

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

NEW YORK STATE UNITED TEACHERS by its X
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 OF NEW YORK; 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 UNIVERSITY 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 :
:

**VERIFIED
PETITION/
COMPLAINT**

----- X

Petitioner-Plaintiffs NEW YORK STATE UNITED TEACHERS (“NYSUT”), by
its President ANDREW PALLOTTA; UNITED FEDERATION OF TEACHERS,
LOCAL 2, (“UFT”) by its President MICHAEL MULGREW; ROBERT HUNTER
SCHOENFELD; and EDWIN K. BRADLEY, by their attorneys, Robert T. Reilly, Esq..
Adam S. Ross, Esq., and Stroock & Stroock & Lavan LLP, for their verified
petition/complaint respectfully allege:

PRELIMINARY STATEMENT

1. Petitioners-Plaintiffs (“Petitioners”) commence this hybrid declaratory
action and Article 78 proceeding to vacate regulations adopted by defendant-respondent

(“defendant”) State University of New York (“SUNY”) Board of Trustees’ Charter Schools Committee (the “Committee”) on October 11, 2017, putting in place a watered down system for certifying teachers in certain charter schools, one that is wholly distinct from and contrary to the more rigorous system for certifying teachers who work in public schools and the other charter schools in New York, and must meet the certification requirements set forth by the New York Commissioner of Education (“Commissioner”). These regulations significantly undercut the quality of teaching in SUNY authorized charter schools by permitting insufficiently prepared individuals to educate large numbers of high needs students beyond that which is already allowed for by law. Further, they would have the effect of leading potential educators through an essentially fake certification process, one not valid for employment in New York’s public school districts, other charter schools, or the public schools of other states.

2. Education Law §2854 (the “Charter School Act”) expressly sets forth the limited circumstances in which a person can teach in a charter school without a certification issued by the Commissioner. The Committee proposed Regulations of the Board of Trustees Charter School Committee (the “SUNY Regulations”) are, therefore, invalid because the regulations violate the Charter School Act. Nevertheless, in adopting these regulations, the Committee acted purportedly in exercise of the power granted to it by Education Law § 355(2-a) to regulate with respect to the “governance, structure, and operations” of the charter schools for which defendant SUNY Board of Trustees is the charter entity. As the legislative history shows, the terms “governance, structure, and operations” do not—and cannot—include the certification or licensing of teachers, since, pursuant to the express provisions of the Charter School Act, teachers in charter schools,

with limited exception must be certified in accordance with the same requirements applicable to teachers in all other public schools. Thus, Petitioners are entitled to relief under Article 78 of the CPLR.

3. Indeed, if Education Law § 355(2-a) did in fact grant the SUNY Board of Trustees the power to adopt regulations with respect to certification or licensing of teachers that are contrary to the express language of the Charter School Act, the law would be unconstitutional, since the Legislature cannot grant an administrative agency unlimited power without any guidance to promulgate regulations. It is well-settled that Courts will not interpret statutes in a manner that would render them unconstitutional, thus, the Court should interpret §355(2-a) in a more limited way, that does not allow for regulations that are contrary to the Charter School Act. Here, the Committee engaged in a legislative function, not an administrative one when it adopted the regulations at issue, and therefore, the regulations violate the separation of powers doctrine under the New York Constitution. In sum, the Committee stretched the applicable statute beyond its valid reach when it used the statute as a basis for drafting a code embodying its own assessment of what public policy ought to be.

JURISDICTION

4. This Court has jurisdiction to issue a declaratory judgment pursuant to CPLR §§ 3001 and 3017, and to issue an order and judgment pursuant to CPLR Article 78 granting the relief Petitioners seek by vacating and annulling the challenged regulations. Counsel for Respondents-Defendants (“Respondents”) were notified on October 11, 2017, that Petitioners would be seeking an order to show cause from the court on October 12, 2017.

VENUE

5. Venue is laid in the County of New York where the Committee has its principal place of business.

6. No prior application for the relief requested in this petition/complaint has been made in any forum.

PETITIONERS

7. Petitioner Andrew Pallotta is a resident of the State of New York and is the president of NYSUT. NYSUT is an unincorporated association and New York's largest labor union, representing approximately 600,000 in-service and retired teachers, school related professionals, academic and professional faculty in higher education, and professionals in health care.

8. Petitioner Michael Mulgrew is a resident of the State and City of New York, and is the President of the UFT. The UFT is an unincorporated association with its principal place of business in the City and County of New York and is the recognized bargaining agent for all nonsupervisory pedagogical personnel and classroom paraprofessionals employed by the Board of Education of the City School District of the City of New York (the "BOE") as well as teachers and other pedagogical personnel in certain charter schools, including those authorized by SUNY.

9. Petitioner Robert Hunter Schoenfeld is a teacher at University Prep Charter High School, located in Bronx, New York. He is also a member of the UFT, and is the duly elected Chapter Leader of the UFT's membership at University Prep Charter High School. In his capacity of Chapter Leader, Mr. Schoenfeld is the UFT representative responsible for representing a bargaining unit of teachers employed by

University Prep Charter School. Defendant SUNY Board of Trustees is the charter entity for University Prep Charter School.

10. Petitioner Edwin K. Bradley is a teacher at South Buffalo Charter School, located in Buffalo, New York. He is also a member of NYSUT and the President of the South Buffalo Charter School Instructional Staff Association. The South Buffalo Charter School Instructional Staff Association is a local affiliate of NYSUT.

RESPONDENTS

11. Respondent State of New York is a state body governed by the New York State Constitution with its principal place of business located at the Capitol, Albany, New York.

12. Respondent SUNY is a state university created under Article 8 of the Education Law.

13. Respondent Kristina M. Johnson is the Chancellor of SUNY and is the Chief Executive Officer of SUNY.

14. Respondent SUNY Board of Trustees is authorized, pursuant to Education Law § 2851 to serve as a charter entity for certain charter schools operating in New York. The SUNY Board of Trustees is currently the charter entity or authorizer for 167 charter schools, operating in New York including University Prep Charter School and South Buffalo Charter School.

15. Respondent H. Carl McCall is Chairman of the SUNY Board of Trustees.

16. Respondent SUNY Charter Schools Institute was created by the SUNY Board of Trustees to assist the SUNY Board of Trustees in carrying out its responsibilities as a charter entity pursuant to the Charter School Act.

17. Respondent Committee was established by the SUNY Board of Trustees. The Committee promulgates policies related to oversight of charter schools authorized by the SUNY Board of Trustees. Prior to June 2016, however, SUNY had no statutory authority to separately adopt regulations.

18. Respondent Joseph W. Belluck is the Chair of the Committee.

STATEMENT OF THE CASE

The Charter School Act

19. One of the stated purposes of the Charter School Act is to “authorize a system of charter schools . . . in order to . . . improve student learning and achievement . . .” Education Law § 2850.2(a).

20. In enacting the Charter School Act, the Legislature created a comprehensive statutory scheme governing the manner in which charter schools may legally operate in New York State. *See* Education Law § 2850 *et seq.*

21. This statutory framework ensures that, where the Legislature so decided, students attending charter schools in New York would be treated in the same manner as other public school students.

22. New York has a rich tradition of ensuring that teachers working in its public schools meet rigorous teacher certification requirements.

23. The certification requirements for teachers working in public schools in New York are duly promulgated by the Commissioner, pursuant to statutory authority. The Commissioner has the sole authority to issue teaching certificates and to promulgate regulations for teacher certification – for all teachers. *See* Education Law § 3004(1). The Commissioner’s Regulations for obtaining teacher certification are found at 8

NYCRR 80-1 *et seq.*; 8 NYCRR 80-3 *et seq.* These regulations are not found under the Charter School Act.

24. The Commissioner’s Regulations concerning teacher certification ensure that certified educators are thoroughly prepared to teach, with such preparation ultimately achieved by, among other things, (1) completing coursework—over 70 semester hours of instruction, with over 50 of those semester hours in core content and pedagogy, (2) teaching experience—40 school days of experience in a college supervised teacher experience or as an employed teacher, (3) and passing competitive examinations including tests in performance assessment, content, and educating students.

25. In passing the Charter School Act, the Legislature required that teachers working in charter schools in New York, with limited exception, meet the same stringent requirements of teacher certification applicable to those teachers working in any other public school in New York, *i.e.*, that they be certified in accordance with the requirements “applicable to other public schools.” Education Law § 2854.3(a-1).

26. The exceptions to the certification requirement are explicitly stated in the statute:

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.

Education Law § 2854.3(a-1).

27. Moreover, a charter school may only employ uncertified teachers pursuant to the exceptions enumerated above:

in an amount that 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. A teacher certified or otherwise approved by the commissioner shall not be included in the numerical limits established by the preceding sentence.” *Id.*

The SUNY Charter Schools Committee Regulations

28. On or about June 17, 2016, the Legislature enacted Chapter 73 of the Laws of 2016, which includes Education Law § 355(2-a).

29. Education Law § 355(2-a) provides:

[n]otwithstanding any other provision of law, rule, or regulation to the contrary, the state university trustees charter school committee, as a charter entity, are further authorized and empowered, to promulgate regulations with respect to governance, structure and operations of charter schools for which they are the charter entity pursuant to section twenty-eight hundred fifty-one of this chapter.

30. In enacting Education Law § 355(2-a), the Legislature provided the Committee with the limited authority to enact regulations concerning the governance, structure, and operations of a charter school. The Legislature did not delegate to the Committee any authority to promulgate regulations concerning teacher certification for those charter schools where the SUNY Board of Trustees is the charter entity.

31. Indeed, prior to enacting Education Law § 355(2-a), in January 2016, Senator John Flanagan introduced a bill in the Senate to amend Section 2854 of the Education Law to expressly permit “high performing charter school[s] with [] rigorous teacher training program[s]” to hire teachers who were not certified in accordance with

the Commissioner's requirements and allowing these teachers "three years from their employment start date [to] satisfy certification requirements." Senate Bill 6406-B, January 14, 2016. However, this proposed amendment did not make it past the Senate Finance Committee.

32. Senator Flanagan made a second attempt in relation to the Budget Bill. In introducing the Senate's first draft of the Budget Bill, Senator Flanagan described the amendment as "allow[ing] charter schools to employ uncertified teachers for a period of three years if such schools have a teacher training program in place..." New York State Senate, Introducer's Memorandum in Support, S8016A. This, too, failed to meet with Legislative approval. This legislative attempt to amend the law would be beneficial to charter schools because, in the words of Senator Flanagan: "allowing these schools flexibility on the rigid certification requirements will enable these schools to continue to function at their high levels of success." In other words, the regulations at-issue provide for the same changes to teacher certification that the proposed – but failed – legislation would have provided. The Committee is attempting to achieve by exercise of its purported regulatory power what its proponents failed to achieve in the Legislature.

33. Notwithstanding the limited authority delegated to the Committee pursuant to Education Law § 355(2-a), on July 6, 2017, a full year after the statute was passed, the Committee issued the SUNY Regulations providing for less rigorous teacher certification requirements for charter schools were authorized by the SUNY Board of Trustees. A full copy of the SUNY Regulations issued on July 6, 2017 is attached as Exhibit "A".

34. A Notice of Proposed Rulemaking regarding the SUNY Regulations was published in the State Register on July 26, 2017, with a forty-five day public comment period.

35. Just a few days prior to the October 11, 2017 Committee meeting, the SUNY Board of Trustees amended the proposed Regulations. A copy of the revised, SUNY Regulations is attached as Exhibit “B”. The revisions included, *inter alia*, an increase in the number of hours of instruction required, a decrease in the number of teaching experience hours required, and the addition of a single examination.

36. On October 11, 2017, the Committee adopted the revised SUNY Regulations and resolved to send them for publication in the State Register as final regulations, without issuing them for further public comment, notwithstanding the changes the Committee made to the regulations.

37. The revised SUNY Regulations apply to all charter schools in New York for which the SUNY Board of Trustees is the charter entity.

38. Currently, the SUNY Board of Trustees is the charter entity for approximately 167 charter schools in New York. Each school year, the charter schools authorized by the SUNY Board of Trustees educate thousands of New York’s children.

39. The SUNY Regulations set forth a method for certifying teachers that directly conflicts with the teacher certification requirements as set forth in the Charter School Act for charter schools operating in New York.

40. Specifically, the SUNY Regulations allow charter schools authorized by the SUNY Board of Trustees to submit for approval to the Charter Schools Institute an “Instructional Program” providing for an alternate path for teacher certification. This

directly contradicts the Charter School Act mandate that charter schools operating in New York employ teachers who are certified in accordance with the requirements “applicable to other public schools.”

41. Despite directly conflicting with the explicit teacher certification requirements provided for in the Charter School Act, the SUNY Regulations also state that “an approved Instructional Program under this section are to be considered equivalent to the certification requirements applicable to other public schools of the state for purposes of [Education Law § 2854.3(a-1)].” SUNY Regulations, § 700.4(a).

42. Even a cursory review of the SUNY Regulations demonstrates that they impose a watered down path for teacher certification as compared to the certification requirements set forth by the Commissioner, applicable to teachers working in public schools, and therefore in charter schools, in New York. According to the Commissioner and the Chancellor of the New York State Board of Regents, the regulations are “an affront to a critical tenet in education: rigorous and high-quality teacher preparation programs foster high-quality teachers who increase the likelihood of students achieving proficiency on state standards.”

43. Among other things, in terms of education, the regulations would eliminate the need for a teacher to ultimately achieve a master’s degree or even, it seems, achieve bachelor’s degree, if the teacher had the “necessary knowledge and skills to successfully complete” a program administered by the Charter Schools Institute. In terms of instruction, the teacher would need to achieve a set number of “clock” hours of instruction. In terms of experience, the teacher would need to achieve only 40 clock

hours of field experience. The at issue regulations contrast starkly with the Commissioner's Regulations for classroom teachers.

44. For example, the Commissioner's Regulations require that, to obtain certification, public school teacher ultimately have a bachelor's degree, that includes the completion of over 70 "semester hours," each of which represents multiple hours of instruction over the course of the semester at an accredited college or university, with over 50 of those "semester hours" in general education core, content core, and pedagogical core studies. *See* 8 NYCRR 80-3.7(a)(2). However, the revised SUNY Regulations only require 160 "clock hours," or actual hours, of instruction in content core and pedagogical core instruction. *See* SUNY Regulations, 700.4(b)(4). Further, the SUNY Regulations do not require a candidate to have completed a bachelor's degree. Rather, the SUNY Charter Schools Institute can make a determination that a candidate "[has] been found to have the necessary knowledge and skills to successfully complete the program." SUNY Regulations 700.4(b)(2).

45. In order to receive certification, public school teachers ultimately are required to pass the following examinations: the teacher performance assessment, the content specialty test, and educating all students. 8 NYCRR 80-1.5. The SUNY Regulations merely require a final assessment which "may be either the State teacher certification examination, the Educating All Students ("EAS") test, or an examination which measures, at a minimum, all required elements of the EAS test, and is approved by the institute."

46. In addition, the Commissioner's Regulations require candidates to ultimately complete 40 school days in a college supervised teaching experience or as an

employed teacher. *See* 8 NYCRR 80-7.3(b). The revised SUNY Regulations however, only require a mere 40 “clock hours” of “field experience appropriate to the certification being sought.” SUNY Regulations, 700.4(b)(4).

47. Moreover, the SUNY Regulations contradict SUNY’s own publicly stated policy goals which were set forth by former SUNY Chancellor Nancy Zimpher in a June 21, 2017 memorandum to the SUNY Board of Trustees. In her June 21, 2017 memorandum, former Chancellor Zimpher set forth a resolution called TeachNY that would require SUNY to among other things implement a new standard of excellence for educator preparation, with commitments in at least four areas: (1) recruitment and selection of excellent candidates for the profession, (2) preparation of excellent educators through rigorous academic study and clinical practice, (3) provision of excellent professional support throughout the continuum of practice, and (4) demonstration of program excellence and impact on professional practice, all with the goal of raising standards for teachers, not lowering them.

48. Many of New York’s public education leaders have openly and expressly opposed the SUNY Regulations.

49. For example, SUNY’s own Deans and Directors of Education publicly opposed the SUNY Regulations. In a July 27, 2017 letter to the SUNY Board of Trustees, the Deans and Directors of Education “strenuously objected” to the SUNY Regulations, and described the SUNY Regulations as “virtually eliminating teacher certification requirements.”

50. In addition, the current Commissioner, Mary Ellen Elia, and the Chancellor of the New York State Board of Regents, Betty Rosa also publicly opposed

the SUNY Regulations. In fact, they found the proposed regulations not only to be insulting but also to have “significant legal challenges,” including being promulgated in excess of SUNY’s statutory authority, superseding the Commissioner’s sole authority to issue teaching certificates, and being in direct conflict with those provisions of the Education Law that govern Statewide Universal Full-Day Pre-Kindergarten.

51. Finally, during the public comment period, NYSUT and the UFT submitted comments opposing the SUNY Regulations.

52. On August 1, 2017 NYSUT Executive Vice President Jolene DiBrango addressed a letter to the SUNY Charter Schools Institute.

53. In its public comment letter, NYSUT noted that the SUNY Regulations circumvent “many of the established criteria for teacher certification set forth by the [Commissioner] and the Board of Regents” and further that the SUNY Regulations directly conflict with the TeachNY initiative established by SUNY and SUNY’s former Chancellor Nancy Zimpher.

54. A July 26, 2017, letter from UFT President Michael Mulgrew addressed to Joseph W. Belluck, the Committee Chair, included the UFT’s public comments, noting among other things “[t]hat 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.”

55. Notwithstanding, the public statements opposing the SUNY Regulations by the Commissioner, the Chancellor of the New York State Board of Regents, SUNY’s

Deans and Directors, the UFT, and NYSUT, on October 11, 2017, the SUNY Board of Trustees adopted the SUNY Regulations.

56. Upon information and belief, petitioner Robert Hunter Schoenfeld, who is currently employed as a teacher at University Prep Charter School, and petitioner Edwin K. Bradley who is employed as a teacher at South Buffalo Charter School as well as other regularly certified teachers, will be harmed because he and they will bear a larger burden of responsibility for the effective education of students who have been taught by teachers certified through a less rigorous process.

57. Petitioners agree with Commissioner Elia and Chancellor Rosa when they say that “[o]ur efforts should focus on promoting effective teaching and strengthening and supporting the entire educator preparation pipeline, not eroding it.” The regulations at-issue erode that pipeline.

58. As stated by Commissioner Elia and Chancellor Rosa in their public comments, “[t]he erosion of teacher certification requirements and teacher preparation programs will diminish the number of effective teachers in New York and have a negative impact on student achievement.”

59. “The greatest impact,” according to Commissioner Elia and Chancellor Rosa, “will be on students of color, those that are economically disadvantaged, and students with disabilities who are served in SUNY-authorized charter schools.”

60. As described more fully by Commissioner Elia and Chancellor Rosa, “SUNY’s attempt to dilute the standards and requirements for charter school teachers will have profound consequences.”

FIRST CAUSE OF ACTION

61. The regulations are *ultra vires* because they conflict with existing law.

62. The Charter School Act explicitly mandates that charter schools operating in New York meet specific requirements for employing teachers, with limited exception, who are certified pursuant to the requirements applicable to every other public school teacher in the State.

63. The SUNY Regulations provide for far less stringent teacher certification requirements for teachers employed by charter schools for which the SUNY Board of Trustees is the charter entity. The SUNY Regulations are inconsistent with the Charter School Act.

64. Accordingly, the SUNY Regulations violate the Charter School Act, are irrational, arbitrary and capricious, and *ultra vires*.

SECOND CAUSE OF ACTION

65. The regulations are *ultra vires* because they exceed the scope of permissible regulatory power delegated to the Committee by the Legislature.

66. The Legislature did not delegate to the Committee the lawful authority to enact regulations concerning teacher certification that conflict with the Charter School Act.

67. Rather, Education Law § 355(2-a), is an enabling statute, whereby the Legislature provided the Committee the limited authority to promulgate regulations with respect to governance, structure and operations of charter schools for which it is the charter entity.

68. In promulgating regulations, which create a less stringent means for teachers to obtain certification while working in charter schools authorized by the SUNY Board of Trustees, the Committee engaged in impermissible rulemaking and exceeded the limited authority delegated to it by the Legislature.

69. And, were section 355(2-a) of the Education Law to be interpreted to allow the SUNY Charter School Committee to promulgate the regulations at issue, it would result in an unconstitutional delegation of power to the Committee.

70. A court cannot interpret section 533(2-a) in a way that would needlessly render it unconstitutional.

71. Here, the Committee exceeded the constitutional scope of section 355(2-a) when it adopted the regulations at-issue.

72. Accordingly, the regulations are in violation of lawful procedure and *ultra vires*.

THIRD CAUSE OF ACTION

73. When it adopted the regulations at-issue the Committee violated the State Administrative Procedure Act (“SAPA”).

74. Under Section 202(4-a) of SAPA, when an agency revises regulations that previously had been submitted for public comment, it must also submit the revised regulations for public comment.

75. When an agency fails to comply with the provisions on SAPA in adopting regulations, those regulations are null and void.

76. On October 11, 2017, the Committee adopted revised regulations.

77. The Committee had not submitted those revised regulations for public comment.
78. The Committee violated SAPA.
79. The regulations at issue are null and void.

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

- a. issue an order and judgment pursuant to Article 78 of the CPLR ordering that the challenged regulations are null and void because they are ultra vires, because the Committee exceeded the permissible scope of its mandate in adopting them, because they violate the Charter School Act, and because they are irrational, arbitrary and capricious and otherwise unlawful;
- a. issue a declaratory judgment declaring that the challenged regulations are unconstitutional because they violated the separation of powers doctrine of the New York Constitution;
- b. order disclosure and a trial on any issue of fact pursuant to CPLR §§ 408 and 7804(h);
- c. convert, if necessary, the Article 78 proceeding to a declaratory action or the declaratory action to an Article 78 proceeding pursuant to CPLR § 103; and
- d. grant Petitioners-Plaintiffs such other, further and different relief as may be just and proper, together with reasonable costs.

Dated: New York, New York
October 12, 2017

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