STATE OF NEW YORK
SUPREME COURT COUNTY OF RICHMOND

MYMOENA DAVIDS, et al.,

Plaintiffs,

-against-

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

THE STATE OF NEW YORK, et al.,

Defendants,

-and-

MICHAEL MULGREW, et al.,

Intervenor-Defendants.

JOHN KEONI WRIGHT, et al.,

Plaintiffs,

-against-

THE STATE OF NEW YORK, et al.,

Defendants,

-and-

SETH COHEN, et al.,

Intervenor-Defendants.

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF INTERVENOR-DEFENDANTS' MOTION FOR LEAVE TO RENEW

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PRELIMINARY STATEMENT

Before addressing the merits of the motion to renew, several points made by plaintiffs in their memorandum of law in opposition to the motion to renew ("*Wright* Mem.") should be addressed.

First, plaintiffs' continued assertions that they represent or speak for the schoolchildren of New York is simply not true. *Wright* Mem. at 2, 6, 22-23 and 25. This is not a class action and plaintiffs speak for no children other than their own. Indeed, the teacher defendants and NYSUT, which represents over 250,000 potentially affected New York State public school teachers, many of whom are themselves public school parents, clearly speak for a far greater number of the State's school children than do the plaintiffs. *See* Intervenor-Defendants' (Cohen, et. al) Mem. in Support of Mot. to Dismiss at 4.

Second, plaintiffs quote, out of context, several remarks by New York State legislators. *See e.g.*, *Wright* Mem. at 6-9. These remarks have nothing to do with the legal issues in this case. Plaintiffs have instituted a facial challenge to numerous provisions of the Education Law, many of which were substantially amended on April 1, 2015. *See* Intervenor-Defendants' Mem. in Support of Mot. to Renew at 6-10. In a facial challenge, the court is asked to decide the constitutionality of the challenged statutes as they are written, not as they are applied or allegedly misapplied, and certainly not as they may be viewed by individual legislators. *See Benson Realty Corp. v. Beame*, 50 N.Y.2d 994, 996 (1980).

Third, it is stunning that plaintiffs continue to cite an outdated, informal survey about how long it takes to prosecute Education Law §3020-a cases. *Wright* Mem. at 11-12. Current statistics from the State Education Department have been placed before the Court. *See* Affirmation of Arthur P. Scheuermann in Support of Mot. to dismiss, dated October 23, 2104 at ¶¶ 88 and 89. Plaintiffs'

counsel recited those current statistics to the Court at oral argument in January when he read from Chancellor Tisch's letter to Governor Cuomo, dated December 29, 2014. That letter was specifically referenced in the April 1, 2015 budget legislation that gave rise to this motion to renew. L. 2015, c.56, pt. EE, Subpt. E, §1. While the length of 3020-a cases is not relevant to the facial constitutionality of the statute (*Benson Realty, supra*), plaintiffs owe the Court at least some degree of candor.

Fourth, although not germane to this motion, defendants reiterate that plaintiffs' reliance on 2013 standardized test results to allege a basis for an Education Article claim is legally and factually without merit. *Wright* Mem. at 7. Legally, test results, standing alone, cannot form the basis of an Education Article claim. *Campaign for Fiscal Equity v. State,* 86 N.Y.2d 307, 317 (1995). Factually, because the outcome of the 2013 tests was so questionable, due to the faulty implementation of the new Common Core Curriculum, the Legislature in 2014 determined that those results could not be the basis of high-stakes education decisions for students. Intervenor-Defendants' Reply Mem. of Law in Support of Mot. to Dismiss at 3-4. Education Law §305 (45) and (46).

ARGUMENT

THE AMENDED COMPLAINTS SHOULD BE DISMISSED AS NON-JUSTICIABLE.

The essence of plaintiffs' case is described at page 21 of their Memorandum of Law:

> They [plaintiffs] asserted a constitutional injury, identified enforcement of the Education Law as the cause, and asked this Court to declare the constitutional minimum when it comes to providing children with effective teachers and an adequate education.

This framing of the complaint demonstrates its non-justiciability. The Court of Appeals has already determined the "constitutional minimum" under the Education Law. The Education Law

has been repeatedly amended over the years, including several times in the last decade, to meet that standard. Plaintiffs are in reality asking this Court to rewrite major portions of the Education Law because they disagree with the Legislature's policy decisions.

The Court of Appeals interprets the Education Article to require the State to provide a "sound basic education" to all its children. *CFE v. State*, 86 N.Y.2d at 315. A sound basic education is a "meaningful high school education" preparing children to function productively as citizens and civic participants. *CFE v. State*, 100 N.Y.2d 893, 914 (2003).

To provide a sound basic education, certain educational "inputs" must be furnished, including qualified and competent teachers; schools and classrooms providing enough light, space, heat and air, and reasonable class sizes to permit children to learn; and appropriate instrumentalities of learning, including classroom supplies, text books, libraries and computers. *CFE v. State*, 86 N.Y.2d at 317. Clearly then, the Court of Appeals has already done what the plaintiffs say they want this Court to do: "declare the constitutional minimum when it comes to providing children with effective teachers and adequate education." *Wright* Mem. at 21. In truth, plaintiffs are not really asking the Court to declare the constitutional minimum when it comes to children's education. They are instead challenging the means chosen by the Executive and Legislative branches to provide that minimum.

That the claims raised in the amended complaints are non-justiciable is perhaps best illustrated by what the complaints do *not* contain.

As the Court of Appeals held in *New York Civil Liberties Union v. State*, 4 N.Y. 3d 175, 180 (2005): "An Education Article claim . . . requires a clear articulation of the asserted failings of the State, sufficient for the State to know what it will be expected to do should the plaintiffs prevail." These plaintiffs do not even try to meet this obligation.

Although the amended complaints challenged New York's former three-year probationary period, originally suggesting that at least four years are required to judge an effective teacher (*Wright* Compl. at ¶¶46-47), plaintiffs now claim the recently-enacted four-year probationary term is not long enough, without alleging what probationary term would be sufficient. *Wright* Mem. at 6, 17. For decades, probationary periods for teachers have fluctuated between three and five years. Intervenor-Defendants' Mem. in Support of Mot. to Dismiss at 14-19. Unless it is unconstitutional for the Legislature to establish a probationary term, then the length of that term is clearly a policy matter for the Legislature.

Plaintiffs next challenge the due process protections afforded to teachers by law as being too time-consuming and complex, but never say what procedures would be constitutional. *Wright* Mem. at 9-10, 16. But, once plaintiffs concede, as they must, that public employees can be provided property rights in their continued employment (*see Gould v. Bd. of Educ. Sewanhaka Cent. High Sch. Dist.*, 81 N.Y.2d 446, 451 (1992)), the actual procedures provided by the Legislature, and most recently revised in 2008, 2010, 2012 and in April, are a policy matter, so long as they meet the constitutionally required minimum. *Loudermill, v. Cleveland Bd. of Educ.*, 470 US 532, 538, 541 (1985).

Plaintiffs say that the Legislature has not provided a proper system for identifying minimally-effective teachers, but plaintiffs never say what constitutes an "effective" teacher and never say what teacher evaluation system would, in their opinion, be constitutional. *Wright* Mem. at 10-12, 16-17. Teacher evaluation is a complex policy issue, as demonstrated by the concerted legislative and regulatory effort, ongoing since 2010, to create and design a comprehensive teacher evaluation system. It is improper for the plaintiffs to ask the Court to weigh in on this policy issue without

providing the slightest indication of the alleged, specific constitutional deficiencies of the system designed by the Legislature and the Board of Regents.

Plaintiffs finally allege that the State may not provide seniority protection to teachers who render faithful and competent service, without identifying what system should take its place. *Wright* Mem. at 12-13. Unless the Court is willing to hold that a civil servant's seniority cannot constitutionally be given value or meaning, then the weight given to seniority in a layoff situation most be regarded as a policy matter for the Legislature.

In short, this case is non-justiciable because the Court of Appeals has already clearly defined the state's duty under the Education Article: to ensure the provision of a "sound basic education" that prepares students for "meaningful civic participation in contemporary society." *CFE v. State*, 100 N.Y. 2d at 905. The Executive and Legislative branches have paid careful and constant attention to fulfilling their duties under the Article, and have done so long before these plaintiffs came to court, and will undoubtedly continue to do so long after this case is resolved.

What is ultimately clear is that plaintiffs do not like these laws. Plaintiffs' real goal appears to be to reduce teachers to employees at will, without any employment rights or protections. Of course, such a system would not guarantee an effective teacher for every child and would undermine the public policy that is the very basis of these laws. Indeed, the tenure laws were designed to remedy the abuses and failures of just such a system. *See* Intervenor-Defendants' Mem. in Support of Mot. to Dismiss at 37. The current, ever-evolving system of laws is the Legislature's best attempt to attract and retain good teachers in the public school system and to empower them to teach without fear of unjust dismissal.

This Court should reject as non-justiciable plaintiffs' effort to strip 250,000 New Yorkers

of basic job protections – – protections that the State of New York has every right to establish in order to attract and retain competent teachers, and to provide those teachers with the protections they need to teach professionally. Plaintiffs' entire case is founded not on any factual showing that any student in New York has been denied a sound basic education, much less that any school district as a whole is not providing a sound basic education. *See New York Civil Liberties Union*, 4 N.Y. 3d at 181-82. Rather, plaintiffs simply want this Court to follow the lead of the lower court in *Vergara v. California*, a questionable decision that is on appeal and that was based on completely different legal theories.

The ongoing attack on the basic employment rights of ordinary working people is well known throughout the Country. Disguising a legal assault on teachers' basic job protections as a way of helping students is particularly insidious. The tenure laws challenged in the case created constitutionally-protected property rights for over 250,000 New Yorkers, property rights that are of the utmost importance to them and to their families. *See Gould v. Bd. of Educ.*, 81 N.Y. 2d at 451; and *Loudermill*, 470 U.S. at 542-43.

Defendants are confident that the courts will see through this effort and soundly reject it. Just last November, our Court of Appeals strongly reaffirmed the important policy purposes of tenure. *See Kilduff v. Rochester City Sch. Dist.*, 24 N.Y.3d 505, 509-510 (2014). Only weeks ago, the Appellate Division, Second Department, fully cognizant of the pendency of the case at bar, noted that:

> The Legislature designed the tenure system "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. [*Brown v. Bd. of Educ.*, ___ A.D. 3d ____, 2015 NY Slip Op. 05471 (2d Dep't June 24, 2015) (citations omitted).]

In March, a federal district court in Indiana noted that even that state's *legislature* could not revoke statutory seniority protections from current teachers, since to do so would be a violation of the Contract Clause of the U.S. Constitution. *Elliot v. Bd. of Sch. Trustees of Madison Consol. Sch.*, 2015 WL 1125022 (S.D. Ind. 2015). The court noted that under Indiana law (as in New York), ineffective teachers could be fired for cause, so eliminating seniority rights was not "reasonable and necessary to serve an important public interest." *Id.* at 6-7.

Similarly, in June, a North Carolina appeals court affirmed the decision of a lower court, holding that the legislature could not, consistent with due process and the Contract Clause of the U.S. Constitution, eliminate tenure and due process rights for already tenured teachers. *North Carolina Ass'n of Educators v. North Carolina*, ____ S.E.2d ____, 2015 WL 3466263 (N.C. Ct. App. 2015). Like the federal court in Indiana, the North Carolina Court rejected the claim that eviscerating tenure was reasonable and necessary to improve education. *Id.* at 10-12.

It is clear that New York's Legislature has broad authority to set the general terms of conditions of employment for public servants, to attract qualified candidates to such service, to retain them so long as their service is faithful and competent, to protect them from arbitrary and capricious termination, and to empower them to perform professionally. The Legislature has made policy decisions in this regard, and in doing so has created constitutionally-protected rights enjoyed by defendants. It is not the role of the judiciary to override or rewrite the Legislature's policy judgments.

Finally, plaintiffs' reliance on *Hussein v. State,* 81 A.D.3d 132 (3d Dep't 2011), *aff'd*, 19 N.Y.3d 899 (2012), is totally misplaced, and a disservice to the plaintiff-parents in that case. In *Hussein*, the Court noted that education policy matters were generally *non-justiciable*, with the

narrow exception carved out by the Court of Appeals with regard to inadequate educational inputs based on inadequate funding. 81 A.D.3d at 134. And, the plaintiff parents in *Hussein* - - unlike the current plaintiffs who rushed to court after *Vergara* was decided - - carefully pleaded a *CFE*-type funding case, alleging school district-wide failures to provide a sound basic education, backed by well-pleaded *facts.*[1]

The *Hussein* Court explained:

> Here, plaintiffs' complaint is replete with detailed data allegedly demonstrating, among other things, inadequate teacher qualifications, building standards and equipment, which illustrate glaring deficiencies in the current quality of the schools in plaintiffs' districts and a substantial need for increased aid. Plaintiffs allege that the poverty levels in their districts are higher than the state average and that there are greater funding deficiencies for at-risk students - including those with disabilities, those living in poverty, racial minorities and children for whom English is a second language. Notably, plaintiffs also submit evidence of factors that will allegedly continue to keep their districts underfunded and claim that, even with the increases anticipated as a result of Foundation Aid, their districts will still be substantially short of the funding levels needed to provide a constitutionally sound basic education. (footnote omitted; 81 A.D. 3d at 136).

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[1]In this regard, defendants reiterate that, despite plaintiffs' assertion that they have pleaded facts sufficient to support their Education Article claims, plaintiffs' "factual" allegations are merely legal conclusions disguised as facts, and this Court has no duty to accept them as true. As the Supreme Court noted in *Papasan v. Allain*, 478 U.S. 265, 286 (1986):

> Although for purposes of this motion to dismiss we must take all the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation [citations omitted] . . . The petitioners do not allege that schoolchildren in the Chickasaw Counties are not taught to read or write; they do not allege that they receive no instruction or even the educational basics; they allege no actual facts in support of their assertion that they have been deprived a minimally adequate education. As we see it, we are not bound to credit and may disregard the allegation that petitioners have been denied a minimally adequate education.

The *Davids-Wright* case is utterly without merit, non-justiciable, and mooted by the April 1, 2015 legislation. It should be dismissed.

CONCLUSION

For these reasons, and those set forth in the Affirmations and initial Memorandum of Law, Intervenor-Defendants' motion for leave to renew should be granted. Further, Intervenor-Defendants join in the State's application for a stay pending the appeal.

DATED: July 7, 2015
Latham, New York

Respectfully submitted,

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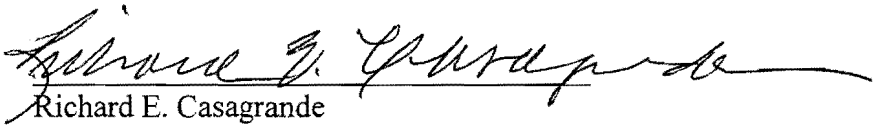
By: 
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