NYSCEF Notification: New York - Special Proceedings - CPLR Article 78 - <NOTICE OF MOTION> 152509/2021 (Jeffrey Bueno et al v. New York City Department of Education)

efile@nycourts.gov <efile@nycourts.gov>
Tue 5/4/2021 8:26 PM

**To:** info_sussman1@frontier.com <info_sussman1@frontier.com>; kwilkens@law.nyc.gov <kwilkens@law.nyc.gov>; efile@nycourts.gov <efile@nycourts.gov>; sussman1@frontiernet.net <sussman1@frontiernet.net>; jaharris@law.nyc.gov <jaharris@law.nyc.gov>; jgoldman_sussman1@frontier.com <jgoldman_sussman1@frontier.com>

# New York County Supreme Court
# Notification of Filing
# 05/04/2021

On 05/04/2021, the NYSCEF System received the documents listed below from filing user, JASMINE HARRIS . Please keep this notice as a confirmation of this filing.

## Case Information

Index #: **152509/2021**
Caption: **Jeffrey Bueno et al v. New York City Department of Education**
eFiling Status: **Full Participation Recorded**
Assigned Case Judge: **Lynn R Kotler**

**During the COVID-19 Health Emergency**

By order of the Chief Administrative Judge, the court shall NOT request working copies of documents in paper format.

## Documents Received

| Doc # | Document | Received Date |
|---|---|---|
| 16 | NOTICE OF MOTION<br>**Relief Sought:** Dismiss<br>**Return Date:** 05/19/2021 | 05/04/2021 |
| 17 | NO FEE AUTHORIZATION (LETTER/ORDER/AFFIRMATION) | 05/04/2021 |

## E-mail Service Notifications Sent

| Name | Email Address |
|---|---|
| Michael Sussman | sussman1@frontiernet.net |
| KIMBERLY WILKENS | kwilkens@law.nyc.gov |
| JASMINE HARRIS | jaharris@law.nyc.gov |

## Filing User

**JASMINE HARRIS** | jaharris@law.nyc.gov | 929-930-0837 | 100 Church St, Rm 2-314, New York City, NY 10007



**Hon. Milton A. Tingling, New York County Clerk and Clerk of the Supreme Court**
**Phone:** 646-386-5956
**Website:** http://www.nycourts.gov/courts/1jd/supctmanh/county_clerk_operations.shtml

THE CITY OF NEW YORK
LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, NY 10007

JAMES E. JOHNSON
*Corporation Counsel*

JASMINE HARRIS
929-930-0837
jaharris@law.nyc.gov

May 4, 2021

Court Clerk
Supreme Court of the State of New York
County of New York
60 Centre Street
New York, New York 10007

Re: Bueno & Severino v. New York City Department of Education
Index No. 152509/2021

Dear Sir or Madam:

Attached for filing in the above proceeding is a Notice of Motion to Dismiss, and a supporting memorandum of law. Pursuant to CPLR 8019(d), Respondent is exempt from the filing fee.

If you have any questions, do not hesitate to call. Thank you for your assistance in this regard.

Best,

/s/ *Jasmine Harris*
Assistant Corporation Counsel
100 Church St, Rm 109-d
New York, New York 10007
929-930-0837

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

---------- x

In the Matter of the Application of

JEFFREY BUENO & JOEL SEVERINO,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Laws and Rules,

--against--

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

---------- x

**RESPONDENT'S NOTICE OF CROSS-MOTION TO DISMISS THE VERIFIED PETITION**

Index No. 152509/2021
(Kotler, L.)

**PLEASE TAKE NOTICE,** that upon all prior pleadings and proceedings heretofore had herein, the Respondent, New York City Department of Education, will move this Court, in the Motion Submission Part, located at the Supreme Court of the State of New York, Room 130, 60 Centre Street, New York, New York, on May 19, 2021, or as soon thereafter as counsel can be heard, for an order and judgment, pursuant to Rule 3211(a) (7) of the New York Civil Practice Law and Rules ("CPLR"), dismissing the Petition on the ground that the Petition fails to state a claim against the Respondent, and granting the Respondent costs, fees, and disbursements together with such other and further relief as the Court deems just and proper.

**PLEASE TAKE FURTHER NOTICE** that, pursuant to Section 7804(f) of the CPLR, in the event of denial by the Court of the Respondents' Cross-Motion to Dismiss the Petition, in whole or in part, Respondent reserves the right to answer and respectfully requests

thirty (30) days from the date of service of the order with notice of entry in which to serve a verified answer.

Dated: New York, New York
May 4, 2021

JAMES E. JOHNSON
Corporation Counsel of the
City of New York
Attorney for the Respondent
100 Church Street, Room 2-193
New York, New York 10007
(929)930 – 0837

/s/ *Lawrence J. Profeta*
Lawrence J. Profeta
Assistant Corporation Counsel

/s/ *Jack B. Greenhouse*
Jack Greenhouse
Assistant Corporation Counsel (admission pending)

**TO:**
**Michael H. Sussman** (*via NYSCEF*)
Sussman & Associates
Attorney for Petitioners
PO Box 1005
Goshen, NY 10924

Index No. 152509/2021

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JEFFREY BUENO & JOEL SEVERINO,

Petitioners,

--against--

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

For an Order and Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

**NOTICE OF CROSS-MOTION TO DISMISS THE VERIFIED PETITION**

***JAMES E. JOHNSON***
*Corporation Counsel of the City of New York*
*Attorney for Respondent*
*100 Church Street, Rm. 2-314*
*New York, N.Y. 10007*

*Of Counsel: Jack B. Greenhouse (admission pending)*
*Tel: (212) 356-2533*

*Lawrence J. Profeta*
*Tel: (212) 356-2630*

*Due and timely service is hereby admitted.*

*New York, N.Y.* .....

.....

*Attorney for Respondent* .....

NYSCEF Notification: New York - Special Proceedings - CPLR Article 78 - <MEMORANDUM OF LAW> 152509/2021 (Jeffrey Bueno et al v. New York City Department of Education)

efile@nycourts.gov <efile@nycourts.gov>

Tue 5/4/2021 8:27 PM

**To:** info_sussman1@frontier.com <info_sussman1@frontier.com>; kwilkens@law.nyc.gov <kwilkens@law.nyc.gov>; efile@nycourts.gov <efile@nycourts.gov>; sussman1@frontiernet.net <sussman1@frontiernet.net>; jaharris@law.nyc.gov <jaharris@law.nyc.gov>; jgoldman_sussman1@frontier.com <jgoldman_sussman1@frontier.com>

# New York County Supreme Court
# Notification of Filing
# 05/04/2021

On 05/04/2021, the NYSCEF System received the documents listed below from filing user, JASMINE HARRIS . Please keep this notice as a confirmation of this filing.

## Case Information

Index #: **152509/2021**
Caption: **Jeffrey Bueno et al v. New York City Department of Education**
eFiling Status: **Full Participation Recorded**
Assigned Case Judge: **Lynn R Kotler**

**During the COVID-19 Health Emergency**

By order of the Chief Administrative Judge, the court shall NOT request working copies of documents in paper format.

## Documents Received

| Doc # | Document | Received Date |
|---|---|---|
| 18 | MEMORANDUM OF LAW | 05/04/2021 |

## E-mail Service Notifications Sent

| Name | Email Address |
|---|---|
| Michael Sussman | sussman1@frontiernet.net |
| KIMBERLY WILKENS | kwilkens@law.nyc.gov |
| JASMINE HARRIS | jaharris@law.nyc.gov |

## Filing User

**JASMINE HARRIS** | jaharris@law.nyc.gov | 929-930-0837 | 100 Church St, Rm 2-314, New York City, NY 10007

Index No. 152509/2021

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of

JEFFREY BUENO & JOEL SEVERINO,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Laws and Rules,

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

# MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S CROSS-MOTION TO DISMISS THE PETITION

***JAMES E. JOHNSON***
*Corporation Counsel of the City of New York*
*Attorney for Respondent*
*100 Church Street*
*New York, N.Y. 10007*

*Of Counsel: Lawrence J.Profeta*
*Tel: (212) 356-2630*

*Of Counsel: Jack B. Greenhouse*
*Not Yet Admitted*
*Tel: (212)356-2533*

*Matter No.: 2021-006826*

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
---------- x

In the Matter of the Application of

JEFFREY BUENO & JOEL SEVERINO,

Petitioner,

Index No. 152509/2021
(Kotler, L.)

For a Judgment Pursuant to Article 78 of the Civil Practice Laws and Rules,

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

---------- x

**MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S CROSS-MOTION TO DISMISS THE PETITION**

**PRELIMINARY STATEMENT**

Petitioner Jeffrey Bueno works as a School Aide and petitioner Joel Severino works as a Paraprofessional (collectively "Petitioners"), for the New York City Department of Education ("DOE"). Petitioners bring this special proceeding pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") challenging the DOE's protocol which requires all employees including teachers and teacher aides to fill out a consent form for in-school COVID-19 testing before they are permitted to return from remote employment. Petitioners claim that Respondents' COVID-19 testing protocol is arbitrary and capricious and has no rational basis.

For the reasons set forth below, the Petition is meritless and should be dismissed. First and foremost, petitioners have failed to demonstrate that the DOE's protocol is arbitrary and capricious. The protocol provides that a blind representative sample, comprised of 10% to 20%

of all students and adults from every NYC DOE school, will be selected each month for COVID-19 testing, with results available within 48 hours. All random COVID monitoring tests are free of charge to participants. This testing protocol is part of the DOE's formal reopening plan, the specifics of which have been reviewed and approved by both the New York State Department of Health and New York State Department of Education.

Petitioners, who have refused to consent to the mandatory COVID testing protocol, contend that it is arbitrary and capricious but do not state how the policy is irrational, and cite no law and no relevant scientific support for the proposition that the DOE's COVID testing protocol is in any way defective or improper. In essence, the Petitioners are asking the Court to adopt their view of how to address the COVID pandemic instead of the protocols and procedures the DOE adopted after consultation with and approval from the New York State Department of Health and New York State Department of Education.

Indeed, the remedy sought by petitioners herein would require the Court to decide patently nonjusticiable issues. It is beyond dispute that the DOE is vested with the nondelegable duty to manage its school system, included within which is the ability to make decisions concerning whether and how to reopen its schools after their closure due to the COVID-19 pandemic. It is well-settled that such challenges to the DOE's inherent policymaking authority are not justiciable, as to grant any relief in this sphere would embroil the judiciary in the management of the executive and political branches of City government, violating separation of powers principles.

Third and finally, petitioners, who are members of labor unions, Jeffrey Bueno a member of District Council 37, Local 372 ("DC-37") and Joel Severino a member of the United Federation of Teachers ("UFT"), are not permitted to repudiate the acts and choices of their own

union. On September 1, 2020, after weeks of negotiation, DC-37 and the UFT came to an agreement with DOE to extend the first day of in-person instruction in schools from September 10 to September 21, 2020, leading the President of the UFT to state that, "New York City will now have the most aggressive policies and the strongest safeguards of any school system in the nation." Furthermore, both DC-37 and the UFT specifically affirmed that there would be mandatory COVID testing of personnel working at DOE schools as part of the reopening of schools in September 2020. Petitioners, who are bound by the acts and choices of their union, are not free to reject the unions' agreements simply because they do not suit petitioners. Indeed, it is settled law that labor unions are even free to negotiate away the rights of some union members for benefits to others. As such, petitioners may not challenge the DOE's reopening plan to the extent that it has been ratified by their unions.

Accordingly, this Court should dismiss the Petition in its entirety.

## STATEMENT OF FACTS[1]

Petitioners Jeffrey Bueno and Joel Severino are employees of the Respondent Department of Education. Verified Petition ¶ 1. Jeffrey Bueno works as a School Aide and Joel Severino is a paraprofessional. Id. Petitioners are both union members. Id. Respondent, New York City Department of Education ("DOE") has implemented a protocol which requires all teachers and teacher aides to fill out a consent form for in-school COVID testing before they are permitted to return from remote employment. Verified Petition ¶ 4. Any staff who elects not to sign the consent form is placed on unpaid leave. See Verified Petition ¶ 6;

[1] This statement of facts is derived from the material factual allegations set forth in the petition, verified March 10, 2021 ("Petition" or "Pet."), and its exhibits. Those allegations, but not the conclusions, will be deemed to be true solely for the purpose of this Cross-Motion to Dismiss.

https://www.uft.org/news/press-releases/uft-fact-sheet-on-school-opening-agreement (last visited April 26, 2021); http://www.local372.org/wp-content/uploads/2021/01/Mandatory-Testing.jpg (last visited May 3, 2021).

The DOE implemented reopening protocols, which implemented a COVID-19 testing policy in September 2020. https://www.uft.org/news/press-releases/uft-fact-sheet-on-school-opening-agreement (last visited April 26, 2021). The policy states, "Once in-person learning has begun, the DOE will establish a mandatory, robust system of repeated random COVID testing of adults and students. A blind representative sample, comprised of 10% to 20% of all students and adults from every NYC DOE school, will be selected each month for COVID-19 testing, with results available within 48 hours. All random COVID monitoring tests will be free of charge to participants." Id. Both DC-37 and the UFT made it clear that COVID tests are mandatory to its members working in DOE schools. http://www.local372.org/wp-content/uploads/2021/01/Mandatory-Testing.jpg (last visited May 3, 2021); https://www.uft.org/news/press-releases/uft-fact-sheet-on-school-opening-agreement (last visited April 26, 2021).

The DOE's reopening plan borrows guidance from the federal, state, and City health and education guidance, including language from the Center for Disease Control (CDC), Department of Health (DOH), New York State Education Department (SED), and New York City Department of Health and Mental Hygiene ("DOHMH") and adapting them to the needs of the DOE. See generally, New York City Department of Education's School Reopening Plan Submission to the New York State Department of Education ("SED Plan"), publicly available at https://www.schools.nyc.gov/school-year-20-21/district-school-reopening-plan-submission-to-nysed (last visited April 26, 2021). The reopening plan has been approved by the Governor at the

state level (id, https://www.governor.ny.gov/news/governor-cuomo-announces-new-york-city-cleared-global-health-experts-enter-phase-four-reopening [July 17, 2020]), and the DOE Chancellor at the City level (https://www.schools.nyc.gov/school-year-20-21/district-school-reopening-plan-submission-to-nysed [last visited April 26, 2021]). The petitioners' own unions were consulted on a daily basis regarding the plan. https://cdn-blob-prd.azureedge.net/prd-pws/docs/default-source/default-document-library/2020-nycdoe-reopeningplan.pdf at 12 (last visited May 3, 2021).

In January 2021, DOE employees approached petitioner Bueno and requested that he sign the COVID testing consent form. Verified Petition ¶ 13. Petitioner Bueno refused to sign the form and stated that he would provide the DOE with timely results from his own New York State-licensed physician. Verified Petition ¶ 14. Petitioner Bueno claims that he refused to sign the form due to his professed belief that the DOE uses tests which attain many false positives. Verified Petition ¶ 15.

DOE officials refused to allow Petitioner Bueno to enter the school building and resume his duties absent his consent to be tested. Verified Petition ¶ 16. On January 20, 2021, Petitioner Bueno was suspended without pay from the DOE as a result of his refusal to consent to COVID testing. Verified Petition ¶ 18. Petitioner Bueno was welcome to return to work upon consenting to the testing protocol. Verified Petition ¶ 19.

On March 3, 2021, Respondent suspended Petitioner Severino without pay after he refused to take the in-school COVID test. Verified Petition ¶ 21. Petitioner Severino signed the consent form allowing the DOE to conduct the Covid-19 test but nevertheless refused to take the test when randomly selected. Id.

## ARGUMENT

## THE PETITION DOES NOT STATE A CAUSE OF ACTION, AND SHOULD BE DISMISSED.

### A. Standard of Review

In an Article 78 proceeding, the applicable standard is "whether [the] determination was made in violation of lawful procedure, was affected by error of law or was arbitrary and capricious or an abuse of discretion." CPLR § 7803(3). Administrative action is arbitrary when it is taken "without sound basis in reason" and "without regard to the facts." Pell v. Bd. of Educ., 34 N.Y.2d 222, 231 (1974); see Ward v. City of Long Beach, 20 N.Y.3d 1042, 1043 (2013). "[T]he Court may not upset the agency's determination in the absence of a finding...that the determination had no rational basis." Mid-State Mgmt. Corp. v. New York City Conciliation and Appeals Bd., 112 A.D.2d 72, 76 (1st Dep't 1985), affirmed 66 N.Y.2d 1032 (1985).

Even if the Court would have acted differently in the agency's position, it may not substitute its judgment for that of the government. See, e.g., Peckham v. Calogero, 12 N.Y.3d 424, 431 (2009) ("[E]ven if the court concludes that it would have reached a different result than the one reached by the agency," the court "must sustain the determination," provided that it is "supported by a rational basis"); Arrocha v. Bd. of Educ., 93 N.Y.2d 361, 363 (1999) ("[I]t is well-settled that a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion") (emphasis in original) (internal quotation marks omitted); Mid-State Mgmt. Corp., 112 A.D.2d at 76. "The decision need not be the best which could have been made and need not be free from flaws—it must only have a rational basis." Walker v. Franco, 275 A.D.2d 627, 628 (1st Dep't 2000).

Consequently, the Court may not weigh the evidence on which the agency relied against evidence submitted by petitioners, for "the duty of weighing the evidence and making the choice rests solely upon the [administrative agency]. The courts may not weigh the evidence or reject the choice made by [such agency] where the evidence is conflicting and room for choice exists." Toys R Us v. Silva, 89 N.Y.2d 411, 424 (1996), citing Stork Rest, Inc. v. Boland, 282 N.Y. 256, 267 (1940); Friend of P.S 163, Inc. v. Jewish Home Lifecare, Manhattan, 146 A.D.3d 576, 578 (1st Dep't 2017) ("The choice between conflicting expert testimony rests in the discretion of the administrative agency") (citations omitted); Graci v. Ponte, 147 A.D.3d 412, 413 (1st Dep't 2017) (DOE is "entitled to rely on the findings of their own medical personnel even if those findings are contrary to those of professionals retained by the [employee]") (internal quotations and citations omitted).

Accordingly, as long as there is any rational basis to support the agency's action, it cannot be said that the determination was irrational, and the Court's inquiry ends. See, e.g., Sullivan Cty. Harness Racing Ass'n v. Glasser, 30 N.Y.2d 269, 277 (1972) ("The judicial function is exhausted when there is to be found a rational basis for the conclusions approved by the administrative body").

**B. DOE's Testing Protocol Is Rational, And Neither Arbitrary Nor Capricious**

The COVID testing policy promulgated by Department of Education ("DOE") in their reopening plans to the State Department of Health ("DOH') and the State Department of Education ("SED") is entirely rational. The DOE implemented reopening protocols, including their COVID testing policy in September 2020. https://www.uft.org/news/press-releases/uft-fact-sheet-on-school-opening-agreement (last visited April 26, 2021). The plan was influenced by federal, state, and City health and education guidance, borrowing protocols and language from the Center for Disease Control (CDC), Department of Health (DOH), New York State Education

Department (SED), and New York City Department of Health and Mental Hygiene ("DOHMH") and adapting them to the needs of the DOE. See generally, New York City Department of Education's School Reopening Plan Submission to the New York State Department of Education ("SED Plan"), publicly available at https://www.schools.nyc.gov/school-year-20-21/district-school-reopening-plan-submission-to-nysed (last visited April 26, 2021). The reopening plan has been approved by the Governor at the state level (id, https://www.governor.ny.gov/news/governor-cuomo-announces-new-york-city-cleared-global-health-experts-enter-phase-four-reopening [July 17, 2020]), the DOE Chancellor at the City level (https://www.schools.nyc.gov/school-year-20-21/district-school-reopening-plan-submission-to-nysed [last visited April 26, 2021]). The petitioners' respective unions were even consulted on a daily basis regarding the plan. https://cdn-blob-prd.azureedge.net/prd-pws/docs/default-source/default-document-library/2020-nycdoe-reopeningplan.pdf at 12 (last visited May 3, 2021). The policy states, "Once in-person learning has begun, the DOE will establish a mandatory, robust system of repeated random COVID testing of adults and students. A blind representative sample, comprised of 10% to 20% of all students and adults from every NYC DOE school, will be selected each month for COVID-19 testing, with results available within 48 hours. All random COVID monitoring test will be free of charge to participants." Id.

As noted, petitioners in this case merely argue that the testing policy is arbitrary and capricious because they do not wish to consent to a COVID test administered pursuant to DOE guidelines and would prefer to use their own medical professionals. See Verified Petition ¶ 6, 21. Petitioners cite no law for the proposition that individuals who do not consent to DOE COVID testing are excused from the regulations required of DOE staff and students. Indeed, such arguments have been rejected by the Courts. Graci v. Ponte, 147 A.D.3d 412, 413 (1st

Dep't 2017) (DOE is "entitled to rely on the findings of their own medical personnel even if those findings are contrary to those of professionals retained by the [employee].") (internal quotations and citations omitted) Matter of Sweeney v. N.Y.C. Civil Serv. Comm'n, 2016 NY Slip Op 51061(U), ¶ 1, 52 Misc. 3d 1207(A), 41 N.Y.S.3d 721 (Sup. Ct. N.Y. Co. May 16, 2016) (In determining whether a candidate is medically qualified to serve as a correction officer, the appointing authority is entitled to rely on its own medical personnel's findings, even if those findings are contrary to those of professionals retained by the candidate).

Setting aside that petitioners' position is contrary to law, it need only be added that petitioners have provided no support for their position that they are entitled to forgo COVID testing administered by the DOE.

As such, it cannot be said that the DOE's testing policy is in any way arbitrary or capricious. To the contrary, the policy is in keeping with applicable law, informed by science and data, and specifically tailored to the needs of the DOE, staff and students alike. As noted above, so long as the agency provides rational support underlying the policy, the Court's inquiry ends and the determination must be upheld. Graci v. Ponte, 147 A.D.3d 412, 413 (1st Dep't 2017). Even if the Court were to construe the Petition as adducing some sort of scientific evidence to support its claim—which it certainly does not—the Petition would still not state a cause of action because the agency is permitted to rely on its own evidence and conclusions even where conflicting evidence and room for choice exists. Id.

Petitioners also contend that the Emergency Authorization Act does not permit mandatory testing. Verified Petition ¶ 15. Petitioners are mistaken. The Act, as cited by Petitioners, is not titled the "Emergency Authorization Act," but the "Authorization for Medical Products for Use in Emergencies." 21 USCS § 360bbb-3. Petitioners reference 21 USCS §

360bbb-3, however, USCS § 360bbb-3 is irrelevant because it has nothing to do with medical procedures or testing.

Finally, Petitioners' argument that strict scrutiny should be applied is meritless. Petitioners cite Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261 (1990) for the proposition that a competent person "has a constitutionally protected liberty interest in refusing unwanted medical treatment." The Cruzan case is inapplicable because it pertains to end-of-life decisions involving a woman in a vegetative state who was not permitted to exercise her wishes regarding her medical care because she did not maintain the capacity to do so. This case is a far cry from minimally invasive nose swabs administered through the DOE to conduct random testing to protect public health.

Similarly without merit is Petitioners' reliance on Washington State Grange v. Washington State Republican Party, 552 U.S. 442 (2008) for their assertion that "Laws that severely or substantially burden, infringe upon, or significantly interfere with the exercise of a fundamental constitutional right are subject to strict scrutiny review requiring a compelling state interest and objectives which cannot be achieved by less intrusive means." Petition at 6. Washington State Grange stands for the proposition that a political party's right to exclude is central to its freedom of association. Washington State Grange does not mention or pertain to medical testing or public health.

While petitioners attempt to undermine Aviles v. De Blasio, 2021 U.S. Dist. LEXIS 38930, at *50 (S.D.N.Y. Mar. 2, 2021), this case is relevant and further demonstrates that Petitioners' contention that the state is required to show a compelling state interest to conduct random COVID tests is without merit. Petition at 5. The Aviles court concluded that randomized COVID testing of students "need only be reasonably related to a legitimate state objective...

Here, the Court has determined that Defendants' testing regime is reasonably related to a legitimate state objective — curbing the spread of the COVID-19 virus." In fact, the Aviles court was evaluating the very same testing regime that Petitioners herein challenge, where "twenty percent (20%) of the students and staff will be tested each week." Id. at 32. In finding that randomized COVID testing was permitted, the Aviles court quoted the Second Circuit stating, "stemming the spread of COVID-19 is unquestionably a compelling [governmental] interest." Id. quoting Agudath Israel of Am. v. Cuomo, 983 F.3d 620, 631 (2d Cir. 2020).

In sum, the Petitioners' claim that the DOE's testing policy and protocol is arbitrary and capricious is entirely without merit and should be dismissed.

**C. The Issues In This Case Are Not Justiciable**

In this proceeding, petitioner requests that this Court infringe on the DOE's authority to manage its schools and those individuals entering DOE property. To do so would be a blatant violation of the separation of powers. See New York State Inspection, Sec. & Law Enforcement Emples., Dist. Council 82 v. Cuomo, 64 N.Y.2d 233, 237-40 (1984) (rejecting Article 78 challenge and motion for preliminary injunction relating to the safety of Correctional facilities as nonjusticiable and violative of separation of powers principles, holding that "the manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the political branches of government" (citing Klostermann v. Cuomo, 61 N.Y.2d 525 (1984) and Abrams v. New York City Trans. Auth., 39 N.Y.2d 990 (1976)). Indeed, the Court specifically rejected an Article 78 Petition premised on purported safety concerns in the workplace: "By seeking to vindicate their legally protected interest in a safe workplace, petitioners call for a remedy which would embroil the judiciary in the management and operation of the State correctional system." New York State Inspection, 64 N.Y.2d at 239.

The Court of Appeals' decision in New York State Inspection has been repeatedly cited with approval to bar Article 78 challenges as nonjusticiable where petitioners challenge agency determinations on the grounds that the determinations pose a potential safety risk. See, e.g., Corwin v. City of New York, 2020 NY Slip Op 33130(U), ¶ 19 (Sup. Ct. N.Y. Co. September 17, 2020); Roberts v. Health & Hosps. Corp., 87 A.D.3d 311, 325-26 (1st Dep't 2011); Civil Serv. Emps. Assoc'n v. Cty. of Erie, 43 A.D.3d 1341, 1341-42 (4th Dep't 2007) (reversing Supreme Court's granting of Article 78 petition and permanent injunction on justiciability grounds where petitioners argued that agency staffing determination would pose a "severe exacerbation of the danger to the safety and health of the remaining staff").

Relying on the First Department's Roberts decision, the recent Corwin decision is particularly instructive. In Corwin, Petitioners brought an Article 78 petition seeking to label the DOE's reasonable accommodation policy during the Covid-19 Pandemic as arbitrary and capricious. Corwin, 2020 NY Slip Op 33130(U), ¶ 19 (Sup. Ct. N.Y. Co). The Corwin Court rejected the petition stating that the requested remedy would "embroil the judiciary in the management and operation of the school system in New York City." Id. The Corwin Court quoted Roberts, stating, "as a policy matter, courts will not interfere in areas that it is ill-equipped to undertake and where another branch of government is more suited to the task. Id. quoting Roberts, 2012 N.Y. Misc. LEXIS 1717, at *7 (Sup. Ct. N.Y. Co. April 11, 2012).

As the case law amply demonstrates, the instant Petition presents a nonjusticiable controversy. It is the DOE that is vested with the nondelegable duty to provide an education to 1.1 million City schoolchildren, and to keep students and staff safe while doing so. In the lawful exercise of this duty, DOE has determined that random COVID testing is a necessary factor to prevent the spread of Covid-19 in schools. As the DOE's determinations are rational, the

determinations may not be second-guessed by the petitioners or this Court without infringing on the separation of powers.

**D. Petitioners Are Bound By The Actions Of Their Unions Which Ratified DOE's Reopening Plan and Provision for Random COVID Testing**

Both the UFT and DC-37 were involved in the reopening plan and were specifically involved in the negotiations regarding mandatory COVID testing requirements. See https://cdn-blob-prd.azureedge.net/prd-pws/docs/default-source/default-document-library/2020-nycdoe-reopeningplan.pdf at 12 (last visited May 3, 2021); https://www.uft.org/news/press-releases/uft-fact-sheet-on-school-opening-agreement (last visited April 26, 2021); http://www.local372.org/wp-content/uploads/2021/01/Mandatory-Testing.jpg (last visited May 3, 2021). Union members are bound by the acts and choices of their union. See Schacht v. City of New York, 39 N.Y.2d 28, 32 (1979) ("Plaintiff, having designated the union to be her agent for collective bargaining purposes, is bound by agreements made by that union or her behalf") (emphasis added); see also Plummer, 48 N.Y.2d at 489 (same). "The union is free to waive any right of its members to certain benefits in exchange for other considerations . . . ." Fairport v. Newman, 90 A.D.2d 293, 296 (4th Dep't 1982) (citing Schacht, 39 N.Y.2d 28). A union member does not have the right to "reject certain acts of her bargaining representative and accept others." Pupiales v. Bldg. Mgmt. Co., Inc., No. 158098/2012, 2014 N.Y. Misc. LEXIS 289, at *15 (Sup. Ct. N.Y. Co. Jan. 22, 2014) (citing Schacht, 39 N.Y.2d 28); Kravitz v. Twentieth Century-Fox Film Corp., 5 Misc. 2d 368, 372 (Sup. Ct. N.Y. Co. 1957) ("The law is well settled that employees who designate a labor union as their representative for collective bargaining purposes are bound by all acts of that organization taken after proper voting and the individual

employee is not free to accept such decisions and acts as please him and reject all others") (citation omitted).

As noted, after weeks of negotiation between UFT, DC-37 and the DOE, an agreement was reached on September 1, 2020, whereby the schools would not commence in-person instruction as scheduled on September 10, 2020, but would reopen on September 21, 2020 for in-person learning. See https://www.uft.org/news/press-releases/uft-fact-sheet-on-school-opening-agreement (last visited April 26, 2021); https://dc37blog.wordpress.com/2020/09/04/unions-win-delay-in-doe-schools-opening-to-sept-21/ (last visited May 3, 2021). Indeed, Michael Mulgrew, the President of UFT, stated in a press release that, due to this agreement, "New York City will now have the most aggressive policies and the strongest safeguards of any school system in the nation." Id.

Given that DC-37 and UFT, the unions and certified representatives to act on behalf of the petitioners, contributed the DOE's reopening plans (which included provisions for random COVID testing), petitioners are bound by their union's actions and may not choose to reject it. See cases cited above, including Schacht, 39 N.Y.2d at 32.

## CONCLUSION

For the above reasons, Respondent respectfully requests that its cross-motion to dismiss the Verified Petition be granted, that the Petition be denied in its entirety, that this proceeding be dismissed with costs and disbursements, that judgment be entered for Respondents, and that this Court grant such other and further relief as it deems just, proper, and equitable.

If Respondent's cross-motion to dismiss the Petition is denied, in whole or in part, Respondent reserves their right to answer, pursuant to Section 7804(f) of the CPLR, and respectfully request thirty days from the date of service of the order with notice of entry in which to serve a verified answer.

Dated: New York, New York
May 4, 2021

**JAMES E. JOHNSON**
Corporation Counsel of the
City of New York
Attorney for Respondent
100 Church Street, Room 2-314
New York, New York 10007-2601
(929) 930-0837

By: /s/ *Jack Greenhouse*
Jack Greenhouse (admission pending)
Assistant Corporation Counsel

/s/ *Lawrence J. Profeta*
Lawrence J. Profeta
Assistant Corporation Counsel