

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of
SHERRI G. LEDERMAN, Ed.D.

Petitioner,

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

Index No. 5443-14

Hon. Roger McDonough

-against-

August 12, 2015

JOHN B KING JR., Commissioner, New York State
Education Department, CANDACE H. SHYER,
Assistant Commissioner, Office of State Assessment of
the New York State Education Department,

Respondents.

**MEMORANDUM OF LAW IN OPPOSITION
TO PETITION**

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PRELIMINARY STATEMENT

Through this Article 78 proceeding, Petitioner Sherri G. Lederman, a fourth grade teacher in the Great Neck School District (who was rated “Effective” overall on her annual evaluation), seeks a declaration to nullify her rating of “Ineffective” (1 out of 20 points) on the student growth subcomponent of Petitioner’s 2013-2014 annual professional performance review (“APPR”) conducted pursuant to Education Law § 3012-c. Petitioner does not challenge her overall rating, only her subcomponent rating, claiming that such award was arbitrary and capricious, and an abuse of discretion. Petitioner also seeks a declaration that the use of student growth scores as implemented by the New York State Education Department (“SED”) in connection with annual teacher evaluations, is itself arbitrary and capricious, and an abuse of discretion.

Respondents, the Commissioner of Education and Assistant Commissioner¹, oppose the Petition on the grounds that the use of the growth model methodology as implemented by SED is rational and necessary to effectuate both federal and state law. Further, the specific State-provided growth score for Petitioner of one point out of 20 points (or ineffective) in one subcomponent of her overall APPR score for the 2013-14 school year is rational and was properly calculated pursuant to Education Law § 3012-c and Subpart 30-2 the Rules of the Board of Regents (8 NYCRR 30-2). The facts establish that Petitioner’s students did not grow or improve during the year they spent in petitioner’s classroom as much as comparable students in other teachers’ classrooms.²

¹ Former New York State Education Department Commissioner John B. King, Jr. resigned on January 2, 2015; the Commissioner, as of July 6, 2015 is MaryEllen Elia. The named-respondent Assistant Commissioner has also departed SED service, but need not be substituted since the Commissioner is the only proper and necessary “body or officer” that need be named as a respondent.

² Respondents moved to dismiss this action pursuant to CPLR 3211 on the grounds that the claims were unripe and that Petitioner lacks standing to challenge the matters she is attempting to challenge. The Court denied

STATEMENT OF FACTS

The facts relevant to this matter are more fully contained in the affidavits of Ira Schwartz and Daniel Sherman and their exhibits submitted herewith, which constitute the return of the Respondents, and in the interest of economy are adopted and incorporated herein by reference.

BACKGROUND

The Statute

In 2010, the Legislature passed, and the Governor signed, legislation establishing a new evaluation system for teachers and principals in New York State (*see* Chapter 103 of the Laws of 2010).³ Education Law § 3012-c(2)(a) requires that evaluations, referred to as annual professional performance reviews (APPRs), be conducted annually and that they differentiate teacher and principal effectiveness using four rating categories: highly effective, effective, developing and ineffective. The statute further requires that a single composite teacher or principal effectiveness score be calculated based on a teacher's or principal's scores in three subcomponents, resulting in a final rating. (*See* Education Law § 3012-c(2)(a).) The three subcomponents, and their corresponding weights in the overall score are as follows:

- 1) the State assessment and other comparable measures subcomponent (20%)- *Petitioner's score in this subcomponent is at issue in this proceeding*;
- 2) the locally selected measures of student achievement subcomponent (20%); and
- 3) other measures of teacher effectiveness subcomponent (60%).

Respondents' motion by Decision and Order dated May 28, 2015. This objection has therefore been preserved for appeal.

³ Education Law § 3012-c has been amended several times, however, the amendments have no effect on this litigation.

§3012-c(2)(f)(1) and (h).

Petitioner's score on the first subcomponent—the State growth or other comparable measures subcomponent-- is what is at issue in this litigation. (See Petition generally.) The statute requires that the first subcomponent (20%) of a teacher's overall composite score be based upon his or her students' *growth* on State assessments, where such state assessment data are available. (See §3012-c(2)(f)(1).) For grade 4 teachers such as Petitioner, State assessments are available. Therefore, a grade 4 teacher's score in this subcomponent is based on his/her students' growth on the grade 4 English language arts (ELA) and mathematics State assessments. (Schwartz Aff. ¶ 18.)

The statute defines "student growth" as the change in student achievement for an individual student between two or more points in time and authorizes the Commissioner of Education to prescribe how growth is calculated in regulations, after consultation with an advisory committee consisting of representatives of teachers, principals, superintendents of schools, school boards, school districts and boards of cooperative educational services officials and other interested parties. See §§3012-c(2)(f)(1), (i) and (7).

Stakeholder Involvement in Development of Growth Model

As required by Education Law §3012-c(7), the Board of Regents formed an advisory group in September 2010 to consult with NYSED and the Board of Regents on implementing the regulations and other steps to implement the new teacher and principal evaluation system, including development of the student growth subcomponent. (Schwartz Aff. ¶¶ 12-15.) This advisory group, known as the Regents Task Force on Teacher and Principal Effectiveness ("Task Force"), included a broad range of representatives of teachers, principals, superintendents of schools, boards of education, school district and BOCES officials, and other interested parties. It

also included representatives of the New York State United Teachers (“NYSUT”) and the United Federation of Teachers (“UFT”) on behalf of teachers.

The Task Force began meeting in September 2010. After months of meetings, discussion and deliberation, the Task Force issued its written report and presented it to the Board of Regents at their meeting on April 4, 2011, with recommendations on many aspects of the evaluation system, including the student growth subcomponent.⁴ (Schwartz Aff. Exhibit ¶¶13-15.)

The following guiding principles set forth on pages 71 and 72 of the Task Force report helped inform the development of the growth model:

- It measures student growth on the grade 4-8 ELA and math assessments.
- A student growth score will only be computed for students who have a minimum of two consecutive years of assessment results in a tested subject.
- The methodology for establishing student growth scores uses as much of the student’s prior state academic results as NYSED determines is necessary to establish the growth score.
- The methodology adjusts the student growth score before assigning teacher and principal rating points so that a teacher or principal’s student growth result takes into account student poverty and special needs status (Students With Disabilities (SWDs), English Language Learners (ELLs)).
- The teacher student growth scores are calculated as means and standard deviations.
- A minimum N size has been established, below which a teacher will not receive a growth score.
- The mean student growth score is converted into a teacher or principal effectiveness score of 0 to 20.
- Teachers must verify their student rosters.
- Each teacher receives a detailed report about his or her growth score in a format designed to be easy to understand and to provide information for developmental planning for each educator.

(See Schwartz Aff. ¶¶13-14 and Exhibit A).

⁴ On May 16, 2011, the Board of Regents adopted emergency regulations relating to APPRs of classroom teachers and building principals, including the student growth model. (Schwartz Aff. FN 5)

After the Task Force made its initial report and recommendations to the Board of Regents, NYSED continued to consult with the Metrics Workgroup, a Subcommittee of the Task Force, during the development of the growth model (Schwartz ¶15).

NYSED also convened a Technical Advisory Committee, which was comprised of national experts in growth and value-added modeling, to advise on the technical aspects of the development of the growth model (Schwartz ¶16). There were three main principles that guided the development of the growth model: (1) the model needed to be able to allow NYSED to transition to more rigorous standards, new assessments and assessments that have different scale scores across grade levels; (2) the model needed to allow teachers to demonstrate effectiveness regardless of the makeup of their classrooms; and (3) the model needed to define effectiveness as the degree to which a teacher's students met the State average for growth compared to similar students, which in turn, means every year a significant number of teachers would receive an "Effective" rating for the State-provided growth subcomponent if they met the State average (Schwartz ¶16). The current growth model addresses all three (Schwartz ¶16). Therefore, contrary to Petitioner's assertions, the foundation for the State-provided growth model is rational and was developed in accordance with federal and State law and with significant input from experts in the field, teachers, principals and other key stakeholders (Schwartz ¶17).

The Regulations

The State growth model is codified in the Rules of the Board of Regents (8 NYCRR 30-2.2(p) and (r)), which were adopted by the Board of Regents in May 2011 and amended in June 2013 to provide as follows:

- (p) Student growth percentile score shall mean the result of a statistical model that calculates each student's change in achievement between two or more points in time on a State assessment or other comparable measure

and compares each student's performance to that of similarly achieving students.

...

(r) Teacher or principal student growth percentile score shall mean a measure of central tendency of the student growth percentile scores for a teacher's or principal's students after one or more of the following student characteristics are taken into consideration: **poverty, students with disabilities and English language learners**. Additional factors related to poverty, students with disabilities and English language learners may be added by the commissioner, subject to approval by the Board of Regents (emphasis added).

The regulations also specify the scoring ranges needed for a teacher to receive a rating in the State assessment or other comparable measures subcomponent, which provides as follows:

(1) A classroom teacher or building principal shall receive:

- (i) a Highly Effective rating in this subcomponent if the teacher's or principal's results are well-above the State average for similar students and they achieve a subcomponent score of:
 - (a) 18-20 . . . for the 2012-2013 school year and thereafter . . .
- (ii) and Effective rating in this subcomponent if the teacher's or principal's results meet the State average for similar students and they achieve a subcomponent score of:
 - (a) 9-17 . . . for the 2012-2013 school year and thereafter . . .
- (iii) a Developing rating in this subcomponent if the teacher's or principal's results are below the State average for similar students and they achieve a subcomponent score of:
 - (a) 3-8 . . . for the 2012-2013 school year and thereafter . . .
- (iv) an Ineffective rating in this subcomponent if the teacher's or principal's results are well-below the

State average for similar students and they achieve a subcomponent score of 0-2.

8 NYCRR § 30-2.6(b).

Calculation of a Teacher's State-Provided Growth Score and Resulting HEDI Rating in the First Subcomponent

The computation of a teacher's State-provided student growth score and HEDI (Highly Effective, Effective, Developing, Ineffective) effectiveness rating, involves a four step process: (1) calculation of each student's Student Growth Percentile (SGP); (2) calculation of the teacher's Mean Growth Percentile (MGP); (3) Calculation of MGP cut points and corresponding HEDI ratings; and (4) Calculation of a Student Growth Score for the individual teacher. (Sherman Aff ¶ 1-20.) These calculations are made on behalf of SED by its contractor American Institutes for Research (AIR) pursuant to contract. (Schwartz Aff. ¶1.)

Step 1: Each student's SGP is calculated by comparing that student's performance on a state examination with the average score of similar students on the same examination or assessment. (Sherman Aff. ¶ 4-12.) Similar students are those that had the same score as the student the previous year, along with other characteristics such as English language learner status, economic disadvantage, or disability. (Sherman Aff ¶5.) The student's actual score is then compared to an expected score that is calculated for each student in the State based on the student's prior test scores and other student characteristics. (Sherman Aff ¶9.)

Step 2. Once SGPs have been calculated, each teacher's Mean Growth Percentile ("MGP") is calculated by determining the mean (a measure of central tendency) of the SGPs associated with that teacher. (Sherman Aff ¶13.) Each student's SGP is weighted in the teacher's MGP based on the amount of time that the student was enrolled and attended the course, based on teacher-student data linkage ("TSDL") data reported by the districts, after

teacher verification. (Sherman Aff ¶13.) The ELA& Math SGPs are then averaged to create an overall MGP. (Sherman Aff ¶ 13.)

Step 3. Once MGPs for all teachers in the state have been calculated, specific MGP cutpoints associated within each HEDI rating category are calculated (Sherman Aff ¶ 5-17). These rules are based on the definitions for each rating category established by New York State law (*See* Education Law §3012-c[2][a][3]).

Step 4. A Student Growth Score and corresponding HEDI rating for the student growth subcomponent is then assigned to each teacher based upon how different her MGP is from the State average. (Sherman Aff ¶ 19.)

Calculation of Petitioner's State-Provided Growth Score

Using the 4 step process described above, and as more fully described in the Affidavit of Daniel Sherman (¶¶4-23), Petitioner's score of 1 out of 20 points for the 2013-2014 school year (and corresponding rating of ineffective for the State growth subcomponent) was calculated as follows:

Petitioner's Teacher-Student Data Linkage [TSDL] information was provided to SED by Great Neck School District. (Sherman Aff. ¶13.) Because of the complexity and importance of TSDL information, section 30-2.3 of the Rules of the Board of Regents requires that teachers and principals be involved in data verification efforts (*See* 8 NYCRR §30-2.3).⁵ AIR, as SED's contractor responsible for generating the State-provided student growth scores on SED's behalf, used Petitioner's certified TSDL to calculate Petitioner's score. (Sherman Aff. ¶13 ; Exhibit H).

As explained more fully in the Affidavit of Daniel Sherman, after determining the SGPs for each of Petitioner's students, and using Petitioner's TSDL to weight the actual time each

⁵ Petitioner also has access to this information through SED's ENGAGENY website, which provides teachers with a secure portal in which to view their associated data and assessments.

student spent in Petitioner's class, Petitioner's MGP was calculated to be 32. (Sherman Aff ¶ 13.) Petitioner's MGP of 32 was then compared to the State average for fourth grade teachers (51.0907) and found to be significantly below the average for other teachers. (Sherman Aff ¶ 32, 13, 17.) As a result, petitioner's MGP translated to a score of 1 and a HEDI rating of Ineffective on the State-provided student growth subcomponent of the APPR. (Sherman Aff ¶ 20.)

A comparison of the actual and expected scores of Ms. Lederman's students reveals that across Math and ELA, six students performed as well or better than their expected scores (Sherman Aff. ¶12; Tables 1a and 1b). The remaining 26 actual student scores, however, were below expected scores and these students therefore received SGPs of less than 50. That is, Tables 1a and 1b in Daniel Sherman's Affidavit demonstrates that most of Ms. Lederman's students performed less well than other similar students in the State.

(Sherman Aff ¶12; Tables 1a and 1b).

It should be noted that even un-modeled data of test results (an analysis of test results that does not use a statistical model) for Ms. Lederman's students mirrors the results of, and therefore evidences the validity of, the growth model. First, the percentile ranks of Ms. Lederman's students on Math and ELA state assessments compared with the rest of the state for the most part declined after a year in Ms. Lederman's class. (Schwartz Aff ¶¶30-33; SED Figures 1-2.) In addition, when looking at student proficiency across ELA and Mathematics, in 9 of 32 cases (28 percent), Petitioner's students declined a proficiency level between 2013 and 2014. In only 3 cases, Petitioner's students increased one proficiency level, and in the remainder, her students remained at the same level. (Schwartz Aff ¶33.) The growth model results generally mirror these patterns.

Moreover, as explained more fully in the Affidavit of Ira Schwartz, while Ms. Lederman received 1 point and a rating of Ineffective on the State growth subcomponent, other teachers with similar students received higher ratings and points on this subcomponent because their students showed more academic growth on State assessments than Ms. Lederman's students. (Sherman Aff ¶ 21.) An analysis conducted by AIR of 100 teachers in the state with similar students to Ms. Lederman's in terms of prior scores in Mathematics and ELA, reveals that 5% percent of those teachers were rated Highly Effective, 80% were rated Effective, 12% were rated Developing and 3% were rated Ineffective. (Sherman Aff ¶21 and Table 6.) These ranges are consistent with the overall ratings for the state. (Sherman Aff ¶22.)

ARGUMENT

POINT I

RESPONDENTS' USE OF STUDENT GROWTH SCORES IS RATIONAL AND REQUIRED BY LAW

An administrative regulation will be upheld where it is rational basis, and not arbitrary or capricious.” *New York State Association of Counties v. Axelrod*, 78 NY2d 158, 166 (1991); *see also Koppersmith v. Dowling*, 93 NY2d 93, 96 (1999). “[T]he challenger must establish that a regulation is ‘so lacking in reason for its promulgation that it is essentially arbitrary.’” *New York State Association of Counties*, 78 NY2d at 166 (quoting *Matter of Marburg v. Cole*, 286 NY 202, 212 (1941)). Courts may overturn an agency rule or regulation when that action is taken without a sound basis in reason or without regard to the facts. *Surfside Nursing Home, LLC v. Daines*, 103 AD3d 637, 639 (2d Dept). Upon review of an administrative determination under Article 78, the proper standard is whether there is a rational basis for the administrative decision. *Pell v. Board of Education*, 34 N.Y.2d 222, 231 (1974). The court should not substitute its judgment for that of the agency. *Id.* It is well settled that judicial review of the Commissioner of

Education's determination, or that of his designee, is limited to review of whether the determination was arbitrary or capricious, without rational basis or affected by an error of law. *Board. of Educ. of Monticello Cent. School Dist. v. Commr. of Educ.*, 91 NY2d 133, 139 (1997); *O'Connor v. Sobol*, 173 AD2d at 77. Thus, unless the determination is "patently violative of statutory or constitutional mandates" it should not be overturned. *O'Connor*, 173 AD2d at 79 (quoting *Board of Educ. v Ambach*, 90 AD2d at 231).

"An administrative agency's 'ruling, interpretations and opinions' of the statute it is charged with enforcing or implementing are entitled to great weight, to the extent that the interpretation relies on the special competence which the agency is presumed to have developed in its statutory administration." *Jennings v. Commissioner, New York State Department of Social Services*, 71 AD3d 98, 109 (2d Dept 2010) (quoting *Skidmore v. Swift & Co.*, 323 US 134, 140 (1944)). Unless the Commissioner's determination is "patently violative of statutory or constitutional mandates" it should not be overturned. *Matter of O'Connor v. Sobol*, 173 AD2d 74, 79 (3d Dept 1991), *app dismissed* 80 NY2d 897 (1992) (quoting *Matter of Board of Educ. v. Ambach*, 90 AD2d 227, 231 (3d Dept 1982), *aff'd* 60 NY2d 758 (1983), *cert. denied* 465 US 1101 (1984)). In assessing the rationality of the Commissioner's position, the Court may not substitute its own judgment regarding the better of two reasonable options. See *Mtr of Catlin v Sobol*, 77 NY2d 552, 561 (1991); *Mtr of Gundrum v Ambach*, 55 NY2d 872, 873 (1982).

These precepts are even more important when undertaking judicial review of a commissioner's regulations and the methodology derived from those regulations in the area of his or her technical expertise. See *e.g.*, *NYS Conference of Blue Cross & Blue Shield Plans v. Muhl*, 253 AD2d 158 (3d Dept 1999). The "great deference" to be provided to the respondents on these technical and methodology issues should not be disturbed unless petitioner satisfies her

“heavy burden” of demonstrating that the determination was wholly irrational. *Id.* Indeed, such deference is warranted even if a “fairer” methodology” might exist. *Unimax Corp. v Tax Appeals Trib. of State of NY*, 79 N.Y.2d 139 (1992) (“the choice of the allowable method of calculation is reposed in the Department...[and the Legislature] explicitly granted the Department the authority to determine the method of calculation... Deference is warranted even if a ‘fairer’ methodology could have been adopted.”). Under these standards, “it is not the role of the court to weigh the desirability of the proposed action, choose among alternatives, resolve disagreements among experts, or substitute its judgment for that of the agency.” *Roosevelt Islanders for Responsible Southtown Dev. v Roosevelt Is. Operating Corp.*, 291 AD2d 40 (1st Dept 2001).

Petitioner has not met her heavy burden in this instance. Here, Respondents’ use of their student growth model in APPR, both generally, and as applied to calculate Ms. Lederman’s State growth subcomponent score is rational and required by federal law and Education Law § 3012-c.

In 2009, the Federal government announced its Race to the Top (“RTTT”) initiative, which included a specific requirement that applicants implement reforms that required the State to design and implement rigorous, transparent and fair teacher and principal evaluation systems that differentiate effectiveness using **multiple rating categories** that **take into account data on student growth.** (Schwartz Aff.¶ ¶5, 6.) In 2010, in response to the RTTT initiative, the Legislature passed, and the Governor signed, Education Law §3012-c to implement a State-wide annual evaluation system for classroom teachers and building principals. *See* Ch. 103 of the Laws of 2010. Education Law § 3012-c(2)(f)(1) provides that “twenty percent of the evaluation shall be based upon student growth data on state assessments as prescribed by the commissioner or a comparable measure of student growth if such growth data is not available.” In an effort to

implement Education Law § 3012-c, the Rules of the Board of Regents likewise require that student growth be used as part of the assessment of a teacher's overall effectiveness. 8 NYCRR 30-2.2(f)(1); 30-2.5(b)(ii).

As more fully set forth in Point II, the specific State-provided growth score for Petitioner of one out of 20 points (or ineffective) in one subcomponent of her overall APPR score for the 2013-14 school year is rational and is supported by the simple fact that Petitioner's students did not improve their test scores during the year they spent in petitioner's classroom as much as similarly situated students in other teachers' classrooms, and her score was properly calculated pursuant to Education Law § 3012-c and Subpart 30-2 the Rules of the Board of Regents (8 NYCRR 30-2; Sherman Aff. ¶20.)

The inclusion of student growth as part of the evaluation of teacher effectiveness is also rational in that it provides an objective outcome-based component to what might otherwise be a subjective evaluation. By comparing a particular student's performance with the performance of students who have performed similarly to the subject student in the past, one can see if the subject student progressed as much during the year as other similar students. This relative growth is expressed as the SGP. (Sherman Aff. ¶10.) The SGPs for all students of a particular teacher are then combined to create a Mean Growth Percentile ("MGP") for a particular teacher. (Sherman Aff. ¶13.) By comparing the MGP for a particular teacher with MGPs for all teachers in the state for the same grade and subject one can get a picture of how much the subject teacher's students progressed relative to similar students throughout the state. (Sherman Aff. ¶¶14-16.)

Petitioner's criticism of the student growth model used here is based upon a misunderstanding of the model itself. (Schwartz Aff. ¶¶ 23-27.) The petition alleges that

“Growth Measures implicitly assume, without justification, that students who begin at different achievement levels should be expected to gain at the same rate. . .” (Petition ¶ 43.) The New York model, however, does not compare an individual student’s rate of growth to that of all students. Instead, a student’s results are compared with those of other similar students (i.e., a statistical projection of how well students with similar academic histories and a variety of student characteristics would perform). In fact, the very research relied upon by Petitioner confirms that this is a better approach than status test-score comparisons (that simply compare the average student scores of one teacher to the average student scores of another); over change measures (that simply compare the average student scores of a teacher in one year to her average student scores in the previous year); and over growth measures (that simply compare the average student scores of a teacher in one year to the same student’s scores when they were in an earlier grade the previous year). (See Petition Exhibit G; Schwartz Aff. ¶47.) As explained more fully in the Schwartz Affidavit, significant research supports the use of a model such as the one at issue here. (Schwartz Aff. ¶¶ 43-58.)⁶

The calculation of teacher student growth scores is also not performed in a “black box” as alleged by Petitioner, but pursuant to a procedure clearly articulated in the statute, regulations, and multiple documents issued by SED. The Education Law states specifically that: “twenty percent of the evaluation shall be based upon student growth data on state assessments . . .” (§ 3012-c[2][a][1]) and that student growth is the change in achievement over two points in time

⁶ Any customary and expected difference in scholarly opinions, however, is not dispositive because, again, the Court may not substitute its own judgment regarding the better of two reasonable options. See, *NYS Conference of Blue Cross & Blue Shield Plans v. Muhl*, 253 AD2d 158 (3d Dept 1999) (difference in expert opinions does not necessarily establish that the superintendent’s outcome was arbitrary). Further, for example, in considering challenges to other state’s value-added student growth assessments for teachers, the federal courts have found a rational basis for the assessments, even in the face of scholarly criticism. (*c.f. Wagner v. Haslam*, 2015 U.S. Dist. LEXIS 76443 *47 (June 12, 2015 M.D. Tenn.) (“a rational basis review . . . is limited to determining only whether there is conceivable rational relationship between the policy and a legitimate government objective.”); *Cook v. Stewart*, 28 F. Supp 3d 1207 (NDFL) *aff’d* 2015 U.S. App LEXIS 11671 (11th Cir. July 7, 2015).

(See § 3012-c(2)(j)). The Rules of the Board of Regents further explain that “[t]he student growth percentile score shall mean the result of a statistical model that calculates each student’s change in achievement between two or more points in time on state assessment . . . and compares each student’s performance to that of similar achieving students . . .” (8 NYCRR §30-2.2(p)), and that a teacher’s student growth percentile shall mean a measure of the “central tendency” of the teacher’s students’ growth percentile scores. (8 NYCRR §30-2.2(r).) Therefore, the model used by SED, through its contractor, to calculate teacher’s student growth subcomponent scores is well within the scope of the model described by the statute and regulations.

Additionally, the State has developed and publicly shared numerous resources that explain how State-provided growth scores are calculated with varying degrees of technical specificity. For individuals who seek a higher level explanation of how student growth is measured, aggregated into educator-level results, and assigned an effectiveness rating and score, NYSED has developed a set of brochures that walk teachers through how their growth score is calculated, including, but not limited to, the role of growth scores in APPR, why growth is a component of APPR, how student growth is measured, how student growth is used for teacher evaluation and samples of the reports and types of information teachers receive related to their growth scores. (See Schwartz Aff. 35-42; Exhibits B, F, G and I.) NYSED also has a set of training materials that go into similar information in more detail, including a training script and recorded webinar. Details about the specific MGPs required to receive particular growth ratings and scores each year are also released. These materials are meant to give all educators a solid foundation for understanding how their growth scores were calculated and why they received the rating and score that they did. For individuals who want to fully understand the technical model used to calculate growth scores, NYSED also published a technical report that includes the

details of the statistical calculation. See Exhibit G. This report provides all of the information needed to understand how growth scores are calculated.

While it is true that no individual educator can replicate the calculations used in determining his or her growth score, which would entail the processing of multiple data files containing multiple-millions of records, and personally identifiable data that cannot be released under federal law, NYSED does provide detailed data files to districts and directly to educators that provide the information needed to understand how an individual educator's MGP, growth rating, and growth score was calculated. (*See for example*, information provided by State to Ms. Lederman for 2012-2013 and 2013-2014, at Exhibits A and B to the Petition.) The Education Department provides more than sufficient resources to teachers, principals, districts and BOCES so they understand how growth scores are derived and NYSED, through its vendor, calculate growth scores.

Therefore, Respondents' use and calculation of growth scores is both rational and consistent with applicable laws and regulations. It is also rational as applied to Ms. Lederman, as explained in the next section.

POINT II

THE ADMINISTRATIVE DETERMINATION TO AWARD PETITIONER ONE POINT ON THE STATE-PROVIDED STUDENT GROWTH SCORE SUBCOMPONENT OF HER 2013-14 APPR WAS NOT ARBITRARY, CAPRICIOUS OR AN ABUSE OF DISCRETION

Here, Petitioner challenges her State-provided score of 1 out of 20 points and corresponding Ineffective rating on the student growth subcomponent (20%) of her overall composite score of 81, and rating of Effective on her APPR for the 2013-2014 school year. The

award of only one point was rational under the narrow standards of judicial review set forth above since it was based upon verified facts, and properly calculated pursuant to Education Law 3012-c, the Rules of the Board of Regents and the resources provided to the field explaining how growth scores are calculated. It is also supported by un-modeled data, thereby confirming that it is neither arbitrary or capricious.

Petitioner argues that the decision to award her only one point for student growth was arbitrary and capricious and beyond the discretion of Respondents, because her students have always been high achievers. A review of the data for Ms. Lederman's students, however, reveals that Petitioner's students for the 2013 -2014 school year significantly underperformed when compared to similar students throughout the state. (Sherman Aff ¶12; Table 1a and 1b.) This simple fact is the primary basis for respondents' determination to award petitioner 1 point and assign her a rating of "ineffective" on the student growth subcomponent.

Here, the data provided for Petitioner's students, which Petitioner has the opportunity to review and certify, reveals that Petitioner's students underperformed students who had test scores similar to Petitioner's students on state assessments the year before. For example, Tables 1a and 1b of Daniel Sherman's Affidavit demonstrate that across Math and ELA, six students performed as well or better than their expected scores. The remaining 26 actual student scores, however, were below expected scores. That is, Tables 1a and 1b show that most of Ms. Lederman's students performed less well than other similar students in the State. (Sherman Aff. ¶13.) While Petitioner's students' achievements may have been above the State average, they were far below what they should have been based upon these students' prior performances. (Sherman Aff. ¶13.) Similarly, of the 32 SGPs used to calculate Petitioner's MGP, only 6 were above 50, 2 were close to 50, and 24 were significantly below 50 (7 of which were below 10).

(Sherman Aff. ¶ 13.) This resulted in a MGP for Petitioner of 32, and a score of 1 and a corresponding rating of Ineffective on the State subcomponent. (Sherman Aff. ¶13.). The reasonableness of this score can be demonstrated by the fact that 98% of teachers with students similar to Petitioner's on the basis of their prior academic performance saw more growth in their students between the 2013 and 2014 state assessments. (Sherman Aff. Tables 6 and 7.) Indeed, as explained above, multiple aspects of un-modeled data (changes in percentile rank and changes in proficiency, for example) mirror the results of the growth model and therefore support the same result. (See Schwartz Aff ¶30-33.)

While petitioner's students did perform better than the state average in state assessments in 2013-2014, the student growth subcomponent required under State law assessed growth of students between two points in time--as compared to similar students, rather than student achievement at one particular point in time. The goal of the State is to provide all students with an educational opportunity to maximize their potential. While the teacher of historically low-achieving students should not be penalized because her students come to her with deficiencies, nor should the teacher of historically high-achieving students be rewarded because her students come to her already above average. In both situations, the expectation is that student knowledge and proficiency will advance during the school year, and the purpose of the evaluation system is to measure the performance of each teacher during that year.

Petitioner's own statements in the Petition demonstrate her lack of understanding of the growth model, and her repeated confusion of student growth and student achievement. The proficiency rates of Petitioner's students (i.e., the percentage of students meeting and exceeding the state average on state assessments) and the comparison of their proficiency rates to the statewide proficiency rate, are not directly relevant to Petitioner's State-provided growth score

and/or rating. The purpose of assessing student growth (as opposed to student achievement) is to ensure that the model measures a student's growth compared to other similar students, so that all teachers have the opportunity to demonstrate effectiveness regardless of the makeup of their classroom. Otherwise, teachers of low performing students would be prejudiced and teachers of high performing students would effectively be given a pass.

If this subcomponent of the evaluation system were based only on measures of achievement, such as the percentage of students meeting and exceeding standards on state assessments as discussed in Petition, it could create incentives for teachers to seek to avoid teaching low performing students or those students who enter their classrooms at the beginning of the year far behind grade level, for fear they would be penalized if these students did not reach full proficiency by the end of the year. It could also create reverse incentives for teachers to only want to teach high performing students and there would be little incentive for teachers to ensure that these students grow (teachers could just show up and receive an Effective or Highly Effective rating). The State expects that teachers will ensure that all students grow; not just low performing students.

What Petitioner continuously fails to recognize in the Petition and throughout this proceeding is that her students have not grown as much as predicted when compared to other similar students across the state. When compared with students who have similar achievement in the prior year and have similar student characteristics (students with disabilities, poverty and English language learner status), Petitioner's students did less well a year later.

Based on the foregoing, Petitioner's score of 1 and rating of Ineffective on the State-provided student growth subcomponent of her 2013-2014 APPR is rational and based upon facts. Petitioner's score was accurately calculated pursuant to the model required by Education Law §

3012-c and the Rules of the Board of Regents, and the numerous documents explaining the model. It is also consistent with the State's intent in measuring student growth, as opposed to student achievement, which is to ensure that all students improve and/or grow while in a teacher's classroom and that student performance is a significant factor in teacher evaluations. Respondents' determination should therefore not be disturbed.

POINT III

PETITIONER IS NOT ENTITLED TO DISCOVERY

Petitioner commenced this action by Order to Show Cause. In the Order to Show Cause, Petitioner sought pre-answer discovery including "all raw data, formulas, or other information (statistical or otherwise) used in establishing Petitioner's Growth Score of 1 out of 20 points, and a statement of what was required for Petitioner to obtain all 20 point and a rating of "highly effective" pursuant to CPLR § 409. (Order to Show Cause at 3.) Petitioner also sought leave to conduct depositions of Respondents, NYSED Commissioner John B. King, Jr. and Executive Deputy Commissioner Candace H. Shyer, in order that they "answer questions, under oath, as to whether, based upon the record of this case, they agree that petitioner is an ineffective educator and why she was rated as an ineffective educator under the Growth Score and Rating System as implemented by the respondent under Section 3012-c of the Education Law as well as what would be required for Petitioner to obtain a highly effective rating on the Growth Score Rating System . . ." pursuant to CPLR § 408 (Order to Show Cause at 3.) Judge Platkin, struck out these portions of the Order to Show Cause before it was signed on October 27, 2014.

On or about March 3, 2015, Petitioner filed a cross-motion renewing her request for pre-answer discovery. By Decision and Order dated May 28, 2015, This Court reserved decision on Petitioner's cross-motion for summary judgment stating:

The Court will reserve on the issue of discovery until after respondents have submitted their answer and administrative record. The Court has not been persuaded, at this stage of the proceeding, that any need for discovery exists in this Article 78 matter (*see generally, Matter of Cohn Chemung Properties, Inc. v. Town of Southport*, 108 AD3d 928, 930 [3rd Dept. 2013]).

“The Court Notes that petitioner has already, without the benefit of the record procured four expert affidavits wherein the authors conclude that respondents have acted irrationally herein as to the ratings, processes at calculating the rating, etc.” Decision and Order, May 28, 2015, at 4 fn. 2.

Respondents have produced detailed affidavits and a complete administrative record and return through their exhibits with their instant answer. Petitioner’s pending cross-motion for discovery should be denied. Parties may not engage in discovery in special proceedings without leave of court. CPLR § 408. “[P]retrial disclosure is available in summary proceedings only by leave of court (see CPLR 408), and leave is granted only where there is a demonstrated need.” *Matter of Lally v Johnson City Cent. Sch. Dist.*, 105 AD3d 1129, 1132 (3d Dep’t 2013) (citing *Matter of Town of Pleasant Val. v New York State Bd. of Real Prop. Servs.*, 253 AD2d 8, 15 (1999)). As the Court of Appeals has observed, “Article 78 proceedings are [] designed for the prompt resolution of largely legal issues, rather than for discovery, trials and ‘credibility judgments’ . . .” *Matter of Council of City of N.Y. v. Bloomberg*, 6 NY3d 380, 389 (2006). In response to a special proceeding pursuant to Article 78, respondent must provide a copy of the record which forms the basis for the administrative determination at issue. CPLR §7804(e).

Here, Respondents have provided all data, records, and information relied upon in calculating Petitioner’s Student Growth Score. Petitioner cannot establish need for the additional discovery sought as it is not relevant to the questions before the Court. Plaintiff is not entitled to “a statement of what was required for Petitioner to obtain all 20 point and a rating of ‘highly

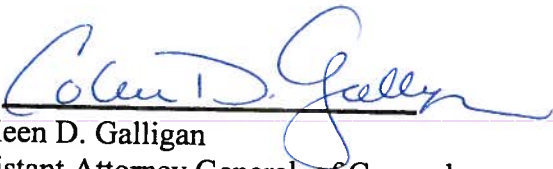
effective.” Nevertheless, respondents have provided a thorough explanation of the 4 step process used to arrive at each of the HEDI ratings and point scores for the growth subcomponent in the Affidavit of Daniel Sherman. Depositions of Respondents, as to whether they “agree that Petitioner is an ineffective educator,” are not necessary. Petitioner has not been labelled an “ineffective educator” overall. Respondents have adequately set forth the information that resulted in their determination on the student growth subcomponent (first 20%). The other 80% is locally determined and, therefore, outside respondent’s personal knowledge. Moreover, the question before the Court is simply whether Respondents’ determination of Petitioner’s Student Growth Score was rational and based upon facts, which has been amply demonstrated through Respondents’ submissions in this proceeding. Petitioner should be denied any additional discovery.

CONCLUSION

For the reasons explained herein and in the accompanying affidavits and exhibits, Respondents respectfully request that the Verified Petition be denied in its entirety.

Dated: Albany, New York
July 17, 2015

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