Consolidated Index No. 101105/14

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

MYMEONA DAVIDS, et al.,

Plaintiffs,

-against-

THE STATE OF NEW YORK, et al.,

Defendants.

-and-

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

Intervenor-Defendant,

SETH COHEN, *et al.*,

Intervenors-Defendants,

PHILIP A. CAMMARATA, *et al.*,

Intervenors-Defendants.

JOHN KEONI WRIGHT, *et al.*,

Plaintiffs,

- against –

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

Defendants

-and-

SETH COHEN, *et al.*,

Intervenors-Defendants,

PHILIP A. CAMMARATA, *et al.*,

Intervenors-Defendants,

NEW YORK CITY DEPARTMENT OF EDUCATION,

Intervenor-Defendant,

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

Intervenor-Defendant.

MUNICIPAL DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR A STAY

ZACHARY W. CARTER
Corporation Counsel of the City of New York
Attorney for Municipal Defendants
100 Church Street, Rm. 2-195
New York, N.Y. 10007-2601

Of Counsel: Janice Birnbaum
Tel: (212)356-2085
Matter No. 2014-026935

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Cases **Pages**

Statutes

Other Authorities

PRELIMINARY STATEMENT

By this motion, Defendants/Defendant-Intervenor City of New York ("City") and the New York City Department of Education ("DOE"; collectively, "Municipal Defendants") seek a stay of all trial court proceedings (a) during the pendency of their application for leave to appeal the Second Department's decision and order of March 28, 2018, which affirmed the trial court's order denying the Municipal Defendants' motions for dismissal, and upon renewal, dismissal of the above-captioned consolidated actions, and if leave is granted, pending a determination by the New York Court of Appeals on the Municipal Defendants' motions.

The stay is needed given the unique nature of this case. It is a case of first impression in this State. In short, Plaintiffs seek to strip statutory tenure and seniority protections from public school teachers employed by school districts throughout the State, including DOE. There are threshold questions that may dispose of the case in its entirety on appeal, including lack of justiciability, staleness/mootness since the challenged statutory scheme has been materially amended without amendment of the amended complaints conforming to the new scheme, standing, and failure to state a claim. Given the statewide scope of the claims alleged, litigation of this case will result in complex, time-consuming, expansive, and expensive discovery. A stay is warranted to conserve judicial and attorney resources. Moreover, the public fisc of the Municipal Defendants (and the State of New York), should not be forced to bear the cost of this litigation without first obtaining a ruling on the potentially dispositive threshold issues. The plaintiffs will not be prejudiced by the stay since they do not allege that any one of them has been deprived of the "sound basic education" that the State constitution guarantees under the Education Article, much less that the statutes at issue have resulted in a systemic crisis of teacher quality.

STATEMENT OF FACTS

In 2014, two actions were filed alleging claims under the Education Article (Article XI) of the State constitution challenging New York's teacher tenure and seniority laws. They were consolidated that summer, and thereafter each was amended. The amended complaints, as consolidated, base their claims on the theory that these aforementioned laws permit an unidentified number of "ineffective teachers" to remain in the school system, placing some children "at risk" of being assigned to an underperforming teacher. They do not allege that any one of them had been deprived of the "sound basic education" that the Education Article guarantees, much less that the statutes at issue have resulted in a systemic crisis of teacher quality. In fact, they concede that "the majority of teachers in New York are providing students with a quality education," and contend that only those taught by a small minority of teachers are disadvantaged. *See Davids v. State*, 159 A.D.3d 987, 989, 2018 N.Y. App. Div. LEXIS 2029 at *7 (2d Dep't 2018).

On March 28, 2018, the Second Department issued its decision and order, affirming the trial court's denial of the motions by the Municipal Defendants (and all other defendants) for an order, including on renewal, of dismissal of the consolidated amended complaints. *Id.*

By short form order dated April 23, 2018, this Court set June 20, 2018, as the date by which answers to the amended complaints are due.

However, on April 30, 2018, the Municipal Defendants (and all other defendants) moved for leave to appeal the Second Department's Decision and Order to the New York Court of Appeals. All briefing on the motions for leave was completed on May 31, 2018. A ruling is imminent.

The Municipal Defendants now move for a stay of all trial court proceedings, including the answers, until a determination is rendered from the appellate proceedings.

LEGAL ARGUMENT

THIS COURT SHOULD ISSUE A STAY

CPLR § 2201 permits "the court in which an action is pending" to "grant a stay of proceedings in a proper case, upon such terms as may be just." "[A] court has broad discretion to grant a stay in order to avoid the risk of inconsistent adjudications, application of proof and potential waste of judicial resources." *Zonghetti v. Jeromack*, 150 A.D.2d 561, 563, 541 N.Y.S.2d 235, 237 (2d Dep't 1989). In this case, the Court should grant a stay of the proceedings pending resolution of the motion for leave, and if granted, pending appeal, because there are threshold issues, such as nonjusticiability, staleness/mootness, and failure to state a claim under the Education Article or otherwise, that would dispose of the case in its entirety if the Court of Appeals rules in defendants' favor.

To date, the Court of Appeals has identified only a narrow band of justiciable Education Article claims -- specifically those that assert facts that allege a "gross and glaring inadequacy" in funding by the State that allegedly causes a school district-wide failure to provide a sound basic education that specifically harms the plaintiff students (among others). *Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 317–19, 631 N.Y.S.2d 565, 570-72 (1995) ("*CFE I*"); *Board of Educ. v. Nyquist*, 57 N.Y.2d 27, 48, 453 N.Y.S.2d 643, 653 (1982).[1] This case breaks new ground. Beyond a passing indication that Education Article claims may extend to the

[1] The Education Article provides 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." N.Y. Constitution, Article XI, § 1. An Education Article cause of action requires two elements: "first, that the State fails to provide [the plaintiff students] a sound basic education in that it provides deficient inputs – teaching, facilities and instrumentalities of learning – which lead to deficient outputs such as test results and graduation rates; and second, that this failure is causally connected to the funding system." *Paynter v. State,* 100 N.Y.2d 434, 440 765 N.Y.S.2d 819, 822 (2003); *Campaign for Fiscal Equity v. State,* 100 N.Y.2d 893, 909-18 769 N.Y.S.2d 106, 113-120 (2003)(*CFE II); NYS Ass'n of Small City School Districts, Inc. v. State,* 42 A.D.3d 648, 652, 840 N.Y.S.2d 179, 183 (3d Dep't 2007). In addition, the complaint's allegations must show that plaintiffs are harmed by some district-wide failure. *ACLU v. State,* 4 N.Y.3d 175, 181, 791 N.Y.S.2d 507, 511 (2005); *NYS Ass'n,* 42 A.D.3d at 652, 840 N.Y.S.2d at 184. Neither the *Davids* complaint, nor the *Wright* complaint, meets this standard.

provision of "other resources," *N.Y. Civil Liberties Union v. State*, 4 N.Y.3d 175, 182, 791 N.Y.S.2d 507, 511 (2005), the Court of Appeals has never held that any education policy outside the funding context is susceptible to judicial scrutiny. Quite the opposite—the Court has doubled down on its "respect for the separation of powers" given the judiciary's "limited access … to the controlling economic and social facts" which dictate policy, *Campaign for Fiscal Equity, Inc. v. State,* 8 N.Y.3d 14, 28, 828 N.Y.S.2d 235, 243 (2006) (*CFE III;* internal quotation marks omitted), reiterating as recently as last year, that courts "cannot intrude upon the policy-making and discretionary decisions that are reserved to the legislative and executive branches," *Aristy-Farer v. State*, 29 N.Y.3d 501, 513, 58 N.Y.S.3d 877, 885 (2017) (quotation marks omitted).

Plaintiffs attack teacher tenure, a century-old institution that reflects "strong public policy considerations." *Feinerman v. Board of Co-op. Educ. Servs. of Nassau Cty.*, 48 N.Y.2d 491, 497, 423 N.Y.S.2d 867, 871 (1979). Its precise impact on teaching quality, however, is inherently a matter of policy judgment. Unlike all other Education Article claims in the funding context, where the impact of educational inputs is one-directional, any downside to tenure must be weighed against its benefits, for example, in improving teacher recruitment and retention. *See, e.g., Ricca v. Board of Educ. of City Sch. Dist. of City of N.Y.*, 47 N.Y.2d 385, 391, 418 N.Y.S.2d 345, 349 (1979) (noting tenure "foster[s] academic freedom"). Balancing these effects lies outside the judiciary's usual compass. *See Jones v. Beame*, 45 N.Y.2d 402, 408–09, 408 N.Y.S.2d 449, 452 (1978) ("[T]he court … will abstain from venturing into areas if it is ill-equipped … and other branches of government are far more suited to the task.").

The Legislature, by contrast, has thoroughly weighed tenure's pros and cons. In response to continually-evolving public debate,[2] it has repeatedly revisited and refined the tenure statutes, including five times in the last ten years (and once during this litigation). Few areas of public policy have received more consideration, and at each opportunity, the Legislature has concluded that tenure has a net beneficial effect on our education system. That judgment is a considered one, and while it may be "debatable," it was not so "irrational" as to place tenure outside the menu of policies compliant with the Education Article's "constitutional ... floor." *CFE III*, 8 N.Y.3d at 20, 31, 8 N.Y.S.3d at 245. The plaintiffs, in contrast, ignored the most recent set of amendments to the statutes they challenge and refused to amend their complaints, when given the opportunity.

Thus, plaintiffs' use of the Education Article to second guess the Legislature's judgment is a sharp departure from how the Court of Appeals has interpreted the Article to date, and a substantial expansion of its scope.[3] Whether it is appropriate for the courts of the State to entertain such challenges is a matter warranting review by the Court of Appeals and is the basis for the Municipal Defendants' motion for leave. The question is fundamental to this case, and it will not disappear with further proceedings. Hence, this Court should stay the trial court proceedings now, until the appellate process is complete.

It is an understatement to say that the discovery and trial process in this case will be burdensome and costly. The case alleges statewide claims, and focuses heavily on the city

---

[2] *See, e.g.*, Yana Kunichoff, *The Big Money Behind California's Tenure Lawsuit*, Truthout (June 19, 2014), http://bit.ly/1XVqoal; Timothy R. Williams, *Tenure Decision Draws Sharp Debate*, N.Y. Times, Times Insider, June 12, 2014, https://nyti.ms/2vtQq1f. The debate continues. *See, e.g.,* Monica Disare, *With changes coming to New York's teacher evaluations, union and state officials prepare to clash*, Chalkbeat (Feb. 12, 2018), https://bit.ly/2qKDI9D.

[3] A wide range of policies—from charter authorizations, to curriculum requirements, to testing regimes—may fairly be said to affect both education inputs and outputs, and this Court's decision may render them all subject to constitutional challenge by plaintiffs who disagree with them.

school district of the City of New York. Before imposing such a burden on the taxpayers of the City (and of course, our co-defendants, the State Defendants), the Court should let the appellate process play out. Given the expansive scope of this case and its causation issues, which will require linking teacher tenure (and teacher discipline, seniority and lay-offs) to student failure, litigation of this case will dwarf the acknowledged profound burdens imposed by more straightforward funding cases of the past. *See, e.g.*, *CFE II*, 100 N.Y.2d at 902-3, 769 N.Y.S.2d 106, 108-09 (describing 111-day trial involving high ranking officials); *accord, Vergara v. State of California,* 246 Cal. App. 4th 619, 632, 209 Cal. Rptr. 532, 542 (2016) (bench trial at which over 50 lay and expert witnesses from throughout California testified, including teachers, principals, superintendents and California Department of Education employees).

Finally, the Municipal Defendants note that Judge Minardo stayed all trial court proceedings after denying defendants' original motion to dismiss and upon renewal, during the pendency of the appeal to the Second Department.

For all these reasons, the Municipal Defendants respectfully request that this Court issue a stay of all trial proceedings in this case, including the answers that are currently due on June 20.

CONCLUSION

For the reasons set forth herein, the Municipal Defendants respectfully request that this Court issue a stay of all trial court proceedings, until a determination is issued concerning their motion for leave to appeal to the Court of Appeals, and if granted, until the Court of Appeals issues a determination.

Dated: New York, New York
June 5, 2018

ZACHARY W. CARTER
Corporation Counsel of the City of New York
Attorney for Municipal Defendants
100 Church Street, Room 2-195
New York, New York 10007
(212) 356-2085

By: _____
Janice Birnbaum
Senior Counsel