UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DR. SHIMON WARONKER

Plaintiff,

-against-

DOCKET NO.: 2018-cv-0393

HEMPSTEAD UNION FREE SCHOOL DISTRICT, BOARD OF EDUCATION OF THE HEMPSTEAD SCHOOL DISTRICT, DAVID B. GATES, in his individual and official capacity, RANDY STITH, in his individual and official capacity, LAMONT E. JOHNSON, in his individual and official capacity, and Patricia Wright as a necessary party in her capacity as Clerk of the Hempstead School District

Defendants.

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DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO THE PLAINTIFF'S MOTION FOR AN INJUNCTION

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PRELIMINARY STATEMENT

This Memorandum of Law is submitted by the Defendants HEMPSTEAD UNION FREE SCHOOL DISTRICT ("District"), BOARD OF EDUCATION OF THE HEMPSTEAD SCHOOL DISTRICT ("Board"), DAVID B. GATES ("Gates"), RANDY STITH ("Stith"), LAMONT E. JOHNSON ("Johnson") and PATRICIA WRIGHT ("Wright") (collectively referred to as "Defendants") in opposition to the Motion filed by the Plaintiff DR. SHIMON WARONKER ("Plaintiff") seeking injunctive relief.

The Plaintiff has been placed on an Administrative Leave of Absence with Pay ("ALOA with Pay") by the District to enable the District to conduct investigations into seven specific areas where the Board has learned that there may be improper, illegal, unethical or inappropriate conduct by the Plaintiff. These seven areas of investigation are:

(1) the BOCES investigation of his involvement in and the circumstances surrounding the publishing of the RFP, the responses to the RFP, the negotiations of the contract, the drafting of the contract and the engagement of the New American Initiative ("NAI"), and any and all services rendered by NIA, the processing of payments made to NAI, and the receipt of payments by NAI; and

(2) the District's Special Counsel's investigation of his involvement in and the circumstances surrounding the publishing of the RFP, the responses to the RFP, the negotiations of the contract, the drafting of the contract and the engagement of the New American Initiative NAI, and any and all services rendered by NAI, the processing of payments made to NAI, and the receipt of payments by NAI; and

(3) the District's Special Counsel's [to be assigned] investigation of the District's failure to timely submit a completed application for the Community School Grant;

(4) the District's investigation of the Superintendent of Schools' failure to timely implement a facilities maintenance and repair program for the boilers and pipes at the District's various buildings, which were assessed to be

in need of repairs and maintenance by administrative staff, as well as by the Distinguished Educator, and as recorded in the Facilities Assessment conducted by the Superintendent of Schools and completed before September 28, 2017; and

(5) the District's investigation of the Superintendent of Schools' failure to timely implement a Violence Suppression and Security Plan at the High School and the Middle School; and

(6) the District's investigation of the Superintendent of Schools' failure to timely and responsibly investigate, and report to the Board of Education as repeatedly demanded by members of the Board the facts and circumstances concerning the termination of the High School Principal.

(7) the District's investigation of the Superintendent of Schools' disenrollment of approximately 300 students in the High School in the Fall of 2017, which is under review by the NYSED.

Exhibit A, a copy of the Resolution of the Board placing the Plaintiff on ALOA with Pay, at page 2, (confidential Attachment)

As discussed at length in this Memorandum of Law and the Affidavit of Patricia Wright, sworn to on the 22nd day of January 2018 ("Wright Affidavit"), the Affidavit of Robert Cialone, sworn to on the 22nd day of January 2018 ("Cialone Affidavit"), the Affidavit of Lamont E. Johnson, sworn to on the 22nd day of January 2018 ("Johnson Affidavit"), the Affidavit of Robert Rodriguez, sworn to on the 22nd day of January 2018 ("Rodriguez Affidavit"), the Affidavit of David B. Gates, sworn to on the 22nd day of January 2018 ("Gates Affidavit"), the Affidavit of Randy Stith, sworn to on the 22nd day of January 2018 ("Stith Affidavit"), and the Affirmation of Austin Graff, affirmed to on the 22nd day of January 2018 ("Graff Affirmation"), the Plaintiff has interfered with investigations, pressured witnesses not to speak to investigators, has potentially committed criminal bid rigging activity, breached his fiduciary duty to the District by enriching members of his not-for-profit, New American Initiative ("NAI"), an entity that received a contract with the District in the amount of $450,000.00 under very suspicious and potentially illegal circumstances. *See,* **Exhibit B,** a copy of the NAI contract.

The District cannot effectively and appropriately conduct investigations into the seven areas of concern while the Plaintiff continues to have control over the employees as their supervisor, making employees subject to discipline for insubordination if they did not follow his direction, and while the Plaintiff has access to the District's email server and documents. As a result, the District had to place the Plaintiff on ALOA with Pay to protect the integrity of its investigations into the Plaintiff's conduct.

A. BOCES Investigation into NAI's Relationship With The District

In or about late-2017, the Nassau County branch of the Boards of Cooperative Educational Services("BOCES")[1] began to investigate the contract between NAI and the District.

BOCES has requested from the District certain documents and has requested interviews with key employees of the District involved in the NAI contract, including the Plaintiff. *See,* **Exhibit C,** a copy of the BOCES letter dated December 11, 2017. *See also*, **Exhibit D,** a copy of the BOCES letter dated December 20, 2017.

Through the process of gathering information and documents for BOCES and in communications with BOCES regarding its investigation, it has become clear that there are serious issues with the way the Plaintiff funneled significant sums of District money to NAI, its officers, and others involved in NAI. As a result, these revelations have led the District to conduct its own, independent investigation from BOCES.

B. The District's Investigation into NAI and Its Relationship With the District

The Plaintiff's contract with the District states that the Plaintiff

[1] BOCES is a "voluntary, cooperative association of school districts in a geographic area that share planning, services, and programs to provide educational and support activities more economically, efficiently, and equitably than could be provided by an individual district." **Exhibit X,** a copy of the description of what BOCES is from *School Law*, 36th Edition, at page 77. *See also,* N.Y. Education Law § 1950. The District is a member of Nassau BOCES. *See,* Wright Affidavit, at ¶ 5.

> has had professional or financial relationships with organizations that he may recommend that the district enter into transactions in order to help the District attract, develop and retain talent to improve the instruction for students. These organizations include but are not limited to:
>
> 1. The Harvard Graduate School of Education;
> 2. The National Board for Professional Teaching Standards;
> 3. The New American Initiative; and
> 4. The New York City Leadership Academy.
>
> The Superintendent will not draw any compensation from the above entities during the term of this Agreement in order to eliminate any possible conflict of interest.

Exhibit E, a copy of the Plaintiff's Contract with the District, at § 15.

While the District has no evidence (at this point) that the Plaintiff has personally benefited from the District's relationship with NAI, the Plaintiff has funneled a significant amount of District money to members and leaders in NAI.

For example, in August, 2017, the Plaintiff held a mediation session with Professor Baruch Bush of Hofstra Law School at a cost to the District of $50,000.00. *See,* **Exhibit F**, a copy of the invoice for $25,000.00 in mediation services, but the cost was $50,000.00. Professor Bush is on the Board of Advisors of NAI. *See,* **Exhibit G**, a copy of the letterhead from NAI. *See also,* **Exhibit Y**, a copy a second version of the NAI letterhead that adds a CEO that is not the Plaintiff. There is no evidence that the Plaintiff disclosed the relationship between NAI and Professor Bush prior to spending $50,000.00 on Professor Bush's services.

Additionally, one of the Plaintiff's main accomplishments as Superintendent of Schools is the hiring by the District of Master Teachers. *See,* Declaration of Dr. Shimon Waronker, dated January 19, 2018, at ¶ 27 ("Waronker Declaration"). These Master Teachers are former (or possibly current) employees of NAI. These Master Teachers were not budgeted in the District's 2017-2018 budget as adopted by the District's voters and in order to pay for the Master Teachers. The Plaintiff has alleged that the Master Teachers were paid through "unallocated funds" in the District budget, but the Plaintiff's explanation has been rejected by Jack Bierwirth

("Bierwirth"), the Distinguished Educator appointed by the New York State Commissioner. *See,* **Exhibit I,** a copy of the Distinguished Educator's Report, at pages 5-6.

Finally, there is a significant question regarding how NAI was awarded the bid for its services. The District's former Purchasing Agent submits an Affidavit in opposition to the Plaintiff's Motion, detailing the RFP process and how, based upon his more than twenty (20) years as the District's Purchasing Agent, he believe the RFP process was "inadequate, and points towards the desire to eliminate competition and award to one specific vendor that was the vendor of choice from the beginning." *See,* Cialone Affidavit, at ¶ 15. Amongst his concerns was that the timeline for publication was too short, the bid specifications were too narrow and were written by the Plaintiff as of to describe his organization, the means of how the District received the only bid submitted (from his organization) speaks of deceit and reflects the outcome of a manipulative process. In addition, the fact that the Plaintiff's name appeared on the letterhead of NAI, listing him as the CEO and founder of NAI, raised questions of a manipulative process and pre-determined outcome. *See,* Cialone Affidavit, at ¶ 15.

These issues need to be investigated without the Plaintiff interfering with the investigation process. The District needs its employees to be free to speak and disclose the facts to the District's investigators without a threat of retaliation by the Plaintiff. Placing the Plaintiff on ALOA with Pay to enable the District to investigate the underlying facts before deciding whether to bring specifications and charges against the Plaintiff is authorized by New York State law and comports with due process. *See, Appeal of Kavanaugh*, 2016 NY Educ. Dept. LEXIS 39, *10 (N.Y. St. Educ. Dep't Apr. 11, 2016).

C. The District's Investigation Into the Failure Of the Plaintiff to Complete the Application for the Community School Grant

On January 8, 2018, the Plaintiff informed the Board that he had filed the District's application for the Community School Grant. If the District were to be granted the funds pursuant to the Community School Grant, the District would be entitled to $5,418,134.00 in additional funds from New York State. *See,* Johnson Affidavit, at ¶ 4.

The Plaintiff reported to the Board that the Master Teachers were working on the Community School Grant.

As it turns out, the Plaintiff lied to the Board. As of January 8, 2018, the District's application for the Community School Grant had not been fully submitted and there were errors on the portions of the application that was submitted by the Plaintiff. *See,* Johnson Affidavit, at ¶ 4.

The District wants to investigate what the Master Teachers were actually doing for their salaries and why the Plaintiff could not and did not complete the Community School Grant. If the Plaintiff continued to act as Superintendent of Schools, he would have the ability to influence the witnesses and interfere with the investigation. This is unacceptable.

The District needs its employees to be free to speak and disclose the facts to the District's investigators. Placing the Plaintiff on ALOA with Pay to enable the District to investigate the underlying facts before deciding whether to bring specifications and charges against the Plaintiff is authorized by New York State law and comports with due process. *See, Appeal of Kavanaugh,* 2016 NY Educ. Dept. LEXIS 39, *10.

D. The District's Investigation Into the Failure to Timely Implement Facilities Maintenance and Repair Program

In October 2017, the Plaintiff reported to the residents and the Board that he inspected the District's buildings and grounds. The Plaintiff had actual knowledge that there were serious issues and concerns with the buildings.

Yet, by January 2018, when the students returned from winter break, during a long period of below freezing temperatures, the Plaintiff had failed to take any steps to implement any maintenance or repair program or even repair any of the District's facilities and buildings.

On January 2, 2018, when the District's students returned from winter break, three (3) schools had to close because pipes burst and other maintenance issues had to be resolved for the

students' safety and welfare. It was an embarrassment to the District and was widely reported in the media. *See,* **Exhibit K,** copies of a *Newsday* article regarding the District's burst pipes in January 2018.

The District wants to investigate the steps, if any, the Plaintiff took since October 2017 to implement a facilities maintenance and repair program. As Biewirth reported in his report, there was "repeated failures of various school hearing plants in late November 2017 with school cancelled in one case and inadequately heated buildings in several other cases." *See,* **Exhibit I,** at page 17.

The District needs its employees to be free to speak and disclose the facts to the District's investigators. Placing the Plaintiff on ALOA with Pay to enable the District to investigate the underlying facts before deciding whether to bring specifications and charges against the Plaintiff is authorized by New York State law and comports with due process. *See, Appeal of Kavanaugh,* 2016 NY Educ. Dept. LEXIS 39, *10.

E. The District's Investigation Into The Plaintiff's Failure To Timely Implement A Violence Suppression Plan at the District's High School and Middle School

From September 2017 through December 2017, there were fifty (50) fights at the District's High School. *See,* **Exhibit I,** at page 13. The Plaintiff replaced the District's former High School Principal with a friend of his who could not handle the difficulties in the high school.

The Plaintiff failed to put into place any plan to curtail violence in the High School or the Middle School even though violence in those schools were on the rise and certainly impacted upon the District's students' learning environment.

The District needs to investigate why there has been so much violence, what changed since the last school year that has caused an increase in the violence, and what steps the Plaintiff put into place to curtail the violence.

The District needs its employees to be free to speak and disclose the facts to the District's investigators. Placing the Plaintiff on ALOA with Pay to enable the District to investigate the underlying facts before deciding whether to bring specifications and charges against the Plaintiff is authorized by New York State law and comports with due process. *See, Appeal of Kavanaugh*, 2016 NY Educ. Dept. LEXIS 39, *10.

F. The District's Investigation Into The Plaintiff's Failure to Timely And Responsibly Investigate, And Report to the Board of Education as Repeatedly Demanded by Members of the Board the Facts and Circumstances Concerning the Termination of the High School Principal

Stith and Gates have repeatedly asked the Plaintiff for information regarding his investigation into Stephen Stroughn ("Stroughn"), the District's High School Principal recommended for termination by the Plaintiff based upon an investigation into Stroughn's work as High School Principal.

The Plaintiff refused to give any information to Stith and Gates regarding his investigation into Stroughn. *See,* Stith Affidavit, at ¶¶ 41 through 46. *See,* Gates Affidavit, at ¶ 7. Different stories were told to Stith and Gates regarding what the Plaintiff found during his investigation. *See,* Stith Affidavit, at ¶¶ 41 through 46. *See,* Gates Affidavit, at ¶ 7.

The District needs to investigate the steps taken by the Plaintiff to investigate Stroughn before the Plaintiff recommended Stroughn's termination.

The District needs its employees to be free to speak and disclose the facts to the District's investigators. Placing the Plaintiff on ALOA with Pay to enable the District to investigate the underlying facts before deciding whether to bring specifications and charges against the Plaintiff is authorized by New York State law and comports with due process. *See, Appeal of Kavanaugh*, 2016 NY Educ. Dept. LEXIS 39, *10.

G. The District's Investigation Into the Plaintiff'sDisenrollment of Approximately 300 Students in the High School in the Fall of 2017

The Plaintiff admits in his Declaration that he dis-enrolled 294 students from the District's high school because the students were absent. *See,* Waronker Declaration, at ¶ 49.

Based upon a brief investigation by the District's General Counsel, it appears that the Plaintiff illegally dis-enrolled the students without due process and in violation of New York Education Law. *See,* Rodriguez Affidavit, at ¶¶ 3, 7 through 22.

The New York State Education Department has opened an investigation into this matter. The District is greatly concerned that the Plaintiff's conduct in dis-enrolling 294 students without due process will open the District to significant legal liability.

In addition, based upon information learned from the New York State Education Department, several students who were dis-enrolled were barred, by order of the Plaintiff from re-enrolling. This is very troubling to the Defendants.

The District needs to investigate this matter without the Plaintiff having access to witnesses or access to witnesses.

The District needs its employees to be free to speak and disclose the facts to the District's investigators. Placing the Plaintiff on ALOA with Pay to enable the District to investigate the underlying facts before deciding whether to bring specifications and charges against the Plaintiff is authorized by New York State law and comports with due process. *See, Appeal of Kavanaugh,* 2016 NY Educ. Dept. LEXIS 39, *10.

H. ALOA With Pay Policy Is Authorized By The New York Education Law And Comports With Due Process

The ALOA with Pay policy adopted by the Board (**Exhibit M,** a copy of the ALOA with Pay policy) specifically states that it can be used "when an investigation is being conducted by

the District relating to an employee's misconduct or questionable judgment or conduct...." **Exhibit M.** This is exact reason the Plaintiff was placed on ALOA with Pay. *See,* Johnson Affidavit, at ¶ 6.

In addition, the District's ALOA with Pay policy requires that the employee placed on ALOA with Pay to

> be paid for each regular workday that he/she is out from work and shall continue to accrue vacation, sick, personal, holiday or other paid benefit days while out from work on such an Administrative Leave of Absence with Pay. Further, an employee on such paid leave shall continue to be covered by the District's health insurance and shall continue to have payments made on his/her behalf to the New York State & Local Retirement System during such Administrative Leave of Absence with Pay. Seniority shall also accrue during such leave. For avoidance of any doubt, an employee's salary and benefits shall not be abridged by virtue of being placed on an Administrative Leave of Absence with Pay.

Exhibit M.

The ALOA with Pay policy states that it "shall not be used for disciplinary purposes and shall not be a substitute for a suspension..." and shall be limited to "sixty (60) consecutive working days, unless extended by the Board in a subsequent consideration of the matter." **Exhibit M.**

The ALOA with Pay policy is in full compliance with New York Education Law.

In *Appeal of Kavanaugh*, 2016 NY Educ. Dept. LEXIS 39, *10, the Commissioner of Education held that "a board of education has the right to place an employee on administrative leave pending an investigation and/or pending disciplinary charges being filed against the employee." *See also, Appeal of Parker*, 2017 NY Educ. Dept. LEXIS 33, *10 (N.Y. St. Educ. Dep't Feb. 28, 2017) (holding "a board of education has the right to place an employee on administrative leave pending an investigation and/or pending disciplinary charges being filed against the employee.").

While the Plaintiff attempts to make the District's decision to place him on ALOA with Pay a constitutional issue, the Plaintiff's real complaint is that the District purportedly committed a breach of contract with respect to his contract with the District. The Plaintiff's breach of contract claim does not rise to a constitutional issue warranting an injunction.

If the Court were to grant the Plaintiff's injunction, the District will be forced to investigate its Superintendent of Schools while that same person can direct, discipline, and coerce the District's employees during the investigation. As discussed in the Cialone Affidavit, ¶¶ 21 through 27, the Plaintiff has already shown that he will interfere with District investigations into his conduct while acting as Superintendent of Schools.

The District needs to investigate very serious and potentially criminal allegations without the fear and threat of intimidation against its employees. *See,* Cialone Affidavit, at ¶ 14 through 17.

For the reasons argued in this Memorandum of Law and the accompanying Affidavits, the Plaintiffs' Motion should be denied.

POINT I. STANDARD OF REVIEW FOR A MOTION FOR AN INJUNCTION

The Second Circuit has set forth two standards of review for a District Court to analyze whether an injunction should issue. Both standards come from the Court's decision in *Plaza Health Labs., Inc. v. Perales*, 878 F.2d 577 (2d Cir 1989).

The first standard states that

> [i]n general, the district court may grant a preliminary injunction if the moving party establishes (1) irreparable harm and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party.

Plaza Health Labs., Inc. v. Perales, 878 F.2d at 580.

The second standard states that

> where the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme, the district court should not apply the less rigorous fair-ground-for-litigation standard and should not grant the injunction unless the moving party establishes, along with irreparable injury, a likelihood that he will succeed on the merits of his claim.

Plaza Health Labs., Inc. v. Perales, 878 F2d at 580.

In this Action, the Plaintiff cannot meet either standard.

The Plaintiff has no likelihood of success on the merits. The Plaintiff has no constitutional claims because he has no property interest in his position of Superintendent of Schools and has failed to allege a First Amendment retaliation claim or a "stigma-plus" claim. In addition, the Plaintiffs' claims based upon a breach of contract or New York State law violations are barred by statute based upon the Plaintiff's failure to file a Notice of Claim with the District before commencing this Action. *See,* Wright Affidavit, at ¶ 2.

In addition, the balance of the equities does not weigh in the Plaintiff's favor. The Plaintiff has allegedly been involved in questionable conduct that the District needs to investigate before proffering specifications and charges against him. The Plaintiff has shown a propensity to influence, threaten, and cajole witnesses in investigations against the Plaintiff while he has been Superintendent of Schools. *See,* Cialone Affidavit, at ¶¶ 21 through 27.

The equities weigh in favor of the Defendants so that the District can complete its investigations into the Plaintiff's conduct while the Plaintiff has no access to the District, its facilities, and its personnel so that the investigation can be free of taint by the Plaintiff.

Accordingly, no injunction should issue.

POINT II. THE PLAINTIFF HAS NO LIKELIHOOD OF SUCCESS ON THE MERITS ON THE PLAINTIFF'S FIRST CAUSE OF ACTION

The Plaintiff has suffered no violation of due process, no deprivation of his rights, or privileges and immunities secured by the Fourteenth Amendment of the United States Constitution.

The Plaintiff continues to receive his full salary and benefits. *See,* **Exhibit M.**

Under New York State Education Law, the District does not have to provide the Plaintiff an immediate hearing on specifications and charges relating to misconduct because the New York State Education Law authorizes a District to "place an employee on administrative leave pending an investigation and/or pending disciplinary charges being filed against the employee." *Appeal of Kavanaugh*, 2016 NY Educ. Dept. LEXIS 39, *10. *See also, Appeal of Parker*, 2017 NY Educ. Dept. LEXIS 33, *10.

The District is in the process of investigating seven areas of concern about the Plaintiff's conduct. *See,* **Exhibit A.** The investigations into those areas of concern may or may not lead to specifications and charges against the Plaintiff, but the District has an absolute right to place the Plaintiff on ALOA with Pay pending its investigations, so long as it is limited in time and the ALOA with Pay policy limits the leave for sixty days. *See,* **Exhibit M.**

In addition, the Plaintiff does not have a constitutionally protected liberty or property interest in the position of Superintendent of Schools. The Plaintiff

> was not a classroom teacher but a school superintendent, and as a normal part of the political process, school superintendents are frequently fired from one place and hired at another (as Mr. Holloway's own subsequent job in Georgia illustrates). Stated differently, Mr. Holloway could expect the full economic benefit of his contract, but, to borrow from the language of *Winegar*, 20 F.3d at 900, no superintendent could "legitimately" expect to continue in that position at *any* school district beyond the pleasure of the school board, as school boards and other public bodies frequently "buy out" the contracts of top managers. Any alleged

> property interest in a public policy-making position itself, that is, in a "right" to serve in that particular position in addition to being paid, if it were recognized, would severely limit the right of the electorate, through its chosen representatives, to control the operation of public institutions. If a public institution specifically contracts to create such a right, of course, the situation would be different. But that did not occur here.

Holloway v. Reeves, 277 F3d 1035, 1039 (8th Cir 2002).

In *Batagiannis v. W. Lafayette Community Sch. Corp.*, 454 F.3d 738, 740 (7th Cir 2006), the Court held that the plaintiff, a Superintendent of Schools, just like the Plaintiff in this Action, "was a policymaker, the head of a school district and wielder of considerable discretionary authority. Such a person may well have a property interest in the office's emoluments but not in the office itself--yet it is restoration to the position of Superintendent, and not just money, that Batagiannis seeks in this litigation."

In *Batagiannis*, the Court held that "a contractual right to be a superintendent of schools creates a property interest in the salary of that office but not the ability to make decisions on behalf of the public. " *Batagiannis v. W. Lafayette Community Sch. Corp.*, 454 F3d at 740.

Similarly in *Royster v. Bd. of Trustees*, 774 F.2d 618 (4th Cir 1985) a Superintendent of Schools asserted a constitutional law violation when the school district removed him from his position. In *Royster* the Court held

> not every breach of a public employment contract amounts to a constitutional violation. See *Kilcoyne v. Morgan*, 664 F.2d 940, 942 (4th Cir. 1981); *Sigmon v. Poe*, 564 F.2d 1093, 1096 (4th Cir. 1977). In the present instance, careful consideration of the issue has persuaded us that Royster's contract afforded him only the right to be fully compensated, and not the right to occupy the office of superintendent.
>
> Royster has directed us to no authority which supports the proposition that a property interest in the continued expectation of public employment includes the right to physically possess a job, in defiance of the stated desire of the employer; nor has our own review revealed such authority. Indeed, to hold that Royster had a

> constitutionally protected property interest in continuing to perform his services would make it impossible for a public employer, dissatisfied with an employee's performance, but without specific contractual cause to discharge him, to relieve the employee from his duties although willing to compensate the employee in full. This is a situation full of difficulty and one which has received no support from the South Carolina Court, the Supreme Court, nor the courts of appeals, including our own.

Royster v. Bd. of Trustees, 774 F.2d at 621.

In *Ezekwo v. NY City Health & Hosps. Corp.*, 940 F.2d 775, 782 (2d Cir 1991), the Second Circuit held that "not every contractual benefit rises to the level of a constitutionally protected property interest."

In *Ezekwo*, the Court held that "certain contractual rights are entitled to federal protection under the Fourteenth Amendment. In determining which interests are afforded such protection, a court must look to whether the interest involved would be protected under state law and must weigh 'the importance to the holder of the right.'" *Ezekwo v. NY City Health &Hosps.Corp.*, 940 F2d at 783.

Unlike in *Ezekwo*, the Plaintiff does not allege that he was promised lifetime appointment to the position of Superintendent of Schools or that his contract barred him from being placed upon ALOA with Pay. The Plaintiff does not allege that he was ever informed that he would serve as Superintendent of Schools for any period of time only that he would receive the financial benefits of his contract with the District for four years. *See*, **Exhibit E.**

To the contrary, the Plaintiff's employment contract with the District has a termination provision and therefore, he cannot claim a property interest in continuing to make decision in the position of Superintendent of Schools. *See*, **Exhibit E**, at § 9. *See, Ezekwo v. NY City Health &Hosps. Corp.*, 940 F.2d at 783.

In *Kane v. Krebser*, 44 F.Supp.2d 542, 549-550 (S.D.N.Y. 1999), the Court held

> [t]raditionally, non-economic injury is an insufficient basis for a claim of property deprivation without due process under the Fourteenth Amendment; in fact, such a concept would seem inconsistent with the concept of 'property.' The Second Circuit has specifically found that denials of "a particular work assignment" concerns "interests that are not entitled to the protections afforded by the Due Process Clause."*Ezekwo v. New York City Health & Hosp. Corp.*, 940 F.2d 775, 783 (2d Cir. 1991). Plaintiffs do not have property interests in the insubstantial aspects or discretionary benefits of their employment. *Boyd v. Schembri*, 1997 U.S. Dist. LEXIS 11965, 1997 WL 466539, *3 (S.D.N.Y. Aug. 13, 1997); *McNill v.New York City Dep't of Correction*, 950 F. Supp. 564, 572 (S.D.N.Y. 1996).... In fact, numerous courts have found that work assignment decisions far more serious than those at issue here fail to implicate a protected property interest, such as being denied the right to serve as school superintendent, *Kinsey v. Salado Indep. Sch. Dist.*, 950 F.2d 988 (5th Cir. 1992) (en banc)... There is simply no property interest at stake in this case.

In this Action, the Plaintiff's contract does not create a property right in the duties and responsibilities of Superintendent of Schools. The Plaintiff's contract with the District permits the District to terminate the Plaintiff. *See,* **Exhibit E,** at § 9. If the Plaintiff is terminated, the District is obligated to pay the compensation, then due and owing to him under the terms of the contract. *See,* **Exhibit E,** at § 9.A.

The Plaintiff may have a property interest in his salary (which has continued to be paid to him while on ALOA with Pay (**Exhibit M**), but not in the duties and responsibilities of Superintendent of Schools.

In addition, under New York State Education Law, a District has the right to "place an employee on administrative leave pending an investigation and/or pending disciplinary charges being filed against the employee." *Appeal of Kavanaugh*, 2016 NY Educ. Dept. LEXIS 39, *10. *See also, Appeal of Parker*, 2017 NY Educ. Dept. LEXIS 33, *10. The Commissioner of Education has not limited the District's right to any particular employee or barred Districts from placing its Superintendent of School on administrative leave pending an investigation.

The Plaintiff has no guaranty, whether by contract or statute, that he would not be placed upon ALOA with Pay, a policy that is authorized by New York Education Law.

In *Fishman v. County of Nassau*, 2011 U.S. Dist LEXIS 100255, at *14-17 (E.D.N.Y. Sep. 7, 2011) (Hurley, J.), this Court held

> "In order to assert a violation of procedural due process rights, a plaintiff must 'first identify a property right, second show that the [government] has deprived him of that right, and third show that the deprivation was effected without due process.'"*DeFabio v. E. Hampton Union Free Sch. Dist.*, 658 F. Supp. 2d 461, 487 (E.D.N.Y. 2009) (quoting *Local 342, Long Island Pub. Serv. Emps., UMD, ILA, AFL-CIO v. Town Bd. of Huntington*, 31 F.3d 1191, 1194 (2d Cir. 1994)) (alteration in the original). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it . . . He must, instead, have a legitimate claim of entitlement to it."*Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). The Supreme Court has determined that property interests "are not created by the Constitution."*Id.*"Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ."*Id.*
>
> Plaintiff contends that"the complaint addresses his interest in his continued employment." (Pl.'s Opp'n at 7.) It is well-settled however, that "there is no constitutionally-protected interest in the continuation of at-will employment in New York."*Alberti*, 393 F. Supp.2d at 162 (citing *Goetz v. Windsor Cent. Sch. Dist.*, 698 F.2d 606, 609 (2d Cir. 1983)). Moreover, in New York, there is a strong presumption that all employment is at-will, and therefore "terminable at any time by either party."*Baron v. Port Auth of N.Y. & N.J.*, 271 F.3d 81, 85 (2d Cir. 2001) (internal quotation marks omitted).
>
> While the at-will presumption may be overcome in some instances, *see e.g., Stamelman v. Fleishman-Hillard, Inc.*, 2003 U.S. Dist. LEXIS 13328, 2003 WL 21782645, at *4 (S.D.N.Y. July 31, 2003) (citing *Weiner v. McGraw-Hill*, 57 N.Y.2d 458, 465-66, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982)), a plaintiff bears the burden to plead allegations sufficient to overcome the presumption. *See Cooper v. Metro. Transp. Auth.*, 2006 U.S. Dist. LEXIS 47970, 2006 WL 1975936, at *6 (S.D.N.Y. July 14, 2006) (dismissing due

> process claim when plaintiff's allegations were "insufficient . . . to overcome the presumption of at-will employment") Here, plaintiff has failed to plead sufficient facts to overcome the strong presumption that he was an at-will employee and, thus, he has failed to identify any constitutionally-protected property right in his continued employment. Accordingly, that portion of defendant's motion seeking to dismiss Count II of the Complaint is granted and plaintiff's Fourteenth Amendment due process claim is dismissed.

While the Plaintiff was not an at-will employee, but a contractual employee with provisions in the contract for there to be a termination by the District (**Exhibit M**, at § 9), the Plaintiff has failed to establish a property right interest in continuing to be Superintendent of Schools with the duties and obligations of the office.

Without a property right in the position of Superintendent of Schools, the Plaintiff has no likelihood of success on the merits of a Fourteenth Amendment violation of his due process rights. Without a "protectable property interest in his employment at stake that might entitle him to the substantive protections of the Fourteenth Amendment" the Plaintiff has no likelihood of success on the merits on his First Cause of Action. *Dorcely v. Wyandanch Union Free Sch. Dist.*, 665 F.Supp.2d 178, 211 (E.D.N.Y. 2009) (Hurley, J.).

No injunction should issue based upon the Plaintiff's First Cause of Action.

POINT III. THE PLAINTIFF HAS NO LIKELIHOOD OF SUCCESS ON THE MERITS ON THE PLAINTIFF'S SECOND CAUSE OF ACTION

The Plaintiff's Second Cause of Action alleges retaliation, in violation of 42 U.S.C. § 1983, "against the Plaintiff when the Plaintiff began to conduct in depth investigations in the Defendant SCHOOL DISTRICT to root out the corruption and mismanagement in hopes of transforming Hempstead schools." **Exhibit N**, a copy of the Complaint, at ¶ 173.

In *Labensky v. Rozzi*, 1999 U.S. App. LEXIS 4241, at *4 (2d Cir Mar. 15, 1999), the Second Circuit held: "[t]o establish a retaliation claim under § 1983, a plaintiff must show: (1)

that her conduct was constitutionally protected, and (2) that the protected conduct was a substantial or motivating factor in the state actor's decision to take action involving the plaintiff."

The Plaintiff fails to allege what constitutionally protected activity the Plaintiff undertook when he investigated the District to root out corruption and mismanagement.

Without a constitutionally protected activity there can be no retaliation under 42 U.S.C. § 1983. Accordingly, the Plaintiff has no likelihood of success on the merits on his Second Cause of Action.

POINT IV. THE PLAINTIFF HAS NO LIKELIHOOD OF SUCCESS ON THE MERITS ON THE PLAINTIFF'S THIRD CAUSE OF ACTION

The Plaintiff alleges in his Third Cause of Action that he has been retaliated against based upon his assertion of his First Amendment rights.

It is important to note that the Defendants did not place the Plaintiff on ALOA with Pay because of the assertion of his speech, but to conduct investigations into seven areas of concern **(Exhibit A)** as authorized by the New York Education Law. *See,* Gates Affidavit, at ¶ 6; Johnson Affidavit, at ¶ 6.

The Plaintiff identifies two writings by the Plaintiff that he argues are protected by the First Amendment against retaliation.

First, the Plaintiff alleges that on December 6, 2017 the Plaintiff sent a letter to the Defendants raising questions of illegal financial activity and informing the Defendants that he has consulted several law enforcement agencies regarding the illegal activities. *See,* **Exhibit N,** at ¶ 182.

Second, the Plaintiff alleges that he wrote an open letter to the community on January 5, 2018. *See,* **Exhibit N,** at ¶ 183.

These activities are not protected activities under the First Amendment, since the Plaintiff: (1) was Superintendent of Schools with an obligation, "[a]s a fiduciary and as a guardian of the public trust" to report illegal activities to the appropriate government agencies (**Exhibit N,** at ¶ 182; *see also,* **Exhibit O,** a copy of the Plaintiff's December 6, 2017 letter); (2) the open letter to the community, written on District letterhead, identifying the Plaintiff as the Superintendent of Schools (*see,* **Exhibit P,** a copy of the Plaintiff's letter to the community), was in the context of his position as Superintendent of Schools and therefore he did not speak out as a private citizen, and even if he did, under *Pickering* it is not protected speech; and (3) the First Amendment retaliation claim is a set-up to create a cause of action to stave off ALOA with Pay.

The Plaintiff has no likelihood of success on the merits on his First Amendment retaliation claim and therefore is not entitled to an injunction.

A. The Plaintiff's Obligation As Superintendent Of Schools Can Give Rise To A First Amendment Retaliation

On December 6, 2017, the Plaintiff sent an email to the members of the Board -- the Board's President, Maribel Toure ("Toure"), the Board's Vice President, Gwendolyn Jackson ("Jackson"), Stith, Gates, and Johnson, the Distinguished Educator appointed by the New York State Commissioner of Education, Jack Bierwith ("Bierwirth"), the District Clerk (Wright), the Plaintiff's secretary (Ana Lovascz) and the attorneys for the District (Richard Hamburger and John Sheehan). *See,* **Exhibit O.**

The December 6, 2017 email was a communication by the Plaintiff, as Superintendent of Schools, to his supervisors, the members of the District's Board of Education regarding his efforts he has made to report illegal financial activity and steps he has taken to report those illegal financial activities to the appropriate authorities.

The Plaintiff recognized in his December 6, 2017 that he reported these purported illegal financial activities in the context of his duties as Superintendent of Schools "[a]s a fiduciary and as a guardian of the public trust...." **Exhibit O.**

The Plaintiff was clearly making a report to his supervisors, the Board, regarding his efforts to report illegal activity, a report that he made in the context of his official duties as Superintendent of Schools.

"[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti v.Ceballos*, 547 U.S. 410, 421 (2006).

It is also very important to point out that the Plaintiff stated in his December 6, 2017 email, "I am advising the Board that after raising questions about suspected illegal financial activity to members of the District, no corrective action has taken place." **Exhibit O.**

The Court must understand that the control over the Board was not in the hands of Stith, Gates, and Johnson until November 27, 2017 when the Commissioner of Education overturned the Board's decision to remove Johnson as a Board member based upon no evidence and a violation of Johnson's due process rights. *See,* **Exhibit Q,** a copy of the Commissioner of Education decision, at pages 18-19.

So, when the Plaintiff alleges that he raised questions about suspected illegal financial activity to members of the District and no corrective action has taken place, Stith, Gates, and Johnson only came into power nine (9) days before the Plaintiff wrote this email. The Plaintiff never raised issues of illegal financial activities with Gates (Gates Affidavit, at ¶ 8) nor Johnson (Johnson Affidavit, at ¶ 7) prior to this email.

On December 6, 2017, as the Superintendent of Schools, the Plaintiff was reporting to his supervisors what he did to root out of corruption, which is part of his duties and obligations as Superintendent of Schools.

The Plaintiff's December 6, 2017 email was in the context of his job duties as Superintendent of Schools and since it was part of his official duties it was not protected speech.

B. The Plaintiff's Letter To The Community As Superintendent Of Schools Was Not An Assertion Of His First Amendment Rights

The Plaintiff wrote an Open Letter to the Community, on District's letterhead, dated January 5, 2018, and he had it posted on the District's website. *See,* **Exhibit P.**

The Plaintiff's letter touted what he has done to "raise student performance, reduce violence and expose the corruption." The Plaintiff asked the community for support on his plans to improve the schools. **Exhibit P.**

The Plaintiff clearly was speaking as Superintendent of Schools and not as a private citizen. In addition, the subject matter of the speech was not protected speech by the Superintendent of Schools.

In *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968), the Court held that there is a "balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

In *Pappas v Giuliani*, 290 F.3d 143, 156 (2d Cir. 2002), the Court held

> A court must consider not only the agency's mission in relation to the nature of the speech, but also the employee's responsibilities in relation to that mission. We are not free to disregard this part of the analysis. The Supreme Court has instructed that 'in weighing the State's interest in discharging an employee based on any claim that the content of a statement made by the employee somehow undermines the mission of the public employer, some attention *must be paid* to the responsibilities of the employee within the agency." *Rankin v. McPherson*, 483 U.S. 378, 390, 97 L. Ed. 2d 315, 107 S. Ct. 2891 (1987) (emphasis added); *see also McEvoy v. Spencer*, 124 F.3d 92, 102-03 (2d Cir. 1997) (emphasizing this aspect of *Rankin*). As this Court has explained, "the more the employee's job requires confidentiality, policymaking, or public contact, the greater the state's interest in firing her for expression that offends her employer." *McEvoy*, 124 F.3d at 103 (quotation marks omitted) (citing *Caruso v. DeLuca*, 81 F.3d 666, 670 n. 3

> (7th Cir. 1996); *Hall v. Ford*, 272 U.S. App. D.C. 301, 856 F.2d 255, 261-64 (D.C. Cir. 1988)). The importance of these factors, we have explained, "should not be surprising." *Id.* "Common sense tells us that the expressive activities of a highly placed supervisory, confidential, policymaking, or advisory employee will be more disruptive to the operation of the workplace than similar activity by a low level employee with little authority or discretion." *Id.* (citing *Bates v. Hunt*, 3 F.3d 374, 378 (11th Cir. 1993); *Kinsey v. Salado Indep. Sch. Dist.*, 950 F.2d 988, 994 (5th Cir. 1992)).

In *McEvoy v. Spencer*, 124 F.3d 92, 103 (2d Cir. 1997), the Court held

> In sum, although the Supreme Court has ruled that the policymaking status of an employee is relevant to the *Pickering* analysis, it has never stated that the discharged employee's position in the employment hierarchy would automatically tilt the *Pickering* balance in the employer's favor. We therefore read *Pickering* and its progeny as holding that the policymaking status of the discharged or demoted employee is very significant in the *Pickering* balance, but not conclusive. That the nature of the employee's position is important to the free speech balancing test should not be surprising. Common sense tells us that the expressive activities of a highly placed supervisory, confidential, policymaking, or advisory employee will be more disruptive to the operation of the workplace than similar activity by a low level employee with little authority or discretion. *See, e.g., Bates v. Hunt*, 3 F.3d 374, 378 (11th Cir. 1993) ("For some categories of employees such as those in a confidential or policy-making relation to their public employer, First Amendment constitutional protection is often slight."); *Kinsey v. Salado Independent School District*, 950 F.2d 988, 994 (5th Cir. 1992) (noting that "government's interests more easily outweigh the employee's" in *Pickering* cases that "involve public employees who occupy policymaker or confidential positions"). Indeed, where the employee holds an extremely confidential or highly placed advisory position, it would be unlikely if the *Pickering* balance were to be struck in his favor. The tremendous disruption to the public workplace likely to result from the critical speech of such an employee would in most cases outweigh any First Amendment interests possessed by that employee. *Cf. Kaluczky*, 57 F.3d at 209.

Here the Plaintiff is the highest-ranking employee of the District. The Plaintiff is Superintendent of Schools. He is highest confidential and policymaking employee in the District.

The Plaintiff, as Superintendent of Schools, in most cases, including in this situation, does not have First Amendment protection when he speaks as Superintendent of Schools, even if the matter is on a matter of public concern because of the disruption it could cause in the District.

Accordingly, the Plaintiff's January 5, 2018 letter was not protected speech and the Plaintiff does not possess a First Amendment retaliation claim based upon the letter because of the disruption it did cause in the District.

C. This Whole Claim Was Set-Up To Create A Cause Of Action

The Plaintiff repeatedly testifies that Stith and Gates made clear that they were going to terminate his employment. *See,* Waronker Declaration, at ¶¶ 29, 36, and 67. The Plaintiff knew that when Johnson was reinstated as a Board member by the Commissioner of Education **(Exhibit Q)** on November 27, 2017, he was facing a Board majority that he thought would take the first opportunity to terminate him.

In fact, his attorney Frederick Brewington, Esq. ran to *Newsday* to report that the proposed ALOA with Pay policy was being adopted specifically to be enforced against the Plaintiff. *See,* **Exhibit R,** a copy of the *Newsday* article.

As a result, the Plaintiff, just eight (8) days after Johnson is reinstated the Plaintiff sent out his first letter that he relies upon for his First Amendment retaliation claim. *See,* **Exhibit O.** Then, thirty-eight (38) days after Johnson is reinstated and right before the Board was to adopt the ALOA with Pay policy, the Plaintiff writes his January 5, 2018 letter on District letterhead to the community. *See,* **Exhibit P.**

The Plaintiff and his attorney have trumped up a First Amendment retaliation claim in an attempt to create a constitutional law violation.

In *Univ. of Texas Southwestern Med. Ctr. V. Nassar*, 133 S.Ct. 2517, 570 U.S. 338 (2013), the Supreme Court addressed an employee who sets up his employer for a retaliation claim.

> Consider in this regard the case of an employee who knows that he or she is about to be fired for poor performance, given a lower pay grade, or even just transferred to a different assignment or location. To forestall that lawful action, he or she might be tempted to make an unfounded charge of racial, sexual, or religious discrimination; then, when the unrelated employment action comes, the employee could allege that it is retaliation. If respondent were to prevail in his argument here, that claim could be established by a lessened causation standard, all in order to prevent the undesired change in employment circumstances.

Univ. of Texas Southwestern Med. Ctr. v. Nassar, 133 S.Ct. at 2532.

This Court should not fall for the Plaintiff's trickery. There was no First Amendment infringement here by the Defendants, only a Plaintiff and his attorney using the press and purported letters to stave off an ALOA with Pay so that the District can investigate misconduct by the Plaintiff.

****

The Plaintiff has no First Amendment claim for retaliation. His speech was either in the context of his position as Superintendent of Schools or the District has the right to limit his speech under *Pickering* based upon his extremely high confidential and policymaking position.

The Plaintiff has no likelihood of success on the merits on his First Amendment retaliation claim and therefore no injunction should issue.

POINT V. THE PLAINTIFF HAS NO LIKELIHOOD OF SUCCESS ON THE MERITS ON THE PLAINTIFF'S FOURTH CAUSE OF ACTION

The Plaintiff asserts whistleblower causes of action in his Fourth Cause of Action based upon N.Y. Civil Service Law § 75-B, N.Y. Labor Law §§ 215 and 740, and N.Y. Education Law § 3028-D.

The Plaintiff has failed to file a Notice of Claim with the District prior to the commencement of this Action. *See,* Wright Affidavit, at ¶ 2.

N.Y. Education Law § 3813.1. states:

> No action or special proceeding, for any cause whatever, except as hereinafter provided, relating to district property or property of schools provided for in article eighty-five of this chapter or chapter ten hundred sixty of the laws of nineteen hundred seventy-four or claim against the district or any such school, or involving the rights or interests of any district or any such school shall be prosecuted or maintained against any school district, board of education, board of cooperative educational services, school provided for in article eighty-five of this chapter or chapter ten hundred sixty of the laws of nineteen hundred seventy-four or any officer of a school district, board of education, board of cooperative educational services, or school provided for in article eighty-five of this chapter or chapter ten hundred sixty of the laws of nineteen hundred seventy-four unless it shall appear by and as an allegation in the complaint or necessary moving papers that a written verified claim upon which such action or special proceeding is founded was presented to the governing body of said district or school within three months after the accrual of such claim, and that the officer or body having the power to adjust or pay said claim has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment. In the case of an action or special proceeding for monies due arising out of contract, accrual of such claim shall be deemed to have occurred as of the date payment for the amount claimed was denied.

In *Bucalo v. E. Hampton Union Free Sch. Dist.*, 351 F.Supp.2d 33, 34-35 (E.D.N.Y. 2005), the Court held

> As a condition precedent to commencement of any action under New York State law against a school district, New York's Education Law § 3813(1) requires that a written verified claim be presented to the governing body of the school district within three months of accrual of such a claim. N.Y. Educ. Law § 3813(1) (McKinney's 2004). The New York Court of Appeals has interpreted the statute as follows: "The Legislature has spoken unequivocally that no action or proceeding may be prosecuted or maintained against any school district or board of education unless a notice of claim has been 'presented to the governing body,' and this court may not disregard its pronouncement."*Parochial Bus Sys., Inc. v. Bd. of Educ.*, 60 N.Y.2d 539, 549, 470 N.Y.S.2d 564, 569, 458 N.E.2d 1241 (1983) (citations omitted). Indeed, the New York Court of Appeals has "always insisted that statutory requirements mandating notification to the proper public body or official must be fulfilled."*See id.*at 547-48, 470 N.Y.S.2d 564, 458 N.E.2d 1241 (citing *Chesney v. Bd. of Educ.*, 5 N.Y.2d 1007, 185 N.Y.S.2d 263, 158 N.E.2d 125 (1959); *Munroe v. Booth*, 305 N.Y. 426, 113 N.E.2d 546 (1953)). Thus, a failure to present a claim within ninety days of its accrual is a fatal defect. *See id.*at 547; *Bd. of Educ. of Union Free Sch. Dist. No. 2 v.* State Div. of Human Rights, 44 N.Y.2d 902, 904, 407 N.Y.S.2d 636, 637, 379 N.E.2d 163 (1978)("Noncompliance with [the notice] requirement likewise bars the right to the relief sought."); *see also, Pinaud v. County of Suffolk*, 798 F. Supp. 913, 925 (E.D.N.Y. 1992).

Accordingly, the Plaintiff has no likelihood of success on the merits with respect to his Fourth Cause of Action since on a Motion to Dismiss it will be dismissed for failure to file a Notice of Claim.

POINT VI. THE PLAINTIFF HAS NO LIKELIHOOD OF SUCCESS ON THE MERITS ON THE PLAINTIFF'S FIFTH CAUSE OF ACTION

The Plaintiff's Fifth Cause of Action sounds in breach of contract.

In *Meyer v. William Floyd Union Free Sch. Dist.*, 2008 U.S. Dist LEXIS 73296, at *22 (E.D.N.Y. Aug. 24, 2008), the Court dismissed a plaintiff's breach of contract claim against the school district "because Plaintiff failed to file a notice of claim, as required by New York Education Law § 3813(1)").

The same result should happen with the Plaintiff's Fifth Cause of Acion on a Motion to Dismiss. The Plaintiff's Fifth Cause of Action will be dismissed because the Plaintiff failed to file a Notice of Claim with the District prior to commencing this Action. *See,* Wright Affidavit, at ¶ 2.

Accordingly, no injunction should issue.

POINT VII. PLAINTIFF'S ARGUMENTS IN HIS MEMORANDUM OF LAW MUST BE REJECTED

The Plaintiff makes two arguments in his Memorandum of Law in support of the Plaintiff's Motion for an Injunction.

The first argument, which is not pled in his Complaint, is an allegation of a violation of the Plaintiff's Fourteenth Amendment rights referred to as "stigma-plus". *See,* Plaintiff's Memorandum of Law, at pages 19-23. The Plaintiff does not cite any allegations in the Complaint to support the argument and therefore should be rejected as an unpled cause of action.

Even if it was properly pled, the Plaintiff cannot establish a "stigma-plus" claim against the Defendants.

The second argument is that the Defendants failed to comply with the provisions of the Plaintiff's contract with the District. *See,* Plaintiff's Memorandum of Law, at pages 23-25. This argument must be rejected because this is a State-law claim and the Plaintiff has failed to file a Notice of Claim, which is fatal to his claim in this Court at this time. *See,* N.Y. Education Law § 3813.1.

Even if the Court were to accept the Plaintiff's argument and assertions of claims made in his Memorandum of Law in support of the motion, the Plaintiff still fails and is not entitled to an injunction.

A. The Plaintiff Cannot Establish A "Stigma-Plus" Claim

> [A] plaintiff who complains of governmental defamation must show (1) the utterance of a statement about him or her that is sufficiently derogatory to injure his or her reputation, that is capable of being proved false, and that he or she claims is false, and (2) some tangible and material state-imposed burden or alteration of his or her status or of a right in addition to the stigmatizing statement. *See Paul*, 424 U.S. at 701-02, 710-11. This requirement is known in this Circuit and elsewhere as the "stigma plus" test.

Doe v. Dep't of Pub.Safety ex rel. Lee, 271 F.3d 38, 47 (2d Cir. 2001).

The Plaintiff alleges (in his Memorandum of Law and not in the Complaint) that the adverse actions taken against him include

> the clear language of the Board Resolution that refer to investigations of Dr. Waronker and him being instructed to cooperate with the investigators. Likewise, his treatment like a common criminal in being banned from access to the school and to his email, as well as any information is clearly treatment that adds a layer of harm that far surpasses the which come due to the fact that he was suspended.

Plaintiff's Memorandum of Law, at pages 21-22.

The Plaintiff has failed to allege any action taken by the Defendants that is "sufficiently derogatory to injure his or her reputation, that is capable of being proved false, and that he or she claims is false." *Doe v. Dep't of Pub.Safety ex rel. Lee*, 271 F.3d at 47.

The language of the Board's resolution gave the Plaintiff a directive to assist the investigators appointed by the Board to investigate the NAI matter (**Exhibit A**), a matter that is the subject of a District investigation as well as a BOCES investigation. The Plaintiff in his Declaration does not deny that there is an ongoing investigation, that all matters being

investigated relating to NAI is false or that he can establish the falsity behind any investigation. Therefore his claim must fail.

In addition, to protect the Plaintiff's reputation, the Board resolution contained a second page that was marked confidential, listing the investigations that were to take place while the Plaintiff was on ALOA with Pay. *See,* **Exhibit A.**

The District took special precautions not to utter statements that may have been deemed derogatory by the Plaintiff, but since the Plaintiff has placed the reasons for being placed on ALOA with Pay in the public realm by filing this lawsuit and by authorizing his counsel to speak with *Newsday* regarding this Action (**Exhibit S**, a copy of the *Newsday* article from January 20, 2018) and News12, the confidential nature of the reasons for the Plaintiff being placed on ALOA with Pay must be disclosed to protect against the Plaintiff's false and misleading arguments asserted in his papers.

The Plaintiff's liberty interests were not impinged when the Board gave the Plaintiff a directive to aid in any investigation conducted by the District's Special Investigators regarding NAI. The only way for the Board to give the Superintendent of Schools a directive is through a Board resolution. The only way for the Board to act is publicly and in open to avoid an issue with the New York State Open Meetings Law.

Accordingly the District's resolution is not defamatory in any way, not false in any manner, and its purpose was to ensure that the investigation is not impinged, interfered with, and that the District's investigators receive the full cooperation from the Plaintiff.

Since the Plaintiff has failed to allege the sufficient elements for a cause of action for "stigma-plus", whether in his Complaint or in his moving papers, the Plaintiff's Motion should be denied and an injunction should not issue.

B. The Plaintiff's Argument For Breach Of Contract Must Be Rejected

Any claims for breach of contract must be rejected because the Plaintiff failed to file a Notice of Claim prior to commencing this Action. *See,* N.Y. Education Law § 3813.1. *See,* Wright Affidavit, at ¶ 2.This is fatal to the Plaintiff's cause of action sounding in breach of contract.

If the Court is going to consider the claim, it must be rejected.

The Plaintiff has not been disciplined. *See,* **Exhibit M** (stating "Placement of an employee on an Administrative Leave of Absence with Pay shall not be used for disciplinary purposes and shall not be a substitute for a suspension appropriately imposed pursuant to N.Y. Education Law and/or the District's collective bargaining agreements, where the Board determines that discipline is warranted."). The Plaintiff has not been suspended. The Plaintiff continues to receive the full benefits of his contract, except for the privilege to act as Superintendent of Schools while the District investigates serious allegations of misconduct and potential illegal activity by the Plaintiff. *See,* Cialone Affidavit, at ¶¶15 through 17.

New York Education Law permits the Board, even though there is a contract between the parties, to "place an employee on administrative leave pending an investigation and/or pending disciplinary charges being filed against the employee." *Appeal of Kavanaugh*, 2016 NY Educ. Dept. LEXIS 39, *10. *See also, Appeal of Parker*, 2017 NY Educ. Dept. LEXIS 33, *10.

The Plaintiff failed to obtain at the bargaining table a provision in his contract that did not permit the District to place him on ALOA with Pay. The Plaintiff cannot come to this Court and obtain a better result than he bargained for at the bargaining table.

Accordingly, the Plaintiff's breach of contract claim or arguments does not require this Court to issue an injunction. The Plaintiff's Motion must be denied.

POINT VIII. FREDERICK BREWINGTON HAS A CONFLICT OF INTEREST AND THERE IS AN APPEARANCE OF IMPROPRIETY THAT REQUIRES HIS DISQUALIFICATION

The Plaintiff's attorney, Frederick Brewington, Esq. represents the President and Vice President of the Defendant Board. There is a serious conflict of interest in this matter and an appearance of impropriety and therefore, Mr. Brewington must be disqualified from this case.

The Plaintiff's papers show that he represents Toure, the President of the Board. *See,* Wright Affidavit, at ¶ 3. Exhibit J to the Plaintiff's Motion papers is a decision from the Commissioner of Education relating to the District's election in May 2014. On the first page of the document it states "The Law Offices of Frederick K. Brewington, attorneys for petitioners, Frederick K. Brewington, Esq., of counsel. The first named Petitioner in the case was Maribel Toure. *See,* **Exhibit T**, a copy of Exhibit J, a copy of the decision from the Commissioner of Education.

In addition, Exhibit K to the Plaintiff's papers show that Mr.Brewington represented both Gwendolyn Jackson and Maribel Toure in a case in 2015 before the Commissioner of Education. *See,* **Exhibit U.** a copy of Exhibit K. Jackson is Vice President of the Board that the Plaintiff has named as Defendant in this Action.

In addition, Jackson testified under oath during the hearing to remove Johnson as a Board member in June 2017 that she and Toure consult with Brewington and it was Brewington whom she informed by text that Johnson had allegedly admitted purported misconduct. *See,* **Exhibit V**, a copy of the transcript of June 21, 2017, at page 215, line 9 through page 216, line 11. *See also,* **Exhibit H**, a copy of the text exchange between Mr. Brewington and Jackson.

Now Mr. Brewington, on behalf of his client, the Superintendent of Schools (Plaintiff), while simultaneously representing and consulting with the Board President (Toure) and the Board Vice President (Jackson) has named as a Defendant, the Board.

In *T. C. Theatre Corp. v Warner Bros. Pictures, Inc.*, 113 F.Supp. 265, 268 (S.D.N.Y. 1953), the Court held

> A lawyer's duty of absolute loyalty to his client's interests does not end with his retainer. He is enjoined for all time, except as he may be released by law, from disclosing matters revealed to him by reason of the confidential relationship. Related to this principle is the rule that where any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter will be prohibited.

The fact that Jackson admitted that she consulted with Mr. Brewington (**Exhibit V**, at page 215, line 9 through page 216, line 11) and that Jackson consulted with Mr. Brewington, and not counsel for the District, regarding her allegation that Johnson admitted wrongdoing (**Exhibit V**, at page 215, line 9 through page 216, line 11) reveals that Toure and Jackson were not consulting Mr. Brewington about personal, legal matters, but about District business.

The consultation between Toure, the Board's President and Mr. Brewington and Jackson, the Board's Vice President and Mr. Brewington raises serious issues and concerns regarding Mr. Brewington's loyalty to Toure and Jackson in light of the fact that Mr. Brewington's new client, the Plaintiff, has named the Board as a Defendant in the Action, the same Board that Toure is President of and Jackson is Vice President. *See*, Wright Affidavit, at ¶¶ 3 and 4.

In addition, Toure as President of the Board has significant legal authority over the District.[2] Toure's authority in conjunction with the relationship with Mr. Brewington raises the specter of questionable activity and a threat to the adversary process in this Action.

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[2] As Board President, Toure has the authority to conduct Board meetings and sets agenda items with the Superintendent. As Board President, Toure serves as the District's CEO and CFO. *See*, N.Y. Local Law §2.00(s)(e), N.Y. Local Law § (5-a)(e), N.Y. Local Law §30.00). As Board President, Toure has the authority to sign contracts. *See*, N.Y. Education Law § 3625. As Board Preisdent, Toure is the primary spokesperson for the District and a host of other very important duties. *See*, **Exhibit W**, a copy of the New York State Board Association's School Board U presentation. In the absence of the President, the Vice President of the Board has the authority to exercise the duties of the President. *See*, N.Y. Education Law § 1701.

There is a potential that Mr. Brewington will use the information he has learned through attorney-client privileged communications with the Board's President (Toure) and the Board's Vice President (Jackson) against the Board in this Action, placing the Board and the District at a disadvantage. *See, Bd. of Educ. v. Nyquist*, 590 F.2d 1241, 1245-1246 (2d Cir. 1979) (holding "disqualification has been ordered … where the attorney is at least potentially in a position to use privileged information concerning the other side through prior representation.").

Here, Mr. Brewington's disqualification is warranted where there is a conflict of interest between his representation of the Board's President (Toure) and the Board's Vice President (Jackson), while simultaneously representing the District's Superintendent of Schools suing the Board.

Mr. Brewington's relationship with Toure/Jackson and the Plaintiff creates the appearance of impropriety, which warrants Mr. Brewington's disqualification.

> The mere appearance of impropriety is not sufficient for disqualification without the threat that the proceeding will be tainted. *Liu v. Real Estate Inv. Group. Inc.*, 771 F. Supp. at 87; *Dinger v. Gulino*, 661 F. Supp. 438, 445 (E.D N Y. 1987); *United States Football League v. Nat'l Football League*. 605 F Supp. at 1452; *Yaretsky v. Blum*, 525 F. Supp. 24, 30 (S.D.N.Y. 1981). There are two circumstances that raise that specter: (1) when an attorney concurrently represents adverse interests, and (2) when an attorney successively represents adverse interests. *Tisby v. Buffalo Gen. Hosp.* 157 F.R.D. 157, 165 (W.D.N.Y. 1994); *Liu v. Real Estate Inv. Group.Inc.*, 771 F. Supp at 87; *Dinger v Gulino*, 661 F. Supp. at 445, *United States Football League v Nat'l Football League*, 605 F. Supp. at 1452.

Post-Confirmation Comm. of Unsecured Creditors v. Feld Group, Inc. (In re I Successor Corp.), 321 BR 640, 651 (Bankr. S.D.N.Y. 2005).

Since this Action has been publicized in the media (**Exhibit S**), it is important for there to be no appearance of impropriety. Whether the Court determines there is a conflict, there at least is an appearance of impropriety that requires disqualification.

CONCLUSION

For the reasons argued in this Memorandum of Law, the accompanying Affidavits, the Plaintiff's Motion for an Injunction should be denied.

Dated: Carle Place, New York
January 22, 2018

Respectfully submitted

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