

SUPREME COURT FOR THE STATE OF NEW YORK
COUNTY OF ALBANY

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

Plaintiffs,

- against -

STATE OF NEW YORK; REGENTS OF THE
UNIVERSITY OF THE STATE OF NEW
YORK; MERRYL H. TISCH, CHANCELLOR
OF THE BOARD OF REGENTS; JOHN B.
KING, COMMISSIONER OF EDUCATION
AND PRESIDENT OF THE UNIVERSITY OF
THE STATE OF NEW YORK,

Defendants.

Index No.:

Date purchased: July 28, 2014

Summons

Plaintiffs designates Albany
County as the place of trial.

The basis for venue is CPLR §§ 503(a), 505

Defendants reside at

County of Albany

To the State of New York:

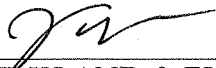
You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorneys within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: July 28, 2014

Attorneys for the Plaintiffs

Defendant's address:

Office of the Attorney General
Justice Building, Second Floor
Empire State Plaza
Albany, NY 12224



KIRKLAND & ELLIS LLP

Jay P. Lefkowitz
lefkowitz@kirkland.com
Devora W. Allon
devora.allon@kirkland.com
Danielle R. Sassoon
danielle.sassoon@kirkland.com
Sarah M. Sternlieb
sarah.sternlieb@kirkland.com
601 Lexington Avenue
New York, New York 10022-4611
Telephone: (212) 446-4800
Facsimile: (212) 446-4900

SUPREME COURT FOR THE STATE OF NEW YORK
COUNTY OF ALBANY

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

Plaintiffs,

- against -

STATE OF NEW YORK; REGENTS OF THE
UNIVERSITY OF THE STATE OF NEW
YORK; MERRYL H. TISCH, CHANCELLOR
OF THE BOARD OF REGENTS; JOHN B.
KING, COMMISSIONER OF EDUCATION
AND PRESIDENT OF THE UNIVERSITY OF
THE STATE OF NEW YORK,

Defendants.

Index No.:

Date purchased: July 28, 2014

Summons

Plaintiffs designates Albany
County as the place of trial.

The basis for venue is CPLR §§ 503(a), 505

Defendants reside at

County of Albany

To the Regents of the University of the State of New York:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorneys within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: July 28, 2014

Attorneys for the Plaintiffs

Defendant's address:

89 Washington Avenue
Board of Regents, Room 110 EB
Albany, New York 12234



KIRKLAND & ELLIS LLP

Jay P. Lefkowitz
lefkowitz@kirkland.com
Devora W. Allon
devora.allon@kirkland.com
Danielle R. Sassoon
danielle.sassoon@kirkland.com
Sarah M. Sternlieb
sarah.sternlieb@kirkland.com
601 Lexington Avenue
New York, New York 10022-4611
Telephone: (212) 446-4800
Facsimile: (212) 446-4900

SUPREME COURT FOR THE STATE OF NEW YORK
COUNTY OF ALBANY

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

Plaintiffs,

- against -

STATE OF NEW YORK; REGENTS OF THE
UNIVERSITY OF THE STATE OF NEW
YORK; MERRYL H. TISCH, CHANCELLOR
OF THE BOARD OF REGENTS; JOHN B.
KING, COMMISSIONER OF EDUCATION
AND PRESIDENT OF THE UNIVERSITY OF
THE STATE OF NEW YORK,

Defendants.

Index No.:

Date purchased: July 28, 2014

Summons

Plaintiffs designates Albany
County as the place of trial.

The basis for venue is CPLR §§ 503(a), 505

Defendants reside at

County of Albany

To Meryll H. Tisch, Chancellor of the Board of Regents:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorneys within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: July 28, 2014

Attorneys for the Plaintiffs

Defendant's address:

89 Washington Avenue
Albany, New York 12234


KIRKLAND & ELLIS LLP

Jay P. Lefkowitz
lefkowitz@kirkland.com
Devora W. Allon
devora.allon@kirkland.com
Danielle R. Sassoon
danielle.sassoon@kirkland.com
Sarah M. Sternlieb
sarah.sternlieb@kirkland.com
601 Lexington Avenue
New York, New York 10022-4611
Telephone: (212) 446-4800
Facsimile: (212) 446-4900

SUPREME COURT FOR THE STATE OF NEW YORK
COUNTY OF ALBANY

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

Plaintiffs,

- against -

STATE OF NEW YORK; REGENTS OF THE
UNIVERSITY OF THE STATE OF NEW
YORK; MERRYL H. TISCH, CHANCELLOR
OF THE BOARD OF REGENTS; JOHN B.
KING, COMMISSIONER OF EDUCATION
AND PRESIDENT OF THE UNIVERSITY OF
THE STATE OF NEW YORK,

Defendants.

Index No.:

Date purchased: July 28, 2014

Summons

Plaintiffs designates Albany
County as the place of trial.

The basis for venue is CPLR §§ 503(a), 505

Defendants reside at

County of Albany

To John B. King, Jr., Commissioner of Education and President of the University of the State of
New York:

You are hereby summoned to answer the complaint in this action and to serve a copy
of your answer, or, if the complaint is not served with this summons, to serve a notice of
appearance, on the Plaintiff's Attorneys within 20 days after the service of this summons, exclusive
of the day of service (or within 30 days after the service is complete if this summons is not personally
delivered to you within the State of New York); and in case of your failure to appear or answer,
judgment will be taken against you by default for the relief demanded in the complaint.

Dated: July 28, 2014

Attorneys for the Plaintiffs

Defendant's address:

89 Washington Avenue
Albany, New York 12234



KIRKLAND & ELLIS LLP

Jay P. Lefkowitz
lefkowitz@kirkland.com
Devora W. Allon
devora.allon@kirkland.com
Danielle R. Sassoon
danielle.sassoon@kirkland.com
Sarah M. Sternlieb
sarah.sternlieb@kirkland.com
601 Lexington Avenue
New York, New York 10022-4611
Telephone: (212) 446-4800
Facsimile: (212) 446-4900

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY**

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

Plaintiffs,

- against -

STATE OF NEW YORK; REGENTS OF
THE UNIVERSITY OF THE STATE OF
NEW YORK; MERRYL H. TISCH,
CHANCELLOR OF THE BOARD OF
REGENTS; JOHN B. KING,
COMMISSIONER OF EDUCATION AND
PRESIDENT OF THE UNIVERSITY OF
THE STATE OF NEW YORK,

Defendants.

Index No.

I.A.S. Part:
Justice:

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

PRELIMINARY STATEMENT

1. New York's Constitution guarantees all children in the State a sound basic education. Yet in any given school year, New York schoolchildren are at risk of being assigned to an ineffective teacher.

2. A child's teacher is the single most influential school-based variable in the adequacy of the child's education, and a teacher's quality is a critical determinant of a student's educational success. For the all-too-many New York children taught by an ineffective teacher, the damage to their educational advancement is significant and long-lasting.

3. The status quo in New York's education system is neither tolerable nor unavoidable. It is the product of outdated laws that protect ineffective teachers well above what due process requires and at the direct expense of their students' constitutional rights. These laws hamstring school administrators from making employment decisions based on student need and obstruct them from restoring the quality of the New York public education system. Cumulatively, these laws make it nearly impossible to dismiss and discipline teachers with a proven track record of ineffectiveness or misconduct. Plaintiffs, and other New York State schoolchildren, are the primary victims of this failing system.

4. Plaintiff John Keoni Wright's twin daughters, Kaylah and Kyler are New York public school students whose divergent experiences at school exemplify the direct effects that a teacher's quality has on a child's education. Kaylah and Kyler share nearly everything in common, including their birth date and home life. But one variable separates their life experiences and futures: last year, Kyler was assigned to an ineffective teacher.

5. The effects are apparent. In one year alone, the difference in the twins' teachers caused measurable differences in their educational progress. Kaylah excelled with the benefit of an effective teacher, while Kyler fell behind and is still struggling to catch up with her twin. In terms of reading skills alone, Kaylah and Kyler are now reading several levels apart. The gulf between Kaylah's and Kyler's learning illustrates what is a matter of common sense. An ineffective teacher can leave a student ill-equipped to advance, or even to stay apace of those alike in all respects except the quality of their teacher.

6. This suit challenges the constitutionality, in whole or in part, of Education Laws §§ 2509, 2510, 2573, 2585, 2588, 2590, 3012, 3012-c, 3020, and 3020(a) (the "Challenged Statutes"). 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. These Statutes prevent students like Kyler Wright and the other plaintiffs from obtaining the sound basic education guaranteed under Article XI, § 1 of the New York Constitution (the "Education Article").

7. This suit seeks to strike down the legal impediments that prevent New York's schools from providing a sound basic education to all of their students, as guaranteed by the New York Constitution. Plaintiffs seek a declaration that the Challenged Statutes violate the constitutional rights of New York schoolchildren and a permanent injunction to prevent their future enforcement.

JURISDICTION AND VENUE

8. Venue is proper in the County of Albany pursuant to the Civil Practice Law and Rules 503(a) and 505(a) because the Defendants' principal offices are located in the County of Albany.

9. The Supreme Court has jurisdiction to hear this case and grant declaratory judgment and appropriate injunctive relief pursuant to Civil Practice Law and Rules 3001 and 3017(b).

PARTIES

Plaintiffs

10. Plaintiff John Keoni Wright sues on his own behalf and on behalf of his minor children, Kaylah and Kyler Wright, students who attend P.S. 158, a Brooklyn school in the New York City School District.

11. Plaintiff Ginnet Borrero sues on her own behalf and on behalf of her minor child, Raymond Diaz, Jr., a student who attends I.S. 171, a Brooklyn school in the New York City School District.

12. Plaintiff Tauana Goins sues on her own behalf and on behalf of her minor child, Tanai Goins, a student who attends P.S. 106, a Queens school in the New York City School District.

13. Plaintiff Nina Doster sues on her own behalf and on behalf of her minor children, Patience and King McFarlane, students who attend P.S. 140, a Queens school in the New York City School District.

14. Plaintiff Carla Williams sues on her own behalf and on behalf of her minor child, Jada Williams, a student who previously attended Nathaniel Rochester Community School No. 3 in the Rochester City School District and now attends World of Inquiry School No. 58 in the Rochester City School District.

15. Plaintiff Mona Pradia sues on her own behalf and on behalf of her minor child, Adia-Jendayi Pradia, a student who previously attended Audubon School No. 333 in the Rochester City School District and now attends Norman Howard School, paid for by the Rochester City School District.

16. Plaintiff Angeles Barragan sues on her own behalf and on behalf of her minor child, Natalie Mendoza, a student who attends P.S. 94, Kings College Elementary School, a Bronx school in the New York City School District.

Defendants

17. Defendant the State of New York (the “State”) is responsible for the educational system in New York.

18. Defendant Regents of the University of the State of New York (“Board of Regents”) is an executive department of the State of New York. The Board of Regents is empowered by the New York Legislature to determine educational policy and promulgate rules to effectuate New York State education law and policies.

19. Defendant Merryl H. Tisch is the Chancellor of the Board of Regents. As Chancellor, Ms. Tisch is the head of the Board of Regents and presides over Regents meetings

and appoints its committees. N.Y. Educ. L. § 203; 8 NYCCR 3.1(a). She is sued in her official capacity.

20. Defendant John B. King, Jr. is the Commissioner of Education and President of the University of the State of New York. As Commissioner, Mr. King has the obligation and authority to supervise and monitor all public schools and to assure that educational services are being provided in New York as required by law and regulation. N.Y. Educ. L. §§ 302-03, 305(2), 308. He is sued in his official capacity.

21. Collectively, the defendants are legally responsible for the operation of the New York State educational system and are required to ensure that its operation complies with relevant state and federal constitutional requirements.

BACKGROUND

22. 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. Const. Art. XI, § 1. Article XI guarantees all students in New York a sound basic education. A sound basic education is the key to a promising future, preparing children to realize their potential, be productive citizens, and contribute to society.

23. The State fails to meet its constitutional obligation when it provides deficient inputs to adequately educate its students. Students are entitled to adequate teaching by effective personnel because teachers are the core “input” of a sound basic education.

24. The New York Legislature enacted the Challenged Statutes. Through enforcement by the Defendants, the Challenged Statutes confer permanent employment, prevent

the removal of ineffective teachers, and result in layoffs of effective teachers in favor of less-effective, more senior teachers. Under the existing tenure laws, teachers are granted essentially permanent employment before their effectiveness can be determined. The current dismissal and disciplinary laws for tenured teachers make it nearly impossible to remove ineffective teachers from the classroom once they are prematurely tenured.

25. Because of the Challenged Statutes, New York schoolchildren are taught by ineffective teachers who otherwise would not remain in the classroom. These laws prevent school administrators from dismissing and disciplining teachers who do not meet the most basic standards of adequacy and effectiveness, and from making employment decisions driven by their students' constitutional right to a sound basic education.

26. The State's promotion and retention of ineffective teachers, through its promulgation and enforcement of the Challenged Statutes, violates the New York Constitution.

I. TEACHER EFFECTIVENESS IS A NECESSARY INPUT TO A SOUND BASIC EDUCATION.

27. Effective teachers are the most important factor in student performance. Recent studies have confirmed what the Court of Appeals recognized over ten years ago: teachers "are the first and surely the most important input" in creating an adequate education. *Campaign for Fiscal Equality, Inc. v. State (CFE II)*, 100 N.Y.2d 893, 909 (2003).

28. The key determinant of educational effectiveness is teacher quality. (*See, e.g.,* Ex. 1, Chetty et al., Nat'l Bureau of Econ. Research, *The Long-Term Impacts of Teachers: Teacher Value-Added and Student Outcomes in Adulthood* (2011).)

29. In the short-term, effective teachers provide tangible educational results in the form of higher test scores and higher graduation rates. (Ex. 2, Bill & Melinda Gates Found., *Ensuring Fair and Reliable Measures of Effective Teaching: Culminating Findings from the MET Project's Three-Year Study* (2013); Ex. 3, Eric A. Hanushek, *Valuing Teachers: How Much Is a Good Teacher Worth?*, Education Next, Summer 2011, at 42.)

30. In the long-term, students taught by effective teachers are given a strong foundation from which to advance and achieve. These students are less likely to become teenage parents and more likely to progress in their education, attending college and matriculating at colleges of higher quality. They are more likely to earn more money throughout their lives, live in neighborhoods of higher socioeconomic status, and save more money for retirement. (See Ex. 1, Chetty et al., *supra*.)

31. Teacher quality affects student success more than any other in-school factor. High-quality instruction from effective teachers helps students overcome the traditional barriers demographics impose, (see Ex. 4, Steven G. Rivkin et al., *Teachers, Schools, and Academic Achievement*, 73 *Econometrica* 417, 419 (2005)), and may have the greatest positive effect on low-performing students and minorities, (see Ex. 5, Daniel Aaronson et al., *Teachers and Student Achievement in the Chicago Public High Schools*, 25 *J. Lab. Econ.* 95, 126-128 (2007)).

32. If schools were able to replace the least effective teachers, it would add enormous value to the future earnings of students and the U.S. economy as a whole. (Ex. 3, Hanushek, *supra*, at 43-44.)

33. In light of the substantial and enduring effect that teachers have on their students' achievement, the ability to remove ineffective teachers employed by the New York public school

system would improve the lives and better the futures of the students who would otherwise be assigned to those teachers. Yet the Challenged Statutes deprive New York students of a sound basic education, providing no true means for administrators to remove teachers with a track record of ineffectiveness, and causing too many students to remain in the classroom with ineffective teachers.

II. THE TEACHER TENURE STATUTES CONFER PERMANENT EMPLOYMENT ON INEFFECTIVE TEACHERS.

34. Sections 2509, 2573, 3012 and 3012-c (the “Permanent Employment Statutes”), alone and in conjunction with the other statutes at issue, ensure that ineffective teachers 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.

35. New York Education Law § 3012(2)¹ provides that “at the expiration of the probationary term of a person appointed for such term, subject to the conditions of this section, the superintendent of schools shall make a written report to the board of education or the trustees of a common school district recommending for appointment on tenure those persons who have been found competent, efficient and satisfactory, consistent with any applicable rules of the board of regents adopted pursuant to section 3012(b) or this article.”

36. Tenure confers extraordinary benefits and protections, but it is out of the ordinary for a teacher to be denied tenure. The default is to grant teachers tenure and the process is a formality, rather than an appraisal of teacher performance. (*See* Ex. 6, Ann Duffett et al., Educ.

¹ Section 3012 applies to certain school districts, including common school districts and/or school districts employing fewer than eight teachers, other than city school districts. Section 2509 applies the same law to school districts of cities with less than 125,000 inhabitants. Section 2573 applies the same law to school districts of cities with 125,000 inhabitants or more.

Sector, *Waiting to Be Won Over: Teachers Speak on the Profession, Unions, and Reform* 3 (2008).)

37. In 2007, 97 % of tenure-eligible New York City teachers received tenure. Even with recent reforms meant to strengthen the evaluation system, few teachers are denied tenure. In 2011 and 2012, while some teachers had their probationary periods extended, only 3 % of tenure-eligible teachers were denied tenure outright. (See Ex. 7, Susanna Loeb et al., *Performance Screens for School Improvement: The Case of Teacher Tenure Reform in New York City* (2014).) These numbers indicate that most ineffective teachers are not denied tenure.

38. New York school districts typically grant tenure to new teachers after a probationary period of three years, and after only two years of performance review. The statute's prescribed methods for evaluating effectiveness before granting tenure are deficient and three years is inadequate to assess whether a teacher has earned the lifelong benefits of tenure.

39. Pursuant to New York Education Law § 3012-c(1), New York State implemented the Annual Professional Performance Review (the "APPR") to evaluate teachers and principals. A teacher's review is meant to be a significant factor in employment decisions, including tenure, retention, and termination. N.Y. Educ. Law. § 3012-c(1).

40. Under the APPR, teachers receive a numerical score every year that is transposed into one of four ratings: "Highly Effective," "Effective," "Developing," or "Ineffective." Each school district negotiates the specific terms of their APPR plans, which must comply with § 3012-c. State-developed measures of student growth, such as test results, must form twenty percent of a teacher's rating. Another twenty percent must be based on locally selected measures of student achievement. Locally determined evaluation methods, such as classroom observations

by administrative staff, form the remaining sixty percent. Rather than impose a uniform definition of what constitutes conduct unworthy of tenure, the Permanent Employment Statutes have invited variable and superficial definitions of ineffective teaching that do not ensure tenure is awarded only to effective teachers.

41. The APPR does not adequately identify teachers who are truly “Developing” or “Ineffective.” For example, teachers are not rated ineffective even when their students consistently fail state exams. In 2012, only 1 % of teachers were rated “Ineffective.”² At the same time, 91.5 % of New York teachers were rated “Highly Effective” or “Effective,” even though only 31 % of students taking the English Language Arts and Math standardized tests met the standard for proficiency. (Ex. 8, Cathy Woodruff, *Why Are Most Teachers Rated Effective When Most Students Test Below Standards?*, N.Y. St. Sch. Bds. Ass’n, (Dec. 16, 2013), <http://www.nyssba.org/news/2013/12/12/on-board-online-december-16-2013/why-are-most-teachers-rated-effective-when-most-students-test-below-standards/>.)

42. Similarly, of the New York City teachers eligible for tenure from 2010-11 to 2012-2013, only 2.3 % received a final rating of “Ineffective” (302 teachers), even though 8 % of the teachers had low attendance (more than twenty absences over prior two years) and 12 % of teachers had low value added. (See Ex. 7, Loeb et al., *supra*.) These discrepancies indicate that the APPR ratings operate as a rubber stamp for tenure and are not a meaningful check within the tenure process.

² The data excludes New York City teachers because the city and teachers’ union were unable to agree on a plan for the teacher evaluation system. (Ex. 9, Geoff Decker, *Few Teachers Across New York State Earned Low Ratings Last Year*, Chalkbeat, (Oct. 22, 2013), <http://ny.chalkbeat.org/2013/10/22/few-teachers-across-new-york-state-earned-low-ratings-last-year/#.U3oacPldXgU>.) On information and belief, the New York City data would be similar to the overall New York State data.

43. The APPR's deficient and superficial means of assessing teacher effectiveness is the most highly predictive measure of whether a teacher will be awarded tenure. (*See id.*)

44. The few teachers receiving an "Ineffective" or "Developing" rating are not the only ineffective teachers in the New York public school system. It is less likely that so few teachers are ineffective than that the ratings of many ineffective teachers are inflated and the ineffective performance by teachers is roundly ignored. The ratings do not identify pedagogically incompetent teachers, including teachers unable to control their classroom, who fail to provide instruction, prepare lesson plans, or distribute homework, and teachers indifferent to their students' educational advancement.

45. Of the miniscule percentage of ineffective teachers actually rated as such, not all are denied tenure. Between 2010 and 2013, close to 1 % were approved for tenure and 18.2 % had their probationary periods extended. (*See id.*) In addition, teachers have the right to appeal an Ineffective rating³ and tenure cannot be denied to a probationary teacher while an APPR appeal about the teacher's performance is pending. N.Y. Educ. Law § 3012-c(5). Moreover, administrators renew probationary teachers in their final probationary year despite any performance concerns. (Ex. 11, Communities for Teaching Excellence, *Earned, Not Given: Transforming Teacher Tenure* 3 (2012).)

46. A teacher's long-term effectiveness cannot be determined with any degree of confidence during the first two or three years of teaching. Most studies indicate that teacher effectiveness is typically established by the fourth year of teaching. (*Id.* at 5.) After that,

³ Most districts also allow tenured, as well as non-tenured, teachers to appeal a Developing rating. (*See* Ex. 10, Alexander Colvin et al., Scheinman Inst. on Conflict Resolution, *APPR Teacher Appeals Process Report* (2014).)

effective teachers tend to remain relatively effective, and ineffective teachers remain relatively ineffective. Deciding tenure after a three-year probationary period confers permanent employment on many teachers who will be ineffective for the rest of their teaching career.

47. The statute's notification requirements make it effectively impossible to consider a teacher's third-year APPR before a tenure determination is made, even if a teacher is found to be ineffective in the third year of his or her probationary period. Section 3012 requires the superintendent of school to notify in writing "each person who is not to be recommended" for tenure of that decision no later than sixty days before the expiration of his or her probationary period. N.Y. Educ. Law § 3012(2). Typically, however, a teacher's probationary term ends before the third-year APPR is reported, at the end of the school year. (*See Ex. 12, Warren H. Richmond III, Evaluation Law Could Limit Ability to Terminate Probationary Teachers*, N.Y.L.J., May 16, 2013, at 2.) The final APPR rating may not be provided until September 1 of the following school year. N.Y. Educ. Law § 3012-c(2)(c)(2). A tenure determination, therefore, may be made on the basis of only two years of APPR reviews, and without regard to an ineffectiveness determination in the third year.

48. Once a teacher receives tenure, he or she is guaranteed continued employment except in limited enumerated circumstances and only after a disciplinary hearing pursuant to section 3020(a).

III. THE DISCIPLINARY STATUTES KEEP INEFFECTIVE, TENURED TEACHERS IN THE SCHOOL SYSTEM.

49. Once a teacher receives tenure, he or she cannot be removed except for just cause, and in accordance with the disciplinary process prescribed by § 3020-a. N.Y. Educ. Law § 3020(1) (§ 3020-a and § 3020 hereinafter collectively referred to as the "Disciplinary

Statutes”). The following causes may constitute reason to remove or discipline a teacher: insubordination, immoral character or conduct unbecoming of a teacher, inefficiency, incompetency, physical or mental disability, or neglect of duty, or a failure to maintain required certification. N.Y. Educ. Law § 3012(2).

50. As applied, the Disciplinary Statutes result in the retention of ineffective teachers. The Disciplinary Statutes impose dozens of hurdles to dismiss or discipline an ineffective teacher, including investigations, hearings, improvement plans, arbitration processes, and administrative appeals. On top of these procedural obstacles, the standard for proving just cause to terminate a teacher is nigh impossible to satisfy. The statutorily mandated hearings are “consuming and expensive hurdles that make the dismissal of chronically ineffective, tenured teachers almost impossible.” (Ex. 11, *Communities for Teaching Excellence*, *supra*, at 5.)

51. The Disciplinary Statutes make it prohibitively expensive, time-consuming, and effectively impossible to dismiss an ineffective teacher who has already received tenure. 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.

52. Disciplinary proceedings are rarely initiated. It is well known that “because of the cumbersome, lengthy, and costly due process protections [tenure] affords, many school districts rarely attempt to fire teachers--in effect granting them permanent employment.” (*Id.* at 2.)

53. As an initial matter, administrators are deterred from giving an Ineffective rating. On information and belief, principals and other administrators may be inclined to rate teachers artificially high because of the lengthy appeals process for an ineffectiveness rating and because

they must partake in the development and execution of a teacher improvement plan (“TIP”) for Developing and Ineffective teachers. N.Y. Educ. Law § 3012-c(4). The TIP must be mutually agreed upon by the teacher and principal and must include “needed areas of improvement, a timeline for achieving improvement, the manner in which improvement will be assessed, and, where appropriate, differentiated activities to support a teacher’s or principal’s improvement in those areas.” *Id.*

54. Section 3020-a imposes a three-year limit for bringing charges against a teacher. But before administrators may initiate proceedings to discipline or terminate an ineffective or incompetent teacher, they must meticulously build a trove of evidence that includes extensive observation, detailed documentation, and consultation with the teacher. On information and belief, it may be difficult for school districts to collect enough evidence for a 3020-a hearing within the three-year period. This laborious and complicated process deters administrators from trying to remove ineffective teachers from the classroom. (See Ex. 13, John Stossel, *How to Fire an Incompetent Teacher*, Reason (Oct. 2006), <http://cloudfront-assets.reason.com/assets/db/12639308918768.pdf>.)

55. On information and belief, principals and administrators would be more likely to use the 3020-a process to discipline or dismiss a teacher if it was less time-consuming and more effective. A 2009 survey found that 48 % of districts surveyed considered bringing 3020-a charges at least once, but did not. The districts stated multiple reasons for not filing charges, including that the process was too cumbersome, too expensive, that their case was not strong enough, or that the employee resigned. (See Ex. 14, Patricia Gould, *3020-a Process Remains Slow, Costly*, N.Y. St. Sch. Bds. Ass’n (May 11, 2009),

<http://www.nyssba.org/index.php?src=news&refno=853&category=On%20Board%20Online%20May%2011%202009.>)

56. Once an administrator clears the hurdles to file charges, termination can result only after a 3020-a hearing. Despite statutory time limits, from 2004-2008, 3020-a disciplinary proceedings took an average of 502 days, from the time charges were brought until a final decision. (*See* Ex. 15, 3020-a Teacher Discipline Reform, N.Y. State Sch. Bds. Ass'n, http://www.nyssba.org/index.php?src=gendocs&ref=3020-a%20Teacher%20Discipline%20Reform&category=advocacy_legislation.)⁴

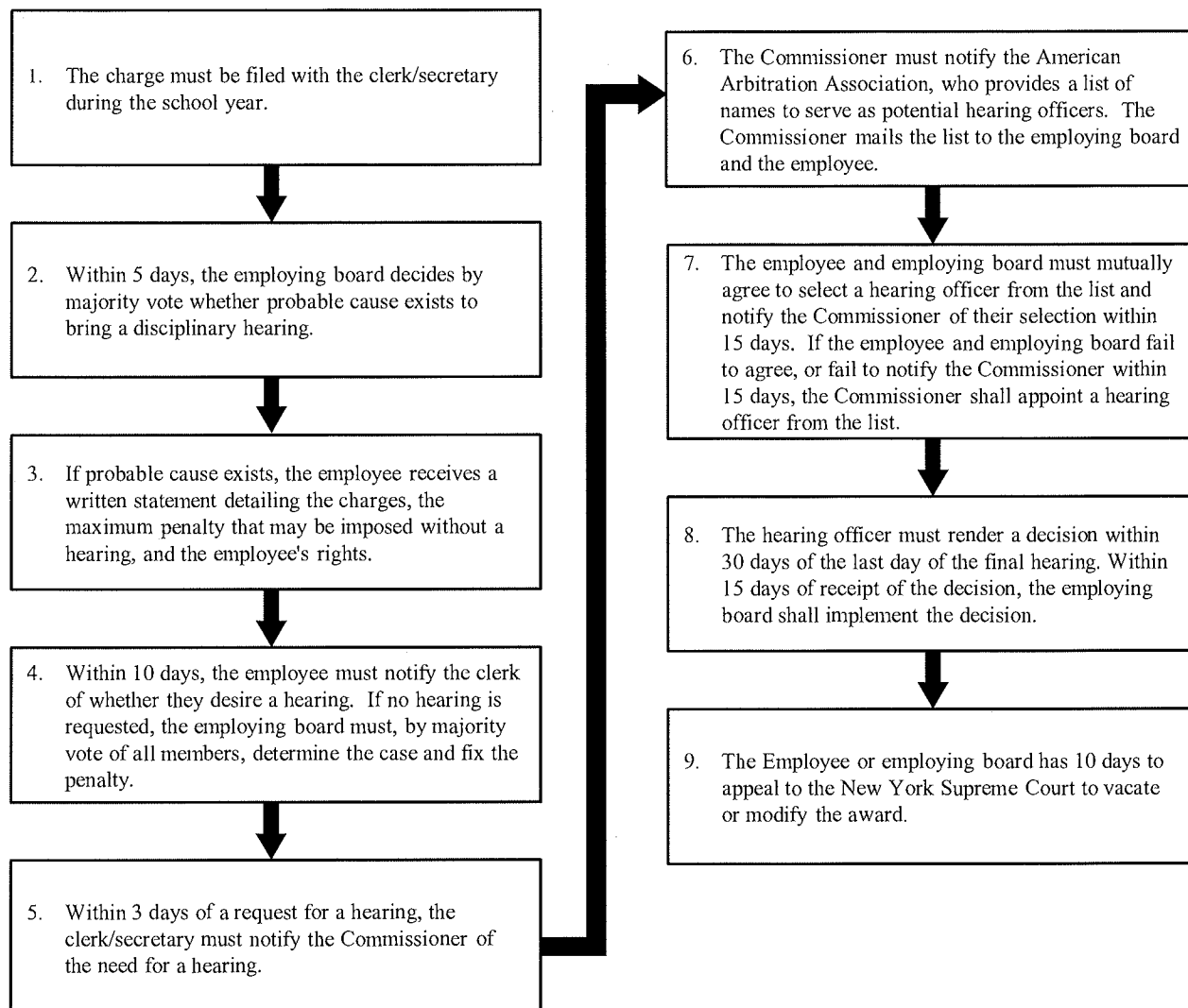
57. Incompetency proceedings, which may include charges such as inability to control a class and failure to prepare required lesson plans, take even longer. From 1995-2006, incompetency proceedings in New York took an average of 830 days, costing \$313,000 per teacher. (*Id.*)

58. Two consecutive Ineffective ratings constitute a pattern of ineffective teaching or performance, subjecting a teacher to an expedited § 3020-a hearing. N.Y. Educ. Law § 3020-a(3)(c)(i-a)(A). But few teachers receive two consecutive Ineffective ratings to trigger an expedited process.

59. While charges are pending, ineffective teachers continue to be paid even if they are suspended. Unless a teacher is convicted of certain felony crimes, the teacher “may be suspended pending a hearing on the charges and the final determination thereof” *with pay*. N.Y. Educ. Law § 3020-a(2)(b).

⁴ The statistics in paragraphs 56-57 exclude New York City, which has an alternate disciplinary process.

60. The Disciplinary Statutes require the following procedure to discipline a teacher:



61. Section 3020(1) incorporates the “alternate disciplinary procedures contained in a collective bargaining agreement.” N.Y. Educ. Law § 3020(1). This means that the Statute allows its procedural requirements to be modified by contract. In practice, the collective bargaining agreements make it even more difficult to remove ineffective teachers and add conditions that delay the process even further. For example, in New York City the arbitrator must be jointly selected with the union, which effectively grants the union the power to veto

arbitrators on the list. The refusal to appoint hearing officers contributes to the massive backlog of disciplinary cases in New York City.

62. These proceedings are not only long, they are futile. When administrators do pursue disciplinary action, few 3020-a proceedings result in termination, *even when an arbitrator determines that the teacher is ineffective, incompetent, or has engaged in misconduct*. In a study of New York City 3020-a proceedings from 1997-2007, only twelve teachers were dismissed for incompetent teaching. (Ex. 16, Katharine B. Stevens, *Firing Teachers: Mission Impossible*, N.Y. Daily News (Feb. 17, 2014), <http://www.nydailynews.com/opinion/firing-teachers-mission-impossible-article-1.1615003>.)

63. On information and belief, dismissals are so rare not because there are no incompetent teachers, but because the Permanent Employment and Disciplinary Statutes make it impossible to fire them.

64. Thus, if administrators are ever able to comply with the myriad procedural requirements that precede disciplinary action, they then confront a burden of proof that is nearly insurmountable. In order to terminate a teacher, administrators must not only validate the charges, but also prove that the school has undertaken sufficient remediation efforts, that all remediation efforts have failed, and that they will continue to fail indefinitely. *See, e.g., deSouza v. Dep't of Educ.*, 28 Misc. 3d 1201(A) (N.Y. Sup. 2010).

65. The result of these proceedings is that ineffective teachers return to the classroom, and students are denied the adequate education that is their right.

IV. THE LIFO STATUTES REQUIRE THE STATE TO RETAIN MORE SENIOR TEACHERS AT THE EXPENSE OF MORE EFFECTIVE TEACHERS.

66. When school districts conduct layoffs that reduce the teacher workforce, New York Education Law § 2585 mandates that the last teachers hired be the first teachers fired (the “Last In First Out” or “LIFO” Statute).⁵ Under the LIFO Statute, “[w]henver a board of education abolishes a position under this chapter, the services of the teacher having the least seniority in the system within the tenure of the position abolished shall be discontinued.” N.Y. Educ. Law § 2585(3).

67. New York is one of only ten states to conduct layoffs on the basis of seniority alone, irrespective of a teacher’s performance, effectiveness, or quality. (Ex. 17, *Vergara v. California*, No. BC484642 (Cal. Super. Ct. June 10, 2014).)

68. Under the LIFO Statute, school districts conducting layoffs must fire, junior high-performing teachers. While these teachers are lost to the classroom, senior, low-performing, and more highly-paid teachers continue to provide poor instruction to their students.

69. Seniority is not an accurate predictor of teacher effectiveness. Studies demonstrate that a teacher’s effectiveness generally levels off or returns to experience after five to seven years. (Ex. 18, Allison Atteberry et al., *Do First Impressions Matter? Improvement in Early Career Teacher Effectiveness* 4 (CALDER, Working Paper No. 90, 2013).) Yet the LIFO Statute requires that seniority, which has little correlation to a teacher’s effectiveness, be the sole factor in layoffs.

⁵ Section 2585 applies to school districts of cities with 125,000 inhabitants or more, such as Rochester City School District. Section 2510(1)-(2) applies the same law to school districts of cities with less than 125,000 inhabitants. Section 2588 applies to school districts of cities with over 1,000,000 inhabitants, such as New York City.

70. In recent years, various school districts in New York, including the Rochester City School District, have implemented district-wide layoffs due to budgetary constraints. In Rochester, the district laid off 116 teachers in 2010, 400 teachers in 2011, and 56 teachers in 2012. Pursuant to the LIFO Statute, school administrators discontinued the employment of top-performing teachers with lower seniority, and retained low-performing teachers with greater seniority.

71. Under a seniority-based layoff system, school districts must fire more teachers to satisfy budgetary constraints because newer teachers are paid less. The higher the number of layoffs, the greater the detriment suffered by schools and students.

72. Seniority-based layoffs affect children at struggling schools the most, because lower-performing schools generally have a disproportionate number of newly-hired teachers.

73. The LIFO Statute hinders recruitment of talented personnel because newly-hired teachers face a heightened risk of being laid off, regardless of their abilities and performance.

74. Layoffs determined on the basis of teacher effectiveness, rather than seniority alone, would result in a more effective workforce. If New York City had conducted seniority-based layoffs between 2006 and 2009, none of the New York City teachers that received an Unsatisfactory⁶ rating during those years would have been laid off. In the absence of the LIFO 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

⁶ New York changed their rating system in 2010, from rating teachers as 'Satisfactory' or 'Unsatisfactory,' to 'Highly Effective,' 'Effective,' 'Developing,' and 'Ineffective.'

effective teacher. (Ex. 19, Donald Boyd et al., *Teacher Layoffs: An Empirical Illustration of Seniority Versus Measures of Effectiveness*, 6 Educ. Finance & Pol. 439 (2011).)

75. The LIFO Statute, 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.

76. Cumulatively, the State's enforcement of the Challenged Statutes forces schools to retain ineffective teachers and violates New York students' right to a sound basic education.

FIRST CAUSE OF ACTION

77. Plaintiffs repeat and re-allege each and every allegation set forth in Paragraphs 1 through 76 as though fully set forth herein at length.

78. The Permanent Employment Statute violates the Education Article of the New York Constitution because it has failed, and continues to fail to provide all children in New York State with a sound basic education.

79. Teacher effectiveness cannot be determined within three years. The teachers who obtain tenure may fail to provide students with an effective education, but are guaranteed lifetime employment and compensation.

SECOND CAUSE OF ACTION

80. Plaintiffs repeat and re-allege each and every allegation set forth in Paragraphs 1 through 76 as though fully set forth herein at length.

81. The Disciplinary Statutes violate the Education Article of the New York Constitution because they fail to provide all children in New York State with a sound basic education by preventing the dismissal of ineffective teachers.

82. Principals are unlikely to take action to attempt to dismiss or discipline an ineffective teacher. Because disciplinary proceedings are time-consuming, costly, and unlikely to result in the removal of teachers, ineffective teachers are kept in the classroom.

THIRD CAUSE OF ACTION

83. Plaintiffs repeat and re-allege each and every allegation set forth in Paragraphs 1 through 76 as though fully set forth herein at length.

84. The LIFO Statute violates the Education Article of the New York Constitution because it has failed, and will continue to fail to provide children throughout the Rochester City School District with a sound basic education.

85. LIFO prohibits administrators from taking teacher quality into account when conducting layoffs so that ineffective, more senior teachers are retained and effective teachers are fired.

PRAYER FOR RELIEF

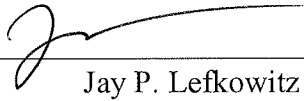
WHEREFORE, plaintiffs respectfully request that this Court enter a judgment against Defendants as follows:

- (i) As to each Count, a declaratory judgment, that the Challenged Statutes violate the New York Constitution in the manner alleged above.

- (ii) As to each Count, preliminary and permanent injunctions enjoining Defendants from implementing or enforcing the Challenged Statutes.
- (iii) Award plaintiffs all costs and expenses incurred in bringing this action, including reasonable attorney's fees and costs;
- (iv) Such other relief available under New York law that may be considered appropriate under the circumstances, and further relief as this Court deems just and proper.

Dated: New York, New York
July 28, 2014

Kirkland & Ellis LLP

By: 
Jay P. Lefkowitz

Jay P. Lefkowitz
Devora W. Allon
Danielle R. Sassoon
Sarah M. Sternlieb
KIRKLAND & ELLIS LLP
601 Lexington Ave.
New York, NY 10022
Telephone (212) 446-4800
Facsimile (212) 446-6460

Attorneys for Plaintiffs