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

NEW YORKERS FOR STUDENTS' EDUCATIONAL RIGHTS ("*NYSER*"), RUBNELIA AGOSTINO, MIRIAM ARISTY-FARER, KATHRYN BARNETT, AVA CAPOTE, MILAGROS ARCIA. G. CHANGLERTH, MONA DAVIDS, JANET DURAN, ROLANDO GARITA, SARA HARRINGTON, SONJA JONES, NICOLE IORIO, HEIDI MOUILLESSEAUX-KUNZMAN, GRETCHEN MULLINS-KIM, ANNETTE RENAUD, ELLEN TRACHTENBERG, HEIDI TESKA-PRINCE, AND ANDY WILLARD, Plaintiffs, vs. THE STATE OF NEW YORK, ANDREW M. CUOMO, as Governor of the State of New York, NEW YORK STATE BOARD OF REGENTS, and JOHN B. KING, Jr. as President of the University of the State of New York, and Commissioner of Education, Defendants.	Index No. 650450/2014 (Mendez, J.S.C.)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO CHANGE VENUE AND FOR STAY

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PRELIMINARY STATEMENT

Plaintiffs properly commenced this action in New York County. It is well-settled that a plaintiff has the right to make the initial selection of venue, and that choice rarely should be disturbed. Defendants now seek to upset Plaintiffs' selection and move the entire case to Albany. But contrary to Defendants' argument, Section 6311(1) of the New York Civil Practice Law and Rules ("C.P.L.R."), which applies only to motions for preliminary injunctions, does not require Plaintiffs' motion for preliminary injunction -- much less the entire case -- to be transferred to Albany. Rather, the plain language of the Rule permits the motion to be heard in New York County. Thus, because there is no basis for the motion to be transferred, Defendants' argument that the entire case should be moved to Albany for purposes of "efficiency" necessarily fails. In any event, even if the Court were to transfer the motion to another venue -- and it should not -- Defendants' claim that the entire case should follow because the motion for preliminary injunction encompasses the ultimate relief pled is unsupported and entirely at odds with the allegations in the Amended Complaint.

Defendants' request for a stay of proceedings should also be denied because briefing on the parties' pending motions to dismiss and for preliminary injunction must be completed regardless of the outcome on the venue motion. Indeed, less than one week prior to bringing this motion by order to show cause, Defendants negotiated a briefing schedule for these motions, which the Court entered. That schedule should not be set aside because Defendants later decided to move for change of venue. For these reasons set forth in more detail below, venue is proper and the Defendants' motion should be denied in its entirety.

RELEVANT FACTUAL BACKGROUND

Plaintiffs filed the Complaint in New York County on February 11, 2014 and alleged that venue was proper because "several plaintiffs reside in New York County, and the defendants

exercise their responsibilities throughout the State of New York." Compl. ¶ 25. The Amended Complaint filed on March 28, 2014 contains the identical allegation. Am. Compl. ¶ 28. Following a conference with the Court on March 25, 2014, Defendants moved to dismiss the Amended Complaint on May 30, 2014, and Plaintiffs thereafter moved for a preliminary injunction on June 24, 2014. Briefing on these motions is underway and will be complete by September 12.

Shortly after Plaintiffs filed the motion for preliminary injunction, on June 30, 2014, Defendants served Plaintiffs' counsel with a Demand for Change of Venue under C.P.L.R. 511(b) seeking to transfer the case from New York to Albany County. During that same week, counsel for the parties negotiated a schedule for the pending motions and submitted that proposed schedule to the Court on July 2, 2014. The Court entered the schedule the following day.

Plaintiffs timely responded to Defendants' Demand on July 7, 2014 and asserted that venue was proper because certain of the individual named plaintiffs reside in New York County. *See* Affirm. Michael A. Rebell, July 7, 2014 (Dckt. 59). The next day, Defendants brought this motion seeking to change venue and requesting a stay of the schedule they negotiated the previous week.

ARGUMENT

I. LEGAL STANDARD

In New York, a plaintiff has the right to designate venue at the outset of a case. C.P.L.R. 509. On a motion to change venue, the defendant bears the burden to demonstrate that the plaintiff's choice of forum is not appropriate, or that other factors and circumstances require that venue be changed. *Doyaga v. Camelot Taxi Inc.*, 102 A.D.3d 594, 594-95 (1st Dep't 2013); *Weiss v. Wal-Mart Stores E., L.P.*, 83 A.D.3d 461, 461 (1st Dep't 2011); *Hernandez v. Seminatore*, 48 A.D.3d 260, 260 (1st Dep't 2008); *Weingarten v. Bd. of Educ. of City Sch. Dist.*

of City of New York, 776 N.Y.S.2d 701, 704 (Sup. Ct. N.Y. Cnty. 2004). Moreover, it is well-established that "unless the balance is strongly in favor of the defendant, the plaintiffs choice of forum should rarely be disturbed." *Weingarten*, 776 N.Y.S.2d at 704.

II. THE PRELIMINARY INJUNCTION MOTION MAY BE HEARD IN NEW YORK COUNTY UNDER SECTION 6311(1)

Defendants' sole argument for transferring Plaintiffs' motion for preliminary injunction (and the entire case) to Albany rests on C.P.L.R. Section 6311(1), which provides in relevant part:

> A preliminary injunction to restrain a public officer, board or municipal corporation of the state from performing a statutory duty may be granted only by the supreme court at a term in the department in which the officer or board is located or in which the duty is required to be performed.

N.Y. C.P.L.R. § 6311(1) (emphasis supplied). In essence, Defendants argue that because the Governor, the State Education Officer and the Board of Regents are "based in Albany, New York and their duties are to be performed in Albany," Plaintiffs' motion for preliminary injunction must be heard in Albany. Defs.' Br. at 5. But, as discussed below, Defendants self-serving reading of the statute is wrong and defies established rules of statutory construction because the relevant Defendants are "located" in New York County and the statutory duty at issue is required to be performed in New York County.

A. Plaintiffs' Motion for Preliminary Injunction Only Concerns Defendants Responsible for Providing School Funding and Those Defendants Are "Located" in New York County

As a threshold matter, the only Defendants relevant to an inquiry under Section 6311(1) are those who Plaintiffs are seeking to enjoin in their motion for preliminary injunction -- the State and the Governor. N.Y. C.P.L.R. § 6311(1). As set forth more fully in their motion papers, Plaintiffs have challenged three unconstitutional restrictions on public school funding: (1) the Gap Elimination Adjustment, (2) the Allowable Growth Cap, and (3) the Supermajority Property

Tax Cap. *See* Pls.' Mem. of Law in Support of Their Motion for Preliminary Injunction, at 6-10, 11-18 (Dckt. 30). Accordingly, the only Defendants who could be restrained on that motion are those responsible for the deprivation of funding resulting from the above limitations -- the State and the Governor, both of whom are located in New York County for purposes of Section 6311(1).[1] Indeed, Defendants cannot dispute that both the Governor and the State have offices in New York, New York.[2] This presence in New York County is sufficient for the Court to rule on Plaintiffs' motion for preliminary injunction under Section 6311(1).

Contrary to Defendants' narrow reading of the statute, Section 6311(1) does not limit the "location" of the Governor and the State to their offices in Albany. It is axiomatic that statutory interpretation begins with the "plain meaning" of the language of the statute. *Janssen v. Inc. Vill. of Rockville Ctr.*, 59 A.D.3d 15, 28 (2d Dep't 2008). Moreover, "[w]ords of ordinary import used in a statute are to be given their usual and commonly understood meaning, unless it is plain from the statute that a different meaning is intended." N.Y. Stat. Law § 232 (McKinney 2014). Here, for Defendants' argument to prevail the Court must interpret the term "located" to mean principal office, however, unlike other venue statutes in the C.P.L.R., Section 6311(1) does not use the term principal office or anything like it in its text. It is settled in New York that "'a court cannot amend a statute by inserting words that are not there, nor will a court read into a statute a provision which the Legislature did not see fit to enact.'" *Janssen*, 59 A.D.3d at 28 (quoting *Matter of Chem. Specialties Mfrs. Ass'n v. Jorling*, 85 N.Y.2d 382, 394 (1995)). It is also black letter law that "[w]hen different terms are used in various parts of a statute or rule, it is

[1] Upon information and belief, neither the Board of Regents nor the Commissioner of Education are involved in the implementation or enforcement of the funding restrictions at issue in Plaintiffs' preliminary injunction motion.

[2] NYS Phone Directory, New York State, http://phonedirectory.ny.gov/telecom/phones/orgSearch.do?agencyId=44 ("Office of the Governor: 633 3rd Ave., New York, NY 10017.") (last accessed July 18, 2014).

reasonable to assume that a distinction between them is intended." *Albano v. Kirby*, 36 N.Y.2d 526, 530 (1995); *see also* N.Y. Stat. Law § 236 (McKinney 2014).

When faced with similar circumstances interpreting a venue statute in *Weingarten*, the New York Supreme Court rejected defendant's argument that the term "situated" should mean principal office. *Weingarten*, 776 N.Y.S.2d at 708. In reviewing various venue statutes the court held that where the legislature meant for the location of a principal office to serve as the exclusive basis for venue, it expressly said so and therefore the omission of the term was intentional. *Id.*

The same reasoning applies here. In contrast to other venue-fixing statutes contained in the C.P.L.R., Section 6311(1) states that venue for a preliminary injunction motion is appropriate where "the officer or board is located," not where "the officer's or board's principal office is located." *Compare* C.P.L.R. 6311(1) *with* 503(c) ("A domestic corporation . . . shall be deemed a resident of the county *in which its principal office is located* . . . ."), *and* 506(b) ("A proceeding against a body or officer shall be commenced . . . *where the principal office of the respondent is located* . . . ."), *and* 505(a) ("The place of trial of an action by or against a public authority shall be *in the county in which the authority has its principal office* . . . .").

The ordinary meaning of the term "location" is "a place or position" or "the act of finding where something or someone is." *Location – Definition*, Merriam-Webster, http://www.merriam-webster.com/dictionary/location (last visited July 18, 2014). The term is not defined to mean a principal office and the Court should decline to accept such a restrictive interpretation and/or insert those words into the statute. On similar facts, the court in *Weingarten* agreed and held that because limiting language was not used in the text of C.P.L.R. Section 504(2), the provision was meant to "incorporate more venue choices than those proposed by

defendants . . . [and] include every county where a school district or district corporation is transacting business or has a meaningful presence." *Weingarten*, 776 N.Y.S.2d at 708. Thus, the significant presence of the Defendants in New York County is sufficient for this Court to rule on Plaintiffs' motion for preliminary injunction under Section 6311(1).

The authority cited by Defendants does not hold otherwise. None of the cases cited by Defendants addressed the above statutory interpretation arguments or the facts presented here, where a defendant maintains multiple offices. *See, e.g.*, *Bull v. Stichman*, 189 Misc. 590 (N.Y. Sup. Ct. Albany Cnty. 1947) (concluding without analysis that the Emergency Housing Joint Board, the Commissioner of Housing, and the Director of the Budget, were located in Albany County); *Hurlbut v. Whalen*, 58 A.D.2d 311, 316 (4th Dep't 1977) (finding that the venue issue was moot with no analysis).[3]

B. The Duty to Provide Funding at a Constitutionally Compliant Level Is Performed in New York County

It is undisputed that Defendants have a constitutional obligation to provide the funding necessary to offer the opportunity for a sound basic education throughout New York State, including New York County.[4] For this independently sufficient reason, Defendants' motion

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[3] Defendants reliance on *Queens-Nassau Transit Lines v. Maltbie*, 183 Misc. 924, 934 (N.Y. Sup. Ct. N.Y. Cnty. 1944) is also unavailing. In that case, decided 70 years ago, the court merely quoted from another unpublished and unavailable decision from 1936 holding that the term "location" should mean principal office. In that case, however, it was conceded that the Public Service Commission was located in Albany. *Id.* at 932. Moreover, times have indisputably changed since 1936 and public officers now maintain multiple offices. Thus, the concerns about the convenience of public officers working at the State's capital no longer applies. *See generally* 3 Weinstein, Korn, & Miller, NY Civ. Prac. CPLR ¶ 504.02 (discussing a venue provision) (2d Ed. 2004); 13 Weinstein, Korn, & Miller, NY Civ. Prac. CPLR ¶ 6311.03 (2d Ed. 2004).

[4] It is important to note that Plaintiffs' motion for preliminary injunction challenges three statutory mechanisms as unconstitutional on their face. Thus, if Plaintiffs prevail, there would be no viable statutory predicate to serve as a basis for a Section 6311 transfer. *See Skelos v. Paterson*, 65 A.D.3d 339, 345-46 (2d Dep't 2009) (holding that Section 6311 did not require the preliminary injunction motion to be transferred to Albany because if the defendants actions were not authorized by the Constitution, there was no statutory basis to trigger Section 6311), *rev'd on other grounds*, 13 N.Y.3d 141 (2009) (not addressing venue under C.P.L.R. 6311).

should be denied because the "duty to be performed" by Defendants arises in New York County (among other places).

The text of Section 6311(1) expressly recognizes that the duties of public officers or boards extend beyond the place they are located -- any other reading would impermissibly render the phrase "or in which the duty is required to be performed" entirely superfluous. *See* N.Y. Stat. Law § 231 (McKinney 2014). Here, the statutory duty at issue in Plaintiffs' motion for preliminary injunction motion concerns the disbursement of constitutionally required funding throughout the State, including in New York County. Because the performance of this duty arises in the place where funds are owed and ultimately required to be paid, this Court may properly rule on Plaintiffs' motion for preliminary injunction. *See generally Indosuez Int'l Fin. B.V. v. Nat'l Reserve Bank*, 98 N.Y.2d 238, 246 (2002) (holding that the place of performance for two contracts was New York because the affected party was to be paid through a bank in New York); *see also* Restatement (Second) of Conflict of Laws § 195 (providing the place where repayment is made as the applicable law).[5]

Again, not a single case cited by Defendants addresses the relevant language of 6311(1) concerning where "the duty is to be performed." While Defendants highlight *Bull v. Stichman*, that case was decided more than 65 years ago and does not address the "duty" language of the statute. Instead, that court decided to transfer venue because the various officers of the Housing Department who were sued were, at that time "located at the seat of government in the City of Albany." 189 Misc. at 594. The court did not further discuss its reasoning or make any mention of Section 6311(1)'s alternative grounds to determine venue based on where the duty is performed.

[5] Plaintiffs are not aware of any authority interpreting Section 6311(1)'s language concerning where the "duty is required to be performed." In the absence of such guidance, Plaintiffs submit that the interpretation of where performance occurs in the conflicts of laws context is instructive.

* * *

For all of the above reasons, Defendants cannot meet their burden to disturb Plaintiffs' choice of venue on the motion for preliminary injunction. Significantly, in a related case currently pending before this Court, *Aristy-Farer v. State of New York*, No. 13-100274, 2013 WL 875771 (Sup. Ct. N.Y. Cnty. 2013), the plaintiffs also filed a motion for preliminary injunction against the same defendants seeking certain relief in connection with education funding. Defendants never contested venue on that preliminary injunction motion, which concerned nearly identical facts as those presented here, and the Court granted the motion. In other words, neither the preliminary injunction motion nor the case in *Aristy-Farer* was transferred to Albany. The motion in this case has no merit and should be denied.

III. VENUE IS PROPER AND THERE IS NO BASIS TO TRANSFER THE ENTIRE CASE TO ALBANY

Without any relevant authority, Defendants argue that if the Court transfers the motion for preliminary injunction to Albany under Section 6311(1), the Court should also transfer the entire case because the relief sought by the motion is "the very relief sought in their amended complaint." Defs.' Br. at 9. This argument fails for multiple reasons.

As a threshold matter, as discussed above, Section 6311(1) only authorizes the transfer of a motion for preliminary injunction, not the entire case.[6] Plaintiffs have not cited any other statutory basis to transfer the case to Albany, because there is none. Instead, Defendants' argument is premised on the mistaken belief that the relief sought in the motion for preliminary injunction is the same as the relief sought in the Amended Complaint and, therefore, for

[6] Defendants' authority confirms this fundamental point. *See N.Y. Central R. Co. v. Lefkowitz*, 12 N.Y.2d 305 (1963) (holding that the predecessor statute "applies to temporary injunctions only" and noting that the new C.P.L.R. 6311 "makes the venue requirement of [the predecessor to C.P.L.R. 6311] as applicable to 'preliminary injunctions' only"); *Stichman*, 189 Misc. at 595 ("So, this action for a declaratory judgment may be brought in Erie County, but a motion for a temporary injunction therein must be brought in the Third Judicial Department.").

efficiency reasons the case should be transferred. But, a plain reading of the Amended Complaint makes plain that the three discrete funding restrictions challenged by Plaintiffs in their motion for preliminary injunction are only a small portion of the much more expansive declaratory relief sought in the Amended Complaint based on the state's overall failure to fund public education at constitutionally compliant levels. *See* Am. Compl. at 64-67.

Specifically, the Amended Complaint alleges that "[m]ore than ten years after the Court of Appeals' ruling in CFE II and more than six years after state defendants enacted the Budget and Reform Act of 2007 . . . because of budgetary reductions and other actions and inactions of the state, students in the City of New York are still being denied the opportunity for a sound basic education on a systemic basis." Am. Compl. ¶ 94. The Amended Complaint further alleges in paragraph 149 that "[s]ince 2009, the defendants have failed to carry out any of the constitutionally-required actions necessary to ensure that students in New York State are being provided the opportunity for a sound basic education under current conditions." *Id.* ¶ 149. Moreover, the relief sought includes adopting substantial reforms and accountability measures to bring the system in line with constitutional requirements. Am. Compl. at 64-67. And, the overall relief sought in the Amended Complaint concerns two additional Defendants -- the Board of Regents and the Commissioner of Education. Thus, any purported overlap between the motion and the case is minimal at best.

The authority cited by Defendants negates rather than supports their position. Putting aside the fact that none of the cases concerns facts similar to those presented here, the cases cited relate to instances where the entire case was improperly venued from the outset, which is not the case here. *See, e.g., Cnty. of Nassau v. State*, No. 5821/10, 2010 N.Y. Misc. LEXIS 5032, at *6-10 (Sup. Ct. Nassau Cnty. Oct. 13, 2010) (holding venue for the entire action, as filed, was only

proper in Albany County); *see also Gonsalves-Carvalhal v. Aurora Bank, FSB*, No. 12-CV-2790 (MKB), 2014 U.S. Dist. LEXIS 6068, at *13-15, 21-31, 31-41 (E.D.N.Y. Jan. 16, 2014); *Katz v. Whittingslow*, No. Civ-88-574E, 1989 U.S. Dist. LEXIS 14062, at *5-10 (W.D.N.Y. Apr. 25, 1989) (holding that venue was improper under 28 U.S.C. § 1400(b) as to one defendant and transferring the entire case under 28 U.S.C. § 1406, which directs the court to consider whether the change of venue would be in the interest of justice). There is no basis to transfer this case out of Plaintiffs' chosen forum.

IV. DEFENDANTS REQUEST FOR A STAY AND A FURTHER EXTENSION OF TIME SHOULD BE DENIED

A. There Is No Just Reason for a Stay

In an effort to further delay this litigation, the Defendants have requested the Court to stay all further proceedings while this motion is pending. Defs.' Br. at 10. Under C.P.L.R. Section 2201, a stay may be granted in "a proper case, upon such terms as may be just." *Id.* To support their request, Defendants offer "[s]taying these proceedings, including Defendants' time to oppose the motion for a preliminary injunction and file reply papers on this motion to dismiss, will allow the Supreme Court, Albany County, to have a clean slate, and to make any rulings it deems appropriate." Defs.' Br. at 10. This superficial justification for a stay, however, is insufficient in light of the substantial prejudice Plaintiffs would suffer as a result of a delay of indefinite duration.

In the Amended Complaint, Plaintiffs have alleged a constitutional violation based on the State's failure to fund public education at required levels. To ensure that the harm to public schoolchildren throughout the State is not further exacerbated during the pendency of this litigation, Plaintiffs have sought a preliminary injunction to enjoin Defendants from withholding further funds based on three unconstitutional statutory restrictions. An alleged deprivation of a

constitutional right is an irreparable harm appropriate for injunctive relief and such relief should not be thwarted without sufficient justification. *See Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (2d Cir. 2000); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996). Indeed, as one Court of Appeals Judge has observed, "if plaintiffs, the parents of children in those public schools are constitutionally entitled to have this money spent on their children's educations, they are entitled to it now." *Hussein v. State*, 19 N.Y.3d 899, 908 (2012) (Smith, J. concurring).

Defendants do not dispute that the venue motion has no impact on the outcome of the motions they seek to stay, or the fact that those motions need to be briefed regardless of a ruling on this motion. Contrary to Plaintiffs' argument, if the Court determines transfer is appropriate -- and it is not -- it would be most efficient to transfer fully briefed motions to the transferee court, and not merely opening briefs. In any event, weighed against the delay in adjudicating Plaintiffs' motion to quell the irreparable harm to New York's public schoolchildren based on unconstitutional funding restrictions, Defendants' request should be denied.

B. Defendants Should Be Held to the Schedule They Negotiated Less than One Week Prior to Bringing this Motion

There is similarly no reason to extend Defendants to oppose Plaintiffs' motion for a preliminary injunction for 45 days after a decision on this motion. Less than one week prior to bringing this motion, the parties negotiated a schedule for the pending motions in the case, including Plaintiffs' motion for a preliminary injunction, where they would be fully briefed by September 12. Now, based on an issue of their own making, Defendants are seeking additional time. The request should be denied for the same reasons the stay should be denied. The Court should proceed to address the irreparable harm to New York's schoolchildren raised by Plaintiffs' motion for preliminary injunction without further delay. Under the current schedule -- negotiated by Defendants -- Defendants will have had 52 days to draft their opposition brief.

Defendants should be held to the schedule they negotiated, which provides ample time to prepare and serve their brief. Under C.P.L.R. Section 2004, an extension of time may be given "upon good cause shown." *Id.* Defendants offer no reason for the extension let alone provide good cause. The request should be denied.

CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that the Court deny Defendants' Motion to Change Venue and for Stay in its entirety and to grant such other further relief it deems just and proper.

Dated: New York, New York
July 18, 2014

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