Corwin v City of New York
2020 NY Slip Op 33016(U)
September 14, 2020
Supreme Court, New York County
Docket Number: 157166/2020
Judge: Dakota D. Ramseur
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART 5**

Justice

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

- v -

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

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INDEX NO. 157166/2020

MOTION DATE 9/10/20

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number, were considered on this Article 78 Petition/order to show cause seeking injunctive relief (seq 001): 1-13

Petitioners commenced this Article 78 special proceeding against Respondents City of New York, New York City Department of Education ("DOE") and DOE Chancellor Richard Carranza to: (1) challenge as arbitrary and capricious the July 15, 2020 DOE remote teaching policy for the upcoming school year issued in response to the Covid-19 pandemic; and (2) to compel DOE to allow Petitioners "and all others similarly situated" to telework remotely on full salary or without loss of leave.[1] Before the Court is Petitioners' motion, brought by order to show cause, for a temporary restraining order ("TRO") "prohibiting [DOE] from forcing Petitioners to report to work in person on or about September 8, 2020," preventing the loss of Cumulative Absence Reserve ("CAR") and sick leave days, and compelling DOE to permit Petitioners to teach remotely. Respondents oppose. After oral argument on September 11, 2020, and for the reasons below, the TRO is **GRANTED** to the extent discussed below, and the matter is set for an expedited hearing on the preliminary injunction and Petition.

BACKGROUND AND PROCEDURAL HISTORY

I. Response to the Covid-19 pandemic

On March 13, 2020, the World Health Organization declared Covid-19, the disease caused by the recently-discovered novel coronavirus, a global pandemic (*Petition* ¶ 18). On or about March 15, 2020, New York City Mayor Bill de Blasio and Chancellor Carranza closed school buildings and directed remote learning (*id.* at ¶ 19; *NYSCEF 10* ["*Opp*"] ¶ 6). On March 22, 2020, Governor Andrew Cuomo signed the "New York State on PAUSE" executive order (the "PAUSE Order"), mandating various policies and a ten-point plan aimed at mitigating

[1] It is unclear from the papers, and remained unclear after oral argument on September 11, 2020, precisely who the "others" are, except that Petitioners' counsel mentioned that he had received numerous calls from other educators also seeking guidance on whether they were required to return to school. Accordingly, the Court limits this decision only to the named Petitioners.

coronavirus spread (https://www.governor.ny.gov/news/governor-cuomo-signs-new-york-state-pause-executive-order). In April 2020, school closures were extended through the remainder of the school year (*Opp* ¶ 7). On June 5, 2020, Governor Cuomo issued Executive Order 202.37, which permitted school districts to resume in-person special education and services during the summer terms, subject to "State and Federal guidance" (*Opp* ¶ 11). On June 8, 2020, Governor Cuomo lifted the PAUSE Order in New York City, subject to regulations imposing a phased reopening of non-essential businesses (*Petition* ¶ 24). Phase 4, which included school re-openings, was authorized as of July 20, 2020 (*id.* at ¶ 26).

In July 2020, the New York State Education Department ("NYSED") and New York State Department of Health ("NYSDOH") issued 145-page guidelines for the reopening of schools and resumption of in-person instruction (*Opp* ¶ 13, citing http://www.nysed.gov/common/nysed/files/programs/reopening-schools/nys-p12-school-reopening-guidance.pdf and https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Pre-K_to_Grade_12_Schools_MasterGuidance.pdf). On August 7, 2020, Governor Cuomo announced that lowered infection rates justified in-person instruction in the fall (*Opp* ¶ 14, citing *Governor Cuomo Announces That, Based on Each Region's Infection Rate, Schools Across New York State are Permitted to Open This Fall*, https://www.governor.ny.gov/news/governor-cuomo-announces-based-each-regions-infection-rate-schools-across-new-york-state-are).

On the same day, "based on extensive research and guidance from federal, state, and City agencies and health departments," DOE submitted a 109-page reopening plan to NYSED proposing a "blended learning" instruction model whereby students would be taught in person for part of the week, and remotely on other days (*Opp* ¶¶ 15-17, citing *NYSCEF 11* [the "Reopening Plan"). The plan would require teachers and staff to be present in schools each week (*Opp* ¶ 16). The plan included requirements related to (1) capacity limits, (2) physical distancing, (3) limits on shared spaces, (4) personal protective equipment ("PPE") including face coverings, (5) student cohorts, (6) enhanced cleaning and disinfection, (7) hand and respiratory hygiene, (8) restrictions on visitors, (9) special accommodations for at-risk students and staff, (10) appropriate ventilation, (11) screening and monitoring procedures, and (12) in the event of a positive case, containment, contact tracing, notification, and, where appropriate, closure (*Opp* ¶ 19). Specifically, the Reopening Plan would mandate face coverings and provide PPE, require a survey and maintenance of ventilation systems, including "maximiz[ation of] the supply of outdoor air" (*Opp* ¶¶ 20-21, citing *Reopening Plan* pp 19, 37). DOE also submitted a 32-page reopening plan to NYSDOH, which included similar guidelines (*NYSCEF 12*).

On September 1, 2020, Mayor de Blasio and Chancellor Carranza delayed the first in-person instruction day from September 10 to September 21 "to allow school administrators additional time to prepare for the reopening" (*Opp* ¶ 18). This decision was the "product of an agreement between the City, DOE, and the United Federation of Teachers ("UFT"), the certified collective bargaining representative for Petitioners (*Opp* ¶ 25, citing https://www.uft.org/news/press-releases/uft-fact-sheet-on-school-opening-agreement). Among other things, the agreement included mandatory, free, and random Covid-19 testing of students and adults, using a blind sample of 10 to 20% each month (*Opp* ¶ 26). Any children whose parents did not consent to testing would be shifted to remote learning (*id.*).

II. Reasonable accommodations

On July 15, 2020, DOE sent an email to staff providing guidance regarding the availability of reasonable accommodations under the Americans with Disabilities Act ("ADA") and Centers for Disease Control ("CDC"); that is, to permit remote teaching (*NYSCEF 13* [the "Accommodation Policy"). The Accommodation Policy required medical documentation signed by a licensed medical practitioner which "[c]learly indicate[d] … [a] underlying medical condition(s) and/or other factors are AND how they place [the applicant] at an increased risk for severe illness from COVID-19 (*id.*). No documentation was required to verify an age of 65 or older, but "[a]ny other age based request … require[d] documentation from a licensed medical practitioner as to how your age and any underlying medical condition(s) place[s the applicant] at an increased risk for severe illness from COVID-19" (*id.*). The Accommodation policy would "only be granted based on [an employee's own underlying medical conditions" and excluded non-medical reasons ("child care [and] … concern for the health of others in [the] household") from the reasonable accommodation policy (*id.*). At oral argument, the parties also raised the existence of an "internal accommodation" policy available at each school, though the process for utilizing it is unclear.

Petitioners subsequently commenced this Article 78 proceeding, seeking to declare the Accommodation policy, as applied to Petitioners, arbitrary and capricious, and compelling DOE to permit Petitioners to teach remotely with full salary until either the availability of an FDA-approved Covid-19 or December 31, 2020 (*Petition* p 25). Petitioners also seek, by order to show cause, a temporary restraining order and preliminary injunction during the pendency of the litigation compelling Respondents to permit Petitioners, and others similarly situated, the accommodation of working remotely and requiring Respondents to permit Petitioners to remain on payroll without forcing the loss of accrued leave balances (*NYSCEF 7*).

III. Petitioners

Petitioner Shannon Corwin is a tenured English teacher at the High School for Health Professions and Human Services in DOE Manhattan District 2 (*Petition* ¶ 34). Her husband works as a Dean there (*id.*). The school building also contains two other schools, ICE (a middle and high school) and PS 226 (a District 75 school for students with moderate to severe special needs) (*id.*, totaling about 2,500 students and several hundred faculty. Corwin is concerned, given existing sanitation and ventilation issues in the building, that even a relatively low (1%) positivity rate in New York City means that potentially 25 people will be infectious and able to spread coronavirus easily (*id.* at ¶¶ 34-35). As of September 11, 2020, Corwin's request for a reasonable accommodation has been denied, but Corwin has been permitted to work remotely until September 21, 2020 (*Ct Appendix A, Petitioners' 9/11/20 email to the Court* ["*9/11/20 Email*"]).[2]

[2] Given the rapidly-changing circumstances and time-sensitive nature of the application, at oral argument on September 11, 2020, the Court directed Petitioners to provide a status update on Petitioners' reasonable accommodation requests. To the extent that Respondents urged the Court to reject the email as unverified, the Court considers them solely for the purposes of the TRO application, with the understanding that Petitioners' counsel has a duty of candor to the Court. The Court also notes that Respondents did not specifically dispute the substantive updates regarding Petitioners' statutes.

Petitioner Umang Desai is a tenured Biology Teacher at Brooklyn Technical High School, which is "a century old and under constant repairs" (*Petition* ¶ 36). Like Corwin, Desai identifies numerous sanitation and ventilation issues: among other things, windows that do not open, high-touch areas, and limited sinks lacking hot water (*id.*). Desai is concerned that, even if Brooklyn Tech employs the use of alternating in-person cohorts of the 6,000 Brooklyn Tech students, "most … live in multi-generational households with elderly relatives [and m]any of their parents work as essential or health care workers as well," which poses a substantial risk of coronavirus infection. Desai is particularly concerned for his father-in-law, who suffers from lymphoma and often requires Desai or his wife (also a DOE teacher) to drive him to appointments, and Desai's father, who has coronary artery disease and previously suffered a heart attack (*id.* at ¶ 43). Compelling Desai to return to in-person teaching would, Desai contends, prevent him from caring for his father-in-law or visiting Desai's elderly parents for fear of potentially carrying and infecting them with Covid-19 (*id.*). As of September 11, 2020, Desai has been "taking sick days since [September 8] with loss of CAR balance each day [because h]e does not feel feel comfortable returning to school [given that] the school did very poorly on its evaluation regarding building safety" (*9/11/20 Email*).

Petitioner Eric Severson is a Social Studies and Special Education teacher at Clara Barton High School in Prospect Heights, Brooklyn, a nearly century-old building with windows that do not open and narrow hallways that accommodates 1350 students and 175 staff members (*Petition* ¶ 44, 45). As a Special Education teacher, Severson travels between four or five different classrooms and works with other teachers daily (*id.* at ¶ 44, 49). Severson is concerned that the building does not have much "access to sinks and soap for handwashing" and "not enough manpower to clean the school at all hours of the day, thereby endangering "several [elderly] members of the faculty" (*id.* at ¶ 45). Severson is "healthy and unable to qualify for medical accommodations to teach remotely," but is concerned about the health of his wife, who suffers from an autoimmune thyroid disorder, and young daughter (*id.* at ¶ 47). According to Severson, the health risks posed by the school building would be compounded by the fact that Severson, who lives in Jersey City, would—like the students that come from all five boroughs—have to commute via public transit (*id.* at ¶¶ 47-49). As of September 11, 2020, Petitioner "applied for his own medical accommodation and was denied," and thus "has been forced to report to work since 9/8 or otherwise lose his pay" (*9/11/20 Email*).

Petitioner Tamdeka Hughes-Carroll is a substitute teacher at New Preparatory Middle School in Jamaica, Queens and single parent to two children with special needs, one registered for remote learning and the other for blended learning (*Petition* ¶ 50). Hughes-Carroll has lost several family members to Covid-19, and is concerned about her health and the health of her children, as well as the availability of childcare (*id.* at ¶ 51). Hughes-Carroll is concerned about the safety of the school, which "has many windows that are nailed shut or so broken that they cannot open fully" (*id.* at ¶ 52). As of September 11, 2020, Hughes-Carroll's school has allowed all teachers to work remotely until September 21, 2020, at which time she is "expected to come in to teach in person or otherwise lose pay" (*9/11/20 Email*).

Petitioner Wanda Caine is a tenured teacher who works at a transfer high school in Morningside Heights in Manhattan teaching high school students who do not have enough credits necessary to receive a NYS Regents Diploma (*Petition* ¶ 54). Caine is 62 years old with a

family history of stroke, seizure, and heart attack and a personal history of tachycardia, migraine, and HRT, all of which "correspond to increased risk of clotting and cardiac events" (*id.* at ¶ 60). Prior to the pandemic, Caine commuted from Stuyvesant Town by subway, but since then her husband, who suffers from chronic lymphocytic leukemia and is immunocompromised, has driven her (*id.* at ¶ 56). In March, Caine's husband's doctor called all of his chronic lymphocytic leukemia patients to advise that they and their families "avoid all public spaces, and specifically advised that Caine not return to work in a school" (*id.* at ¶ 56). Caine worked remotely from that point forward, and learned that on or about April 5, 2020, a colleague with whom she had close contact tested positive for Covid-19 (*id.* at ¶ 58). Caine submitted a medical accommodation request on or about July 23, 2020, which was ultimately denied without any mechanism to submit "two letters from her husband's doctor saying that he is immunocompromised [and must] work 100% remote" (*id.* at ¶¶ 60-64). As of September 11, 2020, Caine has been reporting to work, but has "stayed outside the school building" (*9/11/20 Email*).

DISCUSSION

I. Standard for injunctive relief

CPLR 6301 provides, in relevant part, that

> A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

"A preliminary injunction substantially limits a defendant's rights and is thus an extraordinary provisional remedy requiring a special showing" (*1234 Broadway LLC v W. Side SRO Law Project, Goddard Riverside Community Ctr.*, 86 AD3d 18, 23 [1st Dept 2011]). Thus, to establish entitlement to a TRO or preliminary injunction, the movant must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction, and a balance of equities in its favor (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). "While the proponent of a preliminary injunction need not tender conclusive proof beyond any factual dispute establishing ultimate success in the underlying action, a party seeking the drastic remedy of a preliminary injunction must nevertheless establish a clear right to that relief under the law and the undisputed facts upon the moving papers" (*1234 Broadway LLC,* 86 AD3d at 23).

"[T]he ordinary function of a preliminary injunction is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits. However, if relief is required because of imperative, urgent, or grave necessity, then a court, acting with great caution and upon clearest evidence, i.e., where the undisputed facts are such

that without an injunction order a trial will be futile, may grant a preliminary injunction" (*Spectrum Stamford, LLC v 400 Atl. Tit., LLC,* 162 AD3d 615, 616 [1st Dept 2018] [affirming denial of injunction in the absence of "imperative, urgent, or grave necessity" that the current property manager be replaced at that time]). A mandatory preliminary injunction granting some form of the ultimate relief sought is granted "only in unusual situations, where the granting of the relief is essential to maintain the status quo pending trial of the action" (*Spectrum Stamford,* 162 AD3d at at 617).

A. Likelihood of success on the merits

Petitioners argue that DOE's use of the CDC's "high-risk" categories are arbitrary and capricious and "do not protect teachers who do not strictly fall within the CDC guidelines, but should also be allowed to work remotely due to their own medical concerns and concerns about the health and safety of their families and loved ones" (*Pet'rs' Affirm* ¶ 8). Specifically, Petitioners argue that "it is irrational and arbitrary and capricious that educators who are smokers or suffer from obesity or are simply over 65 years old would be eligible for medical accommodations," but that Petitioners would not qualify for the same accommodations based on the similar needs of their immediate family members (*id.* at ¶ 9). At oral argument, Petitioners also alleged the existence of an additional accommodation policy affording each school principal additional discretion to grant an accommodation. Petitioners also attach a recent Florida Circuit Court decision imposing a temporary injunction barring Governor Ron DeSantis from mandating that teachers return to in-person instruction, together with newspaper articles highlighting other school districts which have chosen to transition to all-remote learning for the foreseeable future (*Florida Education Association, et al., v. Desantis, et al.*, No. 2020-CA-001450 [Fla. 2nd Cir. Ct. Aug. 24, 2020], *NYSCEF 4-5*).

As an initial matter, Respondents argue that Petitioners have not met the standards for mandamus relief. Respondents are generally correct that "a mandamus to compel may not force the performance of a discretionary act, but rather only purely ministerial acts to which a clear legal right exists" (*Matter of Anonymous v Commissioner of Health*, 21 AD3d 841 [1st Dept 2005]).

However, at this juncture, it does not appear that Petitioners are seeking—or, at minimum, seeking only—mandamus to compel the performance of any statutory (or other) duty; in Respondents' words, "to upend the DOE's reopening plan and reasonable accommodation guidelines" (*Opp* ¶ 50). Rather, Petitioners are seeking review of the Accommodation Policy's failure to contemplate the documented medical needs of immediate family members, as well as the allegedly inconsistent application of the Accommodation Policy; specifically, that similarly-situated colleagues were afforded an accommodation (*see e.g. Matter of Scherbyn v Wayne-Finger Lakes Bd. of Co-op. Educ. Services*, 77 NY2d 753, 757 [1991]) ["…mandamus to review … differs from mandamus to compel in that a petitioner seeking the latter must have a clear legal right to the relief demanded and there must exist a corresponding nondiscretionary duty on the part of the administrative agency to grant that relief," while a "… mandamus to review … examines an administrative action involving the exercise of discretion" (*Matter of Scherbyn v Wayne-Finger Lakes Bd. of Co-op. Educ. Services*, 77 NY2d 753, 757 [1991]).

Regardless of the precise nature of the challenge, Respondents rightly focus on a seminal case which, like this one, implicates both work safety and the separation of powers:

New York State Inspection, Sec. and Law Enf't Employees, Dist. Council 82, AFSCME, AFL-CIO v Cuomo, 64 NY2d 233 [1984] [*"Dist. Council 82*"]). In that case, corrections personnel sought to prevent New York from partially converting a psychiatric center to a medium security correctional facility as part of a capital expansion plan, arguing that doing so "would exacerbate the risk of serious bodily injury and death to persons employed at prison facilities, in violation of their statutory right to a safe workplace (*Dist. Council 82*, 64 NY2d at 238).

The Court analyzed the scope of the judiciary's role within our tripartite system of government, holding that "[t]he lawful acts of executive branch officials, performed in satisfaction of responsibilities conferred by law, involve questions of judgment, allocation of resources and ordering of priorities, which are generally not subject to judicial review. This judicial deference to a coordinate, coequal branch of government includes one issue of justiciability generally denominated as the 'political question' doctrine" (*id.* at 239). "By seeking to vindicate their legally protected interest in a safe workplace," the Court held, the "petitioners call for a remedy which would embroil the judiciary in the management and operation of the State correction system" (*id.*; *see also S. Bay United Pentecostal Church v Newsom*, 140 S Ct 1613, 207 L Ed 2d 154 [2020] [denying injunctive relief against Covid-19-related attendance restrictions at houses of worship because "[o]ur Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States to guard and protect [and] [w]hen those officials undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad"] [Roberts, C.J., concurring]).

For the purposes of this TRO application, however, *Dist. Council 82* is distinguishable. As an initial matter, the relief sought here is far more limited than the closure and repurposing of an entire correctional facility. More importantly, Respondents omit a key passage in the *Dist. Council 82* opinion: "where … policy matters have demonstrably and textually been committed to a coordinate, political branch of government, any consideration of such matters by a branch or body other than that in which the power expressly is reposed would, *absent extraordinary or emergency circumstances*, constitute an *ultra vires* act" (64 NY2d at 240 [emphasis added]). Additionally, "[a]s to the likelihood of success on the merits, a *prima facie* showing of a right to relief is sufficient; actual proof of the case should be left to further court proceedings" (*Terrell v Terrell*, 279 AD2d 301, 303 [1st Dept 2001], quoting *McLaughlin, Piven, Vogel, Inc. v W. J. Nolan & Co.*, 114 AD2d 165, 172-173 [2d Dept 1986]). Here, the most widespread pandemic in a century, which spreads easily between people in enclosed, poorly ventilated spaces, has killed nearly 200,000 people in this country, and at least 23,743 New York City residents, in 6 months (*Covid-19: Data*, https://www1.nyc.gov/site/doh/covid/covid-19-data.page). At this juncture, it is reasonable to conclude that this is an "extraordinary and emergency circumstance" justifying caution in the form of a temporary restraining order limiting five teachers from returning to in-person instruction.[3]

[3] 19,120 confirmed deaths and 4,623 probable deaths.

B. Danger of irreparable injury in the absence of an injunction

Petitioners argue that the failure to grant injunctive relief will result in irreparable harm because they are faced with choosing between their health and the health of their families and their economic livelihoods (*Pet'rs' Affirm* ¶¶ 3, *et seq.*). Respondents argue that irreparable harm "must be of the type that cannot be redressed by money damages or other relief" (*Opp* ¶¶ 68, *et seq.*).

As a general matter, it is true that the prospective injury, as alleged by Petitioners, if they are forced to return to in-person teaching is potentially irreparable: a significant illness, hospitalization, or even death could result from any one infection (*see Innovative Health Systems, Inc. v City of White Plains*, 117 F3d 37, 43-44 [2d Cir 1997] [finding irreparable harm where the closure of a treatment program would pose serious risk of harm to plaintiffs, including "death, illness or disability"]; *see also Cuomo predicts Covid-19 outbreaks in K-12 schools amid reopenings*, NY Post, Aug. 31 2020 ["A coronavirus outbreak in schools that forces them to shutter and turn to all-remote learning is inevitable, Gov. Andrew Cuomo warned Monday. … 'It is inevitable that when you bring a concentration of people together, the transmission rate will go up,' Cuomo said."]; *see also* CDC: Morbidity and Mortality Weekly Report: Transmission Dynamics of Covid-19 Outbreaks Associated with Child Care Facilities – Salt Lake City, Utah, April-July 2020, Sep. 11, 2020, https://www.cdc.gov/mmwr/volumes/69/wr/mm6937e3.htm?s_cid=mm6937e3_w] [determining that Covid-19 transmission was documented from 12 children in child care facilities, including two asymptomatic children, to at least 26% of 46 confirmed or probable non-facility cases, including the hospitalization of one parent]).

However, the damage sought to be enjoined must be likely and not merely possible; fear or apprehension of the possibility of injury alone is not a basis for injunctive relief (*Dist. Council 82*, 64 NY2d at 240 ["where the harm sought to be enjoined is contingent upon events which may not come to pass, the claim to enjoin the purported hazard [closure of prisons] is nonjusticiable as wholly speculative and abstract."]; *see also Frey v DeCordova Bend Estates Owners Ass'n*, 647 SW2d 246, 248 [Tex 1983] [denying injunctive relief sought on basis of fear that assessed fees would be invalid]; *Callis, Papa, Jackstadt & Halloran, P.C. v Norfolk and W. Ry. Co.*, 195 Ill 2d 356, 371, 748 NE2d 153, 162 [2001] [denying injunctive relief based on fear of disclosure of confidential information]). That said, Petitioners' allegations regarding their respective school buildings is entirely speculative; where there is any support provided, it is based on conditions from six months ago. While courts across the country have concluded that the risk of contracting Covid-19 as a result of unsafe conditions constitutes irreparable harm, those decisions discussed confinement, usually in immigration detention (*see Martinez-Brooks v Easter*, 3:20-CV-00569 (MPS), 2020 WL 2405350, at *27 [D Conn May 12, 2020], citing *Wilson v Williams*, 2020 WL 1940882, at *9 [N.D.Ohio Apr. 22, 2020]; *Mays v Dart*, 2020 WL 1812381, at *13 [N.D. Ill. Apr. 9, 2020]; *Basank v Decker*, 2020 WL 1481503, at *4 [S.D.N.Y. Mar. 26, 2020] ["The risk that Petitioners will face a severe, and quite possibly fatal, infection if they remain in immigration detention constitutes irreparable harm warranting a TRO."]).

Petitioners' characterization of their dilemma as a "Hobson's Choice" is apropos. "Hobson's Choice" derives from the "take it or leave it" practice of a livery keeper in Cambridge

England in the 1600s who, when a customer wanted to rent a horse, would rotate the order in which he lent his livestock. The customer could not choose his mount and had to either take the horse offered or leave without a mount. Here, Petitioners face a difficult choice, but not an impossible one. They have the option, however difficult or unappealing, of choosing—as some already have—to utilize accrued leave time by staying home. Petitioners' papers do not contain information regarding each Petitioner's individual leave or pay situations; to the extent, however, that they may lose accrued leave, or eventually pay, "[i]njuries that are compensable by monetary relief, even if monetary damages are difficult to calculate, are not irreparable for the purposes of a preliminary injunction (*SportsChannel Am. Associates v Nat'l Hockey League*, 186 AD2d 417, 418 [1st Dept 1992]). Accordingly, Petitioners have not demonstrated a danger of irreparable injury.

C. Balance of the equities

Petitioners argue that DOE: "(1) has a record of disregarding the health and safety of students and staff in their schools, (2) is forcing employees to choose between their lives and health and a paycheck on September 8, 2020, and (3) is arbitrarily determining that only certain employees merit a remote work accommodation due to its July 15, 2020 policy" (*Pet'rs' Affirm* ¶ 12). Respondents focus on "[t]he harm done to the children of the City by an absence of teachers who do not themselves qualify for a reasonable accommodation in the form of remote work …" (*Opp* ¶ 76). Respondents argue that "[o]ver one million children will be deprived of access to in-person education if schools are forced to move to a fully remote model because there are not enough teachers available to deliver on-site learning, should these petitioners and others refuse to perform their job duties" (*id.*).

"In evaluating the balance of equities on a motion for a preliminary injunction, courts must weigh the interests of the general public as well as the interests of the parties to the litigation" (*Amboy Bus Co., Inc. v Klein*, 2010 NY Slip Op 31356[U], *24-25 [Sup Ct, NY County 2010, Madden, J.]). To obtain an injunction, a plaintiff is "required to show that the irreparable injury to be sustained is more burdensome to him than the harm that would be caused to the defendant through the imposition of the injunction" (*Lombard v Sta. Sq. Inn Apts. Corp.*, 94 AD3d 717, 721-722 [2d Dept 2012]).

Respondents express (justified) concern for one million pupils, but that concern is overstated, as any injunctive relief will, to the extent that no other evidence regarding any other parties has been presented, be limited to the five Petitioners, and therefore only to their students. Additionally, to the extent that Respondents express staffing concerns, shortly before the issuance of this decision, Mayor de Blasio stated that "2,000 additional educators" would be deployed across New York City (*New York City Answers Call For More Teachers, Establishes COVID Situation Room To Monitor Cases In Schools*, https://newyork.cbslocal.com/2020/09/14/nyc-schools-covid-situation-room/]). Moreover, in determining the parties' respective burdens, it is significant that several Petitioners have already been granted leave to work remotely until at least September 21, 2020, or have simply declined to return in-person until further notice. Accordingly, the Court finds that the balance of the equities—by an exceedingly thin margin—favors Petitioners.

II. Undertaking

To the extent that Respondents seek an undertaking "to reimburse the City for lost monetary savings … [because] all plans for the start of the school year will need to be dramatically altered, resulting in substantial cost to the DOE, in addition to inconvenience to well over a million New Yorkers," Respondents' allegations are overbroad and speculative. Accordingly, that branch of the motion is denied without prejudice.

CONCLUSION/ORDER

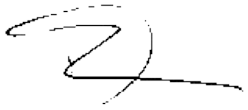
For the reasons above, it is

ORDERED that Petitioners' motion for a temporary restraining order is GRANTED solely to the extent that Respondents may not compel Petitioners to report to work in person, may not deny them the ability to work remotely, and may not deny or deduct salary and/or leave time for remote work until further order of the Court; and it is further

ORDERED that this TRO applies only to the named Petitioners; and it is further

ORDERED that counsel for the parties shall forthwith confer regarding their immediate availability for an expedited remote hearing on the preliminary injunction and call the Court at 10 a.m. on September 15, 2020 to discuss the logistics of the hearing.

This constitutes the decision and order of the Court.



9/14/2020
DATE

DAKOTA D. RAMSEUR, J.S.C.

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