

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

NEW YORK STATE UNITED TEACHERS, by
its president ANDREW PALLOTTA;
UNITED FEDERATION OF TEACHERS, LOCAL 2,
by its President MICHAEL MULGREW;
ROBERT HUNTER SCHOENFELD; and
EDWIN K. BRADLEY,

Petitioners-Plaintiffs,

-against-

STATE UNIVERSITY OF NEW YORK;
KRISTINA M. JOHNSON, as Chancellor of the
STATE UNIVERSITY OF NEW YORK;
STATE UNIVERSITY OF NEW YORK BOARD
OF TRUSTEES; H. CARL MCCALL, as Chairman
of the State University of New York
Board of Trustees; STATE UNIVERISTY
OF NEW YORK CHARTER SCHOOLS
INSTITUTE; STATE UNIVERSITY OF NEW YORK
BOARD OF TRUSTEES' CHARTER
SCHOOLS COMMITTEE; JOSEPH W. BELLUCK,
as Chair of the State University of New York
Board of Trustees' Charter Schools Committee,

Respondents-Defendants.

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

ROBERT T. REILLY, an attorney admitted to practice law before the Courts of this State,
pursuant to Civil Practice Law and Rules § 2106 and under penalties of perjury, affirms as
follows:

**AFFIRMATION OF
ROBERT T. REILLY**

1. I am the attorney of record for the petitioners-plaintiffs (“petitioners”) in the above-entitled action.

2. Pursuant to Section 202.7 of the Uniform Civil Rules for the Supreme and County Courts, and in order to provide respondents-defendants (“respondents”) with sufficient notice of the filing of this action by order to show cause which will result in an expedited briefing schedule, Jennifer N. Coffey, Esq., an Associate General Counsel in my office, notified the following counsel for respondents via telephone on the afternoon of October 11, 2017 that petitioners would be filing this action by electronic filing in Supreme Court, New York County on October 12, 2017 and would be presenting an order to show cause to a judge on the same date: James Cooney, Esq., Emergency Litigation Coordinator/Assistant Attorney General, Office of the New York State Attorney General; Sandra Casey, Deputy General Counsel for the State University of New York; and Carrie E. Gee, Associate Counsel of the SUNY Charter Schools Institute.

3. I submit this affidavit in support of petitioners’ hybrid declaratory action and Article 78 proceeding brought to challenge as *ultra vires* regulations adopted by respondent SUNY Board of Trustees’ Charter Schools Committee (the “Committee”), regulations that purportedly would provide an “alternative teacher Certification pathway to Charter Schools.” 8 NYCRR § 700.4. The regulations are *ultra vires* because the Legislature did not delegate to the Committee the power to adopt such regulations. Moreover, the Legislature could not delegate to the Committee the power to legislate, and in adopting the regulations at bar the Committee usurped the Legislature’s policy making power. *See Boreali vs. Axelrod*, 71 N.Y. 2d 1 (1987).

4. The policy set by the Committee's regulations is contrary to the policies and practices of the SUNY Chancellor, the Deans and Directors of the SUNY education schools, the New York Commissioner of Education (the "Commissioner"), and the Board of Regents. Indeed, the regulations significantly undercut the quality of teaching in charter schools by permitting unqualified individuals to educate large number of special needs students. And these regulations would have the effect of leading potential educators down a primrose path through a fake "certification" process that would not be valid for employment in public school districts, charter schools authorized by the Board of Regents, or in schools located in other states. In sum, the leaders of the educational institutions in New York believe the regulations are bad for schools and bad for students. They are also, most significantly for this action, unlawful.

5. When the Legislature enacted the Charter School Act, it mandated that charter school teachers, with certain enumerated exceptions, "be certified in accordance with the requirements applicable to other public schools." Education Law § 2854 (a-1). Thus, the Committee's regulation purportedly establishing "an attentive teacher certification pathway" is, by its plain, clear and express terms, contrary to the Legislature's intent.

6. While the Legislature provided some enumerated exceptions to the requirement that charter school teachers be certified in the same manner as public school teachers, these exceptions were very specific and circumscribed. (Education Law 2854 (a-1)). The Legislature expressly limited such teachers both by type and by number.

7. According to the Legislature, the types of teachers subject to the exception are limited to the following:

- (i) uncertified teachers with at least three years of elementary, middle or secondary classroom teaching experience;

(ii) tenured or tenure track college faculty;

(iii) individuals with two years of satisfactory experience through the Teach for America program; and

(iv) individuals who possess exceptional business, professional, artistic, athletic, or military experience . . .

8. According to the Legislature, the numbers of teachers subject to the exception are limited to the following:

such teachers described in clauses (i), (ii), (iii), and (iv) [quoted above]... shall not in total comprise more than the sum of:

(A) thirty per centum of the teaching staff of a charter school, or five teachers, whichever is less; plus

(B) five teachers of mathematics, science, computer science, technology, or career and technical education; plus

(C) five additional teachers.

9. Significantly, according to the Legislature, “[a] teacher certified or otherwise approved by the commissioner shall not be included in the numerical limits established by the preceding sentence.”

10. The Committee’s regulations create a new type of teacher exception from the Commissioner’s certification requirement, and it allows for an unlimited number of them.

11. Clearly, the Legislature intended that the Commissioner be empowered to certify the teachers who work in all charter schools, and that only the Legislature has the power to create the exceptions, if any, to that certification requirement. The regulations at issue, however, are contrary to that clear legislative intent.

12. Furthermore, the regulatory power granted to the Committee by the Legislature was limited to promulgating regulations “with respect to governance, structure, and operations of Charter Schools. ” Education Law §355 (2-a). The Legislature did not delegate to the Committee the power to provide an alternative teacher certification pathway. Simply by looking at the plain, everyday meaning of the “governance, structure, and operations of Charter Schools”, one should conclude that those terms do not include the certification of the teachers in those charter schools. Indeed, in the quoted clause, each of the terms – governance, structure, and operations – relate to the schools themselves, not to teachers.

13. The regulations are particularly suspect given that the Legislature considered, but did not pass, a bill that would have allowed for teacher certification for charter school teachers to differ from that of public school teachers. For example, in June 2016, the Legislature considered bill number S. 6567 which would have amended Paragraph (a-1) of subdivision 3 of section 2854 of the education law to do something similar to what the regulation would allow. (A copy of the Bill is attached to this affidavit as Exhibit “A”). While that bill passed the Senate, it did not pass the Assembly. Senator John J. Flanagan, Temporary President and Majority Leader, wrote a letter Governor Andrew M. Cuomo dated June 20, 2016 supporting such legislation. (A copy of the letter is attached to this affidavit as Exhibit “B”). Among other things he said that “[a]llowing these schools flexibility on the rigid certification requirements will enable these schools to continue to function at their high levels of success;” although petitioners question how lowering standards would promote success. Clearly, the Legislature thought it was a matter of policy for the Legislature to decide. The Committee cannot by regulation usurp the Legislature’s power to make policy.

14. That bill, among other things, stated:

§ 2. Paragraph (a-1) of subdivision 3 of section 2854 of the education law, as amended by section 1 of subpart A of part B of chapter 20 of the laws of 2015, is amended to read as follows:

(a-1) The board of trustees of a *charter* school shall employ and contract with necessary teachers, administrators and other school personnel. Such teachers shall be certified in accordance with the requirements applicable to other public schools; provided, however, that **teachers employed by a high performing public charter school with a rigorous teacher training program will have three school years from their employment start date before they must satisfy certification requirements; provided further that a charter school may employ as teachers (i) uncertified teachers with at least three years of elementary, middle or secondary classroom teaching experience; (ii) tenured or tenure track college faculty; (iii) individuals with two years of satisfactory experience through the Teach for America program; and (iv) individuals who possess exceptional business, professional, artistic, athletic, or military experience, provided, however, that such teachers described in clauses (i), (ii), (iii), and (iv) of this paragraph shall not in total comprise more than the sum of: (A) thirty per centum of the teaching staff of a *charter* school, or five teachers, whichever is [less] greater; plus (B) five teachers of mathematics, science, computer science, technology, or career and technical education; plus (C) five additional teachers. A teacher certified or otherwise approved by the commissioner shall not be included in the numerical limits established by the preceding sentence.**

15. Indeed, the Speaker of the Assembly, Carl E. Heastie, and the Chair of the Assembly's Education Committee, Cathy Nolan are on Public record stating that the Committee's ability to regulate does not extend to teacher certification. Attached to this Affidavit is Exhibit "C" is a letter from Speaker Heastie and Chairperson Nolan to Governor Andrew Cuomo dated August 15, 2016 in which they state that "the Legislature did not intend to delegate to SUNY broad authority to regulate the charter schools it oversees. Nor did it intend to empower SUNY to adopt regulations that are inconsistent with current laws governing charter schools including, but not limited to, laws related to teacher certification requirements, participation in pre-kindergarten programs, and co-location of charter schools within traditional public schools."

16. Further, the Committee's regulations are contrary to the public policies and goals of the State University of New York SUNY itself. Attached to this Affidavit is as Exhibit "D" is a memorandum from SUNY Chancellor, Nancy L. Zimpher, to the members of the SUNY Board of Trustees dated June 21, 2017. In that memorandum the SUNY Chancellor sets forth a regulation that among other things, would require SUNY to recruit and select excellent candidates for the teaching certification and prepare them through "rigorous academic study and clinical practice." While the Chancellor is striving for excellence and imposing rigorous standards, the Committee, it seems, is doing just the opposite.

17. In fact, the Deans and Directors of Education of SUNY all opposed the Committee's regulations. Attached to this Affidavit is Exhibit "E" is a letter from the Deans and Directors of Education in CUNY to the members of the SUNY Board of Trustees dated July 27, 2017, calling on the Committee to rescind its proposal, and calling of the Chancellor and the entire Board to speak out against changes and take action to repeal them. According to the Deans and Directors, the Committee's regulations will have "negative consequences for all teachers and the education profession across New York State."

18. During the regulatory process, New York State Untied Teachers ("NYSUT") submitted public comments. Attached to this Affidavit as Exhibit "F" is a letter from NYSUT Executive Vice President Jolene P. DiBranco addressed to Ralph A. Ross II at the Charter Schools Institute dated August 1, 2017 with NYSUT's comments. These comments include among others, that the regulations "would significantly undercut the quality of teaching in charter schools by permitting unqualified individuals to educate large numbers of high needs students." NYSUT also stated that the "regulations would have the effect of leading potential educators down a primrose path through a fake 'certification' process that would not be valid for

employment in public school districts, charter schools authorized by the Board of Regents, or in schools located in other states.”

19. Also, the United Federation of Teachers, Local 2 (the”UFT”) submitted public comment. Attached to this affidavit as Exhibit “G” is a letter from UFT President Michael Mulgrew addressed to Joseph W. Belluck, the Committee Chair dated July 26, 2017 with UFT’s comments. These comments, among other things, state: “That some charter chains, facing high levels of teacher burnout and departures, cannot appropriately staff their schools is not reason for the state to radically depart from its decades-long effort to ensure a highly qualified teacher in every classroom.”

20. At a panel event held on August 16, 2017, Commissioner Elia and the Chancellor to the State Board of Regents Betty A. Rosa spoke in opposition to the regulations, saying, among other things, that they found them insulting to the teaching profession. Attached to this affidavit as Exhibit "H" is a transcription of their statements opposing the regulations.

21. And most recently Chancellor Rosa and the President of the NAACP New York State Conference Hazel N. Dukes published an opinion stating among other things that the regulations at issue "would lower the bar on what it means to be a teacher in some of New York's charter schools." A copy of this opinion is attached to this Affidavit as Exhibit "I."

Dated: New York, New York
October 12, 2017

/s/ Robert T. Reilly
ROBERT T. REILLY