Hensley v Williamsville Cent. Sch. Dist.
2021 NY Slip Op 31959(U)
April 28, 2021
Supreme Court, Erie County
Docket Number: Index No. 804182/2021
Judge: Emilio Colaiacovo
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STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

DANA HENSLEY, on behalf of her minor children and on behalf of all others similarly situated;
DANIELLE MACAULAY, on behalf of her minor children and on behalf of all others similarly situated;
JILL LICATA, on behalf of her minor children and on behalf of all others similarly situated;
MARK SPEYER, on behalf of his minor children and on behalf of all others similarly situated;
CHARLES MACLAY, on behalf of his minor children and on behalf of all others similarly situated;
CLARISSA ZADOR; on behalf of her minor child and on behalf of all others similarly situated;
PARAG PARIKH, on behalf of his minor children and on behalf of all others similarly situated,

Index#: 804182/2021

Petitioners/Plaintiffs,

For Judgment Pursuant to Article 78 of the CPLR, Article XI, § 1 of the New York State Constitution, and/or Article I, § 11 of the New York State Constitution.

Decision & Order

WILLIAMSVILLE CENTRAL SCHOOL DISTRICT; BOARD OF EDUCATION OF THE WILLIAMSVILLE CENTRAL SCHOOL DISTRICT; ANDREW M. CUOMO, GOVERNOR OF NEW YORK; NEW YORK STATE DEPARTMENT OF HEALTH; and NEW YORK STATE EDUCATION DEPARTMENT,

Respondents/Defendants.

ROBERT DINERO, on behalf of his minor children and on behalf of all others similarly situated,

Petitioner/Plaintiff,

For Judgment Pursuant to Article 78 of the CPLR, Article XI, § 1 of the New York State Constitution, and/or Article I, § 11 of the New York State Constitution.

v.

Index #: 804310/2021

ORCHARD PARK CENTRAL SCHOOL DISTRICT; BOARD OF EDUCATION OF THE ORCHARD PARK CENTRAL SCHOOL DISTRICT; ANDREW M. CUOMO, GOVERNOR OF NEW YORK; NEW YORK STATE DEPARTMENT OF HEALTH; and NEW YORK STATE EDUCATION DEPARTMENT

Respondents/Defendants

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Colaiacovo, J.

Petitioners commenced these two (2) special proceedings by filing a petition pursuant to Article 78 of the CPLR[1] Petitioners seek, *inter alia*, a judgment declaring the Hybrid/Remote Learning Model used by Respondent Williamsville Central School District (hereinafter "Williamsville") and Respondent Orchard Park Central School District (hereinafter "Orchard Park") to be violative of the New York State Constitution, the New York State Education Law, and declaring the model to be arbitrary and capricious. In the alternative, Petitioners seek declaratory judgment that the Hybrid/Remote Learning model is illegal. In addition to the relief they seek, Petitioners request a preliminary

[1] These two (2) proceedings are not joined nor were they consolidated. However, because of the similarities of these proceedings and their related relief, the Court has, with the consent of counsel, issued one decision.

injunction to restrain Williamsville and Orchard Park from denying their students in-school instruction five days per week. Williamsville and Orchard Park maintain that they are adhering to New York State Health and Education guidance governing the resumption of in-person learning. Respondents Governor Andrew Cuomo, New York State Department of Health, and the New York State Education Department (hereinafter "State Respondents") insist that the guidance is necessary to address the ongoing challenges posed by the COVID-19 pandemic. After initially denying a request for a temporary restraining order, the Court directed the State Respondents to issue updated, in-person education guidance. Thereafter, Williamsville and Orchard Park were directed to produce revised plans to return school children to in-person learning. A hearing was subsequently held to determine whether a preliminary injunction is justified. The Court's decision is as follows.

Statement of Facts and Procedural History

The first diagnosed cases of Severe Acute Respiratory Syndrome Coronvavirus-2 (SARS-CoV-2) (hereinafter referred to as "coronavirus" or "COVID") became known in late January 2020. In February 2020, the Centers for Disease Control and Prevention (hereinafter "CDC"), began to issue warnings about a nation-wide surge of the virus and provided guidance to schools about

possible closures and recommended planning for "teleschools".[2] The first schools in the nation began to close in late February 2020 and shifted to virtual distance learning.

On the advice of the Erie County Executive, all school districts in Erie County, New York closed from March 15, 2020 to April 20, 2020. This closure was subsequently extended. Thereafter, on May 7, 2020, Governor Andrew Cuomo issued Executive Order §202.28 which effectively closed schools across the State for the remainder of the 2019-2020 school year. This was later extended again by Executive Order on May 28, 2020, June 26, 2020 and modified again on September 4, 2020.[3]

Upon closing, school districts were challenged on how to educate their students for the remainder of the 2019-2020 school year. Approaches varied from school district to school district, and, often, from school to school. Some adopted a virtual learning platform of daily instruction. Others simply provided "packets" of schoolwork to students, supplemented by weekly virtual interaction between teachers and pupils. School districts across the country were confronted with the problem of providing technology to support virtual learning

[2] "Schools Should Prepare for Coronavirus Outbreaks, CDC Officials Warn", EducationWeek, February 20, 2020. Schools Should Prepare for Coronavirus Outbreaks, CDC Officials Warn (edweek.org)

[3] See Executive Orders §202.28 (May 7, 2020), §202.34 (May 28, 2020), §202.45 (June 26, 2020), and §202.60 (September 4, 2020).

to students as well as delivering essential services, such as food service and special education programs.

For the 2020-2021 school year, each school district developed and implemented different approaches to teaching, many of which included a "hybrid" style of learning that included both in-person and remote learning options. In adopting new plans for learning, parents found it necessary to incorporate and understand new educational concepts. These included:

- *In-person*: in-school instruction when students are physically in school
- *Synchronous learning*: direct instruction and engagement facilitated by the teacher/educator remotely, happening in real time
- *Asynchronous learning*: digital instructional materials and resources provided by the teacher/educator to students for their individual access (e.g., recorded and video-based lessons); can be revisited on multiple opportunities if desired or needed
- *Independent student practice*: meaningful engagement of students as they apply the skills and strategies gained and demonstrate understanding of their learning; also includes engagement with resources and activities not requiring a device
- *Support for students and parents*: opportunities for students and parents to interact directly with the teacher for any additional assistance needed or to ask questions

See Williamsville and Orchard Park Petitions, "Exhibit F".

Williamsville and Orchard Park each developed and implemented different models when they resumed classes in Fall 2020.

Williamsville Central School District

Williamsville adopted a hybrid model that divided elementary students (K-4) into four (4) groups. Group A (last names A-L) attended school in-person on Mondays and Tuesdays, were remote on Wednesdays, and engaged in independent learning on Thursdays and Fridays. Group B (last names M-Z), were engaged in independent learning on Mondays and Tuesdays, remote on Wednesdays, and attended in-person Thursday and Friday. Group C, labeled as "English Language Learners", would attend in-person on Monday, Tuesday, Thursday, and Friday. Group D, described as self-contained classes, which include 15:1, 12:1 and 8:1 student-to-teacher ratios, attended school in-person Monday through Friday. Id.

Remote learning was separated into synchronous learning (direct instruction between a teacher and student) and asynchronous learning (instructional materials provided for the student to review and complete independently). In its initial plan, Williamsville provided several examples of weekly schedules for different grades. For the "remote online learning option" for grades K-4, K-1 would have 1 hour of synchronous learning and 2 hours of asynchronous learning for a total of 3 hours. For grades 2-4, students would have 1.5 hours of synchronous learning and 2.5 hours of asynchronous learning for a total of 4 hours. By contrast, in-person learning days would start at 9:00 am and

end at 2:50, or 5 hours and 50 minutes (less 30 minutes for lunch and a 20 minute recess). Id.

Middle school (grades 5-8) and high school (grades 9-12) students had a different schedule. For students in grades 5-12, cohorts were utilized. In this context, a "cohort" is a group of students within a school building who interact only with students within the same group. The goal of "cohorting" is to limit the number of people possibly exposed to COVID. There are two (2) Cohorts, "A" and "B", which are divided by last name. In Cohort A, students receive in-person instruction on Monday and Tuesday, and participate in a "'synchronous experience' with the entire class on Wednesday which allows for office hours with their teachers as well as one on one instruction or support as needed or as scheduled." See Affidavit of Dr. John McKenna, ¶18. In Cohort B, students receive "synchronous" instruction on Thursday and Friday. Cohort B receives "live, concurrent and synchronous remote instruction on Monday and Tuesday, with the same synchronous experience … on Wednesday, ending the week with in-person instruction on Thursday and Friday." Id.

Orchard Park Central School District

Orchard Park adopted a similar hybrid model, with certain distinctions. Like Williamsville, it adopted a synchronous and asynchronous approach to in-person and remote learning. Although slightly more difficult to define, K-3 students attended in-person each day of the week. Grades 4-5 adopted a hybrid

model, using a synchronous and asynchronous cycle. When not physically in school, students utilized an asynchronous schedule that alternated between "indirect learning" and "computer based instructional learning". The synchronous component totaled approximately 1.5 hours of instruction while the asynchronous component totaled approximately 3.5 hours of instruction daily. Grades 6-12 similarly employed a hybrid model, complemented by synchronous and asynchronous learning. See generally Petition, ¶21. Orchard Park provided guidance to its families containing these schedules on August 21, 2020. In it, they included sample daily schedules that demonstrated how the hybrid model would work.[4]

While Williamsville delayed the beginning of the 2020-2021 academic year, each school district has been utilizing its hybrid models for the majority of the academic year without interruption.

On March 19, 2021, the CDC issued new guidance that eased social distancing restrictions. In particular, the updated guidance provided that six (6) feet of distancing between students was no longer required. Instead, the CDC recommended students maintain at least three (3) feet of distance in elementary

[4] "August 21, 2020 OPCSD Parent Forum Summary", COVID-19 and Reopening Information / District Reopening Communications (opschools.org)

schools, regardless of the level of transmission.[5] In middle and high schools, where "mask use is universal and in communities where transmission is low, moderate, or substantial", three (3) feet of social distancing was deemed appropriate. In areas where transmission was high, middle school and high school students were to keep six (6) feet apart, only if cohorting was not possible.

On March 31, 2021, Petitioners commenced these proceedings seeking to invalidate the current hybrid models in favor of a traditional five (5) day, in-person educational experience. Petitioners argued that the current hybrid models violate the New York State Constitution, which, they argue, requires in-person schooling by a competent teacher or instructor. Petitioners maintain that the current hybrid models run afoul of these constitutionally protected rights, as the hybrid models fail to "educate" children in accordance with the State Education Law. Notwithstanding the constitutional arguments raised, Petitioners insist that the State's guidance, which requires social distancing of six (6) feet, to be arbitrary and capricious. Petitioners also argue that the hybrid models themselves are arbitrary and capricious.

[5] "CDC Updates Operational Strategy for K-12 Schools to Reflect New Evidence on Physical Distance in Classrooms", CDC Updates Operational Strategy for K-12 Schools to Reflect New Evidence on Physical Distance in Classrooms | CDC Online Newsroom | CDC, March 19, 2021.

In order to preserve the status quo, the Court denied Petitioners a temporary restraining order. However, in its April 6, 2021 decision, the Court granted an Order to Show Cause which directed Williamsville and Orchard Park to provide revised re-opening plans taking into consideration the CDC's revised guidance. The State Respondents, who had not yet issued new guidelines as the CDC had, were similarly directed to provide updated guidance for full-time in-person learning.

The responding parties having done so, the Court attempted mediation to resolve the dispute. Having been unsuccessful, oral argument regarding the preliminary injunction was held concerning the Williamsville petition on April 23, 2021. A hearing regarding the Orchard Park petition was held on April 27, 2021.

Argument

Williamsville Central School District

Petitioners raise several arguments wherein they insist the current plan of hybrid education is not only unconstitutional, but illegal, and arbitrary and capricious. Petitioners assert that Williamsville's Hybrid/Remote Learning Model violates the New York State Education Law, which requires instruction by a teacher five (5) days a week. More specifically, they insist that Education Law §3204(2)(i) and Education Law §3205(1)(a) requires students to attend full-time instruction to be administered by a competent teacher. Under the current

model, students are given only two days of in-person instruction, one day (Wednesday) with a brief period of remote on-line instruction, and two days of full independent school work conducted at home. See Petitioner's Memorandum of Law, p. 5. Petitioners claim this is inconsistent with the Education Law, which requires in-person learning, five days a week, assisted at all times by a teacher. In addition, Petitioners maintain that learning must occur in a school, as opposed to at home, pursuant to Article XI of the New York State Constitution.

Similarly, Petitioners claim that the Hybrid/Remote Learning model denies students equal protection under the law. Petitioners claim Article XI, §I of the New York Constitution, has been interpreted to mean that "the right of an education …must be available to all on equal terms." Bennett v. City Sch. District of New Rochelle, 114 A.D.2d 58 (2nd Dept. 1985). By depriving students of a full-time teacher and full-time instruction, in adequate facilities, children are denied equal protection under the laws of the state. See Article I, §11 New York State Constitution. Petitioners suggest that by depriving students in-person or full-time instruction for three (3) days a week, Williamsville is failing to provide students an equal opportunity to be educated, which is mandated by the New York State Constitution. Petitioners maintain that attending school for two (2) days per week, remote instruction on Wednesdays with minimal contact with a teacher, and then two (2) additional days with absolutely no instruction from

a teacher hardly constitutes education, which is to be made available on equal terms. Bennett, 114 A.D.2d at 68.

Petitioners also argue that the Hybrid/Remote Learning model is not authorized by any Executive Order. While Executive Order 202.60 closed schools, no further Executive Orders were issued that extended this type of instruction. In fact, Petitioners maintain, that the Governor's Executive Orders expired and subsequently were suspended by a September 4, 2020 amendment to §29-a of the Executive Law. Petitioners cite to two (2) recently decided cases in Erie County, where Justices Paul Wojtaszek and Timothy Walker held that the Governor could not extend "directives" indefinitely. Both Courts concluded that directives extended beyond thirty (30) days were invalid. See Athletes Unleashed, Inc. v. Cuomo, Index #: 815246/2020 (N.Y. Supreme Court, Erie County, February 23, 2021); Gallivan v. Cuomo, Index #: 801046/2021 (N.Y. Supreme Court, Erie County, February 27, 2021). As such, because Executive Order 202.60 had expired, Petitioners aver that "there remains no legal authority for either the NYSDOH or the NYSED Guidelines." See Petitioner's Memorandum of Law, p. 15.

Petitioners also argue that the NYSDOH and NYSED Guidelines which authorize the Hybrid/Remote Learning Model violate Chapter 23 of 2020. Petitioners contend that Williamsville has imposed a highly-restrictive learning model and educational protocols that are not supported by current CDC

guidance. Petitioners maintain that Respondents' insistence to continue six (6) feet of social distancing, when neither the CDC nor available medical and scientific evidence support this position, is arbitrary and capricious. As such, to maintain distancing levels that are inconsistent with national recommendations and other scientific evidence is arbitrary and capricious, which in turn violates the Education Law.

Petitioners also submitted affidavits of six (6) parents of children who attend Williamsville Schools. In his affidavit, Charles MacClay, a parent of two (2) seventeen (17) year old high school students, generally spoke of the "positive impact" of in-person schooling and the "negative effects" his children have suffered for want of a full-time, in-person education. See Affidavit of Charles MacClay, March 28, 2021. Dana Hensley, a parent of three (3) Williamsville students in 3rd, 6th, and 7th grades, lamented the one-half (1/2) hour of education her children receive on Wednesdays, and the emotional and physical decline the Hybrid/Remote Learning model has had on her children. One of her children was diagnosed with clinical depression and other related social deteriorations, which she attributes to the effects of the Hybrid model. Her other children have exhibited behavioral outbursts, self-described "meltdowns", and an overall decrease in happiness, confidence, and academic performance. See Affidavit of Dana Hensley, March 28, 2021. Danielle Macaulay, a parent of an eight (8) and twelve (12) year old, decried the limited education her children receive. In her

affidavit she states, "On Mondays and Tuesdays, I spend four hours per day attempting to educate B.I.M. On these days B.I.M. receives a list of assignments from his teacher, but no instruction." She detailed the effect the hybrid model has had on her children's social interaction with friends as well as the dramatic decline in their academic performance. See Affidavit of Danielle Macaulay, March 29, 2021. Mark Speyer, a father of a seven (7) and ten (10) year old, suffers from brain cancer and shoulders the responsibilities of supervising his children's education along with his wife, who is forced to work from home. His one child was diagnosed with ADHD and has a 504 Plan for another medical condition. That child was found to have engaged in self-harming behavior, which he described as "not normal". On the advice of the child's psychologist and pediatrician, his child was enrolled in a full-time day service so that their needs could be professionally attended to. Due to being behind, he and his wife were forced to hire a tutor for his other child, who previously not had any educational problems. He attributes these problems and experiences to the lack of full-time, in-person learning. See Affidavit of Mark Speyer, March 27, 2021. Clarissa Zador, a single parent, was forced, at great expense, to hire a tutor for her seven (7) year old, in order to supplement the education her child was not receiving due to the Hybrid/Remote Learning model. She lamented that her child has been "overcome with great sadness" for want of her friends and a normal educational

routine. She "has no doubt" that her child would be doing well, but for the Hybrid model. See Affidavit of Clarissa Zador, March 29, 2021.

In response, Williamsville argues that it cannot be held liable for educational malpractice. By alleging that Williamsville has denied students their right to "quality" education, Petitioners ignore long-established precedent that immunizes school districts from such causes of action. See Sitomer v. Half Hollow Hills School Dist., 133 A.D.2d 748 (2nd Dept. 1987). Williamsville contends that "causes of action sounding in educational negligence or malpractice 'should not, as a matter of public policy, be entertained by the courts of this New York State'." See Williamsville's Memorandum of Law, p. 6; Hoffman v. Bd. of Educ., 49 N.Y.2d 121 (1979). Williamsville argues Courts should not insert themselves in broader educational policies that, in effect, sit in review of the "day to day" decisions made by educators.

Williamsville also argues that the Petition is untimely, as the action was commenced well-outside the four (4) month statute of limitations. A cause of action from Executive Order 202.80, which Petitioners claim expired, should have been made within four (4) months from its date of expiration, or October 4, 2020. Also, Williamsville maintains that Petitioners failed to exhaust their administrative remedies and also failed to file a notice of claim.

Lastly, Williamsville contends that their Hybrid/Remote Learning model is far from arbitrary or capricious. They insist that their guidelines are consistent

with the State's guidance for safe reopening of schools and that such decisions are protected discretionary decisions. Matter of Curry v. New York State Educ. Dept., 163 A.D.3d 1327 (3rd Dept. 2018). Williamsville maintains that there is a sound basis in designing and implementing its Hybrid model and that Petitioners fail to meet their high burden, but instead merely assert allegations and speculative assertions. Matter of Town of Marilla v. Travis, 151 A.D.3d 1588 (4th Dept. 2017).

In his affidavit, Dr. John McKenna, the Acting Superintendent of Williamsville, contends that the Hybrid/Remote Learning Model is consistent with approved state guidelines and that "nowhere" in the reopening guidance is full-time, in-person instruction required. See Affidavit of Dr. John McKenna, ¶11. According to Dr. McKenna, the plan adopted accounted for the seriousness of the pandemic, the recommendations of the State, and the many logistical problems, such as transportation and meal service, school districts encountered. Dr. McKenna described the thorough process used in designing the model, which began in July 2020 with a committee comprised of educators, administrators, parents, and community members. Id. at ¶15. Dr. McKenna insists that the model, which incorporates synchronous and asynchronous learning, allows children to attend school, and permits the district to "accomplish a deeper cleaning" of its facilities. Id. at ¶18. Pointing out that numerous school districts

across the state use a similar learning model, Dr. McKenna believes that this is the safest way to instruct students.

State Respondents claim that Petitioners only present anecdotal evidence to support their argument that their children have been irreparably harmed, both emotionally and academically, from the use of Hybrid/Remote Learning models. Further, the reopening guidelines provide safe options to school districts to resume learning opportunities for students. They maintain that these guidelines have contributed to limiting the spread of COVID in schools.

In opposing the Petitioners' relief, the State Respondents insist that the Petition is defective, as necessary parties, namely the teacher's unions, were not named. Further, the State Respondents suggest that Petitioners are not entitled to the relief they seek as they have failed to show how the current guidelines are arbitrary and capricious. To that end, the Attorney General maintains that Petitioners have failed to satisfy their high burden, as they have failed to show any urgency in bringing this Petition nor have they demonstrated any entitlement to injunctive relief. Instead, they portray Petitioners as having acted "irrationally" and "without any basis". See State Respondents Memorandum of Law, p. 15.

State Respondents rely on ancient precedent that purports to convey unlimited and "broad authority" to State officials when using their powers to impose public health and safety measures in response to a pandemic. See

Jacobson v. Massachusetts, 197 U.S. 11 (1905). The State Respondents maintain that to adopt three (3) feet of social distancing instead of six (6) would greatly disturb the status quo and that simple conflicting opinions of experts does not render a determination to be arbitrary and capricious. Instead, they argue, there exists a "rational basis" for the State to impose its guidelines that school districts must follow.

Lastly, State Respondents insist that the constitutional challenges raised by Petitioner are meritless. While conceding the Constitution does provide a right to education, the State Respondents responds that it is not restricted to in-person learning. Indeed, State Respondents contend that the Hybrid models are consistent with long-standing conventions used in educating children. To maintain the education neglect claim, Petitioners must demonstrate deprivation of a sound basic education with the cause being attributable to the State. See NYCLU v. State, 4 N.Y.3d 175 (2005). State Respondents argue that Petitioners have failed to meet this burden. Allegations of fewer assignments, remote learning, and less direct instruction with a teacher do not rise to the levels that would otherwise entitle Petitioners to the relief they now seek. The State Respondents maintain that parents have "no constitutional right to provide their children with education unfettered by reasonable government regulation." Immediato v. Rye Neck Sch. Dist., 73 F.3d 454 (2nd Cir. 1996). According to State Respondents, there is no fundamental parental right to dictate to a school

district, especially in a pandemic, whether classes should be done in-person or remotely. See State Respondents Memorandum of Law, p. 27.

Orchard Park Central School District

This Court need not repeat the Petitioner's argument as it relates to the Orchard Park Central School District, as most of the arguments are the same as those advanced in the Williamsville matter. Conceding that the Hybrid model used by Orchard Park is different than the one used by Williamsville, the legal arguments offered by Petitioners are essentially the same.

In his affidavit, the Petitioner, Robert Dinero, a parent of a 9th grader and 11th grader, states that his children receive in-person learning on Mondays, Wednesdays, and Fridays in Week 1 and on Tuesdays and Thursdays in Week 2. During Week 1, on Tuesday and Thursday, his children receive no instruction whatsoever other than work assignments to be completed independently. During Week 2, on Monday, Wednesday and Friday, his children receive no instruction other than the independent assignments. See Affidavit of Robert Dinero, ¶¶8 and 9. His children, which he describes as "A" students, have seen their grades drop precipitously. One child has a 66% in Algebra and 44% in Physics, his other child an 80% in English and 78% in Algebra. Id. at ¶13. He attributes this directly to the Hybrid/Remote Learning Model. As a result of not attending school on a full-time basis, his children are becoming listless and depressed. According to

their father, his children are less happy and confident, which he ascribes to being deprived of a normal and routine educational experience for more than a year.

In response, Orchard Park maintains that the Court should not exercise its jurisdiction over this matter because the control and management of educational affairs is vested with the Board of Regents and Commissioner of Education. See Orchard Park Memorandum of Law, p. 2. Orchard Park argues that Petitioners have no standing to challenge the delivery of educational services during the COVID-19 pandemic. Further, nothing adopted in the Orchard Park guidelines to adopt a Hybrid/Remote Learning model is arbitrary or capricious. Instead, like the Williamsville arguments, the guidelines meet the rational basis standard. Unlike the Petitioner's self-serving conclusions and beliefs on how he believes his children are to be educated, Orchard Park contends that the policies adopted meet and satisfy the general well-being of all students.

Orchard Park claims that the State's current social distancing guidelines and requirements that were set forth in its initial re-opening plans "precludes Orchard Park from offering in-person education to all of its students because Orchard Park's classrooms are too small to afford six feet of social distancing between every student in a class." See Affidavit of Matthew McGarrity, ¶¶23-29. Referencing local contact tracing, Superintendent McGarrity maintains that the Erie County Department of Health identifies close contacts as anyone who

was within six (6) feet of an individual who tested positive. As such, Orchard Park cannot accommodate anything less than six (6) feet of distancing.

Further, Orchard Park believes that Petitioner's constitutional arguments are without merit. The instructional Hybrid model used by Orchard Park "clearly meets the minimum constitutional standard set by the Court of Appeals, and the guidance issued by NYSED in connection with reopening schools." See Orchard Park Memorandum of Law, pp. 10-11.

Orchard Park points to a lack of any competent evidence that children lack an adequate learning environment at home or that they have been subject to disparate treatment compared to other students. Id.

Lastly, Orchard Park maintains that following guidance issued by the State's Department of Health cannot be considered arbitrary or capricious. Orchard Park argues that they could not resolve issues concerning transportation, food service, and gym and music classes if they used less than six (6) feet of distancing. See McGarrity Affidavit, ¶¶23-32. While citing to the purchase of $227,000 worth of polycarbonate barriers, the Superintendent insists that these would be insufficient for the entire district. Citing numerous logistical hurdles to overcome, Orchard Park insists that it cannot discard the current Hybrid/Remote Learning model. Orchard Park insists that it would have to "completely revamp" its instructional models, including teacher, staff, and

student assignments, in order to comply with guidelines that are different from those issued by the State. Id. at ¶23.

In their opposition, the State Respondents argue that the relief Petitioner seeks would represent a drastic departure from the status quo, which would jeopardize the health of students and staff. Forcing a rushed and hectic return, especially as the school calendar nears its end, would make parents uncomfortable and put school districts in an impossible position. See State Respondents Memorandum of Law, p. 5. Making many of the same arguments it did in opposing the Petition in the Williamsville matter, the State Respondents again reference the State's apparent unbridled authority when "they undertake to act in areas fraught with medical and scientific uncertainties." South Bay Pentecostal Church v. Newsom, ___ U.S.___, 140 S.Ct. 1613 (2020).

As they did in the Williamsville matter, the State Respondents argue that attacks on the Hybrid/Remote Learning Models under the Education Law lack merit. The Attorney General maintains there is no "right" to in-person instruction five days a week during a pandemic. Moreover, Respondents contend there is nothing unconstitutional or disparate in implementing the Hybrid models. In addition, State Respondents insist that Executive Order 202.60 was properly extended beyond its initial 30-day period and therefore Petitioner's interpretation of Executive Law §29-a is misplaced.

Lastly, State Respondents claim that the Department of Health's social distancing guidelines are not arbitrary or capricious and to alter the guidelines based on the Petitioner's arguments, would "upend the daily routine of thousands of staff, parents, and students in Orchard Park." See State Respondents Memorandum of Law, p. 21. The State Respondents insist that to grant the relief requested would do a great disservice to the general public and would limit the State's use of its powers. See generally Eastview Mall, LLC v. Grace Holmes, Inc., 182 A.D.3d 1057 (4th Dept. 2020); Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7 (2008).

Decision

The Court heard argument on whether to grant a Preliminary Injunction on April 23, 2021 for the Williamsville matter and April 27, 2021 for the Orchard Park matter.

The limited issue before the Court is whether Petitioners are entitled to a preliminary injunction. More specifically, Petitioners seek injunctive relief to restrain the Williamsville and Orchard Park from adhering to social distancing guidelines for middle school and high school students they maintain are arbitrary and capricious. In addition to maintaining that students should receive full-time instruction, five days a week supervised by a teacher at all times, and that the

Governor lacked the necessary authority under his Executive Orders to issue such directives, Petitioners claim that the preliminary injunction would return matters to the way they existed before COVID-19 and the policies and directives that resulted in the Hybrid/Remote Learning models.

On a motion for a preliminary injunction, the moving party must demonstrate by clear and convincing evidence a likelihood of ultimate success on the merits, irreparable injury if the injunction were not granted, and a balancing of equities in favor of granting the injunction. Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 N.Y.3d 839 (2005); Aetna Ins. Co. v. Capasso, 75 N.Y.2d 860 (1990). If any one of these three requirements are not satisfied, the motion must be denied. Faberge Intern., Inc. v. Di Pino, 109 A.D.2d 235 (1st Dep't. 1985). An injunction is a provisional remedy to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual. However, it is not to determine the ultimate rights of the parties. As such, absent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief sought in the complaint. Reichman v. Reichman, 88 A.D.3d 680, (2nd Dep't. 2011); SHS Baisley, LLC v. Res Land, Inc., 18 A.D.3d 727 (2nd Dep't. 2005). In addition, preliminary injunctions should not be granted absent extraordinary or unique circumstances or where the final judgment may otherwise fail to afford complete relief. SHS Baisley, LLC v. Res Land, Inc., 18 A.D.3d at 727, supra. However, the decision whether to grant or deny a

preliminary injunction is within the sound discretion of the Court. Masjid Usman, Inc. v. Beech 140, LLC, 68 A.D.3d 942 (2nd Dep't. 2009).

Here, the Court must evaluate the preliminary injunctive standard in the context of the requirements under Article 78 of the CPLR. Article 78 of the CPLR is the main procedural vehicle to review and challenge administrative action in New York. On judicial review of an administrative action under CPLR Article 78, courts must uphold the administrative exercise of discretion unless it has "no rational basis" or the action is "arbitrary and capricious." Matter of Pell v. Board of Ed. Union Free School District, 34 N.Y.2d 222 (1974). "The arbitrary and capricious test chiefly relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." Id. at 231; See also Jackson v. New York State Urban Dev Corp., 67 N.Y.2d 400 (1986). Rationality is the key in determining whether an action is arbitrary and capricious or an abuse of discretion. Matter of Pell v. Board of Education, 34 N.Y.2d at 231. The Court's function is completed on finding that a rational basis supports the administrative determination. See Howard v. Wyman, 28 N.Y.2d 434 (1971). "Where the administrative interpretation is founded on a rational basis, that interpretation should be affirmed even if the court might have come to a different conclusion." Mid-State Management Corp. v. New York City Conciliation and Appeals Board,

112 A.D.2d 72 (1st Dep't. 1985) aff'd 66 N.Y.2d 1032 (1985); Matter of Savetsky v. Zoning Bd. of Appeals of Southampton, 5 A.D.3d 779 (2d Dep't. 2004).

It is without question that the Petition is sufficient as a matter of law as the allegations must be construed favorably to the Petitioner. Gray v. Canisius College of Buffalo, 76 A.D.2d 30 (4th Dept. 1980); Emray Realty Corp. v Stoute, 157 N.Y.S.2d 457 (N.Y. Sup. Ct. 1956). Petitioners have appropriately alleged the necessary factual and legal arguments to maintain its Article 78 causes of action. However, does this entitle the Petitioners to a preliminary injunction?

It is well-settled that the fundamental purpose of a preliminary injunction is not to give the moving party the relief sought, but to preserve the status quo and prevent irreparable damage until a decision can be reached on the merits. Matter of Heisler v Gingras, 238 A.D.2d 702 (3rd Dept 1997); St. Paul Fire and Marine Insurance Co., v. New York Claims Service, Inc., 308 A.D.2d 347 (1st Dept. 2003). However, what Petitioners seek is to compel certain relief as opposed to enjoin it. Regardless of what Petitioners suggest, the Court cannot return to the *status quo ante*, wishing the COVID-19 pandemic had never occurred. As a result of a once-in-a-life time pandemic, school districts, such as Williamsville and Orchard Park, as well as State Departments of Health across the nation, were forced to design and implement standards and guidelines to protect teachers, children, and adults from a virus we knew little about. Those guidelines, as well as fluctuating infection rates, require this Court to look to the present as opposed

to what happened prior to the pandemic. To that end, in seeking mandamus, the court cannot perform an "end-run" around the Article 78 proceeding, short circuit it, and grant Petitioner the ultimate relief they seek. Matos v. City of New York, 21 A.D.3d 936 (2nd Dept. 2005); Village of Westhampton Beach v. Cayea, 38 A.D.3d 760 (2nd Dept. 2007); Rosa Hair Stylists v Jaber Food Corp., 218 A.D.2d 793 (2nd Dept. 1995).

Contrary to the Respondent's arguments, Petitioners have demonstrated irreparable harm. Petitioner's moving affidavits demonstrate the physical and psychological harm caused by the lasting effects of Hybrid/Remote Learning. While Respondents seek to dismiss the connection, no other logical conclusion can be reached when students, who otherwise have no reported academic, social or behavior issues, now are listless, cannot get out of bed, have been diagnosed with depression, have attempted self-harm, and act aggressively towards others. The issues raised by parents in these affidavits cannot be ignored and they certainly show the irreparable harm they will face if Williamsville and Orchard Park continue to reply on the Hybrid/Remote Learning models. See Hensely et al v. Williamsville, NYSCEF documents #s 12-17, 24, and 29 ; Dinero v. Orchard Park, NYSCEF documents #11. While many have endured the past year of remote learning with the assistance of others, it is undeniable that many children have been left without the necessary support and, as a result, their educational needs have been neglected. Under New York's Constitution, universal education is an

entitlement that each child deserves, regardless of their street, zip code, or station in life. As such, this Court finds that the continuation of the Hybrid/Remote models would, inexorably, further harm children.

Further, the balancing of the equities certainly favors Petitioners. Children are being deprived of a proper education. No one suggests that the Hybrid/Remote Learning model should be sustained. Children require social interaction and instructional reinforcement. The current approach does not accommodate either interest.

That said, as often with these types of applications, the balancing rests on the showing of a likelihood of success on the merits. See CPLR 6301; Matter of Armanida Realty Corp. v. Town of Oyster Bay, 126 A.D.3d 894 (2nd Dept. 2015); M.H. Mandelbaum Orthotic & Prosthetic Servs., Inc. v. Werner, 126 A.D.3d 859 (2nd Dept. 2015). While Petitioner raises important questions as to the propriety of the Governor's Executive Orders and whether the remote model complies with the Education Law, the ultimate issue, for this Court to determine, is whether the guidelines imposed by the Respondent Department of Health are arbitrary and capricious? Are they rational? Are they effective? Does the science bear them out? What is the difference between six (6) feet and three (3) feet of social distancing in a school? Why is six (6) feet of distancing required of middle and high school students required when elementary school students are not required to observe it or, for that matter, no one else is required to heed it

at sporting events, shopping malls, grocery stores, or political victory rallies? Why use county-wide rates when determining a high transmission area as opposed to numbers that are directly traced back to students now in school? If nothing else, these are questions of fact.

If a triable issue of fact is raised in an Article 78 proceeding it must be tried forthwith. See 7804(h), Mulligan v. Lackey, 33 A.D.2d 991 (4th Dep't. 1970). Conflicting affidavits and studies, purportedly by experts, which arrived at different conclusions as to whether three (3) feet or (6) feet of distancing is acceptable distancing for middle and high school students in a "high transmission" area have presented triable issues of fact requiring a hearing to determine whether the School Districts decision to adhere to the State's arguably irrational guidelines is arbitrary and capricious. See generally Nodine v. Board of Trustees, 44 A.D.2d 764 (4th Dep't. 1974).

As such, Petitioner's motion for a preliminary injunction is hereby DENIED. However, a hearing on the merits on the narrow issues presented herein, is hereby ORDERED.

This Court acknowledges that at the very beginning of the pandemic, certain restrictions were necessary in light of the fog of uncertainty posed by the coronavirus. However, much has changed in the last fourteen (14) months and more is known about the virus. Treatments are available and the elevated hospitalization rates lamented about during the nascent stages of the pandemic

have subsided. Now, as more and more people are vaccinated against the virus, quite cautiously, people have attempted to return to normalcy. Yet, schools are the last sanctuary of policies that deter, delay, and discourage, such a return.

While the State and its agencies possess broad powers in times of crisis, they are not unlimited. Adopted policies and "guidelines" have to be rational and pose the least restrictive interruptions. When the product of those powers run afoul of these time-honored understandings, courts possess powers to check those expansions when they have gone unabated for an extended period of time or seem disproportionate to the harm they seek to prevent. While deference should be accorded, some policies cannot continue in perpetuity, especially at the expense of children who require more than the limited opportunities adults seemingly believe they can tolerate. Healthy children, unlike like adults, cannot sit at home captivated by silence or screens. Their mental and physical well-being requires more. When that is endangered, Courts such as these, or elsewhere, must do all that they can to protect them, even if this requires eschewing the broad powers the State always asserts in times of "crisis".

After the hearing, this Court will be in a better position to evaluate whether the guidelines promulgated by the State are appropriate, fair, and reasonable given what we now know about this virus, how it is transmitted, and where it is transmitted. It seems that "zero has become the only tolerable risk level", for schools even as every other business, forum, industry, or profession

is opening up.[6] However, "reasonable policies cannot sprout from unreasonable levels of risk tolerance."[7] More needs to be done by those entrusted with the public's confidence to weigh how much longer these Hybrid/Remote Learning models, which are not a suitable alternative for in-person learning, should continue and how an apparent three (3) foot distance differential is more necessary than returning ALL children to the classroom where they belong.

As such, it is hereby,

ORDERED, that the Petitioner's request for a preliminary injunction is denied without prejudice, and it is further

ORDERED, that a Hearing on the merits for both matters will be held on Friday, May 7, 2021 and Monday, May 10, 2021, if needed; and it is further

ORDERED, that the State Respondents are hereby directed to review, revisit, and, if applicable, update its guidance as to social distancing in middle and high schools no later than April 30, 2021; and it is further

ORDERED, that Respondents' Answers, if not already filed, will be due no less than five (5) days prior to the Hearing date; and it is further

ORDERED, all Motions to Dismiss, if any, shall be made returnable on May 7, 2021, where they will be deemed submitted without argument pursuant to 22 NYCRR §202.8; and it is further

ORDERED, that Petitioner and Respondents shall exchange witness lists no later than May 5, 2021; and it is further

ORDERED, that any Motion to Dismiss shall be filed no later than close of electronic business May 4, 2021 with any replies due no later than close of electronic business May 6, 202.

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[6] Joseph A. Lapado, M.D., "An American Epidemic of Covid Mania", Wall Street Journal, April 20, 2021.
[7] Id.

This shall constitute the Decision and Order of this Court.

Hon. Emilio Colaiacovo, J.S.C.

ENTER
Buffalo, NY
April 28, 2021