UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT

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NICOLE WILLIAMS,

Petitioner,

-against-

BOARD OF EDUCATION OF THE POUGHKEEPSIE CITY SCHOOL DISTRICT, SHEREEN CADER, JOHN SAMMON,

Appeal No. 20750

Respondents.

From actions of the Board of Education restricting teacher transfers and rescinding a directive of the Superintendent regarding transfer of a teacher.

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RESPONDENTS' MEMORANDUM OF LAW

PRELIMINARY STATEMENT

This case is of critical importance to the children being educated in the Poughkeepsie City School District and will have far reaching implications for school districts throughout New York State.

The process by which children are assigned to specific classrooms is painstaking. Great care and concern is dedicated to ensuring that the unique social-emotional and academic needs of children are properly matched with the specific skill set, teaching style and personality of a given teacher. Some children require a teacher who can push them to reach their potential. Others may need to be nurtured through the learning process. For others who are shy or withdrawn, the best teacher match may be a creative spirit with a quick wit. Stated differently, assigning teachers is not a matter of whimsy or caprice; rather, it is a decision that can quite literally be life-altering for the well-being of a young child.

In this regard, the Legislature expressly recognized that the proverbial buck when it comes to classroom assignments stops with the Board of Education. Indeed, the ultimate mission and responsibility of a school board is to make certain that at the granular level children are being taught by those most uniquely suited to meet their needs. A necessary corollary recognized by the Legislature is that in order to effectuate this ultimate responsibility a Superintendent, no matter how strident, cannot arbitrarily transfer teachers over the objection of the Board.

Indeed, the Commissioner has long made clear that a board of education has a "veto" power over superintendent transfers. The Petitioner, however, views herself immune from the Commissioner's decisional law and the state statutes upon which it is based. She is wrong.

To the outside world, Dr. Nicole Williams is a Harvard educated, soft-spoken leader with substantive gravitas in the field of public school education. Inside Poughkeepsie, however, that façade has crumbled. Teacher and administrators have come both to fear Dr. Williams and to realize that behind the educational jargon there is an empty promise and a vengeful streak.

Specific here, Dr. Williams repeatedly attempted to transfer teachers in bad faith without reporting those transfers to the Board. Mere days before the start of school in 2017, Dr. Williams attempted to transfer two of the District's most accomplished elementary school teachers and transformation team members to teach in the middle school setting for the first time in their teaching careers. Dr. Williams was implored by the Board, building principals and teachers to provide an explanation for these transfers. Frontline stakeholders made clear to Dr. Williams that her last-minute transfers would be destructive to the elementary school children who were specifically selected on the basis of educational need to be in these two teachers' classes and their respective challenged elementary school buildings that remain under the State designation for the 2017-2018 school year as focus and priority schools.

No rational substantive explanation has ever been given by Dr. Williams. It appears from the Petition that Dr. Williams is of the view that, as Superintendent and middle school Receiver, she can do as she sees fit, when she sees fit and how she sees fit and that nobody – including the Board – had better dare to question her. That notion is the impetus behind this appeal.

The Commissioner must make clear in this case that a superintendent is in fact answerable to the Board of Education and that a superintendent may not, with impunity, transfer teachers mere days before school to exact retribution for some real or imagined slight. As will be demonstrated below, the Petition fails as a matter of law and the destructive conduct by the Petitioner must be called out by the Commissioner of Education for being just that.

POINT I

THE PETITION FAILS TO STATE A CLAIM

It is well-settled that, in an appeal to the Commissioner, "the petitioner has the burden of demonstrating a clear legal right to the relief requested and the burden of establishing the facts upon which she seeks relief." *Appeal of Dillon*, 43 Ed. Dep't. Rep. 333, 335; Dec. No. 15,010 (2004); 8 N.Y.C.R.R. § 275.10. As will be demonstrated below, Petitioner does not meet this exacting standard.

A. It is The Petitioner who violated Education Law § 2508(5), Not the Board.

The Petitioner's main thesis is that the Board violated Section 2508(5) by placing a moratorium on building to building transfers without prior board approval. That statute provides, in pertinent part, that the Superintendent of a small city school district has the power to "transfer teachers from one school to another or from one grade of the course of study to another grade in such course and to **report immediately such transfers to such board for its consideration and action**."(emphasis added). On June 15, 2017, Dr. Williams, without explanation and over the strenuous objection of two building principals and both teachers in question, swapped two of the District's best elementary school teachers with one another to teach a different grade in a different elementary school building.

In capriciously attempting to effectuate these transfers, Dr. Williams ignored the fact that the two teachers served critical roles on their respective building transformation teams, ignored the fact that the applicable collective bargaining agreement makes teacher preference a priority, and ignored the fact both building principles felt that the transfers would be destructive to the best interests of children in their schools. Dispositively, Dr. Williams failed to report these transfers to the Board, let alone comply with the statutory mandate that she "**immediately**

report" the transfer to the Board for "its consideration and action." *See* Watson Aff. at ¶ 27. Dr. William's claim to the contrary (Williams Reply Aff. at ¶ 11) is unavailing. *See Appeal of Coleman*, Dec. No. 14,845 (2003)("The parties present conflicting statements and, on the record before me, I find that petitioners' statements and affidavits are effectively countered by respondents' statements and affidavits, and the proof is therefore placed in equipoise. Since petitioners have the burden of establishing the facts upon which they seek relief ... I find that petitioners have failed to carry their burden of proof and their allegations must be dismissed.")(citations omitted).[1]

The newly elected Board was informed by someone other than Dr. Williams that transfers had taken placed. Consequently, on July 14, 2017, it placed a temporary moratorium on building to building transfers. This was done so that the Board could exercise its due diligence in performing its statutory obligations under Section 2508 and its fiduciary duty to the children it serves. The Board then directed Dr. William to give an explanation as to the reasons for the transfers. *See* Watson Aff. at Exhbit "A." The Board specifically noted:

> If there are legitimate factually supported reasons for the transfers, the Board will consider them in the best interests of our students. But those reasons **must** be clearly and thoroughly provided and substantiated in **complete facts**.

Id. (emphasis in the original). Dr. Williams refused to provide further information to the Board to explain the transfers. Instead, she appealed to the Commissioner to have the Board declared irrelevant. Indeed, Dr. Williams is quite proud of the fact that four of the six teachers transferred by her remain in their transferred positons despite a September 1, 2017 directive from the Board

[1] Dr. Williams makes the general claim that the reported transfers to the Board were made in "June 2017." *See* Williams Aff. at ¶ 11. Most telling, Dr. Williams fails to identify in which of the six board meetings in June she made this alleged report and what she specifically reported. She does not attest that she gave the actual names of the teachers, schools involved, principal objections and the specific reasons for the transfers. It is noteworthy that Dr. Williams is prolific as sending emails to the Board. Yet, she has produced no written report from June informing the Board of the transfers.

disapproving of and invalidating the transfers. It is noteworthy that Dr. Williams sought to bring Ms. Cader up on Section 3020-a charges for complying with the Board directive yet unilaterally declaring herself immune from Board directives. In other words, Dr. Williams has taken it upon herself to write the Board's rights that are expressly stated in Education Law § 2508 out of the statute. The Commissioner cannot allow this to stand.

Dr. Williams argues that her transfer power is absolute. *See* Williams Mem at 5. That has never been the law as against the board of education. In *The Matter of Jo-Elisabeth Woicik*, 2 Ed Dept. Rep 171 (1962), the Commissioner made clear:

> It has been held on numerous occasions by the Commissioner that the Superintendent of Schools (**subject, of course, to the veto of the Board of Education**) has the absolute power to transfer teachers between schools, in the absence of a showing of **malice, bad faith, gross error or prejudice** and the Commissioner will not substitute his judgment for that of the Superintendent of Schools and the Board of Education in such matters. (emphasis added).

Dr. Williams is asking the Commissioner to gut the Board's veto power and substitute her judgment for that of the Board. Throughout the Education Law, power has been divided between the Board and Superintendent so that they ultimately act in concert. For example, appointment of educators, termination of educators during the probationary term, granting of tenure, and even juul agreements. In no part of the Education Law, however, is the superintendent granted absolute power. Everything is ultimately reviewable by the Board of Education and the Commissioner. This case is no different.

Moreover, the Superintendent's transfer authority is circumscribed by the CBA. *See In re Steuben-Allegany Bd. of Coop. Educational Services*, 153 Mis.2d 414, 581 N.Y.S.2d 973 (Sup. Ct. Steuben County 1990). Here, the CBA expressly makes a teacher's wishes a primary factor.

See Sammon Aff. at Exhibit "B." There is no dispute that Dr. Williams ran roughshod over the teachers' wishes.

Dr. Williams nonetheless opines that the flaw in the Board's moratorium is that the Board cannot proactively protect its students and staff, but must instead wait until the transfer has been effectuated. The law does not, however, permit form to be exalted over substance. *See People v. Sapp*, 130 Misc.2d 90, 494 N.Y.S. 2d 980 (Sup.Ct. N.Y. Cty. 1985) ("To interpret the statute,... strictly as defendant wishes, would be to exalt form over substance and would allow a calculated strategy to subvert the intention of the statute.); *Vickers v. Home Federal Sav. & Loan Asso.*, 87 Misc. 2d 880386 N.Y.S.2d 291 (Sup.Ct Monroe Cty., 1976)("Clearly, this contemplated authorization for the maintenance of such an action even though a statement expressly authorizing the same may not be set forth in *haec verbae*. To require such a predicate verbalistic ritual would be exalting form over substance.")

Under the Petitioner's reasoning, where, as here, the Board learns that the Superintendent has made transfers without reporting them to the Board, the Board is impotent to do anything about it. Instead, under Dr. Williams' view, the Board must hope that transferred teacher will somehow summon the courage to inform the Board at the risk of retaliation by the Superintendent. Put simply, since Dr. Williams failed to comply with the statute, she cannot be heard to complain that the Board executed its statutory responsibility to protect its students and staff. As held by the Commissioner:

> It is true that under the provisions of section 2516 (formerly section 870) of the Education Law the superintendent of the schools is given specific power to transfer teachers and other members of the teaching and supervising staff. Boards of education are, however, the employing authority and have general jurisdiction and supervision over the maintenance of the whole system. It was unnecessary for the Legislature to accord specific authority to a board of education to make transfers because such

> power is inherent in the jurisdiction vested by statute in the board. It was necessary on the other hand for the Legislature to accord such power to the superintendent of schools because without it he would not have the authority so to do and it would be questionable as to whether the board could delegate to him such authority. **However, the statute specifically prescribes that even his transfers are subject to review by the board of education**.

Matter of Broderick, 68 State Dept. Rep. 28 (1947)(emphasis added).

Dr. Williams' conduct in transferring teachers without giving notice to the Board and a cogent explanation violates the Board's rights under the Education Law. Her appeal must be dismissed.

B. The transfers of Mr. Sammon and Ms. Cader were "motivated by malice, bad faith, gross error, prejudice or retaliation."

In opposition to the Petition, the District submitted the Affidavits of Andrea Moriarty, Jason Gerard, John Sammon, and Shereen Cader. Significantly, Ms. Moriarty and Mr. Gerard are not parties to this appeal and therefore have no motivation to lie. Mr. Gerard, in fact, is a probationary principal who quite literally put his chance at tenure at risk by submitting an affidavit challenging Dr. Williams. These affidavits all make clear that Dr. Williams transfers of Ms. Cader and Mr. Sammon were destructive of the education of young school children who were specifically selected to be their classes and gave no substantive educational explanation for doing so.

It is plain that these transfers were done in bad faith. They were done mere days before the start of school making it impossible for Ms. Cader and Mr. Sammon to have adequately prepared to teach a new curriculum. Mr. Sammon and Ms. Cader were both stripped of being on their respective building transformation teams. Dr. Williams refused to provide Mr. Sammon, Ms. Cader, Ms. Moriarty, Mr. Gerard and the Board with the real educational reasons for the transfers. **Dr. Williams failed to inform the Board that the principals objected to the**

transfers. Mr. Sammon and Ms. Cader were ordered to pack their belongings like common criminals.

Dr. Williams does not dispute that the children who were selected to be in Mr. Sammon's and Ms. Cader's classes would be receiving vastly inferior instruction as a result of the transfers. To the contrary, Dr. Williams boasts that it was her specific intent to dump the poor performing middle school teachers on these at-risk young children. ***See*** **Williams Reply at ¶ 6. If that is not bad faith and gross error, what is?**

Dr. Williams seeks to support her cold-hearted calculus by misquoting the applicable CBA, misquoting the Education Law and misquoting scholarly articles. As to the articles, Dr. Williams quotes part of *Strategic Involuntary Teacher Transfers and Teacher Performance: Examining Equity and Efficiency*. *See* Williams Aff. at ¶ 3, n. 1. But she conspicuously omits critical passages. For example, the authors of the article specifically state:

> Alternatively, if involuntary transfers result in worse matches of teacher skills and student needs, or if the transfer itself hurts teacher productivity, then potential gains to efficiency or equity will be undercut. (p.2)

Here the transfers were labeled as being educationally "destructive" to children by the individuals in the District with the most knowledge of the situation. *See* Cader Aff at Exhibit "B," Watson Reply Aff. at Exhibit "C." Further, the two middle school teachers with no elementary school experience were being dumped in elementary schools still in need of improvement. Plainly, the transfers created "worse matches" and hurt teacher productivity. Indeed, Sammon only returned to his elementary school in mid-November due to the stress of the Dr. Williams transfer order.

The article also states:

> If principals are going to identify low-performing teachers to be transferred, relocating those teachers to other low-performing

> schools facing similar accountability pressures is not, from the district's perspective, beneficial.(p.10).

Again, the transfers sought to strip Mr. Sammon and Ms. Cader of their roles on the transformation teams. Replacing these two teachers with underperforming middle school teachers undermined the accountability pressures of the elementary schools.

The article further states:

> On the other hand, if districts do not have the capability to create better matches, teacher transfers would have no or even negative impacts on the productivity of transferred teachers. (p.10).
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> ***
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> In sum, while an involuntary transfer policy has the potential to further district goals along efficiency and equity lines, there are numerous reasons to expect that it may be ineffective or even deleterious. (p.12).

Dr. Williams ignored the edicts of the scholarly material upon which she purports to rely.

At bottom, for all of the acrimony, the case can be adjudicated on the following syllogism.

> *The education law requires the superintendent to immediately report transfers;*
>
> *The education law and commissioner's decisions give the board "veto" power over the transfers;*
>
> *Dr. Williams failed to immediately report transfers and failed to respond to board directives for explanations about the transfers,*
>
> *Therefore, the Board had the right to temporarily block transfers until the superintendent complied with the law and its directives.*

C. The Board did not violate the Receivership Law.

As is her unfortunate hallmark, Dr. Williams selectively quotes the Receivership Law. On page 9 of her memorandum of law, Dr. Williams quotes Section 211-f of the Education Law as including the following language: "The school receiver shall have the power to supersede any

decision, policy or regulation of the superintendent of schools or chief school officer, or of the board of education or another school officer or the building principal that in the sole judgment of the receiver conflicts with the approved school intervention plan or the approved intervention model or comprehensive education plan." But she omits the critical next line, "provided however that *the school receiver may not supersede decisions that are not directly linked to such approved plan or model* ..." (emphasis added).

The receivership law gives Dr. Williams certain power over the receivership school - - *not solitary power over the entire District.* As a matter of statutory construction, if the Legislature intended for the receiver of one school building to control the resources of the entire school system, it would have clearly and unambiguously said so. The absence of such a sweeping grant of power cannot be read into the statute. Indeed, "A court cannot amend a statute by inserting words that are not there, nor will a court read into a statute a provision which the Legislature did not see fit to enact." N.Y. Stat. § 363; *accord, Chemical Mfrs. v. Jorling*, 85 N.Y.2d 382, 626 N.Y.S.2d 1 (1995); *Nestor v. DHCR*, 257 A.D.2d 395, 683 N.Y.S.2d 74 (1st Dep't 1999). While Dr. Williams may believe that the failure to expressly give the superintendent power over the Board in all matters must have been an oversight, the Court of Appeals has made it clear that: "The failure of the Legislature to include a matter within a particular statute is an indication that its exclusion was intended." *Pajak v. Pajak*, 56 N.Y.2d 394, 397, 452 N.Y.S.2d 381, 382 (1982), *citing* N.Y. Stat. § 74.

The Court of Appeals has, in fact, made it clear that a court, and in this case the Commissioner, may not do from the bench what the Legislature has declined to do through statutory enactment:

> In construing a statute, the legislative intention must be sought in the language used therein, construed with such helps as the canons

> of interpretation allow. But new language, or, as in this case, an entirely new provision, cannot be imported into a statute, giving it meaning not otherwise found therein. While the courts may interpret doubtful or obscure phrases and imperfect language in a statute so as to give effect to the presumed intention of the legislature, and to carry out what appears to be the general policy of the law, they cannot, by construction, cure *casus omissus*, however just and desirable it may be to supply the omitted provision.

McKuskie v. Hendrickson, 128 N.Y. 555, 28 N.E. 650 (1891); *see also* N.Y. Stat. § 94 (stating that "new statutory language cannot be imported into a statute to give it a meaning not otherwise found therein"); *accord Chemical Mfrs. v. Jorling*, 85 N.Y.2d 383, 626 N.Y.S.2d 1; N.Y. Stat. § 74 ("It is a basic rule of statutory construction that the courts should avoid judicial legislation . . . . and the courts may not legislate under the guise of interpretation of statutes. . . . Thus, it is said that courts may not make, change, amend or repeal a statute.").

The New York State Legislature has not anointed Dr. Nicole Williams as the monarch of the entire Poughkeepsie school system. As the Receiver of the *middle school*, Dr. Williams has no statutory authority to eviscerate critical resources from every other school building in the District. The District's approved plan does not call for making elementary schools the dumping grounds for poor performing teachers. Nor does the approved plan give carte blanche for the receiver to transfer elementary school teachers – mere days before the beginning of schools—to teach in the middle school environment annually for the first time. Dr. Williams' actions are not in accord with the Receivership Law; they are an anathema to the Receivership Law.

D. Dr. Williams Reply Affidavit is False and Contains Manufactured Evidence

The integrity of the Section 310 appeal process is critical to the orderly functioning of public school districts. That process cannot work if litigants submit false statements and manufactured evidence. We do not lightly accuse a superintendent of schools of engaging in such behavior. Unfortunately, however, there is irrefutable proof that paragraph "16" of Dr.

Williams' affidavit is false and Exhibit "B" thereto was manufactured to bolster her case. In paragraph 16 Dr. Williams attests under oath she sent Exhibit "B" to the Board. The actual chart that was sent to the Board is annexed to Dr. Felicia Watson's Affidavit. This is proven beyond cavil by the affidavit of Sean Daneshvar, the District's Director of Technology. The manufactured Exhibit "B" now seeks to post-date explanations for the Cader and Sammon transfers.

The introduction of a false exhibit cannot be swept under the rug. This is an extremely serious matter. A school district superintendent has sought to influence the appeal process with knowingly false evidence. Because of the public nature of this dispute, the public will look to the Commissioner to see if this behavior will be tolerated. Freedom of Information Act requests have been filed by the local newspaper seeking copies of all papers in the appeal. At a bare minimum, the submission of false evidence warrants a Part 83 referral.

Even if Dr. Williams' false submissions could be condoned, her statements at face value make the following clear:

- Dr. Williams states for the first time in her reply papers that she transferred Ms. Cader because she wanted to separate Ms. Cader from Mr. Moriarty. Consequently, (1) the "high skill, high will" explanation Dr. Williams gave to Ms. Cader and Ms. Moriarty was a lie; and (2) the chart Dr. Williams gave to the Board containing her "explanations" was a lie. Nowhere in the chart does it state the newfound reason in her reply. Nor does she inform the Board, as she was directed, that building principals objected to the transfer.

- Dr. Williams does not dispute that students were carefully selected for Ms. Cader's and Mr. Sammon's elementary school classes based on their unique educational needs. Consequently, when Dr. Williams transferred Ms. Cader and Mr. Sammon -- a mere few days before school -- to the middle school: 1) she cavalierly dismissed any concern about the elementary school students who would not be having the best matched teacher for them; and 2) she did not consider the well-being of the middle school students who would have teachers who have never taught in the middle school setting during the regular school year.

- In paragraph "12" of her affidavit, Dr. Williams attests: "I decided to transfer two teachers, Ms. Boccio and Mr. Conrad, out of the Middle School due to poor performance, pursuant to my authority as Receiver." Consequently, Dr. Williams admits that instead of placing two poorly performing middle teachers on a performance improvement plan or bringing them up on Section 3020-a charges, she dumped them in the elementary school to teach at-risk students.

It is clear that Dr. Williams' views her superintendent and receiver powers as being imperial in nature. Her reply is an admission to giving false information to the Board, administrators and teachers about the reasons for her transfer orders. This is not hyperbole. The explanation for Ms. Cader's transfer was given for the first time in Dr. Williams reply. By definition it means that her prior explanations were knowingly false. The Commissioner simply cannot let this stand.

CONCLUSION

For the foregoing reasons, the Petition should be dismissed, Dr. Williams should be removed as Receiver, Dr. Williams should be removed as Superintendent, and a Part 83 referral should be issued.

Dated: Garden City, New York
November 21, 2017

Respectfully submitted,

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