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March 22, 2011

Hon. Sheldon Silver  
Speaker  
Co-Chair, General Conference Cmte.  
New York State Assembly  
Legislative Office Building 932  
Albany, NY 12248

Hon. Catherine Nolan  
Co-Chair  
Education Joint Budget Subcommittee  
New York State Assembly  
Legislative Office Building 836  
Albany, NY 12248

Hon. Dean Skelos  
Majority Leader  
Co-Chair, General Conference Cmte.  
New York State Senate  
Legislative Office Building 907  
Albany, NY 12247

Hon. John Flanagan  
Co-Chair  
Education Joint Budget Subcommittee  
New York State Senate  
Legislative Office Building 613  
Albany, NY 12247

Re: Provision of Senate budget bill S.2808-B (Part EE) relating to retaining quality teachers when teaching positions are eliminated in city school districts in cities with population of one million or more and referring to certain “qualifying” criminal convictions as a basis for lay-offs.

Dear Speaker Silver, Senator Skelos, Assembly Member Nolan and Senator Flanagan:

On behalf of the Committee on Corrections of the New York City Bar Association, I write regarding the above-referenced proposed legislation, which would make a teacher’s conviction for any “qualifying criminal offense in the past five years and since being appointed” a dispositive ground for lay-off priority. In the Committee’s view, this proposed legislation is at odds with the due-process rights afforded teachers under the Regulations of the Commissioner of Education and the public-policy aims of New York Correction Law Article 23-A<sup>1</sup>.

Currently, if a certified teacher is found to have been convicted of a crime, Part 83 of the Regulations of the Commissioner of Education prescribes the steps that must be taken before any teacher is subject to revocation or suspension of his or her teaching certificate. If a teacher’s criminal conviction is brought to the attention of the Professional Conduct Officer of the Department of Education, that officer must conduct an investigation to determine whether that conviction evidences a lack of good moral character. It will then issue a report and recommendation to the State Professional Standards and Practices Board for teaching, or to a subcommittee of such board with its

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<sup>1</sup> See Correction Law §§ 750-755.

determination. If the Board or a subcommittee finds, based on the report and recommendation, that the conviction creates a question as to the teacher's good moral character, the teacher is given the right to a hearing before a hearing officer or, in the alternative, before a hearing officer and a three-member hearing panel. In determining whether a certificate should be revoked or suspended or an application for certification should be denied based on a previous criminal conviction, the hearing officer or panel performs an individualized assessment, applying standards and considering factors set forth in Correction Law Article 23-A. After hearing evidence, the officer or panel issues recommendations. If the recommendation includes a penalty, including suspension or revocation of the teacher's certification, the teacher has the right to take an appeal to the Commissioner of Education.

Importantly, in the above-described process, no conviction in and of itself may create a conclusive presumption that the teacher lacks good moral character. The proposed legislation thus constitutes a drastic departure from the process now in place, which ensures that any adverse employment action taken in connection with a teacher's criminal conviction is based on individual circumstances. The existing process - as opposed to the proposed legislation - minimizes the chance that a teacher will be removed from the classroom arbitrarily.

The Commissioner's Regulations are consistent with the public policy aims of Article 23-A of the Correction Law. That law was enacted in 1976 with the intent to eliminate the effect of bias against individuals who have been previously convicted of a criminal offense, which prevented them from obtaining employment.<sup>2</sup> In 2007, Article 23-A was amended to expand its coverage to protect from unfair discrimination individuals who are employed and whose prior criminal conviction record predates their current employment. Article 23-A requires public agencies and private employers to make an individualized assessment regarding the employment of such individuals: employers must consider eight enumerated factors<sup>3</sup> to determine whether there is a direct relationship between the employment held and the employee's prior criminal conviction record, or if continuation of the employment would involve an unreasonable risk to property or to safety or welfare of specific individuals or the general public.

By contrast, under the proposed legislation, a current employee's criminal conviction would be used as a dispositive ground for lay-off priority without affording any individualized assessment or due process rights. As drafted, the proposed legislation wholly undercuts the public-policy purpose of Correction Law Article 23-A, which is to protect individuals with prior criminal convictions from such blanket discrimination. Moreover, while the lay-off procedure is facially neutral with regard to race and ethnicity, it may have a disparate impact on African-Americans and Latinos, potentially in

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<sup>2</sup> See Bonacorsa v. Van Lindt, 71 N.Y.2d 605, 611 (1988).

<sup>3</sup> See Correction Law § 753. These factors are: (a) the public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses; (b) the specific duties and responsibilities necessarily related to the license or employment sought; (c) the bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his/her fitness or ability to perform one or more such duties or responsibilities; (d) the time which has elapsed since the occurrence of the criminal offense or offenses; (e) the age of the person at the time of occurrence of the criminal offense or offenses; (f) the seriousness of the offense or offenses; (g) any information produced by the person, or produced on his/her behalf, in regard to his/her rehabilitation and good conduct; and (h) the legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

violation of Title VII of the Civil Rights Act of 1964.<sup>4</sup> Finally, the proposed legislation does not serve the purpose of retaining quality teachers because it provides for no meaningful, individualized assessment of whether a criminal conviction has any bearing on the teacher's performance and effectiveness.

For the reasons stated above, the Committee urges that the proposed legislation be amended to strike the provision making an employee's criminal conviction a sole basis for terminating employment or, alternatively, to provide a meaningful process under which proper consideration may be given in order to retain effective and excellent professionals in the classroom.

Respectfully,

A handwritten signature in black ink, appearing to read 'Sara Manaugh', with a horizontal line extending to the right.

Sara Manaugh  
Chair, Corrections Committee

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<sup>4</sup> See EEOC, "Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et. seq.* (1982)" Feb. 4, 1987), *available at* <http://eoc.gov/policy/docs/convict1.html>.