SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

BARBARA BOWEN as President of the Professional Staff Congress/CUNY, PROFESSIONAL STAFF CONGRESS/CUNY, LOCAL 2334, AFT, AFL-CIO, SANDI E. COOPER as Chair of the University Faculty Senate, and TERRENCE MARTELL as Vice-Chair of the University Faculty Senate and Chair of the Baruch College Faculty Senate, Plaintiffs, -against- CITY UNIVERSITY OF NEW YORK, and the BOARD OF TRUSTEES of the City University of New York, Defendants.	**Index No. 151021/2012** **Part 61** **(Hon. Anil C. Singh)**

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO CONVERT TO A SPECIAL PROCEEDING AND TO DISMISS THE COMPLAINT

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PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO CONVERT TO A SPECIAL PROCEEDING AND TO DISMISS THE COMPLAINT

Plaintiffs Barbara Bowen, as President of the Professional Staff Congress/CUNY, the Professional Staff Congress/CUNY, Local 2334, AFT, AFL-CIO ("PSC"), Sandi E. Cooper as Chair of the University Faculty Senate, and Terrence Martell as Vice-Chair of the University Faculty Senate and Chair of the Baruch College Faculty Senate (collectively "Plaintiffs'), by their attorneys, Meyer, Suozzi, English & Klein, P.C. and Emery Celli Brinckerhoff and Abady, LLP respectfully submit this Memorandum of Law in Opposition to Defendants' Motion to Convert the Action to a Special Proceeding and to Dismiss the Complaint.

FACTS

1. The Parties

The PSC is the labor union that represents CUNY's faculty and staff. Barbara Bowen is the democratically elected President of the PSC. The University Faculty Senate ("Faculty Senate") is the democratically elected faculty governance body at CUNY. It is comprised of approximately 120 Senators representing CUNY's approximately 19,000 full and part-time faculty. The Faculty Senate is established and operates pursuant to § 8.10 of the CUNY By-Laws, which provides that the Faculty Senate is:

> responsible, subject to the [CUNY] board, for the formulation of policy relating to the academic status, role, rights, and freedoms of the faculty, university level educational and instructional matters, and research and scholarship activities of university wide-import. The powers and duties of the University Faculty Senate shall not extend to areas or

> interests which fall exclusively within the domain of the faculty councils of the constituent units of the university.

CUNY By-Laws, § 8.10, Kolko Aff., Exhibit A.[1] As of the date of the Complaint, Plaintiff Sandi Cooper was the Chair of the Faculty Senate and Plaintiff Terrence Martell was the Vice-Chair of the Faculty Senate. Defendant the City University of New York ("CUNY") is a public university with 11 senior colleges, six community colleges, a law school, a school of professional studies, a graduate center, and a school of journalism. Defendant Board of Trustees of the City University of New York (the "CUNY Board") is, pursuant to Education Law § 6204(1), CUNY's governing body.

2. The Polishook Litigation

In 1995, the CUNY Board adopted a resolution of the Committee on Long Range Planning (the "1995 Resolution"). In item number 27 of the 1995 Resolution ("LRP 27") the CUNY Board changed the number of credits required to obtain a CUNY degree. Later in 1995, Irwin Polishook, in his capacity as then-President of the PSC, Sandi Cooper, in her capacity as then-Chair of the University Faculty Senate, and others commenced an Article 78 action against CUNY, the CUNY Board, and others to challenge the 1995 Resolution. In April, 1996, Supreme Court, New York County vacated the 1995 Resolution and LRP 27, and remanded the matter to the CUNY Board. In December, 1996, the Appellate Division, First Department, affirmed the vacatur of LRP 27, finding that it lacked a rational basis, but otherwise reversed the decision of the Supreme Court. Polishook v. City University of New York, 234 A.D. 2d

[1] A copy of § 8.10 of the CUNY By-Laws is attached as Exhibit A to the Affirmation of Hanan B. Kolko ("Kolko Aff") dated July 19, 2012.

165 (1st Dep't 1996).

In the Polishook decision, the First Department found that the CUNY Board lawfully declared a financial exigency and implemented certain faculty terminations and budget cuts in 1995. It explained that neither courts nor faculty members should be permitted to "second guess the response of university administration to a bona fide financial crisis," and found that the CUNY Board "acted in good faith in declaring the continued existence of financial exigency in June 1995, and in determining that the implementation of various programs, to which petitioners take exception, was crucial to the quality of a CUNY education and, thus, the university's long term success." 234 A.D. 2d at 166.

Discussing LRP 27, however, the Court explained that it "unnecessarily reduces the number of credits required for a degree, and lowers the value of a CUNY diploma, a result which would certainly affect not only the students and faculty members, but also the school's standing and its long term success." Id. at 167. As a result, the Court found that it did not "perceive a rational basis" for LRP 27. Id. Thus, in Polishook, the Court declined to interfere with CUNY's decisions to declare a financial emergency and implement certain budget cuts, but found that LRP 27, the CUNY's Board attempt to reduce the number of credits required to graduate, lacked a rational basis.

The Court of Appeals denied the Polishook petitioners' motion for leave to appeal. 89 N.Y. 2d 814 (1997). It granted CUNY's motion for leave to appeal. 90 N.Y. 2d 802 (1997).

3. The Settlement Agreement

Thus, as of late 1997, the issue before the Court of Appeals was whether the two lower courts correctly struck down a fundamental academic decision made by the CUNY Board of Trustees to reduce the number of credits required to graduate, the decision embodied in LRP 27. Rather than risk a decision on that issue, the parties resolved that litigation in a Settlement Agreement dated November 24, 1997 (the "Settlement Agreement").[2] On or about November 24, 1997, the CUNY Board passed a resolution approving the Settlement Agreement.

The Settlement Agreement provided that if the Board passed the Resolution - which it did - CUNY and the other respondents in the Polishook litigation "will promptly notify the Court of Appeals and take all necessary and appropriate actions to withdraw and discontinue the appeal." Settlement Agreement, ¶2. Thus, by entering into the Settlement Agreement, CUNY ended a litigation which carried with it the risk that the Court of Appeals would uphold the Appellate Division's Polishook decision.

Also, as part of the Settlement Agreement, the Polishook petitioners agreed that LRP 27 "has a rational foundation." Settlement Agreement, 4. This was a significant concession: both the Supreme Court, New York County and the Appellate Division, First Department had found that the CUNY Board's adoption of LRP 27 was not rational and thus unlawful.

Thus, the Settlement Agreement provided CUNY with two valuable pieces of

[2] A copy of the Settlement Agreement and resolution are attached as Exhibit B to the Kolko Aff.

consideration: (a) it eliminated the risk that the Court of Appeals would affirm the two lower courts which struck down LRP 27, and (b) it obtained the Polishook petitioners' agreement that LRP 27 was rational, something which CUNY had been unable to obtain from the Supreme Court, New York County, or the Appellate Division, First Department.

In exchange for that consideration, the Polishook petitioners also obtained valuable consideration: a contractual commitment on the part of CUNY Trustees to adhere to By-Law §§ 8.6 and 8.13,[3] and a contractual commitment by the CUNY Board to "consider" policy made by the Faculty Senate when the Board made "decisions relating to educational matters." Thus, in the Settlement Agreement, the CUNY Board agreed that:

> The Faculty, in accordance with CUNY By-Laws § 8.6, shall be responsible, subject to guidelines, if any, as established by the [CUNY] Board for the formulation of policy relating to the admission and retention of students including health and scholarship standards therefor, student attendance including leaves of absence, curriculum, awarding of college credit, and granting of degrees; that this responsibility is to be exercised through the college Faculty Senates pursuant to Board By-Laws or college governance plans approved by the Board, or the University Faculty Senate in accordance with CUNY By-Laws § 8.13.

Settlement Agreement, 4-5. (emphasis added) The Settlement Agreement continued, quoting § 8.13, which states that:

> There shall be a university Faculty Senate, responsible, subject to the Board, for the formulation of policy relating to

[3] By-Law Sections 8.6 and 8.13 have been renumbered, and are now 8.5 and 8.10. They are attached as Exhibits C and A to the Kolko Aff. Throughout the remainder of this memorandum, we refer to these By-Law sections by the numbers used in the Settlement Agreement, 8.6 and 8.13.

> the academic status, role, rights and freedoms of the faculty, university level educational and instructional matters, and research in scholarly activities of university-wide import. The powers and duties of the University Faculty Senate shall not extend to areas or interests which fall exclusively within the domain of the faculty councils of the constituent units of the university.

Settlement Agreement, 5. Finally, the Settlement Agreement contained the CUNY Board's agreement that "such policies [formulated by the Faculty Senate] will then be considered by the Board or its appropriate committees in making policy decisions relating to educational matters." Settlement Agreement, 5.

4. In Its 2011 Pathways Resolution, The CUNY Board Formulates Policy Regarding Credits, The Awarding Of Degrees, Curriculum, And University Level Educational And Instructional Matters, With No Input From The University Faculty Senate

With no input or involvement by the Faculty Senate, CUNY passed a resolution on June 27, 2011 (the "2011 Resolution") establishing what is often called Pathways.[4] The 2011 Resolution contained, inter alia, the following elements:

- For all CUNY colleges, it establishes a requirement of a "common core" of courses, totaling 30 credits, which all CUNY undergraduates will be required to complete in order to graduate with an A.A., A.A.S, or B.A. degree;
- It requires all CUNY colleges to create a "college option," consisting of 12 credits, which all CUNY students must complete in order to receive a B.A. degree;
- It requires every CUNY college to accept for transfer credit any course taken within the common core for credit at any other CUNY college.

2011 Resolution. The 2011 Resolution, sometimes referred to as Pathways, also created a task force charged with developing credit requirements, course requirements,

[4] A copy of the 2011 Resolution is attached as Exhibit D, to the Kolko Aff.

and degree requirements to implement the 2011 Resolution.

Despite the fact that, under the Settlement Agreement, CUNY agreed that the Faculty Senates "shall be responsible" for the formulation of policy, subject to guidelines, if any, set by the CUNY Board, and despite the fact that pursuant to the 1997 Resolution, once the Faculty Senate formulates policy, "such policies would then be considered by the Board or its appropriate committees in making policy decisions relating to educational matters," CUNY, by its own admission, implemented Pathways without any involvement of the Faculty Senate. Settlement Agreement, 4-5.

5. The Widespread Faculty Opposition To Pathways

Defendants describe problems that CUNY students face in transferring, and the "months of university-wide deliberation and planning" that led up to the adoption of the 2011 Resolution, D Mem 4,[5] and assert in their memorandum that Pathways is a widely supported mechanism for establishing "a structure for the efficient transfer of credits among CUNY colleges," D Mem 2. However, defendants simply ignore the widespread opposition to Pathways among the CUNY faculty.

Plaintiffs do not ask this court to pass on the wisdom of Pathways. However, given CUNY's claim that Pathways is a benign and wise policy designed to enhance the ability of students to transfer, plaintiffs wish to make this court aware of the very substantial faculty opposition to Pathways.

[5] We cite to the "Memorandum of Law in Support of Defendants' Motion to Convert to a Special Proceeding and to Dismiss the Complaint" as D Mem __.

For example, the College of Staten Island ("CSI") Pathways taskforce stated that there was "widespread agreement that Pathways (1) lowers educational standards at CUNY, severely damaging its reputation for academic excellence; (2) violates legally defined and traditional prerogatives of faculty to determine curriculum; and (3) departs from recognized norms of academic freedom, exposing CUNY to national condemnation."[6] The Baruch College Faculty Senate Executive Committee stated that certain elements of Pathways could "undermine Baruch's reputation for quality."[7] The Queensborough Community College ("QCC") Academic Senate passed a resolution which asserted that Pathways "will result in a lowering of academic standards in general education courses," and that Pathways "curricula changes are harmful to the academic reputation of [QCC] and [CUNY]."[8]

The Science Department of the Borough of Manhattan Community College ("BMCC") unanimously passed a resolution stating that Pathways, if implemented, would require the faculty in that department to "eviscerate our courses by eliminating content."[9] The Chairman of the Mathematics Department of the New York City College of Technology advised the Pathways taskforce that "the common general education core as described . . . would greatly weaken the academic value of our career and professional programs . . . . [t]he proposal would seem to require us to accept a random selection of general education courses as counting towards the degree, rather than ones which would strengthen the students' employment prospects. There is also the

[6] A copy of the CSI Pathways Taskforce Statement is attached as Exhibit E to the Kolko Aff.
[7] A copy of the Statement of the Baruch College Faculty Standards Executive Committee on Pathways is attached as Exhibit F to the Kolko Aff.
[8] A copy of the QCC Academic Senate's Pathways resolution is attached as Exhibit G to the Kolko Aff.
[9] A copy of the resolution of the BMCC Science Department is attached as Exhibit H to the Kolko Aff.

danger that students will shop around for the easiest courses . . . undermining the goal of strengthening education."[10]

At the June 18, 2012 CUNY Board Meeting, a number of CUNY faculty members gave testimony explaining their opposition to Pathways. Professor Julie Trachman, Professor of Natural Sciences at Hostos Community College, gave the following testimony:

> We are all in agreement that there are transferability issues in the CUNY system, which need to be resolved. However, many of us feel that the Pathways initiative is not the best way to remedy the problem. We feel that the implementation of the [Pathways mandated] 30-credit common core as it is structured now will have a negative impact on the quality of the education of our students, especially those students at the community college campuses, and particularly when it comes to our students' education in the science disciplines . . . In conclusion, we want to offer our students appropriately rigorous science course that meet their academic needs at the senior colleges, that satisfy their needs for their career aspirations, and that meet society's needs to have scientifically literate citizens. We believe that the Pathways initiative, as it is structured now, will not allow us to do these things for our students.

Trachman testimony, attached as Exhibit J to the Kolko Affidavit.

George D. Sussman, a Professor of History at LaGuardia Community College, gave the following testimony to the Trustees:

> What Pathways tells the student is that academic disciplines, subject matter, or knowledge do not matter. What matters is something the proposal calls "learning outcomes," which

[10]A copy of the statement of the Chair of the Mathematics Department of New York City College of Technology is attached as Exhibit I to the Kolko Aff.

> appear to be unverifiable skills . . . . The Pathways curriculum does not hold students responsible for any specific knowledge. But education cannot separate skills from knowledge. Our understanding of the world advances by the accumulation of knowledge through the disciplines and their fruitful interactions. It is folly to attempt to construct a curriculum, as Pathways does, without the bricks provided by the disciplines. This building cannot stand.

Sussman testimony, attached as Exhibit K to the Kolko Affidavit.

Professor John Pittman, Associate Professor of Philosophy at John Jay College of Criminal Justice, gave the following testimony:

> This initiative substitutes a grab bag of courses for a structured, reasoned approach to general education. It panders to the idea that students should get to choose to study what interests them while gutting their access to the core knowledge base they need to tackle the complexities of advanced study and research.

Pittman testimony, attached as Exhibit L to the Kolko Affidavit.

Kathleen Offenholley, Assistant Professor of Math at the Borough of Manhattan Community College ("BCC"), gave the following testimony:

> Pathways has been billed by its supporters as a way to provide uniformly high standards at CUNY. I am here to testify that in the Mathematics Department at BMCC, it will have quite the opposite effect. . . . Far from being a rigorous new curriculum, Pathways ends up requiring that we provide less math for the students who need it the most.

Offenholley testimony, attached as Exhibit M to the Kolko Affidavit.

Professor K. E. Saavik Ford, an Associate Professor at the Borough of

Manhattan Community College, and a member of the instrument team on the successor to NASA's Hubble Space Telescope, gave the following testimony:

> We are required by Pathways to include a lab in our Science classes – an essential component of any rigorous Science course – but are given only three hours (three credits) per week with our students. Current national best practice is a four-credit class, meeting for at least five hours per week, for non-Science majors. You are asking us to invite national ridicule by shortening our courses at the expense of understanding. In our increasingly scientific and technical world, when people must be scientifically literate to participate in many of our political discussions, cutting time on science leaves our students disenfranchised as citizens of the future. . . . Many "adjustments" have been made to Pathways to correct the worst absurdities – in my own field, we're being asked to design co-requisite Science courses, meeting for six hours per week, worth six credits. This is pure credit inflation, sure to embarrass us on the national stage. No adjustment can fix the fact that you did not properly consult your experts – the elected faculty bodies entrusted with curriculum decisions. . . . I implore you to take the time needed to fix the transfer situation without diminishing the scientific rigor of a CUNY degree. Our students deserve more than three-fifths of a science class.

Saavik Ford testimony, attached as Exhibit N to the Kolko Affidavit.

6. Misstatement In Defendants' "Preliminary Statement" And "Factual And Procedural Background"

In the "Preliminary Statement," and "Factual And Procedural Background" section of defendants' memorandum, defendants make a number of misstatements. We address them here.

a. Misstatements About Faculty Involvement

Defendants assert that "recognizing the faculty's 'special responsibilities for

courses and curriculum,' the Board ensured that faculty members have a significant role in the development and implementation of the Pathways initiative." D Mem 2. It is true that the Resolution gives faculty members a role in the development and implementation of the Pathways initiative. However, Pathways was not based on policy formulated by the faculty, acting through the University Faculty Senate, as required by the Settlement Agreement.

b. Misstatements About Plaintiffs' Position

Defendants assert that in this action, plaintiffs "contend that the Faculty Senates alone have the exclusive ability to make changes to the university's academic policies." D Mem 3. This misrepresents plaintiffs' position. Plaintiffs acknowledge, as they must, that under Education Law § 6204, the Trustees "govern and administer" CUNY, and that "the control of the educational work of [CUNY] shall rest solely in the Board of Trustees which shall govern it and administer all educational units of the City University." Education Law, § 6204(1). However, the nub of this lawsuit is whether the Settlement Agreement allows the CUNY Board to ignore the University Faculty Senate when it decides policy "relating to . . . curriculum, awarding of college credit, and granting of degrees." Settlement Agreement, 5.

Under the Settlement Agreement, CUNY has agreed that the University Faculty Senate is "responsible . . for the formulation of policy" relating to those matters. That is what the By-Laws say, and that is what the Settlement Agreement says. Under the Settlement Agreement, "such policies will then be considered by the Board or its appropriate committees in making policy decisions relating to educational matters."

Settlement Agreement, 5. While it is ultimately the CUNY Board which decides what policy to implement, it is the University Faculty Senate which, in the first instance, formulates that policy. Thus, this lawsuit is not an attempt by plaintiffs to usurp the CUNY Board's statutory authority to run the university. Instead, in this case, plaintiffs seek only to enforce the Settlement Agreement that the CUNY Board entered into, an agreement that gives the faculty, acting through the Faculty Senate, the right to formulate policy for the Board to consider relating to curriculum, the awarding of credit, and the granting of degrees, and obliges the Board to consider that policy.

c. Misstatements About The Holdings In Polishook

Defendants mischaracterize the holding in Polishook. They assert that the Polishook decision dispositively ruled on "the proper role of the faculty in CUNY governance," D Mem, 7.

In Polishook, the issue before the court was whether, in the context of an Article 78 proceeding, the CUNY Board's declaration of a financial exigency and subsequent faculty terminations and budget cuts were "arbitrary or generated by ill will, fraud, collusion or such other motive." 234 A.D. 2d at 166, quoting Klein v. Board of Higher Educ., 434 F. Supp. 1113, 1118. In finding that the CUNY Board's decision to declare a financial exigency and implement certain budget cuts and faculty terminations was lawful, and that CUNY's "long range plan and resolutions" implemented as a part of that were lawful, the Polishook Court noted that it would be inappropriate to allow courts to "second guess the response of university administration to a bona fide financial crisis," 234 A.D. 2d at 166, and found that the CUNY By-Laws did not require the CUNY Board

to "consult with the senior college faculties prior to implementing the long range planning resolutions" which followed from its decision that there was a financial exigency. 234 A.D. 2d at 166-67. The Polishook decision was a narrow one, limited only to the extent to which a court will second guess the university's decision making in the context of a financial exigency.

Defendants also assert that in Polishook, the First Department interpreted the CUNY By-Laws to mean that the CUNY Board "did not have to first consult with the Faculty Senate before implementing academic policy. See Polishook, 234 A.D. 23 at 166-167." D Mem 8-9. The Polishook decision did not mention the phrase "academic policy" and said nothing about the Board's obligation *vis a vis* the Faculty Senate before it implemented academic policy. In fact, to the extent that Polishook explicitly addressed academic policy, it did so in the context of LRP 27, where the Court permitted petitioners to second guess CUNY's decisions regarding the number of credits to be required for graduation and overturned CUNY's action. 234 A.D. 2d at 167.

ARGUMENT

I. PATHWAYS WAS PASSED IN VIOLATION OF THE SETTLEMENT

a. What Does The Settlement Mean, And Why Does Pathways Violate It?

As discussed infra at pages 4 through 6, the Settlement Agreement provides plaintiffs with certain specific rights. Thus, in the Settlement Agreement, CUNY agreed that:

- as a matter of contract, it would comply with By-Laws §§ 8.6 and 8.13;
- "subject to guidelines, if any, as established by the Board," the University Faculty Senate "shall be responsible," "for the formulation of policy relating to . . . curriculum, awarding of college credit, and granting of degrees;"
- the University Faculty Senate is "responsible, subject to the Board, for the formulation of policy relating to academic status, role, rights and freedom of the faculty, university level educational and instructional matters;" and
- "such policies" that are formulated by the University Faculty Senate "will then be considered by the Board or its appropriate committees in making policy decisions relating to educational matters."

Settlement Agreement, 4-5.

These provisions of the Settlement Agreement mean that the University Faculty Senate, in the first instance, formulates policy relating to curriculum, the awarding of college credit, the granting of degrees, and university level educational and instructional matters. The Board must then consider the policy formulated by the Faculty Senate.

Plaintiffs' understanding of the Settlement Agreement is based on its plain language. Thus, under the Settlement Agreement:

- "The faculty . . . shall be responsible . . . for the formulation of policy relating to . . . curriculum, awarding of college credit, and granting of degrees."

Settlement Agreement, 4-5. By its use of the phrase "shall be responsible," the Settlement Agreement makes it a requirement that the faculty have the initial responsibility to formulate policy. By describing the faculty as being responsible for formulating policy relating to "curriculum, awarding of college credit, and granting of degrees," the Settlement Agreement describes the scope of the faculty's responsibility, and makes it clear that the faculty must have responsibility for formulating policy relating

to these subjects.

The Settlement Agreement explains that "this responsibility is to be exercised through the college faculty senates pursuant to Board By-Laws or college governance plans approved by the Board, or the University Faculty Senate in accordance with CUNY By-Laws § 8.13." Settlement Agreement, 5. In the Settlement Agreement, the CUNY Board then agrees to adhere to CUNY By-Law § 8.13, which provides that the University Faculty Senate is "responsible, subject to the Board, for the formulation of policy relating to . . . university level educational and instructional matters." Settlement Agreement, 5. By describing the University Faculty Senate as being responsible for formulating "policy relating to . . . university level educational and instructional matters," the Settlement Agreement describes the scope of the University Faculty Senate's responsibility, and makes it clear that it has responsibility for formulating policy relating to those subjects.

Under the Settlement Agreement and the relevant By-Laws provisions, the CUNY faculty, acting through the University Faculty Senate, exercises these responsibilities "subject to the [CUNY] Board." Under the Education Law, the CUNY Board has ultimate authority over the governance of CUNY. Education Law, § 6204(1) ("The Board of Trustees shall govern and administer the City University".) In light of the CUNY Board's statutory authority and the "subject to" language of the By-Laws, the Settlement Agreement means that, in the first instance, the faculty, acting through the Faculty Senates, has the power to formulate policy, policy which, under the Settlement Agreement, "will then be considered by the Board." Settlement Agreement, 5.

Because Pathways was not formulated by the Faculty Senate, and because it relates to curriculum, the awarding of college credit, the granting of degrees, and university level educational and instructional matters, its passage violates the Settlement Agreement. Given that Pathways applies across the Board throughout CUNY, and given that it relates to directly "educational and instructional matters," it is clear under the Settlement Agreement that the faculty, exercising its responsibility "through the . . . University Faculty Senate," is, in the first instance, to make policy on the issues covered by Pathways, and that the Board must consider that policy.

b. Defendants' Insistence That This Case Must Be Converted To An Article 78 Must Be Rejected Because It Renders The Settlement Agreement A Nullity, And Because It Ignores The Fact That The Settlement Agreement Is A Contract

Under defendants' theory of the case, the Settlement Agreement is meaningless, because, with or without it, plaintiffs' only recourse to remedy the Board's passage of Pathways is an Article 78 proceeding, D Mem 9-16. That is, in CUNY's view, despite the existence of the Settlement Agreement, plaintiffs have no more rights *vis a vis* CUNY than anyone else. However, this theory must be rejected because it renders the Settlement Agreement a nullity. Plaintiffs here are entitled to enforce their contract, the Settlement Agreement, and they are able to do so as a contract action, rather than in an Article 78 proceeding.

Defendants' claim that this dispute must be converted to an Article 78 proceeding ignores the contractual nature of the Settlement Agreement. In entering into the Settlement Agreement, the Polishook plaintiffs provided CUNY with consideration - an acknowledgment that LRP 27 was lawful, and elimination of the risk that the Court of

Appeals would affirm the First Department's Polishook ruling. Given that both the Supreme Court, New York County and Appellate Division, First Department had found that LRP 27 was unlawful, this was significant consideration. In exchange, the Polishook plaintiffs received something which they did not have before – a contractual commitment on the part of CUNY to adhere By-Laws §§ 8.6 and 8.13, and a contractual commitment on the part of CUNY to consider policies formulated by the University Faculty Senate when "making policy decisions related to educational matters." Settlement Agreement, 4-5. CUNY's theory of the case here vitiates this, and thus must be rejected.

c. The Settlement Agreement Embodies And Is Informed By The Well Established Principle Of Shared Governance

The Settlement Agreement, which by its terms makes the faculty, acting through the University Faculty Senate, "responsible" "for the formulation of policy relating to . . . curriculum, awarding of college credit, and granting of degrees . . . [and] university level educational and instructional matters," was entered into within the context of the well-established principle in higher education of shared governance. Settlement Agreement, 4-5. Shared governance is explained in a joint statement issued by the American Association of University Professors ("AAUP"), the American Council on Education ("ACE") and the Association of Governing Boards of Universities and Colleges ("AGBUC"), which states, in relevant part:

> The faculty has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process. On these matters the power of review or final decision lodged in

> the governing board or delegated by it to the president should be exercised adversely only in exceptional circumstances, and for reasons communicated to the faculty.

Joint Statement of AAUP, ACE, AGBUC attached as Exhibit O to the Kolko Affidavit.

Similarly, the AAUP statement "On the Relationship of Faculty Governance to Academic Freedom" provides that:

> . . . Since the faculty has primary responsibility for the teaching and research done in the institution, the faculty's voice on matters having to do with teaching and research should be given the greatest weight. From that idea flow more specific principles regarding the faculty's role....Since such decisions as those involving choice of method of instruction, subject matter to be taught, policies for admitting students, standards of student competence in a discipline, the maintenance of a suitable environment for learning, and standards of faculty competence bear directly on the teaching and research conducted in the institution, the faculty should have primary authority over decisions about such matters – that is, the administration should "concur with the faculty judgment except in rare instances and for compelling reasons which should be stated in detail." [quoting the AAUP's 1966 Statement on Government of Colleges and Universities]

AAUP Statement "On the Relationship of Faculty Governances to Academic Freedom" attached as Exhibit P to the Kolko Affidavit.

Thus, the Settlement Agreement is informed by the concept of shared governance, a well-known concept under which the faculty first formulates policy relating to curriculum, "those aspects of student life which relate to educational process," "standards of student competence in a discipline," and the awarding of credit and degrees. Settlement Agreement, 4-5.

II. CONTRARY TO DEFENDANTS' CLAIM, PLAINTIFFS ARE ENTITLED TO ENFORCE THE SETTLEMENT AGREEMENT IN A CONTRACT ACTION RATHER THAN AN ARTICLE 78 PROCEEDING

a. Plaintiffs Are Enforcing A Contract

Defendants argue that "plaintiffs' claims are based on an alleged violation of the By-Laws and, thus, can only be brought in an Article 78 proceeding." D Mem 11, 11-14. This argument mischaracterizes the nature of plaintiffs' claim, and must be rejected.

Plaintiffs' complaint asserts two causes of action. The first cause of action asserts that "defendants' approval and implementation of the taskforce's proposal to the Chancellor was a breach of the Settlement Agreement." Complaint, ¶56. The second cause of action asserts that "the passage of the 2011 Resolution was a breach of contract by defendants." Complaint, ¶63. While it is true that plaintiffs' breach of contract claims were triggered by actions undertaken by the CUNY Board which also violated the By-Laws, it is also true that, unlike parties who generally might bring an Article 78 proceeding to challenge CUNY's violation of the By-Laws, plaintiffs here have the Settlement Agreement – a contract – in which CUNY committed to adhering to the By-Laws. The mere fact that CUNY's contract violation is also a violation of its own By-Laws does not require plaintiffs to forego enforcement of their contract claim. Thus, the fact that an Article 78 proceeding is appropriate for a party to challenge CUNY's violation of the By-Laws is not relevant here, because, unlike any other party, plaintiffs here have a contract, the Settlement Agreement, and thus are suing on that contract.

b. As A Matter Of Law, Plaintiffs Can Bring This Case As A Contract Action

Defendants argue that, as a matter of law, plaintiffs cannot enforce the

Settlement Agreement in a contract action. Instead, in their view, "the 2011 Resolution is only subject to limited review and only through an Article 78 proceeding," under the "university cases" doctrine. D Mem 9. We explain here why the defendants are wrong. Courts have repeatedly found that a contract claim may lie against a university, and do not require such claims to be shoehorned into an Article 78 proceeding, even where those claims involve issues of academic judgment.

Thus, in Polakoff v. Saint Lawrence University, No. 95-CV-1660, 1996 U.S. Dist. LEXIS 12292 (N.D.N.Y. August 16, 1996), plaintiff, a professor who was denied tenure, sued, alleging a number of causes of action arising out of the university's decision to deny her tenure. One of her claims was a contract claim, relying on the university's faculty handbook. Id. at *16. The defendant there "criticize[d] plaintiff for ignoring the relevant authorities addressing this type of contract issue in the academic setting," but the court disagreed. Id. at *18. It explained that "the court is not persuaded that contract disputes in the academic setting are necessarily different, or require a different analysis, from those in other settings. Id. at *18 (emphasis supplied). The Court then proceeded to analyze the faculty handbook to determine whether or not it created a contract, and ultimately denied the university's motion for summary judgment on the contract claim. Id. at *19-22.

Similarly, in Romer v. Board of Trustees of Hobart and William Smith Colleges, 842 F. Supp. 703 (W.D.N.Y. 1994) - a case which defendants cite, D Mem at 11, the plaintiff, a former professor, sued, asserting a number of causes of action arising out of his denial of tenure, including a claim that the college breached its contractual obligation

to him, an obligation which plaintiff asserted arose from a handbook. The Romer defendants, like the defendants here, argued that the contract claim should be treated as an Article 78 proceeding. Id. at 707. However, the Romer court rejected this argument, explaining that "Article 78 is not the exclusive remedy for all relief sought against a college. A cause of action based on a contract may be brought (and sometimes can only be brought) in an action at law rather than in an Article 78 proceeding." Id. The Court then proceeded to analyze "whether plaintiff has truly stated a contract claim." Id. Thus, like Polakoff, and contrary to defendants' assertions here, Romer stands for the proposition that even where a plaintiff seeks to challenge core academic decisions by a university, a contract claim lies, and that claim need not be converted into an Article 78 proceeding.

In Gertler v. Goodgold, 107 A.D. 2d 481 (1st Dep't 1985), aff'd 66 N.Y. 2d 946 (1985), plaintiffs sued, bringing four causes of action against his employer, New York University, arising out of its decision to deny him tenure. Id. at 482-83. One of his causes of action asserted a contract claim. The court did not convert his contract claim to an Article 78 claim. Instead, it examined whether or not a contract existed, found that no contract existed, and dismissed his contract claim on that basis. Id. at 485.

In Maas v. Cornell University, 94 N.Y. 2d 87 (1999), a case cited by defendants, D Mem 9, plaintiff, a professor at Cornell University, brought a breach of contract claim against the university, alleging that the university breached a contract with him by failing to follow the procedures it had established for the resolution of sexual harassment claims. Under the theory advanced by defendants here, there was no reason for the

Maas court to determine whether a contract existed: instead, the contract claim against the university was beyond judicial review, and without evaluating the merits of it, the court in Maas should have converted the case to an Article 78.

That is not what the Maas court did. Although it dismissed his claim, it did so because it found that the university "cannot be held to have contractually bound itself to follow these internal rules when it hired Maas." Id. at 93. This conclusion was based on the court's evaluation of Maas's contract claim, its evaluation of whether Maas demonstrated the existence of an implied-in-fact contract, as defined in the Restatement (Second) of Contracts, and its detailed analysis of the code which Maas asserted created a contract. Id. at 93-94. Thus, Maas stands for the proposition that a contract claim can be asserted against the university, that a court is not required to convert such a claim to an Article 78 proceeding, and that, instead, the court is to examine the merits of the contract claim to determine whether it can proceed.

Defendants' reliance on Klinge v. Ithaca College, 244 A.D. 2d 611 (3d Dep't 1997) is misplaced. D Mem 21. There, plaintiff, a professor, was dismissed for alleged plagiarism. He sued, alleging, *inter alia*, a breach of his employment contract. Contrary to the position advanced by defendants here, the Klinge court did not insist that his contract claim be treated as an Article 78 proceeding. Instead, the court reviewed the contract, determined that plaintiff was terminated in compliance with the contract, and, only at that point, applied the Article 78 "restricted role" in reviewing the college's decision. Id. at 613. Thus, if anything, Klinge stands for the proposition advanced by plaintiffs here: where a party brings a contract claim against a university, it is

appropriate for the court to address the merits of that contract claim.

In Roklina v. Skidmore College, 268 A.D. 2d 765, 766 (3d Dep't 2000), plaintiff asserted a contract claim arising out of defendant college's denial of tenure. Rather than convert the action to an Article 78 proceeding, the court analyzed plaintiff's contract claim on its merits. In Roufaiel v. Ithaca College, 241 A.D. 2d 865, 867 (3d Dep't 1997), plaintiff sued, alleging a breach of contract claim arising out of his denial of tenure. Like defendants here, defendants in Roufaiel argued that plaintiff could bring that claim only as an Article 78 proceeding. The lower court disagreed. On appeal, defendants argued "the Supreme Court erred in determining that plaintiff could pursue her breach of contract causes of action instead of a CPLR Article 78 proceeding." Id. The Appellate Division disagreed, examining whether a contract in fact existed, and determining that one did. See id.

c. The "University Cases" Doctrine Does Not Require This Case To Be Converted To An Article 78 Proceeding

CUNY argues that "plaintiffs' claims go to the very heart of CUNY's ability to conduct its own internal affairs and so are squarely within the 'university cases' doctrine . . . . [and] judicial review . . . of this authority is only properly available under CPLR Article 78." D Mem 12. This is simply not so.

In arguing that plaintiffs cannot bring a contract claim to enforce the Settlement Agreement, but must instead bring an Article 78 proceeding, defendants misstate the law. Thus, defendants cite Fils-Aime v. Ryder TRS, Inc., 11 Misc. 3d 679, 682-83 (Sup. Ct. Nassau County 2006), aff'd 40 A.D. 3d 914 (2d Dep't 2007) for the proposition that a

contract claim against a university is permitted only if it has "'nothing to do with how the university conducts its own affairs,' and [is] 'remote from the university's internal academic and campus management.'" D Mem 12, citing Fils-Aime, 11 Misc. 3d at 682. Defendants mischaracterize the Fils-Aime holding.

The Fils-Aime language quoted by defendants was from the court's discussion of a policy under which a university agreed to indemnify certain university volunteers. Discussing that policy, the Court explained:

> A review of the policy demonstrates that it is framed much like any liability insurance policy; it identifies the persons covered, specifically excludes certain acts, and provides procedures to be followed by persons seeking such coverage. It also provides that it does not apply to any action or proceeding brought against an individual by Cornell itself. It thus is directed to protecting members of the university community from the claims of third parties, which, as in the present case, might have nothing to do with how the university conducts its own affairs.

11 Misc. 3d at 682. Thus, in using the phrase "have nothing to do with how the university conducts its own affairs," the court in Fils-Aime was simply describing the Cornell indemnification policy at issue in that case. It said nothing there about the type of claims that, as a matter of law, could be asserted against a university in a contract action. The Fils-Aime court described the claim there as one involving "issues even more remote from the university's internal academic and campus management affairs than Tedeschi [Tedeschi v. Wagner, 49 N.Y. 2d 652 (1980).]" 11 Misc. 3d at 682. Again, while the court in Fils-Aime was comparing the cause of action there to another cause of action, it simply did not opine on what types of contract claims could be

brought against a university. Thus, Fils-Aime does nothing to help defendants' claim that this case must be converted into an Article 78 proceeding.

In making its argument that the "university cases" doctrine requires this matter to be converted to an Article 78 proceeding, and that the Article 78 standard applies to the evaluation of plaintiffs' claim, defendants cite a series of cases where students asked courts to second guess their colleges' decisions to impose discipline or regarding student academic performance. These cases are simply not on point.

Defendants cite Eidlisz v. New York Univ., 15 N.Y. 3d 730, 732 (2010) for the proposition that a court will allow a contract claim against a university "only to the extent the challenged decision was purely financial and did not involve academic considerations." D Mem 12. This assertion misstates the holding in Eidlisz. In Eidlisz, plaintiff, who started as a student at the NYU Dental School in 1993, "was granted re-admission to the school as part-time student for the academic year 2002 - 2003 in a letter, . . . stating that he would receive the school's degree upon successful completion of three specified courses for which he would be assessed tuition based on the number of credits per course." Eidlisz v. New York Univ., 61 A.D. 3d 473, 474 (1st Dep't 2009). Plaintiff there alleged that the university violated the commitment made to him in that letter, and asserted a contract claim based on the terms of that letter.

The Eidlisz court made two holdings relevant to this case. First, it acknowledged the possibility that plaintiff could bring a contract claim against the university, stating that "more information is necessary in order to ascertain whether there has been an implied contract between the parties and, if so, whether the parties satisfied their respective

obligations under such implied agreement." Eidlisz, 15 N.Y. 3d at 732. Second, it stated that "if . . . defendant's decision [not to award plaintiff a degree] was in fact based upon plaintiff's academic performance, the action should have been brought as a proceeding under Article 78, subject to review solely for arbitrariness or irrationality [citation omitted] and would be untimely." Id. Thus, Eidlisz stands only for the proposition that where a student challenges a university's evaluation of his academic performance, the Article 78 standard applies. However, that is not the situation here, so Eidlisz does not bar plaintiffs' contract claim here.

Defendants cite Tedeschi v. Wagner College, 49 N.Y. 2d 652 (1980) for the proposition that "judicial review of academic and administrative decisions by universities is even more restricted than review of disciplinary decisions." D Mem 21. But the issue before the court in Tedeschi was "the effect of guidelines or rules published by a private educational institution upon its right to suspend a student." Id. at 655. The entire thrust of the court's decision was to determine (a) what theory of law applied to cases involving a college's suspension or expulsion of a student, (b) the different standards that applied when a college suspended a student for academic reasons, as opposed to non-academic reasons, and (c) the applicability of those principles to the facts in the case there. Id. at 657-62. The court there said nothing about any topic other than the suspension and expulsion of students. Tedeschi has no applicability here.

Defendants cite Mtr. of McIntosh v. Borough of Manhattan Comm. Coll., 55 N.Y. 2d 913 (1982). D Mem 21. There, the court rejected a student's claim that the college violated her due process rights by refusing to round her failing grade of 69.713 to a

passing grade of 70, and rejected her claim that a particular question on a test was arbitrary and capricious. Id. at 915. McIntosh does not apply here.

Defendants cite Olsson v. Board of Higher Educ., 49 N.Y. 2d 408, 413 (1980) for the proposition that "courts traditionally exercise 'the utmost restraint in applying traditional legal rules to disputes within the academic community.'" D Mem 21. In Olsson, the issue before the court was whether a student's reliance on a professor's "misleading statement regarding the institution's grading criteria" warranted a conclusion that the college "may be estopped from asserting that the student has not fulfilled the requirements for graduation." 49 N.Y. 2d at 411.

In commenting on whether a college, the principal, can be bound by the misstatements of its agent, the professor, "when the latter is clothed with a mantle of apparent authority," the Court of Appeals stated that "hornbook rules cannot be applied mechanically where the 'principal' is an educational institution and the result would be to override a determination concerning a student's academic qualifications. Because such determinations rest in most cases upon the subjective professional judgment of trained educators, the courts have quite properly exercised the utmost restraint in applying traditional legal rules to disputes within the academic community." Id. at 413. The Olsson court was explaining the need to apply "the utmost restraint" in the context of making determinations "concerning a student's academic qualifications," Id., and thus Olsson says nothing of relevance to this case.

Defendants cite Stone v. Cornell University, 126 A.D. 2d 816 (3d Dep't 1987). D Mem 21. In Stone, a high school student attending the Cornell summer program

admitted to smoking marijuana and consuming alcohol while at the program. The university expelled her from that program, because she violated the summer program's code of conduct, which provided that use or possession of alcohol and other drugs "'is grounds for immediate dismissal.'" Id. at 817. She sued, arguing that her dismissal violated her right to due process and New York Constitution, Article 1 § 6. Finding that the student admittedly violated the applicable code of conduct, the Third Department upheld her dismissal. Stone has no applicability here, where CUNY entered into a settlement agreement under which it agreed that the faculty, acting through the university senate, would have the right to first formulate policy relating to academic matters, degree granting, and student credit, and then ignored that settlement agreement.

Defendants cite Sabin v. SUNY Maritime College, 92 A.D. 2d 831 (1st Dep't 1983). D Mem 21. In Sabin, the court upheld a college's dismissal of a student for "alleged vandalism and possession of drug related paraphernalia, as well as [his] overall record, including his lack of sobriety." 92 A.D. 2d at 832. The court found that the college's decision to expel the student was made "upon the exercise of honest discretion after a full review of the operative facts," and a hearing conducted by the university where the student was "represented by counsel, had a full and fair opportunity to contest the charges, present relevant proof and cross-examine[d] witnesses." Id. at 832. Thus, Sabin – a case where the student asked a court to second guess a disciplinary decision made by a university after a full hearing - has no application here.

Matter of Patti Ann H. v. New York Medical College, 88 A.D. 2d 296 (2d Dep't

1982), cited by defendants, D Mem 10, 21, is also not applicable. There, a student brought an Article 78 proceeding challenging her dismissal from New York Medical College. She was dismissed because she failed four of her six freshman courses. The Appellate Division ruled that because the student had an administrative appeal through the Commissioner of Education, "special term should have refrained from exercising jurisdiction in this matter until after petitioner had sought review by the Commissioner of Education of her dismissal from the medical college." Patti Ann, 88 A.D. 2d at 300.

Defendants assert that Patti Ann stands for the proposition that "judicial review of 'judgment[s] rendered within [an] . . . academic milieu' is limited." D Mem at 21, quoting Patti Ann, 88 A.D. 2d at 301. However, defendants' quotation from Patti Ann omits the full quoted sentence. In full, the sentence reads as follows: "The college's decision did not demonstrate bad faith, arbitrariness or irrationality. It was based on a proper and legitimate, though subjective, judgment rendered within a professional and academic milieu." Patti Ann, 88 A.D. 2d at 296. While we do not dispute the uncontroversial principal in Patti Ann - that there should be limited judicial review when a college dismisses a student who failed four of her six freshman courses - that principle simply has no applicability here.

Defendants quote Susan M. v. New York Law School, 76 N.Y. 2d 241 (1990), for the proposition that "'strong policy considerations militate against the intervention of courts in controversies relating to an educational institutions' judgment [.]'" D Mem 21, quoting Susan M., 76 N.Y. 2d at 245. This is also an incomplete quotation. The full quotation is: "Strong policy considerations militate against the intervention of courts in

controversies relating to an educational institution's judgment of a student's academic performance." Susan M., 76 N.Y. 2d at 245. (emphasis supplied). In Susan M., the issue before the court was whether a law school acted arbitrarily in dismissing a student for having a cumulative average of 1.89, where the school's rules provided that a student could be dismissed if she had a cumulative average of 2.0 or below. Susan M. does not stand for the generalized proposition which defendants advance: instead, it stands for a more limited proposition - that courts should not second guess a university's decisions concerning student performance, a principle which simply has no applicability here. This series of cases addressing student challenges to discipline and academic standing says nothing about a situation, such as this one, where a university voluntarily enters into an enforceable contract requiring faculty to formulate policy regarding academic standards and curriculum.

III. THE COMPLAINT STATES A CAUSE OF ACTION

Defendants argue that "the complaint fails to state a claim for relief because the Board has the ultimate and independent authority to govern the academic policy of CUNY." D Mem 20, 20-28. We explain here why this argument is wrong.

a. The First Department's Polishook Decision Does Not Undercut Plaintiffs' Contract Claims, Which Are Based On The Post-Polishook Decision Settlement Agreement

A linchpin of defendants' assertion that the complaint does not state a claim is their argument that "plaintiffs' contention that academic policy at CUNY must be first formulated by the faculty senates before the Board can act was directly rejected by the

First Department in Polishook. 234 A.D. 2d at 166." D Mem 20. This argument must be rejected because in this lawsuit, plaintiffs seek to enforce the Polishook Settlement Agreement. The Settlement Agreement was entered into eleven months after the First Department decided Polishook. Thus, whatever the First Department's Polishook decision stands for - a decision issued on December 19, 1996 - it cannot possibly shed light on the meaning of the Settlement Agreement, which was entered into in November, 1997, eleven months later.

In addition, Polishook simply does not stand for the proposition asserted by defendants. As the court there explained, the issue was whether, in an Article 78 context, the "Board of Trustees' declaration of a continued financial exigency in June 1995, and the subsequent faculty terminations in budgetary cuts," were made "in good faith, based upon facts and circumstances which [the Trustees] believe[d] [were] in the school's best interests, and there [was] no showing that the acts 'were arbitrary or generated by ill will, fraud, collusion or such other motives'" 234 A.D. 2d 166. The court there rejected the Polishook plaintiffs' invitation "to second guess the response of university administration to a bona fide financial crisis." Id., internal citations omitted. To the extent that the Polishook court addressed matters of academic policy, it rejected LRP 27, and agreed with the petitioners there that the CUNY Board's decision to reduce the number of credits required for graduation was unlawful. Thus, in fact, the Polishook decision struck down the CUNY Board's academic determination. In addition, a review of the language of that decision makes it clear that it said nothing about the role of the Faculty Senate *vis a vis* the Board in terms of formulating academic policy.

b. The By-Laws Do Not Give CUNY The Power To Ignore The Settlement Agreement

Defendants argue that plaintiffs fail to state a cause of action because the CUNY Board has "ultimate," "independent," and "unfettered" power to "make academic policy for CUNY." D Mem 22-24. This argument must be rejected because it relies on a misreading of the By-Laws and is an attempt to evade the Settlement Agreement which defendants entered into.

Under By-Laws § 8.6 - which CUNY agreed to adhere to in the Settlement Agreement - the faculty is "responsible, subject to guidelines, if any, as established by the [CUNY] Board for the formulation of policy relating to . . . curriculum, awarding of college credit, and granting of degrees." CUNY offers no evidence that the CUNY Board has issued any such guidelines. Thus, in this case, the "subject to guidelines, if any" language in § 8.6 does not help CUNY.

The language in § 8.13 - that, acting through the Faculty Senate, the faculty is "responsible, subject to the [CUNY] Board, for the formulation of policy relating to . . . university level educational and instructional matters" – means simply that it is the Board that has the ultimate decision-making authority. However, given that both § 8.13 and § 8.6 state that the faculty is "responsible" for formulating policy, it is clear that they envision a role for the faculty, acting through the Faculty Senate, in the creation of policy.

Defendants assert that the complaint "repeatedly omits the 'subject to' clause when it quotes the By-Laws," and contend that "an ellipsis is not an argument." D Mem

25. Defendants' claim that plaintiffs are misleading the court by omitting the "subject to" language from the Complaint is wrong. That language is explicitly quoted in seven different paragraphs of the complaint. See Complaint, ¶¶4, 28, 29, 30, 31, 60 and 61.

In an effort to escape the language of the Settlement Agreement, defendants point to the fact that other members of the CUNY community have certain powers under other By-Laws provisions. D Mem 25-26. As an initial matter this fact does nothing to relieve CUNY of tis contractual responsibilities under the Settlement Agreement. In addition, the By-Laws cited by defendants are inapposite. Thus, they cite to By-Law § 15.7, which provides that the university student senate is "responsible, subject to the Board, for the formulation of university wide student policy relating to the academic status, role, rights and freedoms of the student."[11] This is irrelevant, as it says nothing about the formulation of policy relating to curriculum, credit, or the awarding of degrees. Defendants cite to By-Law § 4.2, which addresses the "function of the Council of [college] Presidents." However, the language in § 4.2 cuts against defendant's argument here. While §§ 8.6, 8.13, and the Settlement Agreement provide that the faculty, acting through the Faculty Senate, "shall be . . . responsible" for the "formulation of policy," the language in § 4.2 does not state that the Council of Presidents has any responsibility; instead, it states that the function of the Council of Presidents is to "advise the Chancellor" concerning "the formulation and periodic revision of a coordinated master plan for a system of public higher education for the City of New York." CUNY By-Law § 4.2, Kolko Aff., Exhibit R. Nothing in § 4.2 detracts from the faculty's rights under § 8.6 and 8.13.

[11] By-Law § 15.7 is attached as Exhibit Q to the Kolko Aff.

In arguing that "the faculty's ability to formulate academic policy to recommend to the Board" is not a right which is "exclusive to the faculty," defendants point to By-Law § 11.2, which defines the powers of the CUNY Chancellor. D Mem 25. Section 11.2 states that the Chancellor "shall have the following duties and responsibilities: (a) to initiate, plan, develop and implement institutional strategy and policy on all educational and administrative issues affecting the university, including to prepare a comprehensive overall academic plan for the university, subject to the Board's approval; and to supervise a staff to conduct research, coordinate data, and make analysis and reports on a university wide basis." By-Law § 11.2, Kolko Aff., Exhibit S, quoted at D Mem 25.

A comparison of §§ 11.2, 8.6 and 8.13 demonstrates that the Faculty Senate and the Chancellor have different responsibilities. Under §§ 8.6 and 8.13, the Faculty Senate has responsibilities for formulating policies relating to "curriculum, awarding of college credit [and] granting of degrees." Those specific responsibilities are missing from the list of responsibilities which the Chancellor has. Given that, in the Settlement Agreement, CUNY agreed that faculty is to exercise this responsibility "through the college Faculty Senates pursuant to Board By-Laws or college governance plans approved by the Board, or the Faculty Senate, and in accordance with CUNY By-Law § 8.13," Settlement Agreement, 5, the fact that the Chancellor has some powers cannot be read to vitiate the rights which the faculty, acting through the Faculty Senate, has under the Settlement Agreement.

Defendants cite to By-Law §§ 4.2, 11.2, and 15.7, and Matter of Perez v. City University of NY, 5 N.Y. 3d 522 (2005) for the proposition that, as used by By-Law

§§ 8.6 and 8.13, the term "'formulation' does not mean the exclusive right to originate policy." D Mem 26. This argument must be rejected.

First, nothing in By-Law §§ 4.2, 11.2 or 15.7 addresses the role of the faculty. Indeed, as discussed at pages 35 through 36, the plain language of these By-Law Sections do not affect the right of the faculty to formulate policy.

Second, Perez does not support this argument. Defendants argue that Perez stands for the proposition that "formulation does not mean the exclusive right to originate policy." D Mem 26. Defendants are wrong. In Perez, the court explained that a college faculty senate had the power "to recommend policy on all college matters"; it "is to review proposals for and recommend the creation of new academic units and programs of study"; it "must be consulted prior to any additions or alterations to the college's divisions"; and "it is the only body that can initiate changes to the college governance charter." 5 N.Y. 3d at 526, 529. Indeed, the court described the college senate as "the sole legislative body on campus authorized to send proposals to the CUNY Board of Trustees." Id. at 530. Based in part on these powers, the court found that the college faculty senate was subject to the open meeting law. In light of this, if there is any implication to be drawn from Perez, it is that the power to "formulate" policy can mean the "sole" power to initiate such policy. Id. at 529-30.

c. The Education Law Does Not Give CUNY The Power To Ignore The Settlement Agreement

Defendants argue that the Education Law allows them to ignore the Settlement Agreement. D Mem 22. However, the relevant provisions of the Education Law cited

by defendants are not on point here. And nothing in the Education Law permits the CUNY Board of Trustees to refuse to adhere to a valid contract. It is true, as defendants assert, that under Education Law § 6206(7)(a), the CUNY Board "shall . . . establish and conduct courses and curricula." However, in exercising this power, the CUNY Board issued By-Laws and entered into the Settlement Agreement. Under the By-Laws and the Settlement Agreement, the CUNY Board ceded to the faculty, acting through the Faculty Senate, the right to initially formulate educational policy, and policy relating to curriculum, the granting of degrees, and academic credit, and agreed that such policy "will then be considered by the Board . . . in making policy decisions relating to educational matters." Settlement Agreement, 5. Thus, defendants' citation to the Education Law simply turns a blind eye to the fact that the CUNY Board, acting pursuant to its statutory authority, made a contractual commitment to vest certain authority with the University Faculty Senate. It is this authority, lawfully vested in the University Faculty Senate, which plaintiffs seek to enforce here.

Matter of Mendez v. Reynolds, 248 A.D. 62 (1st Dep't 1998) cited at D Mem 23, 24, and 26 also does not help defendants here. The only issues before the court there were (a) whether an individual college within CUNY had the power to modify graduation and course requirements for CUNY students, and (b) whether a student could assert equitable estoppel against CUNY. The Mendez court found that an individual college "had no authority to alter unilaterally" university graduation and course requirements, and rejected the application of estoppel against CUNY. 248 A.D. 2d at 65. Mendez simply did not address the issues in this case: the extent to which the Faculty Senate has power under the Settlement Agreement.

d. Defendant's Interpretation Of The Settlement Agreement Must Be Rejected, Because It Renders The Settlement Agreement Meaningless

Plaintiffs interpret the Settlement Agreement to mean that the University Faculty Senate is responsible for, in the first instance, the formulation of policy relating to curriculum, the awarding of college credit, the granting of degrees, academic status, and university level educational and instructional matters. In addition, under the Settlement Agreement, policies formulated by the University Faculty Senate will then be considered by the Board in making policy decisions relating to educational matters.

Plaintiffs' understanding of the Settlement Agreement is based on its plain language. Defendants disagree. In their view:

- The CUNY Board can formulate policy regarding curriculum, the awarding of credit, the granting of degrees, and university level educational and instructional matters without regard to the Senate, and without providing the Senate with any role;
- By-Law §§ 8.6 and 8.13's statement that the Faculty Senate's responsibilities are "subject to" the CUNY Board means the CUNY Board can make policy in these areas without providing the Senate with any role;
- As used in the By-Laws in the Settlement Agreement, the Faculty Senate's responsibility to formulate policy "means the ability to recommend policies to the [CUNY] Board for consideration, not an exclusive right to be the sole source of policy," D Mem 25;
- Although the Settlement Agreement and the By-Laws give the Faculty Senate the responsibility to formulate policy, the CUNY Board can formulate policy without any involvement on the part of the Faculty Senate; and
- Although the Settlement Agreement provides that policies formulated by the Faculty Senate "will then be considered by the Board . . . in making policy decisions relating to educational matters," the CUNY Board can ignore the Faculty Senate in setting educational policy.

D Mem 24-27. Defendants' interpretation of the Settlement Agreement is wrong.

In support of this argument, defendants cite the First Department's ruling in Polishook for the proposition that the CUNY Board "did not have to first consult with faculty before making academic policy." D Mem 24. This is a misreading of Polishook. Polishook did not address "academic policy." Instead, it addressed "the Board of Trustees' declaration of a continued financial exigency . . . and the subsequent faculty termination and budgetary cuts." Polishook, 234 A.D. 2d at 166. Second, there is no discussion in the decision about whether or not the University first needs to consult with the Faculty Senate before making those decisions.

In further support of this argument, defendants claim that plaintiffs are asserting that the CUNY Board entered into a settlement agreement that "permanently delegates the exclusive authority for academic policy to the faculty in perpetuity." D Mem 24. This is a misstatement of plaintiffs' position. Plaintiffs do not assert that the faculty, acting through the Faculty Senate, has "exclusive authority for academic policy." Instead, plaintiffs assert that the Faculty Senate has the responsibility to initially formulate policy for consideration by the CUNY Board, which ultimately decides policies to implement. Plaintiffs ground their view of the Settlement Agreement in its language: the Settlement Agreement says that, acting through the College Senates and the University Faculty Senate, the faculty "shall be responsible" "for the formulation of policy relating to . . . curriculum, awarding of college credit, and granting of degrees." Settlement Agreement, 4-5. By its use of the word "shall," the Settlement Agreement clearly grants that power to the faculty, acting through the Faculty Senate. Of course, given that the Settlement Agreement acknowledges the CUNY Board's authority to "govern and administer" CUNY pursuant to Education Law § 6204(1), it is also clear that, under the

Settlement Agreement, it is the CUNY Board which makes the final decision on policy.

In a further attempt to argue that the plaintiffs fail to state a claim, the defendants point to the fact that faculty were involved in the development of common core guidelines and the selection of "curricular content." D Mem 27. That is irrelevant under the Settlement Agreement, in which CUNY explicitly agreed that the power to formulate policy was to be "exercised through the College Faculty Senates . . . or the University Faculty Senate in accordance with the CUNY By-Law § 8.13." Settlement Agreement, 5. CUNY cannot meet its obligations under this language by simply assigning certain duties to some faculty members.

IV. IF THIS CASE IS CONVERTED TO AN ARTICLE 78, IT IS TIMELY

As set forth infra at 20 to 31, this litigation should not be converted to an Article 78 proceeding. If the Court converts this matter to an Article 78, it is timely.

The applicable limitations period does not begin to run until after the "determination to be reviewed becomes final and binding upon the petitioner." N.Y.S. Assn. of Counties v. Axelrod, 78 N.Y. 2d 158, 165 (1991). A "final and binding" determination occurs when such determination "definitively impacts and aggrieves the party seeking judicial review." Matter of Paterson v. N.Y.S. Teachers' Retirement Sys., 25 A.D. 3d 899, 899 (3d Dep't 2006). A determination is final when "the decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury...that may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party". Matter of Alterra Healthcare Corp.

v. Novello, 306 A.D. 2d 787, 788 (3d Dep't 2003).

Were the four-month statute of limitations for an Article 78 to apply, it would run from December 12, 2011, the date the Chancellor adopted the recommendation of the taskforce. It was at this point, and not before, that CUNY's conduct became final, effecting a "concrete injury...that may not be prevented or significantly ameliorated by further administrative action...." Alterra, 306 A.D. 2d at 788. Although CUNY passed the 2011 Resolution in June, 2011, this is not the date from which the limitations period should be measured because that action was not yet final and binding. The 2011 Resolution does not make a final determination for Article 78 purposes. Rather, it articulated a goal for the creation of a system for the transfer of credits among its institutions, appointed a taskforce to develop and recommend to the Chancellor a structure to effectuate that goal, and established deadlines for that goal to be achieved. 2011 Resolution. Notably, the 2011 Resolution provided for the taskforce to be established in consultation with the University Faculty Senate, among others. 2011 Resolution, 2-3. Thus, at the time the 2011 Resolution was adopted, any conceivable injury could have been prevented or ameliorated by the process the 2011 Resolution itself created to effectuate its goal.

After the passage of the 2011 Resolution, the process initiated by the resolution required several steps that could have ameliorated or rectified Defendants' wrongdoing. In the first instance, the taskforce could have recommended that the development of a structure to facilitate student transfers be submitted to the Faculty Senate. Instead, the taskforce developed a structure and invited comments, which were overwhelmingly

negative, as discussed above. At that point, the taskforce could have recommended to the Chancellor that the Faculty Senate be charged with the development of policy and structure for facilitating student transfer. Instead, the taskforce submitted a recommended structure to the Chancellor in violation of the Settlement Agreement on December 1, 2012. The Chancellor could have declined to adopt the recommendation. It was not until Chancellor adopted the taskforce's recommended Pathways structure on December 12, 2012, that determination was final, concrete, and without the possibility of amelioration. Petitioners filed the Complaint on March 21, 2012, within the four month limitations period for an Article 78.

Defendants' position that the limitations period runs from the date the 2011 Resolution was passed is wrong. Defendants argue that "an Article 78 proceeding challenging a determination by a board of trustees begins to run upon notice of the board's adoption of the challenged resolution." D Mem 17. Defendants further argue that the date a resolution is adopted starts the limitations period "[e]ven where the implementation of the board's determination requires additional steps...because the board 'has committed itself to a definite course of future decisions.'" D Mem 17. In support of these arguments, defendants cite Matter of Young v. Board of Trustees of the Village of Blasdell, 89 N.Y. 2d 846, 848-849 (1996), Branch v. Riverside Park Community, LLC, 74 A.D. 3d 634 (1st Dep't 2010), and Matter of Douglaston & Little Neck Coalition v. Sexton, 145 A.D. 2d 480, 481 (2nd Dep't 1988).

Each of these cases is inapposite. They arise in the context of a court's analysis of the State Environmental Quality Review Act ("SEQRA"), a statute which requires

government agencies to consider environmental impact in discretionary decision making, referred to within the statute as "actions." N.Y. Envtl. Conserv. Law § 8 (Consol. 2012). Within the definition of an "action" is "Agency planning and policy making activities that may affect the environment and commit the agency to a definite course of future decisions." N.Y. Comp. Codes R. & Regs. tit. 6, § 617.2(b)(2) (2000). The language of the SEQRA statute is revealing. It demonstrates that the cases cited by defendants were not speaking to Article 78 proceedings generally, but in the specific context of challenges to government action pursuant to SEQRA. In fact, defendants cite no case outside of the SEQRA context where a court applies this principle. Indeed, plaintiffs have located only 22 cases where a court uses the highlighted language upon which defendants rely, and each such case involves the application of SEQRA. The Court should not make new law by expanding the SEQRA requirement into a general Article 78 requirement.

V. PLAINTIFFS' CLAIMS ARE NOT BARRED BY STATE SOVEREIGN IMMUNITY

Defendants argue that plaintiffs' claims "are barred by state sovereign immunity." D Mem 13. This is not so. First this is not a case which appropriately belongs in the Court of Claims, because that court has jurisdiction only "as to actions for money damages." Koerner v. State of New York, 62 N.Y. 2d 442, 448 (1984). Second, by entering into the Settlement Agreement – in which defendants promised to take certain actions – CUNY and its Board have implicitly waived whatever sovereign immunity they have. Courts in this state have repeatedly recognized waivers of sovereign immunity. See, e.g., Koerner, 62 N.Y. 2d at 448-449 (court finds implied waiver); Matter of the

Arbitration Between the State Insurance Fund and State of New York, 212 A.D. 2d 98, 101-102 (4th Dep't 1995) (court finds implied waiver of sovereign immunity); Bowen v. State Board of Social Welfare, 55 A.D. 2d 235, 236-37 (2d Dep't 1976) (court finds that state has waived its sovereign immunity in declaratory judgment actions) rev'd on other grounds sub nom. Jones v. Beame, 45 N.Y. 2d 402 (1978).

In Bowen v. State Board, the Second Department explained that "the doctrine of sovereign immunity from suit is rooted in the monarchial semi-religious tenet that 'the king can do no wrong' . . . . today the doctrine is more commonly regarded as a rule of social policy, addressed to the protection of the state against burdensome interference with the performance of its governmental functions and preservation of its control over state funds, property and instrumentalities." 55 A.D. 2d at 236-237. Here, plaintiffs do not seek to engage in free-wheeling and "burdensome" interference with CUNY's operations. Rather, they seek narrow relief: to compel CUNY to adhere to what it promised to do. CUNY made promises in the Settlement Agreement. It did so to settle a lawsuit. In doing so, it must be deemed to have implicitly waived whatever sovereign immunity it has.

CONCLUSION

For the reasons discussed above, defendants' "Motion To Convert To A Special Proceeding And To Dismiss The Complaint" should be denied.

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