STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of

NEW YORK STATE UNITED TEACHERS, by its President Andrew Pallotta; ROCHESTER TEACHERS ASSOCIATION, by its President Adam Urbanski; and SYRACUSE TEACHERS ASSOCIATION, INC., by its President Megan Root,

Petitioners-Plaintiffs,

Index No._____

For an Order and Judgment pursuant to Article 78 of the CPLR

-against

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK; NEW YORK STATE EDUCATION DEPARTMENT; and MARYELLEN ELIA, as Commissioner of the New York State Education Department,

Respondents-Defendants

MEMORANDUM OF LAW ON BEHALF OF PETITIONERS-PLAINTIFFS

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PRELIMINARY STATEMENT

Plaintiffs-Petitioners (hereinafter "petitioners") commence this Article 78/declaratory judgment proceeding to challenge certain emergency regulations adopted by the Respondent-Defendant Board of Regents ("Regents" or "respondent"), which require parties to change the terms of their collective bargaining agreements mid-agreement, and command parties to include specific provisions in new collective bargaining agreements, in direct contravention of well-established public policy under the constitution and law of New York State, including the Public Employees Fair Employment Act, Civil Service Law §§ 200, *et seq.*("Taylor Law"). The regulations were arbitrarily adopted without statutory authority, and should be declared null and void.

This case is not about whether the challenged regulations represent good education policy. "[T]his case presents no question concerning the wisdom of the challenged regulations." *Boreali v. Axelrod*, 71 N.Y.2d 1, 8 (1987). Rather, the issue before this Court is whether the regulations encroach on the authority of the Legislature or otherwise exceed the Regents' authority.

An administrative agency may only adopt regulations within the authority conferred to it by the Legislature. Regulations adopted in the absence of such authority are an unconstitutional usurpation of the Legislature's authority and are consistently struck down by the courts. Here, the Legislature did not confer any authority upon the Regents or Respondent State Education Department ("SED") to regulate specific teacher transfer and assignment rights, or to otherwise regulate labor policy in the State, or the Taylor Law.

Accordingly, it is respectfully submitted that the Court should enter an order and judgment in petitioners' favor annulling and invalidating the at-issue regulations.

FACTS

A. Collective Bargaining Agreements

Petitioner Rochester Teachers Association ("RTA") and the Syracuse Teachers Association ("STA") are parties to contracts, collective bargaining agreements, with their respective school districts that govern teacher transfers between schools. The RTA is an employee organization within the meaning of the Taylor Law and is the recognized exclusive bargaining representative for a bargaining unit including certificated professionals employed by the Rochester City School District. *Verified Petition/Complaint at ¶9* ("*Ver. Pet.*"). The RTA and the Rochester City School District are parties to a collective bargaining agreement which contains provisions relating to employee transfer rights. *Id. at ¶15; Affidavit of Adam Urbanski, sworn to on October 10, 2018* ("*Urbanski Aff.*") *at Exhibits "A" and "B"*. The Rochester City School District and the RTA are also parties to two Memoranda of Agreement ("MOA") that supplement the main collective bargaining agreement; one that relates to receivership schools and another to schools designated under the Rochester Innovation Schools Empowered program, or "RISE". *Urbanski Aff. at Exhibits "C" and "D".*

The collective bargaining agreement and both MOA contain contractual terms related to teacher transfers. *Urbanski Aff. at ¶4.* These terms were mutually negotiated between the RTA and the Rochester City School District. *Id.* Specifically, Article 24 of the collective bargaining agreement governs transfers and sets forth the procedures for transfer placements. *Id.* Namely, a "school-based planning team" or "SBPT" ranks transfer candidates and then makes decisions

based thereon. *Id.* Any unfilled vacancies are then determined, in part, based on seniority, with absolutely no limitations based on teachers' ratings under Education Law §3012-d. *Id.* Moreover, both the RISE and receivership MOAs also contain terms relative to transfers, the former of which does limit transfers into such schools, but only if the teacher is rated "Ineffective". *Id* at ¶5.

The Syracuse Teachers Association, Inc. ("STA") is an employee organization within the meaning of the Taylor Law and is the recognized exclusive bargaining representative for a bargaining unit including certificated professionals employed by the Syracuse City School District. *Ver. Pet. ¶10.* The STA and the Syracuse City School District are parties to a collective bargaining agreement which contains provisions relating to employee transfer rights. *Id. at ¶17; Affidavit of Megan Root, sworn to on October 10, 2018* ("*Root Aff.*") *at Exhibit "A".* The Syracuse City School District and the STA are also parties to a Memorandum of Understanding ("MOU") that supplements the main collective bargaining agreement and relates to receivership schools. *Root Aff. at Exhibit "B".*

The collective bargaining agreement and MOU contain contractual terms related to teacher transfers. *Root Aff. at ¶5.* These terms were mutually negotiated between the STA and the Syracuse City School District. *Id.* Specifically, Article 10 of the collective bargaining agreement governs transfers and sets forth the procedures for transfer placements. *Id.* Namely, the Syracuse City School District is given discretion in "administrative transfers", but is free to consider a variety of factors. *Id.* If the affected teacher is unsatisfied, the STA has a right to meet with the Syracuse City School District and attempt to reach a mutually satisfactory resolution. *Id.* In terms of voluntary transfers, in the event skills and knowledge are equal,

seniority is the deciding factor. *Id.* The collective bargaining agreement contains absolutely no limitations on the ability to transfer based on teachers' ratings under Education Law §3012-d. *Id.* Moreover, the receivership MOU also contains terms relative to transfers, namely that it prohibits teachers from remaining in receivership schools if the teacher is rated "Ineffective". *Id.* at ¶6.

The RTA and the STA are but two of many employee organizations across the state affiliated with NYSUT whose collective bargaining agreements govern teacher transfers.

Plaintiff New York State United Teachers ("NYSUT") is an unincorporated association, and represents approximately 600,000 in-service and retired teachers, school-related professionals, academic and professional faculty in higher education, and professionals in education and health care. *Ver. Pet. ¶6.* Andrew Pallotta is NYSUT's duly elected President. *Id. at* ¶7. Local labor unions, such as RTA and STA, are also affiliated as member locals of NYSUT. NYSUT has over 1300 locals, including approximately 700 locals representing over 98% of New York's public school teachers. *Id. at ¶8.*

B. Every Student Succeeds Act ("ESSA")

In 2015, Congress passed, and President Barack Obama signed, ESSA which is codified at 20 U.S.C. §6301, et seq. *Ver. Pet. ¶19.* As part of that law, states were required to submit to the United States Department of Education ("DOE") a draft plan through which they proposed to implement certain aspects ESSA, including what interventions it would use to address low-achieving schools and districts ("Plan"). *Id. at ¶25.*

Prior to ESSA, federal education regulators required states to identify "focus schools" and "priority schools". *Ver. Pet. ¶23.* Focus schools were schools that had low academic

performance that was not improving; priority schools were schools with the overall lowest student academic performance on state assessments and persistently low graduation rates. A Parent's Guide to Understanding Focus District, Focus & Priority School Identification (http://www.p12.nysed.gov/accountability/documents/ParentCommunicationDocument022616.pdf (accessed October 3, 2018)). ESSA, however, introduces a new vernacular to describe similarly low performing schools, requiring each state to identify schools that are in need of "comprehensive support and improvement" and those that will receive "targeted support and improvement". *Ver. Pet. ¶21.* Schools receiving these designations are known respectively as "CSI" and "TSI" schools. *Id.* As of the filing of this action, CSI designations for the 2018-2019 school year have not yet been made. *Id. at ¶22.*

For the 2017-2018 school year, the Rochester City School District had 27 schools identified as "priority schools" and the Syracuse City School District had 11. *Ver. Pet. ¶¶45, 47.* Upon information and belief, when the CSI designations are released for the 2018-2019 school year, they will include schools in both the Rochester and Syracuse districts. *Id. at ¶46, 48.*

C. State Plan Implementing ESSA

ESSA could not, and in fact did not, enable the State to impair or otherwise abridge collective bargaining agreements or collective bargaining rights. To the contrary, ESSA also specifically states that "Nothing in this subsection shall be construed to alter or otherwise affect the rights, remedies, and procedures afforded to school or local educational agency employees under Federal, State, or local laws (including applicable regulations or court orders) or under the terms of collective bargaining agreements, memoranda of understanding, or other agreements between such employers and their employees." *Ver. Pet. ¶20.* The plan submitted by SED to the

DOE was approved. *Id. at ¶26; Attorney Affirmation of Matthew E. Bergeron, dated October 10, 2018* ("*Bergeron Aff.*") at *Exh. A.* However, neither the New York State Legislature nor the Governor have taken action with regard to any legislation relating to the implementation of ESSA or that law's interrelation with the Taylor Law or any other state law. *Id at. ¶24.* Upon approval of the Plan, the Commissioner then took steps to promulgate, and the Board of Regents took action to adopt, emergency regulations.

Specifically, on or about June 12, 2018, the Board of Regents adopted emergency regulations relating to the implementation of the State's ESSA Plan, regulations that purport to override collective bargaining agreements and collective bargaining rights. *Ver. Pet. ¶27.* The regulations being challenged in this action are contained wholly within a new section 100.21, titled "ESSA Accountability System". *Id. at ¶27; Bergeron Aff.* at *Exh. B.* Under the regulations, the Regents require school districts to impose changes to existing and successor collective bargaining agreements negotiated under the Taylor Law. *Id. at ¶¶30,31.*

First, the regulations purport to limit what unit members may transfer to CSI schools. Specifically, §100.21(i)(1)(i)(c) of the adopted regulations states in relevant part,

> (1)Interventions for CSI Schools. (i) in the first year in which the school is identified as a CSI school, the school must:...(c) limit incoming teachers transfers to teachers rated effective or highly effective pursuant to Education Law §3012-d[1] by a school district in the previous school year, subject to collective bargaining as required under Article 14 of the Civil Service Law, and require that any successor collective bargaining agreement authorize such transfers unless otherwise prohibited by law. *Ver. Comp. ¶30; Bergeron Aff., Exhibit B at p. 84.*

[1] Education Law §3012-d(3) creates four rating categories for teachers: Highly Effective, Effective, Developing, and Ineffective.

For the second and third school years that a school is identified as CSI, "the school shall continue to implement the requirements established by subparagraph (i) of this subdivision". *§§100.21(i)(1)(ii)(a), (iii)(a). Id. at ¶31; Bergeron Aff., Exhibit B at pp. 84-85.*

Next, the regulations purport to limit which unit members may transfer into certain new schools. The regulations also permit the Commissioner of Education to place a school under "registration review", colloquially known as "SURR". *Ver. Pet. ¶34.* If the Commissioner deems it appropriate, she may order that the SURR school to enter into a contract with the State university trustees or, in the case of New York City, with the City board of education and City University of New York, for the education of the school's children; or phase out or close the school. *Id. at ¶35.* If a school district seeks to register a new school to replace a SURR school which has been phased out or closed, it must describe for the Commissioner, among other things,

> the process for identifying and appointing the leadership and staff of the new school, which must result in the selection of school leaders with a track record of success as school leaders and a staff that consists primarily of experienced teachers (i.e., at least three years of teaching experience) who are certified in the subject area(s) they will teach, have been rated Effective or Highly Effective pursuant to Education Law §3012-d in each of the past three years, and are not currently assigned to the school to be closed or phased out, unless approval has been granted by the Commissioner to waive any of these requirements, subject to collective bargaining as required under article 14 of the Civil Service Law, and require that any successor collective bargaining agreement authorize such appointments unless otherwise prohibited by law. *§100.21(l)(5)(iv). Id. at ¶36; Bergeron Aff., Exhibit B at pp. 108-109.*

On or about September 18, 2018, the Regents adopted amended emergency regulations related to ESSA, however none of those amendments change any of the regulations being

challenged here. *Ver. Comp.* ¶¶*33, 37.* Once the regulations were adopted, this action ensued to protect petitioners' collective bargaining agreements and collective bargaining rights.

ARGUMENT

THE CHALLENGED REGULATIONS SHOULD BE STRUCK DOWN BECAUSE THEY USURP THE POWER OF THE LEGISLATURE AND UNLAWFULLY AND UNREASONABLY INTERFERE WITH COLLECTIVE BARGAINING RIGHTS PROTECTED BY THE CONSTITUTION, THE TAYLOR LAW AND THE PUBLIC POLICY OF THIS STATE.

A. Limitations on Administrative Power in General

"Even when broad rule-making authority has been granted, an agency cannot promulgate rules in contravention of the will of the Legislature". *Matter of Beer Garden v. New York State Liq. Auth*, 79 N.Y.2d 266, 276 (1992), *internal quotation and citation omitted.* If an agency rule is in contravention of a statute, the statute must prevail. *Weiss v. City of New York*, 95 N.Y.2d 1, 4-5 (2000) (citing *Finger Lakes Racing Ass'n v. New York State Racing & Wagering Bd.*, 475 N.Y.2d 471, 480-481 (1978)). Furthermore, "an administrative agency may not, in the exercise of rule-making authority, engage in broad-based public policy determinations". *Rent Stabilization Assn. of N.Y. City v Higgins*, 83 N.Y.2d 156, 169 (1993), *cert. denied*, 512 U.S. 1213 (1994); *Boreali v. Axelrod*, 71 N.Y.2d 1, 9 (1987). Rather, an administrative agency may only adopt regulations that are consistent and in harmony "with the statutory language or its underlying purposes". *Matter of General Elec. Capital Corp. v New York State Div. of Tax Appeals Tax Appeals Trib.*, 2 N.Y.3d 249, 254 (2004).

Under these principles, "[a]n agency cannot create rules, through its own interstitial declaration, that were not contemplated or authorized by the Legislature". *Matter of Tze Chun*

Liao v New York State Banking Dept., 74 N.Y.2d 505, 510 (1989). "Indeed, an administrative agency may not promulgate a regulation that adds a requirement that does not exist under the statute". *Kahal Bnei Emunim & Talmud Torah Bnei Simon Israel v Town of Fallsburg*, 78 N.Y.2d 194, 204 (1991). If a regulation adds a requirement that does not exist under state law, such regulation must be deemed invalid. *See, Matter of Jones v Berman*, 37 N.Y.2d 42, 53 (1975).

The Legislature conferred authority to the Regents to enact rules "[s]ubject and in conformity to the constitution and laws of the state." *Education Law §207.* Although "the regents shall exercise legislative functions concerning the educational system of the state, determine its educational policies, and ... establish rules for carrying into effect the laws and policies of the state, relating to education, and the functions, powers, duties and trusts conferred or charged upon the [University of the State of New York] and [SED]," it must do so while conforming to the constitution and the laws of the state. *Id.* The Court of Appeals has cautioned that the Regents' rule-making authority is "not unbridled," and has characterized the Regents' authority over educational matters as being limited to those powers granted to them by the Legislature in Education Law § 207. *Moore v Board of Regents of Univ of State of N.Y.*, 44 NY2d 593, 602 (1978).

Indeed, "in the absence of a specific grant of power by the Legislature ... the Regents cannot transform [Education Law § 207], the fountainhead of the Regents' rule making power, into an all-encompassing power permitting the Regents' intervention in the day-to-day operations of the institutions of higher education in New York." *Id.* Similarly, the Regents does

not have all-encompassing power to intervene into collective bargaining relationships between public employers and exclusive bargaining representatives, without some sort of statutory authority. To permit the Regents to go beyond the statutory limits on their powers would violate the constitutional prohibition against the Legislature's delegation of lawmaking powers to other bodies. *Id.*

The regulations directly conflict with other provisions of the Education law pertaining to teacher transfers. Education Law § 1711(4) provides that "notwithstanding any inconsistent provision of law, the provisions of [subdivision 5(e)] of this section relating to the transfer of teachers may be modified by an agreement that is collectively negotiated pursuant to the provisions of the [Taylor Law]." The same statutory language is included in Education Law § 2508(7), pertaining to small city school districts, and §2566(9), pertaining to large city school districts. *See, Matter of Bd. of Educ. of the Arlington Central School District v. Arlington Teachers Association*, 78 N.Y.2d 33, 38 (1991); *Bd. of Educ. of Greenburgh Cent. Sch. Dist. v. Greenburgh Teachers Federation*, 82 N.Y.2d 771, 772 (1993). Permitting the regulations to go forward would be tantamount to repealing those provisions of the Education Law which, more importantly, grant the right to bargain under the Taylor Law. Thus, the regulations were adopted in excess of the Regents' authority and in conflict with the will of the Legislature, and must be declared null and void. *Weiss*, 95 N.Y.2d at 5 ("if an agency regulation is out of harmony with an applicable statute, the statute must prevail").

This result fully comports with the well-established public policy in favor of public sector collective bargaining over terms and conditions of employment, as set forth in the Constitution,

statutory, and decisional law of the State. The New York State Constitution, at Article I §17 of New York's Bill of Rights provides that:

> Labor of human beings is not a commodity . . . Employees shall have the right to organize and bargain collectively through representatives of their own choosing.

Thus, under the New York Constitution, the labor of ordinary working people is respected, and the right of working people to bargain over their terms and conditions of employment is protected as a *fundamental* right. *E.g., Domanick v. Triboro Coach Corp.*, 18 N.Y.S.2d 650, 653 (Sup. Ct., New York Co., 1940). This right is deemed to be "consonant" with the First Amendment protected rights of speech and association. *Bd. of Educ., Cent. School Dist. No. 1, Town of Grand Island v. Helsby*, 37 A.D.2d 493, 497 (4th Dep't 1971), *aff'd,* 32 N.Y.2d 660 (1973).

The right of public sector employees to collectively bargain terms and conditions of employment is further enshrined in the Taylor Law. Civil Service Law § 200 declares it to be New York's public policy to promote public sector collective bargaining. The Court of Appeals has "time and again underscored [that] the public policy of this State in favor of collective bargaining is 'strong and sweeping.'" *City of Watertown v. State of New York, PERB*, 95 N.Y.2d 73, 78 (2000) (internal citations omitted). "The presumption in favor of bargaining may be overcome only in 'special circumstances' where the legislative intent to remove the issue from mandatory bargaining is 'plain' and 'clear.'" *Id.* Under the Taylor Law, public employers and employee organizations must bargain in good faith with respect to "salaries, wages, hours and other terms and conditions of employment." *Civil Service Law* §201(4). When a public

employer refuses to bargain over a term and condition of employment, it violates the statute, not merely PERB case precedent. *Id.* at §209-a.1(d).

Moreover, another basic premise underlying the Taylor Law is that it not only governs *what* must be bargained, but also *when* it must be bargained. *See*, *South Huntington C.S.D.*, 20 PERB ¶3021 (1987) (finding that a party is not required to engage in negotiations during a contract's term over a subject which the agreement covers). Put another way, unions are not required to revisit their contracts mid-term and a government agency, unless it has plain and clear authority from the Legislature, cannot unilaterally order parties to a collective bargaining agreement to renegotiate a valid, preexisting agreement.

In this same vein, the Taylor Law makes perfectly clear that while a public employer and labor organization are required to collectively negotiate in good faith, "such an obligation does not compel either party to agree to a proposal or require the making of a concession". *Civil Service Law §204(3).*

Here, the regulations undermine and violate the well-established public policy in favor of collective bargaining. Namely, the regulations require, in an absolute sense, that new terms be included in a collective bargaining agreement which are not otherwise required under the Taylor Law. *See*, *Matter of Jones, supra.*

Turning to the at-issue regulations related to the transfer and assignment of teachers, the law unequivocally requires that such terms be negotiated at an arm's length and cannot be imposed by administrative fiat, as the respondents have done here.

B. The Challenged Regulations Impermissibly Interfere with Petitioners' Collective Bargaining Rights

It cannot be disputed that the challenged regulations require parties to make changes to their collective bargaining agreements to include preordained terms. The first challenged regulation requires changes in two parts. One, in the first and any succeeding year in which a school has been designated CSI and there is a preexisting, executory agreement, the parties are required to "limit incoming teachers transfers to teachers rated effective or highly effective pursuant to Education Law §3012-d by a school district in the previous school year, subject to collective bargaining as required under Article 14 of the Civil Service Law." §§100.21(i)(1)(i)(c),(ii)(a),(iii)(a). The second part "requires that any successor collective bargaining agreement authorize such transfers unless otherwise prohibited by law." §100.21(i)(1)(i)(c).

The second regulation requires that any school district that has a SURR school closed or phased out and wants to replace it with a new school must provide information to the Commissioner upon request, including

> the process for identifying and appointing the leadership and staff of the new school, which must result in the selection of school leaders with a track record of success as school leaders and a staff that consists primarily of experienced teachers (i.e., at least three years of teaching experience) who are certified in the subject area(s) they will teach, have been rated Effective or Highly Effective pursuant to Education Law §3012-d in each of the past three years, and are not currently assigned to the school to be closed or phased out, unless approval has been granted by the Commissioner to waive any of these requirements, subject to collective bargaining as required under article 14 of the Civil Service Law, and require that any successor collective bargaining agreement authorize such appointments unless otherwise prohibited by law. §100.21(l)(5)(iv).

Again, like the above challenged regulation which relates to CSI schools, this one also imposes upon parties to a collective bargaining agreement the obligation to include a predetermined term related to the qualifications of assigned or transferring teachers which the law otherwise says parties are obligated to negotiate, but that "such an obligation does not compel either party to agree to a proposal or require the making of a concession". *Civil Service Law §204(3).*

It is expected that respondents will place significant emphasis upon the regulations' requirement that the changes be "subject to collective bargaining as required under Article 14 of the Civil Service Law". This argument must be rejected for two equally compelling reasons. First, once parties have agreed upon the terms of a collective bargaining agreement, they cannot be compelled to re-open negotiations. *See, South Huntington C.S.D.*, 20 PERB ¶3021 (1987) (finding that a party is not required to engage in negotiations during a contract's term over a subject which the agreement covers).

Here, the RTA and STA both have main collective bargaining agreements, as well as memoranda of agreement and/or understanding relating to receivership and other special schools. Each of those agreements are executory by their terms, with both of their main agreements expiring in 2019. *Urbanski Aff. Exhs. A-D; Root Aff., Exhs. A & B.* Moreover, though petitioners submit that whether parties to a collective bargaining have in fact agreed upon terms that limit teachers' ability to transfer is not dispositive of their claims, it is however illustrative in that both the RTA and STA have chosen to do so. *Urbanski Aff.* ¶¶3-5; *Root Aff.* ¶¶4-6.

Second, the regulations' requirement that the parties negotiate under the Taylor Law is, frankly, hollow and meaningless because they have been given a *fait accompli* in terms of what

they are required to bargain, notwithstanding that the Taylor Law states that "such an obligation [to bargain] does not compel either party to agree to a proposal or require the making of a concession". *Civil Service Law §204(3)*. Put simply, absent action by the State Legislature to modify the parties' rights and obligations under the Taylor Law, defendants cannot unilaterally require the RTA, STA, or any other NYSUT affiliated local to change their collective bargaining agreements. *See, City of Watertown v. State of New York, PERB*, 95 N.Y.2d 73, 78 (2000) ("The presumption in favor of bargaining may be overcome only in 'special circumstances' where the legislative intent to remove the issue from mandatory bargaining is 'plain' and 'clear.'").

Based on the above reasons and authorities, it is respectfully submitted that the at-issue regulations were promulgated in excess of the respondents' authority, violate the Taylor Law, and are arbitrary and capricious and, therefore, should be declared invalid.

CONCLUSION

For the reasons set forth above, the challenged regulations should be invalidated, together with such other and further relief as this Court deems just and proper.

DATED: October 10, 2018
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Respectfully submitted,

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