinations and not the judiciary, which looks at the decisions from an arm's length away.

C. Statutes providing for due process prior to the termination of tenured administrators (Education Law §§ 3020, 3020-a).

Plaintiffs allege that the statutes providing for due process procedures prior to the removal of a tenured educator, either for ineffective performance or misconduct, violates their constitutional rights to a sound basic education. The plaintiffs aver school district simply refuse to seek the removal of ineffective educators because they find the procedures too lengthy, expensive and/or otherwise cumbersome to bother commencing the process. This supposedly results in ineffective educators, who would otherwise be terminated, remaining employed in schools. Prior to the April 2015 amendments, Education Law §3020-a was radically amended in 2012 to expedite the disciplinary arbitration process so that the hearings now are to be completed within 125 days of the charges against the tenured educators being filed. Moreover, with the creation of Education Law §3012-c in 2010, which specifically addressed Plaintiffs' concerns about the removal of ineffective educators, a school district was given the right to charge any educator who received two consecutive ineffective ratings with incompetency and the hearing needs to be completed within a mere 30 days after charges are issued.

Nevertheless, the Legislature engaged in further substantial revisions to these disciplinary statutes. As part of the 2015 Budget Bill, the Legislature enacted legislation that where teachers and administrators are charged with pedagogical incompetence, they will no longer have the option to have a panel hear the charges against them, but are instead limited to a single hearing officer, which will significantly speed up the hearing.

Additionally, a new statute, Education Law § 3020-b, has further streamlined removal procedures for teachers who have been rated Ineffective for two or more consecutive years. Specifically, §3020-b permits school districts to file disciplinary charges based upon incompetence for classroom teachers who have been rated ineffective for two consecutive years and now *requires* the filing of charges for classroom teachers who have been rated ineffective for three consecutive years. The Legislature also changed the evidentiary proof needed to remove an ineffective teacher by providing that either two consecutive ineffective ratings or three consecutive ineffective ratings constitute prima facie proof of incompetence. Such prima facie proof can only be overcome by clear and convincing evidence in the event of two consecutive ineffective ratings and may only be overcome through a showing of fraud in the case of three consecutive ratings.

Finally, any disciplinary charges involving the sexual or physical abuse of a student brought on or after July 1, 2015, the Legislature now allows school districts to issue unpaid suspensions pending the disciplinary hearing. If an unpaid suspension is issued, a probable cause hearing must be held within ten days and the charges will be subject to an expedited hearing. Expedited hearings must be completed within 60 days of a pre-hearing conference.

With these significant hurdles to overcome and streamlined changes to the disciplinary process, the Legislature has clearly paved the way for an expeditious and economical method of removing tenured educators while still providing a modicum of due process. Since school districts no longer have the discretion to allow ineffective educators to continue working after demonstrating a pattern of ineffectiveness, Plaintiffs' allegations are moot as a matter of law.

D. Statute relating to the evaluations of teachers and principals (Education Law § 3012-c).

Plaintiffs also contend that the now moot evaluation statute, Education Law §3012-c, violates their constitutional rights insofar as it leaves too much power in the hands of districts and unions to negotiate higher ratings than ineffective educators should otherwise receive. Education Law §3012-c was only enacted in 2010 and had been amended four times **prior to** when Defendant-Intervenors Cammarata and Mambretti filed their motion to dismiss on October 23, 2014. As

part of the 2015 budget cycle, Education Law §3012-c was overhauled by the Legislature, and the bulk of the substance of the statute has now been replaced by Education Law §3012-d and is subject to a plethora of new regulations promulgated by the State Education Department, which have changed as recently as December 2015. See 8 NYCRR §§ 30-2.14 and 30-3.17. School districts were required to successfully implement the new, more rigorous, Education Law §3012-d process no later than July 1, 2016, or lose increases in state aid. Hence, the Plaintiffs' challenge to Education Law 3012-c is moot by school districts mandated compliance with its successor statute, 3012-d.

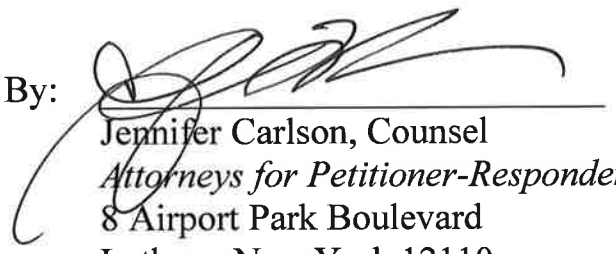
Accordingly, it is respectfully submitted that this is an issue of statewide importance that warrants review by the Court of Appeals.

CONCLUSION

WHEREFORE, Appellants respectfully request an Order of this Court granting permission to appeal to the Court of Appeals from the Appellate Division, Second Department's order dated March 28, 2018, together with such other and further relief as the Court deems just and proper.

Dated: April 27, 2018
Latham, New York

Respectfully submitted,
School Administrators Association of
New York State
Office of General Counsel,
Arthur P. Scheuermann

By: 

Jennifer Carlson, Counsel
Attorneys for Petitioner-Respondent
8 Airport Park Boulevard
Latham, New York 12110
(518) 782-0600

To: Jonathan W. Tribiano, PLLC
1811 Victory Boulevard
Staten Island, New York 10314
Counsel for Davids Plaintiffs

Kirkland & Ellis, LLP
Jay Lefkowitz, Esq., of Counsel
601 Lexington Avenue
New York, New York 10022
Counsel for Wright Plaintiffs

Eric T. Schneiderman, Esq.
Attorney General of the State of New York
Andrew W. Amend, Esq.
Senior Asst. Solicitor General
28 Liberty Street, 23rd Floor
New York, New York 10005
Counsel for State Defendants

Zachary Carter, Esq., Corporation Counsel of the City of New York
Janice Birnbaum, Esq., Senior Counsel
100 Church Street
New York, New York 10007
Counsel for Intervenor-Defendants City of New York and New York City Department of Education

Stoock, Stroock & Lavan, LLP
Charles G. Moerdler, Esq.
180 Maiden Lane
New York, New York 10038
Counsel for Intervenor-Defendant Michael Mulgrew, as President Of the United Federation of Teachers

Adam Ross, Esq.
United Federation of Teachers
52 Broadway, 14th Floor
New York, New York 10004
Counsel for Intervenor-Defendant Michael Mulgrew, as President Of the United Federation of Teachers

Robert Reilly, Esq.
General Counsel
New York State United Teachers
800 Troy Schenectady Road
Latham, New York 12110
Counsel for the NYSUT Intervenors-Defendants

SUPREME COURT FOR THE STATE OF NEW YORK
COUNTY OF RICHMOND

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

Plaintiffs,

-against-

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

NOTICE OF APPEAL

Defendants,

-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,

HON. PHILIP G. MINARDO
DCM PART 6

Index No. 101105/14

Intervenor-Defendants.

PLEASE TAKE NOTICE that the Intervenor-Defendants PHILIP A. CAMMARATA and MARK MAMBRETTI, hereby appeal to the Appellate Division, Second Department of the Supreme Court of the State of New York, from the Decision and Order of the Court dated March 12, 2015 which denied the Intervenor-Defendants' Motion to Dismiss, and entered by the Clerk of the Court on March 20, 2015, and Notice of Entry being served via FedEx Express Priority-Overnight Mail on March 24, 2015, which was received by counsel for said Intervening-Defendants on March 25, 2015. This appeal is taken from the entire Decision and Order with the

exception of the portion granting the motion to dismiss on behalf of Defendants Merryl H. Tisch and John B. King. A copy of the Decision and Order with Notice of Entry is annexed hereto.

Dated: Latham, New York
April 14, 2015

Respectfully Submitted,

Jennifer L. Carlson, Counsel
SCHOOLADMINISTRATORS ASSOCIATION OF NEW YORK STATE
Attorneys for Intervenor-Defendants Cammarata And Mambretti
8 Airport Park Blvd.
Latham, New York 12110
(518) 782-0600

TO: Jonathan W. Tribiano, PLLC
1811 Victory Boulevard
Staten Island, New York 10314
Counsel for Davids Plaintiffs

Kirkland & Ellis, LLP
Danielle R. Sassoon, Esq., of Counsel
Jay Lefkowitz, Esq., of Counsel
Devora W. Allon, Esq., of Counsel
601 Lexington Avenue
New York, New York 10022
Counsel for Wright Plaintiffs

Eric T. Schneiderman, Esq.
Attorney General of the State of New York
Steven L. Banks, Esq.
Monica Connell, Esq.
Christine Ryan, Esq.
Asst. Attorney General
120 Broadway, 24th Floor
New York, New York 10271
Counsel for State Defendants

Zachary Carter, Esq. Corporation Counsel of the City of New York
Janice Birnbaum, Esq., Senior Counsel
Maxwell Leighton, Esq., Senior Counsel
100 Church Street
New York, New York 10007
Counsel for Intervenor-Defendants City of New York and New York City Department of Education

Stroock, Stroock & Lavan LLP
Charles G. Moerdler, Esq.
Alan M. Klinger, Esq.
180 Maiden Lane
New York, New York 10038
Counsel for Intervenor-Defendant Michael Mulgrew, as President Of the United Federation of Teachers

Adam Ross, Esq.
United Federation of Teachers
52 Broadway, 14th Floor
New York, New York 10004
Counsel for Intervenor-Defendant Michael Mulgrew, as President Of the United Federation of Teachers

Richard Casagrande, Esq.
General Counsel
New York State United Teachers
800 Troy Schenectady Road
Latham, New York 12110
Counsel for the NYSUT Intervenors-Defendants

SUPREME COURT FOR THE STATE OF NEW YORK
COUNTY OF RICHMOND

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

Plaintiffs,

- against -

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

Defendants,

- and -

MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO, 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; PHILIP A. CAMMARATA, MARK MAMBRETTI, and THE NEW YORK CITY DEPARTMENT OF EDUCATION,

Intervenor-Defendants.

Index No.: 101105/2014

JUSTICE: Hon. Philip G. Minardo

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the within is a copy of a decision and order entered in this action on the 20th day of March, 2015, in the office of the Clerk of the County of Richmond.

Dated: March 24, 2015

Jay P. Lefkowitz
lefkowitz@kirkland.com
Devora W. Allon
devora.allon@kirkland.com
Danielle R. Sassoon
danielle.sassoon@kirkland.com
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, New York 10022-4611
Telephone: (212) 446-4800
Facsimile: (212) 446-4900
Attorneys for JOHN KEONI WRIGHT, *et al.*

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

DCM PART 6

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

Plaintiffs,

-against-

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

Defendants,

-and-

MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO, 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; PHILIP A CAMMARATA, MARK MAMBRETTI, and THE NEW YORK CITY DEPARTMENT OF EDUCATION,

Intervenor-Defendants.

HON. PHILIP G. MINARDO

DECISION & ORDER

Index No. 101105/14

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

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

MYMOENA DAVIDS, et al. v. THE STATE OF NEW YORK, et al.

The following papers numbered 1 to 12 were fully submitted on the 14th day of January, 2015.

Papers Numbered

Notice of Motion to Dismiss by Defendant THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF EDUCATION,
with Exhibits and Memorandum of Law,
(dated October 28, 2014) 1

Notice of Motion to Dismiss by Intervenor-Defendant MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO,
with Exhibits and Memorandum of Law,
(dated October 28, 2014) 2

Notice of Motion to Dismiss by Intervenor-Defendants PHILIP CAMMARATA and MARK MAMBRETTI,
with Exhibits and Memorandum of Law,
(dated October 23, 2014) 3

Notice of Motion to Dismiss by Intervenor-Defendants SETH COHEN, *et al.*,
with Exhibits and Memorandum of Law,
(dated October 27, 2014) 4

Notice of Motion to Dismiss by Defendants STATE OF NEW YORK, *et al.*,
with Affirmation and Supplemental Affirmation of Assistant Attorney General Steven L. Banks, Exhibits and Memorandum of Law,
(dated October 28, 2014) 5

Affirmation in Opposition of Plaintiffs MYOMENA DAVIDS, *et al.* to Defendants and Intervenor-Defendants' Motions to Dismiss,
with Exhibits and Memorandum of Law,
(dated December 5, 2014) 6

Affirmation in Opposition by Plaintiffs JOHN KEONI WRIGHT, *et al.*, to Defendants and Intervenors-Defendants' Motions to Dismiss,
with Exhibits and Memorandum of Law,
(dated December 5, 2014) 7

MYMOENA DAVIDS, et al. v. THE STATE OF NEW YORK, et al.

Upon the foregoing papers, the above-enumerated motions to dismiss the complaint pursuant to CPLR 3211(a)(2), (3), (7), and (10), by the defendants and intervenor-defendants in each action are denied, as hereinafter provided.

This consolidated action, brought on the behalf of certain representative public school children in the State and City of New York, seeks, *inter alia*, a declaration that various sections of the Education Law with regard to teacher tenure, teacher discipline, teacher layoffs and teacher evaluations are violative of the Education Article (Article XI, §1) of the New York State Constitution. The foregoing provides, in relevant part, that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." (NY Const. Art. XI, §1). As construed by plaintiffs, the Education Article guarantees to all students in New York State a "sound basic education", which is alleged to be the

key to a promising future, insofar as it adequately prepares students with the ability to realize their potential, become productive citizens, and contribute to society. More specifically, plaintiffs argue that the State is constitutionally obligated to, *e.g.* systemically provide its pupils with the opportunity to obtain "the basic literacy, calculating, and verbal skills necessary to enable [them] to eventually function productively as civic participants capable of voting and serving on a jury" (Campaign for Fiscal Equity, Inc. v. State of New York (86 NY2d 307, 316), *i.e.*, "to speak, listen, read and write clearly and effectively in English, perform basic mathematical calculations, be knowledgeable about political, economic and social institutions and procedures in this country and abroad, or to acquire the skills, knowledge, understanding and attitudes necessary to participate in democratic self-government" (*id.* at 319). More recently, the Court of Appeals has refined the constitutionally-mandated minimum to require the teaching of skills that enable students to undertake civic responsibilities meaningfully; to function productively as civic participants (Campaign for Fiscal Equity, Inc. v. State of New York, 8 NY3d 14, 20-21). Plaintiffs further argue that the Court of Appeals has recognized that the Education Article requires adequate teaching by effective personnel as the "most important" factor in the effort to provide children with a "sound basic education" (*see* Campaign for Fiscal Equity, Inc. v. State of New York, 100 NY2d 893, 909). With this as background, plaintiffs maintain that certain identifiable sections of the Education Law foster the continued, permanent employment of ineffective teachers, thereby falling out of compliance with the constitutional mandate that students in New York be provided with a "sound basic education". Finally, it is claimed that the judiciary has been vested with the legal and moral authority to ensure that this constitutional mandate is honored (*see* Campaign for Fiscal Equity, Inc. v. State of New York, 100 NY2d 902).

MYMOENA DAVIDS, et al. v. THE STATE OF NEW YORK, et al.

At bar, the statutes challenged by plaintiffs as impairing compliance with the Education 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.[2] In short, it is claimed that these statutes, both individually and collectively, have been proven to have a negative impact on the quality of education in New York, thereby violating the students' constitutional right to a "sound basic education" (*see* NY Const. Art. XI, §1).

As alleged in the respective complaints, sections §§2509, 2573, 3012 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, efficient and satisfactory, under the applicable rules of the board of regents adopted pursuant to Education Law §3012(b) of this article. However, since these teachers are typically 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 three years is an inadequate period of time to assess whether a teacher has demonstrated or earned the right to avail him or herself of the lifelong benefits of tenure. Also

2. The present statutes require that probationary teachers be furloughed first, and the remaining positions be filled on a seniority basis, *i.e.*, the teachers with the greatest tenure being the last to be terminated. For ease of reference, this manner of proceeding is known as "last-in, first-out" or "LIFO".

drawn into question are the methods employed for evaluating teachers during their probationary period.

In support of these allegations, plaintiffs rely on studies which have shown that it is unusual for a teacher to be denied tenure at the end of the probationary period, and that the granting of tenure in most school districts is more of a formality rather than the result of any meaningful appraisal of their performance or ability. For statistical support, plaintiffs argue, e.g., that in 2007, 97% of tenure-eligible teachers in the New York City school districts were awarded tenure, and that recent legislation intended to implement reforms in the evaluation process have had a minimal impact on this state of affairs. In addition, they note that in 2011 and 2012, only 3% of tenure-eligible teachers were denied tenure.

With regard to the methods for evaluating teacher effectiveness prior to an award of tenure, plaintiffs maintain that the recently-implemented Annual Professional Performance Review ("APPR"), now used to evaluate teachers and principals is an unreliable and indirect measure of teacher effectiveness, since it is based on students' performance on standardized tests, other locally selected (*i.e.*, non-standardized) measures of student achievement, and classroom observations by administrative staff, which are clearly subjective in nature. On this issue, plaintiffs note that 60% 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 of this postulate, plaintiffs refer to studies that have shown that in 2012, 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 Language Arts and Math met the minimum standard for proficiency. As a further example,

plaintiffs allege that only 2.3% of teachers eligible for tenure between 2010 and 2013 received a final rating of "ineffective", even though 8% of teachers had low attendance, and 12% received low "value added" ratings. Notably, these allegations are merely representative of the purported facts pleaded in support of plaintiffs' challenge to the tenure laws, and are intended simply to illustrate the statutes' reliance on some of the more superficial and artificial means of assessing teacher effectiveness, leading to an award of tenure without a sufficient demonstration of merit. Each of the above are alleged to operate to the detriment of New York students.[3]

With regard to plaintiffs' challenge to those sections of the Education Laws which address the matter of disciplining or obtaining the dismissal of a tenured teacher, it is alleged that they, too, operate to deny children their constitutional right to a "sound basic education". As plended, these statutes are claimed to prevent school administrators in New York from dismissing teachers for poor performance, thereby forcing the retention of ineffective teachers to the detriment of their students. Among other impediments, these statutes are claimed to afford New York teachers "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 underperforming teacher will actually be dismissed. As a result, dismissal proceedings are alleged 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

[3] Also worthy of note in this regard is plaintiffs' allegation that most of the teachers unable to satisfactorily complete probation are asked to extend their probation term.

administrators attempting to obtain the dismissal of ineffective teachers, the result of which is that their retention is virtually assured.

Pertinent to this cause of action, plaintiffs rely upon the results of a survey indicating that 48% of districts which had considered bringing disciplinary charges at least once, declined to do so. In addition, it was reported that between 2004 and 2008, each disciplinary proceeding took an average of 502 days to complete, and between 1995 and 2006, dismissal proceedings based on allegations of incompetence took an average of 830 days to complete, at a cost of $313,000 per teacher. It is further alleged that more often than not these proceedings allow the ineffective teachers to return to the classroom, which deprives students of their constitutional right to a "sound basic education".

Finally, plaintiffs allege that the so-called "LIFO" statutes (Education Law §§2585, 2510, 2588 and 3013) violate the Education Article of the New York State Constitution in that they have failed, and will continue to fail to provide children throughout the State with a "sound basic education". In particular, plaintiffs maintain that the foregoing sections of the Education 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 retention of new teachers, a failure which was cited by the Court of Appeals (albeit on other grounds) as having a negative impact on the constitutional imperative (Campaign for Fiscal Equity, Inc. v. State of New York, 100 NY2d at 909-911).

MYMOENA DAVIDS, et al. v. THE STATE OF NEW YORK, et al.

In moving to dismiss the complaints, defendants and intervenor-defendants (hereinafter collectively referred to as the "movants") singly and jointly, seek dismissal of the complaints on the grounds (1) that the courts are not the proper forum in which to bring these claims, *i.e.*, that they are nonjusticiable; (2) that the stated grievances should be brought before the state legislature; and (3) that the courts are not permitted to substitute their judgment for that of a legislative body as to the wisdom and expediency of legislation (*see e.g.* Matter of Retired Pub Empl Assoc, Inc. v. Cuomo, – Misc3d –, 2012 NY Slip Op 32979 [U][Sup Ct Albany Co]). In brief, it is argued that teacher tenure and the other statutes represent a "legislative expression of a firm public policy determination that the interest of the public in the education of our youth can best be served by [the present] system [which is] designed to foster academic freedom in our schools and to protect competent teachers from the abuses they might be subjected to if they could be dismissed at the whim of their supervisors" (Ricca v Board of Edu, 47 NY2d 385, 391). Thus, it is claimed that the policy decisions made by the Legislature are beyond the scope of the Judicial Branch of government.

It is further claimed that if these statutes violated the Education Article of the Constitution, the Legislature would have redressed the issue long ago. To the contrary, tenure laws have been 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 fulfilling the principal purpose of these statutes, *i.e.*, to protect tenured teachers from official and bureaucratic caprice. In brief, it is movants' position that "lobbying by litigation" for changes in educational policy represents an incursion on the province of the Legislative and Executive branches of the government, and is an improper vehicle through which to obtain changes in education policy. Accordingly, while conceding that there may be some room for judicial

encroachment, educational policy is said to rest with the Legislature.

Movants also argue that the complaints fail to state a cause of action. In this regard, it is claimed that in order to state a valid cause of action under Article XI, a plaintiff must allege two elements: (1) the deprivation of a sound basic education, and (2) causes attributable to the State (*see* New York Civ Liberties Union v. State of New York, 4 NY3d 177, 178-179). Moreover, the crux of a claim under the Education Article is said to be the failure of the state to "provide for the maintenance and support" of the public school system (Paynter v. State of New York, 100 NY2d 434, 439 [internal quotation marks omitted]; New York State Assn of Small City School Dists Inc. v. State of New York, 42 AD3d 648, 652). Here, it is claimed that the respective complaints are devoid of any facts tending to show that the failure to offer a "sound basic education" is causally connected to the State, rather than, as claimed, administered locally.

The movants also argue that the State's responsibility under the Education Article is to provide minimally adequate funding, resources, and educational supports to make basic learning possible, *i.e*, the requisite funding and resources to make possible "a sound basic education consist[ing] of the basic literacy, calculating and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury" (Paynter v. State of New York, 100 NY2d at 439-440). On this analysis, it is alleged to be the ultimate responsibility of the local school districts to regulate their curriculae in order to effect compliance with the Education Article while respecting "constitutional principle that districts make the basic decision on ... operating their own schools" (New York Civ Liberties Union v. State of New York, 4 NY3d at 182). Thus, it is the local districts rather than the State which is responsible for recruiting, hiring, disciplining and otherwise managing its teachers. For example, the APPR,

implemented to measure the effectiveness of teachers and principals, reserves 80% of the evaluation criteria for negotiation between the local school district and its relevant administrator and unions. Movants argue that these determinations do not constitute state action.

In addition, movants argue that both complaints fail to state a cause of action because they are riddled with vague and conclusory allegations regarding their claim that the tenure and other laws combine to violate the Education Article, basing their causes of action on (1) alleged "specious statistics" regarding the number of teachers receiving tenure, (2) the alleged cost of terminating teachers for ineffectiveness, (3) inconclusive surveys of school administrators on the reasons why charges often are not pursued, and (4) a showing that the challenged statutes result in a denial of a "sound basic education". According to the movants, none of these allegations are sufficient to establish the unconstitutionality of the subject statutes, *i.e.*, that there exists no rational and compelling bases for the challenged probationary, tenure and seniority statutes.

Also said to be problematic are plaintiffs' conclusory statements that students in New York are somehow receiving an inadequate education due to the retention of ineffective educators because of the challenged statutes. Moreover, while plaintiffs argue that public education is plagued 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. Accordingly, movants claim that merely because some of the 250,000 teachers licensed to teach in New York may be ineffective, is not a viable basis for eliminating these basic safeguards for the remaining teachers. In brief, movants maintain that aside from vague references to ineffective teachers and "cherry-picked" statistics without wider significance, the plaintiffs have done little to

demonstrate that the alleged problem is one of constitutional dimension.

Movants also argue that the action should be dismissed for the failure to join necessary parties as required by CPLR 1001 and 1003. In this regard, it is claimed that since the relief which plaintiffs seek would affect all school districts across the state, this Court should either order the joinder of every school district statewide, or dismiss the action. In addition, the movants argue that plaintiffs have failed to allege injury-in-fact, and that the claims which they do make are either not ripe or fail to plead any imminent or specific harm. More importantly, the complaints fail to take into account the recent amendments to these statutes, which are claimed to render all of their claims moot (*see generally* Hussein v. State of New York, 81 AD3d 132). In the alternative, it is alleged that the subject statutes are meant, *inter alia*, to protect school district employees from arbitrary termination rather than the general public or its students (*but see* Chiara v. Town of New Castle, – AD3d –, 2015 NY Slip Op 00326, *21-22 [2d Dept])

Finally, defendants the STATE of NEW YORK, the BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, MERRYL H. TISCH, in her official capacity as Chancellor of the Board of Regents of the University of the State of New York; and 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, argue that complaints as against them should be dismissed since they were not involved in the enactment of the challenged statutes and cannot grant the relief requested by plaintiff.

The motions to dismiss are granted to the extent that the causes of action against MERRYL H. TISCH and JOHN B. KING, in their official capacities as Chancellor and Commissioner are

severed and dismissed, the balance of the motions are denied.[4]

The law is well settled that when reviewing a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, a court "must accept as true the facts as alleged in the complaint and any submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and [without expressing any opinion as to whether the truth of the allegations can be established at trial], determine only whether the facts as alleged fit within any cognizable legal theory" (Sokoloff v. Harriman Estates Dev. Corp., 96 NY2d 409, 414; *see* Sanders v. Winship, 57 NY2d 391, 394). Accordingly, "the sole criterion is whether the pleading states a cause of action, 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 material fact as claimed by the pleader to be one is not a fact at all and, unless it can be said that no significant dispute exists regarding it", the motion must be denied (*id*.). Here, it is the opinion of this Court that the complaints are sufficiently pleaded to avoid dismissal.

The core of plaintiffs' argument at bar is that school children in New York State are being denied the opportunity for a "sound basic education" as a result of teacher tenure, discipline and seniority laws (*see* Education Laws §§2573, 3012, 1103(3), 3014, 3012, 3020, 2510, 2585, 2588,

---

[4] Claims against municipal officials in their official capacities are really claims against the municipality and are therefore, redundant when the municipality is also named as a defendant (*see* Frank v. State of NY Off. of Mental Retardation & Dev. Disabilities, 86 AD3d 183, 188).

3013). While the papers submitted on the motions to dismiss undoubtedly explain that the primary purpose of these statutes is to provide employment security, protect teachers from arbitrary dismissal, and attract and keep younger teachers, when afforded a liberal construction, the facts alleged in the respective complaints are sufficient to state a cause of action for a judgment declaring that the challenged sections of the Education Law operate to deprive students of a "sound basic education" in violation of Article XI of the New York State Constitution, *i.e.*, that the subject tenure laws permit ineffective teachers to remain in the classroom; that such ineffective teachers continue to teach in New York due to statutory impediments to their discharge; and that the problem is exacerbated 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.

It is undisputed that the Education Article requires "[t]he legislature [to] provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." (NY Const. Art. XI, §1). Moreover, this Article has been held to guarantee all students within the state a "sound basic education", which is recognized by all to be the key to a promising future, preparing children to realize their potential, become productive citizens, and contribute to society. In this regard, it is the state's responsibility to provide minimally adequate funding, resources, and educational supports to make basic learning possible, *i.e.*," the basic literacy, calculating and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury" (Paynter v. State of New York, 100 NY2d at 440), which has been judicially recognized to entitle children to "minimally adequate teaching of reasonably up-to-date basic curricula ... by sufficient personnel adequately trained to teach those

subject areas" (Campaign for Fiscal Equity, Inc. v. State of NewYork, 86 NY2d at 317). Further, it has been held that the state may be called to account when it fails in its obligation to meet minimum constitutional standards of educational quality (*see* New York Civ Liberties Union v. State of New York, 4 NY3d at 178), which is capable of measurement, as alleged, by, *inter alia*, sub-standard test results and falling graduation rates (*id.*) that plaintiffs have attributed to the impact of certain legislation.

More to the point, accepting as true plaintiffs' allegations of serious deficiencies in teacher quality; its negative impact on the performance of students; the role played by subject statutes 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 receive a "sound basic education"; plus the statistical studies and surveys cited in support thereof are sufficient to make out a prima facie case of constitutional dimension connecting the retention of ineffective teachers to the low performance levels exhibited by New York students, *e.g.*, a lack of proficiency in math and english (*see* Campaign for Fiscal Equity, Inc. v. State of New York, 100 NY2d at 910). Once it is determined that plaintiffs may be entitled to relief under any reasonable view of the facts stated, the court's inquiry is complete and the complaint must be declared legally sufficient (*see* Campaign for Fiscal Equity, Inc. v. State of New York, 86 NY2d at 318).

The Court also finds the matter before it to be justiciable since a declaratory judgment action is well suited to, *e.g.*, interpret and safeguard constitutional rights and review the acts of the other branches of government, not for the purpose of making policy decisions, but to preserve the constitutional rights of its citizenry (*see* Campaign for Fiscal Equity, Inc. v. State of New York, 100

NY2d at 931).

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 to receive a "sound basic education", which injury, it is claimed will continue into the future so long as the subject statutes continue to operate in the manner stated. Further details regarding the individual plaintiffs' purported injuries can certainly be ascertained during discovery. Moreover, since these children are the intended beneficiaries of the Education Article, in the opinion of this Court, they are clearly within the zone of protected interest.

Only recently have the courts recognized the right of plaintiffs to seek redress and not have the courthouse doors closed at the very inception of an action where the pleading meets the minimal standard to avoid dismissal (*see* Campaign for Fiscal Equity, Inc. v. State of New York, 86 NY2d at 318). This Court is in complete agreement with this sentiment and will not close the courthouse door to parents and children with viable constitutional claims (*see* Hussein v. State of New York, 19 NY3d 899). Manifestly, movants' attempted challenge to the merits of plaintiffs' 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 balance of the arguments tendered in support of dismissal, including the joinder of other parties, have been considered and rejected.

Accordingly, it is

ORDERED that the motion (No. 3598 - 012) of defendant-intervenors MERRYL H. TISCH, in her official capacity as Chancellor of the Board of Regents of the University of the State of New

York, and 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 is granted; and it is further

ORDERED that the causes of action against said individuals are hereby severed and dismissed; and it is further

ORDERED that the balance of the motions are denied; and it is further

ORDERED that the clerk shall enter judgment accordingly.

ENTER,

J.S.C.

Dated: MAR. 17, 2015

GRANTED
MAR 17 2015
STEPHEN J. FIALA

SUPREME COURT FOR THE STATE OF NEW YORK
COUNTY OF RICHMOND

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

Plaintiffs,

-against-

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

NOTICE OF APPEAL

Defendants,

-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.

HON. PHILIP G. MINARDO
DCM PART 6

Index No. 101105/14

PLEASE TAKE NOTICE that the Intervenor-Defendants PHILIP A. CAMMARATA and MARK MAMBRETTI, hereby appeal to the Appellate Division, Second Department of the Supreme Court of the State of New York, from the Decision and Order of the Court dated October 22, 2015 which denied the Intervenor-Defendants' Motion to Renew their Motion to Dismiss, and entered by the Clerk of the Court on October 28, 2015, and Notice of Entry being served on November 4, 2015. This appeal is taken from the each and every part of the Decision and Order, as well as the whole thereto. A copy of the Decision and Order with Notice of Entry is annexed hereto.

Dated: Latham, New York
November 20, 2015

Respectfully Submitted,

Jennifer L. Carlson, Counsel
SCHOOLADMINISTRATORS ASSOCIATION
OF NEW YORK STATE
Attorneys for Intervenor-Defendants Cammarata And Mambretti
8 Airport Park Blvd.
Latham, New York 12110
(518) 782-0600

TO: Jonathan W. Tribiano, PLLC
1811 Victory Boulevard
Staten Island, New York 10314
Counsel for Davids Plaintiffs

Kirkland & Ellis, LLP
Danielle R. Sassoon, Esq., of Counsel
Jay Lefkowitz, Esq., of Counsel
Devora W. Allon, Esq., of Counsel
601 Lexington Avenue
New York, New York 10022
Counsel for Wright Plaintiffs

Eric T. Schneiderman, Esq.
Attorney General of the State of New York
Steven L. Banks, Esq.
Monica Connell, Esq.
Christine Ryan, Esq.
Asst. Attorney General
120 Broadway, 24th Floor
New York, New York 10271
Counsel for State Defendants

Zachary Carter, Esq. Corporation Counsel of the City of New York
Janice Birnbaum, Esq., Senior Counsel
Maxwell Leighton, Esq., Senior Counsel
100 Church Street
New York, New York 10007
Counsel for Intervenor-Defendants City of New York and New York City Department of Education

Stroock, Stroock & Lavan LLP
Charles G. Moerdler, Esq.
Alan M. Klinger, Esq.
180 Maiden Lane
New York, New York 10038
Counsel for Intervenor-Defendant Michael Mulgrew, as President Of the United Federation of Teachers

Adam Ross, Esq.
United Federation of Teachers
52 Broadway, 14th Floor
New York, New York 10004
Counsel for Intervenor-Defendant Michael Mulgrew, as President Of the United Federation of Teachers

Richard Casagrande, Esq.
General Counsel
New York State United Teachers
800 Troy Schenectady Road
Latham, New York 12110
Counsel for the NYSUT Intervenors-Defendants

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

---------- x

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

Plaintiffs,

- against -

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

Defendants,

-and-

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

Intervenor-Defendant,

-and-

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

Intervenors-Defendants,

-and-

PHILIP A. CAMMARATA and MARK MAMBRETTI,

Intervenors-Defendants.

----------x

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

NOTICE OF ENTRY

---------- x

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

Plaintiffs,

- against –

THE STATE OF NEW YORK; THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK; MERRYL H. TISCH, in her official capacity as Chancellor of the Board of Regents of the University of the State of New York; JOHN B. KING, in his official capacity as the Commissioner of Education of the State of New York and President of the University of the State of New York;

Defendants

-and-

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

Intervenors-Defendants,

-and-

PHILIP A. CAMMARATA and MARK MAMBRETTI,

Intervenors-Defendants,

-and-

NEW YORK CITY DEPARTMENT OF EDUCATION,

Intervenor-Defendant,

-and-

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

Intervenor-Defendant.

----------x

PLEASE TAKE NOTICE, that the attached is a true and accurate copy of the Decision and Order of the Supreme Court, Richmond County (Honorable Philip J. Minardo, J.S.C.), dated October 22, 2015 and duly filed and entered in the Office of the Clerk of Richmond County on October 28, 2015.

November 4, 2015

STROOCK & STROOCK & LAVAN LLP

Charles G. Moerdler
Alan M. Klinger
180 Maiden Lane
New York, New York 10038
(212) 806-5400

-and-

Adam S. Ross, Esq.
United Federation of Teachers
52 Broadway
New York, NY 10004

Co-Counsel for Intervenor-Defendant UFT

TO:

JONATHAN W. TRIBIANO, ESQ.
1811 Victory Boulevard
Staten Island, New York 10314
Counsel for Davids Plaintiffs
jwtribiano@jwtesq.com

JAY P. LEFKOWITZ, ESQ.
Kirkland & Ellis LLP
601 Lexington Avenue
New York, New York 10022
Counsel for Wright Plaintiffs
lefkowitz@kirkland.com

STEVEN L. BANKS, ESQ.
Assistant Attorney General of the State of New York
120 Broadway, 24th Floor
New York, New York 10271
Counsel for Defendants State of New York and New York State Education Department and New York State Board of Regents
steven.banks@ag.ny.gov

JANICE BIRNBAUM, ESQ.
Corporation Counsel of the City of New York
100 Church Street
New York, New York 10007
Counsel for Defendants City of New York and New York City Department of Education
jbirnbau@law.nyc.gov

RICHARD E. CASSAGRANDE, ESQ.
800 Troy-Schenectady Road
Latham, New York 12110-2455
Counsel for Proposed Intervenor-Defendants New York State United Teachers
rcasagra@nysutmail.org

ARTHUR P. SCHEUERMANN, ESQ.
Office of General Counsel
School Administrators Association of New York State
8 Airport Park Boulevard
Latham, New York 12110
Counsel for Defendant School Administrators Association of New York State
ascheuermann@saanys.org

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

DCM PART 6

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

Plaintiffs,

-against-

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

Defendants,

-and-

MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO, 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; PHILIP A. CAMMARATA, MARK MAMBRETTI, and THE NEW YORK CITY DEPARTMENT OF EDUCATION,

Intervenor-Defendants.

HON. PHILIP G. MINARDO

DECISION & ORDER

Index No. 101105/14

Motion Nos.[1] 1996 - 013
2012 - 014
2110 - 015
2111 - 016
2186 - 017

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

MYMOENA DAVIDS, *et al.* v. THE STATE OF NEW YORK , *et al.*

The following papers numbered 1 to 12 were fully submitted on the 25th day of August, 2015.

Papers Numbered

Notice of Motion to Dismiss and/or Renew by Intervenors-Defendants MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO, with Exhibits and Memorandum of Law, (dated May 27, 2015) ____ 1

Notice of Motion to Dismiss and/or Renew by Defendants THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF EDUCATION, with Exhibits and Memorandum of Law, (dated May 27, 2015) ____ 2

Notice of Motion to Dismiss and/or Renew by Defendants STATE OF NEW YORK, *et al.*, with Affirmation and Supplemental Affirmation of Assistant Attorney General Steven L.Banks, with Exhibits and Memorandum of Law, (dated May 27, 2015) ____ 3

Notice of Motion to Dismiss and/or Renew by Intervenors-Defendants SETH COHEN,*et al.*, with Exhibits and Memorandum of Law, (dated May 26, 2014) ____ 4

Notice of Motion to Dismiss and/or Renew by Intervenors-Defendants PHILIP CAMMARATA and MARK MAMBRETTI with Exhibits and Memorandum of Law, (dated MAY 26, 2015) ____ 5

Affirmation in Opposition by Plaintiffs JOHN KEONI WRIGHT, *et al.*, to Defendants and Intervenors-Defendants' Motions to Dismiss and/or Renew, with Exhibits and Memorandum of Law (dated June 26, 2015) ____ 6

Affirmation in Opposition of Plaintiffs MYOMENA DAVIDS, *et al.*, to Defendants and Intervenors-Defendants' Motion to Dismiss and/or Renew, with Exhibits and Memorandum of Law, (dated December 5, 2014) ____ 7

MYMOENA DAVIDS, et al. v. THE STATE OF NEW YORK, et al.

Reply Memorandum of Law by Intervenors-Defendants MICHAEL MULGREW, as President Of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO,
(dated July 7, 2015) 8

Reply Affirmation by Defendants THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF EDUCATION,
(dated July 7, 2015) 9

Reply Affirmation by Intervenors-Defendants PHILIP CAMMARATA and MARK MAMBRETTI,
(dated July 1, 2015) 10

Reply Memorandum of Law by Intervenors-Defendants SETH COHEN, *et al.*,
(dated July 7, 2015) 11

Reply Memorandum of Law by Defendants STATE OF NEW YORK, , *et al* ,
(dated July 7, 2015) 12

Upon the foregoing papers, the motions by defendants and intervenor-defendants for, *inter alia*, dismissal of the complaints and/or leave to renew their prior motions for like relief are decided as follows.

The parties' familiarity with the facts is presumed from their participation in this litigation and the exhaustive Decision and Order of this Court entered on March 20, 2015.

In this action for a judgment declaring, singly and in combination, various sections of the Education Law as violative of Art. XI, §1 of the New York State Constitution[2] (hereinafter the Education Article), this Court previously denied defendants' and intervenor-defendants' several motions to dismiss the complaints on various grounds which the Court found to be without merit.

---

[2] To the extent relevant, this article guarantees to all of the students within the State of New York a "sound basic education".

MYMOENA DAVIDS, et al. v. THE STATE OF NEW YORK, et al.

Defendants and intervenor-defendants subsequently appealed that determination to the Appellate Division, Second Department, where it has yet be to calendared for oral argument. At or about the same time, the State Legislature undertook to amend certain sections of the Education Law challenged by plaintiffs, which prompted defendants and intervenor-defendants to file a second round of motions to dismiss on the ground that this action of the Legislature rendered the complaints moot and/or nonjusticiable. In the alternative, defendants and intervenor-defendants moved for leave to renew their prior motions based on "new facts not offered on the prior motions" or "a change in the law" (CPLR 2221[e][2]), both of which plaintiffs strenuously opposed. Oral argument was held on August 25, 2015, at which time decision was reserved.

Except to the extent hereinafter provided, the motions are denied.

In principal part, movants assert the same grounds for dismissal rejected by the Court in its prior determination. To this extent, the present motions to dismiss are essentially motions for leave to reargue and, as such, are improperly "based on matters of fact not offered on the prior motion(s)" (CPLR 2221[d][2]), *e.g.*, the aforementioned legislative amendments. Accordingly, these motions are denied. Neither is the Court persuaded that the above amendments operated to render the prior motions nonjusticiable or moot, or to deprive this Court of subject matter jurisdiction (*see* CPLR 3211[a][2]; Matter of Newton v. Town of Middletown, 31 AD3d 1004, 1005-1006).

Moreover, while the introduction of "new facts" or "a change in the law" may serve as the basis for a renewal motion under CPLR 2221(e)(2), the motion will nevertheless be denied where, as here, neither of the foregoing "would change the prior determination" of the court (*Id.*). In this case, the legislature's marginal changes affecting, e.g., the term of probation and/or the disciplinary proceedings applicable to teachers, are insufficient to achieve the required result.

MYMOENA DAVIDS, et al. v. THE STATE OF NEW YORK, et al.

Nonetheless, given the extensive nature of discovery likely to be required in this case, it is only proper that all further proceedings in this matter should be stayed pending the determination of the Appellate Division.

Accordingly, it is

SO ORDERED.

J.S.C.

Dated: Oct 23, 2015

GRANTED
OCT 23 2015
STEPHEN J. FIALA

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

----------x

MYMOENA DAVIDS, by her parent and natural guardian Miamona Davids, *et al.*, and John Keoni Wright *et al.*,

Plaintiffs,

- against -

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

Defendants,

- and -

MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, local 2, American Federation of Teachers, AFL-CIO, *et al.*

Intervenor- Defendants

----------x

Index No. 101105/2014

Justice: Hon. Justice Marin

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the annexed order is a true and correct copy of an order duly entered in the above entitled action and filed in the office of the Clerk of the Supreme Court, Appellate Division, Second Department, on March 28, 2018.

Dated: New York, New York
March 29, 2018

Devora W. Allon

Jay P. Lefkowitz
Devora W. Allon
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, New York 10022
Telephone: (212) 446-4800
Facsimile: (212) 446-4900

Attorneys for Plaintiffs
John Keoni Wright, *et.al.*

TO:

Eric T. Schneiderman Attorney General of the State of New York Counsel for State Defendants 120 Broadway, 24th floor New York, NY 10271
Zachary W. Carter Corporation Counsel for the City of New York Counsel for the New York City Defendants/Intervenor-Defendant 100 Church Street, Room 2-195 New York, NY 10007
Charles G. Moerdler, Esq. Stroock & Stroock & Lavan LLP Counsel for Intervenor-Defendant United Federation of Teachers 180 Maiden Lane New York, NY 10038
Richard E. Casagrande, Esq. Counsel for NYSUT Intervenors-Defendants 800 Troy-Schenectady Road Latham, NY 12110
Arthur P. Scheuermann, Esq. Counsel for the Intervenors-Defendants Cammarata and Mambretti 8 Airport Park Boulevard Latham, NY 12110
Jonathan W. Tribiano, PLLC Counsel for Plaintiffs in Davids v. State 1811 Victory Boulevard, Suite One Staten Island, NY 10314

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

D54896
T/hu

____AD3d____

Argued - November 30, 2017

REINALDO E. RIVERA, J.P.
JEFFREY A. COHEN
JOSEPH J. MALTESE
ANGELA G. IANNACCI, JJ.

2015-03922 DECISION & ORDER
2015-12041

Mymoena Davids, etc., et al., respondents, v State of New York, et al., defendants-appellants, et al., defendants; Michael Mulgrew, etc., et al., intervenors-defendants-appellants.

(Index No. 101105/14)

Eric T. Schneiderman, Attorney General, New York, NY (Steven C. Wu, Andrew W. Amend, and Philip V. Tisne of counsel), for defendants-appellants State of New York, Board of Regents of the University of the State of New York, and New York State Department of Education.

Zachary W. Carter, Corporation Counsel, New York, NY (Richard Dearing, Devin Slack, and Benjamin Welikson of counsel), for defendants-appellants City of New York and New York City Department of Education.

Stroock & Stroock & Lavan LLP, New York, NY (Charles G. Moerdler, Alan M. Klinger, Beth A. Norton, David J. Kahne, and Adam S. Ross, of counsel), for intervenor-defendant-appellant Michael Mulgrew.

Richard E. Casagrande, Latham, NY (Jennifer N. Coffey, Wendy M. Star, Keith J. Gross, Jacquelyn Hadam, and Christopher Lewis of counsel), for intervenors-defendants-appellants Seth Cohen, Daniel Delehanty, Ashli Skura Dreher, Kathleen Ferguson, Israel Martinez, Richard Ognibene, Jr., Lonnette R. Tuck, and Karen E. Magee.

Arthur P. Scheuermann, General Counsel, School Administrators Association of New York State, Latham, NY (Jennifer L. Carlson of counsel), for intervenors-defendants-appellants Philip A. Cammarata and Mark Mambretti.

Jonathan W. Tribiano, PLLC, Staten Island, NY, for respondents Mymoena Davids, Eric Davids, Alexis Peralta, Stacy Peralta, Lenora Peralta, Andrew Henson, Adrian Colson, Darius Colson, Samantha Pirozzolo, Franklin Pirozzolo, and Izaiyah Ewers.

Kirkland & Ellis LLP, New York, NY (Jay P. Lefkowitz and Devora W. Allon of counsel), for respondents John Keoni Wright, Ginet Borrero, Tauana Goins, Nina Doster, Carla Williams, Mona Pradia, and Angeles Barragan.

Wendy Lecker, Albany, NY, for amicus curiae Alliance for Quality Education.

In a consolidated action for declaratory relief, the defendants State of New York, Board of Regents of the University of the State of New York, and New York State Department of Education, the defendants City of New York and New York City Department of Education, the intervenor-defendant Michael Mulgrew, the intervenor-defendants Seth Cohen, Daniel Delehanty, Ashli Skura Dreher, Kathleen Ferguson, Israel Martinez, Richard Ognibene, Jr., Lonnette R. Tuck, and Karen E. Magee, and the intervenor-defendants Philip A. Cammarata and Mark Mambretti separately appeal, as limited by their respective briefs, from (1) so much of an order of the Supreme Court, Richmond County (Philip G. Minardo, J.), dated March 12, 2015, as denied their respective motions pursuant to CPLR 3211(a) to dismiss the complaints insofar as asserted against each of them, and (2) so much of an order of the same court dated October 22, 2015, as, in effect, upon renewal, adhered to its prior determination.

ORDERED that the appeals from the order dated March 12, 2015, are dismissed, as that order was superseded by the order dated October 22, 2015; and it is further,

ORDERED that the order dated October 22, 2015, is affirmed insofar as appealed from; and it is further,

ORDERED that one bill of costs is awarded to the respondents appearing separately and filing separate briefs.

This consolidated action challenges the constitutionality of several sections of the Education Law relating to the tenure, discipline, evaluation, and layoff of teachers, on the ground that those sections permit ineffective teachers to remain within New York's public schools and thereby deny students the "sound basic education" guaranteed by article XI, § 1 of the NY Constitution (hereinafter the Education Article) (*Board of Educ., Levittown Union Free School Dist. v Nyquist*, 57 NY2d 27, 48).

The first complaint in the consolidated action was filed by Mymoena Davids, among others (hereinafter collectively the Davids plaintiffs), in Richmond County. The Davids plaintiffs are 11 children who reside in the State of New York and attend New York City public schools. The first complaint named as defendants, among others, the State of New York, the Board of Regents of the University of the State of New York, and the New York State Department of Education (hereinafter collectively the State defendants), and the City of New York and the New York City Department of Education (hereinafter together the City defendants).

The second complaint in the consolidated action was filed by John Keoni Wright, among others (hereinafter collectively the Wright plaintiffs), in Albany County. The Wright plaintiffs are nine parents of students who attend public schools in Albany, New York City, and Rochester. The second complaint named as defendants, among others, the State of New York and the Board of Regents of the University of the State of New York. The actions were consolidated by order of the Supreme Court, Richmond County. Michael Mulgrew, as President of the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO (hereinafter the UFT), 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 (hereinafter collectively the Teacher defendants), and Philip A. Cammarata and Mark Mambretti (hereinafter together the School Administrator defendants), were granted leave to intervene as defendants in the consolidated action.

The State defendants, the City defendants, the UFT, the Teacher defendants, and the School Administrator defendants (hereinafter collectively the defendants) made separate motions pursuant to CPLR 3211(a)(2), (3), (7), and (10) to dismiss the complaints insofar as asserted against each of them on the grounds, inter alia, that they failed to state a cause of action, that they presented a nonjusticiable controversy, and that the Davids plaintiffs and the Wright plaintiffs (hereinafter together the plaintiffs) did not have standing to maintain the actions. In an order dated March 12, 2015, the Supreme Court, among other things, denied the defendants' respective motions. The defendants then made separate motions, inter alia, for leave to renew their prior motions, contending that the actions had become academic since the New York State Legislature had amended some of the statutes challenged by the plaintiffs. In an order dated October 22, 2015, the court, in effect, granted renewal and, upon renewal, adhered to its original determination. The defendants appeal.

"In considering the sufficiency of a pleading subject to a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), our well-settled task is to determine whether, accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated" (*Aristy-Farer v State of New York,* 29 NY3d 501, 509 [internal quotation marks omitted]; *see Campaign for Fiscal Equity v State of New York,* 86 NY2d 307, 318; *People v New York City Tr. Auth.,* 59 NY2d 343, 348). The plaintiffs are entitled to all favorable inferences that can be drawn from their pleadings (*see Aristy-Farer v State of New York,* 29 NY3d at 509). Thus, if the court determines that the plaintiffs are entitled to relief on any reasonable view of the facts stated, the inquiry is complete and the court must declare the complaint legally sufficient (*see id.*).

"The Education Article requires the Legislature to 'provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated'" (*Paynter v State of New York,* 100 NY2d 434, 439, quoting NY Const, art XI, § 1). "[S]tudents have a constitutional right to a 'sound basic education'" (*Paynter v State of New York,* 100 NY2d at 439, quoting *Board of Educ., Levittown Union Free School Dist. v Nyquist,* 57 NY2d at 28). "[A] sound basic education consists of 'the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury'" (*Paynter v State of New York,* 100 NY2d at 439-440, quoting *Campaign for Fiscal Equity v State of New York,* 86 NY2d at 316). "'Fundamentally, an Education Article claim requires two elements: the deprivation of a sound basic education, and

causes attributable to the State'" (*Aristy-Farer v State of New York,* 29 NY3d at 517, quoting *New York Civ. Liberties Union v State of New York,* 4 NY3d 175, 178-179).

Here, the Davids plaintiffs allege in their complaint that teachers are a key determinant of the quality of education students receive and have a profound impact on students' lifetime achievement. The Davids plaintiffs allege that students taught by ineffective teachers—those in approximately the bottom five percent of teachers in New York—suffer lifelong problems and fail to recover from this marked disadvantage.

The Davids plaintiffs allege that the statutory scheme which controls the dismissal of teachers in New York and a seniority-based layoff system make it nearly impossible for school administrators to dismiss ineffective teachers. Specifically, the Davids plaintiffs allege that the following statutes pertaining to the dismissal of teachers deprive students of a sound basic education: Education Law §§ 1102(3), 2509, 2573, 2590-j, 3012, 3014, and 3020-a (hereinafter collectively the Dismissal Statutes). They further allege that Education Law § 3013(2), which mandates that teachers with the least seniority be laid off first (i.e., "last in first out"; hereinafter the LIFO Statute), also deprives students of a sound basic education.

The Davids plaintiffs allege that because of the Dismissal Statutes, school administrators are compelled to either leave ineffective teachers in place or transfer them from school to school. This statutory scheme, they allege, inevitably presents a fatal conflict with the right to a sound basic education guaranteed by article XI, § 1 of the NY Constitution because it forces certain New York students to be educated by ineffective teachers who fail to provide such students with the basic tools necessary to compete in the economic marketplace and participate in a democratic society. The Davids plaintiffs further allege that the LIFO Statute creates a seniority-based layoff system, irrespective of a teacher's performance, effectiveness, or quality. They allege that the LIFO Statute, together with the other statutes at issue, ensures that a certain number of ineffective teachers who are unable to prepare students to compete in the economic marketplace or to participate in a democracy retain employment in the New York school system, and substantially reduces the overall quality of the teacher workforce in New York public schools. The Davids plaintiffs seek a declaration that the Dismissal Statutes and the LIFO Statute, separately and together, violate the right to a sound basic education protected by the Education Article of the NY Constitution.

The Wright plaintiffs challenge the constitutionality of Education Law §§ 2509, 2510, 2573, 2585, 2588, 2590, 3012, 3012-c, 3020, and 3020-a (hereinafter collectively the Challenged Statutes). They allege that the Challenged Statutes confer permanent employment, prevent the removal of ineffective teachers from the classroom, and mandate that layoffs be based on seniority alone, rather than effectiveness. The Wright plaintiffs allege that the Challenged Statutes ensure that ineffective teachers who are unable to provide students with a sound basic education are granted virtually permanent employment in the New York public school system and near-total immunity from termination of their employment. They allege that the Challenged Statutes impose dozens of procedural hurdles to dismiss or discipline ineffective teachers, including investigations, hearings, improvement plans, arbitration processes, and administrative appeals, making it prohibitively expensive, time-consuming, and effectively impossible to dismiss an ineffective teacher who has already received tenure. The Wright plaintiffs allege that, because of the difficulty, cost, and length of time associated with removal,

the number of ineffective teachers who remain employed is far higher than the number of those disciplined or terminated, and that ineffective teachers return to the classroom and students are denied their right to a sound basic education.

The Wright plaintiffs further allege that Education Law § 2585 mandates that the last teachers hired are the first fired when school districts conduct layoffs that reduce the teacher workforce, irrespective of teacher effectiveness or quality. They allege that, in the absence of that statute, school administrators conducting layoffs would consider teacher performance, a higher number of effective teachers would be retained, and fewer children would suffer the loss of an effective teacher. The Wright plaintiffs allege that Education Law § 2585, both alone and in conjunction with the other Challenged Statutes, ensures that a number of ineffective teachers unable to provide students with a sound basic education retain employment in the New York school system. The Wright plaintiffs seek a declaration that the Challenged Statutes violate the NY Constitution.

We agree with the Supreme Court that the Davids plaintiffs' allegations are sufficient to state a cause of action for a judgment declaring that the Dismissal Statutes and the LIFO Statute separately and together violate the right to a sound basic education protected by the Education Article of the NY Constitution. In addition, the Wright plaintiffs' allegations are sufficient to state a cause of action for a judgment declaring that the Challenged Statutes violate the NY Constitution. Accordingly, the defendants were not entitled to dismissal under CPLR 3211(a)(7).

Contrary to the defendants' further contentions, the plaintiffs' allegations present a justiciable controversy (*see Matter of Montano v County Legislature of County of Suffolk,* 70 AD3d 203, 211). "[T]o avoid resolving questions of law merely because a case touches upon a political issue or involves acts of the executive would ultimately 'undermine the function of the judiciary as a coequal branch of government'" (*Matter of Boung Jae Jang v Brown,* 161 AD2d 49, 55, quoting *Matter of Anderson v Krupsak,* 40 NY2d 397, 404). "Notwithstanding the doctrines of justiciability and separation of powers or, perhaps more aptly, because of them, the courts will always be available to resolve disputes concerning the scope of that authority which is granted by the Constitution to the two other branches of the government" (*Matter of Montano v County Legislature of County of Suffolk,* 70 AD3d at 211 [internal quotation marks omitted]; *see Korn v Gulotta,* 72 NY2d 363, 369; *Saxton v Carey,* 44 NY2d 545, 551).

We further agree with the Supreme Court that the plaintiffs' claims are not academic despite the amendments to some of the statutes they challenge. It cannot be concluded at this stage of the proceedings that a declaration as to the validity or invalidity of those statutes would "have no practical effect on the parties" (*Saratoga County Chamber of Commerce, v Pataki,* 100 NY2d 801, 811). Further, contrary to the defendants' contentions, the plaintiffs had standing to commence these actions, as they adequately alleged a threatened injury in fact to their protected right of a sound basic education due to the retention and promotion of alleged ineffective teachers (*see generally Bernfeld v Kurilenko,* 91 AD3d 893, 894).

The defendants' remaining contentions are without merit.

RIVERA, J.P., COHEN, MALTESE and IANNACCI, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court