Civil Action No. 20 CV 5878 (CM)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J.T., Individually and on behalf of D.T.; *et al.*,

Plaintiffs,

-against-

Bill de Blasio, in his official capacity as the Mayor of New York City; *et al.*,

Defendants.

REPLY MEMORANDUM OF LAW OF THE NYC DEFENDANTS IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT

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

Of Counsel: Marilyn Richter, Senior Counsel,
(mrichter@law.nyc.gov)
Mark Toews, Senior Counsel
(mtoews@law.nyc.gov)
Janice Birnbaum, Senior Counsel
(jbirnbau@law.nyc.gov)
Tel: (212) 356-???????
LM #: 2020-027097

PRELIMINARY STATEMENT

Mayor Bill de Blasio, Chancellor Richard Carranza, in their official capacities, and the New York City Department of Education ("DOE") (collectively, the "NYC Defendants") submit this Reply Memorandum of Law in further support of their Motion to Dismiss the Complaint.

POINT I

PLAINTIFFS IGNORE THE CONTROLLING LEGAL AUTHORITY WHICH PROVIDES BROAD DISCRETION TO ELECTED OFFICIALS TO PROTECT THE PUBLIC HEALTH. SYSTEMWIDE CHANGES IN SCHOOL OPERATIONS IN RESPONSE TO THE COVID-19 PANDEMIC DO NOT VIOLATE THE IDEA AND DO NOT GIVE RISE TO PENDENCY.

(1)

Plaintiffs' papers in Further Support of their Order to Show Cause for a Temporary Restraining Order and Preliminary Injunction and in Opposition to [the NYC Defendants'] Motion to Dismiss (hereafter "Pl. Opp. Papers"), completely ignore the extensive case law cited by the NYC Defendants, including Jacobson v. Massachusetts, 197 U. S. 11 (1905) and South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020), which provide broad discretion to state and local officials to act for the common good and restrict activities that would normally be constitutionally protected in response to a pubic health emergency, including such fundamental rights as the freedom to attend religious services, *Id.* at 1613. and liberty from incarceration. Jacobson, 197 U.S. at 26-27..[1]

[1] Attached hereto a New York State Supreme Court decision, filed on September 25, 2020, dismissing a petition brought by DOE teachers who wanted to work remotely. Corwin v. City of New York, Index No. 157166/2020 (N.Y. Sup. Ct., N.Y. Cnty. Sept. 25, 2020). Although the decision relies on state law, the analysis is similar to that used by the federal courts, and the decision has a useful discussion of the development of the DOE's school reopening plan for Fall 2020.

The gravamen of the complaint is that the provisions of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et seq. ("IDEA") are immutable and must be strictly complied with in all circumstances, including during a global pandemic that is the worst public health crisis in a century. If this stated a claim, then the IDEA would be the most fundamental law, elevated above the First Amendment and all other constitutional rights. Not only is this incorrect, public education is not even a federal fundamental right. *Plyler v. Doe*, 457 U.S. 202, 221 (1982) ("Public education is not a 'right' granted to individuals by the Constitution."); *San Antonio Indep. School Dist. v. Rodriguez,* 411 U.S. 1, 35 (1973). The complaint further essentially asserts that the alleged failure to strictly comply with the provisions of the IDEA constitutes unlawful discrimination based solely on Plaintiff Students' disabilities in violation of Title II of the Americans with Disabilities Act, 42 U.S.C. 12010, et seq. (Complaint ¶ 188) and denies Plaintiff Students access to appropriate educational services compared to those received by non-disabled students in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 494, et seq. (Complaint ¶ 178). No claims are stated under these statutes; the NYC Defendants' response to the pandemic provides that all New York City public school students have been treated alike; they all began full remote learning as of March 23, 2020 and they all had the option of blended learning or full remote learning beginning in Fall 2020.

Public health measures that affect all students do not violate the rights of any, including students with disabilities ("SWDs"). Plaintiffs also ignore Phillips v. City of New York. 775 F.3d 538, 542 (2d Cir. 2015). There, the Second Circuit upheld N.Y. Public Health Law § 2164, which bans all students from attending any school in New York State if they have failed to obtain the required vaccinations. Following Phillips, in V.D. v. New York, 403 F. Supp. 3d 76 (E.D.N.Y. 2019), the court held that N.Y. Public Health Law § 2164 was not preempted by the

IDEA and denied both a preliminary injunction and "stay-put" orders. The plaintiffs were parents of SWDs, who previously had a statutory religious exemption from the vaccination requirement, until the exemption was repealed. After discussing the considerable discretion accorded the states in areas affecting public health and safety, the court denied the stay-put orders, finding in part

> …that the stay-put provision, as written and applied, is designed to preserve the existing placement for an *individual* child—not to enjoin systemic action. *See* 20 U.S.C. § 1415(j)… Indeed, courts have acknowledged that the stay-put provision "was not intended to cover system-wide changes in public schools that affect disabled and non-disabled children alike.'' *N.D.*, 600 F.3d at 1107-08; *see also Tilton*, 705 F.2d at 804 ("Congress did not compel, as the price for federal participation in education for the handicapped, a wholesale transfer of authority over the allocation of educational resources from the duly elected or appointed state and local boards to the parents of individual handicapped children."). If an individual parent could enjoin any system-wide action that incidentally impacted her child's educational services, she would be granted "veto power over a state's decisions regarding the management of its schools." *N.D.*, 600 F.3d at 1117

Id. at 94.

The Ninth Circuit's decision in N.D. v. Hawaii, 600 F.3d 1104 (9th Cir. 2010), quoted in V.D., concerned staff furloughs due to a fiscal crisis, which reduced the school week to four days for seventeen weeks (a loss of 10% of instructional time). The requested preliminary injunction and stay put orders were denied.

(2)

The claim that, as a matter of law, the change from full-time in-person learning to remote or blended learning in response to the pandemic, violates the IDEA and constitutes a denial of a free appropriate public education ("FAPE"), is contradicted by the relevant guidance provided by federal and New York State agencies. The most recent guidance by the federal government was issued on September 28, 2020, by the U.S. Department of Education's Office of Special Education Programs ("OSEP") and the U.S. Department of Justice's Office of Civil Rights

("OCR") in the form of Questions and Answers documents. The OSEP guidance concerns the implementation of Part B of the IDEA (provisions of special education services to school-age students) "in the current COVID-19 environment." It is published at https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-provision-of-services-idea-part-b-09-28-2020.pdf. . The introduction states, in part:

> State educational agencies (SEAs) and local educational agencies (LEAs) are facing new and unexpected challenges in providing meaningful instruction to children, including children with disabilities, for the 2020-2021 school year. OSEP recognizes that the COVID-19 pandemic has impacted various parts of the nation in different ways. OSEP also recognizes that circumstances continue to rapidly change, and ultimately, the health and safety of children, families, and the school community is most important.
>
> Decisions about the 2020-2021 school year, including how and when educational and other services are provided, are being made by State and local officials, with continued academic growth and the safety of the local school community being of paramount significance. As public agencies and officials grapple with challenging decisions, administrators, educators, and parents may need to consider multiple options for delivering instruction, including special education and related services to children with disabilities. **Those options could include remote/distance instruction, in-person attendance, or a combination of both remote/distance instruction and in-person attendance (hybrid model).** [footnote omitted; emphasis added]. Id. at 1-2

The Guidance further states:

> We understand circumstances are always subject to change and recognize that ultimately the health and safety of children, families, and the school community is most important. SEAs and their public agencies must make every effort to continue to provide children with disabilities with the special education and related services appropriate to their needs.
>
> As conditions continue to change throughout the country, some of the special education and related services included in a child's IEP may need to be provided in a different manner; however, all children with disabilities must continue to receive FAPE…Id. at 2-3.

OCR's published "Questions and Answers for K-12 Public School to a Current COVID-10 Environment." It is published at https://www2.ed.gov/about/offices/list/ocr/docs/qa-covid-20200928.pdf. Question and Answer 8 is particularly relevant.

> Question 8:
> If a school is experiencing operational challenges relating to COVID-19, including suspending in-person instruction and offering distance learning, must the school revise plans developed to meet the requirements of Section 504 to reflect the change to distance learning?
>
> Answer
> Placement decisions and educational settings in effect at the time that a school suspends in-person instruction in response to concerns over COVID-19 do not need to be changed or updated solely to reflect a *temporary* shift to distance learning. However, State and local decisions that require schools to limit or suspend in-person instruction do not relieve school districts of the obligation to provide a FAPE to students with a disability. And as explained in Question 5, failing to implement aids, services, or accommodations/modifications identified in an IEP or Section 504 plan could in some cases deny a student a FAPE, violating Section 504. School districts should therefore continue to make individualized determinations as to whether students' IEPs or Section 504 plans need to be revised to ensure students with disabilities are provided a FAPE, including by identifying how the special education or related aids and services called for by a student's IEP or Section 504 plan may be provided through a variety of instructional methods and settings. School staff and parents are encouraged to work together to find ways to meet the needs of students with disabilities, notwithstanding challenges due to COVID-19. Id. at 5-6.

See also, Operating schools during COVID-19: CDC's Considerations, Updated September 1, 2020 (identifies a range of options including full in-person learning, alternating schedules where students attend in-person on alternate days, hybrid schedules, a combination of some in-person and some virtual learning and full virtual learning) https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/schools.html; New York State Education Department, published July 2020, "Recovering, Rebuilding and Renewing: The Sprit of New York's Schools, Reopening Guidance" ("Everybody wants our students back in school. But it would be reckless to return until it is safe to do so. That is why this guidance document contemplates three possible reopening scenarios: in-person instruction,

remote instruction, and a combination of the two.") http://www.nysed.gov/common/nysed/files/programs/reopening-schools/nys-p12-school-reopening-guidance.pdf,; at p. 3.

POINT II

THE COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE PLAINTIFFS FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES

Brach v. Newsom, 20-cv-06422-SVW-AFM (C.D.CA. August 21, 2020) (a copy of this unreported decision is attached hereto) is a very similar case that has an instructive discussion on exhaustion of administrative remedies. At least five of the fourteen plaintiffs are SWDs. They challenged California's limitation on in-person learning for fall 2020 (schools cannot provide in-person instruction unless certain COVID-19-related benchmarks are met in the county). Among the claims are that California's limits on in-person learning violates the IDEA, the ADA and Section 504 of the Rehabilitation Act of 1973.

In denying a temporary restraining order, the court indicated that while it had requested further briefing on the exhaustion issue because the parties had not fully briefed it, the court had determined that "Plaintiffs' failure to exhaust is unlikely to be excused." Id. at 11. The court further found that Plaintiffs were unlikely to be entitled to an exception to the exhaustion requirement even for policies or practices of general applicability that are contrary to law. The court noted that while the State's limitation on in-person learning is a policy of general applicability, it is not facially invalid and there are individualized factual questions that must be addressed "including detailed analysis of a child's particular impairments and ability to interact with technology" to determine whether these students "can receive a FAPE remotely." Id. at . 13.

In addition, the administrative process would permit full exploration of both the educational issues and decision makers, who have expertise and responsibility for administering special education in the relevant school sytem(s). Id. This analysis is certainly applicable here, where the complaint (and the motion papers for a preliminary injunction) provide no factual information whatsoever as to the individual Plaintiff Students' experiences with remote learning and for thirty-seven of the thirty-nine New York City Plaintiff Students' state only that they are New York City residents who have been classified as students with disabilities. Finally, the court in Brach found that the failure to exhaust will apply to the ADA and Rehabilitation Act claims as well, since the gravamen of those claims is that plaintiffs have been denied their right to receive a FAPE. Id. at 14; *See also*, 20 U.S.C. 1415(l); Fry v. Napoleon Community School, 137 S Ct. 743 (2017).

It should be stressed that parents have other non-litigation options available if they believe their child's IEP should be revised to address the student's current needs; there are ¶described in the Declaration of Christina Foti, dated September 18, 2020, ¶ 22.

POINT III

PLAINTIFFS' RICO STATEMENT DOES NOT STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND SHOULD BE DISMISSED

The complaint does not mention a claim pursuant to the Racketeer Influenced and Corrupt Organization Act. ("RICO") 18 U.S.C.§§_1961-1968. Plaintiffs' Rico Statement, which is now incorporated into the complaint, was filed pursuant to the Court's Civil Rico Case Standing Order (and about three weeks late), does not comply with the Standing Order requirements to provide very specific and detailed factual allegations and to reference the letter and number of the item on the Standing Order to the allegations.

The Rico Statement does not state a claim upon which relief can be granted and should be dismissed pursuant to Rule 12(b)(6). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). A complaint must contain more than "labels and conclusions" Id at 678 and must assert a connection between the alleged wrongdoing and the injury allegedly suffered by the plaintiffs Even if the named plaintiffs purport to represent a class they must allege and show that they personally have been injured and cannot rely on injury to an unidentified member of the purported class. Lewis v. Casey, 518 U.S 343, 357 (1996).

The RICO Statement fails to meet the liberal Ashcroft pleading standard, let alone the applicable heightened pleading standard of Rule 9(b), which provides in relevant part: In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. The RICO Statement reiterates the conclusory allegations of the complaint and then asserts that these violate various provisions of the RICO statute, essentially tracking the statutory language. There is no listing of victims nor any statement about how any individual victim was injured There are over 13,000 defendants, who are not listed, and it is alleged that they all engaged in the same purportedly illegal conduct. There are tens of thousands of additional alleged wrongdoers: "Superintendents and other school administrators, school boards, school employees and contract workers. State Education Directors and other state education and other state administrators, responsible for the oversight and enforcement of federal and state regulations and laws." Rico Statement, p.22. All of this is wholly insufficient to satisfy the pleading requirements. The date of the predicate acts are March 2020 to the present. Id. p. 34 And so on. It is wholly insufficient to meet the pleading standards.

However, what is offensive is that Plaintiffs' use the RICO statute to take what is a legal dispute between the parties, as to whether state and local officials may modify the manner of providing education and services to S.W.D.s, during the pandemic, and turn this disagreement into wholly conclusory allegations of wholesale misconduct and fraud by Defendants. Thus, seeking reimbursement for services provided remotely is worthless services fraud because the services are worthless)(Rico Statement, p. 29) and representing that related services which are being provided remotely are provided in accordance with the IDEA and Medicaid is a fraudulent representation. (Rico Statement, p. 27). It is submitted that this is an abuse of the RICO statute.

CONCLUSION

For the reasons set forth in this memorandum of law and NYC Defendants' main memorandum of law filed on March 18, 2020, the Court should dismiss the complaint.

Dated: October 2, 2020
New York, NY

JAMES E. JOHNSON
Corporation Counsel of the City of New York
Attorney for *NYC Defendants*
100 Church Street, Room 2-113 New York,
NY 10007 Tel: (212) 356-0871
mrichter @law.nyc.gov

by: / s/ Marilyn Richter

Marilyn Richter
Mark G. Toews
Janice Birnbaum
Assistants Corporation Counsel

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. CAROL R. EDMEAD** **PART** **IAS MOTION 35EFM**

Justice

----------X

SHANNON CORWIN, UMANG DESAI, ERIC SEVERSON, TAMDEKA HUGHES-CARROLL, WANDA CAIN

Plaintiff,

- v -

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION, RICHARD CARRANZA,

Defendant.

----------X

INDEX NO. 157166/2020

MOTION DATE 9/4/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 40

were read on this motion to/for ARTICLE 78 PETITION.

Upon the foregoing documents, it is

ORDERED that the application of Petitioners Umang Desai, Tamdeka Hughes-Carroll and Wanda Caine ("Petitioners")(Motion Seq. 001), pursuant to Article 78, for an order: (i) declaring the Accommodation Policy issued by the New York City Department of Education ("DOE") to be arbitrary, capricious, made in bad faith and/or irrational; and (ii) compelling the DOE and its chancellor, Richard Carranza, to allow Petitioners, and those similarly situated, to continue remote teaching without loss of salary and without having to use their Cumulative Absence Reserve or sick days in the absence of eligibility for remote teaching based on the Accommodation Policy until at least December 31, 2020 or until a safe and effective vaccine approved by the Centers for Disease Control and Prevention and/or US Food and Drug Administration is made available is denied and the petition is dismissed; and it is further

ORDERED that the Clerk of the Court is to enter judgment accordingly; and it is further

ORDERED that the counsel for Petitioners shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for all parties.

MEMORANDUM DECISION

In this Article 78 proceeding, Petitioners Shannon Corwin[1], Umang Desai, Eric Severson[2], Tamdeka Hughes-Carroll and Wanda Caine ("Petitioners") seek an order: (i) declaring the "COVID-19 Reasonable Accommodation Process for Fall 2020" (the "Accommodation Policy") issued by the New York City Department of Education ("DOE") to be arbitrary, capricious, made in bad faith and/or irrational; and (ii) compelling Respondents New York City ("City")[3], DOE and its chancellor, Richard Carranza ("Chancellor Carranza"), (collectively, the "Respondents") to allow Petitioners, and those similarly situated, to continue remote teaching without loss of salary and without having to use their Cumulative Absence Reserve ("CAR") or sick days in the absence of eligibility for remote teaching based on the Accommodation Policy until at least December 31, 2020 or until a safe and effective vaccine approved by the Centers for Disease Control and Prevention ("CDC") and/or US Food and Drug Administration is made available (Verified Petition, Wherefore ¶).

Respondents frame this proceeding as one seeking to: (i) declare "reasonable" accommodation guidelines as arbitrary and capricious (NYSCEF doc No. 10, ¶ 35); (ii) compel DOE to "discard their carefully constructed and ADA-compliant" guidelines (*Id.*, ¶ 36); (iii) "substitute petitioners' judgment for that of the City, DOE and their own union, all of which have been involved in the preparation and planning for resuming in-person instruction for months—as well as that of the CDC, Governor, DOH, SED, and DOHMH, none of which has mandated the accommodation petitioners seek" (*Id.*, ¶ 51); and (iv) "ignore the careful planning and decision-

[1] In his email of September 22, 2020, counsel for Petitioners informed the Court that Petitioner Corwin was offered accommodation and her claim is now moot.
[2] This case was dismissed as moot with respect to Petitioner Severson (Judge Ramseur's September 18, 2020 Order; NYSCEF doc No. 28).
[3] This case was dismissed as against the City as an improper party (Judge Ramseur's September 18, 2020 Order; NYSCEF doc No. 28).

making of City and State government officials so that [Petitioners] may work from home at the expense of students— particularly vulnerable and high-needs students—and their families" (*Id.*).

For the reasons below, the relief sought in this Article 78 proceeding is denied and the Petition is dismissed.

BACKGROUND

COVID-19 and the DOE

On or about March 15, 2020, as a result of the outbreak of the Novel Coronavirus ("COVID-19") in the State of New York, Mayor Bill de Blasio and DOE Chancellor Carranza closed school buildings across the City and directed remote learning for students (NYSCEF doc Nos. 1, ¶ 21; 10, ¶ 6). In April 2020, school closures were extended through the remainder of the school year (NYSCEF doc No. 10, ¶ 7).

On March 22, 2020, New York State Governor Andrew Cuomo ("Governor Cuomo") placed New York State "on PAUSE" to mitigate the spread of COVID-19 (https://www.governor.ny.gov/news/governor-cuomo-signs-new-york-state-pause-executive-order [last accessed on 9/22/2020]).

On June 5, 2020, Governor Cuomo issued Executive Order 202.37 providing that "special education services and instruction required under Federal, state or local laws, rules, or regulations, may be provided in person for the summer term in school districts" subject to "State and Federal guidance" (at https://www.governor.ny.gov/news/no-20237-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency-0 [last accessed on 9/22/2020]).

On June 8, 2020, Governor Cuomo lifted the "PAUSE" order in New York City and on July 4, 2020, the City was given clearance to enter Phase 4, the final phase of the state-wide reopening plans which included the reopening of schools (NYSCEF doc Nos. 1, ¶ 26; 10, ¶ 12).

In July 2020, the New York State Education Department ("NYSED") and New York State Department of Health ("NYSDOH") issued guidelines for the reopening of schools and resumption of in-person instruction (NYSCEF doc No. 10, ¶ 13).

On August 7, 2020, Governor Cuomo announced that schools across the State were permitted to open in the fall based on the lowered infection rate of COVID-19 in each New York region (*Id.*, ¶ 14; NYSCEF doc No. 1, ¶ 27).

a. The Reopening Plan

Following Governor Cuomo's announcement, the DOE submitted to NYSED a reopening plan (the "Reopening Plan") which sets forth a "blended learning" model for instruction, whereby "students will be taught on-site in school for part of the week, and will attend school remotely on other days of the week" (https://cdn-blob-prd.azureedge.net/prd-pws/docs/default-source/default-document-library/2020-nycdoe-reopeningplan.pdf [last accessed on 9/22/2020]). The DOE acknowledges that under this model, teachers and DOE staff need to be present in schools each week (NYSCEF doc No. 10, ¶ 16).

b. The Accommodation Policy

On July 15, 2020, the DOE sent an email to its staff setting forth the Accommodation Policy which provides for the process to apply for reasonable accommodation to work remotely (*see* NYSCEF doc No. 2) ("July 15 Email"). The Accommodation Policy provides in pertinent part the following:

> "A reasonable accommodation to work from home will be considered under the Americans with Disabilities Act (ADA) and in line with the medical conditions as set forth by the U.S. Centers for Disease Control and Prevention (CDC). These conditions are not exclusive and are subject to change.
>
> - In order to submit an application, you must provide documentation at the same time. The medical documentation must:
>   - Be signed by a licensed medical practitioner, and

- Clearly indicate what your underlying medical condition(s) and/or other factors are AND how they place you at an increased risk for severe illness from COVID-19.
- Note: no documentation is required to verify that you are age 65 or over as of December 31, 2020. Any other age based request will require documentation from a licensed medical practitioner as to how your age and any underlying medical condition(s) place you at an increased risk for severe illness from COVID-19

- A reasonable accommodation to work remotely due to COVID-19 will only be granted based on your own underlying medical conditions. If you are unable to work at a school for other reasons (for instance, child care, or out of concern for the health of others in your household), you may seek other options, such as a leave of absence, but you are not eligible for a reasonable accommodation to work remotely under this policy."

On August 7, 2020, the NYSED incorporated in its plan updated guidelines which provide that:

> "[]DOE employees who are older adults and/or have underlying medical condition(s) that create an increased risk of severe illness should they contract COVID-19 may be eligible for a reasonable accommodation to work remotely at the start of the school year.
>
> Requests for reasonable accommodations to work from home will be considered in accordance with relevant disability laws, including the Americans with Disabilities Act (ADA), and consistent with applicable health guidance, CDC guidance[4].
>
> Schools and offices may consider the needs of individuals who may not feel comfortable returning to an in-person educational environment when making assignments and modifying work settings and/or schedules where possible"

(NYSCEF doc No. 10, ¶¶ 31-32; *see also* DOE's Reopening Plan at https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=rSCEfeUWNpcuEVCljgYjuQ== [last accessed on 9/23/2020]).

This Article 78 Proceeding

On September 4, 2020, Petitioners commenced this proceeding challenging the Accommodation Policy as irrational, arbitrary and capricious.

[4] https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/schools.html (last accessed on 9/23/2020).

a. The Petition and the Representative Petitioners[5]

The Petition alleges that while the Accommodation Policy uses categories designated by the CDC as "high-risk" for contracting Covid-19, these categories are arbitrary and capricious as they allow "employees who are smokers and suffer from obesity or who are merely over 65 years old" to be eligible for remote teaching while Petitioners would not be eligible even if they have serious health and safety concerns for themselves and their families.

Petitioner Desai is a tenured Biology teacher at Brooklyn Technical High School. He identifies sanitation and ventilation issues in his school premises. He further states that he is concerned about "students and faculty tak[ing] multiple subway trains to get to school everyday," students "liv[ing] in multigenerational households with elderly relatives [and] parents work[ing] as essential or health workers." Mr. Desai is particularly concerned that he will not be able to help his father-in-law who is suffering from a chronic form of lymphoma if he is "exposed to COVID-19 on a daily basis" (*Id.*, ¶¶ 36-43).

Petitioner Hughes-Carroll is a substitute teacher at New Preparatory Middle School in Jamaica, Queens. Hughes-Carroll has lost several family members to Covid-19 and is concerned about her health and the health of her two children with special needs, as well as the availability of childcare while she is at work (*Id.*, ¶¶ 51-52).

Lastly, Petitioner Caine is a 62-year old teacher who works at a transfer high school in Morningside Heights, Manhattan. She has a family history of stroke, seizure and heart attack and her husband is suffering from chronic lymphocytic leukemia and was advised to "avoid all public spaces, and specifically advised [Ms.] Caine not to return to work in school" (*Id.*, ¶¶ 54-64).

[5] For a complete discussion on the situation of Representative Petitioners, *see* Petition, pp. 34-64 (NYSCEF doc No. 1).

b. The Application for TRO

Simultaneous to the filing of the Petition, Petitioners sought, by Order to Show Cause, a Temporary Restraining Order ("TRO") and preliminary injunction pending hearing to restrain Respondents from removing Petitioners and those similarly situated from payroll or requiring them to use CAR leave balance accruals for the 2020-21 school year to the extent they are available for remote work until at least December 31, 2020 or until a safe and effective vaccine approved by the CDC and/or Food and Drug Administration is made available.

On September 14, 2020, Judge Dakota Ramseur granted the TRO permitting Petitioners the opportunity to work remotely and enjoining Respondents from deducting accrued leave and/or withholding pay on that basis (NYSCEF doc No. 14).

Subsequent to the issuance of the TRO, on September 17, 2020, Respondents informed the Court that the DOE decided to delay the resumption of in-person education, transitioning instead to a phased-in rollout. Pursuant to the new plan, pre-K, Pre-K3, and District 75 (special education) students would return as previously scheduled on September 21, elementary school students would return on September 29, and middle, high school, and transfer school/adult education students would return on October 1, 2020 (NYSCEF doc No. 21). In view of this development, Judge Ramseur vacated the TRO by Order dated September 18, 2020 (NYSCEF doc No. 28). That order further dismissed the Petition as against the City as an improper party, and as against Petitioner Severson as moot after Petitioner Severson received the accommodation he requested. The remainder of the Petition was ordered severed and transferred.

On September 21, 2020, this Article 78 matter was assigned to this Court.

c. Answer

In their Answer, Respondents maintain that the Accommodation Policy is rational, it being part of Reopening Plans which were crafted over a series of months, constantly altered and tweaked to correspond with the changing landscape in the City, informed by federal, state, and city health and education guidance, borrowing protocols and language from the CDC, NYDOH, NYSED, and New York City Department of Health and Mental Hygiene and adapting them to the needs of the DOE (NYSCEF doc No. 20, p.5). Respondents argue that Petitioners cannot seek an order compelling DOE to grant them particular accommodations as the court's authority to issue this type of relief is limited to instances where a petitioner has demonstrated a clear legal right to the relief sought (*Id.*, p. 9). Respondents also submit that the issues in this case are not justiciable as granting Petitioners' request will infringe on the DOE's authority to manage its schools and substitute Petitioners' own judgment for that of the DOE Chancellor (*Id.*, p. 10). Finally, Respondents argue that Petitioners are bound by the acts of their union, United Federation of Teachers ("UFT"), which agreed on September 1, 2020 to move the first day of in-person instruction in schools from September 10, 2020 to September 21, 2020 (*Id.*, pp. 12-13).

d. Reply

In their Reply, Petitioners argue that Respondents offer no relief for educators who face the dilemma of choosing between their health/safety and their paycheck (NYSCEF doc No. 22,¶ 6); that Respondents omit any mention of their "not comfortable" informal accommodation guideline which could be a workable solution (*Id.*, ¶ 7); that while they are members of UFT, there is nothing to indicate that the union was involved in negotiating the Accommodation Policy (*Id.*, ¶ 17); that UFT has not been aligned with the DOE's safety and accommodation plans (*Id.*, ¶ 17); and that the reality is that COVID-19 continues to infect people resulting in confirmed cases of

teachers and students alike and with at least three teachers in the United States dying because of it since September 1, 2020 (*Id.*, ¶¶ 27-53).

In their Reply, Petitioners also attached affidavits of twenty (20) additional teachers with situations allegedly similar to Petitioners named herein. Petitioners requested that these individuals be allowed to intervene. However, as discussed *infra* (p. 9), this relief was denied by Judge Ramseur in her September 18, 2020 Order.

On September 22, 2020, counsel for Petitioners advised the Court by email of his intention "to file a new amended petition…with approximately 25 additional petitioners who have signed onto the case."

e. September 23 Conference Call

On September 23, 2020, this Court held a Skype conference call with all counsels to address procedural issues, including Petitioners' application to amend their Petition.

At said conference, the Court denied Petitioners' application to amend their Petition as Judge Ramseur's September 18, 2020 Order previously ruled on whether "intervenors" (as used in Petitioners' Reply) or "new petitioners" (as used in Petitioners' Amended Petition) can be added. This Court held that it is prohibited from overruling the September 18, 2020 Order issued by a court of concurrent jurisdiction. The Court also denied Petitioners' application for the alternative relief of withdrawing the Petition without prejudice since the Petition, at that time, had already been fully briefed and the addition of new petitioners would not change the focal issue in this proceeding, *i.e.*, whether or not the Accommodation Policy is arbitrary, capricious or irrational.[6]

[6] *See* Interim Order of this Court dated September 23, 2020 (NYSCEF doc No. 40) stating in part:

> "*First*, CPLR 3217 (a)(1) provides that a party asserting a claim may discontinue the same "by serving upon all parties to the action a notice of discontinuance at any time before a responsive

DISCUSSION

Separation of Powers and the Doctrine of Justiciability

Respondents argue that this Petition presents issues that are nonjusticiable. They maintain that the DOE is vested with the 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 COVID-19. Thus, it is Respondents' position that challenges to DOE's inherent policymaking authority are nonjusticiable (NYSCEF doc No. 20, p. 3).

Petitioner, however, argues that the issue of justiciability has essentially been rejected by Judge Ramseur's September 14, 2020 Order and "should be rejected based on collateral estoppel and/or res judicata" (NYSCEF doc No. 22, ¶ 4).

On the issue of justiciability, this Court finds that Judge Ramseur's September 14, 2020 Order is discretely limited to the circumstances surrounding the issuance of a TRO. Judge Ramseur's ruling was clearly limited to the context of the Court's authority to provide an "extraordinary" or "emergency" *provisional* remedy pending hearing, which is distinct from this Court's authority to decide the issues in this Petition. The September 14, 2020 Order did not address the issue of the rationality of the Accommodation Policy; rather said order dealt with the issue of whether the Court could temporarily restrain the return to in-person instruction of five teachers pending hearing (*see* NYSCEF doc No. 14, p. 7 ["At this juncture, it is reasonable to

---

pleading is served or, if no responsive pleading is required, within twenty days after service of the pleading asserting the claim and filing the notice with proof of service with the clerk of the court". Here, Respondents already filed their Answer and this Petition has already been fully briefed. While CPLR 3217(b) allows discontinuance of an action by a party asserting a claim "upon order of the court", this Court deems it improper as to do so would be tantamount to overriding Hon. Ramseur's September 18, 2020 which already precluded the addition of new petitioners.

Second, to the extent that the Amended Petition seeks to add new petitioners, the Amended Petition will not change the issue presented by this Article 78 proceeding, i.e., whether or not the Accommodation Guidelines are arbitrary, capricious or irrational."

conclude that this is an "extraordinary and emergency circumstance" justifying caution in the form of a temporary restraining order limiting five teachers from returning to in-person instruction."[7]). Thus, this Court will proceed to address the issue of justiciability for purposes of resolving the Petition on the merits.

One of the fundamental principles of our government is the distribution of its power into three branches, that is the executive, legislative and judicial, in order "to prevent too strong a concentration of authority in one person or body" (*Roberts v Health & Hosps. Corp.* (87 AD3d 311 [1st Dept 2011], *citing Under 21, Catholic Home Bur. for Dependent Children v City of New York*, 65 NY2d 344 [1985]). "While the doctrine of separation of powers does not require the maintenance of three airtight departments of government, it does require that no one branch be allowed to arrogate unto itself powers residing entirely in another branch" (*Id.*).

The doctrine of "justiciability" "embraces the constitutional doctrine of separation of powers and refers, in the broad sense, to matters resolvable by the judicial branch of government as opposed to the executive or legislative branches or their extensions" (*Jiggets v Grinker*, 75 NY2d 411 [1990]). "At the heart of the justification for the doctrine of justiciability lies the jurisprudential canon that the power of the judicial branch may only be exercised in a manner consistent with the "judicial function" [] upon the proper presentation of matter of a "judiciary nature"" (*NY State Inspection, Sec & Law Enforcement Emples., Dist. Council 82 v Cuomo*, 64 NY2d 233 [Ct App 1984], *citing In re Workmen's Compensation Fund*, 224 NY 13 [Ct App 1918]).

[7] The Court notes that Judge Ramseur subsequently vacated the TRO on September 18, 2020 upon a finding that "the imminent harm and balance of the equities presented to the Court in the initial application are no longer the same." (NYSCEF doc No. 28, p. 2).

The Court begins its analysis with the *Matter of Roberts v Board of Educ.* (2012 NY Slip Op 30972(U) [Sup Ct 2012]) ("Roberts"), a case which similarly involves the issue of justiciability of determinations made by the DOE. In *Roberts*, petitioners challenged DOE's determination to terminate employees following a 3.26% budget cut across all schools. Petitioner asserted that the DOE failed to consider other viable alternatives before choosing termination, such as reducing the hours that these employees worked each day. In denying the Article 78 petition, the *Roberts* Court held that allocation of school resources and school staffing are left to the discretion of school administrators, thus:

> "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. "[A]bsent a showing of an ultra vires act or a failure to perform a required act, the decision of a school official involving an inherently administrative process, which is uniquely part of that official's function and expertise, presents a nonjusticiable controversy."
>
> Decisions concerning the allocation of scarce school resources and school staffing levels are left to the discretion and sound judgment of school administrators. Therefore, this court finds that petitioners' claims regarding the DOE's decision to reduce all school budgets by 3.26% and to terminate 642 employees arc nonjusticiable." (citations omitted)

In so ruling, the *Roberts* Court rested on several cases, including the case of *NY State Inspection, Sec & Law Enforcement Emples., Dist. Council 82 v Cuomo*, 64 NY2d 233 [Ct App 1984] ("Cuomo") which this Court finds also instructive as it involves the issue of justiciability of executive determinations implicating safety and health of employees. In *Cuomo*, the petitioner-employees of New York correctional facilities contended that the Governor's plan to close a correctional facility "exacerbate the risk of serious bodily injury and death to persons employed at prison facilities, in violation of their statutory right to a safe workplace." Thus, petitioners commenced an Article 78 proceeding to enjoin said closure. The *Cuomo* Court, however, dismissed the case, holding that "[b]y 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 correction system" as the "primary responsibility for administering the system is vested in the Commissioner of Correctional Services…who is appointed by and holds office at the pleasure of the Governor." According to the *Cuomo* Court, "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."

Roberts v Health & Hosps. Corp (87 AD3d 311 [1st Dept 2011]) ("Health & Hosps.") is also instructive. In *Health & Hosps.*, petitioners brought an Article 78 proceedings to challenge the New York City Health and Hospitals Corporation's ("HHC") decision to reduce its maintenance staff on the ground that it would create an unsafe condition for patients and staff members who remained employed. While the lower court annulled HHC's decision on the ground that "HHC did not develop an adequate health and safety plan," the First Department reversed, holding that the petition "seek[s] to involve the court in a decision-making process that lies within the purview of the executive branch." The *Health & Hosps.* Court cautioned that "[n]either the petitioners nor the courts should be permitted to substitute their judgment for the discretionary management of public business by public officials, as neither have been lawfully charged with that responsibility."

Guided by the above cases, the Court finds that this Petition calls for a remedy that would "embroil" the judiciary in the management and operation of the school system in New York City. Similar to *Roberts* where petitioners asserted that the DOE failed to consider other viable alternatives before formulating its plan, Petitioners here likewise argue that DOE should have considered other options such as giving teachers a choice whether they wanted to work remotely or in-person, which is allegedly the case in New York State's Finger Lakes region (NYSCEF doc

No. 1, ¶ 84) and Mechanicsburg, Pennsylvania (*Id.*, ¶ 86). In keeping with *Roberts*, however, this Court holds that the determination with respect to the viable accommodation options for teachers is within Respondents' purview and should be left within their sound discretion. While Petitioners believe they have more credible ideas of what would work for teachers in the City, this Court takes heed of the pronouncement in *Health & Hosps.* to avoid "substituting" petitioners' own judgment for that of Respondents. Moreover, as the *Health & Hosps.* Court rejected a challenge that touches on the adequacy of the executive agency's "health and safety plan," this Court finds it improper to rule on the sufficiency of Respondents' health and safety plans as incorporated in the Reopening Plans. It bears highlighting that the authority to supervise the public school system in the City is expressly vested with the Department of Education[8] and its Chancellor (*see* Education Law § 2590-b [1]; §§ 2590-g, 2590-h). By statute, the DOE has the broad power to determine all policies of the city district and its Chancellor is empowered to "[p]romulgate minimum clear educational standards, curriculum requirements and frameworks, and mandatory educational objectives applicable to all schools and programs throughout the city district" (*see* Education Law §§ 2590-g, 2590-h; *see also New York City School Boards Ass'n v Board of Education*, 39 NY2d 111 [Ct App 1976]). The Court finds that the broad authority of Respondents to manage the school system in the City includes the authority to decide whether and how to reopen schools after their closure due to COVID-19.

It bears repeating, as detailed by Respondents in their Opposition to Petitioner's application for a TRO (NYSCEF doc No. 10, ¶ 8), that throughout the closure period and the summer, the DOE planned for the anticipated reopening of school buildings. In so planning, the DOE consulted with and solicited input from families, teachers, principals, superintendents, education advocates,

[8] Or the Board of Education as its predecessor.

the Panel for Educational Policy, elected officials, community stakeholders, the UFT and other unions representing DOE employees, multiple local and State government officials and agencies, and other community stakeholders and interested parties. Throughout its planning efforts, the DOE was guided by evolving local, State, and federal guidance, including as issued by the CDC, Governor Cuomo, NYSDOH, NYSED and NYCDOHMH.

Thus, similar to *Cuomo*, the policy matters being questioned here "have demonstrably and textually been committed to a coordinate, political branch of government". Consequently, any substantive consideration and evaluation of such matters by this Court, "absent extraordinary or emergency circumstances" constitutes an *ultra vires* act. [9]

Assuming *arguendo* that this Article 78 Petition is justiciable, its dismissal is nevertheless warranted as this Court finds that the Accommodation Policy has a rational basis, and is neither arbitrary nor capricious.

The Challenge to the Accommodation Policy

The court's role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 [Ct App 1974]). A determination is deemed arbitrary and capricious if it is "without sound basis in reason and is generally taken without regard of facts"; if there is a rational basis for the administrative determination, there can be no judicial interference (*Id.*).

[9] The Court notes that the updated guidelines provide that "[s]chools and offices may consider the needs of individuals who may not feel comfortable returning to an in-person educational environment when making assignments and modifying work settings and/or schedules where possible."

Here, Petitioners argue that the Accommodation Policy is arbitrary, capricious and irrational as it "do[es] not protect teachers…who do not strictly fall within the CDC guidelines, but should also be allowed to work remotely due to serious health and safety risks to themselves and their families" (NYSCEF doc No. 1, ¶ 31). Petitioners argue that "it is irrational and arbitrary and capricious that educators who are smokers or suffer from obesity or are simply over 65 years old would be eligible for medical accommodations," but that Petitioners would not qualify for the same accommodations even if they have an "immunocompromised" family member NYSCEF doc No. 8, ¶ 9).

Respondents counter that the Accommodation Policy is rational as it is part of DOE's Reopening Plans which were crafted over a series of months, constantly altered and tweaked to correspond with the changing landscape in the City, informed by federal, state, and city health and education guidance, borrowing protocols and language from the CDC, NYDOH, NYSED, and New York City Department of Health and Mental Hygiene.

The Court finds that the Accommodation Policy has a rational basis, and is neither arbitrary nor capricious.

First, the DOE has shown that the Accommodation Policy is based, *inter alia*, on medical evidence and Petitioners have adduced no evidence, scientific or otherwise, to refute the various scientific authorities that were consulted in connection with the challenged policy. It is worth noting that the DOE, throughout its NYC Reopening Plans, referenced guidelines from the DOH and CDC as basis for its health and safety plans (https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=rSCEfeUWNpcuEVCljgYjuQ== [last accessed on 9/24/2020]). In fact, the July 15 Email hyperlinked the page of the CDC website which identifies who are at "Increased Risk" for severe illness from COVID-19.

Petitioners do not dispute that the Accommodation Policy borrows language from the CDC (NYSCEF doc No. 1, ¶ 31). While Petitioners argue that CDC's high-risk categories "are written in an arbitrary and capricious manner", this Court is disinclined to adopt that conclusion given that CDC is ostensibly the nation's health protection agency (https://www.cdc.gov/about/default.htm [last accessed on 9/23/2020]) and has been supporting both the federal and state governments on the front line of public health since the start of the COVID-19 pandemic (https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cdc-in-action.html [last accessed on 9/23/2020]). Moreover, the CDC posits that it applies "rigorous scientific standards" "to ensure the accuracy and reliability of [its] research results" (https://www.cdc.gov/os/quality/support/info-qual.htm [last accessed on 9/23/2020]). Thus, this Court is not persuaded that the incorporation of CDC guidelines into the Accommodation Policy is irrational, arbitrary or capricious.

Second, the Court rejects Petitioners' contention that the Accommodation Policy is arbitrary and capricious as it does not provide accommodations for Petitioners even if they have an "immunocompromised" family member. The July 15 Email makes it clear that the Accommodation Policy takes guidance from the ADA. The U.S. Equal Employment Opportunity Commission ("EEOC"), the agency responsible for enforcing the ADA, articulates that the statute does not provide accommodation to employees to "avoid exposing a family member who is at higher risk of severe illness from COVID-19" (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws [last accessed on 9/24/2020]). The EEOC explains its interpretation as follows:

> "…The ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom she is associated.

> For example, an employee without a disability is not entitled under the ADA to telework as an accommodation in order to protect a family member with a disability from potential COVID-19 exposure.
>
> Of course, an employer is free to provide such flexibilities if it chooses to do so. An employer choosing to offer additional flexibilities beyond what the law requires should be careful not to engage in disparate treatment on a protected EEO basis."

Relevant case law on the matter is consistent with the EEOC's pronouncement. In the case of *Marchioli v Garland Co.* (US Dist. LEXIS 54227 [NDNY 200]), the Court held that "the ADA only requires an employer to make a reasonable accommodation for an employee with a disability; they are not required to provide such accommodations to employees who have a relative with a disability." In the recent case of *Dolac v City Erie* (US Dist. LEXIS 95981 [WDNY 2020], the Court stated that it is "unaware of any caselaw in which a person may be considered disabled under the ADA because of a relative's illness or providing care for a relative."

The Court notes that Petitioners correctly point to the case of *Florida Educ. Ass'n v Desantis* (2d Cir. Fl. 2020) for the proposition that "[w]ithout prescribed standards for approval of plans, the Commissioner has engaged in ad hoc and unconstitutional decision making without considering local safety and the medical opinions of experts, local or otherwise."

However, Respondents aptly distinguish the practices disallowed in *Desantis* from the efforts undertaken by the DOE herein which were inclusive. As Respondents argue, the DOE avoided each and every pitfall that led to the granting of the injunction in *Desantis* as the DOE has adhered to prescribed standards for approval of reopening plans, carefully considered all facets of local safety, and has taken into consideration the medical opinions of experts at the federal, state, and City levels.

Based on the foregoing, this Court holds that the Accommodation Policy issued by Respondents is rational, and is not arbitrary or capricious.

Relief for Mandamus

Petitioners also seek an order compelling the DOE to grant them, and others similarly situated, accommodation to teach remotely without loss of salary and without having to use their CAR or sick days until at least December 31, 2020 or until a safe and effective vaccine for COVID-19 is made available.

This relief is denied as mandamus is available only where there is a clear and absolute right to the relief sought, and the body or officer whose duty it is to enforce such right has refused to perform such duty (*Brusco v Braun*, 84 N.Y.2d 674 [Ct App 1994]). Petitioners failed to establish clear legal right to accommodation when they themselves conceded that they are not eligible for remote work under the Accommodation Policy (NYSCEF doc No. 1, ¶ 32). Moreover, as correctly argued by Respondents, Petitioners failed to cite any law, rule or regulation that would compel the DOE to provide them with a discretionary accommodation when the Accommodation Policy in place does not require one.

CONCLUSION

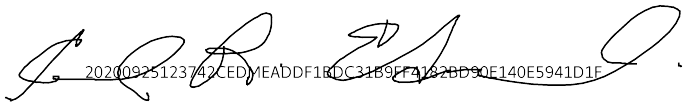
Based on the foregoing, it is hereby

ORDERED that the application of Petitioners Umang Desai, Tamdeka Hughes-Carroll and Wanda Caine ("Petitioners")(Motion Seq. 001), pursuant to Article 78, for an order: (i) declaring the Accommodation Policy issued by the New York City Department of Education ("DOE") to be arbitrary, capricious, made in bad faith and/or irrational; and (ii) compelling the DOE and its chancellor, Richard Carranza, to allow Petitioners, and those similarly situated, to continue remote teaching without loss of salary and without having to use their Cumulative Absence Reserve or sick days in the absence of eligibility for remote teaching based on the Accommodation Policy until at least December 31, 2020 or until a safe and effective vaccine

approved by the Centers for Disease Control and Prevention and/or US Food and Drug Administration is made available is denied and the petition is dismissed; and it is further

ORDERED that the Clerk of the Court is to enter judgment accordingly; and it is further

ORDERED that the counsel for Petitioners shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for all parties.



9/25/2020
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[X] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**