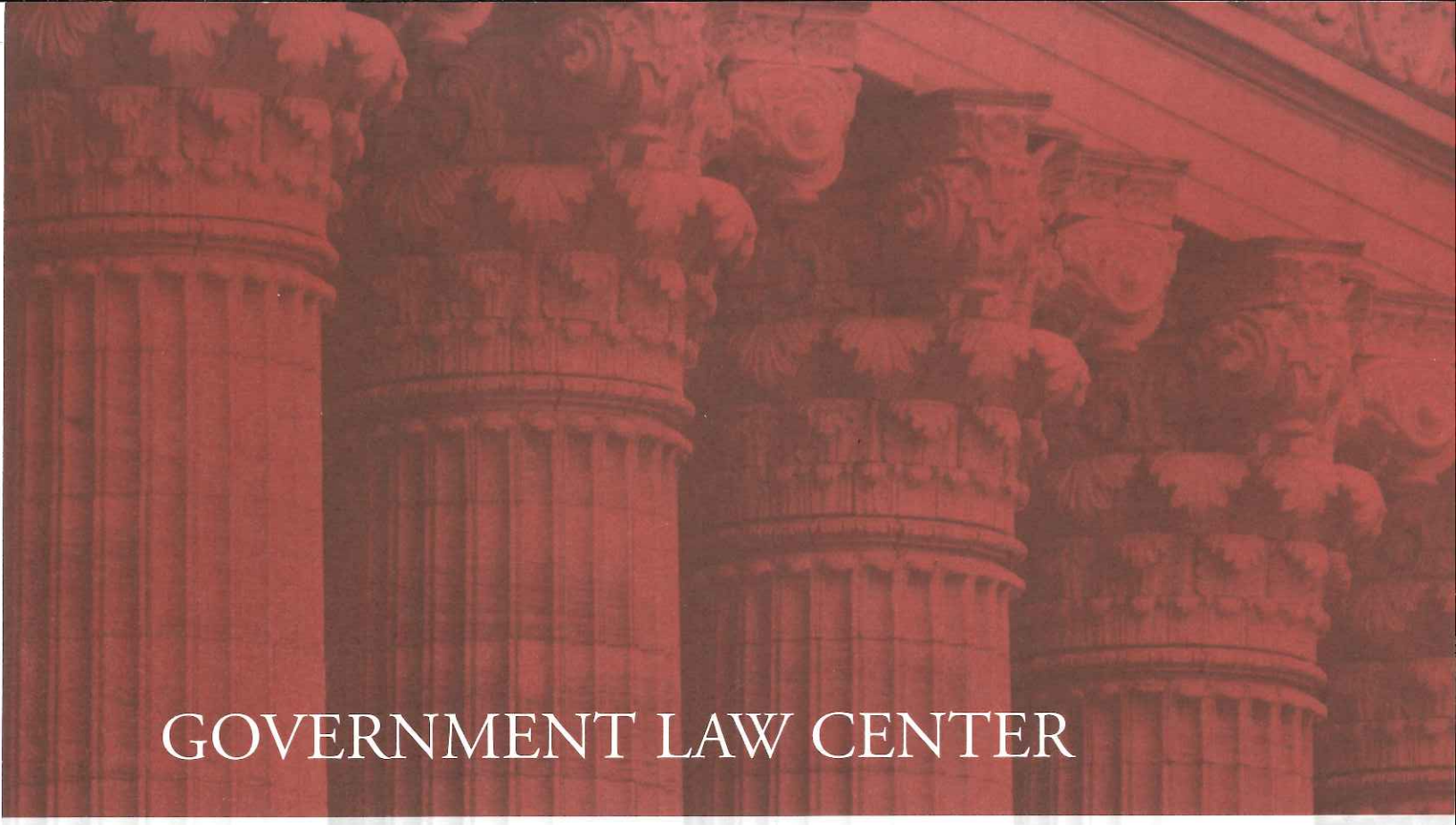

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2015
Warren M. Anderson Legislative Breakfast Seminar Series

"Unchaining Local Government: Opportunities in New York State"

April 21, 2015

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Warren M. Anderson Legislative Breakfast Seminar Series
Unchaining Local Government: Opportunities in New York State

April 21, 2015

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Warren M. Anderson Legislative Breakfast Seminar Series
Unchaining Local Government: Opportunities in New York State

April 21, 2015

SPEAKER BIOGRAPHIES

STEPHEN J. ACQUARIO, ESQ. is Executive Director and General Counsel of the New York State Association of Counties (NYSAC). In this capacity, Mr. Acquario presents a single voice for the county governments of New York State. He is responsible for the overall direction of the association, and oversees the association's agendas to ensure a cohesive and coherent legal and legislative strategy on behalf of New York's 62 county governments. Mr. Acquario graduated from Albany Law School of Union University (magna cum laude). He holds a bachelor's degree in Industrial and Labor Relations from the State University of New York College at Potsdam. In addition, he earned a graduate certificate in Industrial and Labor Relations from Cornell University.

JOHN REGAN, ESQ. is a partner with Whiteman Osterman & Hanna's Government Relations Practice Group. He came to the Firm in February, 2015 from the administration of Governor Andrew M. Cuomo, where he served as an Assistant Counsel to the Governor and prior to that, as Associate Deputy Counsel for State Operations. Mr. Regan previously worked with WOH Government Solutions LLC the Washington, D.C.-based subsidiary of Whiteman Osterman & Hanna LLP, with his primary focus on government relations and immigration law. From 2002-2007, Mr. Regan held a Presidential commission as a diplomat with the U.S. Foreign Service. He served as Acting Coordinator of the Office of Cuban Affairs at the U.S. Department of State where he managed and directed all aspects of the U.S. bilateral relationship with Cuba. He was progressively promoted from Political Officer to Deputy Director and then Acting Coordinator of the office in 2007. He also served as Vice Consul at the U.S. Embassy in Barbados. Mr. Regan was at various times head of the Non-Immigrant, Immigrant, and American Citizen Services sections of the Embassy. He received a Meritorious Honor Award and a Superior Honor Award for his work in the Foreign Service. Prior to his entry into the Foreign Service, Mr. Regan held various government relations positions in Washington, D.C. He resides with his wife and son in Loudonville, N.Y. and is active in the community, serving as a member of the Board of Directors of the Albany Symphony Orchestra and on the Government Law Center of Albany Law School.

NYS Const. Grants/Restrictions

- Grants of local self-governing powers, and restrictions upon such powers are found within the New York Constitution, including the power to pass local laws

- Article IX Section 2(c)(i) of the NYS Constitution grants counties "..with the power to adopt local laws not inconsistent with the provisions of the NYS Constitution or any general law relating to its property affairs, or government."

Bill of Rights for Local Government

" Effective self-government and intergovernmental cooperation are the purposes of the people of New York State"

New York State Constitution Article IX, Section 1

Bill of Rights for Local Governments

- Every local government shall have an elected legislative body
- No local government can be annexed without approval of the voters through referendum
- Power to apportion costs of government services with authorization of the legislature
- Request the legislature to authorize establishment of forms of county government

Bill of Rights for Local Governments

- All offices not in the constitution are elected or appointed by officials of local government
- Have the power of Eminent Domain
- Local governments can act jointly as authorized by the legislature
- State legislature must adopt a statute of local governments

Constitutional Restrictions to Local Government Authority

- A local government may not enact laws which relate to;
  - Maintenance, support and administration of the public school system
  - Matters relating to the administration of the Courts
  - Matters other than property, affairs or government of a local government

County Charter Law

- Counties are empowered to adopt charters which establish the structure of county government
- May provide for an elected executive
- Must provide for a legislative body
- Assign administrative or executive functions to elected and appointed officials

Local Law Defined

- A local law is defined under Municipal Home Rule Law Section 2(9):

Local law. A law (a) adopted pursuant to this chapter or to other authorization of a state statute or charter by the legislative body of a local government, or (b) proposed by a charter commission or by petition, and ratified by popular vote, as provided in article four of this chapter or as provided in a state statute, charter or local law; but shall not mean or include an ordinance, resolution or other similar act of the legislative body or of any other board or body.

LOCAL LAW NO. "M" FOR 2008

A LOCAL LAW OF THE COUNTY OF ALBANY, NEW YORK PROHIBITING THE USE OF WIRELESS HANDSETS TO COMPOSE, READ, OR SEND TEXT MESSAGES WHILE OPERATING A MOTOR VEHICLE

Introduced: 8/11/08
By Messrs. Higgins, Clenahan, Hoblock, Horstmyer, Morse, Nichols, Ms. Willingham, Messrs. Aylward, Beston, Bullock, Ms. Chapman, Messrs. Clay, Commisso, Ms. Connolly, Messrs. Cotrofeld, Domalewicz, Ethier, Gordon, Houghtaling, Infante, Joyce, Ms. Maffia-Tobler, Messrs. Mayo, McCoy, Ms. McKnight, Messrs. Rahm, Reilly, Scavo, Steck, Timmins, Ward and Zeilman:

BE IT ENACTED by the Albany County Legislature as follows:

Section 1. Intent.

Because the quantity of in-vehicle communication devices continues to grow and numerous studies and reports point out the relationship and dangerous effects of driver distraction and motor vehicle accidents, this Honorable Body recognizes a need to protect citizens from accidents and serious physical injuries caused by driver distraction from use of in-vehicle communication devices. The purpose of this Local Law is to protect the public interest, welfare, health and safety within the County of Albany by reducing the incidence of distracted driving and improving the safety on our roadways. Specifically, the law would ban motorists from using wireless handsets to compose, read or send text messages or emails while operating a motor vehicle on any public street or public highway within the County of Albany. The Albany County legislature finds that according to studies conducted by the American Automobile Association (AAA), any activity that takes a driver's attention off the road for more than two seconds can double a driver's risk of a crash. The federal government estimates that 30% of all crashes in the United States result from driver distraction. Statistics from the New York State Department of Motor Vehicles, in 2006, also indicate that nearly 30% of accidents in the State involve driver distraction or inattention. Notably, in a 2006 joint report issued by the National Highway Traffic Safety Administration and the Virginia Tech Transportation Institute, nearly 80% of crashes and 65% of near-crashes observed in their study involved a driver distracted in the three seconds prior to an accident. The Albany County legislature further recognizes that in response to the growing danger of distracted driving and the increasing number of accidents involving cell phone usage while driving, the New York State Legislature passed a state-wide ban on the use hand-held cell phones while driving. However, the Albany County legislature also recognizes that when New York banned motorists from talking on hand-held cellular phones in 2001, text messaging was fairly uncommon. However, since that time, text messaging has become an increasingly popular form of communication. Indeed, according to a trade group for the cell phone industry, the

Cellular Telecommunications and Internet Association ("The Wireless Association"), in 2006, U.S. wireless subscribers, of which there are currently 251.45 million, sent 158 billion text messages, an increase of 95% from 2005, translating into approximately 300,000 text messages per minute. The Albany County legislature further notes that text messaging is now one of the latest electronic obsessions and driving dangers. In fact, a January 2007 survey conducted by Nationwide Mutual Insurance Company found that 19% of motorists between the ages of 18 and 60 admitted to text messaging while driving, while 37% of drivers between the ages of 18 and 27 indicated that they do so. However, text messaging and emailing while driving, a new and risky phenomenon, is especially dangerous since these practices require drivers to take their eyes and mind off of the road, as well as their hands off of the steering wheel, while operating a motor vehicle. In response to this threat to public safety it is necessary to provide law enforcement with yet another tool to combat this dangerous practice.

Section 2. Definitions.

Wherever used in this title, the following terms shall be defined as follows unless the context or subject matter otherwise requires:

1. "Hands Free" shall mean the manner in which a wireless handset is operated for the purpose of composing, reading or sending text messages, by using an internal feature or function, or through an attachment or addition, including but not limited to an ear piece, head set, remote microphone or short range wireless connection, thereby allowing the user to operate said device without the use of hands.

2. "Inoperability" shall mean a motor vehicle that is incapable of being operated or being operated in a safe and prudent manner due to mechanical failure, including but not limited to, engine overheating or tire failure.

3. "Motor Vehicle" shall mean any vehicle that is self-propelled by a motor, including but not limited to, automobiles, trucks, vans, construction vehicles, etc.

4. "Person" shall mean any natural person, corporation, unincorporated association, firm, partnership, joint venture, joint stock association or other entity or business organization of any kind.

5. "Stopped" shall mean not in motion.

6. "Text Message", also referred to as short messaging service (SMS), shall mean the process by which users send, read, or receive messages on a wireless handset, including but not limited to, text messages, instant messages, electronic messages or e-mails, in order to communicate with any person or device.

7. "Use" shall mean to hold a wireless handset in one's hands.

8. "Wireless Handset" shall mean a portable electronic or computing device, including cellular telephones and digital personal assistants (PDAs), capable of transmitting data in the form of a text message.

Section 3. Prohibited Uses of Electronic Devices While Operating A Motor Vehicle.

1. No person shall use a wireless handset to compose, read or send text messages while operating a motor vehicle on any public street or public highway within the County of Albany.

2. Notwithstanding subsection 1., this law shall not be construed to prohibit the use of any wireless handset by:

   (a) Any law enforcement, public safety or police officers, emergency services officials, first aid, emergency medical technicians and personnel, and fire safety officials in the performance of duties arising out of and in the course of their employment as such;

   (b) A person using a wireless handset to contact an individual listed in subsection (a); or

   (c) A person using a wireless handset inside a motor vehicle while such motor vehicle is parked, standing or stopped and is removed from the flow of traffic, in accordance with applicable laws, rules or ordinances, or is stopped due to the inoperability of such motor vehicle.

3. Notwithstanding subsection 1., this law shall not be construed to prohibit a person operating a motor vehicle from utilizing a hands-free wireless handset.

Section 4. Enforcement and Penalties.

1. A violation of any provisions of this local law shall constitute an offense and be punishable by a fine of an amount between $0 to $150.00 for each single violation. Each such violation shall constitute a separate and distinct offense.

2. This local law shall be enforced by the Albany County Sheriff's Department and may be enforced by any other law enforcement agency having jurisdiction within the County of Albany.

Section 5. Reverse Preemption.

This law shall be null and void on the day that Statewide or Federal legislation goes into effect, incorporating either the same or substantially similar provisions as are contained in this law, or in the event that a pertinent State or Federal administrative agency issues and promulgates regulations preempting such action by the County of Albany. The Albany County Legislature may determine via resolution whether or not identical or substantially similar statewide legislation has been enacted for the purposes of triggering the provisions of this section.

Section 6. Severability.

If any clause, sentence, paragraph, subdivision, section, or part of this Local Law or the application thereof to any person, individual, corporation, firm, partnership, entity, or circumstance shall be adjudged by any court of competent jurisdiction to be invalid or unconstitutional, such order or judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section, or part of this law, or in its application to the person, individual, corporation, firm, partnership, entity, or circumstance directly involved in the controversy in which such order or judgment shall be rendered.

Section 7. Effective Date.

This local law shall take effect August 1, 2009.

Referred to Law Committee. 8/11/08
Favorable Recommendation - Law Committee. 3/23/09
On roll call vote the following voted in favor: Ms. Benedict, Messrs. Beston, Bullock, Ms. Chapman, Messrs. Clenahan, Clouse, Commisso, Ms. Connolly, Messrs. Cotrofeld, Domalewicz, Gordon, Higgins, Hoblock, Horstmyer, Houghtaling, Infante, Joyce, Mss. Lockart, Maffia-Tobler, Mr. Mayo, Ms. McKnight, Messrs. Mendick, Rahm, Scavo, Steck, Ward, Ms. Willingham and Mr. Zeilman – 28
Those opposed: Mr. Dawson – 1.
Local Law was adopted. 4/13/09

Suffolk County Local Law- E-Cigarette Restrictions

Legislative intent.

A.

This Legislature hereby finds that while state and federal governments have been slow to respond meaningfully to the public health crisis caused by smoking, the Suffolk County Legislature has a long and proud history of being at the forefront of the efforts to curb smoking and its inherent dangerous effects on the general public's health.

B.

This Legislature finds that Suffolk County was one of the first municipalities in the nation to ban smoking in restaurants and other public places and one of the first municipalities to limit the access school-age children have to tobacco products by passing "Tobacco 19," which raised to 19 the legal age for the purchase of tobacco products.

C.

This Legislature recognizes that dangers posed by tobacco are not limited to cigarettes, pipes or other traditional forms of smoking.

D.

This Legislature also finds and determines that new, unregulated high-tech smoking devices, commonly referred to as "electronic cigarettes" or "e-cigarettes," have recently been made available to consumers. These devices closely resemble and purposefully mimic the art of smoking by having users inhale vaporized liquid nicotine created by heat through an electronic ignition system. The vapors are expelled via a cartridge that usually contains a concentration of pure nicotine. The cartridge and ignition system are housed in a device created to look exactly like a traditional cigarette, cigar or pipe. After inhaling, the user then blows out the heated vapors, producing a "cloud" of undetermined substances that is virtually indistinguishable from traditional cigarettes, cigars and pipes.

E.

This Legislature also finds and determines that nicotine is a known neurotoxin that is also one of the most highly addictive substances available for public consumption.

F.

This Legislature finds that the manufacturers and marketers of e-cigarettes purposefully and intentionally advertise their products as safe nicotine-delivery devices and smoking cessation modalities.

G.

This Legislature also finds that these safety and smoking cessation assertions made by e-cigarette companies have been disproven by laboratory tests conducted by the United States Food and Drug Administration (FDA). Indeed, this testing has shown that e-cigarettes do contain carcinogens, including nitrosamines. Further, the FDA tests showed that e-cigarettes were found to contain toxic chemicals such as diethylene glycol. This compound is a common ingredient in antifreeze and, in 2007, was also surreptitiously substituted for glycerin by several Chinese manufacturing companies in the making of toothpaste, which resulted in the deaths of hundreds of people worldwide. While some e-cigarette manufacturers dispute the FDA's findings as limited in scope and sample, these manufacturers have not submitted for independent peer review any of their findings that purportedly support their safety and smoking cessation claims.

H.

This Legislature also finds that along with the FDA's publicly expressed concerns over the safety of these devices, the FDA is continuing its official investigation into the e-smoking devices and has refused to allow e-cigarettes, e-cigars and e-pipes to cross the border in our country because they are considered new drugs and drug-delivery devices that require FDA approval.

I.

This Legislature further finds that, concurrent with this lack of suitable information, e-cigarette manufacturers offer their nicotine cartridges in a variety of flavors, including cherry, chocolate, and vanilla. The FDA and public health advocates warn these flavorings are purposefully meant to appeal to and attract young people and are commonly referred to as "training wheels" for traditional cigarettes.

J.

This Legislature also finds that studies show that adolescents can become addicted to nicotine after ingesting the equivalent of 20 traditional cigarettes (the amount traditionally available in a single pack). The appeal created by the flavored e-cigarette can lead young people into a lifetime of nicotine addiction.

K.

This Legislature also finds that the nicotine content in e-cigarettes is unknown and unspecified and presents a significant risk of rapid addiction or overdose.

L.

This Legislature also finds that when consumed in public places where traditional tobacco products are banned, the use of e-cigarettes causes fear, stress and confusion among patrons and workers alike. E-cigarettes also seriously compromise the County's current public health laws governing indoor smoking bans and create an enforcement nightmare for the Department of Health Services' Tobacco Enforcement Unit.

M.

This Legislature is encouraged that other governments and public health organizations have joined the FDA in speaking out about the potential dangers posed by e-cigarettes. These entities are also calling

on e-cigarette manufacturers to discontinue their safety claims until these products have been independently tested. These groups include the World Health Organization and the Canadian government's FDA equivalent, the Health Products and Food Branch Inspectorate.

N.

This Legislature further finds that every year tobacco products siphon off more than $268,000,000,000 in directly related health-care and lost worker productivity costs and lead to the deaths of almost 1/2 million Americans. This Legislature is supportive of tobacco cessation programs and modalities that have proven efficacy and utilize safe FDA-approved products.

O.

This Legislature also determines that protecting Suffolk County residents against an untested nicotine product like e-cigarettes represents sound public health and fiscal policy.

P.

Therefore, the purpose of this article is to ban the sale of e-cigarettes and like products in Suffolk County to persons under the age of 21 and to prohibit the use of e-cigarettes and like products in public places where traditional forms of smoking are already disallowed.

§ 792-8Definitions.

As used in this article, the following terms shall have the meanings indicated:

E-CIGARETTE

Any electronic device composed of a mouthpiece, heating element, battery and electronic circuits that provides a vapor of liquid nicotine and/or other substances mixed with propylene glycol to the user as he or she simulates smoking. This term shall include such devices whether they are manufactured as e-cigarettes, e-cigars, e-pipes or under any other product name.

LIQUID NICOTINE

Any liquid product composed either in whole or part of pure nicotine and proprylene glycol and manufactured for use with e-cigarettes.

PERSON

Any natural person, individual, corporation, unincorporated association, proprietorship, firm, partnership, joint venture, joint-stock association, or other entity or business of any kind.

§ 792-9Sale restrictions.

No person shall sell or offer for sale e-cigarettes or liquid nicotine within the County of Suffolk to persons under 21 years of age.

§ 792-10Penalties for offenses.

Any person who intentionally violates the provisions of § 792-9 of this article shall be guilty of an unclassified misdemeanor, punishable by a fine of up to $1,000. Each violation shall constitute a separate and distinct offense.

§ 792-11Reverse preemption.

This article shall be null and void on the day that statewide or federal legislation goes into effect, incorporating either the same or substantially similar provisions as are contained in this article, or in the event that a pertinent state or federal administrative agency issues and promulgates regulations preempting such action by the County of Suffolk. The County Legislature may determine via mere resolution whether or not identical or substantially similar statewide legislation has been enacted for the purposes of triggering the provisions in this section.

§ 792-12Applicability.

This article shall apply to all actions occurring on or after the effective date of this article.

§ 792-13Effective date.

This article shall take effect 60 days after its filing in the office of the Secretary of State.

This opinion is uncorrected and subject to revision before publication in the New York Reports.

No. 1
The People &c.,
Respondent,
v.
Michael Diack,
Appellant.

Kathy Manley, for appellant.
Kenneth L. Gartner, for respondent.
New York Civil Liberties Union, amicus curiae.

PIGOTT, J.:

In 2006, Nassau County enacted Local Law No. 4-2006 (Local Law 4), which, as relevant here, prohibits registered sex offenders from residing within 1,000 feet of a school. In recent years, dozens of municipalities in this State have enacted similar laws that prohibit registered sex offenders from living

within a certain distance of schools, daycare centers, parks, youth centers and other areas where children are likely to congregate.[1] That such laws are proliferating at an accelerated rate is hardly surprising, given the significant interest involved, namely, the protection of children from sex offenders. Local governments have, understandably, relied on their police power in furthering that interest.

But a local government's police power is not absolute.

---

[1] Sex offender residency laws have generated significant litigation in this State's local and federal courts, with almost all of the challenges to their validity involving the issue of preemption (see People v Kramer, 45 Misc 3d 458 [Village of Massapequa Park Just Ct, 2014] [village law prohibiting a registered sex offender from residing within a one-mile radius of any school or park]; Budesheim v Southampton Town Police Dept., 2014 NY Slip Op 32278[U] [Sup Ct, Suffolk County 2014] [county local law prohibiting registered sex offenders from residing within a quarter mile of the property of any school, daycare center, playground or amusement park]; Doe v County of Rensselaer, 24 Misc 3d 1215[A] [Sup Ct, Rensselaer County 2009] [county local law prohibiting level two and level three sex offenders from residing within 2,000 feet of a school or childcare facility]; People v Blair, 23 Misc 3d 902 [Albany City Ct, 2009] [county local law prohibiting level two and level three sex offenders from residing within 1,000 feet of a school or childcare facility]; People v Oberlander, 22 Misc 3d 1124[A] [Sup Ct, Rockland County 2009] [county law prohibiting sex offenders from residing, working or loitering within 1,000 feet of a school, childcare facility, playground, youth center or public swimming pool]; see also Moore v County of Suffolk, 2013 WL 4432351 [ED NY 2013] [county local law prohibiting registered sex offenders from living within a quarter of a mile of the property line of any school, licenced daycare center or playground]; Terrance v City of Geneva, 799 F Supp 2d 250 [WD NY 2011] [city law prohibiting level two and level three sex offenders from residing within 1,000 feet of a school and 500 feet of a park, playground or daycare center]).

When the State has created a comprehensive and detailed regulatory scheme with regard to the subject matter that the local law attempts to regulate, the local interest must yield to that of the State in regulating that field. We hold that the State's comprehensive and detailed statutory and regulatory framework for the identification, regulation and monitoring of registered sex offenders prohibits the enactment of a residency restriction law such as Local Law 4.

I.

In 2001, defendant, a Nassau County resident, was convicted of the crime of possessing an obscene sexual performance by a child (Penal Law § 263.11). He served 22 months in prison and, upon his release from custody, was classified a level one sex offender under the Sex Offender Registration Act (Correction Law art 6-C, § 168 et seq.). Defendant was discharged from parole on August 19, 2004. In July 2008, defendant reported his change of address to the New York State Division of Criminal Justice Services. Upon receiving this information, the Nassau County Police Department determined that defendant had moved to an apartment located within 500 feet of two schools.

Defendant was charged by information with a violation of Nassau County Local Law 4, which is codified in Nassau County Administrative Code § 8-130.6. That provision states, in relevant part, that "[i]t shall be unlawful for any registered

sex offender to establish a residence or domicile where the property line of such residence or domicile lies within: (1) one thousand feet of the property line of a school; or (2) five hundred feet of the property line of a park . . ." (Nassau County Administrative Code § 8-130.6 [a] [1], [2]). The code defines a "registered sex offender" as "a person who has been classified as a Level 1, Level 2 or Level 3 sex offender and who is required to register with the New York state division of criminal justice services, or other agency having jurisdiction," pursuant to the Sex Offender Registration Act, regardless of whether the sex offender has actually registered (id. at § 8-230.2).

Defendant moved to dismiss the information on the ground that Local Law 4 and section 8-130.6 are preempted by state law. The District Court of Nassau County granted the motion and dismissed the charge on the ground that Local Law 4 is preempted by New York's "comprehensive statutory scheme for sex offenders." The Appellate Term reversed and reinstated the information, holding that it could not discern any express or implied intention by the Legislature through the enactment of the Sex Offender Registration Act (and other state laws) to occupy the entire field so as to prohibit the enactment of local laws imposing "residency restrictions for sex offenders who are no longer on probation, parole supervision, subject to a conditional discharge or . . . seeking public assistance" (41 Misc 3d 36, 39 [App Term, 2d Dept, 9th and 10th Jud Dists 2013]). A Judge of

this Court granted defendant leave to appeal.

II.

Although a local government is constitutionally empowered to enact local laws relating to the welfare of its citizens through its police power, it is prohibited from exercising that power through the adoption of local laws that are inconsistent with the New York State Constitution or any general law of the State (see NY Const, art IX, § 2 [c]; Municipal Home Rule Law § 10 [1] [i]; [ii] [1] [a] [12]). This doctrine of preemption is a significant restriction on a local government's home rule powers because although localities are "invested with substantial powers both by affirmative grant and by restriction on State powers in matters of local concern, the overriding limitation of the preemption doctrine embodies 'the untrammeled primacy of the Legislature to act . . . with respect to matters of State concern'" (Albany Area Bldrs. Assn. v Town of Guilderland, 74 NY2d 372, 377 [1989], quoting Wambat Realty Corp. v State of New York, 41 NY2d 490, 497 [1977]).

Beginning with enactment of the Sex Offender Registration Act (SORA), the Legislature has passed and the Governor has signed a series of laws regulating registered sex offenders, including the Sexual Assault Reform Act (SARA) in 2000, the Sex Offender Management and Treatment Act (SOMTA) in 2007, and Chapter 568 of the Laws of 2008 (Chapter 568). Because the Legislature has not expressly stated an intent to occupy the

field of sex offender residency restrictions in the aforementioned laws, our focus on this appeal is whether the Legislature, by implication, has shown its intent to do so.

III.

The doctrine of field preemption prohibits a municipality from exercising a police power "when the Legislature has restricted such an exercise by preempting the area of regulation" (New York State Club Assn. v City of New York, 69 NY2d 211, 217 [1987], affd 487 US 1 [1988]; see Albany Area Bldrs. Assn., 74 NY2d at 377). Although field preemption may be "express" as evidenced by the Legislature's stated directive, it may also "be implied from a declaration of State policy by the Legislature . . . or from the fact that the Legislature has enacted a comprehensive and detailed regulatory scheme in a particular area" (Consolidated Edison Co. of N.Y. v Town of Red Hook, 60 NY2d 99, 105 [1983] [citations omitted]). Intent to preempt the field may "be implied from the nature of the subject matter being regulated and the purpose and scope of the State legislative scheme, including the need for State-wide uniformity in a given area" (Albany Area Bldrs. Assn., 74 NY2d at 377, citing Robin v Incorporated Vil. of Hempstead, 30 NY2d 347 [1972]).

The People assert that the statutes at issue (SORA, SARA, SOMTA and Chapter 568) either do not specifically mention residency at all or only tangentially touch upon residency by,

for example, limiting travel by parolees and those on probation in areas with schools or childcare centers, and other places where children may congregate. Such "piecemeal" provisions, the People contend, do not constitute the type of "comprehensive and detailed regulatory scheme" from which preemption can be inferred, and it necessarily follows that the Legislature meant to leave to local governments the authority to impose residency restrictions on registered sex offenders who are not on parole or probation or subject to any type of supervision. But it is clear from the State's continuing regulation with respect to identification and monitoring of registered sex offenders that its "purpose and design" is to preempt the subject of sex offender residency restriction legislation and to "occupy the entire field" so as to prohibit local governments from doing so (see Robin, 30 NY2d at 350).[2] We therefore reverse the order of the Appellate Term.

IV.

This State's foray into sex offender management began in 1996 with the enactment of SORA, which addressed the Legislature's concern about the "danger of recidivism posed by sex offenders, especially those sexually violent offenders who commit predatory acts characterized by repetitive and compulsive behavior" (L 1995, ch 192, § 1). SORA, as its title makes clear,

---

[2] In light of our holding that this is an issue involving "field preemption," we do not address defendant's "conflict preemption" argument.

is a registration and notification statute directed at protecting the public from sex offenders, who, upon their release, are assigned a risk level dependent upon whether their risk for re-offending is low (level one), moderate (level two) or high (level three) (see Correction Law § 168-l [6] [a]-[c]). The offender is required by law to register as a sex offender for a period that correlates with his particular risk-level and designation (see id. § 168-f; § 168-h [1]-[3]). The Legislature has described SORA's registration requirement as "a proper exercise of the state's police power regulating present and ongoing conduct" of sex offenders (L 1995, ch 192, § 1 [emphasis supplied]). The registration and notification requirements are, of course, applicable statewide and are aimed at providing local citizens and law enforcement agencies with critical information regarding sex offenders residing within their respective jurisdictions (see Correction Law §§ 168-f, 168-j).

Four years later, in 2000, the Legislature passed and the Governor signed the Sex Assault Reform Act which, as relevant here, amended the Penal Law and the Executive Law to require the imposition of a mandatory condition prohibiting sex offenders placed on probation, conditional release or parole from entering upon school grounds or other facilities where children receive care ("school grounds mandatory condition") (2000 McKinney's Session Law News of NY, Ch 1). As part of that law, Penal Law § 65.10 was amended to require that a court imposing a sentence of

probation or conditional discharge upon a person convicted of an enumerated sex offense[3] and where the victim of the offense was under the age of eighteen at the time the offense was committed, direct that the offender "shall refrain from knowingly entering into or upon any school grounds", as that term is defined in Penal Law § 220.00 (14) (a), or any other facility of institution that is "primarily used for the care and treatment of persons under the age of eighteen . . ." (Penal Law § 65.10 [4-a] [a]). At the same time, Executive Law § 259-c (14) was amended to require the parole board to impose the school grounds mandatory condition on offenders of the aforementioned enumerated sex offenses who are released on parole, who are conditionally released or who are subject to a period of PRS. In 2005, the Legislature extended the school grounds mandatory condition to sex offenders designated level three pursuant to Correction Law § 168-l(6), and also adopted the broad definition of "school grounds" set forth in Penal Law § 220.00 (14) (a), (b) (see 2005 McKinney's Session Law News of NY, Ch 544; see also Executive Law

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[3] Those sex offenses are set forth in Penal Law articles 130 ("Sex Offenses"), 235 ("Obscenity and Related Offenses"), 263 ("Sexual Performance by a Child") and Penal Law §§ 255.25, 255.26, and 225.27 (Incest in the third, second and first degree, respectively). Initially, SARA imposed the school grounds mandatory condition on an offender who committed "Incest" as it was then referred to in former Penal Law § 255.25. In 2006, SARA was amended to require the imposition of the mandatory condition to the newly-enacted offenses of incest in the first, second and third degree (2006 McKinney's Session Law News of NY, Ch 320).

§ 259-c [14]).

The critical provision under SARA (as amended in 2005) is its reference to this definition of "school grounds":

> "(a) . . . any building, structure, athletic playing field, playground or land contained within the real property boundary line of a public or private elementary, parochial, intermediate, junior high, vocational, or high school, or (b) any area accessible to the public located within one thousand feet of the real property boundary line comprising any such school or any parked automobile or other parked vehicle located within one thousand feet of the real property boundary line comprising such school. For the purposes of this section an 'area accessible to the public' shall mean sidewalks, streets, parking lots, parks, playgrounds, stores and restaurants" (Penal Law § 220.00 [14] [a], [b] [emphasis supplied]).[4]

Courts have interpreted section 220.00 (14) as creating a residency restriction prohibiting certain classes of sex offenders from living within 1,000 feet of a school (see Terrance v City of Geneva, 799 F Supp 2d 250, 255 [WD NY 2011]; People v Blair, 23 Misc 3d 902, 908 [Albany City Ct 2009]; People v Oberlander, 22 Misc 3d 1124 [A] [Sup Ct, Rockland County 2009]). The practical effect is that any sex offender who is subject to the school grounds mandatory condition is unable to reside within 1,000 feet of a school or facility as defined in Penal Law §

[4] When SARA was enacted in 2000, the school grounds mandatory condition prohibited sex offenders from actually going inside the boundary line of a school. The 2005 SARA amendment broadened the school grounds mandatory condition to 1,000 feet beyond the boundary line.

220.00 (14) (b). Therefore, SARA's enactment, with its various amendments over the years, provides clear evidence of the State's intention to occupy the field with regard to sex offender management, including where certain sex offenders may reside, and it is of no moment that the defendant in this appeal does not fall within the class of sex offenders who are subject to that mandatory condition.

Further evidence of the State's intent to occupy the field of sex offender housing is found in the enactment of Chapter 568 of the Laws of 2008. That chapter directed the Division of Parole (DOP), Division of Probation and Correctional Alternatives (DPCA) and the Office of Temporary and Disability Assistance (OTDA) "to promulgate rules regarding the placement of sex offenders" to address the inability of those agencies "to locate suitable housing for convicted sex offenders" (Assembly Mem in Support, Bill Jacket, L 2008, ch 568, at 7). Because the lack of suitable housing created "an unacceptable high level of concentration of sex offenders in certain residential areas," resulting in "an unnecessary risk to public safety," Chapter 568's objective was to remedy that problem by allowing the DOP, DPCA and OTDA to consider certain relevant factors when "investigating and approving the residences of sex offenders" (id. [emphasis supplied]).

In approving Chapter 568, the Governor stated that this statute was necessary to address the challenges sex offenders

faced upon leaving prison in light of the shortage of affordable housing and the enactment of "well-intentioned" local ordinances that imposed "even more restrictive residency limitations on registered sex offenders" than the restrictions contained in SARA (Governor's Approval Mem, Bill Jacket, L 2008, ch 568, at 6, 2008 NY Legis Ann at 1668-1669 [emphasis supplied]). The Governor further acknowledged that this chapter "recognizes that the placement of these offenders in the community has been and will continue to be a matter that is properly addressed by the State," and that the chapter's guidelines would "balance" the competing factors of public safety and the provision of suitable housing for sex offenders, leading "to a coordinated and comprehensive statewide policy that will both protect the public and ensure that there is suitable and appropriate housing available for sex offenders in every community in the State" (id. [emphasis supplied]).

Chapter 568 added new subdivisions to Executive Law §§ 243 and 259,[5] and Social Services Law § 20, by requiring certain agencies to promulgate rules and regulations governing sex offender placement and housing (see Executive Law § 243 [4] [requiring the DPCA to give recommendations that include guidelines and procedures concerning "the placement of sex

[5] Chapter 568 amended Executive Law § 259 (5). That provision was repealed in 2011; the substance of that provision has since been relocated Correction Law § 203 (1) (see 2011 Session Law News of NY, Ch 62).

offenders designated level two or level three sex offenders pursuant to (SORA)," and requiring the regulations to direct local probation departments to consider certain factors concerning placement of such offenders]; Correction Law § 203 [1] [requiring the State Commissioner of Corrections and Community Supervision to promulgate similar rules and regulations for level two and level three offenders who are released on presumptive release, parole, conditional release or PRS]; Social Services Law § 20 [8] [a] [requiring the OTDA to promulgate rules and regulations for the conditions under which local social services officials may determine the placement of level two or level three sex offenders who, upon their release, are expected to apply for, or receive, public assistance and who are determined to be in immediate need of shelter]).

Pursuant to these regulations, regardless of whether the level two or level three sex offender is sentenced to probation or is released, the Legislature has determined that placement of the sex offender is dependent on a number of factors, all of which must be considered by the relevant agency. Such factors include the concentration of registered sex offenders in a given area or municipality; the number of registered sex offenders residing at a certain property; the proximity of entities that have vulnerable populations; the sex offender's accessibility to family members or friends or other supportive services such as local sex offender treatment

programs; and the availability of permanent, stable housing so as to reduce the possibility that the sex offender will be transient (see Executive Law § 243 [4] [a]-[e]; Correction Law § 203 [1] [a]-[e]; Social Services Law § 20 [8] [b] [i]-[iv][6]).

The regulations promulgated pursuant to Executive Law § 243 (4), Correction Law § 203 (1) and Social Services Law § 20 (8) (a) all recognize that the placement and housing of sex offenders "are areas that have been, and will continue to be, matters addressed by the State, . . . [and] . . . further the State's coordinated and comprehensive policies in these areas . . ." (9 NYCRR § 365.3 [b] [emphasis supplied] [level two and level three sex offenders on probation]; 9 NYCRR 8002.7 [b]; 18 NYCRR 352.36 [a] [2]). The regulations also acknowledge that the maintenance and location of acceptable housing for sex offenders constitutes "an enormous challenge that impacts all areas of the State" because sex offenders, upon release from prison, typically return to the communities where they previously resided and the proliferation of well-intentioned local ordinances imposing residency restriction has hampered the ability of the State and local authorities to address the difficulty in finding

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[6] One factor that must be considered by local social services officials but need not be considered by the other two agencies is that the Department of Corrections and Community Supervision must investigate and approve any placement of a level two or level three sex offender by local social service officials (see Social Services Law § 8 [b] [v]). Local social services officials need not, however, consider the availability of stable housing in determining placement.

appropriate housing for sex offenders (9 NYCRR 365.3 [d] [5]; 9 NYCRR 8002.7 [d] [5]; 18 NYCRR 352.36 [a] [4] [v]).

Further evidence of the legislative scheme to regulate sex offenders is the Legislature's enactment in 2007 of the Sex Offender Management Treatment Act (L 2007, ch 7). This statute created a procedure for the confinement of certain sex offenders upon the expiration of their prison terms, resulting in their transfer to secure treatment facilities (see Mental Hygiene Law §§ 10.03 [e], 10.07 [f]). Those offenders who are deemed not to require confinement are subjected to an outpatient regimen of strict and intensive supervision and treatment ("SIST") (id. at § 10.07), including the potential designation of specific residences or types of residence by the Department of Corrections and Community Supervision (id. at § 10.11 [a] [1]). SOMTA was enacted for the dual purposes of protecting the public from recidivistic sex offenders while ensuring that sex offenders have access to appropriate treatment (id. § 10.01 [a]-[c]).

V.

The defendant in this appeal is a designated level one sex offender, is not on probation or parole, nor is he subject to conditional release or PRS. None of the aforementioned provisions that even touch upon residency or placement apply to him. Contrary to the People's contention, however, that does not mean that the State has delegated to local governments the duty of enacting residency laws concerning registered sex offenders.

Nor does it mean, as Appellate Term held, that "the Legislature has chosen to limit its regulations over sex offenders and not to enact a comprehensive legislative scheme in the area concerning the residency restrictions of sex offenders who are not on parole, probation, subject to conditional discharge or seeking public assistance" (41 Misc 3d at 39). Rather, it is clear that the State has been continuously active in this field and, as such, it is evident that the State has chosen to occupy it.

What SORA, SARA, Chapter 568 and SOMTA represent is a detailed and comprehensive regulatory scheme involving the State's ongoing monitoring, management and treatment of registered sex offenders, which includes the housing of registered sex offenders. The monitoring and treatment of sex offenders does not end when the sex offender is released from prison. The State, through SORA, has devised a risk level system to identify the offenders who are most likely to reoffend. That system operates in tandem with SARA and Chapter 568, which refer to risk levels in their determinations as to where certain registered sex offenders are allowed. In the case of probation or release from prison, State regulations require local probation and parole officials to consider factors delineated by the State in determining where level two and level three sex offenders are to be placed. It is not coincidental that SARA and Chapter 568 do not address those registered sex offenders who are least likely to reoffend, i.e., those designated level one, and instead

focus on those sex offenders who have been designated as exhibiting a moderate to high risk of recidivism, i.e., those designated level two and three, respectively. This top-down approach, with the State dictating the relevant factors that local officials are required to consider when placing such offenders in housing, plainly establishes that sex offender registry restrictions are within the exclusive bailiwick of the State and accentuates the State's intent to occupy the field.

Residency restriction laws such as Local Law 4 encroach upon the State's occupation of the field, "inhibit the operation of [this] State's general law and thereby thwart the operation of [this] State's overriding policy concerns" relative to the identification, monitoring and treatment of sex offenders (Albany Area Bldrs. Assn., 74 NY2d at 377 [citation and internal quotations omitted]). They also collide with state policy by prohibiting sex offenders who are on probation and parole from living in housing that has been approved by the Division of Probation and Correctional Alternatives and Division of Parole.

Local residency restriction laws also hinder State-wide uniformity concerning sex offender placement. SORA, SARA, Chapter 568 and SOMTA are State-wide laws that apply to every community, including those particular laws and regulations regarding sex offender placement. Local Law 4 and similar laws are easily passed and, understandably, receive local support, but, as the State has acknowledged, communities in recent years

have taken to shifting the burden of sex offender housing to neighboring communities, thereby frustrating the State's policy that each community bear the burden (see 9 NYCRR 365.3 [d] [5] [noting that "it is not appropriate for any one community or county to bear an inappropriate burden in housing sex offenders because another community has attempted to shift its responsibility for those offenders onto other areas of the State"]; 9 NYCRR 8002.7 [d] [5] [same]; 18 NYCRR 352.36 [a] [4] [v]). As such, the unmistakable intent of the State to preempt the field prohibits their enactment.

Accordingly, the order of the Appellate Term should be reversed and the information dismissed.

* * * * * * * * * * * * * * * * *

Order reversed and information dismissed. Opinion by Judge Pigott. Chief Judge Lippman and Judges Read, Rivera and Abdus-Salaam concur. Judges Stein and Fahey took no part.

Decided February 17, 2015

Text

STATE OF NEW YORK

3925

2015-2016 Regular Sessions

IN SENATE

February 20, 2015

Introduced by Sens. VENDITTO, FUNKE, MURPHY -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

AN ACT to amend the correction law, in relation to authorizing municipalities to establish residency restrictions for sex offenders

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Legislative findings. It is the sense of the legislature that determinations regarding restrictions upon the residence of sex offenders who are required to register pursuant to the provisions of article 6-C of the correction law should be made by the local municipality in which such offenders reside since municipalities are in a better position than the state, after taking into consideration local conditions and after determining what entities with vulnerable populations would require protection from registered sex offenders, to make such determinations.

S 2. Section 168-w of the correction law, as relettered by chapter 604 of the laws of 2005, is redesignated section 168-x and a new section 168-w is added to read as follows:

S 168-W. MUNICIPAL RESIDENCY RESTRICTIONS. ANY MUNICIPALITY MAY ENACT A LOCAL LAW WHICH IMPOSES RESIDENCY RESTRICTIONS UPON SEX OFFENDERS REQUIRED TO REGISTER PURSUANT TO THIS ARTICLE, PROVIDED THAT SUCH RESIDENCY RESTRICTIONS ARE NO LESS RESTRICTIVE THAN THE REQUIREMENTS SET FORTH IN PARAGRAPH (A) OF SUBDIVISION FOUR-A OF SECTION 65.10 OF THE PENAL LAW AND SUBDIVISION FOURTEEN OF SECTION TWO HUNDRED FIFTY-NINE-C OF THE EXECUTIVE LAW.

S 3. This act shall take effect immediately.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD09369-01-5

Comments

CC BY NC ND

Memo

BILL NUMBER:S3925

TITLE OF BILL:

An act to amend the correction law, in relation to authorizing municipalities to establish residency restrictions for sex offenders

PURPOSE:

This bill would allow municipalities to enact restrictions on where registered sex offenders reside.

SUMMARY OF PROVISIONS:

Section one of the bill clarifies the legislature's intent to allow municipalities to enact local laws regarding where registered sex offenders may reside.

Section two of the bill authorizes municipalities to impose residency restrictions upon registered sex offenders.

JUSTIFICATION:

On February 17, 2015 the New York State Court of Appeals ruled in People v. Diack, overturning Nassau county Local Law 4-2006 which prohibited all registered sex offenders from residing within 1000 feet of a school. 2015 NY Slip Op 01376. The Court ruled that the extensive statutory scheme created by the legislature with respect to sex offenders and their management demonstrated an all encompassing legislative intent and the Nassau County local law was preempted by state law. Since the creation of the sex offender registry, many municipalities across the state have chosen to enact similar laws.

Municipalities are empowered to create local laws to respond to their particular needs, which naturally differ from community to community. Local laws designed to protect children against registered sex offenders, are enacted in response to unique conditions and concerns of specific communities and should act in complement with existing state law.

The enactment of this bill is necessary to allow municipalities to take in consideration local conditions and needs to protect residents.

LEGISLATIVE HISTORY:

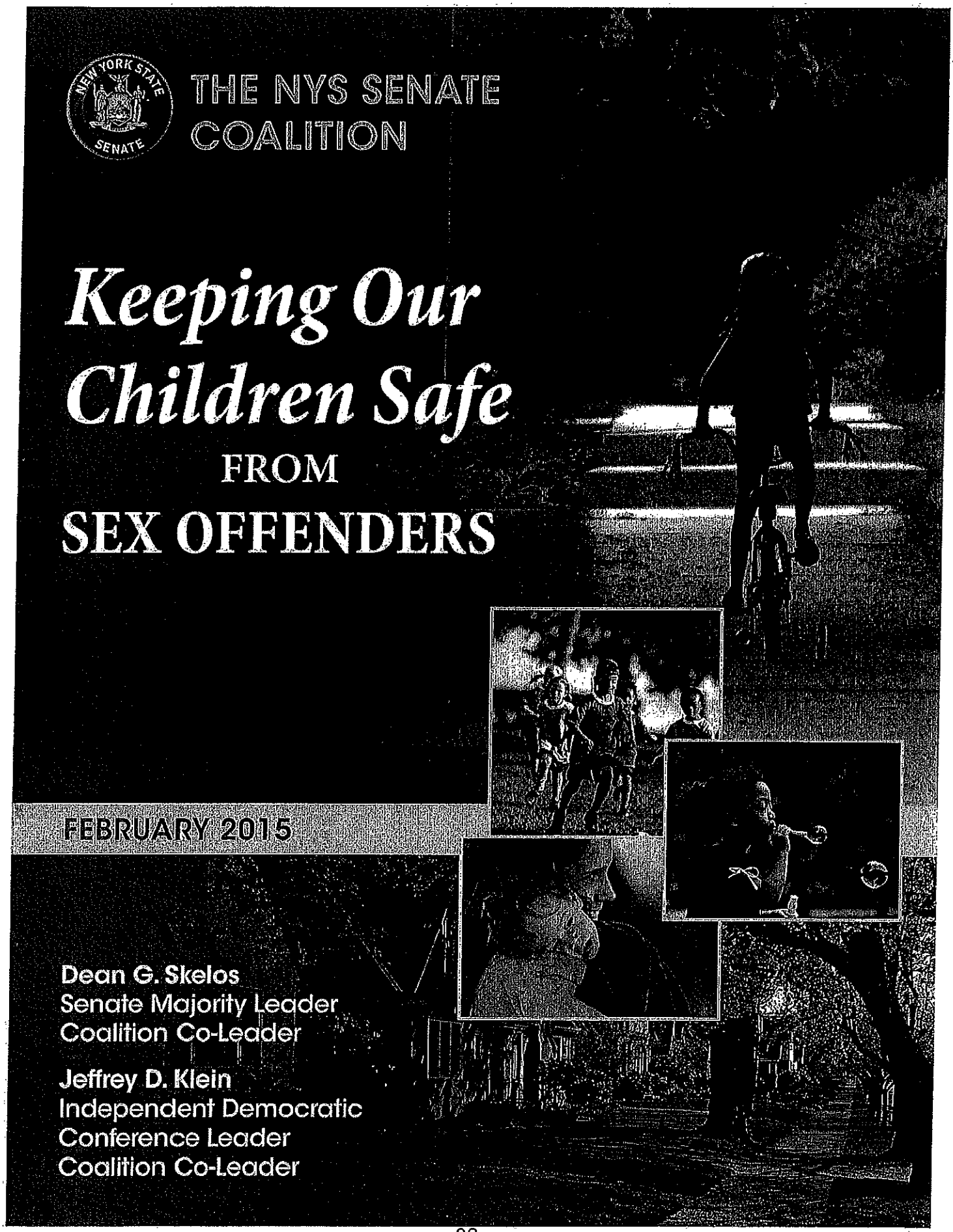
None.

FISCAL IMPLICATIONS:

None.

EFFECTIVE DATE:

This act shall take effect immediately.



THE NYS SENATE COALITION

Keeping Our Children Safe

FROM

SEX OFFENDERS

FEBRUARY 2015

Dean G. Skelos
Senate Majority Leader
Coalition Co-Leader

Jeffrey D. Klein
Independent Democratic Conference Leader
Coalition Co-Leader

Introduction

The New York State Senate Coalition and its leaders Senator Dean G. Skelos and Jeffrey D. Klein are committed to keeping communities safe from sexual predators. The Senate convened the 2015 Legislative session by passing several bills proposed by Coalition members passed to enhance protections afforded to communities.

Those bills, waiting for action by the Assembly, include: a bill sponsored by Senator Jeffrey Klein prohibiting Level 2 and Level 3 sex offenders from being placed in temporary or emergency housing or homeless shelters where children are present, a bill sponsored by Senator Michael Ranzenhofer making it a crime to knowingly house or employ a sex offender who has failed to register or verify employment, a bill sponsored by Senator John Flanagan which would prohibit certain sex offenders from being granted custody and unsupervised visitation with a child, a bill sponsored by Senator John Bonacic which would require a registered sex offender to report multiple or part-time residences, a bill sponsored by Senator Patrick Gallivan requiring the Office for People with Developmental Disabilities to contact local officials when a sex offender is placed in a community residence within their municipality, and two bills by Senator Joseph Robach, the first prohibits sex offenders from living in student housing and the second which creates a sex offender public awareness program.

These bills, however, have not captured all of the infirmities in the current laws. The Court of Appeals dealt a blow to many communities in the state when in *People v. Diack*[1], it held that localities were unable to enact their own local laws more restrictive than state law in protecting children from sexual predators.

Going back to 1996, with Temporary President Dean G. Skelos authoring and securing passage of the ground-breaking Sex Offender Registration Act (SORA) also known as Megan's Law, the Senate has been a leader in protecting children and families across the state from sex offenders. However, more can and should be done. Recently, weakness has been highlighted by the office of State Senator Jeffrey D. Klein when he released an investigative report revealing that shocking numbers of paroled sex offenders were living perilously close to school buildings throughout New York City in blatant contravention of state law. Still more were recorded in state databases as living in one zip code while their actual address was in another zip code. These revelations led Senator Klein to introduce legislation in the Senate, passed by the Senate Coalition in June 2014 that would alter the way that state agencies maintained their sex offender and school location databases, ensuring that such dangers did not threaten New York's children and families any further.

However, that investigation revealed an additional loophole in state law, which allows dangerous sex offenders to live and work next door to many of the kindergarten and pre-kindergarten programs that serve our youngest and most vulnerable children.

In June 2014, Michael Ocasio, a Level 3 sex offender convicted on May 14, 2009 of sexual conduct against a child in the second degree, was found to be living near a Montessori school offering kindergarten and pre-k programs. The Office of Senator Klein conducted a thorough

[1] Slip Op. No. 1 February 17, 2015.

investigation to uncover why and how often such dangerous placements were occurring. Sadly, as this report will show, Mr. Ocasio was only one of many sex offenders living just down the street from our kindergarten and Pre-K schools.

Previous Investigation and Legislation

In January 2014, a Bronx local community leader and grandmother, Edith Blitzer, received an email that registered sex offender Roland Marrero had moved into her neighborhood. The email was the product of a 2009 law sponsored by Senator Klein (Chapter 478 of 2009) that allows concerned New Yorkers to sign-up to receive email notifications when a registered sex offender moves into their zip code. Ms. Blitzer brought the issue to Senator Klein's attention and the ensuing investigation revealed that the sex offender was living less than 700 feet from PS 357 in the Bronx, a school that had opened only a few months prior, in September 2013.

The investigation also revealed six convicted sex offenders living within 1,000 feet of school buildings and over 130 additional sex offenders whose New York City addresses were improperly registered with state authorities.[2] As a result, not only was the safety of children endangered, but community members who wanted to know about sex offenders living in their neighborhoods did not have access to accurate information.

With this in mind, the Senate Coalition and Senator Klein spearheaded Senate bill 6600 (2014) to remedy the situation. The bill called for the Department of Corrections and Community Supervision (DOCCS) and the Board of Parole to obtain on a quarterly basis an updated list of all elementary and secondary schools in the state. The bill would ensure that state agencies charged with supervising sex offenders on probation or parole have accurate lists of any new schools that open in a neighborhood and any schools that close. The bill passed overwhelmingly in the Senate, 53 to 4 but died in committee in the Assembly.

In addition, Senator Klein held a press conference on February 11, 2014 to raise public awareness about the incorrect sex offender zip codes, promising to take legislative action if the problem was not corrected by state agencies. Following the press conference, the Division of Criminal Justice Services (DCJS) announced plans to conduct an audit on registered sex offender addresses. DOCCS also announced that no sex offender would be released until his proposed residence was verified as being in compliance with the Sex Offender Registration Act (SORA).[3]

Senator Klein and the Senate Coalition have also taken steps to address the newly discovered kindergarten and pre-k loophole.

The Loophole

The loophole allowing convicted sex offenders to live near some kindergarten and Pre-K programs arises from the interaction of several separate existing laws:

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[2] Protecting Our Citizens: Curbing the High Incidence of Sex Offenders Living Near Schools, IDC report, released February 2014. tribwpix.files.wordpress.com/2014/02/sexoffenderreport1.pdf

[3] Beth DeFalco, Georgett Roberts, & Josh Saul, *Housing Bungle Allows Convicted Pedophiles to Live Close to Schools*, NY Post, Feb. 17, 2014.

The Sex Offender Registration Act (SORA)

In 1996, then Senator Dean G. Skelos, now Temporary President of the Senate, sponsored and led the effort to enact New York State's Sex Offender Registration Act (SORA)--or "Megan's Law."[4] It established a Sex Offender Registry designed to protect communities and assist local law enforcement agencies by compiling the names, addresses, photographs, and criminal information of sex offenders and making everything available to the public. The registry contains information on all convicted sex offenders living in New York State, even those convicted elsewhere, and classifies them according to the severity of their crimes. A Level 1 sex offender has a relatively low probability of causing his or her community harm, while a Level 2 sex offender is a moderate risk and a Level 3 sex offender is a high risk to his or her community.

The Act then uses these ratings to dictate how long a sex offender's information will remain in the database. Non-designated Level 1 offenders are required to register for 20 years, while the remaining Level 1 offenders, as well as all Level 2 and 3 offenders, are required to register for life (though non-designated Level 2 offenders may petition to be removed after 30 years). All offenders are required to keep their addresses and photographs up-to-date, and failure to abide by registration requirements is punishable by a Class E felony, or a Class D felony for repeat offenders.

Residency Restrictions for Sex Offenders

In order to protect communities from the potential dangers posed by released sex offenders on probation or parole, New York State places several restrictions on them with respect to residency and movement. Level 1 or Level 2 sex offenders whose victim was under the age of 18, as well as all Level 3 sex offenders, are prohibited from entering school grounds or being within 1,000 feet of any school or institution used primarily for the care or treatment of persons under the age of 18. The Executive Law § 259-c (14) and Penal Law § 65.10 (4-a) state that Level 3 sex offenders or those sex offenders with victims under the age of 18 on parole or probation

> "shall refrain from knowingly entering into or upon any school grounds, as that term is defined in subdivision fourteen of section 220.00 of the Penal Law, or any other facility or institution primarily used for the care or treatment of persons under the age of eighteen while one or more of such persons under the age of eighteen are present."

Section 220.00 of the Penal Law then goes on to define school grounds as

> "(a) in or on or within any building, structure, athletic playing field, playground or land contained within the real property boundary line of a public or private elementary, parochial, intermediate, junior high, vocational, or high school, or (b) any area accessible to the public located within one thousand feet of the real property boundary line comprising any such school or any parked automobile or other parked vehicle located within one thousand feet of the real property boundary line comprising any such school. For the purposes of this section an

[4] Correction Law Article 6-A

'area accessible to the public' shall mean sidewalks, streets, parking lots, parks, playgrounds, stores and restaurants."

DOCCS has interpreted these statutes as prohibiting sex offenders from knowingly residing within 1,000 feet of school buildings and from knowingly traveling within 1,000 feet of school buildings.

However, there is some ambiguity as to which schools and which children are covered by these statutes. Although the term "school grounds", as defined by the Penal Law includes public or private elementary schools, schools that only offer pre-kindergarten are not expressly included within this statute. The term "elementary school" is not defined under this statute, leaving the plain meaning of the term to be used. According to the dictionary definition (Merriam-Webster dictionary) an elementary school is "a school including usually the first four to the first eight grades and often a kindergarten." This excludes pre-kindergarten from the definition and thus excludes such schools from the 1,000 feet residency and movement protections.

In addition, there is a difference in interpretation of statutes between state agencies as to whether a school that only offers pre-kindergarten and kindergarten is included within the residency and movement protections. In June 2014, Level 3 sex offender Michael Ocasio was spotted near the Carrig Montessori School, which contains pre-school and kindergarten. DOCCS stated that the Montessori school was not considered an elementary school for purposes of the statute while the State Education Department stated that any school with kindergarten was afforded the protections of the statute. Despite the law's clear and avowed intent to afford protection to *all* children, the language of the statute must be strengthened to unambiguously protect pre-kindergarteners and kindergarteners from sex offenders.

Recidivism Among Sex Offenders

One of the primary reasons that these restrictions are in place is to limit a sex offender's interaction with children. The alarmingly high recidivism rate among sex offenders makes it imperative that they be watched – especially those convicted of preying on children. The New York State Division of Probation and Correctional Alternatives reported in 2007 that of 19,837 sex offenders on the sex offense registry, 15 % were re-arrested within one year of registration, 24% within two years, 41% within five years and 48% within eight years.

Proportion of Registered Sex Offenders Rearrested
(Among 19,827 Offenders on the Registry on March 31, 2005)*

Time From Registration Date	Any New Arrest
~ 1 Year	15%
~ 2 Years	24%
~ 5 Years	41%
~ 8 Years	48%

*Source: DCJS: NYS Sex Offender Registry and NYS Computerized Criminal History Data Base

By limiting their access to schools, and other locations where children may congregate, including day care and other locations the State can also limit sex offenders' access to children, thereby protecting the most vulnerable members of society. Because the intent of SORA and these residency restriction requirements was to protect all children and victims of sexual predators, not just those attending programs tied to a grade school, we must act to close this loophole as well as many others that have been identified.

Sex Offenders Next Door to Pre-schools

In order to determine just how much of a risk this loophole poses to our children, the office of Senator Klein conducted an investigation into the matter. The results revealed that, unfortunately, Michael Ocasio was not the only convicted sex offender living too close to a building housing kindergarten or pre-kindergarten programs. There is a clear need to address the problem and protect all of our children with equal fervor.

Methodology

Since not all preschool programs are attached to a grade school, the first step was to identify kindergarten and Pre-K programs throughout the City of New York. In order to accomplish this, the office of Senator Klein began with the 2014-15 New York City Pre-Kindergarten Directory, which lists the addresses of all available Pre-K programs in each of the five boroughs. These addresses were pulled and compiled to ensure that each program's location was examined.

As mandated by SORA, the New York State Department of Criminal Justice Services (DCJS) maintains an online database for the Public Registry of Sex Offenders. Within the Registry, all of the state's sex offenders are listed by the zip code in which they reside. The zip codes of each of the City's Pre-K programs were then run against the zip codes in the DCJS registry to determine an initial set of sex offenders to be examined.

Each listed sex offender in the DCJS registry also has a link to view their address on Google Maps. Those who shared a zip code with a school then had their address cross-referenced with the addresses of Pre-K programs within that zip code to determine which ones were within close proximity to schools. For those that were, the exact distance between their residence and the nearby school was calculated, and those found within 1,000 feet were recorded.

Because the limitations on the movement and residence of Level 1 and Level 2 sex offenders only apply to those on parole or probation, and not those who have successfully completed their rehabilitation, this list then had to be further focused. The State Department of Corrections and Community Services (DOCCS) maintains a public list of parolees within New York State. The existing list of convicted sex offenders living within 1,000 feet of a Pre-K program was then run against the DOCCS list of parolees, and any sex offender not listed as on active parole by DOCCS was removed. The list was also checked to ensure that those remaining were on parole for the sex offense in question, excluding those on parole for petty crimes or unrelated offenses. Finally, all sex offenders for whom the age of the victim could not be verified were removed from the list, to ensure that only those whose victims had been children were included.

This left a list of 17 paroled sex offenders. As detailed below, all 17 of these dangerous predators were living within 1,000 feet of a Pre-K or K program within New York City despite the clear intent of State law to prevent this.

Findings

The following 12 offenders are, as of the writing of this report, legally allowed to live within 1,000 ft. of the UPKs near them because these programs are not affiliated with a grade school.

Sex Offenders Residing Within 1,000 ft. of a Community UPK Program

Name	Address	Victim Age	School	Distance From School
			Bronx	
Ernest W. Clark	1265 Fulton Ave, Bronx NY 10456	8,12 years old	Habitot Es 3480 Third Ave. Bronx, NY10456	633 ft.
Michael Nieves	3111 Heath Ave 62B, Bronx NY 10463	11 years old	Kingsbridge Heights Community Center 3101 Kingsbridge Terrace, Bronx NY 10463	369 ft.
Monserrate Rodriguez	1252 Noble Ave, Bronx NY 10472	9 years old	Sound Dale Day Care Center 1211 Croes Ave, Bronx NY 10472	633 ft.
			Queens	
Samuel Maldonado	607 Woodward Ave 2R, Ridgewood NY 11385	14 years old	JC Daywatch Daycare 20 St. John's Rd, Queens NY 11385	211 ft.
Joel Navarro	217-19 110th Ave Top Floor, Queens Village NY 11429	7 years old	St. Joseph's Episcopal Church 217-55 110th Ave, Queens Village NY 11429	264 ft.
			Manhattan	
Damon Ford	125 West 25th St, NY NY 10001	7 years old	TT of NYC, LLC 776 Avenue of the Americas, NY NY 10001	528 ft.

Brooklyn

Arturo Ragler	501 New Lots Avenue, Brooklyn, NY 11207	7 years old	United Community Day Care 613 New Lots Avenue, Brooklyn, NY 12207	898 ft.
Angel Rios	501 New Lots Avenue, Brooklyn, NY 11207	7 & 5 years old	United Community Day Care 613 New Lots Avenue, Brooklyn, NY 12207	898 ft.
Garry Manson	32 Rochester Avenue, Brooklyn, NY 11233	7 years old	BCS Atlantic Avenue Early Learning Center 1825 Atlantic Avenue, Brooklyn, NY 11233	580 ft.
Mike Montes	25 Fairview Place, Brooklyn, NY 11226	6 & 4 years old	Joan Watkins Corp. DBA Pre-School Minds Day Care Center 3316-18 Church Street, Brooklyn, NY 11203	633 ft.
Jose Reyes	25 Fairview Place, Brooklyn, NY 11226	11 & 9 years old	Joan Watkins Corp. DBA Pre-School Minds Day Care Center 3316-18 Church Street, Brooklyn, NY 11203	633 ft.
Guillermo Ayala	32 Rochester Avenue, Brooklyn, NY 11233	14 years old	BCS Atlantic Avenue Early Learning Center 1825 Atlantic Avenue, Brooklyn, NY 11233	580 ft.

Because many UPK programs do, in fact, partner with nearby grade schools, the investigation also revealed 5 convicted sex offenders living within 1,000 ft. of local public schools. These predators are currently illegally living too close to a school under existing law, underscoring the need to update agency reporting policies. They are listed below:

Sex Offenders Residing Within 1,000 ft. of a UPK Program affiliated with a Public School

Name	Address	Victim Age	School	Distance From School
Bronx				
Charles S. Grant	1160 Teller Ave, Bronx NY 10456	10 years old	PS 53 Basheer Quisim 360 E 168th St, Bronx NY 10456	369 ft.
Dawud Mckelvin	955 Waring Ave 2D, Bronx NY 10469	11 years old	PS 89 Williamsbridge School 980 Mace Ave, Bronx NY 10469	422 ft.

Queens

Charles Medina	23-11 Cornaga Ave 4G, Queens NY 11691	14 years old	Wave Preparatory Elementary School 535 Briar Place, Queens NY 11691	844 ft.

Staten Island

James Randolph	St. Elizabeth Ann HC 91 Tompkins Ave, Staten Island NY 10304	9 years old	PS 078 100 Tompkins Avenue Staten Island, NY 10304	316 ft.

Brooklyn

Gregory Valdez	338 Forbell Street, Brooklyn, NY 12208	8 years old	PS 214 Michael Friedsam 2944 Pitkin Avenue, Brooklyn, NY 1220 8	739 ft.

Legislative Solution

These findings make it clear that the Michael Ocasio placement was not a rare occurrence, despite its clear dangers. Because the loophole allowing such occurrences stems merely from the fact that kindergarten and pre-kindergarten programs are not explicitly included in the legal descriptions of schools, it is a relatively easy one to fix. To this end, Senator Klein has sponsored Senate bill S. 1520 to alter the definition of school grounds in the Penal and Executive Laws to explicitly include kindergarten and pre-kindergarten programs, thereby ensuring that all preschool programs are equally protected under the law. The provisions of this bill also have broad bipartisan support as the bill passed unanimously in the Senate in 2014 (S.7868). Several other important bills relating to the sex offender registry and aimed at the protection of children were passed by the Senate under the Leadership of Senator Skelos and Senator Klein in 2014 but did not pass the Assembly.

A bill (S. 2269) sponsored by Senator Martin Golden preventing convicted Level 1, 2, or 3 sex offenders from residing within 1000 feet of a building used exclusively as an elementary or high school has passed in the Senate twice already but was not voted on in the Assembly. Further, a bill sponsored this year by Senator Robert Ortt (S. 2981) clarifying the definition of residence in the SORA, overwhelmingly passed the Senate in 2014. Yet another proposal that overwhelmingly passed the Senate in 2014 is Senator Andrew Lanza's bill (S. 3811), which would require that in addition to disclosure to the public of a convicted registered sex offender's residence, that they also disclose where they are working in their community. The Senate passed twice overwhelmingly a bill that expands the definition of an institution for the care and

treatment of children under age 18 to clearly include day care centers, which is carried now by Senator James Seward (S. 3926).

Senator Klein's investigation reveals just one of many serious infirmities in the current system. The recent rejection of a local law enacted by Nassau County related to further imposing restrictions on residency of sexual predators has been a major cause of concern for communities across the State. The Court of Appeals held on February 17, 2015 that the State, through its enactment of these various laws relative to parole and supervision of sexual predators has intended to occupy the field and pre-empt local laws. The Court held, "the State's comprehensive and detailed statutory and regulatory framework for the identification, regulation and monitoring of registered sex offenders prohibits the enactment of a residency restriction law such as Local Law 4." *People v. Diack* No. 1 Slip op. at p. 3 (2/17/2015). However, as just revealed by not only the investigation above, but by the numerous other local laws enacted in counties across the state, that there are local needs and concerns not addressed by the existing statutory framework, which in and of itself has weakness in its imprecision in definition and in implementation by the various state agencies tasked with supervising sex offenders.

The Coalition looks forward to passing S. 3925 sponsored by Senator Michael Venditto and Co-prime sponsors Senator Rich Funke and Senator Terrence Murphy. This bill is a direct response to the recent Court of Appeals decision People v. Diack. [5] This legislation will empower localities to protect their children by enacting local laws that are no less restrictive than the state laws.

The Senate Coalition will also take up Senator Kenneth LaValle's bill (S. 22) requiring a school district, upon receiving sex offender residence information from law enforcement officials, to distribute the information to the parents of its students, and S. 2950, sponsored by Senator Terrence Murphy which would prohibit registered sex offenders from living within 1500 feet of their victim. Senator Tony Avella also carries a bill (S. 712) that will be passed once again with bipartisan support, ensuring that risk assessment hearings are held *before* any sexual predator can be released into a community.

Conclusion

The Senate Coalition stands committed to keeping communities safe as evidenced by the introduction of several important measures safeguarding children. The State of New York has enacted numerous laws to protect its communities and children from dangerous sex offenders, and for the most part they are largely effective. However, continuing vigilance and investigation can uncover seemingly minor weaknesses that, as in these examples, may put our youngest and most vulnerable children at risk unnecessarily. Swift and smart legislation can, however, close these loopholes that allow predators to legally live just down the street from preschool centers, day cares, their victims and other locations where children congregate throughout New York. Enactment of the proposed legislation discussed in this report, not just passage in the Senate, will inform parents, protect victims, and keep New York's children safe.

[5] 2015 NY Slip Op 01376 (February 17, 2015)

STATE OF NEW YORK

3214

2015-2016 Regular Sessions

IN ASSEMBLY

January 22, 2015

Introduced by M. of A. WEPRIN -- read once and referred to the Committee on Local Governments

AN ACT to amend the municipal home rule law, in relation to punishment for the violation of a local law

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (b) of subdivision 4 of section 10 of the municipal home rule law is amended to read as follows:

(b) To provide for the enforcement of local laws by legal or equitable proceedings which are or may be provided or authorized by law, to prescribe that violations thereof shall constitute misdemeanors, offenses or infractions and to provide for the punishment of violations thereof by civil penalty, fine, forfeiture, community service or imprisonment, or by two or more of such punishments, provided, however, that a local law adopted pursuant to subdivision two of this section shall provide only for such enforcement or punishment as could be prescribed if the action of the legislative body were taken by ordinance, resolution, rule or regulation, as the case may be.

§ 2. This act shall take effect immediately.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD07344-01-5

BILL NUMBER: A3214

SPONSOR: Weprin

TITLE OF BILL: An act to amend the municipal home rule law, in relation to punishment for the violation of a local law

PURPOSE OF GENERAL IDEA OF BILL: To provide for community service as one of the punishments for the violation of a local law in a municipality.

JUSTIFICATION: State law prescribes the type of punishment which may be imposed by a local legislature for violations of local law. Current statute allows punishment by civil penalty, fine, forfeiture or imprisonment. This legislation will allow local governing bodies to pass local laws which are punishable by community service.

PRIOR LEGISLATIVE HISTORY: 2011: A.977 -Reported from Local Governments, Referred to Codes 2009-2010: A.216 -Reported from Local Governments, Referred to Codes 2007-2008: A.163 -Reported from Local Governments, Referred to Codes 2005-2006: A.616 -Reported from Local Governments, Referred to Codes 2012: 01/04/12 referred to local governments 01/24/12 reported referred to codes.

FISCAL IMPLICATIONS: None.

EFFECTIVE DATE: Immediately.

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on December 11, 2014

COMMISSIONERS PRESENT:

Audrey Zibelman, Chair
Patricia L. Acampora
Garry A. Brown
Gregg C. Sayre
Diane X. Burman, abstained

CASE 14-M-0224 - Proceeding on Motion of the Commission to Enable Community Choice Aggregation Programs.

ORDER INSTITUTING PROCEEDING AND SOLICITING COMMENTS

(Issued and Effective December 15, 2014)

BY THE COMMISSION:

INTRODUCTION

The Commission has instituted several proceedings to reform New York State's energy industry and regulatory practices to, among other things, promote deeper penetration of renewable energy resources such as wind and solar and wider deployment of distributed energy resources as well as to examine the retail energy markets and increase participation of and benefits for residential and small non-residential customers in those markets.[1] In those proceedings, Department of Public Service (the Department) Staff (Staff) has gathered substantial information on policies and models used in other jurisdictions and presented this information to the Commission. One model

[1] Case 14-M-0101, Reforming the Energy Vision, Order Instituting Proceeding (issued April 25, 2014); Case 12-M-0476 et al., Residential and Small Non-Residential Retail Energy Markets, Order Instituting Proceeding and Seeking Comments Regarding the Operation of the Retail Energy Markets in New York State (issued October 19, 2012).

that may offer benefits in New York is Community Choice Aggregation (CCA).[2]

Given the above stated Commission initiatives and the possible benefits that CCA may afford customers, a proceeding is instituted to examine implementation of CCA in New York. Through this proceeding, comments will be solicited to supplement the information already gathered in the on-going Reforming the Energy Vision (REV) and Retail Markets proceedings. Moreover, to provide commenters with sufficient background to provide specific and useful comments, an attached Staff White Paper on Community Choice Aggregation (Staff White Paper or White Paper) presents information about CCA and provides a context for a potential authorization of CCA programs in New York. The White Paper also includes a list of questions on which stakeholder comments would be particularly useful.

BACKGROUND

As more fully described in the attached Staff White Paper, since the restructuring of markets in New York in the late 1990s, the Commission has sought to ensure that residential and small non-residential customers have the opportunity to participate in and benefit from retail energy markets, where energy services companies (ESCOs) sell energy to customers. Both the REV proceeding and the Retail Markets proceedings have recognized that while large commercial and industrial customers have achieved substantial benefits through retail energy markets, residential customers and some small non-residential

[2] Community Choice Aggregation is sometimes referred to as Municipal Energy Aggregation or Government Energy Aggregation.

customers have seen more mixed results.[3] These proceedings have sought innovative methods to increase the benefits that retail energy markets provide to these consumer groups.

CCA is an energy procurement model presented to the Commission as part of the REV proceeding that has potential to support these goals.[4] CCA, which has been implemented in at least six other states, involves local governments procuring energy supply service for their residents on an opt-out basis. As part of a CCA program, local governments can also develop distributed energy resources or otherwise engage in energy planning. Further background on CCA is provided in the attached Staff White Paper.

DISCUSSION

The potential for enabling CCA in New York is evaluated below, including a discussion of legal issues and necessary changes to the Uniform Business Practices (UBP) and potential benefits and risks of CCA. Further information on benefits, risks, and consumer protections possible in CCA appears in the attached Staff White Paper, as does a potential structure for bringing CCA to New York. This discussion is not intended as a final determination. Based on comments received in this proceeding, as well as further research and engagement with stakeholders, the Commission may permit CCA programs under

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[3] Case 14-M-0101, Reforming the Energy Vision, Order Instituting Proceeding (issued April 25, 2014); Case 12-M-0476 et al., Residential and Small Non-Residential Retail Energy Markets, Order Instituting Proceeding and Seeking Comments Regarding the Operation of the Retail Energy Markets in New York State (issued October 19, 2012).

[4] Case 14-M-0101, supra, WG 1 Customer Engagement - Final Report and Attachments (filed July 8, 2014); Technical Conference (held July 10, 2014), available at http://www3.dps.ny.gov/W/PSCWeb.nsf/All/388452EA6857214B85257D2300543AF5?OpenDocument.

standards similar to those described in this Order and the White Paper; permit CCA programs with wholly different standards; or, take other appropriate action.

Potential Benefits of CCA in New York

CCA programs provide a number of potential benefits to residents of the municipalities that adopt them. However, they also create some risks for customers. CCA programs should be enabled in New York only to the extent that the benefits outweigh the risks and appropriate consumer protections are applied.

CCA programs can result in lower prices, more stable prices, and more attractive terms for customers due to the bargaining power that aggregation provides and the municipal or consultant experts who solicit offers and negotiate agreements. CCA programs also allow municipalities to set their own energy goals based on local input. A municipality might focus on price stability, increased clean energy generation, support of local generation, or inclusion of distributed energy resources. Through this sort of local energy planning, municipalities and residents can seek the benefits important to them and participate in the opportunities that REV will offer, while also providing the public policy benefits sought in the REV proceeding. The process of gaining local approval for and implementing CCA programs can also lead to customer education and engagement on energy issues facing New York.

CCA programs do create some risks and require changes to existing Commission policy, including the individual affirmative consent requirement for supply service changes. The protections that can be included in CCA programs may render affirmative consent unnecessary, but such a change in policy requires careful consideration. In addition, while other states have seen positive results from CCA in the form of fixed

commodity prices that are lower than for the utility's default product, as described in the White Paper, none of the states that permit them structure their utility supply charges to fluctuate on a monthly basis in response to market conditions. In New York, a fixed-price contract offered by a CCA can provide pricing certainty as compared to the variable supply charges from the utility. In addition, the scale and reduced marketing costs provided by aggregation may place downward pressure on commodity prices and provide retail customers with the opportunity to enjoy the same lower supply costs obtained by commercial customers. Depending on the circumstances, a fixed price offered by a CCA might result in higher or lower overall costs to customers.

Because CCA has the potential to bring benefits to New York State and supplement the Commission's work in the Retail Access and REV proceedings, serious consideration of CCA is warranted. Through this proceeding, the Commission will gather information from stakeholders and interested parties to develop a thorough understanding of all benefits, costs, and necessary protections. Some further information on those topics appears in the Staff White Paper.

Legal Status of CCA in New York

Enabling CCA programs in New York requires the resolution of several legal and regulatory issues. First, municipalities[5] need to have the authority under state law to

[5] Except as otherwise specified, references in this Order to municipalities include (a) municipalities as defined in the General Municipal Law §2 and (b) groups of municipalities. In addition, many of the functions discussed could be performed by consultants acting on behalf of municipalities or groups of municipalities.

aggregate their residents;[6] solicit bids and negotiate with ESCOs on behalf of their residents; sign a contract that will apply to residents who do not opt out; and, if desired, assign a portion of customer payments to the funding of the construction and operation of distributed energy resources. Second, the Commission would instruct utilities to transfer customer data to municipalities and selected ESCOs as appropriate and to accept enrollment by the selected ESCO of customers who do not opt out. Third, ESCOs would be permitted to enroll customers who have not explicitly affirmed their consent but instead have declined to exercise an opportunity to opt out.

There would be no purpose to enabling CCA programs if municipalities could not legally participate in those programs. Municipalities may find authority to participate in CCA programs in Article 14-A of the General Municipal Law (GML).[7] This Article permits municipal involvement in the provision of gas and electric service to residents. It has been used by municipalities seeking to operate as municipal utilities and by municipalities seeking to provide service to themselves, their residents, or other municipalities by acting as ESCOs. However, nothing in the Article requires that a municipality become a utility or an ESCO to avail itself of the provisions.

Pursuant to GML §360(2), a municipality may "purchase gas or electrical energy from the state, or from any state agency, or other municipal corporation, or from any private or public corporation" for purposes including "furnishing to itself or for compensation to its inhabitants[ ] any service similar to

[6] In general, the terms "residents" and "customers," when used in this Order, refer to residential customers purchasing energy services; small non-residential customers could be treated in a similar manner.

[7] GML §§360-66.

that furnished by any public utility company specified in article four of the public service law." Before doing so, the municipality must pass a resolution or ordinance and hold a referendum as described in GML §360(3)-(7). Municipal corporations may also enter into agreements with each other to make such purchases and provide such service jointly.[8]

While CCA differs in some respects from activities that municipalities have previously engaged in under this Article, these statutory provisions appear to provide municipalities with all the authority necessary to establish and run CCA programs. This analysis provides only an example of how municipalities could engage in CCA, and is not intended to restrict municipalities from developing CCA programs under different grants of authority.

Proposed Revisions to the Uniform Business Practices

Since their inception, the Commission has supervised retail markets and the participants in them. ESCOs must be deemed eligible by the Department as a condition of market participation and can only provide energy service as permitted by Commission orders and policies, as implemented most prominently through the UBP.[9] The Commission's responsibilities include determining when and on what terms customers may be enrolled with an ESCO.

Enabling CCA will require revisions to several provisions of the UBP. To the extent possible, these revisions should only apply to ESCOs and municipalities engaging in CCA programs. In particular, the following changes will be necessary to enable CCA programs: terms like municipality, aggregator, municipal contractor, and CCA program would be

[8] GML §361(2).

[9] Case 98-M-1343, In the Matter of Retail Access Business Rules, Uniform Business Practices.

defined; UBP Section 4 would be expanded to permit transfer of customer data as necessary and appropriate for CCA programs and with appropriate protections; and, provisions would be added to Section 5 to permit enrollment of customers with an ESCO pursuant to a CCA program. In addition, requirements imposed on CCA programs, including with respect to opt-out rules, may be included in the UBP if appropriate.

The Commission orders:

1. A proceeding is instituted to consider enabling Community Choice Aggregation programs in New York. Interested parties are invited to submit comments in conformance with the questions presented and format described in the attached Staff White Paper by February 17, 2015.

2. The Secretary may, in her sole discretion, extend the deadlines set forth in this Order. Any request for an extension must be in writing, must include a justification for the extension, and must be filed at least one day prior to the affected deadline.

3. This proceeding is continued.

By the Commission,

(SIGNED)

KATHLEEN H. BURGESS
Secretary

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2014

(Argued: September 22, 2014 Decided: February 25, 2015)

Docket No. 14-1042-cv

CAROL LEITNER,

Plaintiff-Appellee,

v.

WESTCHESTER COMMUNITY COLLEGE, JOSEPH HANKIN, in his personal and official capacity as President of Westchester Community College, CHET ROGALSKI, in his personal and official capacity as Dean and Vice President of Academic Affairs, JIANPING WANG, in her personal and official capacity as Associate Dean of the Arts and Humanities, GABRIELLE MILLER, in her personal and official capacity as Curricular Chairperson of the Communications and Media Arts Department,

Defendants-Appellants,

WESTCHESTER COMMUNITY COLLEGE FEDERATION OF TEACHERS LOCAL 2431,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Before:

LEVAL, CHIN, and CARNEY, *Circuit Judges.*

Interlocutory appeal from an order of the United States District Court for the Southern District of New York (Seibel, *J.*), denying in part defendants-appellants' motion to dismiss plaintiff-appellee's first amended complaint. The district court held that defendants-appellants -- a community college and certain of its administrators -- are not "arms of the state" entitled to Eleventh Amendment sovereign immunity.

AFFIRMED.

CURTIS B. LEITNER (Catherine M. Foti, *on the brief*), Morvillo Abramowitz Grand Iason & Anello P.C., New York, New York, *for Plaintiff-Appellee.*

DENISE M. COSSU (John M. Murtagh, *on the brief*), Gaines, Novick, Ponzini, Cossu & Venditti, LLP, White Plains, New York, *for Defendants-Appellants.*

CHIN, *Circuit Judge*:

In this case, plaintiff-appellee Carol Leitner was an adjunct professor at Westchester Community College, a community college in the State University of New York ("SUNY") system. She was fired, purportedly for making offensive comments in class. She sued Westchester Community College and certain of its administrators (collectively "WCC"), claiming that they violated her state and federal constitutional rights.

The district court (Seibel, *J.*) granted in part and denied in part WCC's motion to dismiss. In relevant part, the district court concluded that WCC was not entitled to sovereign immunity under the Eleventh Amendment. We agree. Accordingly, we affirm.[1]

STATEMENT OF THE CASE

A. *The Facts*

For purposes of this appeal, the facts alleged in Leitner's first amended complaint are assumed to be true. In addition, the organizational facts relevant to the sovereign immunity question are set forth in the governing statutes and are largely undisputed.

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[1] Leitner also sued her union, Westchester Community College Federation of Teachers Local 2431 (the "Union"), for breach of its duty of fair representation. The district court denied the Union's motion to dismiss, and it is not a party to this appeal.

1. *WCC*

SUNY is a higher education system established by the New York State Education Department, and WCC is a community college within the SUNY system. By statute, SUNY is comprised of four university centers, various technical and specialized colleges, "and such additional universities, colleges and other institutions" as are "acquired, established, operated or contracted to be operated for the state by the state university trustees." N.Y. Educ. Law § 352(3). New York law defines "community colleges" as "[c]olleges established and operated pursuant to the [New York Education Law] . . . and receiving financial assistance from the state." N.Y. Educ. Law § 350(2).

The laws of Westchester County provide that WCC is a "county department." Laws of Westchester County § 164.71. WCC is locally sponsored by Westchester County and is predominately operated by and accountable to county authorities. *See* N.Y. Educ. Law §§ 355, 6306. WCC's Board of Trustees is composed of ten members: four are appointed by the governor of New York, five are appointed by the Westchester County Board, and one is appointed by WCC's student body. WCC's Board appoints WCC's President, adopts the curriculum, and prepares the annual budget, all subject to approval by SUNY's Board. N.Y.

Educ. Law § 6306(2). Judgments against WCC are paid out of its budget, one-third of which is provided by the state. *See* N.Y. Educ. Law § 6304(1).

WCC has adopted a three-step procedure for disciplining faculty members, which is memorialized in a WCC memorandum written in 1983. The memorandum states that if the administration learns of "some difficulty with the performance or decorum of a faculty member," the following disciplinary procedures are followed: (1) an informal meeting with the associate dean, department chairperson, and union representative, followed by a letter summarizing the meeting; (2) if the problem recurs, a second meeting with the parties, after which an administrator will draft a letter detailing the problem and course of remediation; and (3) if the problem persists, a hearing with the parties and WCC's dean, after which the dean may recommend termination of the faculty member. June 3, 1983 Memorandum of John F.M. Flynn.

2. ***Leitner's Employment at WCC***

In 1981, Leitner began working as an adjunct professor at WCC, and for thirty years, she regularly taught classes in "Speech Communication" and "Voice and Diction." In 2004, Leitner had a step-one meeting to address WCC's criticism of "her refusal to lower her academic standards." App. at 504. In 2007,

Leitner had a step-two meeting to address a number of student complaints that Leitner made offensive remarks during class. After this meeting, WCC directed Leitner not to use "any language that [could] be construed as abusive, belittling, humiliating, or insulting" and to "treat every student with courtesy and respect." App. at 505.

In the fall 2010, an incident during one of Leitner's classes led to her step-three meeting, and, ultimately, WCC's termination of her employment. During a class discussion after a student's recitation of a poem, Leitner expressed her approval of Arizona's controversial immigration law and her doubts about the fairness of spending taxpayer money on public services for illegal immigrants. In June 2011, Leitner had a step-three hearing. Based on what WCC contended was a pattern of student complaints and Leitner's continued failure to comply with previous directives to follow WCC's speech code, WCC dismissed Leitner, effective July 6, 2011. Leitner contends that her termination "was the culmination of the administration's longstanding campaign of retaliation against her." App. at 519.

B. *Proceedings Below*

On May 11, 2012, Leitner filed a complaint against WCC alleging that WCC improperly retaliated against her in response to her constitutionally protected in-class speech. Leitner pled First Amendment retaliation claims and as-applied vagueness and overbreadth claims pursuant to 42 U.S.C. § 1983 and Article I, Sections 6 and 8 of the New York State Constitution. In her amended complaint, Leitner added claims against the Union for breach of duty of fair representation and against WCC for violating her rights under the collective bargaining agreement.

WCC moved to dismiss Leitner's complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) arguing, in relevant part, that the court lacked subject matter jurisdiction, the complaint failed to state a claim upon which relief could be granted, and that WCC was entitled to immunity. Ruling from the bench on March 24, 2014, the district court, in relevant part, held that WCC was not entitled to sovereign immunity under the Eleventh Amendment. On April 4, 2014, WCC filed this interlocutory appeal challenging the district court's denial of sovereign immunity.

DISCUSSION

A. *Applicable Law*

1. *Jurisdiction and Standard of Review*

Our jurisdiction is generally limited to hearing "final decisions of the district courts." 28 U.S.C. § 1291. We do, of course, have jurisdiction to hear appeals from the small class of non-final "collateral" district court orders that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). District court orders rejecting Eleventh Amendment sovereign immunity claims fall within this small class of collateral district court orders. Hence, we have jurisdiction to hear this appeal. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993); *Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 235 (2d Cir. 2006).

In considering whether a governmental entity is entitled to Eleventh Amendment sovereign immunity, we review the district court's factual findings for clear error and its legal conclusions *de novo*. *McGinty v. New York*,

251 F.3d 84, 90 (2d Cir. 2001). All Circuits to have considered the question, including our own, require the party asserting Eleventh Amendment immunity to bear the burden of demonstrating entitlement. *Woods*, 466 F.3d at 237.

2. *Eleventh Amendment Sovereign Immunity*

The Eleventh Amendment generally bars suits in federal court by private individuals against non-consenting states. *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990). This immunity from suit encompasses not just actions in which a state is actually named as a defendant, but also certain actions against state agents and instrumentalities, including actions for the recovery of money from the state. *See Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997); *Hans v. Louisiana*, 134 U.S. 1, 15 (1890). The question is whether the state instrumentality is independent or whether it is an "arm of the state." *See Alden v. Maine*, 527 U.S. 706, 756 (1999). Sovereign immunity does not, however, extend to local governments or municipalities. *See id.*

The Supreme Court has not articulated a clear standard for determining whether a state entity is an "arm of the state" entitled to sovereign immunity, and the Circuits have applied different tests for establishing sovereign immunity. The Supreme Court has emphasized, however, that "the Eleventh

Amendment's twin reasons for being" -- preserving the state's treasury and protecting the integrity of the state -- "remain our prime guide." *Hess v. PATH*, 513 U.S. 30, 47-48 (1994). The first factor, "the vulnerability of the State's purse," is "the most salient factor in Eleventh Amendment determinations." *Id.* at 48.

3. *The Second Circuit's Tests for Sovereign Immunity*

The Second Circuit has applied two different tests to determine whether government entities are "arms of the state" entitled to sovereign immunity under the Eleventh Amendment. The district court noted that, in this case, "it seems the outcome would be the same under either test." Spec. App. at 22.

In 1996, in *Mancuso v. N.Y. State Thruway Auth.*, 86 F.3d 289 (2d Cir. 1996), we applied a six-factor test to determine whether a government entity was an arm of the state: "(1) how the entity is referred to in the documents that created it; (2) how the governing members of the entity are appointed; (3) how the entity is funded; (4) whether the entity's function is traditionally one of local or state government; (5) whether the state has a veto power over the entity's actions; and (6) whether the entity's obligations are binding upon the state." *Id.* at 293 (citing *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391

(1979)). If all six factors point in one direction, the analysis is complete. *See id.* If the factors point in different directions, a court must focus on the two main aims of the Eleventh Amendment, as identified by the Supreme Court: preserving the state's treasury and protecting the integrity of the state. *See id.*; *Hess*, 513 U.S. at 47.

In *Mancuso*, we found the factors relating to the New York State Thruway Authority to point in different directions, and ultimately held that it was not entitled to sovereign immunity because, while closely identified with the state, it was generally self-funded and not under significant state control. 86 F.3d at 296. We have applied this test in cases involving school boards and local school districts, concluding that such entities were not arms of the state entitled to sovereign immunity. *See, e.g.*, *Gorton v. Gettel*, 554 F.3d 60, 62-64 (2d Cir. 2009) (per curiam) (holding that board of cooperative education services was not entitled to sovereign immunity); *Woods*, 466 F.3d at 243-51 (holding that board of education was not entitled to sovereign immunity); *Fay v. S. Colonie Cent. Sch. Dist.*, 802 F.2d 21, 27-28 (2d Cir. 1986), *overruled on other grounds by Taylor v. Vt. Dep't of Educ.*, 313 F.3d 768, 786 (2d Cir. 2002) (holding that school district was not entitled to sovereign immunity); *cf. McGinty*, 251 F.3d at 95-100 (holding that

New York State and Local Employees' Retirement System was entitled to sovereign immunity).

In 2004, in *Clissuras v. City Univ. of N.Y.*, 359 F.3d 79, 82 (2d Cir. 2004) (per curiam), we applied a two-factor test to "guide the determination of whether an institution is an arm of the state: (1) the extent to which the state would be responsible for satisfying any judgment that might be entered against the defendant entity, and (2) the degree of supervision exercised by the state over the defendant entity." *Id.* (quoting *Pikulin v. City Univ. of N.Y.*, 176 F.3d 598, 600 (2d Cir. 1999) (per curiam)) (internal quotation marks omitted).

In *Clissuras*, we held that the New York City College of Technology, a senior college that by statute was part of the City University of New York ("CUNY"), was an arm of the state entitled to sovereign immunity because: (1) the comptroller of the state is responsible for money judgments against a senior CUNY college; and (2) ultimate control over how CUNY is governed and operated rests with the state. 359 F.3d at 81-82. We did not cite *Mancuso* or discuss the six-factor test, and while we have not applied the two-part test in a subsequent precedential opinion, we have continued to cite it in summary orders. *See, e.g., Shibeshi v. City Univ. of N.Y.*, 531 F. App'x 135, 135 (2d Cir. 2013)

(summary order) (affirming finding that CUNY was entitled to sovereign immunity, citing *Clissuras*); *Gengo v. City Univ. of N.Y.*, 479 F. App'x 382, 383 (2d Cir. 2012) (summary order) (same); *Skalafuris v. City of New York*, 444 F. App'x 466, 468 (2d Cir. 2011) (summary order) (citing *Clissuras* to support proposition that CUNY's senior colleges are entitled to sovereign immunity); *Sank v. City Univ. of N.Y.*, 112 F. App'x 761, 763 (2d Cir. 2004) (summary order) (affirming finding that CUNY and City College of New York were entitled to sovereign immunity, citing *Clissuras*).

At the same time, we have continued to apply the *Mancuso* six-part test. *See, e.g., Gorton*, 554 F.3d at 62; *Walker v. City of Waterbury*, 253 F. App'x 58, 60-61 (2d Cir. 2007) (summary order). District courts have continued to apply both tests. *See, e.g., Gengo v. City Univ. of N.Y.*, No. 07-CV-681, 2011 WL 1204716, at *3 (E.D.N.Y. Mar. 29, 2011), *aff'd*, 479 F. App'x 382 (applying the *Clissuras* two-part test); *Innis Arden Golf Club v. Pitney Bowes, Inc.*, 514 F. Supp. 2d 328, 337 (D. Conn. 2007) (applying the *Mancuso* six-part test). Hence, there is a lack of clarity as to whether the *Mancuso* six-part or the *Clissuras* two-part test governs, or whether both can serve simultaneously as useful guides.

4. *Sovereign Immunity for SUNY Community Colleges*

While we have held that SUNY itself is entitled to sovereign immunity because it is "an integral part of the government of the State," *Dube v. State Univ. of N.Y.*, 900 F.2d 587, 594 (2d Cir. 1990) (internal quotation marks omitted), we have yet to decide whether sovereign immunity extends to SUNY's community colleges. Although the district courts in this Circuit have, on several occasions, found that different SUNY community colleges are entitled to sovereign immunity, the cases provide little guidance as to the appropriate analysis. Several district courts have simply cited our finding from *Dube* that SUNY is entitled to sovereign immunity before similarly finding that a SUNY community college enjoys sovereign immunity. *See, e.g., Davis v. Stratton*, 575 F. Supp. 2d 410, 424 (N.D.N.Y. 2008), *rev'd on other grounds*, 360 F. App'x 182 (2d Cir. 2010); *Staskowski v. Cnty. of Nassau*, 05-CIV-5984, 2006 WL 3370699, at *1 (E.D.N.Y. Nov. 16, 2006); *Fabio v. Nassau Cmty. Coll.*, 02-CV 6237 (E.D.N.Y. Feb. 26, 2004). One district court explicitly applied the two-part *Clissuras* test to hold that SUNY Rockland Community College was entitled to sovereign immunity. *Kohlhausen v. SUNY Rockland Cmty. Coll.*, No. 10-CIV-3168, 2011 WL 1404934, at *8 (S.D.N.Y. Feb. 9, 2011).

Other Circuits examining the question whether a particular state's community colleges are entitled to sovereign immunity have conducted detailed inquiries into those colleges' fiscal and governance structures. As in our own *Mancuso* and *Clissuras* tests, such inquiries have focused on how much funding a community college receives from its state government, whether a money judgment against the community college will be borne by the state treasury, the balance between local and state control over the community college, and relevant distinctions that state law draws between community colleges and other governmental entities traditionally entitled to immunity. Given the state-specific nature of these questions, federal courts have unsurprisingly concluded that community colleges in some states are entitled to Eleventh Amendment immunity, while community colleges in other states are not.[2] In general, where a

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[2] *See, e.g., Williams v. Dist. Bd. of Trustees of Edison Cmty. Coll.*, 421 F.3d 1190, 1192-94 (11th Cir. 2005) (finding Eleventh Amendment immunity where all members of Florida community college's board of trustees were appointed by governor, and where state was liable for money judgments against community college); *Hadley v. N. Ark. Cmty. Technical Coll.*, 76 F.3d 1437, 1439-42 (8th Cir. 1996) (finding Eleventh Amendment immunity where Arkansas state legislature identified community college as "state agency" and where state appropriations accounted for 75.1% of college's operating expenses); *Mitchell v. L.A. Cmty. Coll. Dist.*, 861 F.2d 198, 201 (9th Cir. 1988) (finding Eleventh Amendment immunity where state law identified California community colleges as "dependent instrumentalities of the state," where colleges' funding came exclusively from state appropriations and tuition fees set by state, and where some of those tuition fees were re-appropriated by state (internal quotation marks omitted)); *Hander v. San Jacinto Junior Coll.*, 519 F.2d 273, 278-79 (5th Cir. 1975) (finding no Eleventh Amendment immunity where Texas junior college's board of trustees was locally elected and had the power "to issue revenue bonds and to levy . . . taxes," and where state appropriations only supplemented local funding); *see also Griner v. Se. Cmty. Coll.*, 95 F. Supp. 2d 1054, 1059-60 (D. Neb. 2000) (finding no Eleventh Amendment immunity where Nebraska community college's general operating funds did "not come primarily from

community college is predominantly or exclusively dependent on state appropriations rather than local funding, or where the state government controls the college's board of trustees, courts have found the college to be an "arm of the state" and thus entitled to Eleventh Amendment immunity. Absent these conditions, courts have generally declined to extend immunity to community colleges.

B. ***Application***

We apply both the *Mancuso* and *Clissuras* tests. In the end, as we have seen in our review of the cases, the tests have much in common, and the choice of test is rarely outcome-determinative. The *Clissuras* test incorporates four of the six *Mancuso* factors. To the extent that the *Clissuras* factors point in different directions, the additional factors from the *Mancuso* test can be instructive. Here, we address the *Clissuras* factors first and then look to the additional *Mancuso* factors.

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the state treasury," and where there was "neither evidentiary nor statutory evidence that the state of Nebraska would necessarily be liable for payment of a judgment rendered against" college (internal quotation marks omitted)) (distinguishing Nebraska law from Arkansas law analyzed by Eighth Circuit in *Hadley*); *Gardetto v. Mason*, 854 F. Supp. 1520, 1543-44 (D. Wy. 1994) (finding no Eleventh Amendment immunity where Wyoming state legislature had defined "community college districts" as form of "local government," where college's trustees were elected by local voters, and where the college's board had independent power to raise revenue (internal quotation marks omitted)).

1. *State's Responsibility for WCC's Financial Obligations*

The first *Clissuras* factor, and the most important factor in determining whether a state entity is entitled to sovereign immunity, is "whether a judgment against the entity must be satisfied out of a State's treasury." *Hess*, 513 U.S. at 31. This condition is also reflected in the third and sixth *Mancuso* factors, which address how the entity is funded and whether the entity's obligations are binding upon the state, respectively. These considerations weigh against a finding that WCC is entitled to sovereign immunity. WCC receives one-third of its budget from New York State, but the state is not otherwise responsible for WCC's debts or for satisfying judgments against WCC. Rather, Westchester County, which appoints half of WCC's Board of Trustees, has the power to issue bonds and levy taxes to raise funds for WCC. *See* N.Y. Educ. Law § 6304(1)(c). Additionally, if WCC exceeds its budget, the excess is borne by local, not state, sponsors. *See* N.Y. Educ. Law § 6304(1)(c)(3).

Receipt of government funding is relevant in determining whether the state is responsible for judgments against a state entity like a community college. The district court in *Kohlhausen* reasoned that "[t]he absence of an express payment authorization provision suggests that judgments rendered

against the SUNY community college or its employees or trustees in their official capacities are simply paid out of the community college's operating budget, to which the state contributes one-third." 2011 WL 1404934, at *7. Thus, the district court held, "there is some indication that responsibility for money judgments against [the college] rests with the state." *Id.* While WCC -- like the SUNY community college in *Kohlhausen* -- also obtains one-third of its budget from the state, this fact alone is not sufficient to establish state responsibility for a community college's financial obligations.

We have repeatedly held that a school board's receipt of funds from state appropriations is not equivalent to satisfaction of a judgment against the board from the state treasury. *See Woods*, 466 F.3d at 249; *Rosa R. v. Connelly*, 889 F.2d 435, 437-38 (2d Cir. 1989); *Fay v. S. Colonie Cent. Sch. Dist.*, 802 F.2d 21, 27 (2d Cir. 1986), *overruled on other grounds by Taylor v. Vermont Dep't of Educ.*, 313 F.3d 768 (2d Cir. 2002). Indeed, we did not extend sovereign immunity to the school board in *Woods*, which received 39.9% of its funding from the state. 466 F.3d at 245. New York Education Law § 1709(26) clearly provides that where local funds are insufficient to satisfy a judgment against a local board of education, additional funds are obtained not from the state treasury but from levying a local

property tax. *See Woods*, 466 F.3d at 250. While the Education Law provisions governing community colleges are not as explicit, they similarly require local sponsors to levy taxes if a college's budget exceeds the maximum costs allowed by the state. N.Y. Educ. Law § 6304(3) (stating that college is not prohibited from exceeding state's budget so long as "the excess costs over such prescribed limits or allowances shall be borne and paid for or otherwise made available to or by such [local] sponsors"); N.Y. Educ. Law § 6304(5-a) (stating that community college shall "provide for the raising of taxes required by such budget").

We thus conclude that the first *Clissuras* factor -- the state's responsibility for satisfying judgments against WCC -- weighs against a finding that WCC is entitled to sovereign immunity.

2. ***State Control Over WCC***

The second *Clissuras* factor, the extent of the state's control over a community college, also weighs against a finding that WCC is entitled to sovereign immunity. This condition is also reflected in the second and fifth *Mancuso* factors, which consider how the governing members of the entity are appointed and whether the state has veto power over the entity's actions,

respectively. WCC has not demonstrated that these considerations favor a finding that WCC is entitled to sovereign immunity.

WCC is not substantially controlled by the state. The governor appoints four of WCC's ten board members, while the Westchester County Board appoints five members and WCC's student body elects one member. This balance between state and local appointment differs from that at issue in *Clissuras*, where ten of CUNY's seventeen board members were appointed by the state. 359 F.3d at 82. While it is certainly conceivable that the state's control of four votes could yield control of WCC's board, WCC has not met its burden of demonstrating such effective control over board decision-making.

Further, as the district court here emphasized, there is no indication in the record that the state has control over WCC's day-to-day operations. While WCC's officers, curriculum, and budget are subject to board approval and SUNY provides the standards and regulations governing WCC's organization and operation, such powers are not dispositive for sovereign immunity. *See* N.Y. Educ. Law § 6306; N.Y. Comp. Codes R. & Regs. tit. 8, §§ 600.1, 600.2. We have held that state approval, or state veto power, over a state entity is not dispositive for the purpose of sovereign immunity. *See Gorton*, 554 F.3d at 63 (holding that,

while applying *Mancuso* test, board of cooperative educational services was not entitled to sovereign immunity in spite of state's "substantial veto power" over board's decisions); *Woods*, 466 F.3d at 248 (concluding that Commissioner of Education's broad power to remove school officers, withhold funds, and review actions by school board "does not unequivocally equate to veto authority"). Similarly, the state's oversight of WCC here does not equate to state control and thus does not weigh in favor of sovereign immunity. *See Connelly*, 889 F.2d at 437 (stating that state stewardship of education does not transform entity into "alter ego of the state" (quoting *Fay*, 802 F.2d at 27)).

We thus conclude that the second *Clissuras* factor -- the degree of the state's control over the entity -- weighs against a finding that WCC is entitled to sovereign immunity. WCC is not an arm of the state entitled to sovereign immunity under the *Clissuras* test.

3. *Additional* Mancuso *Factors*

The additional *Mancuso* factors support the conclusion that WCC is not entitled to sovereign immunity.

The first *Mancuso* factor -- how the entity is referred to in the documents that created it -- weighs against a finding that WCC is entitled to

sovereign immunity. While SUNY's website designates WCC as part of SUNY, the New York Education Law creates community colleges separately from its creation of SUNY. *See* N.Y. Educ. Law §§ 350, 352. In a case involving the Fashion Institute of Technology ("FIT"), which is statutorily categorized as a SUNY community college, we affirmed the district court's holding that FIT is properly categorized as a community college, statutorily distinct from SUNY. *Mostaghim v. Fashion Inst. of Tech.*, 01-CIV-8090, 2001 WL 1537544, at *2-3 (S.D.N.Y. Dec. 3, 2001), *aff'd sub nom. Mostaghim v. Fashion Inst. of Tech. Student Ass'n*, 57 F. App'x 497 (2d Cir. 2003) (summary order). Here, WCC is also a community college created separately from SUNY by the governing statutory framework.

The fourth *Mancuso* factor -- whether the entity's function is state or local -- similarly weighs against a finding of sovereign immunity. The New York Court of Appeals has held that operation of SUNY community colleges serves a municipal function. *See Grimm v. Rensselaer Cnty.*, 4 N.Y.2d 416, 421 (1958). The New York legislature has also acknowledged the local function of higher education by vesting control of community colleges in boards of trustees that are accountable to local governments rather than the state. *See* N.Y. Educ. Law

§ 6302. Additionally, the New York Court of Claims, which has exclusive jurisdiction over suits against the state, does not have jurisdiction over SUNY community colleges, as such claims "cannot be characterized as being against the State of New York." *Amato v. State*, 502 N.Y.S.2d 928, 929 (Ct. Cl. 1986). All of these considerations confirm that WCC is not a state entity.

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We conclude that a finding of sovereign immunity for WCC would not serve the twin aims of the Eleventh Amendment: immunity would not further the state's interest in preserving its treasury, nor would it protect the integrity of the state. Accordingly, we hold that WCC is not an arm of the state entitled to sovereign immunity under the Eleventh Amendment.

CONCLUSION

Accordingly, the decision of the district court is AFFIRMED.

Links to articles

New York Times article

http://www.nytimes.com/2001/06/26/nyregion/new-york-to-be-first-state-to-ban-holding-cell-phone-while-driving.html

Broome County articles

http://www.wicz.com/news2005/viewarticle.asp?a=37665

http://www.pressconnects.com/story/news/local/2015/04/02/sex-offender-living-limitations/70832460/