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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND : DCM PART 6

MYMOENA DAVIDS, by her parent and natural guardian MIAMONA DAVIDS, et al.,	:	
Plaintiffs,	:	
- against -	:	
THE STATE OF NEW YORK, et al.,	:	**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF STATE DEFENDANTS' MOTION TO DISMISS AND/OR FOR LEAVE TO RENEW, OR ALTERNATIVELY, FOR A STAY OF THE PROCEEDINGS**
Defendants,	:	
- and -	:	
MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO,	:	
Intervenor-Defendant,	:	Index No. 101105/14
- and -	:	(Minardo, J.S.C.)
SETH COHEN, et al.,	:	
Intervenors-Defendants,	:	
- and -	:	
PHILIP A. CAMMARATA and MARK MAMBRETTI,	:	
Intervenors-Defendants.	:	

(Caption continued on next page)

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JOHN KEONI WRIGHT; et al.; :

Plaintiffs, :

- against - :

THE STATE OF NEW YORK; et al.; :

Defendants, :

- and - :

SETH COHEN, et al., :

Intervenors-Defendants, :

- and - :

PHILIP A. CAMMARATA and MARK MAMBRETTI, :

Intervenors-Defendants, :

- and - :

NEW YORK CITY DEPARTMENT OF EDUCATION, :

Intervenor-Defendant, :

- and - :

MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO, :

Intervenor-Defendant. :

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PRELIMINARY STATEMENT

The present motion seeks to dismiss this action after sweeping changes were enacted, as part of the Education Transformation Act of 2015, to the very statutes governing tenure protection, discipline, evaluations, and seniority protection for New York public school teachers that are being challenged by Plaintiffs. See Affirmation of Assistant Attorney General Steven L. Banks ("Banks Aff."), dated May 27, 2015, Ex. C at108 (Part "EE"). In response, Plaintiffs cavalierly dismiss the changes as "cosmetic," "modest," and "tweaks" and assert that "nothing has changed." See Memorandum of Law in Opposition to Defendants' Motion for Leave to Renew, to Dismiss, and for a Stay of the Proceedings Pending Appeal ("Pl. Mem."), at 1, 2, 21. However, as the plain language of the revised statues show, see Banks Aff., Ex. C, this area of the Education Law has been greatly changed, rendering the claims and allegations in Plaintiffs' respective complaints moot and non-justiciable.

Rather than presenting a concrete controversy that is within the Court's power to decide, Plaintiffs invite this Court to engage in a far-reaching inquiry into the state of education in New York State and to set "the constitutional minimum when it comes to providing children with effective teachers and an adequate education." See Pl. Mem. at 21. Not only do Plaintiffs fail to meet their pleading obligation to explain the constitutional infirmities in the current tenure, removal, and seniority statutes, or to propose specific changes to the statutes to frame a justiciable claim, but any challenge would be premature at this juncture because data regarding the implementation of these statutes does not yet exist, and they certainly cannot show injury arising therefrom.[1] Plaintiffs' claims are non-justiciable. Infra, Pt. II.

Finally, Plaintiffs oppose the application for a stay citing purported ongoing harm to New

[1] Notably, Plaintiffs have elected not to amend their complaints in the face of the legislative changes in the Education Transformation Act. Thus, even were they to prevail, they would not be entitled to strike down the new teacher discipline and tenure statutes which are not mentioned in their pleadings.

York public school students. See Pl. Mem. at 28. However, nowhere in Plaintiffs' brief do they identify these alleged public school students who have been denied a sound basic education; they are not alleged to be any of the individually named Plaintiffs. Id. Because Plaintiffs will not be prejudiced in staying discovery in this action, and because this action raises important legal questions of a first impression regarding the use of a claim under the Education Article outside the context of educational funding that should be resolved by the appellate courts before this action goes forward, Defendants' stay application should be granted.

ARGUMENT

POINT I

PLAINTIFFS CANNOT AVOID DISMISSAL OF THE AMENDED COMPLAINTS BY IGNORING THE SUBSTANTIAL CHANGES MADE TO THE EDUCATION LAW BY CHAPTER 56 OF THE LAWS OF 2015.

In their moving brief, State Defendants describe each relevant change made to the Education Law by Chapter 56 of the Law of 2015 ("Chapter 56"), and a full copy of Chapter 56 was included as part of the moving papers. See Memorandum of Law in Support of State Defendants' Motion to Dismiss and/or for Leave to Renew, or, Alternatively, for a Stay of the Proceedings ("State Def. Mem."), dated May 27, 2015, at 3-9; Banks Aff., Ex. C. Among the most notable statutory changes, Chapter 56 extends the probationary period of teachers and building principals from three to four years; requires probationary teachers to receive an Effective or Highly Effective rating on the annual professional performance review ("APPR") in at least three years of the four-year probationary period, including the final year, in order to receive tenure; compels local school district to bring charges of incompetence against teachers who receive three consecutive Ineffective ratings; attempts to toughen and more clearly define standards for assessing teacher performance; further streamlines the disciplinary process; and

where charges are brought based on two consecutive Ineffective ratings, such ratings shall constitute prima facie evidence of incompetence and, if not overcome, "shall be just cause for removal." See Banks Aff., Ex. C at 114-125, 144, 147.

Plaintiffs cannot credibly argue against these substantive changes and so make largely self-defeating and illogical arguments. For example, Plaintiffs assert that extending the probationary period for new teachers to four years--a change they themselves had argued for--"is meaningless when the evaluation system on which it relies fails to distinguish ineffective teachers." Pl. Mem. at 17; State Def. Mem. at 13-14. As an initial matter, Plaintiffs themselves fail to offer their definition of an ineffective teacher. Nevertheless, districts will now have four years, as opposed to three, to identify those teachers they deem to be unsuccessful or ineffective and can fire those probationary teachers or refuse to give them tenure *for any lawful reason and without any further evaluations or procedures*. In addition, the new laws make it more difficult to qualify for tenure. Further, § 3012-c and § 3012-d give school districts an objectively rational process, based on both student performance and teaching observations, to identify poorly performing teachers. See Banks Aff., Ex. C at 127-128. Plaintiffs propose no alternative system.

Contrary to Plaintiffs' claim that the seniority protection remains "untouched," Pl. Mem. at 12, seniority protections were altered by Chapter 56 as well. First, under § 211-f, at schools designated as "failing" or "persistently failing" layoff determinations are now to be made on the basis of APPR ratings. See Banks Aff., Ex. C at 153. Further, the changes to the APPR and the establishment of streamlined removal procedures for teachers who are rated as Ineffective are in themselves an effort to improve the quality of the overall teaching pool, and thus eliminate the possibility of "ineffective" teachers retaining their positions during a layoff because of seniority

protection. In any event, layoffs of public school teachers are rare occurrences; New York City, for example, has not implemented a layoff in decades.

Given the substantive changes to the sections in the Education Law that are targeted by Plaintiffs' amended complaints, and the inclusion of two new sections (§§ 3012-d, 3020-b) that establish a new APPR process and new streamlined removal procedures, Plaintiff cannot credibly maintain that "all of the laws that Plaintiffs challenge remain in place." See Pl. Mem. at 16. While the Education Law continues to contain, for example, a "§ 2573," the probationary period in that section has been extended by a year and the criteria to be used by local school districts to evaluate candidates for tenure has been altered, with greater emphasis on APPR ratings, the process for which has also changed significantly. See State Def. Mem. at 3-6. By examining the title and plain language of Chapter 56 and the amendments to the Education Law, the Court can readily see what Plaintiffs cannot or will not concede, namely that the teacher tenure, discipline and seniority laws cited in the amended complaints and referenced in the Court's decision of March 20, 2015, no longer exist, and a new statutory regime is in effect. This action has therefore been rendered moot.

Moreover, in light of the amendments to the Education Law, all of the statistics cited by Plaintiffs in their amended complaints are now also moot, to the extent that they had any relevancy at all. For example, in their opposition brief, Plaintiffs contend that "extension of the probationary period from three years to four does nothing to change the fact that tenure will be granted as a matter of course, irrespective of merit, because nearly every teacher receives the rubber stamp of a 'Highly Effective' or 'Effective Rating,'" based an allegation in their amended complaint that, in 2012, one-percent of teachers were rated Ineffective under the APPR. See Pl. Mem. at 6-7. However, as a result of Chapter 56, both the probationary periods for public school

teachers and the method by which teachers are evaluated have changed, and Plaintiffs thus cannot claim any injury and lack any factual allegations that those new laws result in an unconstitutional system of education in New York State. Rather, there is every logical reason to believe that with a lengthened probationary period, more rigorous evaluation standards, including the use of "impartial independent trained evaluator[s]," and streamlined removal procedures for teachers rated Ineffective on their APPR, the changed statutes will reduce the ability of allegedly poor performing teachers to receive positive evaluations or to obtain tenure and more ineffective teachers will be removed from the classrooms. There is certainly no rational basis to assume based on alleged data from 2012, as Plaintiffs do, that the statutory changes will have no effect.

Similarly, in an attempt to discredit the current streamlined removal procedures set forth in § 3020-a and § 3020-b, Plaintiffs cite decade-old data that, even if correct, have no possible relevancy to the current statutes. See Pl. Mem. at 11 (alleging that "[f]rom 1995 to 2006" removal proceedings "took an average of 830 days"). Plaintiffs' argument crumbles in light of more recent and reliable data regarding the efficiency of removal procedures even before the recent changes to the Education Law. "Based on data for the 2013-2014 school year as of April 30, 2014, the average length for a decision under the improved 3020-a system was 190 days in NYC and 177 days for the rest of the State, and settlements took approximately 103 days in NYC and 94 days for the rest of the State." See Letter from Chancellor Merryl H. Tisch and Acting Commissioner Elizabeth R. Berlin, dated December 31, 2014, a copy of which is attached to the Supplemental Affirmation of Steven L. Banks, dated July 7, 2015, as Exhibit A.

What is prominently absent in Plaintiffs' opposition brief is any effort to explain in what way they believe the revised Education Law falls short of a constitutional minimum or even what

additional amendments to the Education Law are necessary to improve the quality of education in New York State. Despite their belief that "[n]othing has changed" as a result of Chapter 56, Pl. Mem. at 9, Plaintiffs do not propose any other specific changes to the Education Law to improve teacher quality or student achievement. See Pl. Mem. at 6-14. As Plaintiffs are asking the Court to strike down duly enacted statutes in their entirety, Plaintiffs should at the very least be required to articulate the statutes' specific constitutional infirmity, and explain what system should replace the statutes. "An Education Article claim . . . requires a clear articulation of the asserted failings of the State, sufficient for the State to know what it will be expected to do should the plaintiffs prevail." See New York Civil Liberties Union v. State of New York, 4 N.Y.3d 175, 180 (2005) (affirming dismissal of Education Article complaint at the pleading stage). Plaintiffs' failure to articulate with specificity what they hope to achieve in this lawsuit should not allow them to avoid a dismissal on mootness grounds when the very statutes they challenge have been amended to address the very concerns that they have raised.

Fundamentally, Plaintiffs misapprehend the relief that this Court can give them in this lawsuit and the import of the recent changes to the Education Law. As was explained in the moving brief, the courts cannot propose legislative changes or "determine the best way to calculate the cost of a sound basic education." See State Def. Mem. at 10-11 (quoting Campaign for Fiscal Equity, Inc. v. State of New York, 8 N.Y.3d 14, 28 (2006)). Thus, a judgment in Plaintiffs' favor invalidating one or more of the tenure statutes would leave the task of drafting successor statutes to the Legislature. In Chapter 56, the Legislature has amended the Education Law to address the criticisms that had been leveled against the prior tenure system, see Def. Mem. at 3-9, without waiting for the Court to issue a judgment. Because the recent changes to the tenure statutes are clearly more than "cosmetic," as Plaintiffs allege, and are rationally

intended to improve the overall quality of teachers in New York State, Plaintiffs have thus in effect received the legislative action that they could have achieved in this lawsuit. With substantial changes having been enacted through the political process, Plaintiff cannot keep this lawsuit alive by simply requesting an advisory opinion on the "constitutional minimum when it comes to providing children with effective teachers and adequate education."[2] See Pl. Mem. at 21. Indeed, absent Plaintiffs' assertion and demonstration that the New York Constitution requires that public school teachers have no access to due process protections of any kind, the amount of process that teachers receive is a policy question that must be left to the Executive and Legislative branches.

Accordingly, for reasons set forth above and in State Defendants' moving brief, this action should be dismissed as moot.

POINT II

A CHALLENGE TO THE REVISED TENURE, REMOVAL, AND SENIORITY STATUTES AT THIS TIME WOULD BE NON-JUSTICIABLE.

Point II of State Defendants' moving brief explained why any challenge to the current versions of the tenure statutes at this time would not present a justiciable controversy because, among other things, Plaintiffs do not have, and cannot claim to have, any information demonstrating an injury as a result of the implementation of the revised statutes. See State Def. Mem., Pt. II, at 16-20. Plaintiffs' opposition largely ignores the thrust of this argument.

In their initial motion to dismiss, State Defendants explained why the present action should be considered a facial constitutional challenge. See Banks Aff., Ex. K at 9-10. In

[2] Indeed, the Court of Appeals has defined the constitutionally required minimum education as a sound basic education consisting of "the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury." Campaign for Fiscal Equity, Inc. v. State of New York, 86 N.Y.2d 307, 316 (1995). Plaintiffs have not asserted a legal or factual basis for this Court to somehow change that definition.

particular, the relief that Plaintiffs seek--a complete injunction against the tenure statutes--is only available by way of a facial challenge. Id. at 10. Because this action is a facial constitutional challenge, the Court's inquiry must be limited to the language of the Education Law sections themselves without examining any outside information. See People v. Stuart, 100 N.Y.2d 412, 421 (2003) ("a facial challenge requires the court to examine the words of the statute on a cold page and without reference to the defendant's conduct."). Under a facial challenge, for the plaintiffs "to prevail, they must surmount the presumption of constitutionality accorded to legislative enactments by proof beyond a reasonable doubt. A party mounting a facial constitutional challenge bears the substantial burden of demonstrating that in any degree and in every conceivable application, the law suffers wholesale constitutional impairment." Mtr. of Moran Towing Corp. v. Urbach, 99 N.Y.2d 443, 448 (2003) (quotations and citations omitted). While the Court did not specifically state in its decision whether Plaintiffs' claims should be examined as a facial or as-applied constitutional challenge, it is evident from the decision that the Court, in evaluating the tenure statutes under the Education Article, will receive evidence about how the tenure statutes have been applied in New York State. See Banks Aff., Ex. M.

The use of statistics in the amended complaints suggests that much of Plaintiffs' case will rest on statistical data, including, for example, the percentages of teachers who receive tenure at the end of their probationary period or who receive an Ineffective APPR rating. See Banks Aff., Ex. B at ¶¶ 37, 41. However, the information necessary to assess how the revised Education Law has affected the employment of public school teachers will not exist for some time to come. For example, the new evaluation system described in § 3012-d is not applicable until the 2015-2016 school year and removal proceedings under the revised § 3020-a and the new § 3020-b have not yet been brought. Even after the new school year begins and the revised tenure statutes

begin to be utilized, it will be at least a few years before sufficient data will exist to determine the efficacy of the post-Chapter 56 Education Law in improving teacher quality in New York State. Therefore, unless Plaintiffs intend to proceed as facial challenge seeking to invalidate the tenure statutes based solely on language of the statutes, the present lawsuit is not "sufficiently matured," Park Ave. Clinical Hosp. v. Kramer, 26 A.D.2d 613 (4th Dep't 1966), or justiciable, and cannot, therefore, proceed at this juncture. See State Def. Mem. at 17.

Although they perhaps did not intend to do so, language in Plaintiffs' opposition brief supports the conclusion that judicial review of the current set of tenure statutes is premature. Specifically, Plaintiffs make a number of statements that suggest that their case will turn on future developments in the way that the tenure statutes are applied. See, e.g., Pl. Mem. at 11 ("[a]dministrators will continue to have difficulty complying with the . . . timeline for bringing disciplinary charges"); 17 ("although the method for evaluating teacher effectiveness is now governed by [§ 3012-d], there is no indication that the number of teachers rated "Ineffective" will rise, of that the number of teachers awarded tenure will consequently fall."). A declaratory judgment action based on an evaluation of how local school districts will apply the revised tenure statutes in the future is clearly not a justiciable matter. See State Def. Mem. at 17. See also Cuomo v. Long Island Lighting Co., 71 N.Y.2d 349, 354 (1988) (dismissing complaint which in effect sought an advisory opinion).

Further, Plaintiffs' argument against a mootness dismissal citing the "capable of repetition yet evading review" exception misses the point about the lack of a justiciable controversy. See Pl. Mem. at 22. Setting aside the other legal grounds upon which Plaintiffs' claims are subject to dismissal, including a lack of standing, see Banks Aff., Ex. F, if Plaintiffs do intend to challenge the present versions of the tenure, discipline, and seniority statutes, their

challenge may proceed in the future when there is sufficient data to be able to assess how the statutes have been implemented. Thus Plaintiffs' arguments are not evading review, but are not presently justiciable as they do not present a real and definite controversy that is not contingent on future developments that may or may not come to pass. See State Def. Mem., Pt. II.

Finally, the Third Department's holding in Hussein v. State of New York, 81 A.D.3d 132 (3d Dep't 2011), is inapposite and does not required a different result. See Pl. Mem. at 18. The plaintiffs in Hussein challenged the level of State funding that their school districts received. The Third Department rejected an argument by the State that the claims were not ripe for review after the Legislature approved additional education funding because the plaintiffs had submitted detailed data showing inadequacies in their districts and "also submit[ted] evidence of factors that will allegedly continue to keep their districts underfunded and claim[ed] that, even with the increases anticipated as a result of Foundation Aid, their districts will still be substantially short of the funding levels needed to provide a constitutionally sound basic education." Hussein, 81 A.D.3d at 136. By contrast, in the present action the Legislature has made wholesale changes to the challenged provisions and, at the moment, Plaintiffs offer nothing but conjecture to support their belief that the quality of the teaching pool in New York State will be unaffected. Further, whereas the plaintiffs in Hussein were able to identify a particular remedy, i.e., increased State funding for education, Plaintiffs in this action have not explained how they believe the tenure statutes should be changed.

Accordingly, Plaintiffs challenge to the tenure statutes as they existed at the time with action was commenced is now moot, and, should Plaintiffs seek to challenge the current versions of the tenure statutes, such a challenge would be premature and non-justiciable.

POINT III

IF THIS ACTION IS NOT DISMISSED, A STAY PENDING THE DISPOSITION OF THE PENDING APPEALS SHOULD BE IMPOSED.

As explained in State Defendants' moving brief, the Court has broad discretion under CPLR 2201 to grant a stay of proceedings "upon such terms as may be just." See State Def. Mem., Pt. III, at 20-21. If this action is not dismissed in light of the changes made to the Education Law by Chapter 56, the Court should nonetheless stay all proceedings in this action until the Second Department has disposed of the pending appeals from the decision not to dismiss this action. Significantly, Plaintiffs do not contest that this action is one of first impression in New York courts or that there are important threshold legal issues regarding the use of the Education Law outside of a funding context. See Pl. Mem. at 27-28. Action by the Appellate Division on these issues could dispose of this action completely, or give guidance as to how Plaintiffs' claims should be resolved. See Britt v. Int'l Bus Servs., Inc., 255 A.D.2d 143, 144 (1st Dep't 1998) (in determining stay application, "[f]actors to consider include avoiding the risk of inconsistent adjudications, application of proof and potential waste of judicial resources").

Plaintiffs' sole objection to the stay request is that there are allegedly unidentified public school students "not receiving an adequate public school education." See Pl. Mem. at 28. While a court considering a stay application will routinely consider the stay's "prejudicial impact, that is, the prejudice to the moving party by denying a motion balanced against the prejudice to the non-movant by granting the motion," Nezry v. Haven Ave. Owner LLC, No. 150023/10, 2010 N.Y. Misc. LEXIS 4050, at *12 (Sup. Ct. New York County July 9, 2010), Plaintiffs do not allege any sort of prejudice to themselves as a result of a stay or that they themselves are not receiving an "adequate public school education." Therefore, a balancing of the prejudicial

impact greatly favors defendants and the granting of a stay to preserve judicial resources, avoid unnecessary discovery, and define the legal issues in this case. Additionally, a stay would appear appropriate given the recent changes to the Education Law and the lack of information at this time regarding the effect those changes have had on the quality of the pool of teachers.

Accordingly, for the preceding reasons and the reasons set forth in State Defendants' moving brief, if this action is not dismissed as a result of this motion, the Court should stay all proceedings until the Appellate Division on defendants' pending appeals.

CONCLUSION

For the foregoing reasons and for the reasons previously set forth in the moving brief State Defendants respectfully request that the Court grant their motion and dismiss the amended complaints, with prejudice, in their entirety, together with such other and further relief as the Court deems just and proper.

Dated: New York, New York
July 7, 2015

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SUPREME COURT OF THE STATE OF NEW YORK
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SUPPLEMENTAL AFFIRMATION OF ASSISTANT ATTORNEY GENERAL STEVEN L. BANKS IN SUPPORT OF STATE DEFENDANTS' MOTION TO DISMISS, FOR LEAVE TO RENEW, AND FOR A STAY

Index No. 101105/14

(Minardo, J.S.C.)

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MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO,

Intervenor-Defendant.

STEVEN L. BANKS, an attorney duly admitted to practice in the Courts of the State of New York, hereby affirms under penalty of perjury:

1. I am an Assistant Attorney General in the office of ERIC T. SCHNEIDERMAN, the Attorney General of the State of New York, attorney for defendants THE STATE OF NEW YORK; THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK (also sued here as "The New York State Board of Regents"); and THE NEW YORK STATE EDUCATION DEPARTMENT (collectively the "State Defendants"). I submit this affirmation in support of State Defendants' combined motion to dismiss the amended complaints filed in this consolidated action, for leave to renew State Defendants' prior motion to dismiss,

and, if this action is not dismissed, for a stay of all proceedings pending a decision on the pending appeals from the Decision and Order, entered March 20, 2015.

2. Attached hereto as Exhibit A is a copy of a letter from Chancellor Merry! H. Tisch and Acting Commissioner of Education Elizabeth R. Berlin, to the Governor's Office dated December 31, 2014.

Dated: New York, New York
July 7, 2015

STEVEN L. BANKS

Exhibit
A

THE BOARD OF REGENTS
THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT

Merryl H. Tisch
Chancellor

89 Washington Avenue
Albany, NY 12234

December 31, 2014

Jim Malatras
Director of State Operations
State of New York
Executive Chamber
Albany, New York 12224

Dear Mr. Malatras:

Thank you for your December 18, 2014 letter. The Board of Regents agrees that one of the State's most important obligations is educating our children. Over the last few years, New York has taken significant steps to improve education in this State, including:

- Raising P-12 academic standards so that New York's students will be ready for college, careers, and life when they graduate;
- Increasing graduation rates by more than ten percentage points in the last decade, while simultaneously raising standards, which means that more than 20,000 additional students graduated in June 2014 than in June 2005;
- Increasing the rigor of certification examinations for teachers and school building leaders and supporting high-quality professional development for preparation of program faculty so that teachers will be well-prepared to teach when they enter the classroom and school leaders will be well-prepared to lead when they enter the school building;
- Introducing a comprehensive Statewide evaluation system for educators to support effective professional development and to ensure that every student has an effective teacher and school leader – recognizing the system needs to be continually strengthened;
- Raising standards for accountability by holding all schools and districts accountable for the performance of all of their students and creating more high-quality district and charter school seats in high-needs communities; and
- Expanding access to strong Career and Technical Education (CTE) programs well aligned to the demands of the 21st century economy and creating multiple pathways to graduation.

While New York State has done much to improve public education in recent years, we continue to face critical challenges: more than a fifth of our students do not graduate from high school after four years; only about two-fifths of our students graduate with the academic skills they need for success in college and careers; and we continue to face deeply

troubling achievement gaps for our students from low-income families, English Language Learners, Students with Disabilities, African-American and Latino students. This month's announcement of continued graduation rate gains illustrates that we are moving in the right direction, but there is much more to be done.

While the Board of Regents and the State Education Department ("SED" or "the Department") appreciate the opportunity to opine on the issues raised in your letter, we note, however, that the questions and concerns outlined in the letter relate to issues of State Law, which are under the direct control of the State Legislature and the Governor, not the Department or the Board of Regents. Our response details New York's progress in each of the areas you raise and proposes aggressive measures that build on our work to ensure that every child in New York State has a high quality educator at the front of the classroom. Our response proposes reforms to reward excellence in teaching; strengthen teacher evaluation, improve preparation of new teachers; and, when necessary, streamline the ability to remove ineffective teachers from the classroom. Further, our response proposes additional tools to allow the Department to implement lasting change in failing schools, proposes specific uses of technology to improve student learning, and suggests ways to incentivize regionalization and shared services where appropriate. Our response supports the continuance of Mayoral control in New York City and raising the cap on charter schools to meet demand. In addition we propose a focus on the issues of school segregation and local school district mismanagement such as we have seen recently in East Ramapo, New York.

In addition, since your letter seeks our input to inform the Governor on reforms that may be considered for introduction in the Executive Budget process, we urge you to look beyond the questions you raised and continue to make education funding a priority by adopting the recommendations for targeted investments contained in the recently approved $2 Billion Regents State Aid Proposal for 2015-16 (see http://www.regents.nysed.gov/meetings/2014/December2014/1214bra6.pdf), which is detailed at the conclusion of this letter. These proposed investments in improving education for English Language Learners; strengthening Career and Technical Education; continuing to expand access to high quality pre-kindergarten to all four-year-olds; and providing funding to support teaching excellence, among other things, coupled with our proposals below, can be a roadmap for how we can work together to ensure that every child in New York has access to a high quality education.

Our responses to your questions are as follows:

Teacher Evaluation System

1. As you know, as part of the State's successful 2010 Race to the Top (RTTT) application, in which the State was awarded nearly $700 million in federal funding, landmark education reform legislation was passed by the Legislature and signed into law by the Governor on May 28, 2010 that created a comprehensive teacher and principal evaluation system providing for annual professional performance reviews (APPRs) aimed at improving educator practices and advancing learning for all students (see Education Law

§3012-c). In 2012, the Board of Regents worked with Governor Cuomo, the State Legislature, and the New York State United Teachers (NYSUT) to resolve litigation over the original APPR statute, and amendments were made to Education Law §3012-c on March 27, 2012 to strengthen the evaluation system.

At its December 2014 meeting, the Board of Regents presented the Statewide evaluation results for the 2013-2014 school year, which revealed that less than 1% of teachers in the State were rated Ineffective and over 95% of teachers were rated either Effective or Highly Effective. Results disaggregated by NYC and the rest of the State showed greater differentiation among the four overall rating categories in NYC, which had an APPR plan imposed by the Commissioner pursuant to Education Law §3012-c(2)(m). (NYC had 1.2% of its teachers rated Ineffective and 9.2% Highly Effective compared to 0.4% Ineffective and 58.2% Highly Effective in the rest of the State.) Disaggregated results in the other measures subcomponent (i.e., observations, etc.) also varied considerably across districts depending on what was negotiated locally. For example, NYC, which had State-imposed scoring ranges for the other measures subcomponent, had 1.1% of its teachers rated Ineffective, 8.0% Developing, 60.0% Effective, and 30.8% rated Highly Effective. By comparison a Central NY district had 0.9% rated Ineffective, 32.7% Developing, 34.9% Effective, and 31.4% Highly Effective; and a Lower Hudson district had 0% of its teachers rated Ineffective, 0% Developing, 11.3% Effective, and 88.7% rated Highly Effective.

Differentiation is a necessary component of any evaluation system intended to support professional development and growth. However, as the Governor has previously indicated, **changes in State law are necessary in order to achieve better differentiation and to fulfill the goal of a Statewide evaluation system that identifies those who are excelling so that they can be mentors for their colleagues, identifies those who are struggling so they can get support to improve, and informs high-quality professional development for all educators.**

Currently, evaluations for 80% of New York's teachers are completely determined locally and for the remaining 20% of teachers, 80% of their evaluations are determined locally:

- 20% is based on student growth on State assessments or other comparable measures of student growth determined by districts;
- 20% is based on locally selected measures of student achievement that are established through local collective bargaining; and
- 60% is based on other measures of teacher/principal effectiveness established through local collective bargaining, including observations and surveys.

To make the evaluation system less complex and more effective in differentiating performance, the Governor and Legislature could leverage lessons learned from districts that have effectively differentiated performance and amend Education Law §3012-c to:

- Eliminate the locally selected measures subcomponent, established through local collective bargaining. The data reveal that the locally-negotiated process for assigning points and setting targets in this subcomponent do not differentiate performance in terms of the composite ratings that teachers and principals receive. Instead, assign 40 percentage points to student growth on State assessments and other comparable measures of student growth – including performance-based assessments (like those used in NYC in 2013-14) – determined by districts. Require that for a teacher to be rated "Effective" or better on the other comparable measures of student growth (used for over 80% of teachers that do not have State-provided growth scores), also known as student learning objectives (SLOs), districts must set a rigorous target that a teacher's students achieve at least one year of academic growth. Elimination of the locally selected measures subcomponent could reduce the number of traditional standardized tests students are required to take, thereby addressing the most frequent parent concern with the implementation of this State law, while continuing to allow districts to use locally-selected indicators of student learning.
- Establish State-prescribed scoring ranges for the other measures of teacher and principal effectiveness (the observation subcomponent) rather than allowing them to be locally-negotiated. The existing requirement that educators whose rating on the student performance subcomponents (State growth or other comparable measures and the locally-selected measures in current system) is Ineffective receive an Ineffective overall rating should be maintained.
- Enhance the expedited disciplinary process to make a pattern of ineffective teaching a rebuttable presumption of incompetence rather than merely a significant factor in incompetence determinations, as is done in Education Law §3012-c(5-a)(j) for NYC, but not in §3020-a(3) for the rest of the State. A teacher who has received two consecutive Ineffective ratings should not be permitted to return to the classroom.

Removal of Poorly Performing Teachers

2. On May 28, 2010, the Legislature and the Governor made significant changes to the Education Law to address the problem of removing poorly performing educations from the classroom, including the establishment of the APPR and the provision for expedited hearings under Education Law §3020-a where a teacher or principal exhibits a pattern of ineffective teaching by receiving two consecutive Ineffective ratings on the APPR (see Education Law §3020-a(3)(c)(i-a). Under Governor Cuomo's leadership, the evaluation system was then strengthened via the amendments made to Education Law §3012-c on March 27, 2012. The State has also made significant reforms to improve the efficiency of the administrative hearing process when a teacher is charged with incompetency including the establishment of firm timelines for the teacher discipline/removal procedure set forth in Education Law §3020-a, and greater oversight by SED over the impartial hearing officers who conduct the administrative hearings required by Education Law §3020-a (see e.g., L. 2010, Ch. 103; L. 2012, Ch. 21; L. 2012, Ch. 57, Part B). On March 30, 2012, the Legislature and Governor Cuomo enacted Part B of Chapter 57 of the Laws of 2012, which made additional reforms directed at shortening the length of hearings commenced on or

after April 1, 2012, such as imposing a requirement that all evidence be received within 125 days of the filing of charges and authorizing the Commissioner to appoint a hearing officer if the parties do not agree on one within 15 days of receipt of a list of hearing officers. Part B of Chapter 57 of the Laws of 2012 also modified the manner in which hearing officers are compensated and authorized SED "to monitor and investigate a hearing officer's compliance with statutory timelines" set forth in §3020-a, and exclude from future consideration hearing officers who fail to meet the statutory timelines (see Education Law §3020-a (3)(c)(i)(B)).

When these timelines are strictly adhered to, data produced by the Department this spring reveal that hearings are much shorter than has been the case in the past, without impacting the due process rights of the employee. For example, prior to the 3020-a reforms adopted in 2012, termination hearings resulting in a guilty decision could take as long as two years, a not guilty decision averaged one-and-a-half years, and settlements took about a year. Based on data for the 2013-2014 school year as of April 30, 2014, the average length for a decision under the improved 3020-a system was 190 days in NYC and 177 days for the rest of the State, and settlements took approximately 103 days in NYC and 94 days for the rest of the State. Based on these data, the recent changes in statute have resulted in significantly shorter hearings, but more needs to be done.

Under the current system, the section 3020-a hearings are conducted by private labor arbitrators selected by the parties from an American Arbitration Association list. Those private arbitrators serve in other types of labor arbitrations and are not dedicated solely to section 3020-a hearings. That means they have competing priorities with respect to the scheduling and prompt resolution of section 3020-a hearings. As in any hearing, the arbitrator has discretion to grant adjournments, though section 3020-a(3)(c)(i-a) attempts to constrain those extensions for the expedited hearings. Because arbitrators are selected by the parties, if they are overly zealous in regulating extensions and holding consecutive days of hearings, they risk not being selected for future hearings. On the other hand, while the Commissioner can take action to remove arbitrators from the list based on their continued failure to commence and complete hearings within the statutory time lines, policing the granting of extensions that on their face appear legitimate, but serve to lengthen hearings, would be extremely difficult. **What is required is a paradigm shift—a move to truly expedited section 3020-a hearings.**

The best means to accomplish that, while realizing further cost savings, would be to replace the current group of independent contractors who serve as hearing officers with State employees who will be held accountable for strict adherence to section 3020-a time lines. Accordingly, the Legislature and the Governor could establish a new independent State Office of Administrative Review to conduct these and other administrative hearings for the State. This would eliminate the selection process for hearing officers, with its resulting delays, and would ensure that hearings are conducted by hearing officers who are independent, do not face the competing scheduling issues that hearing officers who are labor arbitrators face, do not have motivation to grant excessive extensions to the parties, and will be answerable to their supervisors for adherence to the section 3020-a time lines. Because the State hearing officers are

salaried, this would also eliminate issues on hearing officer compensation, such as compensation for study days or partial days of hearing and allow the State to control costs. Most importantly, it would give the State control over the conduct of the hearings and avoid the lengthy delays in hearings that have plagued the section 3020-a process. This approach, in conjunction with making a pattern of ineffective teaching a rebuttable presumption of incompetence rather than merely a significant factor in incompetence determinations, would radically reduce the time and cost of the section 3020-a removal process to ensure students are not assigned to the classrooms of ineffective teachers.

In addition, the Governor could propose in State law adopting the policy adopted by the State of Rhode Island in its Race to the Top application (as well as the laws enacted by the State of Indiana and the State of Florida) that no student can be assigned to two teachers in a row with ineffective ratings.[1] This policy would protect students from the lasting negative impact of having multiple ineffective teachers in a row.[2]

Teacher Training and Certification Process

3. Over the past five years, the State has taken several actions to enhance the quality of teachers in New York State:

The State created a more comprehensive evaluation system for teachers and principals. The Board of Regents also used RTTT funds to pilot clinically rich teacher preparation programs that are deeply embedded in classroom practice with extended teaching residencies/internships in schools rather than brief student teaching commitments. These preparation programs partnered with high-need schools to provide clinically rich experiences in return for the candidate's commitment to serve in a high-need school where there is a shortage of well-prepared teachers. New York State invested $20 million in awards to 13 institutions (11 graduate and two undergraduate), followed in 2014-2015 by an additional $3.1 million, to prepare over 530 teachers in clinically rich teacher preparation pilot programs through partnerships with 57 high-need schools across the State. These programs are geared toward increasing the supply of highly effective teachers in high-need subjects such as science, mathematics, special education, or teachers of English to speakers of other languages.

Employment data from the first and second cohorts of graduates indicate that 84 percent have teaching jobs in high-need schools across the State, including NYC, immediately following graduation. Although it is too soon to report retention rates of

[1] http://www2.ed.gov/programs/racetothetop/state-scope-of-work/rhode-island.pdf (last visited December 30, 2014); IND. CODE §20-28-11.5-7 (b); FLA. STAT. §1012.2315(6).

[2] SANDERS, W. L., & RIVERS, J. C. CUMULATIVE AND RESIDUAL EFFECTS OF TEACHERS ON FUTURE STUDENT ACADEMIC ACHIEVEMENT. KNOXVILLE, TN: UNIVERSITY OF TENNESSEE VALUE-ADDED RESEARCH AND ASSESSMENT CENTER (1996), available at http://heartland.org/sites/all/modules/custom/heartland_migration/files/pdfs/3048.pdf (last visited December 30, 2014).

novice teachers as a result of these programs, there is preliminary evidence to suggest a positive impact on student growth and achievement.

Survey data collected by select institutions indicate that P-12 students associated with this program demonstrated increased attendance, frequency of successful homework completion, and on-task student behavior. With strong evidence of the clinically rich preparation programs' ability to prepare teachers and school leaders to meet the instructional needs of students, particularly in high-need schools, the majority of institutions involved in this work are collaborating with their P-12 partners to develop sustainability plans that would allow the continuation of the program. Among the institutions receiving grants was the American Museum of Natural History (AMNH), making it the first museum in the nation authorized to grant teaching degrees. The AMNH program is producing well-prepared Earth Science teachers with deep content knowledge and strong pedagogical skills who are now teaching in high-needs NYC high schools.[3]

In addition, the Board of Regents established new, more rigorous teacher and school building leader certification exams. Beginning May 1, 2014, new teachers must take and pass the Academic Literacy Skills test, which assesses a teacher's literacy skills; a content specialty test, to ensure that teachers have the content knowledge they need to teach a certain subject; the edTPA, a teacher performance assessment that measures a teacher's pedagogical skills; and the Educating All Students exam, which tests a teaching candidate's ability to understand diversity in order to address the needs of all students, including English Language Learners and students with disabilities, and knowledge of working with families and communities. These new certification examinations ensure that teaching candidates have the knowledge, skills and abilities to be effective teachers.

We recently posted institutional pass rates on these exams on the Department's website in an effort to promote transparency and accountability for teacher preparation programs. In New York State, teacher education programs are held accountable for the quality of their programs leading to certification in teacher education and their candidates who complete such programs. Pursuant to the Commissioner's regulations, the Department has the authority to require an institution to submit a corrective action plan if fewer than 80 percent of the institution's students have passed each of the required certification examinations. In order to phase-in the new teacher performance assessment (edTPA), for the 2013-2014 and 2014-2015 years, programs with less than an 80 percent pass rate on the edTPA will be required to submit a professional development plan to the Department that describes how the program plans to improve the readiness of the faculty and pass rates for candidates on the edTPA (see 8 NYCRR 52.21(b)(2)(iv)). **The pass rates on these exams reflect the increased rigor of the revised certification process and demonstrate that New York is fulfilling the commitment in the 2013-2014 budget to develop a "bar exam" for teachers.**

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[3]See Douglas Quenqua, *Back to School, Not on a Campus but in a Beloved Museum,* N.Y. Times, January 12, 2012, available at http://www.nytimes.com/2012/01/16/nyregion/american-museum-of-natural-history-will-groom-school-teachers.html (last visited December 30, 2014).

A potential budget priority for the Governor could be the creation of a New York State Teacher Residency Program, modeled on the Race to the Top clinically rich teacher preparation grants, with rigorous selection criteria and a focus on development of strong content knowledge, year-long internships in schools and intensive mentoring support during the first year of teaching. In the beginning, candidates could, for example, be required to be certified in high demand subjects (such as Teaching English to Speakers of Other Languages and secondary-level Science, Technology, Engineering, and Math (STEM)) and commit to a minimum of five years teaching in high-needs schools.

Financial Incentives For High-Performing Teachers

4. Using $83 million from federal RTTT funds, SED has implemented the Strengthening Teacher and Leader Effectiveness (STLE) grant program. **Through STLE, nearly one-third of all districts in New York have shifted their compensation systems to career ladder pathway models that incentivize and reward the most effective teachers taking on leadership roles. In addition, STLE grantees rewarded the most effective teachers and school leaders through the implementation of recruitment and transfer bonuses that provide financial incentives to attract high performing educators into hard-to-staff and specialty subject areas, as well as into high-need or low performing schools.** Districts are developing unified programs, informed by evidence gathered through the evaluation system, focused on improving the preparation of educators; promoting strategic compensation and innovative staffing models; and ensuring all teachers and school leaders have access to high-quality, targeted coaching and development**.**

District-wide career ladder pathways under STLE provide recognition and advancement to the most effective educators as they demonstrate increased performance. Using carefully developed selection criteria, districts identify individuals who will fulfill the additional roles and responsibilities associated with the compensated career ladder positions, including curriculum and instructional coaches, data driven instructional coaches, peer evaluators, professional developers, and home-school liaisons. For example, teacher leaders and instructional coaches in Greece Central Schools are working with the districts' most high-need students, while also using evidence of student performance and analysis of instructional strategies to support their peers with implementation of college and career ready standards. In addition, Teacher Leaders are using APPR to provide targeted feedback and individualized professional growth opportunities to colleagues. (Video: The Development of Career Pathways in the Greece Central School District).[4] In Huntington Union Free School District, trained academic coaches and teacher mentors are part of a formative peer observation model that incorporates Instructional Focus Walks to support teaching and learning throughout the district. Trained Teacher Leaders serve as

4 See https://www.engageny.org/content/development-career-pathways-greece-central-school-district.

resources for implementation of college and career ready standards, evidence-based instruction, and high-quality evaluations through formative observations, coaching, and co-planning. (Video: "Focus Walks" Foster Professional Growth in Huntington).[5] Staff involved in these kinds of programs report satisfaction in being recognized as the most effective educators in their buildings and districts, in being able to contribute to the school vision and provide assistance to one another, and value the feedback and resources gained through these interactions with colleagues who can relate to the complexities of the classroom environment.

The Department believes that the **Teacher Excellence Fund, which was created in the 2014 Budget (Ch. 56 of the Laws of 2014), can be re-purposed to capitalize on this momentum in our STLE grantees by allowing districts to design innovative compensation models based on educator performance in conjunction with compensated career ladder roles and responsibilities.** Having career ladder pathways connected to highly effective and effective educator performance evaluations support the retention of our most effective educators in schools, acknowledge their accomplishments, improve the equitable access to educators, and ensure that students are college and career ready. **The Board of Regents has also proposed allocating $80 million in the 2015-2016 State Budget to the continuation of the STLE grant.**

Probationary Periods

5. Currently, Education Law §3012-c requires that the APPR constitute a "significant factor" in employment decisions, including but not limited to tenure determinations and termination of probationary teachers and principals. While the law does not require that the APPR be the sole or determinative factor in tenure or termination decisions, it requires that the APPR be considered in making such determinations.

To address concerns districts have expressed about a lack of clarity regarding their legal authority with respect to probationary teachers, **Education Law §3012-c should be amended** – building on existing Commissioner's regulations – **to further clarify that a board of education has unfettered discretion to terminate a probationary teacher or principal, including for performance reasons, until a tenure decision is made at the end of the probationary period, as long as those reasons are statutorily and constitutionally permissible.**

In recent years, several states have made changes to their tenure laws to extend the length of a teacher's probationary period in an effort to provide districts with additional time to evaluate a teacher's performance before tenure is acquired and to provide critical supports to teachers in their first years in the classroom. For example, in 2012, New Jersey extended its teacher probationary period from three to four years. New teachers wishing to achieve tenure must complete a mentorship program during their initial year of employment, and must also receive "effective" or "highly effective" ratings in two

[5] See https://www.engageny.org/resource/focus-walks-foster-leadership-growth-long-island-school-district.

evaluations within the first three years of employment following the year of mentorship to obtain tenure. (see NJ STAT. ANN. §18A:28-5 (2012)). In 2011, Michigan also extended its probationary period for teachers to five years if the teacher has been rated as effective or highly effective on his or her three most recent performance evaluations (see MICH. COMP. LAWS §38.81)).

The New York State probationary teacher process could be further strengthened by the Governor and Legislature by extending the probationary period of teachers and administrators in New York State to five years, so boards of education have additional time to evaluate their performance.

Struggling Schools

6. One key strategy by which the State can address persistent gaps in student achievement among high and low performing groups of students is to intervene successfully in the State's Priority Schools and turn around their low levels of student achievement. Currently there are 178 Priority Schools in the State, heavily concentrated in the Large Five City School Districts and 13 other school districts that enroll primarily low-income students of color. Many of these Priority Schools have been persistently low achieving for many years. In these schools, whole generations of students are left behind, as often fewer than half of the students who attend a Priority School will ultimately graduate on time and, of those who do, almost all will need remediation in order to successfully pursue post-secondary education. **We agree with the Governor that if these schools cannot be made to perform, they must be closed and replaced by institutions that are up to the task of ensuring that students graduate from school college- and career-ready.** However, the current tools available to the Department present substantial obstacles to working with districts to ensure that low-performing schools will not be replaced by other schools that are almost equally low-performing.

Recognizing the Buffalo City School District's (Buffalo) critical need for intervention and support in improving student performance, in June 2012, pursuant to Education Law §211-b and §211-c, the Commissioner appointed a Distinguished Educator (DE) in Buffalo, effective August 1, 2012. The DE was reappointed to additional one-year terms in both 2013 and 2014. An appointed DE has statutory authority to assess the district's programming; to assist it in planning; and to make recommendations to the board, on which the DE serves as an ex-officio non-voting member.

Further, over the past year, SED has worked extensively with Buffalo and has designated four of Buffalo's schools as "Out of Time" schools. "Out of Time" schools are those that have not met the required academic progress for removal from Priority School status in the three years since identification as Persistently Lowest achieving and/or Schools Under Registration Review and are not implementing a whole school reform model, such as a Federal School Improvement Grant or School Innovation Fund model. SED has directed Buffalo to begin phasing out these schools unless viable intervention plans are submitted and has also required that students in the three "Out of Time" high schools be granted immediate access to high-quality programs offered by a neighboring BOCES. SED

provided a summary of the next steps that must be taken with the named schools, including providing SED with an intervention plan for each of the named schools chosen from the following options: (a) closure of the schools and relocation of the students; (b) phase-out of the current schools and replacement with new schools such as district-created schools or charter schools; (c) conversion of the schools to charter schools; (d) entering into a contract with SUNY to assume responsibility for the students attending the schools; or, (e) entering into Educational Partnership Organization contracts to take over administration of the schools. Buffalo is required to submit plans to SED in January 2015 for Commissioner approval. The plans must meet all of the requirements for the option chosen, evidence thoughtful planning and resource allocation, and make the necessary changes for successful implementation of the plan. The Department has similarly required that Syracuse choose from these options for three of its schools, NYC for two of its schools, and Rochester for one of its schools. Additional schools will shortly begin this "Out of Time" process.

The Department has provided extensive resources to Priority Schools to implement whole school reform models through the Federal School Improvement Grant (Title I of the Elementary, Secondary Education Act of 1965 §1003(g)) program as well as the RTTT supported Systemic School Support Grants. The Department has also provided extensive technical assistance to Districts with Priority Schools through its Project Management initiative, as well as the Department's on-site visits using the Diagnostic Tool for School and District Effectiveness. For those schools that have failed to demonstrate improvement despite these supports and interventions, the Department has required that districts implement one of the actions listed above. **Our experience has been that while we have used the full authority available to the Department to address the issue of struggling schools, the tools available to the Department need to be expanded so that systemic conditions in districts that result in struggling schools can be fixed.** Without such an expansion of the available tools as proposed below, there is little guarantee that the conditions in newly created schools in these districts, or schools that operate under alternative governance structures within these districts, can be organized in ways that result in substantially higher student achievement.

Although your letter seeks ideas for driving dramatic improvements in priority and struggling schools, such as those in the Buffalo City School District, we note that many districts across the State also struggle with serious challenges in the areas of governance, fiscal management, operations, and providing appropriate programming and services for students, including English Language Learners and students with disabilities. The Department continues to assist these districts in finding a path to stability and success. For example, in June 2014, in an attempt to address the serious fiscal issues facing the East Ramapo Central School District, the Department appointed Henry M. Greenberg to serve the district as a Fiscal Monitor in an advisory capacity in order to ensure that the district is able to provide an appropriate educational program and properly manage and account for State and federal funds received. On November 17, 2014, Mr. Greenberg delivered his findings and recommendations to the Board and the Department, which made clear that a fiscal, social and human crisis exists in the district. His findings and recommendations, particularly those involving fiscal oversight and available resources, require the

engagement of the Governor and Legislature, and the Department continues to work with the Legislature on this issue.

Mr. Greenberg recognized that additional State funds are needed to avoid future budgetary crises and to put East Ramapo on a path to long-term fiscal stability. However, he also recommended that any additional funds must include an enforceable mechanism to ensure that resources are allocated fairly. Specifically, Mr. Greenberg recommended that "[a]t a minimum, there must be a vehicle to override, in real time, unreasonable decisions by the Board and Superintendent and ensure that the District conducts its affairs in a transparent fashion." **The Board and Department fully support this type of multi-faceted approach to the complex problems facing East Ramapo and hope the Governor will propose such an approach in his Executive Budget.**

In addition, the Department, in partnership with the Office of the Attorney General (OAG), has taken swift and strong action to address the plight of students across the State, including undocumented and unaccompanied students, whose attempts to enroll in public schools and take advantage of their right to a free public education have been delayed or denied in violation of State and federal law, as well as SED guidance. The Department has issued guidance to districts on their obligations regarding enrolling students and making residency determinations and to specifically address the circumstances of unaccompanied minors who have recently entered the country in larger numbers. In October 2014, the Department also held three regional meetings with school officials, community-based organizations and advocates on Long Island and in Rockland and Westchester Counties to provide technical assistance on the legal obligations of districts around enrollment and the rights of students and parents, and to provide information on the due process rights of impacted students, including the right to appeal district enrollment decisions directly to the Commissioner. On October 23, 2014, OAG and SED announced a review of district enrollment procedures for unaccompanied minors and other undocumented students to examine whether students are being denied their constitutional right to an education. The review initially focused on districts in four counties (Nassau, Suffolk, Westchester, and Rockland) experiencing the largest influx of unaccompanied minors, and has expanded to include districts Statewide about which SED and OAG have received complaints regarding enrollment. At its December 2014 meeting, the Board adopted amendments to §100.2(y) of the Commissioner's regulations to codify applicable federal and State laws, as well as existing Department guidance to districts, in order to ensure that unaccompanied minors and undocumented youths are provided their constitutional right to a free public education.

Based on the above, it is clear that, when districts face significant challenges in the areas of governance, fiscal management, equity and access, attention is diverted from the critical mission of educating their students and supporting their teachers and leaders. It is our belief that any plan for intervention and support in struggling schools include careful consideration of these issues to ensure that the State develops a comprehensive, effective system for helping districts address these significant challenges, thereby allowing them to focus on preparing all students for success in college and careers.

To enhance the State's ability to require and implement strong interventions in chronically underperforming districts, the Legislature and Governor should consider passing the Regents Priority Bill on Support and Intervention in Chronically Underperforming Schools. Certain school districts in this State are continually and chronically underperforming and are characterized by years, or even decades of consistently low academic performance, rampant fiscal instability, or both. Fiscally, these districts fail to exercise appropriate fiscal management by failing to take the actions necessary to keep the district's budget in balance and/or maintain appropriate and consistent fund balances. Our Regents priority bill would put these chronically underperforming school districts into three levels of academic and/or fiscal restructuring status, in an effort to provide them with the tools and supports they need to get them back on track and remove them from oversight.

The Governor and Legislature could also implement a model similar to that used in Massachusetts for those districts and schools that have been identified as chronically underperforming. In Massachusetts, the State Legislature authorized in statute the appointment of a receiver for any school or district designated as chronically underperforming. The receiver is authorized to take numerous aggressive actions to increase efficiency and dramatically improve student achievement (see MASS. GEN. LAWS c. 69, §1K (2010)).

Charter Schools

7. Charter schools can be an effective choice for parents and lead to educational innovation if they are held accountable for increases in student achievement and outcomes.

The Board of Regents believes that parents must be afforded the opportunity to have their children educated in a high quality educational program, whether that is in a charter school or a district school. Accordingly, the Board of Regents has supported expanding the number of high quality seats in charter schools. As part of its successful Race to the Top Application, in 2010, the Department worked with the Governor and the Legislature to enact historic legislation that more than doubled the cap on the number of charter schools in the State (see, Ch. 101 of the Laws of 2010). At this time, the cap on the number of charter schools was also adjusted to allow both SUNY and the Regents to issue 130 charters through a RFP process and Education Law §2852(9) was amended to add a further limitation that in each case, no more than 57 of the 130 charters could be in NYC.

There should be no arbitrary barriers to increasing the number of high quality seats in charter schools. Although NYC has not reached the cap established in the 2010 law, it is likely that the cap will be reached shortly. **To prevent an arbitrary barrier, the Governor and Legislature could eliminate the regional distinctions under the current cap (as high quality charter applications have been greater in NYC than in the rest of the State to date), or raise the cap on charter schools in NYC because there is a strong demand in NYC. Moreover, the Legislature and the Governor could strengthen the law to require charter schools that do not improve student performance to close and any closed charter schools should not be counted toward the cap.**

In 2010, the charter school law was further amended to require that enrollment and retention targets be established for students with disabilities, English Language Learners and students in poverty in charter schools, and to make the repeated failure to meet or exceed those targets a ground for termination of the charter. The Board of Regents remains committed to enforcing these targets to ensure that all students have an equal opportunity to receive a high quality education in charter schools.

Use of Technology and Virtual Learning

8. **The Department and the Board of Regents support the use of technology to improve education.** In fact, SED used federal RTTT funds to implement a Statewide virtual learning strategy to develop on-demand virtual learning Advanced Placement (AP) courses for low-wealth/high-need students, schools, and districts in New York State. New York is a national leader in the use of technology to provide high quality, college level courses. Every student deserves to be prepared for college and careers, not just those who live in districts that can afford to offer AP classes.

Recognizing the importance of technology in providing a range of quality coursework for students, the Board of Regents has also approved the use of blended online learning in the Commissioner's regulations. Specifically, 8 NYCRR §100.5(d)(10), effective July 15, 2011, requires school districts, registered nonpublic schools and charter schools that choose to provide their students with instruction by means of online or blended coursework to ensure the rigor and quality of such courses by requiring that they: are aligned with the applicable New York State learning standards for the subject area in which instruction is provided; provide for documentation of student mastery of the learning outcomes for such subjects, including passing the Regents examination in the subject and/or other assessment in the subject if required for earning a diploma; provide for instruction by or under the direction and/or supervision of a certified teacher (if instruction is to be provided by a school district, BOCES, or pursuant to a shared service agreement), or of a teacher of the subject area in which instruction is to be provided (in the case of a registered nonpublic school or charter school); include regular and substantive interaction between the student and the teacher providing direction and/or supervision; and satisfy the unit of study and unit of credit requirements in section 100.1(a) and (b) of the Commissioner's regulations.

Mayoral Control

9. The Board of Regents supported the adoption of mayoral control in NYC. **Mayoral control in NYC should be renewed. Whether mayoral control should be extended to other cities is a local issue that should be decided based on local conditions.**

Regionalization

10. Given the fiscal climate and constraints in this State, as well as patterns of declining enrollments, many school districts, particularly small, rural districts, are

threatened by a decline in educational opportunities and high-quality programs for their students. The Board of Regents has long promoted the provision of certain key services on a regional basis to provide school districts new and innovative models to provide higher quality educational opportunities to students through cost-effective and efficient services, including shared business offices, shared transportation, etc.

The Department has a Regents priority bill that has been introduced for the past three legislative sessions seeking to **establish regional high schools** to provide districts with the opportunity to work together to establish a regional secondary school, to allow for improved educational opportunities and more cost-effective service delivery (see, in 2012, S.7486; in 2013, S.4184; in 2014, S.4184-A/A.7149-A). Regional secondary schools have been used in rural areas of other States, including Massachusetts, to ensure that students in rural communities retain access to specialized coursework, such as Advanced Placement course work or Career and Technical Education programs. This regional approach will help rural communities adjust to declining enrollments while maintaining community identity through the continuing role of the local elementary school.

School district reorganization also provides the opportunity for two or more contiguous school districts that meet prescribed criteria to merge into a single district. The State has provided incentives for reorganization through additional Operating and Building Aid. In recent years, multiple efforts to reorganize have failed, with differential tax impacts on the reorganizing districts often cited as a cause for the failure. While the 2014-2015 Enacted Budget included a provision that will make it easier for some school districts to reorganize by phasing-in impact on tax rates of newly reorganized school districts, there are still a number of statutory and fiscal barriers to mergers.

The Governor recently proposed that $500 million of the settlement funding available to the State be provided to local governments to promote shared services and consolidations. In agreement with this concept, and in order to encourage reorganizations that are beneficial to students, the Board of Regents recommended in their 2015-2016 State Aid Proposal that the formulas that are used to incentivize reorganizations be enhanced to help ease changes in tax rates for reorganized school districts. This could include linking the Reorganization Incentive Aid formula to Foundation Aid, rather than the 2006-2007 Operating Aid. In addition, the State could provide additional incentives for regionalization of services in the State budget.

Appointment and Selection Process for the Board of Regents

11. The Board of Regents has been in continuous existence since 1784, when Alexander Hamilton was a Regent, and was most recently continued in 1938 in Article XI, §2 of the New York Constitution. Under Article V, §4 of the New York Constitution, the Regents are the head of the State Education Department and appoint the Commissioner of Education who serves at their pleasure.

The selection and appointment process for the Board of Regents is within the control of the State Legislature. **The Board of Regents does not recommend any changes to the selection and appointment process.**

Selection Process for the Replacement of Commissioner

12. Under Article V, §4 of the New York Constitution, the Board of Regents appoints the Commissioner of Education. At its December 2014 meeting, the Board publicly explained the qualifications needed for the next Commissioner. The Board expressed a desire for the new Commissioner to continue to focus on the Board's overall commitment to raise standards for all New Yorkers and close the achievement gap. It was also clear that the qualifications would include continuing the prioritization of English Language Learners, immigrants, and students with disabilities; expanding the work on multiple pathways to graduation, career and technical education and STEM opportunities; and enhancing pathways in humanities and the arts. The Board further explained that candidates need to understand the importance of access to higher education, rigorous teacher preparation, and high quality professional development.

The Board publicly described the selection process, including the composition of the search committee and their intention to interview prospective search firms to ensure that the selected firm will only recruit qualified candidates that meet all of the characteristics described above. The Board explained that the search committee will report back to the full Board with a short list of candidates who will be interviewed and shortly thereafter, the Board hopes to appoint a successor Commissioner that meets all of the qualifications described above.

The Board of Regents welcomes input from stakeholders regarding the selection criteria for the next Commissioner of Education.

School Funding to Improve Academic Performance

We believe that for the education reforms implicit in your questions to be effective in improving student outcomes, these reforms must be coupled with investments such as those proposed by the Board of Regents. **The use of average per pupil spending to describe education in New York obscures deeply disturbing inequities in resources between the highest-need and lowest-need districts – which have only grown in the years since the fiscal crisis.** The New York State school finance system needs to be equitable and provide support to our highest-need school districts. The 2015-2016 Regents State Aid Proposal is designed to provide our highest-need districts with support targeted at addressing their needs as well as additional funding to help them overcome the effects of the Great Recession and prepare their students for college and career success. In it we propose:

- **Transition Operating Aid:** The funding approach for our public schools must ensure that all districts have the resources necessary to provide enriching academic programs that prepare students for success in college, careers, and life. The Board

recommends a blended State aid approach through a Transition Operating formula that features a combination of Gap Elimination Adjustment (GEA) restoration and new Operating Aid allocated according to the principles underlying Foundation Aid.

- **Support for English Language Learner (ELL) Programs:** If we truly intend to close the achievement gap, we must increase our support for the estimated 200,000 ELLs in New York State. These students make up a significant percentage of New York's lowest performing students as measured by State tests and are disproportionately represented among students who fail to complete high school within six years. Accordingly, the Board recommends an additional $86 million in aid for districts serving ELLs to support team teaching approaches, instructional resources and supports to improve instructional practice, and substantial and sustained opportunities for all teachers and administrators to participate in meaningful professional development.
- **Support for Districts Experiencing Increases in Enrollment:** The Board recommends a two-tiered approach to provide relief for school districts that have experienced recent enrollment increases that are not accounted for in existing formulas, including $30 million for districts with new students and an additional $10 million to be provided to districts to address the recent arrival of unaccompanied immigrant children. Without these funding increases, we fear districts will be forced to make troubling cuts in program such as we are already seeing in places like Roosevelt Union Free School District on Long Island. Many of the districts receiving the most unaccompanied minors are high-need districts and should not be forced to choose between providing a quality education to incoming students and preserving core academic programs for the district as a whole.
- **Increased Support for Expanding Career and Technical Education (CTE) Programs:** One of the best ways we can make more of our children ready for college and career is by expanding access to Career and Technical Education. Programs like PTECH prepare our kids for the jobs of tomorrow, keeping them engaged in the classroom through graduation and preparing them for college. Unfortunately current funding formulas disincentivize many high-needs districts from participating in these programs because they have not been adjusted to reflect inflation since 1990. After voting at its October meeting to provide Multiple Pathways to graduation – including a "4+1" option that will allow students to take four Regents exams and a comparably rigorous CTE exam – the Board recommends enhanced special services aid for CTE Pathways programs operated by the Big Five and non-component school districts and modernized BOCES Aid for CTE Pathways programs.
- **Expanded Access to Full-Day Prekindergarten Funds:** The Board recommends building on last year's investment in full-day prekindergarten by expanding funding by $251 million as the first step of a multi-year plan to move to a consolidated and truly universal full-day program. The Board's proposal would add $70 million to the $300 million received by New York City last year, and add approximately $180 million to the rest of the State to supplement the $40 million received last year. These funds would allow NYC to continue to expand its historic investment in pre-kindergarten while allowing districts across the State to do the same. This

investment should be part of an alignment of the State's existing pre-kindergarten programs to achieve rigorous quality standards, streamlined data reporting, and consistent regulations regarding staffing and facilities.

- **Provide Support for Instructional Improvement Programs:** The Board recommends $80 million in targeted funding for instructional improvement programs that leverage the most effective teachers as mentors and coaches for their colleagues, such as expansion of the Strengthening Teacher and Leader Effectiveness (STLE) Program, which has been a central part of the effort to prepare teachers and school leaders to teach college- and career-ready standards.
- **Settlement Fund Priorities:** The Board recognizes the State's receipt of approximately $4.8 billion in non-recurring legal settlement funds as a unique opportunity to make $678 million in one-time educational expenditures and investments to bring our instructional programs to the world class standard our students deserve. The Board recommends $360 million for payment of existing school aid liabilities to keep the promise on claims already submitted by districts; $238 million to support acceleration of prekindergarten payments related to the new Statewide Universal Full-Day Prekindergarten program, which was structured in such a way that school districts were required to pay for a majority of the first year of the program themselves before receiving any State funds; creation of a $50 million CTE Technology Facility Construction Fund to support upgrades to facilities necessary to support high-tech training programs; and $30 million to purchase optical scanning voting machines to support districts' efforts to come into compliance with unfunded mandates in the Election Law.

Additional Issues for Consideration that Effect New York's Student Performance

1. School Segregation

One significant area that is not addressed in your questions is school segregation. The Legislature and Governor should be aware that a 2014 study by The Civil Rights Project at UCLA found that New York State has the most segregated schools in the nation. School segregation leads to unequal opportunity. Studies indicate that low-income and minority students perform better academically in diverse schools than in racially and socioeconomically segregated schools, due in large part to fewer disparities in opportunities and resources, including differing levels of teacher qualifications, teacher experience, and teacher effectiveness among schools. School segregation exacerbates existing patterns of housing segregation as parents with means choose neighborhoods based on the availability of zoned schools with higher proportions of affluent children, often exacerbating gentrification patterns around particular school zones.

Just as the consequences of segregated schools are clear, so are the benefits of diverse schools. They offer all children the opportunity to develop the kind of critical-thinking skills that come from the perspectives expressed by students from different backgrounds and can foster welcoming, safe environments where all people feel valued.

Earlier this week, State Education Commissioner John B. King, Jr announced that Socioeconomic Integration Pilot Program grants of up to $1.25 million each will be used to increase student achievement in up to 25 of the State's low-performing Priority and Focus Schools through increased socioeconomic integration.

Title I Focus Districts with poverty rates of at least 60 percent and at least 10 schools in the district are eligible to apply for the grant. Up to 25 Title Focus or Priority schools will be funded for this pilot program.

A district may apply for grant funds to implement one of several models intended to increase achievement of low socioeconomic status (SES) students and attract higher SED students, including students from other school districts based on inter-district choice agreements, to voluntarily enroll in the Focus or Priority School Program design may include but is not limited, to:

- Dual Language programs designed to meet the needs and languages of English Language Learners (ELLs) living in proximity to the school;
- School-side Enrichment Model;
- Career pathways programs based in whole or part at local institutions of higher education (IHE);
- STEM programs that include a summer residential experience of no less than 1 full week at a post-secondary institution;
- Themes such as the arts, which include the visual arts, dance, music, theater, public speaking and drama; or
- Montessori or other proven, student centered educational models.

There are several successful programs in other states that promote socio-economic integration. For example, controlled choice has had a proven impact on school improvement in Lee County, Florida.[6] In addition, Richard Kahlenberg has studied the significant improvements in achievement for, among others, African-American children in Cambridge, MA and magnet schools in Wake County, North Carolina.[7]

The Governor and Legislature could act to promote greater socioeconomic integration by expanding the Rochester Urban-Suburban program or programs such as those in place in other states to other regions of New York and requiring districts to establish enrollment policies designed to increase socioeconomic integration.[8]

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[6] MICHAEL ALVES, CHARLES WILLIE AND RALPH EDWARDS, STUDENT DIVERSITY, CHOICE AND SCHOOL IMPROVEMENT, (Greenwood Press, 2002).

[7] RICHARD D. KAHLENBERG, TURNAROUND SCHOOLS THAT WORK: MOVING BEYOND SEPARATE BUT EQUAL, (Century Foundation, 2009).

[8] See Geoff Decker, *In Brooklyn's District 13, a Task Force Aims to Engineer Socioeconomic Integration*, February 12, 2014, available at http://ny.chalkbeat.org/2014/02/12/in-brooklyns-district-13-a-task-force-aims-to-engineer-socioeconomic-integration/#.VKGjWl4AKA (last visited December 30, 2014).

2. DREAMers Act

Current State law, while providing undocumented immigrant students with in-State tuition rates at our public colleges and universities, prohibits these students from receiving State financial aid, which, in effect, equates to a denial of access to higher education. Our society and our economic growth depend on a vibrant, well-educated workforce. Passing the DREAMers Act would ensure that these undocumented immigrants are no longer denied access to the education they need to fully participate in our economy and would ensure that the full range of possibilities are available to our P-12 students as they look beyond high school graduation.

Thank you for the opportunity to share our thinking and recommendations on these critical issues. As we continue our work to ensure that all students in New York State graduate from high school ready for college and careers, we look forward to continuing this critical dialogue with you and with our stakeholders across the State.

Sincerely,

Merryl H. Tisch
Chancellor
Board of Regents

Elizabeth R. Berlin
Acting Commissioner (Effective 1/3/15)
New York State Education Department