

UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT

NICOLE WILLIAMS,
Petitioner,

Appeal No. 20750

-against-

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

**PETITIONER'S
MEMORANDUM OF LAW**

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

Petitioner, Dr. Nicole Williams, by her undersigned attorney, submits this memorandum of law in support of her petition pursuant to Section 310 of the Education Law. Dr. Williams seeks an order (i) declaring the Board's moratorium on teacher transfers (Resolution 18-0013) null and void *ab initio*; (ii) declaring the Board's September 1, 2017 directives instructing three teachers to disregard the Petitioner's transfer orders null and void *ab initio* and confirming the validity and enforceability of all of the teacher transfers; and (iii) declaring Board Policy 9420 null and void to the extent that it grants the Board power to approve or disapprove teacher transfers beyond the authority granted by the New York State Education Law.

STATEMENT OF FACTS

Petitioner is the Superintendent of the Poughkeepsie City School District. Commencing with the 2015-16 school year, the Education Department designated Poughkeepsie Middle School ("PMS") as a "struggling school," and the Petitioner was appointed as Receiver of PMS, pursuant to Education Law § 211-f. (Verified Petition ¶ 5).

During the 2015-16 school year, NYSED approved an education plan for PMS which, as modified, remains in effect to the date of this Petition. (Verified Petition ¶ 6). Notwithstanding the fact that, by letter dated October 26, 2017, the Commissioner of Education informed the Petitioner of her determination that PMS had made demonstrable improvement in 2016-17 (Reply Affidavit, Exhibit C), as of the date of this Petition, PMS has not been taken off the “struggling school” list, and, therefore, the Petitioner continues to operate the school as receiver pursuant to Education Law § 211-f. (Verified Petition ¶ 10).

On June 15, 2017 Petitioner provided tentative notices of assignment, for the 2017-18 school year, which included several teacher transfers in the district.¹ Among the many transfers throughout the district that the Petitioner directed on June 15, 2017, was the decision to have two elementary school teachers, Shereen Cader and John Sammon, change places. Ms. Cader, a 5th grade teacher at Krieger Elementary School was directed to transfer to Warring Elementary School, and Mr. Sammon, a 4th grade teacher at Warring, was directed to transfer to Krieger. (Reply Affidavit ¶ 4). As described in the Petitioner’s Reply Affidavit, there were legitimate reasons to transfer Cader and Sammon. (Reply Affidavit ¶ 5).

All of the teachers involved in the June 15th transfers – with the exception of Cader and Sammon – moved to their respective assignments. (Reply Affidavit ¶ 10). Ms. Cader and Mr. Sammon chose to ignore the Petitioner’s transfer directive instead of complying with the

¹ The Poughkeepsie Teachers’ Association collective bargaining agreement provides that “[t]entative notice of assignment shall be given by June 15th, wherever possible, to all unit members....” (Art. XVIII, Section 5). (Reply Affidavit ¶ 10).

order and using the contractual grievance process to challenge the transfers.² Neither Cader nor Sammon filed a grievance, and thus waived any contractual challenge.

Cader's and Sammon's refusals to comply with the Superintendent's June 15th transfer directive were plainly insubordinate. However, the Board chose to support their insubordination over compliance with the law. On July 14, 2017, the Board adopted Resolution 18-0013, placing a preemptive moratorium on all teacher transfers in the district for the 2017-18 school year, and permitted Cader and Sammon to remain where they were. (Verified Petition, Exhibit C).

For the reasons stated below, the Petitioner understood that Resolution 18-0013 was unlawful and so advised the Board in several written and verbal communications. (Reply Affidavit, Exhibit A). On August 28, 2017, Dr. Williams issued a written memorandum to the Board, repeating her position that the moratorium was unlawful, and invoking her authority as the receiver of PMS to supersede Resolution 18-0013 and to effect the transfer of six teachers as follows:

- (i) transferring teacher Kenneth Conrad from PMS to Warring Elementary School;
- (ii) transferring Respondent Sammon from Warring to PMS;
- (iii) transferring teacher Andrea Boccio from PMS to Krieger Elementary School;
- (iv) transferring Respondent Cader from Krieger to PMS;
- (v) transferring teacher Holly Dunn from Poughkeepsie High School to PMS; and
- (vi) transferring teacher Amber Grant from PMS to Poughkeepsie High School.

(Verified Petition ¶ 12 and Exhibit D).

² Ms. Cader is the sister-in-law of the Board President, Felicia Watson.

Each of the six transfers affected staffing at PMS and was therefore under Petitioner's legal authority as receiver.

Four of the six teachers who were transferred on August 28th abided by the Petitioner's directive and transferred to the designated assignment. However, Respondents Cader and Sammon again refused to comply, and remain unlawfully in their original assignment. (Verified Petition ¶ 13). The Board again chose to support their insubordination over compliance with the law. On September 1, 2017, the Board issued letters (the "September Board Directives") to three of the teachers affected by the August 28 transfers, Ms. Dunn,³ Respondent Cader and Respondent Sammon, instructing them that they were "hereby directed by the Board of Education to disregard" the Petitioner's transfer directives. (Verified Petition ¶ 14 and Exhibit E).

In order to resolve the Board's violation of the Education Law, the Petitioner filed this proceeding on September 28, 2017.

ARGUMENT

The Board has violated the Education Law and is interfering with the Petitioner's authority, causing a disruption in the educational environment of the district. Thus, swift action by the Commissioner is necessary to remedy the untenable situation in the district.

I. Resolution 18-0013 Violates Education Law §§ 1711 and 2508 and Must Be Declared Null and Void

Education Law §§ 1711(2)(e) and 2508(5) give the superintendent the power to effectuate teacher transfers, stating that the superintendent has the power and duty "to transfer

³ Ms. Dunn ultimately complied with the Petitioner's August 28 transfer directive.

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.”

The superintendent’s authority to transfer teachers has been described by the courts as “nondelegable” and “absolute.” *Sweet Home Central School District v. Sweet Home Education Association*, 90 A.D.2d 683 (4th Dep’t 1982) (“The authority to assign and reassign teachers is essential to maintaining adequate standards in the classroom and is a nondelegable responsibility imposed upon the school superintendent subject to the approval of the board of education (Education Law, § 1711, subd 5, par e)”; *Adlerstein v. Board of Education of the City of New York*, 64 N.Y.2d 90, 485 N.Y.S. 1, 6 (1984) (stating that the superintendent’s power to transfer teachers “has been held to be absolute in the absence of contractual provision otherwise or of malice, bad faith, gross error or prejudice”) (citations omitted). There is no evidence that any of the transfers directed by the Petitioner were motivated by malice, bad faith, gross error, prejudice or retaliation. *See* Reply Affidavit ¶¶ 9, 20.

The Commissioner has held that even the absence of board approval does not nullify the superintendent’s authority to transfer:

Petitioner also contends that respondent superintendent exceeded his authority in making the transfer without the approval of respondent board. Education Law §§1711 and 2508 authorize a superintendent to transfer personnel from school to school (see Appeal of Irving, 39 Ed Dept Rep 761, Decision No. 14,373 [involving the transfer of a principal]). In addition, respondents refer to the superintendent’s contract with the board for additional authority. That contract provides that the superintendent is to be the chief administrative officer of the district and shall have the authority to “organize and reorganize the administrative and supervisory staff, including instructional and non-instructional personnel, in a manner which, in the Superintendent’s judgment, best serves the District. . .” **In light of this clear and broad delegation of**

duties, petitioner’s claim that the superintendent was not authorized to make the transfer also is unavailing.

Appeal of Scott Rabeler, Commissioner’s Decision No. 15,539 (Feb. 27, 2007) (emphasis added).⁴

The Board’s July 14, 2017 “moratorium on all involuntary transfers of teachers and administrators for the 2017-2018 school year” (Verified Petition, Exhibit C) unlawfully strips the superintendent of her nondelegable and absolute statutory power to “to transfer teachers from one school to another, or from one grade of the course of study to another grade in such course.”⁵

The statute’s requirement that the superintendent must “report immediately such transfers to such board for its consideration and action” does not validate the moratorium.⁶ First, “consideration and action” by the Board does not necessarily mean that the Board has plenary authority to nullify teacher transfers ordered by the superintendent. The Board’s role is to confirm, not nullify, the superintendent’s transfers. *Rutherford v. Katonah-Lewisboro School District*, 670 F. Supp. 2d 230, 238 (S.D.N.Y. 2009) (holding that “superintendents in all New York State school districts have the power ‘to transfer teachers from one school to another,’ subject to confirmation by the local board of education”). Under these circumstances, Petitioner submits that the Board overreached its authority by issuing the moratorium.

⁴ <http://www.counsel.nysed.gov/Decisions/volume46/d15539>.

⁵ As in *Rabeler*, the Petitioner/superintendent in this case also is employed pursuant to a contract that provides that Dr. Williams has the “power and obligation” to “assign[] and reassign[] ... instructional and non-instructional staff...” Verified Reply, Exhibit A, Contract ¶ 2(a)(iii).

⁶ Petitioner immediately reported the June 15 and August 28 transfers to the Board. (Reply Affidavit ¶¶ 11, 16).

Second, regardless of whether the statutory language does or does not allow the Board to negate a teacher transfer, it is crystal clear that the Board's action with respect to any such transfer must be *after the fact*. The statute is specific that the superintendent has the initial authority to make the transfer and must thereafter report it to the Board, which implies that the Board is notified of the transfer *after it has been made*. At that point, the Board may give "consideration" to and take "action" regarding the transfer, whatever those terms may mean. However, under any reading of those terms, a preemptive measure such as Resolution 18-0013, which prohibits all involuntary transfers *in advance*, is clearly unlawful and violative of both the statutory scheme and the grant of the superintendent's authority under Sections 1711 and 2508. In fact, the Commissioner's decision in *Appeal of Rabeler, supra*, stating that the absence of board approval does not nullify the superintendent's authority to transfer teachers, makes this conclusion inescapable.

Consistent with Sections 1711 and 2508, Board Policy 9420 places the initial authority for effectuating teacher transfers with the superintendent. Board Policy 9420 states that "[w]ithin the provisions of the appropriate negotiated contracts and state laws, the Superintendent of Schools will assign, transfer and reclassify district personnel subject to Board of Education approval." (Verified Petition, Exhibit F). The phrase "subject to," by definition, means that Board approval will take place after the superintendent has initiated a transfer. Thus, a moratorium on the ability of the superintendent to begin the process of any teacher transfer violates not only Sections 1711 and 2508, but the Board's own policies.

Under the statute and Policy 9420, it is the Board's duty to consider and act upon transfers after they are complete, not to restrict them prospectively. Nor can the Board

supersede its own policy in this instance because, as stated above, the statute clearly vests the initial authority to effectuate teacher transfers with the superintendent. For that reason, Resolution #18-0013 must be declared void and unlawful *ab initio*.

II. The September Board Directives Violate Petitioner's Receivership Authority and Must Be Declared Null and Void

On August 28, 2017, Dr. Williams issued a written memorandum to the Board, stating her position that the moratorium is unlawful, and invoking her authority as the receiver of Poughkeepsie Middle School to supersede Resolution 18-0013 and to transfer three teachers from PMS and three teachers to PMS. (Reply Affidavit, Exhibit A).

Because these six transfers affected the educational staff at PMS, the Petitioner's authority for this directive is governed not only by Sections 1711 and 2508, but by Section 211-f of the Education Law, the new school receivership law that was enacted as part of the Education Transformation Act of 2015. Section 211-f(1)(a) provides that "[t]he commissioner shall designate as failing each of the schools that has been identified under the state's accountability system to be among the lowest achieving five percent of public schools in the state (priority schools) for at least three consecutive school years...." "Failing schools" are referred to as "struggling schools" in § 100.19(a)(1) of the Commissioner's regulations. Therefore, as to transfers affecting PMS, the Board is prohibited not only from making a *prospective* restriction, but from interfering with transfers after the fact as well.

Pursuant to § 211-f(1)(c)(ii), the local district shall continue to operate schools designated as struggling "provided that there is a department-approved intervention model or

comprehensive education plan in place...” and “the superintendent shall be vested with all powers granted to a receiver appointed pursuant to this section.” A superintendent receiver

shall be authorized to manage and operate the failing ... school and 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 school intervention plan.

Education Law § 211-f(2)(b).

Since the 2015-16 school year, the Petitioner has been the receiver of PMS, which operates under a department-approved education plan. (Verified Petition ¶¶ 6-9). As a result, the Petitioner retains authority “to manage and operate the . . . school” and has “the power to supersede any decision, policy or regulation of the . . . board of education . . . that in the sole judgment of the receiver conflicts with the school intervention plan.” Education Law §211-f(2)(b). Thus, the Petitioner was authorized by law to supersede the Board’s July 14 moratorium and to direct the August 28 PMS transfers.

Yet, despite the Petitioner’s receivership authority, on September 1, 2017, the Board issued letters (the “September Board Directives”) to three of the teachers affected by the August 28 teacher transfers, Ms. Dunn,⁷ Respondent Cader and Respondent Sammon, instructing them that they were “hereby directed by the Board of Education to disregard” the Petitioner’s transfer directives. (Verified Petition ¶ 14 and Exhibit E). The September Board Directives clearly violate § 211-f, and in the sole judgment of the Petitioner as receiver, such directives conflict with the school education plan:

⁷ See footnote 3.

It is unquestionably my professional opinion that the September Board Directives conflict with the school intervention plan in place for Poughkeepsie Middle School because it fundamentally undermines my ability as Superintendent/Receiver to implement a strategic, theory of action with the primary goal of improving teaching and learning to enable all scholars to achieve high standards of performance on the rigorous state assessments. Over the past two years, as the Superintendent/Receiver, I have focused my attention on improving instruction and leadership at the middle school while facing tremendous staffing challenges. Our initial results this year indicate that the middle school is trending in the right direction; however, by restricting my ability to transfer the teachers in question, the Board prohibited me from assigning well-qualified teachers to provide consistent, high-quality instruction; effective staffing is critical to the successful implementation of the school intervention plan under receivership.

(Petitioner's Affidavit in Support ¶ 7). This is a clear exercise of specific authority granted to the Petitioner/Superintendent as Receiver to supersede the Board's action and must be sustained. A contrary result would turn the statute on its head by allowing the Board to supersede the Receiver, in blatant violation of § 211-f(2)(b) (authorizing the receiver to "supersede any decision, policy or regulation of the ... board of education...").

Each of the August 28 teacher transfers affected PMS, both as to the teachers transferred from PMS as well as those teachers transferred from another district school into PMS. Petitioner submits that such incoming transfers were authorized not only pursuant to her authority as superintendent (Education Law §§ 1711 and 2508), but also pursuant to her authority as Receiver. Restricting the receiver's authority to only transferring teachers out of the receivership school will severely curtail the effectiveness of the statute. As the Petitioner stated, "[w]ithout the ability to utilize teaching staff in a manner most consistent with the Plan, my duties and powers as Receiver are severely compromised." (Petitioner's Affidavit in Support ¶ 9). The receivership statute is not so restrictive. Section 211-f(2)(b) authorizes the receiver to supersede any decision, policy or regulation of the board of education.

In sum, by attempting to block the August 28 teacher transfers, the September Board Directives violated Education Law § 211-f and must be declared null and void.

Furthermore, the course of conduct demonstrated by the Board is clearly indicative of severe dysfunction and improper interference with the legitimate role of the Petitioner. Dr. Williams is the Superintendent of the Poughkeepsie City School District and, for the sake of the students and the staff of the district, the Board's reckless overstepping of Dr. Williams' authority must be conclusively halted once and for all. For this reason, the prompt intercession of the Commissioner is requested.

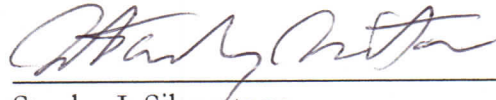
CONCLUSION

Petitioner, Dr. Nicole Williams, respectfully requests an order as follows:

- (i) declaring Resolution 18-0013 null and void *ab initio*;
- (ii) declaring the September Board Directives null and void *ab initio* and confirming the validity and enforceability of all of the Teacher Transfers;
- (iii) declaring Board Policy 9420 null and void to the extent that it grants the Board power to approve or disapprove teacher transfers beyond the authority granted by the New York State Education Law;
- (iv) for such other and further relief as the Commissioner may deem just, proper, and equitable.

Dated: November 13, 2017

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Stanley J. Silverstone", written over a horizontal line.

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UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT

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-against-

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BOARD OF EDUCATION OF THE
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AFFIRMATION OF SERVICE

From actions of the Board of Education restricting
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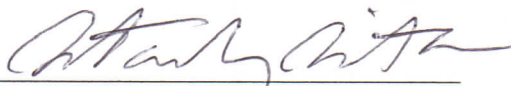
STATE OF NEW YORK)
) ss:
COUNTY OF ROCKLAND)

Stanley J. Silverstone, an attorney duly admitted to practice law in the State of New York, affirms under penalty of perjury that deponent is not a party to this proceeding, is over 18 years of age, and resides at Rockland County, New York. That on November 13, 2017, deponent served the within PETITIONER'S MEMORANDUM OF LAW upon:

Howard M. Miller, Esq.
Bond, Schoeneck & King, PLLC
1010 Franklin Avenue
Suite 200
Garden City, NY 11530-2900
Attorneys for Respondents

at the above address designated by said attorney for that purpose by depositing a true copy of the same in a sealed postage-paid properly addressed envelope in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Dated: November 13, 2017



Stanley J. Silverstone