

STATE OF NEW YORK
COUNTY COURT COUNTY OF ALBANY

In the Matter of New York State Board of Regents; Betty A Rosa as Chancellor of the New York State Board of Regents; University of the State of New York; New York State Education Department; and MaryEllen Elia, as Commissioner of the New York State Education Department and President of the University of the State of New York,
Petitioners,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

DECISION AND ORDER
(Acting Justice Debra J. Young, Presiding)

-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 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; Bronx Charter School for Better Learning; and Success Academy Charter Schools – NYC,
Respondents.

(Supreme Court, Albany County, Special Term, June 4, 2018)
Index No. 957-18, RJI No. 01-18-ST9368)

STATE OF NEW YORK
COUNTY COURT COUNTY OF ALBANY

In the Matter of 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,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

-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.

(Supreme Court, Albany County, Special Term, June 4, 2018)
Index No. 3471-18, RJI No. 01-18-ST9608)

Appearances:

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Young, J.:

Petitioners commenced these combined Article 78 proceedings/ declaratory judgment actions seeking a declaration that the challenged regulations establishing an alternative teacher certification pathway to Charter schools are invalid, annulled, vacated and their use enjoined on the basis that they directly conflict with the Charter Schools Act and Universal Pre K law; the challenged regulations should be declared unlawful, annulled and vacated having been adopted without authority; the challenged regulations should be vacated and use enjoined because they were not promulgated in accordance with SAPA § 202(4-a); and a judgment declaring that the challenged regulations are invalid and unlawful and enjoining Bronx Charter School for Better Learning and Success Academy Charter School- NYC from implementing their “instructional programs” and further enjoining the Institute from approving other applications to provide instructional programs. Petitioners/Plaintiffs seek a preliminary injunction while the proceedings/actions are pending.

Respondents/Defendants cross-move to dismiss the proceedings and oppose the request for a preliminary injunction. Respondents/defendants assert that no preliminary injunction is necessary as no harm will result from the regulations remaining in place. Respondents/Defendants assert that petitioners/plaintiffs lack standing/capacity to bring this proceeding/action. Respondents/defendants argue that petitioners/plaintiffs are not within the zone of interests to be protected. Respondents/defendants argue that even if standing exists, petitioners/plaintiffs do not have a meritorious action. Finally, respondents/defendant argue that the regulations do not violate SAPA.

The parties appeared for oral argument on the record in addition to setting forth their arguments in writing. As to the issue of standing, this Court determines that the petitioners/plaintiffs New York State Education Department and Commissioner of the New Your State Education Department may commence this proceeding/action (see Education Law §§ 305, 308).

At issue is the meaning/interpretation of Education Law § 355 (2-a) which provides as follows: “Notwithstanding 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 operation of charter schools for which they are the charter entity pursuant to section twenty-eight hundred fifty-one of this chapter.” SUNY Charter Schools Committee, a sub-committee of the SUNY Board of Trustees (hereinafter the SUNY Subcommittee) adopted regulations which purported to establish an independent licensure process as a substitute for the teacher certification system as established by New York State Board of Regents and the State Education Department. Respondents/defendants argue that licensing of teachers falls under “governance, structure and operation of charter schools.”

“In determining whether an agency has usurped the authority of the legislative branch, relevant guidelines to be considered are whether (1) the agency did more than balance costs and benefits according to preexisting guidelines, but instead made value judgments entailing difficult and complex choices between broad policy goals to resolve social problems; (2) the agency merely filled in details of a broad policy or if it wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative

guidance; (3) the [L]egislature has unsuccessfully tried to reach agreement on the issue, which would indicate that the matter is a policy consideration for the elected body to resolve; and (4) the agency used special expertise or competence in the field to develop the challenged regulation’ (id. at 179-180 [internal quotation marks, citations and brackets omitted]; see Greater N.Y. Taxi Assn. v New York City Taxi & Limousine Commn., 25 NY3d 600, 610-612 [2015]).” (Matter of National Rest. Assn. v Commissioner of Labor, 141 AD3d 185, 191 [2016]; see Matter of NYC C.L.A.S.H., Inc. v New York State Off. of Parks, Recreation & Historic Preserv., 27 NY3d 174 [2016]; Boreali v Axelrod, 71 NY2d 1 [1987]); see generally Matter of Leadingage N. Y., Inc. v Shah, 153 AD3d 10 [2017]). The Court notes that the Boreali (71 NY2d 1 [1987]) factors are not to be applied rigidly, but rather are guidelines in determining whether an agency has exceeded the delegated authority given to it by the Legislature (see Matter of NYC C.L.A.S.H., Inc. v New York State Off. of Parks, Recreation & Historic Preserv., 27 NY3d at 180).

Education Law § 3004 provides petitioner/plaintiffs Commissioner Elia and the Board of Regents the exclusive authority regarding teacher certification. 8 NYCRR Part 80 sets forth the requirements for teachers’ certificates. This, combined with Education Law § 2854 (3) (a-1) which delineates the certification requirements of teachers in charter schools sets forth the certification requirements. Additionally, Education Law § 3602-ee sets forth the requirements for certification of Universal Pre-K teachers. Under Education Law § 355, contrary to respondents’/defendants’ contentions, licensure or certification of teachers does not constitute the “governance, structure and operations” of charter schools. Education Law § 355 (2-a) merely gives that SUNY subcommittee the power to regulate in limited areas. Notably, the Legislature sought to pass legislation with regard to certification of teachers in charter schools and the legislation failed to pass (see Senate Bill 6567 2017-2018). Moreover, the Speaker of the Assembly clarified the intent of the Legislature in a letter to the Governor dated August 15, 2016 indicating that the Legislature intended to give only limited authority to the SUNY trustees regarding Charter schools which did not extend to or include teacher certification. Thus, while regulations may be promulgated by the subcommittee with regard to teacher certification, those regulations must be at a minimum equivalent, with what petitioners/plaintiffs have already set as the certification requirements. In other words, respondents/defendants are free to require more of the teachers they hire but they must meet the minimum standards set, not less than those required by Elia and the Board of Regents. The minimum certification standards promulgated by Elia and the Board of Regents set the floor not the ceiling. Nothing in Education Law § 355(2-a) provides respondents/defendants with the authority to alter the minimum requirements. In addition, the operation of charter schools may well include the hiring of teachers as argued by respondents, but the hiring of teachers is not the equivalent of the teacher certification process.

Moreover, the regulations were not adopted in accordance with SAPA. The regulations were substantially revised without allowing for additional public comment as is required under SAPA. For example, the elimination of the requirement that a candidate hold a bachelor’s degree or higher and the reduction of field experience hours are substantial revisions as they are revisions which materially alter the purpose, meaning or effect of the regulation (see generally SAPA § 109). Contrary to respondents’/defendants’ contentions these changes were not logical outgrowths of the original proposals as they significantly alter the standards for teacher certification at

charter schools and the public should have had the opportunity to comment on the proposed changes. Thus, these regulations were not properly promulgated as respondents/defendants failed to comply with the provisions of SAPA and are void.

Based on the foregoing, the issue of the preliminary injunction need not be decided. To the extent that respondents'/defendants' remaining arguments have not been addressed specifically, they are found to be without merit.

It is hereby,

ORDERED, ADJUDGED and DECLARED that the petition is granted; and it is

ORDERED, ADJUDGED and DECLARED that the regulations are vacated, annulled and enjoined from use; and it is

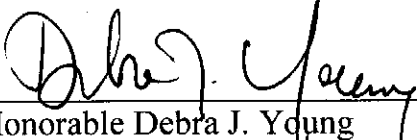
ORDERED, ADJUDGED and DECLARED that Bronx Charter School for Better Learning and Success Academy Charter School- NYC are enjoined from implementing their "instructional programs" as a substitute for the teacher certification system as established by New York State Board of Regents and the State Education Department; and it is

ORDERED, ADJUDGED and DECLARED that the Charter Schools Institute is enjoined from promulgating regulations which fail to meet the minimum standard of teacher certification as determined by the Commissioner of Education and the Board of Regents.

This constitutes the Decision and Order of the Court. No attorneys fees, costs or disbursements are awarded to any party. This Decision and Order is returned to Henry Greenberg, Esq., Counsel for New York State Board of Regents et al. All other papers are delivered to the Supreme Court Clerk for transmission to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

SO ORDERED.
ENTER.

Dated: Troy, New York
June 19, 2018


Honorable Debra J. Young
Acting Supreme Court Justice

Papers Considered:

- I. Order to Show Cause dated April 27, 2018;
- II. Affidavit of MaryEllen Elia sworn to April 26, 2018;
- III. Affidavit of Betty Rosa sworn to on April 26, 2018;
- IV. Affirmation of Shannon L. Tahoe, Esq., dated April 27, 2018, together with annexed exhibits;
- V. Amended Petition (00957/2018) dated April 27, 2018, together with annexed documents;
- VI. Verified Petition/Complaint (3471-18), dated October 12, 2017, together with annexed documents;
- VII. Cross Motion to Dismiss Petition dated May 10, 2018, together with annexed exhibits;
- VIII. Affirmation of Raphaella M. Poteau, Esq., dated May 11, 2018;
- IX. Affirmation in Opposition to Respondent's Motion to Dismiss;
- X. Reply Affidavit of MaryEllen Elia, sworn to May 23, 2018, together with annexed exhibit;
- XI. Reply Affidavit of David M. Frank, sworn to on May 23, 2018;
- XII. Reply Affidavit of Patricia Oleaga, sworn to on May 23, 2018;
- XIII. Opposition Affirmation of Robert T. Reilly, dated May 23, 2018, together with annexed exhibits;
- XIV. Affidavit of Michael Mulgrew, sworn to May 23, 2018;
- XV. Affidavit of Andrew Pallotta, sworn to May 22, 2018.