SUPREME COURT
STATE OF NEW YORK

FILE

GLEN T. BRUENING
ACTING JUSTICE

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October 5, 2015

Matthew E. Bergeron, Esq.
Richard E. Casagrande, Esq.
800 Troy-Schenectady Road,
Latham, New York 12207

Re: Matter of Ahern v King
Index Number 2081-14

Dear Counsel:

Enclosed for filing and service is the original executed Decision and Order with regard to the above-referenced matter. A copy of the Decision and Order has been sent to the County Clerk for placement in the file. The Court has retained the papers considered.

Sincerely,

Jessica R. Wilcox
Principal Law Clerk to
Hon. Glen T. Bruening, AJSC

JRW:jc
Enclosure

cc: w/Enclosure - Copy of Decision and Order only
(via electronic mail) Ms. Maureen Hartmann

Aaron M. Baldwin, Esq.
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

KEVIN AHERN, as President, SYRACUSE TEACHERS ASSOCIATION; MATTHEW ALFIERI; ERIN ALSID; JULIA ASH; MARLENE BAXTER; KRISTIE BLUME; CAROLYN BONNER; NICOLE BOYER; PATRICIA BURNS; LINDA CADARET; CARA CONKLIN; STEFANIE DAIR; JENNIFER DeCARLO; TAMARA FELICIA; ROSALINA FONSECA; BRENDA HARRIS; LINDSEY ISYK-AKLEY; CAROL IWANICKI-ARRIGO; DANIELLE KNAPP; KENNETH KRONENBERG; ILYSSA MOSKOW; JILL PORTER; CHERYL PUDNEY; MICHELLE SARONEY; REGINA SARSFIELD; STEVEN SCHLEGEL; BARBARA SPARKES; PATRICK TIERNEY; CYNTHIA VACCO; and DONNA WARDEN on behalf of themselves and as representatives of a class of all other persons similarly situated,

Plaintiffs/Petitioners,

-against-

JOHN B. KING., JR., as Commissioner of the New York State Education Department; BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK; and NEW YORK STATE EDUCATION DEPARTMENT,

Defendants/Respondents,

and

SYRACUSE CITY SCHOOL DISTRICT, BOARD OF EDUCATION OF THE SYRACUSE CITY SCHOOL DISTRICT, and SHARON CONTRERAS, in her capacity as Superintendent of the Syracuse City School District,

Necessary Party Defendants/
Respondents.

DECISION and ORDER
Index No.: 2081-14
RJI No.: 01-14-ST5662

APPEARANCES:

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GLEN T. BRUENING, J.:

Petitioners are the Syracuse Teachers Association (STA), a labor union representing teachers and school-related professionals employed by the Syracuse School District (District), the STA's president (Kevin Ahern), and certain teachers employed by the District who received final ratings of 'less than effective' for the 2012-2013 school year. Petitioners bring this hybrid CPLR Article 78/declaratory judgment proceeding seeking, among other things, an Order declaring that Respondents failed to comply with Education Law 3012-c through arbitrarily and improperly implementing the annual professional performance review (APPR) teacher evaluation system for the 2012-2013 school year, and by failing to account and adjust for student poverty and low district wealth, resulting in

skewed performance ratings.[1] Respondents John B. King, Jr., the New York State Board of Regents of the University of the State of New York, and the New York State Education Department (collectively NYSED) have moved pursuant to CPLR 3211 (a) (5) and 7804 (f) for an Order dismissing the Petition as untimely.[2] Petitioners oppose NYSED's motion.

As background, as part of the American Recovery and Reinvestment Act of 2009 (see Pub L No 111-5, §14006, 123 Stat 115, 283 [2009]), President Barack Obama announced the "Race to the Top Initiative" (RTTI), which funded a $4.35 billion dollar competitive grant program designed to encourage States to establish educational reforms designed to improve student outcomes. The RTTI envisioned comprehensive reform in four core education reform areas by

- Adopting standards and assessments that prepare students to succeed in college and the workplace and to compete in the global economy;
- Building data systems that measure student growth and success, and inform teachers and principals about how they can improve instruction;
- Recruiting, developing, rewarding, and retaining effective teachers and principals, especially where they are needed most; and
- Turning around our lowest-achieving schools

(http://www2.ed.gov/programs/racetothetop/executive-summary.pdf, page 2 [accessed July 22, 2015]).

To compete for RTTI funding, in 2010, the New York State Legislature enacted Education Law § 3012-c entitled "Annual Professional Performance Review of Classroom Teachers and Building Principals," which established a "new statewide comprehensive evaluation system for classroom

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[1]In the Syracuse City School District approximately 80% of students are impoverished enough to be eligible for free or reduced priced lunch (see Affidavit of Aaron M. Pallas, sworn to on April 11, 2014).

[2]Respondents Syracuse City School District, Board of Education of the Syracuse City School District, and Sharon Contreras have appeared and join in NYSED's motion.

teachers and building principals based on multiple measures of effectiveness, including student achievement" (http://usny.nysed.gov/rttt/faq/qa.html#sept2826). Specifically, Section 3012-c established annual professional performance reviews (APPR) to evaluate teacher and principal effectiveness (see Education Law § 3012-c [2] [a] [1]). There are three parts to the review score which, taken together, comprise the composite effectiveness score. Two parts encompass 40% of the total composite effectiveness score and measure student achievement, broken down equally into the following sub-component parts for consideration: 1) 20% based on "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,"[3] and 2) 20% based on "locally selected measures of student achievement that are determined to be rigorous and comparable across classrooms in accordance with the regulations of the commissioner and as are developed locally in a manner consistent with procedures negotiated pursuant to the requirements of article fourteen of the civil service law" (Education Law § 3012-c [2] [f] [1]). The remaining 60% of the total composite effectiveness score "shall be locally developed, consistent with the standards prescribed in the regulations of the commissioner, through negotiations conducted pursuant to article fourteen of the civil service law" (Education Law § 3012-c [2] [h]). The focus of this proceeding is on that part of the APPR score that was derived from student growth data on state assessments or other comparable measures of student growth.[4]

Effective May 20, 2011, NYSED adopted regulations implementing Education Law § 3012-c,

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[3] "Student growth" is defined as "the change in student achievement for an individual student between two or more points in time" (Education Law § 3012-c [2] [i]).

[4] According to the Petition, 98% of all Syracuse teachers subject to the APPR received "effective" ratings in the 60% "other measures" sub-component not tied to student achievement (Petition, ¶ 58).

which, as is relevant to this proceeding, provided that 20% of a teacher's composite effectiveness score would be based on his or her student's performance, compared to similarly-achieving students through State assessments (grades 4-8 English language arts and math), or through comparable measures (all grades and subjects) (see Education Department Regulations [8 NYCRR part 30 et seq; 30-2.5]).[5] The regulations provided that in computing the student growth percentile score[6], "one or more of the following student characteristics are taken into consideration: poverty, students with disabilities and English language learners" (8 NYCRR former 30-2.2 [r]). Among other amendments not relevant to this matter, 8 NYCRR 30-2.2 (r) was amended, effective July 2, 2013, to include the following language, "[a]dditional 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."

The end result of the APPR is a score which, dependent upon the range where the score falls, rates an individual teacher as "highly effective, effective, developing and ineffective" (HEDI) (Education Law § 3012-c [2] [a] [1]). This rating is

> a significant factor for employment decisions including but not limited to, promotion, retention, tenure determination, termination, and supplemental compensation . . . [and] shall also be a significant factor in teacher and principal development, including but not limited to, coaching, induction support and differentiated professional development . . .

(id at [1]; see also Education Law § § 3020, 3020-a [i] [c]).

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[5]All Petitioners, except for those who taught English language arts and math 4-8, received a score for the first 20% of the APPR calculated according to "Student Learning Objectives" (SLO) which measured individual student growth and utilized aggregate growth to determine if the SLO had been met (Petition, Exhibit K, page 41-42, 46). Pursuant to NYSED, a school district may assign a teacher up to two additional points to a teacher's performance in the State Growth or "other comparable measures" sub-component to adjust for poverty and other factors that may effect growth (id., page 76).

[6]The regulations define 'student growth percentile score' as 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" (8 NYCRR 30-2.2 [p]).

In enacting Education Law 3012-c, the Legislature contemplated an avenue of redress for teachers who wished to challenge, among other things, the substance of the APPR. Specifically, section 3012-c (5) (a) provides that

> [a]n appeals procedure shall be locally established in each school district . . . by which the evaluated teacher or principal may only challenge the substance of the annual professional performance review, the school district's . . . adherence to the standards and methodologies required for such reviews, pursuant to this section, the adherence to the regulations of the commissioner and compliance with any applicable locally negotiated procedures, as well as the school district's . . . issuance and/or implementation of the terms of the teacher or principal improvement plan, as required under this section. Appeal procedures shall provide for the timely and expeditious resolution of any appeal under this subdivision. The specifics of the appeal procedure shall be locally established through negotiations conducted pursuant to article fourteen of the civil service law. . .

In 2012, the District and Petitioners entered into an agreement regarding the development and implementation of Education Law 3012-c, and the process was implemented in the Syracuse School District for the 2012-2013 school year. The agreement modified the parties' then collective bargaining agreement and, as relevant to Defendant's motion, provided for a local appeal process for teachers to challenge a "developing and ineffective" rating.

For the 2012-2013 school year, the District issued its initial APPR scores and HEDI ratings on or about October 25, 2013. A number of local appeals were filed by teachers challenging their ratings of "less than effective." On December 20, 2013, the District issued its determinations on those appeals. The Petitioners consist of those teachers who were unsuccessful in changing their rating by way of the local appeal.

Between August 2012 and August 2013, NYSED issued a number of letters, memoranda, and guidance materials that were either posted on its EngageNY website, or sent to school district superintendents in an attempt to explain how student growth would be calculated, and how poverty

factors would be used and incorporated into the growth model (see Affidavit of Monica Young, sworn to on June 12, 2014, ["Guidance on New York State's Annual Processional Performance review for Teachers and Principals to Implement Education law § 3012-c and the Commissioner's Regulations," updated August 13, 2012, August 30, 2013, and November 20, 2013; Memorandum, dated July 9, 2012 "APPR Submission Tips, Volume I"; "NYS Teacher Growth Scores: From MGP to HEDI Ratings and Scores 2012-13", dated August 2013; "Explaining Student Growth Scores to Teachers and Principals [Key Discussion Points]" undated; Commissioner's Correspondence, dated August 22, 2013]). In December 2013, NYSED posted on its website, the "2012-2013 Growth Model for Education Evaluation Technical Report," compiled by the American Institutes for Research (AIR), the entity that designed New York's growth model for NYSED (id., Exhibit 1 [Exhibit I]). The AIR report described the growth model used to measure student growth for purposes of teacher evaluation for the 2012-2013 school year, and acknowledged that some factors, including a student's economic hardship, is outside of an educator's control, and can impact growth model results (see Petition, Exhibit I, page 14). According to the AIR report, for purposes for measuring student growth for the 2012-2013 school year, if a student's family was participating in any one of a number of economic assistance programs, that student would have been "flagged," and his or her growth would have been compared with students who were similarly "flagged." According to the AIR report, for the 2012-2013 school year, if a student's economic status was unknown, the student was treated as if he or she was not economically disadvantaged (see Petition, Exhibit I, page 14).[7] If a student was not considered

[7]The guidance materials issued by NYSED do not similarly indicate that, if a student's economic status is unknown, he or she would be treated as not economically disadvantaged. AIR also compiled a "2011-2012 Growth Model for Education Evaluation Technical Report," on behalf of NYSED. That report, while referencing missing data flags for demographic variables, does not disclose that missing economic data would result in a student being treated as not economically disadvantaged (see Affidavit of Monica Young, sworn to on August 21, 2014, Exhibit 8, Appendix B, Data Processing Rules and Results).

economically disadvantaged, that student's growth would be compared with other students who were not "flagged," regardless of whether that student was, in fact, economically disadvantaged.

The Petition in this matter sets forth four causes of action. In liberally construing the Petition, as this Court must, the first and second causes of action challenge Petitioners' HEDI ratings, contending that Respondents unlawfully and arbitrarily implemented the Education Law and its corresponding regulations, and that the growth model developed for the 2012-2013 school year utilized for the purposes of teacher APPR does not fairly account for student poverty in comparing "similar students," thus rendering the HEDI results invalid. The third cause of action asserts that Respondents' methodology for determining student growth was not properly promulgated pursuant to the State Administrative Procedure Act (SAPA), the New York State Constitution, and the Executive Law. The fourth cause of action alleges a violation of equal protection under the New York State and Federal constitutions based on the impact Respondents' actions have on teachers who work in poverty-stricken school districts.

Respondents move to dismiss the proceeding as time-barred, contending that the four-month statute of limitations applies to all causes of action, and that Respondents' determination as to how poverty would be considered in APPR scoring was made more than four months before the Petition was filed. Respondents dispute that the statute of limitations began to run upon issuance of the local appeal determinations – December 20, 2013. Rather, Respondents argue that this action is untimely, as it was commenced more than four months after the promulgation of the regulations in May 2011, which indicated that poverty would be considered as part of the APPR or, after publication of NYSED's guidance materials, which were issued to explain both the limits on adjustments for poverty and how growth scores were calculated. Respondents argue that even if the Court were to consider the date of issuance of the APPR scores as controlling for statute of limitations purposes, the action would

nonetheless be barred, as Education Law § 3012-c (2) (c) (2) mandates that teachers be provided with their APPR rating prior to September 3, 2013 for the 2012-2013 school year. Along these lines, Respondents argue that the four-month statute of limitations is not tolled by the local appeals process since Petitioners' challenges are to NYSED's methodologies.

In opposition to the motion, Petitioners argue, among other things, that the multiple publications issued by NYSED on APPR issues cannot be deemed a final and binding determination for statute of limitations purposes. Rather, Petitioners argue that the date of the determination of the local appeals of the APPR scores and HEDI ratings – December 20, 2013 – governs as that is the date that Petitioners were able to ascertain the consequences of Respondents' improper implementation of Education Law § 3012-c. Petitioners argue that the local appeal process, which was a forum that could have ameliorated the injury, was necessary and, had Petitioners been successful in that forum, then this litigation would not have been necessary.

As is relevant to this matter, a CPLR article 78 proceeding is proper where a petitioner seeks to determine "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803 [3]). An article 78 proceeding would be a proper vehicle to determine whether a regulation has been applied in an unconstitutional or illegal manner (see Matter of Morania Oil Tanker Corp. v State Tax Commn., 103 AD2d 965, 966 [3d Dept 1984]). Where, as here, governmental activity is being challenged, "the immediate inquiry is whether the challenge could have been advanced in a CPLR article 78 proceeding" (Matter of Adirondack Med. Center-Uihlein v Daines, 119 AD3d 1175, 1176 [3d Dept 2014] [internal quotation marks and citations omitted]). Thus, whether Petitioners' declaratory judgment and constitutional claims are subject to the four-month statute of limitations period under CPLR article 78 depends on whether the parties' rights could have been resolved in an article 78

proceeding (see Walton v New York State Dept. of Correctional Servs., 8 NY3d 186, 194 [2007]).

In this matter, Petitioners challenge the determinations applying legislation, thus rendering those challenges subject to a CPLR article 78 proceeding. As such, this proceeding, "must [have been] commenced within four months after the determination to be reviewed bec[a]me[] 'final and binding upon the petitioner' " (New York State Assn. of Counties v Axelrod, 78 NY2d 158, 165 [1991], quoting CPLR 217).[8] An administrative determination becomes final and binding when it "inflicts actual, concrete injury," which may not be "significantly ameliorated by further administrative action or by steps available to the complaining party" (Walton v New York State Dept. of Correctional Servs., 8 NY3d at 194). "In the context of quasi-legislative determinations such as the one at issue here, actual notice of the challenged determination is not required in order to start the statute of limitations clock; rather, the statute of limitations begins to run once the administrative agency's definitive position on the issue becomes readily ascertainable to the complaining party" (Matter of School Adm'rs Assn. of N.Y. State v New York State Dept. of Civ. Serv., 124 AD3d 1174, 1176-1177 [3d Dept 2015] [internal quotation marks and citations omitted]). While publication on the agency's website has been held to constitute notice for purposes of when a cause of action accrues (see Matter of Town of Olive v City of New York, 63 AD3d 1416, 1418 [3rd Dept. 2009]), the Court is not convinced that such is the case in the instant matter.

Here, prior to completion of the 2012-2013 school year, NYSED's definition of "similar students" for inclusion in the growth model was still evolving, as evidenced by the Board of Regents' June 2013 approval of an "enhanced list of characteristics used to define" that term (Affidavit of

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[8]Petitioners' cause of action alleging a violation of, among other things, SAPA, is subject to a four-month statute of limitations, which accrues when a rule is promulgated (see Matter of Gill v New York State Racing & Wagering Bd., 50 AD3d 494, 495 [1st Dept 2008]).

Monica Young, Exhibit 1, subpart K, page 34; see http://www.regents.nysed.gov/common/regents/files/613p12hea1%5B1%5D.pdf [accessed July 7, 2015] ["Recommendation to use an Enhanced 'Growth Model' in 2012-13 and 2013-14 and to Implement the Value-Added Model in 2014-2015 and Thereafter"]). In this regard, NYSED provided no guidance as to how a student, whose economic status was unknown, would be classified and to whom that student would be compared. It wasn't until December 20, 2013, when NYSED posted AIR's report, that that methodology was disclosed. Because administrative action was required to either challenge the substance of the APPR or adherence to the regulations, the four-month limitations period applicable to the First, Second and Fourth causes of action started running at the conclusion of the appeal process on December 20, 2013. If the NYSED's published guidance materials are "rules" subject to article two of SAPA, the applicable four-month statute of limitations with respect to the third cause of action does not start to run until SAPA has been complied with (see SAPA 202 [8]). As there is no evidence in the record that SAPA was complied with, the statute of limitations on the Third cause of action has not started to run.

Based on the foregoing, the Court finds that Respondents have failed to establish their entitlement to dismissal based on the statute of limitations defense (see Matter of Richmond Med. Ctr. v Daines, 101 AD3d 1434, 1435 [3d Dept 2012]), and this proceeding, commenced April 16, 2014, is timely. Accordingly, it is hereby

ORDERED AND ADJUDGED that Respondents' motion to dismiss the Petition is denied; and it is further

ORDERED AND ADJUDGED that Respondents shall file and serve its answer to the Petition within 30 days after service of this Decision and Order with notice of entry (see CPLR 3211 [f]; 7804 [f]), and Petitioners shall file and serve any reply within 20 days after service of the answer (see

CPLR 7804 [d] and [f]).

This constitutes the Decision and Order/Judgment of the Court. The original Decision and Order/Judgment is being returned to counsel for Petitioner. A copy of the Decision and Order/Judgment has been delivered to the County Clerk for placement in the file. The supporting papers have been retained by the Court. The signing of this Decision and Order/Judgment, and delivery of a copy of this Decision and Order/Judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

IT IS SO ORDERED AND ADJUDGED.

ENTER

Dated: October 5, 2015
Albany, New York

Glen T. Bruening
Acting Supreme Court Justice

The Court considered the following papers:

By Petitioner:
Summons/Notice of Petition, filed April 16, 2014;
Verified Complaint/Petition, verified April 14, 2014, with Exhibits A-L;
Affidavit of Aaron M. Pallas, sworn to on April 11, 2014, with Exhibit A;
Memorandum of Law, dated April 14, 2014;
Affirmation of Aaron M. Pallas, sworn to on July 17, 2014, with Exhibit A;
Supplemental Affidavit of Aaron M. Pallas, sworn to on October 23, 2014;
Affirmation of Matthew E. Bergeron, Esq., dated July 17, 2014;
Affidavit of Michael Foley, sworn to on July 16, 2014;
Memorandum of Law, dated July 17, 2014;
Correspondence, dated February 10, 2015.

By Respondents:

Notice of Appearance, filed June 18, 2014;
Notice of Motion, filed June 13, 2014;
Affidavit of Monica Young, sworn to on June 12, 2014, with Exhibits 1-7;
Affidavit of Julia Rafal-Baer, sworn to on June 12, 2014;

Memorandum of Law, dated June 13, 2014;
Affidavit of Monica Young, sworn to on August 21, 2014, with Exhibits 8 and 9;
Affirmation of Aaron M. Baldwin, Esq., dated August 21, 2014, with Exhibit 10;
Memorandum of Law, dated August 22, 2014;
Affidavit of Ira Schwartz, sworn to on October 31, 2014;
Correspondence, dated February 5, 2015, with attachment.