

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,

VERIFIED
PETITION/
COMPLAINT

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

-against

Index No.

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,

Oral Argument Requested

Respondents-Defendants.

Petitioners-Plaintiffs 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; by their attorney, Robert T. Reilly, Esq. (Matthew E. Bergeron, Esq. and Michael J. Del Piano, Esq., of Counsel), for their petition/complaint, respectfully allege:

PRELIMINARY STATEMENT

1. Petitioners-Plaintiffs (“Petitioners”) commence this Article 78 hybrid action to challenge certain regulations adopted by Respondent-Defendant Board of Regents of the University of the State of New York because those regulations are *ultra vires*, given that Respondent-Defendant Regents adopted them in excess of the regulatory authority conferred on

it by the Legislature. In adopting the regulations, Respondents-Defendants (“Respondents”) also acted arbitrarily, capriciously and in error of law because the regulations conflict with Article 14 of the New York Civil Service Law, § 200, et seq. (“Taylor Law”). Petitioners seek declaratory, injunctive, and other equitable relief, including an order and judgment nullifying the regulations.

JURISDICTION

2. This Court has jurisdiction to issue a declaratory judgment pursuant to CPLR §3001 and §3017, to grant injunctive relief pursuant to CPLR Article 63, and to issue an order and judgment pursuant to CPLR Article 78.

3. No prior application for the relief requested in this complaint/petition has been made in any forum other than this Court.

4. Petitioners are not required to exhaust any administrative remedies before making the application herein.

VENUE

5. Venue is set in the County of Albany where Respondents have their principal place of business and where the material events occurred.

PLAINTIFFS

6. Petitioner New York State United Teachers (“NYSUT”) is an unincorporated association, is a labor organization under state and federal law, 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. It has its principal place of business located at 800 Troy-Schenectady Road, Latham, New York, 12110.

7. Andrew Pallotta is NYSUT’s duly elected President.

8. NYSUT is a statewide federation with more than 1300 affiliated locals, including approximately 700 local affiliates collectively representing over 98% of New York's public school teachers. Those affiliates include the Petitioners Rochester Teachers Association and the Syracuse Teachers Association, Inc.

9. Petitioner Rochester Teachers Association ("RTA") is an unincorporated association and a labor union affiliated with NYSUT. RTA is also 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. RTA's duly elected president is Adam Urbanski. It has its principal place of business located at 30 North Union Street, Suite 301, Rochester, New York, 14607.

10. Petitioner Syracuse Teachers Association, Inc. ("STA") is a local labor union affiliated with NYSUT. STA is also 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. STA's duly elected president is Megan Root. It has its principal place of business located at 450 West Kirkpatrick Street Syracuse, New York, 13204.

DEFENDANTS-RESPONDENTS

11. Respondent Board of Regents of the University of the State of New York ("Regents") was established by the Legislature as the governing body of the University of the State of New York and exercises those powers and duties authorized by the Legislature pursuant to Education Law Article 5.

12. Respondent New York State Education Department ("SED") is a department of state government established under Education Law §101. It has such powers and duties as are

set forth in the Education Law, including the duty to generally manage and supervise New York's public schools.

13. Respondent MaryEllen Elia is the Commissioner of Education of the State New York, and exercises those powers and duties authorized by the Legislature pursuant to Education Law Article 7.

FACTS

I. Collectively Bargained Transfer Rights of Bargaining Unit Members

14. Transfer rights for teachers is a proper subject for collective bargaining under the Taylor Law, and both the RTA and the STA, like many employee organizations, have collectively bargained with their respective public employers regarding the subject of transfer rights for their bargaining unit members.

15. The RTA and the Rochester City School District are parties to a collective bargaining agreement, a contract. That contract contains provisions relating to employee transfer rights. The collective bargaining agreement and an agreement to extend same are attached as Exhibits A and B to the Affidavit of Adam Urbanski, sworn to on October 10, 2018 ("Urbanski Affidavit").

16. 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 relates to receivership schools and the other relates to schools designated under the Rochester Innovation Schools Empowered program, or "RISE". Both of those MOAs contain provisions related to transfer of teachers. The MOAs are attached as Exhibits C and D to the Urbanski Affidavit.

17. The STA and the Syracuse City School District are parties to a collective bargaining agreement, a contract. That contract contains provisions relating to employee transfer rights. The collective bargaining agreement is attached as Exhibit A to the Affidavit of Megan Root, sworn to on October 10, 2018 (“Root Affidavit”).

18. 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. That MOU also contains provisions related to the placement of teachers. The MOU is attached as Exhibit B to the Root Affidavit.

II. Every Student Succeeds Act

19. This action and proceeding challenges regulations promulgated by Respondents that purport to implement the Every Student Succeeds Act (“ESSA”), 20 U.S.C. §6301, et seq, but go further and violate Petitioners’ collective bargaining rights.

20. ESSA specifically states at §6311(d)(4) 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.”

Accordingly, ESSA does not enable the State or its regulatory agencies to violate collective bargaining rights.

21. ESSA requires each state to identify schools that are in need of “comprehensive support and improvement” and those that will receive “targeted support and improvement”. Schools receiving these designations are known respectively as “CSI” and “TSI” schools. These identifying terms are new with the enactment of ESSA.

22. CSI designations for the 2018-2019 school year have not yet been made.

23. Prior to the passage of ESSA and the creation of the CSI designation, schools that were in the bottom performing five percent in the state and those high schools with low graduation rates were previously designated as “priority schools”.

24. The New York State Legislature has not adopted any legislation relating to the implementation of ESSA and that law’s interrelation with the Taylor Law.

25. ESSA requires states to submit to the United States Department of Education (“DOE”) a draft plan setting forth how they proposed to implement certain aspects ESSA, including how they would implement interventions they would use to address low-achieving schools and districts (“Plan”).

III. New York State ESSA Plan and Implementing Regulations

26. The State adopted a Plan to purportedly comply with ESSA on or about September 17, 2017. The State’s Plan was approved by the DOE. The Plan is attached as Exhibit A to the Attorney Affirmation of Matthew E. Bergeron, sworn to on October 10, 2018 (“Bergeron Affirmation”).

27. On or about June 12, 2018, the Regents adopted emergency regulations that would implement the State’s ESSA Plan. The regulations relevant to this action are contained wholly within a new section 100.21, titled “ESSA Accountability System”.

28. Under this set of emergency regulations, the Regents require school districts to bargain specific changes to existing and successor collective bargaining agreements negotiated under the Taylor Law.

29. A copy of the regulations are attached as Exhibit B to the Bergeron Affirmation.

30. According to the regulations, in the first year a school is identified as a CSI

school, the school must, among other things, “limit incoming teachers¹ transfers to teachers rated effective or highly effective”, subject to collective bargaining. And, the school must “require that any successor collective bargaining agreement authorize such transfers unless otherwise prohibited by law.” 8 N.Y.C.R.R. 100.21(i)(1)(i)(c), Exhibit B to Bergeron Affirmation at pg. 84.

31. For the second and third school years that a school is identified as CSI, “the school shall continue to implement those requirements.” 8 N.Y.C.R.R. §§100.21(i)(1)(ii)(a), (iii)(a), Exhibit B to Bergeron Affirmation at pp. 84-85.

32. On or about September 18, 2018, the Regents adopted amended emergency regulations related to ESSA.

33. The amended emergency regulations did not include any changes to the regulation identified above as it relates to teacher transfers.

34. To the extent relevant here, the regulations also permit the Commissioner of Education to place a school under “registration review”, colloquially known as “SURR”.

35. 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.

36. 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,

¹ This wording is exactly as it is in the regulation.

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(1)(5)(iv), *Bergeron Affirmation, Exhibit B at pp. 108-109.*

37. On or about September 18, 2018, the Regents adopted amended emergency regulations related to ESSA.

38. The amended emergency regulations did not include any changes to the regulation identified above at paragraph 36.

IV. Collective Bargaining In General

39. Under the Taylor Law, public employers and employee organizations are required to collectively bargain with respect to terms and conditions of employment.

40. Such terms of conditions of employment include rights and procedures related to transfers between school buildings and reassignment.

41. Under the Taylor Law, 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).

42. The Taylor Law only requires parties to collective negotiations to include one specific term in their agreement, and that is language indicating that the agreement requires, and

does not become effective until, it receives the applicable legislative approval. Civil Service Law §204-a(1).

43. All other terms and their specifics in a collective bargaining agreement are subject to negotiations unless the State Legislature or Public Employment Relations Board (“PERB”) specifically require or forbid their negotiation.

44. Neither the State Legislature nor PERB have taken action to require parties to collective negotiations to include in their agreements any terms related to the qualifications of teachers for purposes of transfer or assignment.

45. For the 2017-2018 school year, the Rochester City School District had 27 schools identified as “priority schools”, a designation that was issued under ESSA’s predecessor, the No Child Left Behind Act.

46. Upon information and belief, when the CSI designations are released for the 2018-2019 school year, they will include schools in the Rochester City School District because many of the District’s Priority Schools will likely become CSI schools.

47. For the 2017-2018 school year, the Syracuse City School District had 11 schools identified as “priority schools”, a designation that was issued under ESSA’s predecessor, the No Child Left Behind Act.

48. Upon information and belief, when the CSI designations are released for the 2018-2019 school year, they will include schools in the Syracuse City School District because many of the District’s Priority Schools will likely become CSI schools.

49. At these CSI schools in Rochester and Syracuse, collective bargaining and existing collective bargaining agreements will, upon information and belief, be circumscribed by the regulations and the bargaining unit members’ Taylor Law rights will have been abridged.

FIRST CAUSE OF ACTION

50. Respondents-Defendants' regulations are *ultra vires*.

51. The Legislature did not enable the Respondents-Defendants to circumscribe and abridge Petitioners-Plaintiffs' collective bargaining rights under the Taylor Law.

52. The Legislature has not enabled Respondents-Defendants to circumscribe and abridge existing collective bargaining agreements.

53. The Legislature has not enabled Respondents-Defendants to circumscribe and abridge the right to bargain over mandatory subjects of bargaining such as transfer rights of bargaining unit members in further collective bargaining.

SECOND CAUSE OF ACTION

54. Respondents-Defendants have acted arbitrarily, capriciously and in error of law.

55. Under the New York State Constitution, Article III, the legislative power of this State is vested in the Legislature.

56. The public policy of New York, as expressed in New York State Constitution Article I, §17 and the Taylor Law, favors collective bargaining.

57. The challenged regulations are inconsistent with the Taylor Law, which establishes that rights and procedures related to the transfer and assignment of teachers, if the parties so choose to establish them, are subject to negotiation.

58. The Petitioner-Plaintiff local unions and the approximately 700 other NYSUT affiliated locals that represent classroom teachers in public schools have, or may have, provisions in their collective bargaining agreements that relate to teacher transfer and assignment.

59. In direct contravention of the right and duty to bargain collectively under the Taylor Law, the challenged regulations interfere with and violate this right and duty by claiming for SED the power to require changes in collective bargaining agreements as part of SED's implementation of ESSA, despite that ESSA expressly states at §6311(d)(4) that nothing in that law "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."

60. The challenged regulation will damage local teachers' unions including the Petitioner-Plaintiff local unions, and NYSUT, by unlawfully interfering with, and depriving local unions of, statutory collective bargaining rights.

WHEREFORE, the Petitioners-Plaintiffs respectfully request that this Court:

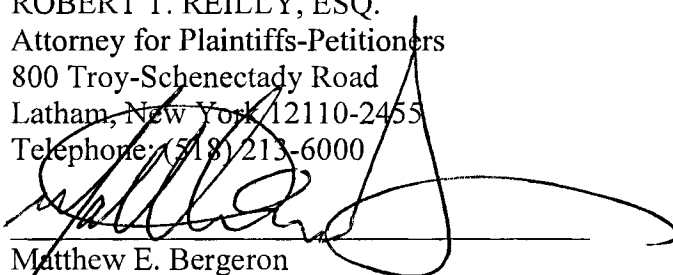
- a. adjudge that the challenged regulations violate the New York State Constitution, violate the Taylor Law, and are arbitrary and capricious and otherwise unlawful;
- b. declare that the challenged regulations violate the New York State Constitution, violate the Taylor Law, and are arbitrary and capricious and otherwise unlawful;
- c. invalidate the challenged regulations;
- d. permanently enjoin the Respondents-Defendants from implementing the challenged regulations;
- e. convert the Article 78 proceeding into an action, if necessary;
- f. convert the action into an Article 78 proceeding, if necessary;

- g. order disclosure and a trial on any issue of fact pursuant to CPLR §408 and CPLR §7804(h); and
- h. grant to the Petitioners-Plaintiffs such other, further, and different relief as may be just and proper, together with reasonable costs.

DATED: October 10, 2018
Latham, NY

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By:


Matthew E. Bergeron
Michael J. Del Piano

136742/CWA1141

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

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,

VERIFICATION

-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.

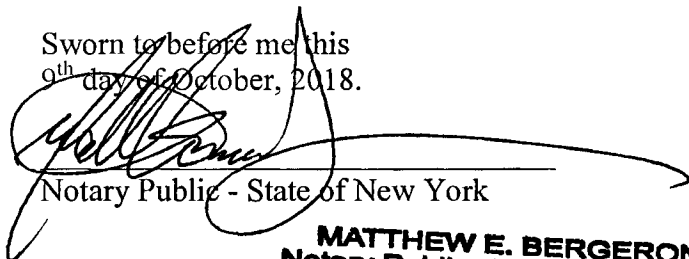
STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

ANDREW PALLOTTA, being duly sworn, deposes and says that he is the President of New York State United Teachers, one of the petitioners-plaintiffs in the above proceeding all of which are united in interest, that deponent has read the foregoing Notice of Petition/Summons and Petition/Complaint and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.



ANDREW PALLOTTA

Sworn to before me this
9th day of October, 2018.


Notary Public - State of New York

MATTHEW E. BERGERON
Notary Public, State of New York
No. 02BE6092817
Qualified In Albany County
Commission Expires May 27, 2019

136742/CWA1141