

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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In the Matter of

Index No.  
Date Purchased

SAMANTHA ROSADO-CIRIELLO, as President of the  
YONKERS FEDERATION OF TEACHERS, LOCAL 860,  
AFT, AFL-CIO; YONKERS FEDERATION OF  
TEACHERS, LOCAL 860, AFT, AFL-CIO,

**VERIFIED PETITION**

Petitioners,

- v -

BOARD OF EDUCATION OF THE YONKERS CITY  
SCHOOL DISTRICT; YONKERS CITY SCHOOL  
DISTRICT; and EDWIN M. QUEZADA, ED.D., in his  
official capacity as Superintendent of the YONKERS CITY  
SCHOOL DISTRICT,

Respondents,

For an Order and Judgment Pursuant to Article 78 of the  
Civil Practice Law and Rules.

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Petitioners Samantha Rosado-Ciriello, as President of the Yonkers Federation of Teachers, Local 860, AFT, AFL-CIO, the Yonkers Federation of Teachers, Local 860, AFT, AFL-CIO (“YFT”) (collectively “Petitioners”), for their petition to compel Respondents Board of Education of the Yonkers City School District (“Board”), Yonkers City School District (“District”), and Edwin M. Quezada, Ed.D., in his official capacity as Superintendent of the Yonkers City School District (collectively “Respondents”) to act as mandated by Executive Orders 202.45 and 202.60, NYSDOH guidance, and their own rules and regulations, to consider telework as a viable accommodation for vulnerable faculty and staff at increased risk of serious illness or death related to SARS-CoV-2 (“COVID-19”) infection, respectfully allege:

## PRELIMINARY STATEMENT

1. Governor Cuomo's Executive Orders 202.45 and 202.60 require schools to consider telework accommodations for vulnerable persons, in accordance with mandatory guidance from the New York State Department of Health. In turn, Respondents adopted rules and regulations mandating them to consider telework accommodations for vulnerable faculty and staff who are at increased risk for COVID-19 illness. Respondents adopted such rules and regulations in compliance with Governor Cuomo's directives for reopening in-person instruction during the 2020-2021 school year. Governor Cuomo required each school district to submit reopening plans and affirm compliance with mandatory guidance promulgated by the New York State Education Department ("NYSED") and the New York State Department of Health ("NYSDOH").

2. The NYSED and NYSDOH guidance required each school district reopening plan to provide policies for vulnerable populations, including telework accommodations, as part of the State's overall plan to not only control transmission of COVID-19, but also to protect the most at-risk school faculty and staff from severe effects and/or death from this relentless virus.

3. Respondents' adopted reopening plan clearly and unambiguously incorporates NYSED and NYSDOH requirements to consider telework accommodations for vulnerable faculty and staff. Nonetheless, Respondents have refused to include telework as an optional accommodation, irrespective of the requestor's unique circumstances ("the Policy"). Respondents' unconscionable disregard of Executive Orders 202.45 and 202.60, and their own rules and regulations puts vulnerable YFT represented faculty and staff at significant and unnecessary risk of serious illness or death.

4. Respondents' actions have put vulnerable faculty and staff between the proverbial rock and a hard place; choosing between a paycheck, health and potentially, life.

5. To comply with the State's reopening requirements, Respondents adopted their reopening plan to establish the procedures for instruction during the 2020-2021 school year. Respondents submitted their reopening plan to NYSED and NYSDOH and posted it on their website homepage.<sup>1</sup> In submitting their reopening plan, Respondents' expressly agreed to adopt the mandatory provisions of the NYSED and NYSDOH guidance. Moreover, Respondents' explicitly incorporated the NYSED and NYSDOH guidance in their reopening plan document.

6. Petitioners commence this special proceeding for an order and judgment: (a) declaring Respondents' actions denying telework accommodations null and void, arbitrary, capricious, *ultra vires*, irrational, in violation of law, in violation of lawful procedure, and a failure to perform a duty enjoined upon Respondents by law; (b) permanently enjoining Respondents from further blanketly denying telework accommodation requests during the COVID-19 pandemic; (c) vacating Respondents' decisions regarding telework accommodation requests; (d) making YFT members whole who were denied telework accommodation requests; (e) mandating that Respondents comply with Executive Orders 202.45 and 202.60 and Respondents' rules and regulations; and (f) mandating that Respondents re-consider previously denied requests for telework accommodations by YFT represented faculty and staff.

### JURISDICTION

7. This Court has jurisdiction to issue an order pursuant to CPLR Article 78 to grant the relief requested herein.

8. No prior application has been made for the relief requested herein.

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<sup>1</sup> <https://www.yonkerspublicschools.org/reopening2020>. Last accessed September 15, 2020.

### VENUE

9. The basis for venue is that Respondents' principal place of business is located in Westchester County.

### PARTIES

10. Petitioner Samantha Rosado-Ciriello is a resident of the State of New York, County of Westchester, and is the President of the YFT.

11. Petitioner YFT is an unincorporated association with its principal place of business located in Westchester County. YFT is the recognized exclusive negotiating representative of all professional pedagogical personnel on tenure, on probation, and on terminal appointments including classroom teachers, attendance teachers, itinerant teachers, regular substitute teachers, teaching interns, teaching assistants, athletic directors, nurse teachers, occupational and physical therapists, librarians, guidance counselors, social workers, psychologists, per diem appointments, teachers in adult basic education, and summer and night school teachers employed by Respondent Board. YFT represents over 1,800 District employees.

12. Respondent Board is a body corporate existing pursuant to Article 52 of the Education Law. Respondent Board's principal place of business is located at One Larkin Center, Yonkers, New York.

13. Respondent District is a City School District existing pursuant to Article 52 of the Education Law. Respondent Board is responsible for the educational affairs of the District.

14. Respondent Dr. Quezada is the superintendent and chief executive officer of the District, and has the duties, powers, and responsibilities set forth in Article 52 of the Education Law, including the duty to "enforce all provisions of law and all rules and regulations relating to the management of the schools and other educational, social and recreational activities under the direction of the [Board]." Educ. Law § 2566(2).

## FACTS

15. The United States remains gripped by the COVID-19 pandemic with no apparent end in sight. The State of New York has been under a continuous State disaster emergency since March 7, 2020. As of September 13, 2020, COVID-19 has killed nearly 200,000 people in the United States, including more than 32,611 New Yorkers.<sup>2</sup> These numbers increase daily. All schools in the State of New York, including those operated by Respondents, were closed to in person instruction from March 2020 to the end of the 2019-2020 school year because of COVID-19.

16. COVID-19 is a severe, acute respiratory virus primarily spread from person to person through respiratory droplets when an infected person coughs, sneezes, or talks.<sup>3</sup> COVID-19's dangers are compounded by transmission risk from asymptomatic and pre-symptomatic infected persons.<sup>4</sup> It is understood that COVID-19 can be spread by human contact with surfaces contaminated with droplets of the virus.<sup>5</sup>

17. COVID-19 can infect anyone. People with certain underlying medical conditions, however, are much more likely to become severely ill if they contract COVID-19, and may require hospitalization, intensive care, or a ventilator to help them breathe, or they may even die. People of any age with certain underlying medical conditions are at increased risk for severe illness and death. For instance, according to the CDC, an individual having chronic kidney disease, at any

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<sup>2</sup> <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>. Last accessed September 13, 2020.

<sup>3</sup> <https://www.cdc.gov/coronavirus/2019-ncov/faq.html>. Last accessed September 13, 2020.

<sup>4</sup> <https://www.cdc.gov/coronavirus/2019-ncov/php/public-health-recommendations.html>. last accessed September 13, 2020.

<sup>5</sup> *Id.*

stage, is *four times* more likely to suffer a severe case than someone without this condition and a person with multiple underlying conditions is five times more likely to suffer severe disease.<sup>6</sup>

18. On March 7, 2020, Governor Cuomo signed Executive Order 202, which declared a State emergency disaster for the entire State of New York. A copy of Executive Order 202 is attached as Exhibit “A”.

19. On March 16, 2020, Westchester County Executive George Latimer declared a state of emergency in Westchester County because of the COVID-19 pandemic. A copy of the State of Emergency Declaration and County Executive Latimer’s subsequent Order is attached as Exhibit “B”. During a press conference about the declaration, County Executive Latimer stated “Our society faces a challenge ahead of us that can only be compared to what was faced when wartime provisions were enacted in our Nation. Like then, we will overcome this. It might not be overnight – but it will be together. We must ensure we are doing all we can to protect all who live in this great County.”<sup>7</sup>

**a. The COVID-19 Pandemic and Closure of Schools for In-Person Instruction During the 2019-2020 School Year**

20. On March 16, 2020, Governor Cuomo issued Executive Order 202.4, which required all schools in the State to close for in person instruction for a two-week period by March 18, 2020. Executive Order 202.4 also required all school districts to develop plans for alternative instructional options to submit to NYSED. A copy of Executive Order 202.4 is attached as Exhibit “B”. Executive Order 202.4 was extended five times, by Executive Orders 202.11, 202.14, 202.18, 202.28, and 202.45 to prohibit in person instruction through the end of the 2019-2020 school year.

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<sup>6</sup><https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html#chronic-kidney-disease>. Last accessed September 13, 2020.

<sup>7</sup> <https://www.westchestergov.com/home/all-press-releases/8320-county-executive-george-latimer-declares-state-of-emergency-in-response-to-covid-19-pandemic>. Last accessed August 28, 2020.

Copies of Executive Orders 202.11, 202.14, 202.18, 202.28, 202.45 are attached as Exhibits “C”, “D”, “E”, “F”, “G”, and “H”, respectively.

21. In order to comply with Executive Order 202.4, *et seq.*, the District developed and implemented plans for alternative instruction options. The District did not have any in person instruction between mid-March and the end of the 2019-2020 school year. All District employed teachers taught remotely during that time period.

**b. The State’s Plan to Reopen Schools for the 2020-2021 School Year**

22. The COVID-19 crisis in New York remains acute. The official New York State website displays a large banner on every page declaring: “Coronavirus is still active in New York. We have to be smart. Wear a mask and maintain 6 feet distance in public.”

23. Under Executive Law Section 29-a of Article 2-B, the Governor of the State of New York has very broad powers to issue executive orders during a declared State disaster emergency.

24. Executive Orders have the full force and effect of law.

25. On June 15, 2020, Governor Cuomo issued Executive Order 202.45 which mandates that “. . . entities [including Pre-K to Grade 12 Schools] must be operated in compliance with the guidance promulgated by the Department of Health.” *See* Ex. “H”.

26. On August 7, 2020, Governor Cuomo permitted schools in the State to open for in person instruction.<sup>8</sup> Governor Cuomo required school districts to adopt and submit detailed reopening plans compliant with the NYSDOH Guidance.<sup>9</sup> The Governor further ordered all

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<sup>8</sup> <https://www.governor.ny.gov/news/governor-cuomo-announces-based-each-regions-infection-rate-schools-across-new-york-state-are>. Last accessed September 13, 2020.

<sup>9</sup> *Id.*

school districts to post remote learning plans online as well as plans for testing and tracing students and teachers for COVID-19.<sup>10</sup>

27. Governor Cuomo unequivocally stated the public policy of the State is that teachers must feel safe in order to return to the classroom.<sup>11</sup>

28. In discussing potential reopening for in-person instruction, Governor Cuomo stated: “Parents and teachers must feel safe and secure in each district’s plan to return to school, and those plans *must adhere to the Department of Health guidance*.”<sup>12</sup> Governor Cuomo further stated “teachers have to feel safe, they can’t teach if they don’t feel safe”<sup>13</sup> and “you can’t order a teacher into a classroom.”<sup>14</sup>

29. On September 4, 2020, Governor Cuomo released Executive Order 202.60, issuing the following directives through October 4, 2020:

The directive contained in Executive Order 202.45, as extended, requiring closure of all schools statewide to in-person instruction, is hereby modified only insofar as to authorize schools statewide to be open for instruction, effective September 1, 2020, subject to adherence to Department of Health issued guidance and directives .  
...

A copy of Executive Order 202.60 is attached as Exhibit “I”.

30. The clear mandate of Executive Orders 202.45 and 202.60 is to require schools to operate in compliance with the guidance promulgated by the NYSDOH.

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* (emphasis added).

<sup>13</sup> <https://www.nytimes.com/2020/08/07/nyregion/cuomo-schools-reopening.html>. Last accessed September 13, 2020.

<sup>14</sup> <https://www.nbcnewyork.com/news/local/cuomo-expected-to-reveal-ny-schools-decision-but-says-its-ultimately-not-up-to-him/2556237/>. Last accessed September 13, 2020.



31. In anticipation of potential school reopening for in person instruction for the 2020-2021 school year, NYSED presented a framework of guidance to reopen New York's schools to the New York State Board of Regents ("Regents").<sup>15</sup> A copy of the framework presented by NYSED to the Regents is attached as Exhibit "J".

32. On July 16, 2020, NYSED and the Regents issued the document entitled "Recovering, Rebuilding, and Renewing the Spirit of New York's Schools – Reopening Guidance" ("NYSED Guidance").<sup>16</sup> A copy of NYSED's Guidance is attached as Exhibit "K".

33. NYSED's Guidance expressly provided that "[t]he health and safety of the children and adults in our schools is paramount. Health and safety considerations must always come first in every decision made and every action taken by our schools and districts." *See* Ex. "K" at p. 17.

34. Under NYSED's Guidance, school districts had to submit comprehensive reopening plans for the 2020-2021 school year.<sup>17</sup> *See* Ex. "K" at p. 14. NYSED required all plans to have provisions for in-person, remote, and hybrid models of instruction. *See* Ex. "K" at p. 89.

35. To facilitate reopening plan submissions, NYSED created a survey to be submitted on the SED Monitoring and Vendor Reporting System ("the Portal") to collect essential information about reopening plans ("the Portal Survey"). *See* Ex. "K" at p. 14.

36. NYSED's Guidance further required school district chief executive officers to execute a survey containing a set of mandatory assurances affirming the school district would

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<sup>15</sup> <http://www.nysed.gov/news/2020/state-education-department-presents-framework-guidance-reopen-new-york-state-schools>. Last accessed September 13, 2020.

<sup>16</sup> <http://www.nysed.gov/news/2020/state-education-department-issues-guidance-reopen-new-york-state-schools>. Last accessed August 28, 2020.

<sup>17</sup> The NYSED Guidance refers to local educational agencies ("LEAs"), which includes school districts. *See* Ex. "K" at p. 14.

implement the mandatory portions of the NYSED Guidance to be submitted with the Portal Survey. *See* Ex. “K” at p. 14.

37. Consistent with Executive Order 202.60, NYSED’s Guidance also mandates school districts’ reopening plans to follow guidance released by the NYSDOH.

38. On or about July 13, 2020, NYSDOH issued its guidance entitled “Interim Guidance for In-Person Instruction at Pre-k to Grade 12 Schools During the COVID-19 Public Health Emergency (“NYSDOH Guidance”). A copy of the NYSDOH document entitled “Interim Guidance for In-Person Instruction at Pre-K to Grade 12 Schools During the COVID-19 Public Health Emergency” is attached is Exhibit “L”.

39. NYSDOH Guidance also required school district chief executive officers to affirm that the school district read and understands its obligation to operate in accordance with the NYSDOH Guidance. *See* Ex. “L” at pp. 1 and 23.

40. On July 17, 2020, NYSED Deputy Commissioner Kimberly Young Wilkins wrote to all school district superintendents, principals, BOCES superintendents, and charter school leaders to notify them about the NYSED Guidance. A copy of Deputy Commissioner Young Wilkins July 17, 2020 letter is attached as Exhibit “N”.

41. Deputy Commissioner Young Wilkins reiterated that all reopening plans must include mandatory elements of the NYSED Guidance and NYSDOH Guidance, and that each district chief executive officer must complete the Portal Survey affirming mandatory assurances that the district will address mandatory elements outlined in the guidance documents. *See* Ex. “N” at pp. 1-2.

42. On July 29, 2020, Deputy Commissioner Young Wilkins again wrote all school district superintendents, principals, BOCES superintendents, and charter school leaders extending

the time to submit reopening plans to NYSED to August 7, 2020. A copy of Deputy Commissioner Young Wilkins July 29, 2020 Letter is attached as Exhibit “O”.

**c. NYSED and NYSDOH Require School District Reopening Plans to Include Policies for Vulnerable Persons, Including Telework Accommodations**

43. NYSED’s Guidance mandates all school districts’ plans to have a written protocol detailing how the district/school(s) will provide accommodations to all students and staff who are at high risk or live with a person at high risk. *See* Ex. “K” at p. 18.

44. NYSDOH also requires districts to establish accommodation policies for vulnerable populations “including students, faculty and staff who are at increased risk for severe COVID-19 illness, and individuals who may not feel comfortable returning to an in-person educational environment, to allow them to safely participate in educational activities and, where appropriate, accommodate their specific circumstances.” Exhibit “L” at p. 4. In addition, and significantly, NYDOH Guidance explicitly identifies telework as a potential accommodation in compliance with such mandates:

These accommodations may include but are not limited to remote learning or *telework*, modified educational or work settings, or providing additional PPE to individuals with underlying health conditions. Responsible Parties must also identify and describe any modifications to social distancing or PPE that may be necessary for certain student or staff populations, including individuals who have hearing impairment or loss, students receiving language services, and young students in early education programs, *ensuring that any modifications minimize COVID-19 exposure risk for students, faculty, and staff, to the greatest extent possible.*

*See* Ex. “L” at pp 4-5. (emphasis added).

45. NYSDOH also issued an abbreviated document (“NYSDOH Checklist”) of its Guidance which, again, specifically included telework as one potential accommodation for staff and faculty. A copy of the NYSDOH Checklist is attached as Exhibit “M” at p. 6.

**d. The District's Reopening Plan for the 2020-2021 School Year Adopted NYSED and NYSDOH Guidance Regarding Telework Accommodations for Vulnerable Persons**

46. On July 31, 2020, in response to NYSED's Guidance, the District submitted a document entitled "Reopening Yonkers Public Schools September 2020" ("District Reopening Plan") to NYSED. A copy of the District Reopening Plan is attached as Exhibit "P".

47. Upon information and belief, Respondents completed the NYSED Portal Survey and NYSDOH affirmation to confirm that the Respondents would follow the mandatory elements of the NYSED and NYSDOH Guidance in reopening District Schools.

48. The District expressly acknowledged that the District Reopening Plan was in alignment with all required elements of the NYSED Guidance. *See* Ex. "P" at p. 14. Indeed, the District Reopening Plan explicitly links to and includes the NYSED and NYSDOH Guidance by incorporation. *See* Ex. "P" at p. 14.

49. In the section entitled "Our Goals", the District stated its "plans would be flexible to quickly adjust to guidance updates from health and education departments" *see* Ex. "P" at p. 7, and its core values included adhering "to State, Health and NYSED Guidance." *See* Ex. "P" at p. 8. The District also recognized that "[a]s circumstances and guidance change regarding health, safety, family/community engagement as well as teaching and learning everyone will be expected to adjust" *see* Ex. "P" at p. 8, and that it would "[p]ivot [its plans] based on science and Public Health Guidance." *See* Ex. "P".

50. The District Reopening Plan outlines three possible reopening scenarios: (a) In-person Instruction; (b) Hybrid Instruction; or (c) Remote Instruction. *See* Ex. "P", at p. 15.

51. Each reopening scenario is "contingent upon guidelines provided by [the] Governor's office, DOH, [NYSED] and local government." *See* Ex. "P" at p. 15.

52. Under the District Reopening Plan's Remote Instruction scenario, school sites are closed to students and all instruction takes place online, contingent on compliance with NYSDOH Guidance and NYSED Guidance. *See Ex. "P" at p. 15.*

53. Under the District Reopening Plan's Hybrid Instruction scenario, students will complete some instruction in-person at school facilities. Students will be broken up into groups "A" and "B". Each group will receive in-person instruction two days per week. Wednesdays will include remote instruction for all students with limited exceptions. *See Ex. "P" at p. 15.*

54. The District Reopening Plan provides "*alternative plans for medically vulnerable/high-risk groups*" in lieu of the Hybrid Instructional scenario. *See Ex. "P" at p. 15.*

55. And, of course, the overall implementation of any instructional scenario is entirely contingent upon "guidelines outlined by [the] Governor's office, [NYSDOH], [NYSED] and local government." *See Ex. "P" at p. 15. (emphasis added).*

56. Under the Remote and Hybrid instruction scenarios, all District staff are expected to report to work in person at District facilities. *See Ex. "P" at p. 15.*

57. The District Reopening Plan includes telework in its stated Policy regarding accommodations for employees. The Policy states:

The District will evaluate each employee's needs to accommodations in accordance with applicable laws and regulations, including the Americans with Disabilities Act (ADA), New York State Human Rights Law, and the Families First Coronavirus Response Act (FFCRA). Accommodations may take the form of additional PPE, decreased students in a classroom, alternating schedules, improved ventilation, *or remote work as deemed appropriate.*

*Ex. "P" at p. 23. (emphasis added).*

58. On August 20, 2020, the Board unanimously passed a resolution to begin the 2020-2021 school year under the Remote Instruction scenario until at least October 5, 2020. A copy of the Board's August 20, 2020 resolution is attached as Exhibit "Q".

59. The decision to begin the 2020-2021 school year under the Remote Instruction scenario was made based on a balancing of the facts, NYSED and NYSDOH requirements, and feedback from the community and staff. By letter, dated August 20, 2020, Dr. Quezada announced the Board's resolution to the District community. A copy of Dr. Quezada's August 20, 2020 letter is attached as Exhibit "R". Dr. Quezada stated that "our priorities continue to be the health, safety and well-being of everyone, robust teaching and learning and equity. We will not compromise ensuring a safe, organized return to school for students, staff and families." Dr. Quezada further noted that significant numbers of parents/guardians and staff were concerned over the continued spread of COVID-19.

**e. Respondents' Failure to Follow Executive Orders 202.45 and 202.60, NYSDOH Guidance, and their own Rules and Regulations, to Consider Telework Accommodations for Vulnerable Faculty and Staff**

60. Respondents employ approximately 2,000 YFT members at over 40 facilities.

61. Respondents have denied all individual requests for telework accommodations made by YFT represented faculty and staff—irrespective of the ongoing health crises and resultant state of emergency. Respondents' actions conflict with Executive Orders 202.45 and 202.60, NYSDOH Guidance, and their own rules and regulations as adopted via the District Reopening Plan.

62. Specifically, upon information and belief, District Labor Relations Specialist, Ten von Hoene, or other similarly situated District employee(s), has responded to each individual request for a telework accommodation in the following manner:

Due to the virtual learning model of all Yonkers' students for the month of September, there are currently no remote/work from home teaching positions. At this time, instruction will take place from the school buildings. We will be able to offer additional PPE if requested, are following CDC and Health Department Guidelines in school buildings, and will continue to have an interactive discussion if we are going to move to the hybrid teaching model in October. Obviously there will be questions, we will field them as diligently as possible.

63. Upon information and belief, Respondents' implementation of their District Reopening Plan has resulted in the denial of at least 40 requests for telework accommodation.

64. Respondents' baseless actions presume—contrary to existing facts—that no possible health condition(s) could give rise to an individual employees' need to avoid school facilities altogether.

65. In other words, Respondents inaccurately assume that without students, faculty and staff incur no risk.

66. Accordingly, Respondents' caveat—that they may need to review their actions if students return for Hybrid instruction, improperly disregards the fact that telework accommodations may still be appropriate for vulnerable individuals with underlying health conditions.

67. For instance, upon information and belief, the Respondents have denied telework requests for people with the following risk factors:

- Multiple kidney transplant recipient
- Human Immunodeficiency Virus (“HIV”)
- Heart disease
- Severe lung scarring and impairment
- Severe respiratory issues

- Post-partum infection

68. As a result, several YFT members have been forced to use sick leave and/or take unpaid leaves of absence because of Respondents' actions.

69. In many instances, the risk for vulnerable individuals who have been denied telework accommodations have also been deprived of promised alternative accommodations such as additional Personal Protective Equipment ("PPE") thereby highlighting the need for a more appropriate (i.e., telework) accommodation under the current circumstances.

**f. Respondents' Refusal to Consider Telework Accommodations for Vulnerable Faculty and Staff is Irrational in Light of the Facts**

70. Respondents' continued failure to consider telework as an accommodation for vulnerable faculty and staff unnecessarily exposes at-risk YFT members to serious illness and/or death when instruction can be provided safely and effectively from remote locations.

71. Numerous YFT represented faculty and staff are at increased risk for severe illness or death if they contract COVID-19 due to various medical conditions like cancer, chronic kidney disease, chronic obstructive pulmonary disease, immunocompromised state, obesity, serious heart conditions, and Type 2 diabetes mellitus.<sup>18</sup>

72. Indeed, the District has already had several instances of employees who tested positive for COVID-19 in multiple facilities.

73. Prior to the first day of instruction, September 8, 2020, multiple employees at School 17 tested positive for COVID-19.

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<sup>18</sup> <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>. Last accessed August 29, 2020.



74. In response to the positive tests at School 17, Respondents ordered all School 17 teachers telework from September 8, 2020 until September 15, 2020. Respondents have since extended telework at School 17 for all employees until September 18, 2020.

75. Upon information and belief, employees who are suspected for COVID-19 infection in two buildings other than School 17 have also been allowed to telework while quarantined.

76. Upon information and belief, employees tested positive for COVID-19 at Saunders Trades and Technical High School (“Saunders”). Respondents ordered all faculty and staff at Saunders to telework for one day on September 14, 2020.

77. Upon information and belief, employees tested positive at Roosevelt High School (“Roosevelt”). Yet, Respondents have continued to require Roosevelt faculty and staff to report to work in-person.

78. Upon information and belief, Respondents have permitted employees at both Saunders and Roosevelt, who are subject to quarantine, to telework.

79. On September 9, 2020, in light of Respondents’ reactive prescription allowing for employees who contracted or suspected for COVID-19 to telework, YFT Staff Director and Elementary Vice President Michael Garbowski e-mailed Dr. Quezada to seek clarification about the District’s position about telework and asked:

Dr. Quezada,

It has come to our attention that teachers who are being asked to stay home and quarantine or to get tested for [COVID], are being told they should work remotely from home during that time. Is this correct? If so, does this mean the district has changed its stance on teachers being able to teach remotely from home?

80. Later that day, Dr. Quezada responded as follows:

Mr. Garbowski,

The district has not changed its stance as it relates to ADA. However if someone is quarantined and is able to teach from home, then the district will support those teachers. If this was not an option, how could I had (sic) started the year at School 17? You are well aware the building is closed until next week. I will not punish children.

Thank you.

Dr. Quezada

81. Dr. Quezada's e-mail to Mr. Garbowski is both perplexing and galling. Dr. Quezada gives no explanation as to how a person in quarantine would be able to teach from home, but a vulnerable person would not.

82. Apparently, Dr. Quezada would rather the vulnerable faculty and staff contract COVID-19 and expose themselves to serious illness or death in lieu of considering a protective telework accommodation.

83. It is wholly arbitrary and capricious to exclude telework as an accommodation to YFT represented faculty and staff, particularly in light of the District's fully remote learning option for students, which demonstrates Respondents' recognition that there is a substantial risk of exposure to COVID-19 and while some children—with unique needs—are able to avoid in-person instruction altogether, staff and faculty are wholly denied the opportunity to continue their work safely and effectively. Indeed, any student—regardless of health circumstances—can elect remote only instruction.

**FIRST CAUSE OF ACTION****(DECLARATION PURSANT TO ARTICLE 78 OF THE CIVIL PRACTICE LAW AND RULES)**

84. Petitioners repeat and reallege paragraphs 1 through 83 as if set forth herein.
85. CPLR § 7803 permits a Court to review and rescind a determination by a public body that is affected by an error of law, arbitrary and capricious and/or *ultra vires*.
86. The Respondents' action of denying all requests for telework accommodation is *ultra vires* arbitrary, capricious, irrational and contrary to law and public policy.
87. Under Executive Law Section 29-a of Article 2-B, the Governor of the State of New York has broad powers to issue executive orders during a declared State disaster emergency.
88. Executive Orders 202.45 and 202.60 have the force and effect of law.
89. Executive Order 202.45 mandates that “. . . entities [including Pre-K to Grade 12 Schools] must be operated in compliance with the guidance promulgated by the Department of Health.” *See* Ex. “H”.
90. To be sure, Governor Cuomo's more recent issuance of Executive Order 202.60 further clarified that schools may reopen subject to NYSDOH's guidance and directives. *See* Ex. “I”.
91. NYSDOH and NYSED issued mandatory guidance to aid in the development and implementation of school districts' reopening plans.
92. NYSDOH Guidance *mandates* that, during this state of emergency, districts establish accommodation policies for vulnerable populations which explicitly lists telework as a potential accommodation.
93. The purpose of NYSED Guidance is to “[w]ithout question . . . ensure the health and safety of everyone in our schools, children and adults alike.” *See* Ex. “K” a p. 5.

94. On or about July 31, 2020, Respondents adopted the District Reopening Plan, which is now in full force and effect.

95. The District Reopening Plan constitutes Respondents' rules and regulations that have the force and effect of law.

96. Respondents, in their District Reopening Plan, explicitly subscribed to and incorporated NYSDOH and NYSED guidance requiring it to develop a protocol dealing with requests for accommodation during the COVID-19 pandemic and state of emergency.

97. Respondents developed said protocol which includes telework as a potential accommodation for faculty and staff.

98. The District Reopening Plan acknowledged and assured Respondents' compliance with NYSDOH and NYSED guidance.

99. Nevertheless, Respondents' have implemented their District Reopening Plan in a way that blanketly denies telework as an accommodation—irrespective of the severity of an employee's underlying medical condition(s), and/or the current state of emergency.

100. Nothing in Executive Orders 202.45 and/or 202.60 authorized Respondents' treatment of employee request for telework accommodations.

101. Respondents' blanket denial of over 40 telework accommodation requests without consideration of the individual circumstances of their faculty and staff members unlawfully narrows NYSDOH Guidance which explicitly sets forth telework as an optional accommodation for YFT represented staff and faculty during the current state of emergency, and arbitrarily and capriciously places employees in the impossible position of choosing between life and livelihood.

102. Respondents' arbitrary exclusion of telework as an option for accommodation during this state of emergency forces staff and faculty to choose between life and livelihood and

undermines the public policy as prescribed by NYSDOH and CDC guidance to limit the very real risk of death and/or serious illness for those most vulnerable to COVID-19 infection.

103. Respondents also have no authority to implement rules, policies and/or procedures that conflict with their own policies and procedures as adopted via their reopening plan—the purported purpose of which is to protect the health, safety and welfare of students and employees.

104. Notably, this action does not seek to ask the Court to decide matters of individual accommodation requests under any federal or state discrimination law. While it is terribly unsound, from a health and safety standpoint, to refuse telework accommodations for those with multiple and severe underlying health conditions, the Petitioners do not ask this Court to grant individual accommodation requests.

105. Rather, Petitioners seek to ensure that Respondents follow the evaluation criteria for accommodating vulnerable populations in the context of reopening, as set out by NYSDOH, as adopted in the District Reopening Plan, and as required by law. See Ex. “K”, pp. 4-5.

106. The accommodation Policy being implemented by Respondents during this state of emergency is *ultra vires*, arbitrary, capricious, irrational, in bad faith, affected by error of law and otherwise in violation of law, in violation of lawful procedure, in excess of Respondents’ authority and/or jurisdiction, and/or contrary to strong public policy.

## SECOND CAUSE OF ACTION

### (MANDAMUS UNDER CPLR §§ 7801 AND 7803 TO COMPEL RESPONDENTS TO CONSIDER TELEWORK AS AN ACCOMMODATION)

107. Petitioners repeat and reallege paragraphs 1 through 106 as if set forth more fully herein.

108. Mandamus is available to enforce a clear legal right where a public official has failed to perform a duty enjoined by law.

109. Executive Orders 202.45 and 202.60 unambiguously require Respondents to adhere to the NYSDOH Guidance in order to provide in-person instruction. Further, the NYSDOH Guidance unquestionably required Respondents to have policies for vulnerable persons that included consideration of telework accommodation requests for vulnerable faculty and staff.

110. Mandamus is further available for compel agencies to follow their own rules and regulations.

111. Respondent Board adopted the District Reopening Plan as the procedures for reopening in-person instruction for the 2020-2021 school year.

112. The District Reopening Plan constitutes rules and regulations of the District that have the force and effect of law.

113. The District Reopening Plan explicitly adopted and incorporated the NYSDOH Guidance regarding vulnerable persons, which mandates policies to accommodate the specific circumstances for faculty and staff who are at increased risk for COVID-19 illness and individuals who may be uncomfortable returning to an in-person educational environment. Such accommodations include remote learning or telework.

114. By refusing to consider telework accommodations for Association faculty and staff, Respondents violated a duty enjoined upon them by law.

115. Petitioners have no other adequate remedy to at law to enforce compliance with the Executive Orders 202.45 and 202.60, NYSDOH Guidance, or the District Reopening Plan.

**WHEREFORE**, Petitioners respectfully demand an order and judgment as follows: (a) declaring Respondents' actions denying telework accommodations null and void, arbitrary, capricious, *ultra vires*, irrational, in violation of law, in violation of lawful procedure, and a failure to perform a duty enjoined upon Respondents by law; (b) permanently enjoining Respondents from further blanketly denying telework accommodation requests during the COVID-19 pandemic; (c)

vacating Respondents' decisions regarding telework accommodation requests; (d) making YFT members whole who were denied telework accommodation requests; (e) mandating that Respondents comply with Executive Orders 202.45 and 202.60 and Respondents' rules and regulations; (f) mandating that Respondents re-consider previously denied requests for telework accommodations by YFT represented faculty and staff; and (g) for such other and further relief deemed just and proper together with costs, attorneys' fees, and disbursements.

Dated: New York, New York  
September 15, 2020

ROBERT T. REILLY

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*Attorney for Petitioners*

VERIFICATION

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

**SAMANTHA ROSADO-CIRIELLO**, being duly sworn, deposes and says:

I am President of the Yonkers Federation of Teachers, Petitioner herein; I have read the foregoing verified petition; I know the contents thereof, and the same is true to my own knowledge, except as to those matters therein stated to be alleged upon information and belief, and that as to those allegations, I believe them to be true.

*Samantha Rosado Ciriello*  
SAMANTHA ROSADO-CIRIELLO

Sworn to before me  
this 15 day of September, 2020

  
\_\_\_\_\_  
Notary Public

PAUL W. MEYER, JR.  
NOTARY PUBLIC-STATE OF NEW YORK  
No. 02ME4781991  
Qualified in Westchester County  
My Commission Expires September 30, 2021