New York Supreme Court

Appellate Division—Second Department

App. Div. Nos. 2015-03922, 2015-12041

MYMOENA DAVIDS, by her parent and natural guardian, MIAMONA DAVIDS, ERIC DAVIDS, by his parent and natural guardian MIAMONA DAVIDS, ALEXIS PERALTA, by her parent and natural guardian, 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-Respondents,

-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-Appellants,

-and-

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

Intervenor-Defendant-Appellant,

-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-Appellants,

-and-

PHILIP A. CAMMARATA and MARK MAMBRETTI,

Intervenors-Defendants-Appellants.

REPLY BRIEF OF INTERVENOR-DEFENDANTS – APPELLANTS UFT AND COHEN, ET AL. IN SUPPORT OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS, FOR AN INTERIM STAY AND FOR A STAY PENDING APPEAL

STROOCK & STROOCK & LAVAN LLP
180 Maiden Lane
New York, New York 10038
(212) 806-5400
Counsel for Intervenor-Defendant Appellant UFT

Adam S. Ross, Esq.
United Federation of Teachers
52 Broadway, New York, NY 10004
(212) 701-9420
Counsel for Intervenor-Appellant UFT

Robert T. Reilly, Esq.
800 Troy-Schenectady Road
Latham, New York 12110
Counsel for Intervenors-Defendants-Appellants Cohen, et al.

RICHMOND COUNTY CLERK'S INDEX NO. 101105/14

Printed on Recycled Paper

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

ARGUMENT 2

POINT I The Education Article Has Never Been Applied By The Court Of Appeals In A Non-Funding Case, Making This A Case Of First Impression 2

POINT II Plaintiffs Have Failed To Sufficiently Plead Causation 7

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

Cases

Aristy-Farer v. State,
143 A.D.3d 101 (1st Dept. 2016) 8

Aristy-Farer v. State,
29 N.Y. 3d 501 (2017) 7, 8, 10

Callahan v. Bd. of Educ. of City of New York,
174 N.Y. 169 (1903) 1

Campaign for Fiscal Equity, Inc. v. State,
100 N.Y.2d 893 (2003) 6

Cornell Univ.v. Bagnardi,
68 N.Y.2d 583 (1986) 11

New York Civil Liberties Union v. State,
4 N.Y.3d 175 (2005) 5, 7, 9

Paynter v. State,
100 N.Y. 2d 434 (2003) 4, 6, 9

Ricca v. Board of Ed. of City School Dist. of City of New York,
47 N.Y. 2d 385 (1979) 1

Rudder v. Pataki,
93 N.Y.2d 273 (1999) 11

Other Authorities

New York Civil Liberties Union v. State,
4 N.Y.3d 175 (2005) 5

N.Y. State Constit. Art XI, §1 3

PRELIMINARY STATEMENT

Intervenor-Defendants-Appellants (the "Teacher Defendants") seek leave to appeal to the Court of Appeals, summarizing in their main brief ("Defts. Br.") the several issues of statewide public importance that merit review. Plaintiff-Respondents disagreed in a brief largely devoted to re-argument of their prior positions ("Pltfs. Br."). However, the critical issue on this application is not whether the Teacher Defendants or Plaintiffs are correct; it is whether these issues warrant dispositive review by the Court of Appeals. Plainly, they impact not only every teacher and every public school student in New York, but also the constitutionality of State legislation. Plaintiffs remarkably suggest that review of this case and the Court's holding therein "is not a matter of public importance." The rulings upon which the Teacher Defendants seek leave would upend the entire State education system. It is hard to conceive of a case that would qualify as being be of "public or statewide importance," if this case does not suffice. Conservatively, this case impacts the lives of 2.7 million public school students and 205,000 teachers statewide.

For over a century it has been settled law that teacher tenure is both constitutional and of vital benefit to the people of New York. *See*, *e.g.*, *Callahan v. Bd. of Educ. of City of New York,* 174 N.Y. 169, 178 (1903)*; see also Ricca v. Board of Ed. of City School Dist. of City of New York,* 47 N.Y. 2d 385 (1979).

Hundreds of thousands of teachers and students throughout the State rely upon tenure as a cornerstone of the statewide public education system and the Court of Appeals has repeatedly determined tenure to be justified and enforceable. Yet, Plaintiffs here seek to eradicate it. Manifestly, review is merited since the issues in this case not only meet the test of "statewide public importance," but, as set forth in greater detail below, present several instances of a direct conflict with determinations of the Court of Appeals and threaten to embroil the State, City and Teacher Defendants in years of costly and overly burdensome discovery. Indeed, Plaintiffs' counsel acknowledged that fact in response to Justice Rivera's questioning on oral argument.

<u>ARGUMENT</u>

POINT I

The Education Article Has Never Been Applied By The Court Of Appeals In <u>A Non-Funding Case, Making This A Case Of First Impression</u>

Try as Plaintiffs may to shoehorn from prior Education Article cases language and dicta to fit their theory of this case –and even attempt to elevate a single ambiguous word in the Court of Appeals' *N.Y. Civil Liberties Union* decision into supposedly negating a precise holding adverse to their position (*see infra,* p. 5) –they cannot dispute that there has *never* been an Education Article case in which the courts have been called upon to decide what makes for an "effective" teacher, let alone to hold that the Education Article applies to warrant a

lawsuit such as this. If dissatisfaction with teaching or with individual teachers is going to be a permissible Education Article claim henceforth, the Court of Appeals should have the final say.

The pleading requirements in an Education Article claim heard on a motion to dismiss preserve the gatekeeping function of the court in shielding the City, State and other governmental entities and defendants from years of costly discovery based on political disagreement with education policy or individual dissatisfaction with a child's educational experience. This case is no exception.

Importantly, Plaintiffs' counsel acknowledged, in response to Presiding Justice Rivera's questioning on oral argument that (absent review) a multi-year statewide discovery onslaught will follow. Every school district in the State, as well as the State Education Department and other State and local agencies, would be burdened with the production of countless documents and student records before the exact same legal issues requiring Court of Appeals resolution return years hence (on the initiative of Plaintiffs or Defendants) for precisely the review here sought. That significant point was made by the Supreme Court on remand when Plaintiffs sought to press that discovery inundation before the issue of review was resolved, Justice Marin correctly noting that review could obviate or narrow the relevant issues.

One simple illustration proves the point that Justice Marin correctly made.

One of the obvious threshold questions here presented is whether the *sole alleged basis for these proceedings,* the Education Article of the State Constitution (N.Y. State Constit. Art XI, §1), applies in a wholly non-funding context such as presented herein. If it does not, this case is over and the millions of dollars that would be devoted to burdensome discovery and hours of judicial and governmental time that could otherwise be devoted to education and the People's business could be saved. After all, as Plaintiffs' submission makes clear, the Court of Appeals is "... the ultimate arbiter of our State Constitution" (Pltfs. Br., at 22 quoting *Campaign for Fiscal Equity, Inc. v. State,* 8 N.Y. 3d 14, 28 (2006)) and, whatever else may be said, the caselaw is clear that the sharp legal issues of statewide public importance that here are present warrant final resolution by the Court of Appeals. (*See* cases cited at Defts. Main Br. pp.13-14).

The Court of Appeals has *never* rendered judgment for Plaintiffs in an Education Article challenge in the absence of a funding adequacy predicate and *none* is here alleged. Obviously, that not only makes this a first impression issue but one of significant constitutional importance.

Of the 10 Education Article cases that have been heard by the Court of Appeals, 9 have been principally concerned with the funding of New York State's public schools. At best, the only arguable outlier was *Paynter v. State*, 100 N.Y. 2d 434 (2003), which concerned the economic and demographic composition of

schools, *and it was dismissed*. That case was dismissed, in large part, because the Court held that the State has no responsibility under the Education Article to "change the demographic composition" of school districts. *Id.* at 442.

Much of Plaintiffs' submission focuses on the question of whether the Education Article may be applied in non-funding cases. In support Plaintiffs cite to *New York Civil Liberties Union v. State*, 4 N.Y.3d 175 (2005), in which the Court according to Plaintiffs here "...faulted the plaintiffs for not alleging a failure of the State to provide resources—financial or *otherwise*—necessary to guarantee a constitutionally adequate education." Pltfs. Br., at 18 (emphasis added). As an initial matter, the choice of *N.Y. Civil Liberties Union* to assert that the Education Article applies outside the funding context is an inapt one because it was a case that was brought to challenge the failure of the State to provide sufficient monetary resources to facilities to afford students in 27 schools the right to a sound basic education. Thus, *N.Y. Civil Liberties Union* was itself a funding case. Further, the notion that a single ambiguous word apart from context somehow turns a judicial decision, much less a body of caselaw, on its head makes no sense. Nonetheless, only the Court of Appeals can determine whether, by the use of the single, ambiguous word –"*otherwise*" – it intended to create jurisdiction and a substantive cause of action where none otherwise exists.

Even if the language in *N.Y. Civil Liberties Union* were to be read to expand the purview of Education Article cases to those involving "other resources," a judicial review of teaching in the classroom—as is before the Court here—has never been the proper subject of constitutional review. It is true, as Plaintiffs repeatedly insist, that teaching is an "input" to a sound basic education, as articulated in the seminal *CFE* case, but Plaintiffs ignore (i) that it was only one of the inputs lacking in the case, which also included overcrowded schools and dilapidated facilities and equipment; and (ii) perhaps more importantly, "teaching" in *CFE* did not encompass an evaluation of the classroom experience. The Court was not called upon to qualitatively evaluate teachers or any other aspect of the education system. Instead, the Court found that students were being taught by teachers who were either uncertified by *State educational standards* in the subjects they were teaching or uncertified altogether. *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 909 (2003). These are the types of readily discernable and non-pedagogical issues the courts are equipped to decide. For the rest, as the *Paynter* court reiterated:

> … the Education Article enshrined in the Constitution a state-local partnership in which "people with a community of interest and a tradition of acting together to govern themselves" make the "basic decisions on funding and operating their own schools" (57 N.Y.2d at 46, 453 N.Y.S.2d 643, 439 N.E.2d 359). The premise of the Article is thus in part that a system of local school districts exists and will continue to do so because the residents of such districts have the right to participate in the governance of their own

> schools. The aim of the Article "was to constitutionalize the established system of common schools rather than to alter its substance" ….

Paynter, at 442.

Indeed, Plaintiffs' argument is *not* that the Education Article *permits* or *authorizes* their challenges to tenure or to the statutes that control the hiring and retention of teachers by school districts across the state; instead, Plaintiffs maintain that "[n]othing in Article XI, or the case law interpreting Article XI, *prohibits [it]…*" Pltfs. Br., at 18 (emphasis added). "*Prohibition*" of course, is a far different thing from "authorizing" or "enabling" sweeping litigation.

In the final analysis, whether the courts should now wade into the deeply complex question of what makes for an effective teacher is precisely the type of determination that should be made by the Court of Appeals.

POINT II

Plaintiffs Have Failed To Sufficiently Plead Causation

The same flaw both in reasoning and in law attends yet another issue meriting Court of Appeals review—whether that Court meant what it said when in *N.Y. Civil Liberties* it ruled that the failure to "sufficiently plead" *causation* by the State is "fatal" to an Education Article claim. *N.Y. Civil Liberties Union,* 4 N.Y.3d at 178; *see also Aristy-Farer v. State,* 29 N.Y. 3d 501, 515-16 (2017). Plaintiffs previously maintained that they were exempt from that explicit pleading requirement (*see* Moerdler Aff. at Exhibit E); they now argue that "extended

causation discussion" at the pleading stage is unnecessary" (Pltfs. Br. 17) . But that is precisely the argument that the *Aristy-Farer* Court rejected, emphasizing that "[a] pleading is not an empty formality." *Id.* at 517.

Aristy-Farer clearly holds that a plaintiffs "must plead some facts as to each school district they claim falls below the constitutional minimum" and the claims must be premised on "failures caused by inadequate state funding." *Aristy-Farer v. State,* 29 N.Y.3d 501, 510, 511 (2017). If, as Plaintiffs suggest, the Court of Appeals did not mean what it said and meant instead by this plain language that an unspecified statewide deficiency is sufficient to state a claim, that can only be determined by the Court of Appeals by way of clarification that language.

Indeed, the *Aristy-Farer* Court has expressly rejected Plaintiffs' argument (Pltfs. Br., at 19-20) that they need not allege district by district failures because they have supposedly alleged systemic statewide failures:

> Plaintiffs contend that requiring proof on a district-by-district basis could be difficult, if not impossible, and therefore reason they should be able to prove a statewide violation by adducing evidence as to some districts of their choosing. *However, our precedent requires district-specific pleading for claims of this nature ....*

Aristy-Farer, 529 N.Y.3d at 512 (emphasis added). Plaintiffs are plainly wrong.

More importantly, however, whether Plaintiffs or Defendants are correct is not the issue here. Rather, it is whether that critical issue merits dispositive review.

Plaintiffs' position creates a clear conflict with *Aristy-Farer* and, thus, is an issue that warrants review by the Court of Appeals.

Moreover, the requirement of a district-wide showing in *Aristy-Farer* and in other Education Article cases is meant, at least in part, to ensure that the educational deficiencies complained of emanate from the same causal factors and that the State is the root of the causation. Although we disagree on the measures chosen by appellees to make their case (*e.g.*, repudiated test scores), even Plaintiffs would have to agree that there are districts in this State that are performing quite well, by any measure. These districts operate under the *very same* laws here challenged, belying Plaintiffs' thesis that the laws are the cause of poor student performance. Thus, on its face, the Complaint cannot allege the requisite causation.

Notably, the Court of Appeals has also disposed of Plaintiffs' argument that their recitation of selected, outdated and rejected statistics suffices "at this stage of the proceedings ..." (Pltfs. Br., at 21). The Court of Appeals has ruled on a motion to dismiss that "aggregate statistics" and allegations of "academic failure alone" do not suffice for an Education Article claim. *N.Y. Civ. Liberties Union,* 4 N.Y.3d at 180-82; *Paynter*, 100 N.Y.2d at 441. The facts alleged in any complaint must meet fundamental pleading thresholds for legal sufficiency. Plaintiffs have cited 2013 English Language Arts and Mathematic State Assessment scores for grades 3

through 8, scores which have since been rejected by State educational authorities. That, along with bald assertions that "tens of thousands" of students have ineffective teachers, cannot be and has never been the basis for a sustainable Education Article claim or the ticket to extraordinarily burdensome discovery.

Indeed, barely a paragraph of Plaintiffs' submission passes without the *ipse dixit* that their effort is to eliminate "ineffective teachers." But, throughout these proceedings, we have repeatedly called upon Plaintiffs to define that touchstone phrase. Their refusal to do so speaks volumes. As the Court of Appeals has made clear, where the pleadings lack specificity as to the underlying challenged predicate—here, the deliberate refusal to define what constitutes an "ineffective teacher," while at the same time railing against that undefined "straw man"—the ability of the Legislature and, hence, the Judiciary to address that issue is negated, thereby rendering the pleadings insufficient as a matter of law. *See Aristy-Farer*, 29 N.Y. 3d at 517. Moreover, Plaintiffs not only studiously omit to define the term, but by so doing they explicitly or implicitly reject the Legislature's considered system for defining ineffective both because it has changed materially since they filed this suit and because it does not brand "enough" teachers as "ineffective" to suit plaintiffs liking or fit their theory.

Again, however, insufficiency is not the issue on this application. Instead, the issue here is whether the Court of Appeals will, now or after millions of dollars of discovery, be allowed to resolve the legal issues here presented.

Finally, Plaintiffs have not meaningfully addressed the issues of mootness and standing. In the interests of brevity, the Teacher Defendants will briefly address these points below, noting that they were discussed in our main brief (at pp. 22-25) and that of co-defendants:

- With respect to mootness, Plaintiffs seek to frame the question as one of degree—they assert that the State's "minor modifications" to the education laws at issue do not moot their claims. First, Plaintiffs have never disagreed that the statutes that they are challenging are *no longer operative.* Whether the changes to the law are major or minor, Plaintiffs are seeking to invalidate a statutory scheme that is no longer in effect. This is underscored by the fact that one of the changes that Plaintiffs still seek in their complaints—the extension of probation—has been changed to precisely the four years they demanded. Second, the mootness doctrine does not provide that all of the allegations be remedied to apply. If a statute is superseded, a claim challenging the statute is moot, whether the amendments fully cure the alleged defects in the prior law. *Cornell Univ. v. Bagnardi*, 68 N.Y.2d 583 (1986).

- Finally, standing is a threshold issue that must be ascertained at the outset of the litigation, not deferred until costly discovery, burdensome motion practice and other processes have taken their toll on litigants and taxpayers. Plaintiffs state broadly in their opposition that they send their children to public school in districts (which, by Plaintiffs' broad allegations, include *all* districts) that are "handicapped by the Challenged Statutes." Pltfs. Br., at 24. This is not actual personal harm or "injury in fact," which is required to confer standing. Actual personal harm is required precisely because "grievances generalized to the degree that they broadly become policy complaints...are best left to the elected branches." *Rudder v. Pataki*, 93 N.Y.2d 273 (1999). If an allegation that a child attends public

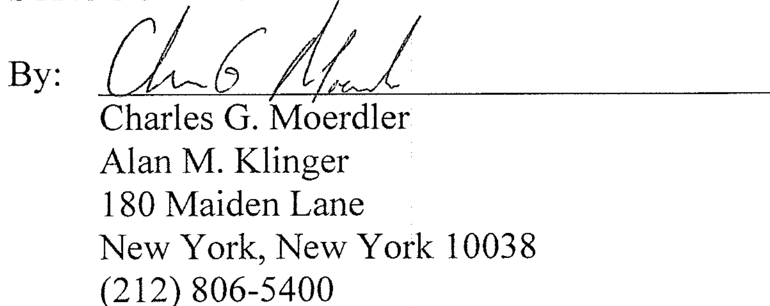
school, without more, is to be sufficient to confer standing, the appropriate venue for that determination is the Court of Appeals.

CONCLUSION

For all of the foregoing reasons, together with the Teacher Defendants' prior submissions and the submissions of the other Defendants in this action, the Teacher Defendants respectfully request that their motion for leave to appeal be granted, together with such other and further relief as may appear appropriate, and that this Court certify the following question:

> Was the determination of the Supreme Court, Richmond County, as affirmed by this Court, properly made?

Dated: New York, New York
May 31, 2018



STROOCK & STROOCK & LAVAN LLP

By: ______________________

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

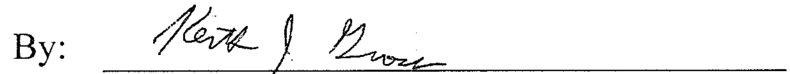
Of Counsel: David J. Kahne
Beth A. Norton

-and-

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

Co-Counsel for Intervenor-Defendant-Appellant UFT

-and-

By: 

ROBERT T. REILLY
Keith J. Gross, Of Counsel
800 Troy-Schenectady Road
Latham, New York 12110-2455

Counsel for Intervenors-Defendants-Appellants Cohen, et al.