

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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-Plaintiffs

-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,

Respondents-Defendants

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VERIFIED PETITION/
COMPLAINT

Index No. 00957/18

Date Filed _____

Petitioners-Plaintiffs, the NEW YORK STATE BOARD OF REGENTS, BETTY A. ROSA, as Chancellor of the New York State Board of Regents, the UNIVERSITY OF THE STATE OF NEW YORK, the 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, by their attorney, Alison B. Bianchi, Counsel and Deputy Commissioner for Legal Affairs, through Shannon L. Tahoe and Aaron M. Baldwin, of counsel, as and for their verified Petition/Complaint respectfully allege:

PRELIMINARY STATEMENT

1. Petitioners-Plaintiffs (“Petitioners”) commence this hybrid declaratory judgment action and Article 78 proceeding to declare unlawful and annul, vacate and enjoin certain regulations adopted by the Defendants-Respondents (“Respondents”) on October 11, 2017, which became effective on December 20, 2017, when they were published in the New York State Register (“the challenged regulations”).

2. Such regulations violate existing law – specifically, Article 56 of the Education Law (known as “the Charter Schools Act”) and §3602-ee of the Education Law (governing the Statewide universal full-day pre-kindergarten program), are in excess of the limited authority granted to Respondents by the Legislature under Education Law §355(2-a), and unlawfully usurp the exclusive statutory authority and constitutional jurisdiction of Petitioners New York State Board of Regents and Commissioner of Education to certify qualified individuals to teach in the public schools of the State of New York.

3. The regulations were also not properly promulgated in accordance with the State Administrative Procedure Act (“SAPA”) §202(4-a).

4. By allowing Respondents to employ inexperienced and unqualified individuals to teach children in SUNY-authorized charter schools, the challenged regulations will effectively erode the quality of teaching in New York State and negatively impact student achievement, particularly for children who are most in need - students of color, those who are economically disadvantaged, English language learners, and students with disabilities. The consequences of the regulations will be profound and far-reaching as they will impede equity in access by all such students to quality teachers.

JURISDICTION and VENUE

5. This Court has jurisdiction pursuant to CPLR §§3001 and 3017, CPLR Articles 63 and 78, and SAPA §202(8) to issue an order and judgment granting the relief Petitioners seek – vacating, annulling, declaring unlawful/invalid and enjoining the challenged regulations.

6. Venue is properly laid in the County of Albany under CPLR §506(b) in that it is the County within which Respondents' principal offices are located.

7. This action/proceeding has been timely commenced within four months of both respondents' adoption of, and the effective date of the challenged regulations.

8. No prior application for the relief requested in this petition/complaint has been made by Petitioners.¹

PETITIONERS

9. Petitioner New York State Board of Regents is the governing body of the University of the State of New York and is responsible for exercising legislative functions over the State educational system, determining its educational policies and, except as related to the judicial functions of the Commissioner of Education, establishing rules for carrying out the State's laws and policies relating to education and the functions, powers, duties and trusts granted to or authorized by the University of the State of New York and the New York State Education Department. Education Law §§101, 207; NYS Const., Art. XI, §2.

10. Petitioner Betty A. Rosa is the Chancellor of the New York State Board of Regents.

¹ New York State United Teachers filed an action/proceeding challenging the same regulations on several grounds. *See, New York State United Teachers, et al. v. State of New York, et al.*, Supreme Court, New York County (Index No. 159108/2017). Defendants-Respondents moved to dismiss that case in its entirety on various grounds including lack of standing.

11. Petitioner University of the State of New York consists of all secondary and higher educational institutions which are now or may hereafter be incorporated in the state and such libraries, museums, institutions, schools, organizations and agencies for education as may be admitted to or incorporated by the University. Education Law §214; NYS Const., Art. XI, §2.

12. Petitioner New York State Education Department (“NYSED” or “the Department”) is charged with the “general management and supervision of all public schools and all of the educational work of the state, including the operations of the University of the State of New York.” Education Law §101. It is the administrative arm of the University of the State of New York and is charged with carrying out the legislative mandates and policies of the Board of Regents. Education Law §§101, 207, 305.

13. Petitioner MaryEllen Elia is the Commissioner of the New York State Education Department and President of the University of the State of New York. She is the chief administrative officer of the Department, is the chief executive officer of the State system of education and of the Board of Regents, and is responsible for enforcing all general and special laws related to the educational system of the State and executing all educational policies determined upon by the Board of Regents. Education Law §§101 and 305; NYS Const., Art. V, §§2 and 4.

RESPONDENTS

14. Respondent State University of New York (“SUNY”) is an education corporation known as a state university responsible for the planning, supervision and administration of facilities and programs to provide for higher education which is supported in whole or in part by State moneys. Education Law §§352, 354-355.

15. Respondent Kristina M. Johnson is the Chancellor of SUNY and is the Chief Executive Officer of SUNY. Education Law §353.

16. Respondent SUNY Board of Trustees is the governing body of SUNY (Education Law §353) and is authorized pursuant to Education Law §2851 to serve as a charter entity for certain charter schools operating in New York.

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

18. Respondents SUNY Charter Schools Committee (“the Committee”) and SUNY Charter Schools Institute (“Institute”) were created by the SUNY Board of Trustees to assist the SUNY Board of Trustees in carrying out its responsibilities as a charter entity pursuant to the Charter Schools Act. The duties and responsibilities of the Committee, as presently constituted, are more thoroughly set forth in a Memorandum/Resolution of Respondent SUNY Board of Trustees dated June 12, 2012, a copy of which is annexed hereto as **Exhibit A**. See also, copies of “About the SUNY Charter Schools Institute” (available at <http://www.newyorkcharters.org/about/>) and “Mission Statement” of SUNY Charter Schools Institute (available at <http://www.newyorkcharters.org/about/mission/>), collectively annexed hereto as **Exhibit B**.

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

STATEMENT OF THE CASE

The Laws Governing Teacher Certification in Public Schools and Charter Schools

20. Education Law §3004(1) (expressly titled “Regulations governing certification of teachers”) grants the Commissioner of Education exclusive authority to prescribe regulations, subject to the approval of the Board of Regents, setting forth the certification requirements for teachers employed in the public schools of the State.

21. Part 80 of the Commissioner's regulations sets forth the requisite education, experience, examination requirements and other qualifications necessary to obtain teacher certification in this State. See 8 NYCRR Part 80.

22. Charter schools operate independently of public school districts and are governed by the Charter Schools Act.

23. In enacting the Charter Schools Act in 1998, the Legislature created a comprehensive statutory framework governing the manner in which charter schools may legally operate in New York State. See Education Law §2850, *et seq.*

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

25. Education Law §2854(3)(a-1) provides as follows (bracketed language and emphasis added):

The board of trustees of a charter school shall employ and contract with necessary teachers, administrators and other school personnel. **Such teachers shall be certified in accordance with the requirements applicable to other public schools** [except as otherwise provided in this paragraph] ...

26. This section makes clear that teachers in all charter schools must meet the certification requirements applicable to other public school teachers (which are outlined in Part 80 of the Commissioner's regulations), subject to only very limited exceptions specifically outlined in the Charter Schools Act. Education Law §2854(3)(a-1). In this way, the statute attempts to ensure that charter school students have access to State certified teachers – who have demonstrated the minimum knowledge, skills and abilities to become a teacher of record – that is equitable to that of their traditional public school peers, and recognizes the critical role that the preparation of, support for, and access to quality teachers plays in the education of New York State's students.

27. The very specific and circumscribed exceptions outlined by the Legislature in the Charter Schools Act are limited both by type and by number. Education Law §2854(3)(a-1).

28. Specifically, pursuant to Education Law §2854(3)(a-1), charter schools may only employ the following types of uncertified individuals:

- i. uncertified teachers with at least three years of elementary, middle or secondary classroom teaching experience;
- ii. tenured or tenure track college faculty;
- iii. individuals with two years of satisfactory experience through the Teach for America program; and
- iv. individuals who possess exceptional business, professional, artistic, athletic, or military experience

29. In addition, the governing statute limits the number of uncertified teachers that may be employed as follows:

such teachers described in clauses (i), (ii), (iii) and (iv) [quoted above] ... shall not in total comprise more than the sum of:

- A. thirty per centum of the teaching staff of a charter school, or five teachers, whichever is less; plus
- B. five teachers of mathematics, science, computer science, technology, or career and technical education; plus
- C. five additional teachers.

30. Significantly, according to the statute, “[a] teacher certified or otherwise approved by the commissioner shall not be included in the numerical limits established by the preceding sentence.” Id.

31. Neither the requirement that teachers in charter schools be certified in accordance with the requirements applicable to other public schools nor the limited exceptions thereto may be superseded through statutory or regulatory action outside of Article 56 inasmuch as Education

Law §2854(1)(a) (captioned “**Applicability of other laws**”) specifically commands that: “Notwithstanding any provision of law to the contrary, to the extent that any provision of this article is inconsistent with any other state or local law, rule or regulation, **the provisions of this article shall govern and be controlling**” (emphasis added).

32. Additionally, to the extent that charter schools are authorized to participate in the State’s universal full-day pre-kindergarten program under Education Law §3602-ee (“UPK”), the UPK law makes clear that the above requirements relating to State certification and the limited exceptions outlined in the Charter Schools Act shall also apply to all teachers employed in a UPK program in a charter school.²

33. Specifically, in 2014 the Legislature decreed under the UPK statute that “[a]ll teachers in the universal full-day pre-kindergarten program shall meet the same teacher certification standards applicable to public schools.” Education Law §3602-ee(8). See also, Education Law §3602-ee(12) (Providing that for charter schools authorized to participate in the UPK program, “[t]he limitations on the employment of uncertified teachers under [Education Law §2854(3)(a-1)] shall apply to all teachers from pre-kindergarten through grade twelve.”).

34. Through Education Law §355(2-a), which was signed by the Governor as Part P of Chapter 73 of the Laws of 2016 on or about June 17, 2016, the Legislature granted to the Respondent Committee a limited authorization to promulgate regulations relating to governance, structure and operations of SUNY-authorized charter schools. A copy of the sponsor’s memo for such legislation is attached hereto as **Exhibit C**.

35. The relevant portion of Education Law §355(2-a) provides as follows:

[n]otwithstanding any other provision of law, rule, or regulation to the contrary, the state university trustees charter school committee,

² Pursuant to Education Law §3602-ee(8)(ii), notwithstanding any limited exemption from certification provided by such subdivision, certification shall be required for employment in a UPK program no later than June 30, 2018.

as a charter entity, are further authorized and empowered, to promulgate regulations with respect to governance, structure and operations of charter schools for which they are the charter entity, pursuant to section twenty-eight hundred fifty-one of this chapter.

36. In enacting Education Law §355(2-a), the Legislature provided the Committee with the limited authority to enact regulations solely with respect to the “*governance, structure and operations*” of a charter school (emphasis added).

37. Nowhere in this legislation or elsewhere did the Legislature authorize the Committee to promulgate regulations concerning teacher certification.

38. Indeed, the Speaker of the Assembly, Carl E. Heastie, and the Chair of the Assembly’s Education Committee, Catherine Nolan, are on public record confirming that the Committee’s delegated authority was limited, that it cannot adopt regulations inconsistent with governing laws, and that its ability to regulate does not extend to teacher certification.

39. Attached hereto as **Exhibit D** is a letter from Speaker Heastie and Chairperson Nolan to Governor Andrew M. Cuomo dated August 15, 2016 in which they state that “the Legislature did not intend to delegate to SUNY broad authority to regulate the charter schools it oversees. Nor did it intend to empower SUNY to adopt regulations that are inconsistent with current laws governing charter schools including, but not limited to, laws related to teacher certification requirements, participation in pre-kindergarten programs, and co-location of charter schools within traditional public schools.”

40. However, on July 26, 2017, citing Education Law §355(2-a) as statutory authority, Respondents published in the *State Register* a Notice of Proposed Rulemaking for the challenged regulations in their initial draft form (“proposed regulations”) signaling an intention to act in excess of their statutory authority and to override the State’s teacher certification

requirements for teachers employed in SUNY-authorized charter schools, including those employed in UPK programs in such schools.

41. A copy of the July 26, 2017 edition of the *State Register* with the subject Notice of Proposed Rulemaking (see, pp. 23-25) is attached hereto as **Exhibit E** and a copy of the proposed regulations is attached hereto as **Exhibit F**.

42. Upon information and belief, just a few days prior to the October 11, 2017 Committee meeting at which the proposed regulations were considered for adoption, Respondents amended and substantially revised the proposed regulations.

43. At its meeting on October 11, 2017, by a 4 to 1 vote, Respondents adopted the challenged regulations which they described as “Proposed Teacher Certification Compliance Regulations” and which became effective thereafter on December 20, 2017. Attached hereto as **Exhibit G** is a copy of the Committee’s Minutes dated October 11, 2017, as **Exhibit H** is a copy of the December 20, 2017 edition of the *State Register* with the subject Notice of Adoption (see, pp. 19-21), and as **Exhibit I** is a copy of the challenged regulations in their final form as codified at 8 NYCRR Part 700.

Respondents Have Adopted Regulations Which:

(A) Unlawfully Conflict with the Charter Schools Act and the UPK Statute;

(B) Are in Excess of the Authority Granted to Respondents by the Legislature and Therefore Unconstitutionally Usurp the Jurisdiction and Authority of Both the Legislature and Petitioners, and; (C) Violate the State Administrative Procedure Act

A. Respondents’ Regulations Unlawfully Conflict with the Charter Schools Act and the UPK Statute

44. It is axiomatic that an agency may not adopt regulations which conflict with a statute.

45. As previously stated, the Charter Schools Act is very clear that the provisions of such Act supersede any other inconsistent State or local law or regulation.

46. More specifically, Education Law §2854(1)(a), could not be any clearer in providing that **“to the extent that any provision of [the Charter Schools Act] is inconsistent with any other state or local law, rule or regulation, the provisions of [the Charter Schools Act] shall govern and be controlling”** (emphasis added).

47. Education Law §2854(3)(a-1) specifically commands that, subject to limited exceptions which have no relevance here, teachers employed in all charter schools shall be State certified in accordance with the requirements applicable to other public schools pursuant to Education Law §3004(1) and 8 NYCRR Part 80.

48. Likewise, under the UPK law, all teachers in the universal full-day pre-kindergarten program, including those at participating charter schools, must meet the same teacher certification standards applicable to public schools pursuant to Education Law §3602-ee(8).

49. The challenged regulations (Exhibit I), however, authorize any teacher employed in a SUNY-authorized charter school to be employed without a State teaching certificate, in direct contravention of the Charter Schools Act and the UPK law, simply by meeting certain education, experience and examination requirements, which, because they are not in accordance with the requirements applicable to other public schools as required by statute, are significantly less rigorous than those required for a State teaching certificate as described below.

50. In addition, section 700.4(a) of the challenged regulations states that “[t]he requirements of an approved Instructional Program under this section **are to be considered equivalent** to the certification requirements applicable to other public schools of the state for the purposes of paragraph a-1 of subdivision 3 of section 2854 of the Education Law.” (emphasis added).

51. Therefore, the challenged regulations also appear to unlawfully propose that these drastically different requirements are “equivalents” to the State certification requirements for all

public school teachers, including charter school teachers, as provided for in Education Law §§3004(1) and 2854 and outlined in Part 80 of the Commissioner's regulations.

52. However, even a cursory review of the challenged regulations demonstrates that SUNY is providing an alternative pathway for employment at SUNY-authorized charter schools which is not in accordance with the requirements applicable to other public schools as required by statute and, therefore, is not as rigorous as the State certification requirements established by the Commissioner, which must be met by teachers to be employed in all public schools in this State, including charter schools (with the limited exceptions provided in the Charter Schools Act).

53. Among other things, in terms of education, the challenged regulations contrast with the Commissioner's teacher certification regulations by eliminating the need for a teacher to ultimately possess a bachelor's degree, which is a uniform baseline educational credential, if the teacher has the "necessary knowledge and skills to successfully complete" a program determined acceptable by the Committee. See 8 NYCRR §§80-3.3(a)(2); 80-3.3(b)(1), compared to §700.4(b)(2) of the challenged regulations.

54. In terms of instruction, the SUNY charter school teacher would only need to achieve 30 "clock" hours of instruction in the content area and in pedagogy. Under existing teacher certification requirements for public schools, however, a teacher would generally need to hold a bachelor's degree or higher (i.e., a minimum of 120 "semester hours"), which would include instruction in general education core, content core, and pedagogical core studies. See 8 NYCRR §52.21(b)(2)(ii); see e.g. §§80-3.3(a)(2) and (b)(1), 80-3.7(a)(2)(iv) and (v)(a), 80-3.7(a)(3)(i)(a) and (b) compared to the challenged regulations at §700.4(b)(4). The 30 "clock" hours of instruction in the challenged regulations generally equate to a mere two "semester" hours. See 8 NYCRR §50.1(o).

55. In terms of experience, the SUNY charter school teacher would need to achieve only 40 clock hours of field experience compared to the at least 100 clock hours required for State certification. See 8 NYCRR §§52.21(b)(2)(ii)(c)(2)(c)(2)(i)(A), 80-3.3(a)(2), 80-3.3(b)(1) compared to the challenged regulations at §700.4(b)(2).

56. In order to receive State certification, public school teachers ultimately are required to pass the following New York State teacher certification examinations, where applicable: the teacher performance assessment, at least one content specialty test, and the educating all students (“EAS”) test. 8 NYCRR §80-1.5. The challenged regulations merely require a final assessment which “*may* be either the State teacher certification examination, the EAS test, or an examination which measures, at a minimum, all required elements of the EAS test, and is approved by the institute.” See 8 NYCRR §700.4.

57. The notion of substituting an instructional program to be considered the “equivalent” to the rigorous certification requirements applicable to teachers employed in all public schools in this State, including charter schools, is in direct conflict with both the Charter Schools Act and the UPK law.

58. Since the challenged regulations are in direct conflict with both the Charter Schools Act and the UPK law, they should be vacated, declared invalid, and their use enjoined.

B. Respondents Acted in Excess of the Authority Granted to the Committee by the Legislature and Therefore Unconstitutionally Usurped the Jurisdiction and Authority of Both the Legislature and Petitioners

59. In adopting the challenged regulations, the Committee acted in excess of its authority and therefore unconstitutionally usurped both the Legislature’s policy-making power and the jurisdiction of Petitioners in violation of the separation of powers doctrine as delineated in the New York State Constitution and *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987) and its progeny.

60. In promulgating these regulations, Respondents appear to be of the position that Education Law §355(2-a) provides them with unfettered authority to promulgate regulations relating to the employment and certification requirements for teachers employed in a charter school authorized by SUNY.

61. This is incorrect, is in excess of the authority granted to Respondents by the Legislature, and unlawfully diminishes and/or modifies the authority of the Petitioners the Board of Regents, the Commissioner and NYSED without any express legislative action to amend Education Law §§207, 305, 2854 and 3004.

62. Through the New York State Constitution and various provisions of Education Law, including §3004(1) (expressly titled "Regulations governing certification of teachers"), the Legislature specifically delegated to Petitioners the responsibility to prescribe and approve regulations governing the examination and certification of teachers employed in the public schools of the State.

63. This delegation has been extended to charter schools through the provisions of the Charter Schools Act and UPK law detailed in the preceding section.

64. If the Legislature intended to provide SUNY with the authority to promulgate regulations encompassing the certification of teachers, which it did not, Education Law §355(2-a) would have expressly so provided.

65. Indeed, the Legislature has considered, but did not pass, various bills that would have expressly allowed for teacher certification for charter school teachers to differ from that of other public school teachers.

66. For example, in June 2017, the Legislature considered Senate Bill No. 6567 which would have amended paragraph (a-1) of subdivision 3 of section 2854 of the Education Law to do

something similar to what the challenged regulations unlawfully attempt to accomplish. A copy of Senate Bill No. 6567 is attached hereto as **Exhibit J**.

67. While that bill, which was introduced almost a year after the amendments to Education Law §355(2-a), passed the Senate, it did not pass the Assembly. Clearly, the Legislature thought that the issue of teacher certification/qualifications in charter schools was a matter of policy for the Legislature to decide and that it had not enacted law on this point previously through §355(2-a).

68. By its terms, that proposed bill would have expressly altered the requirements for employment as a charter school teacher by providing that, unlike teachers in other public schools, **“teachers employed by a high performing public *charter* school with a rigorous teacher training program will have three school years from their employment start date before they must satisfy certification requirements...”**. Exhibit J.

69. Also noteworthy is that that bill proposed to amend the *Charter Schools Act*, specifically Education Law §2854(3)(a-1), rather than a general law, because the Legislature is aware that legislators cannot amend the provisions of the Charter Schools Act by amending the general law, but instead must amend the Charter Schools Act itself.

70. Therefore, by enacting the challenged regulations, the Committee usurped the Legislature’s power to make policy and Petitioners’ exclusive jurisdiction to regulate in this area.

71. This is confirmed by examination of the plain text of the statutory authority cited by the Respondents. The regulatory power granted to the Committee by the Legislature is plainly limited to promulgating regulations “with respect to governance, structure, and operations of *charter schools*.” Education Law §355(2-a) (emphasis added).

72. The Legislature did not delegate to the Committee the power to prescribe *teacher* certification requirements. On the contrary, a plain reading of this statute indicates that it only applies to the “governance, structure, and operations of charter schools.” See also, Heastie Memo at Exhibit D (“the Legislature did not intend to delegate to SUNY broad authority to regulate the charter schools it oversees. Nor did it intend to empower SUNY to adopt regulations ... related to teacher certification requirements”).

73. Here, the Committee thus engaged in a legislative function, not an administrative one, when it adopted the regulations at issue, and therefore, the regulations violate the separation of powers doctrine under the New York Constitution (NYS Const., Art. III, §1).

74. In sum, the Committee stretched the applicable statute beyond its valid reach when it used the cited law as a basis for drafting a code embodying its own assessment of what public policy ought to be.

75. This conclusion is reinforced by the fact that the phrase “governance, structure and operations” of charter schools is not defined by the statute and does not appear in the Charter Schools Act.

76. Indeed, while Education Law §2851(2)(c) does mention “governance structure” and “school governance” and Education Law §2854(1)(c) and (2) mention “school’s financial operations” and “other operations,” it is clear from the context of those references that the term governance relates to the board of trustees and the term operations relates to engaging in day-to-day functions of school administration – not anything whatsoever having to do with the qualifications of or certification requirements of teachers. Also, elsewhere in the Charter Schools Act, teacher certification/employment is specifically referenced where the Legislature meant to address it. See Education Law §2854(3)(a-1).

77. Evidence that “governance, structure and operations” relates to board governance, organizational structure, and day-to-day operations wholly apart from *teacher* certification requirements may be found in the various publications of Respondents which provide guidance on these topics and in no way address teacher certification requirements. See e.g., *Guide to Board Governance for Charter Schools Authorized by the State University of New York Board of Trustees* attached hereto as **Exhibit K**, *Guide to Merging Education Corporations for Charter Schools Authorized by the State University of New York Board of Trustees* attached hereto as **Exhibit L**, and *Prior Action Checklist for Stand Alone Schools* attached hereto as **Exhibit M**. All of those materials reflect guidance by the Committee and Institute in the areas of its expertise – charter school authorization.

78. Additionally, a review of the various powers and duties delegated to the Committee by the full SUNY Board of Trustees (see, Exhibits A and B) reveal no expertise in the area of teacher certification. This lack of special expertise and experience in the very areas which are the subject of the challenged regulations further suggests a violation of the separation of powers doctrine.

79. Undeniably, a review of Exhibit I (final rulemaking, at p. 19 (Substance of Final Rule)) reveals another indicator that Respondents acted in excess of their authority. It confirms that Respondents, by their own portrayal, were acting solely based on their own ideas of what they perceive to be sound public policy in making the choice to allow certain of their charter schools to propose a program of teacher qualification to meet the cited societal goal of identifying high quality teachers in its authorized schools.

80. Overall, through the challenged regulations, Respondents have improperly assumed for themselves the policy-making prerogatives of the Legislature and have unlawfully usurped the lawful jurisdiction of Petitioners in blatant violation of the separation of powers doctrine.

81. The challenged regulations should therefore be declared unconstitutional, *ultra vires* and null and void and their use enjoined.

C. Respondents Violated the State Administrative Procedure Act in Promulgating the Challenged Regulations

82. As stated above, a Notice of Proposed Rulemaking for the challenged regulations was published in the State Register on July 26, 2017, with a forty-five day public comment period in accordance with the SAPA.³ See, Exhibit E.

83. Over 8,600 comments, the largest group of them opposed to the proposed regulations, were received by Respondents. See, Exhibit H (Notice of Adoption) at p. 19.

84. Many of New York's public education leaders openly and expressly opposed the challenged regulations when they were proposed.

85. For example, Respondent SUNY's own Deans and Directors of Education publicly opposed the challenged regulations in a July 27, 2017 letter to the SUNY Board of Trustees (copy annexed hereto as **Exhibit N**) in which the Deans and Directors "strenuously objected" to the regulations, and described the regulations as "virtually eliminating teacher certification requirements."

86. During the public comment period, the State's two largest teachers' unions, New York State United Teachers ("NYSUT") and the United Federation of Teachers ("UFT"), submitted comments opposing the SUNY Regulations.

³³ For rulemakings published on or after October 1, 2017, SAPA now requires a sixty (60) day public comment period. See, Chapter 455 of the Laws of 2017.

87. In its public comment letter dated August 1, 2017 (copy annexed as **Exhibit O**), NYSUT noted that the regulations circumvent “many of the established criteria for teacher certification set forth by the [Commissioner] and the Board of Regents”.

88. Likewise, a July 26, 2017 letter (copy annexed at **Exhibit P**) from UFT President Michael Mulgrew addressed to Joseph W. Belluck, the Committee Chair, included the UFT’s public comments, noting among other things, “[t]hat some charter chains, facing high levels of teacher burnout and departures, cannot appropriately staff their schools is no reason for the state to radically depart from its decades-long effort to ensure a highly qualified teacher in every classroom.”

89. In addition, Petitioners have publicly opposed the SUNY Regulations.

90. Specifically, at a panel event held on August 6, 2017, Petitioners Chancellor Rosa and Commissioner Elia spoke in opposition to the regulations, saying, among other things, that they found them insulting to the teaching profession. Attached hereto as **Exhibit Q** is a transcription of their statements opposing the regulations.

91. On September 7, 2017, Petitioners Chancellor Rosa and Commissioner Elia also submitted joint comments on the proposed regulation, describing the legal infirmities of the proposal and their educational policy concerns (copy annexed hereto as **Exhibit R**).

92. In addition to their significant legal concerns with the challenged regulations, Petitioners Chancellor Rosa and Commissioner Elia noted in their comments that: “[t]he regulations are an affront to a critical tenet in education: rigorous and high-quality teacher preparation programs foster high-quality teachers who increase the likelihood of students achieving proficiency on state standards. Our efforts should focus on promoting effective teaching and strengthening and supporting the entire educator preparation pipeline, not eroding it.” See, Exhibit R.

93. Petitioners Rosa and Elia further noted in their comments that Respondent SUNY cited “challenges in identifying high-quality teachers” as a reason for advancing the proposed regulations. However, Petitioners Rosa and Elia pointed out that “[T]here may be other factors contributing to charter schools’ difficulties in hiring trained and qualified teachers. For example, high turnover rates, which could be the result of compensation that is not comparable to public schools; inadequate professional development; and/or a lack of effective mentoring may be contributing factors. The answer to the problem of the lack of high-quality teachers, however, is not to increase the number of uncertified and therefore unprepared teachers in charter schools, but to address the matter holistically so that all students have access to high-quality teachers. Teacher quality is the number one factor that contributes to student academic success; therefore, the preparation of, support for, and access to quality teachers is essential.” Id.

94. Indeed, data collected by the State Education Department** for 2015-2016 and 2016-2017 indicates that the turnover rates of teachers with fewer than five years of experience versus the turnover rates of all teachers were as follows for charter schools and school districts:

| | | Total Teachers with < 5 Yrs Experience | Turn Over Rate <5 Yrs Experience | Total Teachers with Any Experience* | Turn Over Rate Any Experience* |
|---|--|--|----------------------------------|-------------------------------------|--------------------------------|
| 2015-16 | CHARTER TOTAL | 4,338 | 39.0% | 8,006 | 39.6% |
| 2015-16 | SCHOOL DISTRICTS | 24,498 | 18.0% | 199,165 | 10.4% |
| 2015-16 | STATEWIDE (CHARTER TOTAL + SCHOOL DISTRICTS) | 28,836 | 21.1% | 207,171 | 11.5% |
| | | | | | |
| 2016-17 | CHARTER TOTAL | 4,825 | 37.8% | 9,014 | 37.0% |
| 2016-17 | SCHOOL DISTRICTS | 27,076 | 18.5% | 201,334 | 11.0% |
| 2016-17 | STATEWIDE (CHARTER TOTAL + SCHOOL DISTRICTS) | 31,901 | 21.4% | 210,348 | 12.1% |
| | | | | | |
| *Includes teachers with less than 5 years of experience | | | | | |

***Source: New York State Education Department, Office of Information and Reporting Services*

Clearly, the teacher turnover rate at charter schools far exceeds that of school districts. The critical problem of teacher retention at these schools will only be exacerbated by the challenged regulations and will serve to disproportionately impact the economically disadvantaged students and students of color they serve.

95. At its September 11-12, 2017 meeting, the Petitioner Board of Regents adopted a resolution (copy annexed hereto as **Exhibit S**) expressing the Board's agreement with and support for the educational policy and legal concerns stated by Chancellor Rosa and Commissioner Elia in their public comment letter and encouraging the Committee to withdraw the proposed regulations immediately.

96. Petitioner Chancellor Rosa and the President of the NAACP New York State Conference, Hazel N. Dukes, also spoke out on October 4, 2017 and caused to be published an opinion article in the *Albany Times Union* stating among other things that the regulations at issue "would lower the bar on what it means to be a teacher in some of New York's charter schools," thereby creating "a problem for all of us, but particularly for the black and Hispanic children who make up the vast majority of students that attend New York's charter schools. These students – as well as their peers who are economically disadvantaged, disabled, speak little or no English, or are otherwise at risk – will be disproportionately impacted by these proposed rules." A copy of this article is attached hereto as **Exhibit T**.

97. Indeed, according to Respondent Institute's published data, during the 2015-2016 school year, 65 percent of students in SUNY-authorized charter schools, the vast majority of whom are located in New York City, were Black or African American, 26 percent were Hispanic or Latino,

and 75 percent were economically disadvantaged, compared to 58.6 percent statewide.⁴ Clearly, the consequences of the regulations will be profound and far-reaching as they will impede equity in access to quality teachers for such students.

98. Finally, during a recent Joint Budget hearing on Higher Education with both members of the Assembly and Senate present, Assemblywoman Nolan told the SUNY Chancellor that the Assembly takes the view that SUNY did not have the authority to promulgate the challenged regulations. The pertinent part of the SUNY Chancellor's Budget testimony can be viewed at http://nystateassembly.granicus.com/MediaPlayer.php?view_id=8&clip_id=4493; at time stamp 1:46:31.

99. Notwithstanding the public statements and comments opposing the SUNY Regulations by Petitioners Chancellor Rosa, Commissioner Elia and the Board of Regents, SUNY's Deans and Directors, the UFT, and NYSUT, the Assembly and the over 8,600 comments received on the proposed regulations, Respondents adopted the challenged regulations on October 11, 2017 and issued a resolution to publish the regulations in the State Register as final regulations effective December 20, 2017. See, Exhibits G (meeting minutes) and H (Notice of Adoption).

100. Prior to adopting the challenged regulations, however, the Committee substantially revised and amended the proposed regulations by making changes to sections 700.2(o), (r), 700.4(a), (b), (c), (d), (f), 700.5(b) and 700.6(a). See, Exhibit H (Notice of Adoption).

101. The revisions included, *inter alia*, an increase in the number of clock hours of instruction required, the elimination of the minimum requirement that a candidate hold a bachelor's degree or higher (instead the Institute will make a determination as to whether teaching candidate can be admitted into the program), a significant decrease in the number of field experience hours

⁴ See report on Respondent Institute's website at: https://www.suny.edu/about/leadership/board-of-trustees/meetings/webcastdocs/V_Overall%20SUNY%20Score%20analysis.pdf

required (from 100 to 40 clock hours of field experience), new final examination requirements, and the creation of a new intern teaching certificate.

102. Notwithstanding Respondents' own characterization of the changes as "nonsubstantive," as noted above, the revisions were, however, substantial within the meaning of SAPA §102(9) as they do not merely define or clarify text, but materially alter the regulation's purpose, meaning or effect.

103. Therefore, SAPA §202(4-a) required Respondents to publish a Notice of Revised Rule Making with the Department of State and to submit the revised regulations for an additional 30-day public comment period.

104. Since Respondents failed to do either, the challenged regulations were promulgated in violation of the requirements of SAPA and should be vacated, declared null and void and their use enjoined.

AS AND FOR A FIRST CAUSE OF ACTION

105. Petitioners repeat and reallege all of the allegations in paragraphs 1 through 104, above.

106. The challenged regulations are invalid because they conflict with existing law.

107. Both the Charter Schools Act and UPK law explicitly mandate that teachers in charter schools operating in New York meet specific requirements for employment, with limited exception. That is, they must be State certified pursuant to the requirements applicable to every other public school teacher in the State. See Education Law §§2854(3)(a-1); 3602-ee(8) and (12).

108. The challenged regulations, however, provide for a means of employment by teachers in charter schools for which the SUNY Board of Trustees is the charter entity with far less stringent requirements than teachers employed in other public schools under Part 80 of the

Commissioner's Regulations (per Education Law §3004(1) and applicable to charter schools pursuant to Education Law §§2854(3)(a-1); 3602-cc(8) and (12)).

109. The Charter Schools Act contains express statutory language (§2854(1)(a)) which states that to the extent any provision of the Charter Schools Act is inconsistent with any other State or local law, rule or regulation, the provisions of Charter Schools Act shall govern and be controlling.

110. Accordingly, since the challenged regulations directly conflict with the Charter Schools Act and UPK law, they should be declared invalid, annulled, vacated and their use enjoined.

AS AND FOR A SECOND CAUSE OF ACTION

111. Petitioners repeat and reallege all of the allegations in paragraphs 1 through 110, above.

112. The regulations are also in excess of Respondents' authority for the additional reasons that they exceed the scope of power delegated to the Committee by the Legislature and intrude upon the lawful authority of Petitioners.

113. The Legislature did not delegate to the Committee the authority to enact regulations concerning teacher certification or intrude upon the jurisdiction of Petitioners.

114. Rather, Education Law §355(2-a) is an enabling statute through which the Legislature provided the Committee only with the limited authority to promulgate regulations with respect to "governance, structure and operations" of charter schools for which the SUNY Board of Trustees is the charter entity.

115. The challenged regulations do not relate to the governance, structure and operations of charter schools and instead create a less stringent means for teachers to be employed in charter schools authorized by the SUNY Board of Trustees without holding a State certification.

116. Not only did the SUNY Committee exceed its limited statutory authority in Education Law §355(2-a) by promulgating regulations relating to teacher certification in charter schools authorized by SUNY, but, as set forth above, the regulations also directly conflict with the provisions of the Charter Schools Act, which the Legislature has expressly provided supersedes any inconsistent provision of law or regulation, and the UPK law.

117. Moreover, through the New York State Constitution and various provisions of Education Law, including §§3004(1) and §2854(3)(a-1), Petitioners have been delegated the exclusive responsibility to prescribe and approve regulations governing the examination and certification of teachers employed in public schools of the State, including charter schools, and to provide teachers who meet those requirements a State certification, which is transferrable to all public schools in this State, including charter schools.

118. As a result, Respondents engaged in impermissible policy making and have exceeded the limited authority delegated to the Committee by the Legislature.

119. Having exceeded the authority granted to them by Education Law §355(2-a) and having intruded upon the lawful authority of Petitioners when they adopted the challenged regulations, Respondents violated the separation of powers doctrine such that the challenged regulations should be declared unlawful, annulled and vacated and their use enjoined.

AS AND FOR A THIRD CAUSE OF ACTION

120. Petitioners repeat and reallege all of the allegations in paragraphs 1 through 119, above.

121. When they adopted the challenged regulations, Respondents violated SAPA and did not substantially comply therewith.

122. SAPA §202(4-a) provides as follows:

4-a. Notice of revised rule making. (a) Except with respect to any rule defined in subparagraph (ii) of paragraph (a) of subdivision two of section

one hundred two of this chapter, prior to the adoption of a rule, an agency shall submit a notice of revised rule making to the secretary of state for publication in the state register for any proposed rule which contains a substantial revision. The public shall be afforded an opportunity to submit comments on the revised text of a proposed rule. Unless a different time is specified in statute, the notice of revised rule making must appear in the state register at least thirty days prior to the adoption of the rule. The notice of revised rule making shall indicate the last date for submission of comments on the revised text of the proposed rule, which, unless a different time is specified in statute, shall be not less than thirty days after the date of publication of such notice.

123. In turn, SAPA §102(9) provides as follows:

“Substantial revision” means any addition, deletion or other change in the text of a rule proposed for adoption, which materially alters its purpose, meaning or effect, but shall not include any change which merely defines or clarifies such text and does not materially alter its purpose, meaning or effect. To determine if the revised text of a proposed rule contains a substantial revision, the revised text shall be compared to the text of the rule for which a notice of proposed rule making was published in the state register; provided, however, if a notice of revised rule making was previously published in the state register, the revised text shall be compared to the revised text for which the most recent notice of revised rule making was published.

124. As set forth above, Respondents received over 8,600 comments on the proposed regulations and as a result, the Committee substantially revised, within the meaning of SAPA §102(9), the proposed regulations from the form in which they were initially set out for public comment as compared with the form in which they were finally adopted without filing a Notice of Revised Rulemaking and/or submitting the revised regulations for an additional 30-day public comment period as required by SAPA §202(4-a).

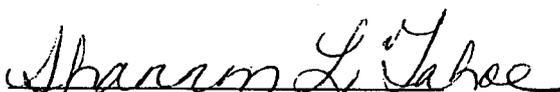
125. Because the challenged regulations at issue were not promulgated in accordance with SAPA §202(4-a), they are therefore null and void and should be vacated, and their use enjoined.

WHEREFORE, the Petitioners-Plaintiffs respectfully request that this Court issue an order and judgment in their favor and against the Defendants-Respondents pursuant to CPLR §§3001 and 3017, CPLR Articles 63 and 78, and SAPA §202(8):

- a. On the First Cause of Action, vacating, annulling, declaring invalid and enjoining the challenged regulations on the grounds that they are impermissibly in conflict with and violate the Charter Schools Act and other provisions of the Education Law, and are therefore irrational, arbitrary and capricious;
- b. On the Second Cause of Action, vacating, annulling, declaring unlawful and enjoining the challenged regulations on the grounds that they were adopted in excess of Respondents' limited delegated authority and in violation of the separation of powers doctrine of the New York Constitution, intrude upon the lawful jurisdiction of the Petitioners and are therefore irrational, arbitrary and capricious;
- c. On the Third Cause of Action, vacating, annulling, declaring unlawful and enjoining the challenged regulations on the grounds that they were adopted in violation of lawful procedure and not in substantial compliance with the State Administrative Procedure Act; and
- d. Granting Petitioners-Plaintiffs such other, further and different relief as may be just and proper, together with reasonable costs and disbursements.

Dated: Albany, New York
February 8, 2018

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