Index No. 85035/2023

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

STEPHANIE DICAPUA, MICHAEL KANE, WILLIAM CASTRO, MARGARET CHU, HEATHER CLARK, SASHA DELGADO, JOAN GIAMMARINO, ROBERT GLADDING, CAROLYN GRIMANDO, BENEDICT LOPARRINO, NWAKAEGO NWAIFEJOKWU, INGRID ROMERO, TRINIDAD SMITH, NATASHA SOLON, AMARYLLIS RUIZ-TORO, DENNIS STRK, and TEACHERS FOR CHOICE, individually and on behalf of its members,

Petitioners,

-against-

CITY OF NEW YORK, and the NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondents.

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' CROSS-MOTION TO DISMISS THE VERIFIED PETITION

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Matter No.: 2023-019394

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MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' CROSS-MOTION TO DISMISS THE VERIFIED PETITION

PRELIMINARY STATEMENT

Respondents City of New York and New York City Department of Education ("DOE") respectfully submit this Memorandum of Law in Support of Respondents' Cross-Motion to Dismiss the Verified Petition. This hybrid action brought by the Petitioners must be dismissed as a matter of law for the following reasons.

First, Petitioners' Article 78 Claims are barred because they failed to commence an Article 78 proceeding within the four-month statute of limitations set forth in CPLR § 217. Second, Petitioners' NYCHRL claims against the DOE are barred because they failed to file notices of claims as required by New York Education Law § 3813(1). Third, Petitioners' claims

are barred by *res judicata* or collateral estoppel. Fourth, the City of New York is not the proper Respondent. Fifth, Petitioners do not have a private right of action to bring claims against Respondents under the New York State Constitution. Finally, Petitioner Teachers for Choice lacks organizational standing to bring this proceeding on behalf of its purported members.

STATEMENT OF FACTS

On August 23, 2021, Mayor de Blasio and the New York City Commissioner of Health and Mental Hygiene, David A. Chokshi, announced that DOE employees were required to receive an initial COVID-19 vaccination by September 27, 2021. (See Verified Petition, NYSCEF No. 40, ¶ 71.) Petitioners requested religious accommodations to be exempted from this vaccination requirement. (Id., ¶¶ 33-48.) Petitioners Castro's and Ruiz Toro's requests for religious accommodations were ultimately granted. (Id., ¶¶ 35,46.) Petitioners Kane, Dicapua, Chu, Clark, Delgado, Gladding, Nwaifejokqu, Romero, Smith, Strk, and Loparrino's requests were denied, and they were subsequently terminated for failing to comply with the vaccination mandate in February of 2022. (Id., ¶¶ 33-34, 36-38, 40, 42-44, 47-48.) Petitioner Giammarino was terminated in August of 2022. (Id., ¶ 389.) Petitioners Grimando's and Solon's requests were denied in the Fall of 2021 before they chose to get vaccinated. (Id., ¶¶ 460-576.) None of the Petitioners filed a notice of claim against the DOE. (See generally id.)

ARGUMENT

POINT I

THIS CASE IS NOT RELATED TO RIVICCI AND PETITIONERS ARE ENGAGED IN IMPROPER FORUM SHOPPING

In a blatant attempt at forum shopping, Petitioners have indicated to the clerk that the instant case is related to Timothy Rivicci v. New York City Fire Department, et. al., Index No. 85131/2022. For the reasons detailed below, such a designation violates 22 NYCRR § 202.3(b)

which requires that cases be assigned to judges pursuant to a method of random selection. Simply put, this case is not remotely related to Rivicci, with the parties and the subject matter differing from Rivicci.

Indeed, such transparent forum shopping has been an inappropriate strategy by multiple petitioners in other Article 78 proceedings to steer their cases toward a preferred Justice of this Court in unrelated cases seeking exemption from the vaccine mandate. Here, as against this proceeding, Rivicci involved a different respondent entity (the City of New York), a different vaccine mandate (pertaining to City employees), a different reasonable accommodation process, a different denial basis, and a myriad of other differing facts.

Particularly, the Petitioner in Rivicci involved a New York City Fire Department ("FDNY") firefighter who sought and was denied a religious exemption from the City of New York's October 20, 2021, vaccination mandate for City employees, and who was subsequently placed on a leave without pay following his denied request. The decision turned on the "vague and conclusory," and therefore "arbitrary and capricious" denial of Rivicci's reasonable accommodation request by the FDNY. In contrast, in the instant Petition, Petitioners are DOE employees who applied for religious exemptions to the vaccination mandate implemented for DOE employees. Petitioners sought religious exemption from this mandate first through the DOE, then appealed to an arbitrator pursuant to a union negotiated procedure, and finally, as the result of federal litigation, obtained a second review of their exemption request by the Citywide Panel. Indeed, Petitioners have been litigating several motions for preliminary injunctions in the Southern District of New York and the Second Circuit Court of Appeals.

Patently, no good faith basis exists to cite Rivicci as a related case in the RJI, and based on this erroneous and misleading designation, the Clerk assigned the instant matter to Justice

Porzio as a "related case." The factual basis for the DOE's denial of a vaccine exemption, the appeal process, and the crux of each proceeding, often differ and are fact specific. The employment circumstances of the Petitioners, including their job duties and interaction with the public, likewise are different.

Because the instant case is not related to and, in any event, is no more or less "related" to Rivicci than it is to other Article 78 proceedings in this Court raising vaccine exemption challenges, adjudicated before other Justices, there is no basis for a case relatedness designation. This Court should not countenance Petitioners' attempts to steer cases to Justices of their choosing through misleading designations on their RJI. Accordingly, Respondents respectfully request that the Court return this case to the Clerk, with the direction to reject Petitioners' related case designation and to randomly assign this case to a Justice of the Court designated to hear Article 78 proceedings.

POINT II

PETITIONERS' ARTICLE 78 CLAIMS ARE TIME-BARRED BECAUSE PETITIONERS WAITED MORE THAN FOUR MONTHS TO CHALLENGE THE DENIAL OF THEIR REQUESTS FOR RELIGIOUS ACCOMMODATION AND SUBSEQUENT TERMINATION

Special proceedings brought pursuant to Article 78 are governed by the four-month statute of limitations set forth in § 217 of the CPLR which provides that, "a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner . . .." CPLR §217(1); see De Milio v. Borghard, 55 N.Y.2d 216, 219 (1982). An administrative determination "becomes 'final and binding' when two requirements are met: completeness (finality) of the determination and exhaustion of administrative remedies." See Walton v. New York State Dept. of Correctional Servs., 8 N.Y.3d

186, 194-95 (2007). Thus, an administrative determination is final and binding for the purposes of determining the limitations period when a petitioner receives notice of the challenged determination and is aggrieved by it. Lubin v. Bd. Of Educ., 60 N.Y.2d 974, 976 (1983), cert. denied, 469 U.S. 823 (1984). The "'final and binding determination' from which the four-month limitations period is measured … is the point when the challenged action has its impact." See Mundy v. Nassau Cnty. Civil Serv. Comm'n, 44 N.Y.2d 352, 357-58 (1978).

Petitioners seek an Order "reversing, annulling and/or setting aside *nunc pro tunc* all DOE and Citywide Panel's denials of reasonable religious accommodation to the COVID-19 Vaccine mandate," claiming that the denials were arbitrary and capricious. (See Verified Petition, NYSCEF No. 40, ¶¶ 648-682.) However, Petitioners' requests for vaccine exemption all were denied more than four months prior filing this proceeding.[1] Moreover, Petitioners Kane, Dicapua, Chu, Clark, Delgado, Gladding, Nwaifejokqu, Romero, Smith, Strk, and Loparrino were all terminated for failing to comply with the vaccination mandate in February of 2022. (See Verified Petition, NYSCEF No. 40, ¶¶ 33-34, 36-38, 40, 42-44, 47-48.) Petitioner Giammarino was later terminated in August of 2022. (See Verified Petition, NYSCEF No. 40, ¶ 389.) Finally, Petitioners Grimando's and Solon's requests were denied in the Fall of 2021 before they chose to get vaccinated. (See Verified Petition, NYSCEF No. 40, ¶¶ 460-576.)

Since Petitioners failed to commence an Article 78 proceeding to seek judicial review of these denials within the four-month statute of limitations set forth in § 217 of the CPLR, their Article 78 claims must be dismissed.

[1] Petitioners Castro's and Ruiz Toro's requests for a religious accommodation were granted. (See Verified Petition, NYSCEF No. 40, ¶¶ 35,46.) Therefore, there is no legal basis for Petitioners Castro's and Ruiz Toro's Article 78 claims.

POINT III

PETITIONERS' NYCHRL, NYSHRL, AND NEW YORK CONSTITUTION CLAIMS AGAINST THE DOE ARE BARRED BECAUSE PETITIONERS FAILED TO FILE NOTICES OF CLAIM

Pursuant to Education Law § 3813, a notice of claim must be served "within three months after the *accrual* of such claim." See N.Y. Educ. L. § 3813(1) (emphasis added); N.Y. Gen. Mun. Law § 50-e(1)(a) (which applies to tort claims filed under N.Y. Educ. L. § 3813). Here, all of Petitioners' claims accrued more than three months prior to the filing of this hybrid action. (See Verified Petition, NYSCEF No. 40, ¶¶ 33-48.) However, Petitioners failed to serve notices of claim.

Because Petitioners each failed to file a timely notice of claim under Education Law § 3813, they have failed to satisfy a necessary condition precedent to bringing suit against the DOE. Davidson v. Bronx Mun. Hosp., 64 N.Y.2d 59, 62 (1984).

While Education Law § 3813(2-a) provides that the Court, in its discretion, may extend the time to serve a notice of claim, "[t]he extension of time shall not exceed the time limited for the commencement of an action by the claimant against any district or any such school." Education Law § 3813(2-a). The statute of limitations for such action is one year after such cause of action arose. Education Law § 3813(2-b). Accordingly, a proceeding seeking leave to file a late notice of claim must be filed within one year after the action accrues. Matter of Amorosi v. S. Colonie Indep. Cent. Sch. Dist., 9 N.Y.3d 367, 370 (2007). Thus, even if Petitioners sought leave to file late notices of claims, to satisfy this condition precedent, the Court lacks the discretion, as a matter of law, to grant such leave. See id. at 370. Plainly, Petitioners' requests for exemption from the DOE vaccine mandate were denied over a year ago, and thus they cannot now remedy their failure to comply with a pre-condition to suit because leave to file a late notice of claim cannot

be granted. Accordingly, Petitioners' NYCHRL, NYSHRL and claims under the New York State Constitution against the DOE must be dismissed.

POINT IV

THE PETITION IS BARRED BY THE DOCTRINE OF *RES JUDICATA* OR COLLATERAL ESTOPPEL

Under the doctrine of *res judicata*, or claim preclusion, litigants are barred from bringing new claims arising from the same factual grouping that has already been subject to a prior judgment. Flushing National Bank v. Durante Bros. & Sons, Inc., 148 A.D.2d 415, 416-417 (2d Dep't 1989); see also Uzamere v. Uzamere, 957 N.Y.S.2d 639 (Kings Cty. Sup. Ct. 2010), aff'd, 89 A.D.3d 1013 (2d Dep't 2011) ("[O]nce a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy."). Moreover, and as pertinent here, "even when a federal court declines to exercise jurisdiction over state claims, those state claims can be barred by collateral estoppel when the federal court addresses issues that are identical to those raised in state claims." Henvill v. Metropolitan Transp. Auth., 2017 N.Y. Misc. LEXIS 2837, *18 (N.Y. Sup. Ct. Co. 2017); see also Grika v. McGraw, Index No. 650459/2016, 2016 N.Y. Misc. LEXIS 5026 at * 22-23 (N.Y. Sup. Ct. Dec. 21, 2016) (plaintiff's state law claims barred following federal court's dismissal of the action following defendant's motion to dismiss the complaint, even where the court declined to exercise supplemental jurisdiction, where the court decided upon issues that were identical to ones raised by plaintiff in the state court action.), aff'd, 161 A.D.3d 450, 450-451 (1st Dep't 2018).

Without arguable doubt, Petitioners challenged the same vaccination mandate based on their religious objections in the Southern District of New York, with that court dismissing all claims advanced there, and squarely upholding the DOE vaccine mandate. See Kane v. De

Blasio, 21-cv-7863 (NRB), 2022 U.S. Dist. LEXIS 154260 (S.D.N.Y. Aug. 26, 2022). Additionally, the federal court found that (1) Petitioners Castro and Ruiz-Toro could not maintain a claim because their accommodations were granted, (2) Petitioners Giammarino and Grimando did not have a claim based on the failure to accommodate religious beliefs because they did not avail themselves of the prescribed exemption process, and (3) Petitioner Solon's claims were moot because she was vaccinated. Id. at 36-37. Furthermore, the Court determined that Petitioners' "inability to teach their students safely in person presented more than a de minimus cost." Id. at 38. This factual determination amounts to, at the very least, issue preclusion, which prevents Petitioners from now claiming that their inability to teach in the classroom constituted an undue burden. Petitioners' claims are thus barred by *res judicata* because they arise from the same factual grouping as Petitioner' first failed federal action.

In addition, the doctrine of collateral estoppel bars the relitigation of a legal or factual issue. "Collateral estoppel comes into play when four conditions are fulfilled: (1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding , and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits" Milione v. City Univ. of NY, 153 AD3d 807, 808 (2d Dept 2017). Petitioners' claims are estopped because these exact issues were already decided in Southern District of New York and Petitioners had a full and fair opportunity to contest the decision. See Kane v. De Blasio, 21-cv-7863 (NRB), 2022 U.S. Dist. LEXIS 154260 (S.D.N.Y. Aug. 26, 2022). Since the Southern District of New York dismissed Petitioners' first action in its entirety in Kane, Petitioners are barred from relitigating such claims in this proceeding, and their claims must be dismissed.

POINT V

PETITIONERS' CLAIMS AGAINST THE CITY OF NEW YORK FAIL BECAUSE THE CITY OF NEW YORK AND THE DOE ARE SEPARATE ENTITIES

The City of New York and the DOE are entities separate and apart from each other and one may not be held liable for the acts of the other. Falzone v. City of N.Y., 9 N.Y.S.3d 165 (2d Dep't. 2015); Perez v. City of New York, 41 A.D.3d 378, 379 (1st Dep't 2007); Myers v. City of New York, 64 A.D.3d 546, 546 (2d Dep't 2009) ("[T]he City does not operate, maintain, or control the school which falls under 'the exclusive care, custody and control of the [New York City] Board of Education, an entity separate and distinct from the City'") (citations omitted).

Because Petitioners are either employees or former employees of the DOE, their claims are properly directed at the DOE and not the City of New York. See NYSCEF No. 40 ¶¶ 34-48. To be clear, the DOE first adjudicated their exemption requests and ultimately made the decision to terminate all Petitioners' employment when they failed to comply with a condition of employment. See Broecker v. N.Y.C. Dep't of Educ., 585 F. Supp. 3d 299, 316 (E.D.N.Y. 2022). Thus, since their claims are based on their termination from employment with the DOE, the City of New York is an improper party to this case and, accordingly, should be dismissed.

POINT VI

PETITIONERS CANNOT BRING A CLAIM FOR EMPLOYMENT DISCRIMINATION UNDER THE NEW YORK STATE CONSTITUTION

Petitioners' claim under the Free Exercise Clause of the New York State Constitution fails because there is no cause of action for employment discrimination under the State Constitution. The general rule is that plaintiffs lack private rights of action under the State Constitution. See Brown v. State, 89 N.Y.2d 172, 186 (1996). Courts only recognize constitutional

tort claims where "necessary and appropriate to ensure the full realization of the rights [the provision] state[s]." Id. at 189; see Martinez v. City of Schenectady, 97 N.Y.2d 78, 83 (2001).

The SHRL and CHRL provide avenues of redress for alleged employment discrimination, including discrimination on the basis of religion. Thus, the recognition of a constitutional tort claim is "neither necessary nor appropriate to ensure the full realization of [Plaintiff's] rights, because the alleged wrongs could have been redressed by an alternative remedy." Lyles v. State, 2 A.D.3d 694, 695 (2d Dep't 2003); see also Muhammad v. New York City Transit Auth., 450 F. Supp 2d 198, 212 (E.D.N.Y. 2006) (dismissing a constitutional tort claim because the CHRL "expressly provides a private right of action" for employment discrimination). Petitioners' cause of action for violation of the State Constitution's Free Exercise Clause is merely a thinly veiled employment discrimination claim this is cognizable under the SHRL and CHRL. Accordingly, this claim must be dismissed.

Regardless, and to the extent further that they are not otherwise precluded by *res judicata*, Petitioners fail to state a claim for violation of the State Constitution's Free Exercise Clause. A law that is facially neutral and generally applicable is subject to rational basis review even if it incidentally burdens a particular religious practice. See We the Patriots USA, Inc. v. Hochul, 17 F.4th 266, 280 (2d Cir. 2021); C.F. v. New York City Dept. of Health & Mental Hygiene, 191 A.D.3d 52, 78 (2d Dep't 2020); Ferrelli v. State, No. 031506/2022, 2022 N.Y. Misc. LEXIS 7339, at *16 (Sup. Ct. Rockland Co., Aug. 2, 2022). The vaccination mandate is generally applicable because it applies to all City employees and is facially neutral because "its restrictions apply equally to those who choose to remain unvaccinated for any reason," not just for religious reasons. Kane v. DeBlasio, 19 F.4th 152, 164 (2d Cir. 2021). Thus, the vaccination mandate is subject to rational basis review.

The vaccination mandate survives rational basis review. Administrative action is rational if it has a sound basis in reason. C.F., 191 A.D.3d at 69; see also Farrelli, 2020 N.Y. Misc. LEXIS 7339, at *21-22 (alteration in original) (quoting Kane, 19 F.4th at 166) ("Rational basis review requires [the policymaker] to have chosen a means for addressing a legitimate goal that is rationally related to achieving that goal."). The vaccination mandate is "a reasonable exercise of the [City's] power to act to protect the public health" during the COVID-19 pandemic. Kane, 19 F.4th at 166; see Deletto v. Adams, No. 156459/2022, 2022 NYLJ LEXIS 1306, at *11 (Sup. Ct. N.Y. Co., Sept. 26, 2022) (holding that "a vaccine mandate does not violate the free exercise clause under the New York State Constitution"); Brousseau, 2022 N.Y. Misc. LEXIS 6653, at *10 (Sup. Ct. N.Y. Co., Nov. 1, 2022) ("[T]here is no basis to find that the [COVID-19] vaccine mandate violates petitioner's constitutional rights and, specifically, the free exercise clause."); see also *C.F.*, 191 A.D.3d 52 (finding that a vaccine mandate for measles did not violate the State Constitution's Free Exercise Clause). Accordingly, the vaccination mandate does not violate the State Constitution's Free Exercise Clause, and this claim must be dismissed.

POINT VII

PETITIONER TEACHERS FOR CHOICE LACKS ORGANIZATIONAL STANDING

Petitioner Teachers for Choice ("TFC") should be dismissed for lack of standing. "Standing is, of course, a threshold requirement for a [petitioner] seeking to challenge governmental action." N.Y. State Ass'n of Nurse Anesthetists v. Novello, 2 N.Y.3d 207, 211 (2004). Once the issue is raised, the petitioner bears the burden of demonstrating that he has standing to raise the issues for which he seeks judicial review. Novello, 2 N.Y.3d at 211; see also Dental Society of State of New York v. Carey, 61 NY2d 330, 333 (1984) (standing

of organization to maintain action on behalf of its members requires that some or all of the members themselves have standing to sue).

For an organization such as Petitioner TFC to have standing, it must establish that (1) at least one of its members would have standing to sue, (2) the interest advanced is representative of the organizational purposes it asserts, and (3) the case would not require the participation of individual members to assert the claim or to afford complete relief to it. See Patrolman's Benevolent Assn. of Southampton Town, Inc. v Town of Southampton, 79 A.D.3d 891, 892 (2d Dep't 2010); Mental Hygiene Legal Serv. v. Daniels, 33 N.Y.3d 44, 51 (2019) quoting N.Y. State Assn. of Nurse Anesthetists v. Novello, 2 N.Y.3d 207, 211 (2004).

Here, Petitioner TFC fails to meet the third prong of the organizational standing test because it cannot demonstrate that this case can be adjudicated without the participation of individual members. To the contrary, the individual circumstance of each allegedly affected TFC member would need to be explored in order to determine whether DOE's religious accommodation denials were unlawful. See Patrolman's Benevolent Assn. of Southampton Town, Inc. v. Town of Southampton, 79 A.D.3d 891, 893 (2d Dep't 2010). Accordingly, Petitioner TFC cannot establish organizational standing.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that the Verified Petition be dismissed, with prejudice, and the claims for relief denied in their entirety, together with such other and further relief as the Court deems just and proper.

Dated: New York, New York
May 3, 2023

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 202.8-b of the Uniform Civil Rules for the Supreme Court and County Court, the enclosed brief is produced using 12-point Times New Roman type and including footnotes and excluding the cover page, captions, table of authorities, and table of contents, contains approximately 4435 words, which is less than the total words permitted by the rules of the Court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: New York, New York
May 3, 2023

/s/ Bilal Haider
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