SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

PARENTS AGAINST STEALTH TAXES, YISROEL EISENBACH, ASHER GROSSMAN, and KENNETH WEBER,

Petitioners-Plaintiffs,

v.

THE BOARD OF EDUCATION FOR THE EAST RAMAPO CENTRAL SCHOOL DISTRICT, and THE COMMISSIONER OF EDUCATION,

Defendants-Respondents

and

ANA MAEDA,

Proposed Intervenor-Respondent.

For judgment pursuant to article 78 of the Civil Practice Law and Rules and other Relief as Requested in this Action.

Index No. 034974/2024

Hon. Sherri L. Eisenpress

MEMORANDUM OF LAW IN SUPPORT OF PROPOSED INTERVENOR-RESPONDENT'S MOTION TO DISMISS THE COMPLAINT

Dated: October 2, 2024
New York, N.Y.

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PRELIMINARY STATEMENT

In this hybrid CPLR article 78 proceeding and declaratory judgment action, petitioners-plaintiffs seek to enjoin the East Ramapo Central School District's Board of Education (the "Board") from voting to increase the District's tax levy by 4.38% as ordered by the Commissioner of Education. Although petitioners-plaintiffs claim that they do not seek to challenge the Commissioner's Interim Order, this is clearly their intent and the desired effect of their litigation. The Court should not entertain their desperate attempt to perform an end-run around established administrative procedures to challenge school board action that would, at long last, provide students in East Ramapo – including those of the proposed intervenor – with a safe learning environment and a quality education. The complaint is entirely without merit and must be dismissed.

The court should dismiss the complaint in its entirety for failure to exhaust administrative remedies mandated by statute. Even if petitioners-plaintiffs' claims are justiciable, they fail to state a claim. First, petitioners-plaintiffs fail to allege any facts that state a due process violation under article I, § 6 of the New York Constitution. Second, the budget allocation challenged by petitioners-plaintiffs does not carry any criminal or civil penalties, and so the "void-for-vagueness" doctrine does not apply. Third, the Board's vote was an exercise of its own taxing authority and so petitioners-plaintiffs cannot show a sufficient nexus with the fiscal activities of the state such that they can assert standing under State Finance Law § 123-b. Fourth, the Board's vote conformed with the Education Law and was neither arbitrary nor capricious, and so may not be disturbed by this court. Fifth, the Board voted to levy the tax in compliance with an order lawfully issued by the Commissioner pursuant to her powers under Education Law § 311 (4) to "direct[] the levying of taxes" to remedy statutory violations by local districts, a power that has been explicitly upheld by the Court of Appeals (*People ex rel Bd. of Educ. of Union Free Sch. Dist. No. 2 of Town of*

Brookhaven, Suffolk County v Graves ["*Brookhaven*"], 243 NY 204 [1926]). Lastly, to the extent that petitioners-plaintiffs seek to enjoin the Board's vote to approve the increased tax, that claim is moot: the Board voted to do so on August 14, 2024. As such, the complaint must be dismissed.

BACKGROUND

This case arises out of a long, well-documented history of educational and financial dysfunction in the East Ramapo Central School District ("East Ramapo" or the "District"), which is managed by the District's Board of Education ("the Board"). The District's state-appointed monitors have characterized the Board's management as a "fiscal calamity." The District's most recent 2024-2025 budget ("the revote budget"), which was approved on June 18, 2024, after voters rejected the Board's initial proposal in May, would have increased the tax levy by only 1%, and was insufficient to fix the abysmal physical conditions in the District's schools and provide adequate instruction. Despite the fiscal cliff facing the District, the Board did not reduce its exorbitant spending on transportation for students who attend private schools.

I. PROPOSED INTERVENOR'S APPEAL OF THE DISTRICT'S 2024-2025 BUDGET.

On July 17, 2024, proposed intervenor filed an appeal to the Commissioner of Education pursuant to Education Law § 310 (the "Commissioner's Appeal"). The Commissioner's Appeal challenged the "revote budget's" violations of the District's obligations to its students, including violations of Public Health Law § 1110, 8 NYCRR § 155.1, and 8 NYCRR § 154-2.3 (affirmation of Camara Stokes Hudson ["Hudson affirmation"], exhibit A, verified petition, *Appeal of A.M.*, Appeal No. 22,189, ¶¶ 49–66). Proposed intervenor Maeda's Appeal to the Commissioner further asserted that the "revote budget" improperly relied upon restricted reserves in violation of Education Law § 3651 and failed to comply with the District's Long-Term Strategic Academic and Fiscal Plan as required by Monitor Law § 5 (*id*. at ¶¶ 67–74). To remedy these violations,

proposed intervenor sought an order from the Commissioner directing the imposition of a tax levy pursuant to Education Law § 311 (4) (*id*. at ¶¶ 90–91).

On July 31, 2024, the Commissioner issued an Interim Decision and Order ("Interim Order") finding the District's "revote budget" to be "arbitrary, capricious, and violative of educational policy due to the ways in which it inequitably favors nonpublic school students at the expense of public school students" (NY St Cts Elec Filing [NYSCEF] Doc. No. 23, Commissioner's Interim Decision and Order at 1 ["Interim Order"]). The Interim Order also directed the District to adopt "a tax levy providing for an additional 4.38 percent increase of the property tax levy, *i.e.,* the 5.38 percent recommended by the superintendent less the one percent approved by the voters" pursuant to the Commissioner's power under Education Law § 311 (4) (*id*. at 15).

II. PROCEDURAL HISTORY OF PETITIONERS-PLAINTIFFS' ACTION AGAINST THE DISTRICT.

To effectuate the Commissioner's Interim Order, the Board scheduled a vote for August 14, 2024, to consider the ordered increase to the tax levy. The day before the Board's scheduled vote, petitioners-plaintiffs filed suit in this court (*see* NY St Cts Elec Filing [NYSCEF] Doc. No. 1, summons and complaint ["complaint"] at 21). The complaint sought to enjoin the Board from levying the ordered tax, alleging six causes of action and claims for relief:

- Declaratory Judgment that an additional tax levy would violate the Due Process Clause of the 14th Amendment (*id*. at ¶¶ 62–63);
- Declaratory judgment that the Board vote is "unconstitutionally vague and void" (*id*. at ¶ 70);
- Declaratory Judgment pursuant to State Finance Law § 123-b (*id*. at ¶¶ 71–79);
- Relief pursuant to CPLR article 78 on the grounds that the imposition of the additional

school tax levy "violates lawful procedure, is an abuse of discretion as well as being arbitrary and capricious" and the expenditure of the levy without "specific direction . . . is arbitrary and capricious, a violation of lawful procedure as well as an abuse of discretion" (*id*. at ¶¶ 81–82);

- Declaratory relief pursuant to Education Law § 1804 that the additional tax levy "is without basis in law and should be enjoined and otherwise restrained" (*id*. at ¶ 90); and
- Preliminary and Permanent Injunctions enjoining the Board "from taking any steps to vote to increase by an additional 4.38% the proposed School Tax Levy" (*id*. at ¶ 101).

Supreme Court, Hon. Sherri L. Eisenpress, held a hearing on August 14, 2024 to consider petitioners-plaintiffs' motion for a preliminary injunction. The Court denied the motion and granted the Commissioner of Education's request to intervene (*see* NY St Cts Elec Filing [NYSCEF] Doc. No. 14, order amending caption).

At its scheduled meeting the same evening, the Board of Education voted to authorize the tax levy "as mandated by the Commissioner in the Interim Decision and Order" (Hudson affirmation, exhibit B, ERCSD Board of Education Minutes 08-14-24 at 9493–9494). Proposed intervenor was present at this meeting and presented her public comments in support of the tax increase (affidavit of Ana Maeda ["Maeda aff"] ¶ 21). It does not appear that petitioners-plaintiffs have appealed the Board's August 14, 2024 vote to the Commissioner through an appeal pursuant to Education Law 210 (*id*. at ¶ 22).

LEGAL ARGUMENT

I. LEGAL STANDARD.

CPLR 3211 (a) provides that "[a] party may move for judgment dismissing one or more causes of action" where the court does not have "jurisdiction of the subject matter of the cause of action" or "the pleading fails to state a cause of action." "Although on a motion to dismiss

plaintiffs' allegations are presumed to be true and accorded every favorable inference, conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss" (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *see also TMCC, Inc. v Jennifer Convertibles, Inc.*, 176 AD3d 1135, 1135 [2d Dept 2019] ["[B]are legal conclusions are not presumed to be true and are not accorded every favorable inference"], quoting *Grant v DiFeo*, 165 AD3d 897, 898–899 [2d Dept 2018]). Dismissal is appropriate where the plaintiff fails to plead the elements of a cause of action (*Maas v Cornell Univ.*, 94 NY2d 87, 93–94 [1999]).

Furthermore, a cause of action must be dismissed under CPLR 3211 (a) (2) where the court lacks jurisdiction or the claim is not justiciable (*City of New York Human Resources Admin. v Hewitt*, 67 Misc 3d 18, 21–22 [App Term, 2d Dept, 11th & 13th Jud Dists 2020] ["[T]he failure to follow mandated administrative procedures prior to the commencement of a plenary lawsuit implicates the subject matter jurisdiction of the court"]; *Cerniglia v Ambach*, 145 AD2d 893, 894 [3d Dept 1988]).

In petitioners-plaintiffs' 21-page complaint, they advance six separate causes of action against the District. None of them, however, are bases to sustain the complaint. First, petitioners-plaintiffs have failed to exhaust administrative remedies by appealing to the Commissioner of Education as required by Education Law §§ 2037 and 310 and therefore this Court does not have jurisdiction to review their claims (CPLR 3211 [a] [2]; *City of New York Human Resources Admin.,* 67 Misc 3d at 21–22). Second, petitioners-plaintiffs' conclusory allegations and improper applications of legal doctrine are insufficient to survive a motion to dismiss (CPLR 3211 [a] [7]; *Godfrey*, 13 NY3d at 373).

II. PETITIONERS-PLAINTIFFS HAVE FAILED TO EXHAUST ADMINISTRATIVE REMEDIES.

At bottom, this complaint is an attempt to circumvent the well-established administrative procedures for challenging a school board's actions and thus must be dismissed for failure to exhaust administrative remedies. "It is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law" (*Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]; *see also* CPLR 7801 [1]). While "there are exceptions to the exhaustion doctrine available where the agency's action is challenged as either unconstitutional or wholly beyond its grant of power, or where resort to administrative remedies would be futile or would cause irreparable injury" (*Town of Oyster Bay v Kirkland*, 81 AD3d 812, 815 [2d Dept 2011]), "the mere assertion that a constitutional right is involved will not excuse the failure to pursue established administrative remedies that can provide adequate relief" (*Pfaff v Columbia-Greene Community Coll.*, 99 AD2d 887, 888 [3d Dept 1984]). Therefore, this court lacks jurisdiction to adjudicate the petitioners-plaintiffs' claims and the complaint should be dismissed pursuant to CPLR 3211 (a) (2) (*Mulgrew v Bd. of Educ. of City Sch. Dist. of City of New York*, 88 AD3d 72, 81–82 [1st Dept 2011]).

Article 41 of the Education Law provides that "[a]ll disputes concerning the validity of any district meeting or election or of any of the acts of the officers of such meeting or election shall be referred to the commissioner of education for determination and [her] decisions in the matter shall be final and not subject to review" (*id*. § 2037). Petitioners seeking review of such disputes must file an appeal pursuant to Education Law § 310, which states that "[a]ny party conceiving himself aggrieved" may appeal any "official act or decision of any officer, school authority, or meetings" to the Commissioner of Education. In deciding such an appeal, the Commissioner has the power "[t]o make all orders, by directing the levying of taxes or otherwise, which may, in [her] judgment,

be proper or necessary to give effect to his decision" (Education Law § 311 [4]).

"The courts have long interpreted Education Law § 2037 and its predecessor statute as conferring exclusive original jurisdiction upon the Commissioner of Education regarding all disputes over the validity of school district meetings and elections" (*Schulz v State of New York*, 86 NY2d 225, 231 [1995]; *see also Schulz v Galgano*, 224 AD2d 535, 536 [2d Dept 1996] ["[T]he Commissioner of Education has jurisdiction over disputes concerning the validity of school district meetings and the acts of its officers, notwithstanding that the construction or application of a statute may be involved."], *lv dismissed* 88 NY2d 1015 [1996]).[1] Accordingly, courts have cited to section 2037 in holding that the Commissioner of Education has exclusive original jurisdiction over challenges to budgetary decisions made by local school boards (*Schamel v Bd. of Educ. of Waverly Cent. Sch. Dist*., 61 AD2d 1115, 1115–1116 [3d Dept 1978] [holding petitioner's application to compel the district to resubmit its budget to the voters because of alleged violation of Education Law concerned "matters within the expertise and cognizance of the Commissioner of Education" and dismissing for failure to exhaust], *lv denied* 44 NY2d 649 [1978]); *Finch*, *Pruyn & Co. v Kearns*, 282 AD2d 858, 859 [3d Dept 2001] [concluding that Commissioner of Education had exclusive original jurisdiction over petitioner's application to review expenditures for capital improvements, including as-applied challenge to tax allocation]).

Mullooly v Union Free School District No. 8, Town of Hempstead (20 Misc 2d 795 [Sup Ct, Nassau County 1959]) is instructive. In that case, plaintiffs moved for a temporary injunction to restrain the defendant school district from voting to submit certain budget items to the district

[1] Disputes related to "the appropriation of necessary funds to meet expenditures" and "votes involving the expenditure of money, or authorizing the levy of taxes" are encompassed in section 2037, which closely follows and refers to the statutory provisions establishing the procedures governing the budget adoption process in the Education Law (Education Law §§ 2022 [1], [3]; McKinney's Cons Laws of NY, Statutes § 97, Comment ["[I]n construing a statute the court must take the entire act into consideration, or look to the act as a whole, and all sections of a law must be read together to determine its fair meaning"]).

voters at a special meeting, arguing that the Education Law instead required the Board to levy a tax for ordinary contingent expenses (*id*. at 796). In denying the plaintiff's injunction motion, the court reasoned that the plaintiffs could have appealed either the board's decision to call the meeting *or* the vote itself to the Commissioner, and as such there were adequate available legal remedies to address their claims (*id*.). Although plaintiffs argued that an administrative appeal would be futile because the Commissioner had "already construed the applicable statutes" to permit the board's action, the court rejected this argument (*id*. at 796–797 ["[T]he question is not whether plaintiff will get, but whether he is under the law entitled to, the ruling he seeks"]).

Here, petitioners-plaintiffs have explicitly challenged the Board's vote and expenditure of the additional tax levy funds, alleging that the vote would violate lawful procedure and that the Board's failure to specify how the tax levy will be allocated is "arbitrary and capricious" (complaint ¶¶ 81–82).[2] These claims fall squarely in the class of claims covered by Education Law § 2037 as they relate to "the validity of [a] district meeting …. [and] the act of the officers of such meetings," and as such the correct course of action is an appeal to the Commissioner pursuant to Education Law § 310 (*see Schamel*, 61 AD2d at 1115–1116). Petitioners-Plaintiffs should have filed such an appeal within 30 days of the Board's vote. However, they failed to do so, and therefore the complaint must be dismissed for failure to exhaust administrative remedies (Maeda aff ¶ 22; *Pacos v Hunter*, 29 Misc 2d 404, 406 [Sup Ct, Erie County 1961], *affd* AD2d 990 [4th Dept 1961]).

Courts have recognized a limited set of exceptions to the exhaustion doctrine, including

[2] Petitioners-Plaintiffs are careful to clarify that "nothing herein this Petition and Complaint is a challenge to the Commissioner's Order" (complaint ¶ 50), however it is clear that this is exactly what they seek to challenge. Any challenge to the Commissioner's authority to order the tax levy is not ripe, as the July 31, 2024 order was merely an interim order and is not "final and binding" (*Rose-Ciriello v Bd. of Educ. of Yonkers City Sch. Dist*., 219 AD3d 839, 840–841 [2d Dept 2023]; *see also Connerton v Ryan*, 86 AD3d 698, 700 [3d Dept 2011] [holding that interlocutory order was not final and dismissing article 78 petition]).

where the agency's action is challenged as unconstitutional or beyond its grant of power, where the legality or meaning of a statute is disputed and no question of fact is involved, or where resort to administrative remedies would be futile or cause irreparable injury. However, none are applicable here (*Town of Oyster Bay*, 81 AD3d at 815; *see also Bd. of Educ., Cent. Sch. Dist. No. 1 of Towns of Otego et al. v Rickard*, 32 AD2d 135, 137–138 [3d Dept 1969]). The fact that petitioners-plaintiffs have asserted tenuous constitutional claims does not excuse their failure to exhaust administrative remedies given that they appear not to challenge the facial validity of the relevant provisions of the Education Law, but rather their application to the facts of this case (*see* complaint ¶¶ 91–92; *Finch, Pruyn & Co.*, 282 AD2d at 859 [holding that Commissioner had exclusive original jurisdiction over petitioner's claims where they did not challenge the "facial validity of any law" but rather argued that the relevant statutes were unconstitutional as applied by the district]; *see also Pfaff*, 99 AD2d at 888). Similarly, petitioners-plaintiffs do not claim that the relevant provisions of article 41 of the Education law are unclear or ambiguous in any way, and so no statutory interpretation is required (*Guariglia v DeFurio*, 34 Misc 2d 200, 205 [Sup Ct, Cayuga County 1962]).[3] Nor can petitioners-plaintiffs show that an appeal to the Commissioner would be futile simply because it is unlikely they would prevail (*see Mullooly*, 20 Misc2d at 796–797), or that such an appeal would cause irreparable harm (*McCall v State of New York*, 215 AD2d 1, 5 [3d Dept 1995] [no irreparable harm where alleged injury could be fully redressed by a monetary award]; *see also WWOR-TV v N.Y. State Dept. of Taxation & Fin.*, 1992 WL 535957 [Sup Ct, Albany County, June 24, 1992, No. TSB-D-92(9)C] [no irreparable harm where taxes would be

[3] *Eisenhauer v Watertown City School District* (208 AD3d 952 [4th Dept 2022]) is not to the contrary. In that case, petitioners-appellants challenged the *applicability* of the relevant provisions of the Education Law. Specifically, they argued that the school board lacked the authority under Education Law § 259 (1) to impose a tax for the benefit of a library that was established by the Legislature (brief for petitioners-appellants, available at 2021 WL 7707707, *8–*9). Here, there is no question that the Education Law applies to the Board and petitioners-plaintiffs do not claim that the provisions are ambiguous such that statutory interpretation is necessary (*see generally Bankers Trust Corp. v New York City Dept. of Fin.*, 1 NY3d 315, 321–322 [2003]).

refunded]).

Therefore, petitioners-plaintiffs' complaint must be dismissed for failure to exhaust administrative remedies (*Mulgrew*, 88 AD3d at 80–82 [dismissing article 78 petition where petitioners failed to exhaust by filing section 310 appeal]).

III. PETITIONERS-PLAINTIFFS HAVE FAILED TO STATE A CAUSE OF ACTION FOR WHICH RELIEF CAN BE GRANTED.

Even if petitioners-plaintiffs' failure to exhaust could be excused, which it cannot, they fail to state a cause of action (CPLR 3211 [a] [7]).

A. Petitioners-Plaintiffs' First Cause of Action Does Not Allege a Due Process Violation.

Petitioners-Plaintiffs have failed to state a claim for violation of their due process rights under the New York State Constitution, article I, § 6. In their "First Claim for Relief and Cause of Action," petitioners-plaintiffs allege that the Education Law "**established** the requirements of due process under law that the Plaintiffs and others are entitled to rely upon when being required to pay School District Taxes and any increase thereof" (complaint ¶ 54). They further allege that a tax may not be levied without voter approval "unless a contingency budget is approved by the School Board Members," and the Board's vote to levy the 4.38% tax "will impair, destroy, infringe[] upon and/or interfere[] with the Plaintiffs' aforesaid due process rights in an outrageously arbitrary and capricious manner" and will "abuse[] [the] statutory process to deprive Plaintiffs of their Due Process Rights and chill the voting rights of the Plaintiffs" (*id*. at ¶¶ 55, 58–59).

"Both the federal and state constitutions forbid the government from 'depriv[ing] . . . any person of life, liberty, or property without due process of law'" (*Tax Equity Now N.Y. LLC v City of New York*, 42 NY3d 1, 30 [2024]; quoting US Const, Amend XVI; NY Const, art I, § 6). Dismissal of a due process challenge to a tax is appropriate where plaintiffs fail to make any

allegations that would support the conclusion that the act is "so arbitrary as to compel the conclusion that it does not involve any exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property" (*A. Magnano Co. v Hamilton*, 292 US 40, 44 [1934]; *see also Supreme Assoc. LLC v Suozzi*, 65 AD3d 1219, 1220 [2d Dept 2009]). As a result, tax schemes do not violate due process as long as they are supported by a rational basis (*Tax Equity Now N.Y. LLC*, 42 NY3d at 30 [affirming dismissal of due process claims and noting "[t]he Legislature has nearly unconstrained authority in the design of taxing measures unless they are utterly unreasonable or arbitrary"], quoting *Ames Volkswagen, Ltd. v State Tax Commn.*, 47 NY2d 345, 349 [1979]).

Petitioners-Plaintiffs' pleading contains a single, conclusory claim that the Board's vote will "impair … Plaintiffs' aforesaid due process rights in an outrageously arbitrary and capricious manner" (complaint ¶ 58). Such "bare legal conclusions" are not presumed to be true or entitled to every reasonable inference on a motion to dismiss (*TMCC, Inc.*, 176 AD3d at 1135, quoting *Grant*, 165 AD3d at 898–899). Furthermore, petitioners-plaintiffs have not alleged any facts that "compel the conclusion" that the levy "constitutes … the direct exertion of a different and forbidden power" (*A. Magnano Co.*, 292 US at 44).

To the contrary, the Board's vote to levy the additional tax was supported by a rational basis. The Board voted to levy the additional 4.38% tax in compliance with the Commissioner's Interim Order, issued pursuant to Education Law § 311 (4), to remedy the District's violations of its statutory obligations challenged by proposed intervenor in her Appeal (*see supra* at 2–3). Indeed, the Board explicitly stated that approval of the tax levy was "mandated by the Commissioner in the Interim Decision and Order" (Hudson affirmation, exhibit B at 9494). Compliance with the direct order of the Commissioner of Education is an eminently rational basis

for the Board's vote. Petitioners-Plaintiffs' conclusory allegations to the contrary are insufficient to survive a motion to dismiss (*Godfrey*, 13 NY3d at 373). As such, dismissal of petitioners-plaintiffs' first claim for relief and cause of action is appropriate (*Tax Equity Now N.Y. LLC*, 42 NY3d at 30).

B. The District's Budget Allocation Is Not Void for Vagueness and Petitioners-Plaintiffs' Second Cause of Action Must Be Dismissed.

Petitioners-Plaintiffs have failed to state a claim that the District's budget resolution is void for vagueness. In their "Second Claim for Relief and Cause of Action," petitioners-plaintiffs allege that the Commissioner's Interim Order lacked "any particularization or any prioritization in specifically how and where" the money to be raised through the tax levy "is to be expended" (complaint ¶ 69). They argue that "[w]ithout such specifics, Plaintiffs are at risk of the School Board raising the School Tax Levy by approximately $6,500,000, but only to be later Ordered by the Commissioner to raise an additional $6,500,000 for programs that should have been restored or expanded" (*id*. at ¶ 70).

"A statute, or a regulation, is unconstitutionally vague if it fails to provide a person of ordinary intelligence with a reasonable opportunity to know what is prohibited, and it is written in a manner that permits or encourages arbitrary or discriminatory enforcement" (*Ulster Home Care v Vacco*, 96 NY2d 505, 509 [2001], quoting *People v Foley*, 94 NY2d 66, 681 [2000]). Although it is "commonly applied to criminal statutes and to administrative regulations which carry penal sanctions," the vagueness doctrine "is also applicable to statutes or administrative regulations imposing serious civil sanctions" (*Quintard Assoc., Ltd. v New York State Liquor Auth.*, 57 AD2d 462, 464 [4th Dept 1977], *lv dismissed & denied* 42 NY2d 973 [1977]).

Here, petitioners-plaintiffs challenge the Board's allocation of the additional funds raised by the tax levy. A budgetary allocation is neither a criminal statute nor an administrative regulation

and does not carry any criminal or civil penalty that could apply to petitioners-plaintiffs. As such, any claim that the Board's budget resolution is "void for vagueness" is wholly without merit (*cf. People v Bright*, 71 NY2d 376, 379 [1988] [holding Penal Law provision prohibiting loitering as unconstitutionally vague for failure "to give fair notice to the ordinary citizen that the prohibited conduct is illegal"]; *Trio Distributor Corp. v City of Albany*, 2 NY2d 690, 695 [1957] [holding city ordinance void for vagueness where violations punishable by fine or imprisonment]).

Therefore, petitioners-plaintiffs' second claim for declaratory relief must be dismissed for failure to state a claim (*Sullivan v New York State Joint Commn. on Pub. Ethics*, 207 AD3d 117, 129 [3d Dept 2022] [dismissing plaintiffs' void-for-vagueness claim for declaratory relief]).

C. Petitioners-Plaintiffs' Third Cause of Action Fails to Allege a Sufficient Nexus with State Fiscal Activities.

Petitioners-Plaintiffs have failed to state a claim alleging a violation of State Finance Law § 123-b. They failed to allege a sufficient nexus between the Board vote and the fiscal activities of the State and, as a result, do not have standing to maintain an action pursuant to State Finance Law § 123-b. Therefore, this claim should be dismissed pursuant to CPLR 3211.

State Finance Law § 123-b provides that "any person, who is a citizen taxpayer, whether or not such person is or may be affected or specially aggrieved by the activity herein referred to, may maintain an action for equitable and declaratory relief" against an officer of the state who has or may cause "a wrongful expenditure, misappropriation, misapplication, or other illegal or unconstitutional disbursement of state funds or state property." Because "the statute might be read to allow actions when little or no injury has been claimed," courts require that a plaintiff's claim "must have a 'sufficient nexus to fiscal activities of the State' in order to confer standing" (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 813 [2003], quoting *Rudder v Pataki*, 93 NY2d 273, 281 [1999]).

Courts have held, therefore, that plaintiffs may not invoke section 123-b to challenge the expenditures of an agency when the funds in question do not originate with the state (*Lancaster Dev. v Power Auth. of State of New York*, 145 AD2d 806, 807 [3d Dept 1988] [finding that plaintiffs lacked standing as citizen taxpayer where funds were "derived from [defendant's] own operating revenue and the issuance of its own bonds and notes], *lv denied* 74 NY2d 612 [1989]).

While petitioners-plaintiffs allege that the District receives funding from the state, they are not challenging these disbursements and expenditures (complaint ¶¶ 74–75). Rather, they challenge the Board's vote to levy an additional 4.38% tax, generating at least $6,500,000 in revenue (*id*. at ¶¶ 43–50). Because these funds are raised in the exercise of the District's local taxing power, "no State expenditure is involved and plaintiff taxpayers do not have standing under the State Finance Law" (*Bd. of Educ., Shoreham-Wading Riv. Cent. Sch. Dist. v State of New York,* 111 AD2d 505, 506–507 [3d Dept 1985] [holding plaintiffs did not have standing under section 123-b where school tax refunds issued would be moneys raised in the district's exercise of its local taxing powers], *lv dismissed* 66 NY2d 603 [1985]).

Therefore, petitioners-plaintiffs have failed to allege that they have standing to challenge the Board's vote pursuant to State Finance Law § 123-b and their third claim for relief and cause of action must be dismissed (*see South Bronx Unite! v New York City Indus. Dev. Agency*, 115 AD3d 607, 610 [1st Dept 2014], *lv denied* 24 NY3d 908 [2014]).

D. Petitioners-Plaintiffs' Fourth Claim for Relief Fails Because the Board's Approval of the Tax Levy Was Supported by a Rational Basis.

Petitioners-Plaintiffs have similarly failed to state a claim for relief under article 78 of the CPLR. In their "Fourth Claim for Relief", petitioners-plaintiffs allege that the action of the Board "to impose an additional School Tax Levy . . . without compliance with the School District's Budget Process as set forth in the . . . New York State Education Law" and "to permit the

expenditure of the additional School Tax Levy . . . without the specific direction that particularize and prioritize what programs and personnel are to benefit from such action" is a violation of "lawful procedure," "an abuse of discretion" and "arbitrary and capricious" (complaint ¶¶ 81–82).

In considering whether an agency's action is arbitrary or capricious, the "test chiefly 'relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact.' Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*Pell v Bd. of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974], quoting 1 NY Jur, Administrative Law § 184). In reviewing the determination of administrative bodies, "the power of the courts is narrowly circumscribed" and "[t]he judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body" (*Kilgus v Bd. of Estimate of City of N.Y.*, 308 NY 620, 627 [1955], quoting *Rochester Tel. Corp. v United States*, 307 US 125, 146 [1939]).

The Board's vote to levy the additional tax was neither a "violation of lawful procedure" nor was it "arbitrary or capricious or an abuse of discretion" (CPLR 7803 [3]). Education Law § 311 (4) explicitly provides that the Commissioner may "direct[] the levying of taxes" as is "proper or necessary to give effect to his decision" regarding section 310 appeals. The Board voted in accordance with the Commissioner's Interim Order directing it to levy the 4.38% tax increase, an order designed to remedy the District's violations of its statutory obligations raised by proposed intervenor in her Appeal to the Commissioner (*supra* at 2–3). In voting to approve the tax, then, the Board adhered to the requirements of the Education Law. Furthermore, compliance with the Commissioner's order is a rational basis for the Board's decision and may not be disturbed by the courts (*see Nehorayoff v Mills*, 95 NY2d 671, 675 [2001]).

Where, as here, the agency "has not acted in excess of [its] jurisdiction, in violation of lawful procedure, arbitrarily, or in abuse of [its] discretionary power . . . the courts have no alternative but to confirm [its] determination" (*Pell*, 34 NY2d at 231). Therefore, petitioners-plaintiffs' fourth claim for relief pursuant to article 78 of the CPLR must be dismissed.

E. Petitioners-Plaintiffs' Fifth Cause of Action Fails Because the Board Approved the Tax Levy in Compliance with a Lawful Order of the Commissioner of Education.

In their "Fifth Claim for Relief and Cause of Action," petitioners-plaintiffs allege that "[t]here is no provision of the Education Law generally or Education Law, Section 1804 specifically that provides the lawful authority for this additional imposition of a 4.38% School Tax Levy without the any [sic] particularized and prioritized direction determined by the Defendant School Board to do so as permitted by law" (complaint ¶ 89). Accordingly, they request a declaration of the court "that said imposition of this proposed additional 4.38% School Tax Levy is without basis in law" and "no such expenditure of this additional 4.38% School Tax Levy shall be permitted unless and until so authorized by this Court or other lawful authority in compliance with all provisions of applicable law" (*id.* at ¶¶ 90, 91). Additionally, they request a declaration "that while a lawful directive for the specific and discrete expenditure of this additional 4.38% School Tax Levy may be permissible in other situations, under the facts of the current proposed 4.38% additional School Tax Levy that there is no basis in law for such action by the School Board members" (*id*. at ¶ 92).

Education Law § 1804 relates to the election, powers, and duties of boards of education in central school districts. Section 1804 (4) provides that an annual meeting and election in each central school district shall be held in May, to be preceded by a budget hearing where the board presents the proposed budget for the following school year. Section 1804 does not establish the process for conducting the annual vote on school district budgets, which is instead explained in

article 41 of the Education Law in sections 2022 and 2023.[4]

Petitioners-Plaintiffs' assertion that there is no other provision of the Education Law that allows for the levying of school taxes studiously ignores Education Law § 311 (4), which, as explained above, grants the Commissioner of Education the power "to make all orders, by directing the levying of taxes or otherwise, which may, in [her] judgment, be proper or necessary to give effect to [her] decision" in appeals under Education Law § 310. In *People ex rel Board of Education of Union Free School District No. 2 of Town of Brookhaven, Suffolk County v Graves* ("*Brookhaven*") (243 NY 204 [1926]), the Court of Appeals explained that this power is essential to concretize New York's constitutional guarantee that "all the children of this state . . . be educated" in "a system of free common schools" (*id*. at 208–209, quoting NY Const, art IX, § 1). Writing for a unanimous Court, Judge McLaughlin reasoned that "[u]nless it be held that the commissioner has [the power to direct the levying of taxes], a school district, by refusing to vote a tax for the maintenance of a public school could thereby deprive the children of school age in the district of any education whatever and nullify the constitutional provision hereinbefore quoted" (*id*. at 208–209, quoting NY Const, art IX, § 1). This is precisely the situation in the District, where two decades of systematic defunding of the public school system has dramatically eroded the quality of education provided to public-school students. Therefore, not only is the Commissioner's Interim Order directing the levy of the 4.38% tax firmly rooted in law, but it was essential to *enforce* the law itself (*id.* at 208–209). As such, petitioners-plaintiffs' request for a declaration that the tax levy "is without basis in law" must be dismissed (complaint ¶ 90).

[4] Petitioners-Plaintiffs do not cite to any specific provision of Education Law § 1804 that the Board violated in complying with the Commissioner's Interim Order. Instead, they generally reference sections 2022 and 2023 of article 41 of the Education Law (complaint ¶¶ 31–39, 85) and assert that "[t]here is no provision of the Education Law generally or Education Law, Section 1804 specifically that provides the lawful authority" for the tax levy (*id*. ¶ 89). These provisions do not place any restriction on the power of the Commissioner to direct the levy of a tax pursuant to section 311 (4) and so do not support petitioners-plaintiffs' claim.

Petitioners-Plaintiffs seem aware that Education Law § 311 (4) empowers the Commissioner to direct a school district to levy taxes, because they acknowledge that an additional levy "may be permissible in other situations" but assert that there "is no basis in law for such action" under the facts of this case (*id*. at ¶ 92). This argument is specious. Just as in *Brookhaven*, the Commissioner examined an appeal from a parent alleging violations of the Education Law, identified violations of the District's statutory obligations to its students, and directed the Board to levy a tax to address these violations (243 NY at 207–208). The Board's vote in compliance with the Commissioner's Interim Order was lawful and there is no merit to petitioners-plaintiffs' argument to the contrary.

Therefore, petitioners-plaintiffs' fifth claim for declaratory relief pursuant to Education Law § 1804 must be dismissed (*Garber v Bd. of Trustees of State Univ. of New York*, 38 AD3d 833, 834–835 [2d Dept 2007] [dismissing claims that awarding of lease was "illegal" where in fact the defendant's actions complied with the express terms of the statute]).

IV. PETITIONERS-PLAINTIFFS' REQUEST FOR INJUNCTIVE RELIEF ENJOINING THE BOARD OF EDUCATION VOTE IS MOOT.

Petitioners-Plaintiffs' sixth claim for relief must be dismissed as moot. Petitioners-Plaintiffs ask this Court to use its "equitable power" to "enjoin all actions of the School District Board Members to vote to impose said additional 4.38% School Tax Levy so as to protect the rights of the Plaintiffs" (complaint ¶ 95). The Court denied petitioners-plaintiffs' motion for a preliminary injunction on August 14, 2024, and the Board voted to increase the school tax levy that night (NY St Cts Elec Filing [NYSCEF] Doc No. 25 at 1). As such, petitioners-plaintiffs' request for an injunction preventing the Board vote has "become moot by passage of time or change in circumstances," (*Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]), and must be dismissed (*Children's Vil. v Greenburgh Eleven Teachers' Union Fedn. of Teachers et al*., 249

AD2d 433, 434 [2d Dept 1998] [holding appeal of preliminary injunction limiting union's right to picket at school event was moot where event had already occurred]; *Duane Reade Inc. v Legal 338, Retail, Wholesale, Dept. Store Union, AFL-CIO, et al.*, 11 AD3d 406, 406 [1st Dept 2004] [dismissing union's challenge to preliminary injunction barring union representatives from entering plaintiff's premises to solicit votes in favor of union affiliation as moot where election had passed and employees had voted in favor of union affiliation]).

CONCLUSION

For the foregoing reasons, petitioners-plaintiffs' complaint should be dismissed in its entirety, with prejudice.

Dated: October 2, 2024
New York, N.Y.

Respectfully Submitted,

NEW YORK CIVIL LIBERTIES UNION FOUNDATION

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CERTIFICATION PURSUANT TO 22 NYCR 202.8-B

I, Emma Curran Donnelly Hulse, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Memorandum of Law complies with the word count limit set forth in 22 NYCRR § 202.8-b because it contains 6,344 words, excluding the parts exempted by § 202.8-b(b). In preparing this certification, I have relied on the word count of the word-processing system used to prepare this affidavit.

Dated: October 2, 2024
New York, N.Y.

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