April 22, 2021

State of New York

Unemployment Insurance Appeal Board

P.O. Box 15126

Albany, NY 12212-5126

Re: In the Matter of Sarah Smith

Appeal Board No. XXXXX

Dear Members of the Appeal Board:

This letter is submitted in support of the appeal by the claimant, Sarah Smith, from the decision dated March 11, 2021 (hereinafter “Decision”) by Administrative Law Judge Lorraine Ferrigno (“ALJ”). The decision should be reversed because the employer, New York City Department of Education (DOE), did not provide good faith reasonable assurance to substitutes that they could expect to receive at least 90% of their 2019-2020 school year earnings in the 2020-2021 school year.

**STATEMENT OF FACTS**

The claimant, Sarah Smith, worked for the employer, a city school district as a substitute teacher. Decision at p. 3. She worked 12 days in the 2019-2020 school year and was allegedly offered 17 days of work through the Sub-Central registry. The Sub-Central registry is utilized by the employer to offer work to substitutes to cover teacher absences.

The witness for the employer, Edward Clinton, worked as a human resources assistant at the DOE for 10 years. 2/17/21 Tr. p. 14. The witness was responsible for conducting interviews and assessments for substitute applicants. Id. p. 14-15. Mr. Clinton also provided anti-harassment and anti-bullying training. Id. p. 15. Mr. Clinton testified how the Sub-Central system worked to fill absences for absent teachers.

The employer emailed a "reasonable assurance" letter to the claimant on June 17, 2020. *Id.* p. 18. The June 17, 2020 letter stated that "we anticipate that there will be a need for per diem substitute teachers for '20/'21 school year. We expect the economic terms and conditions for the '20/'21 school year to be substantially the same as in the 2019/2021 school year. Therefore, we anticipate there will be as much work for occasional per diem substitute teachers during the '20/'21 school year as was available in the '19/'20 school year." *Id.* p. 19; Hearing Ex. 1. The claimant did not dispute that she received the "reasonable assurance" letter by email.

Due to the Covid 19 pandemic, schools were closed on March 18, 2020 and opened remotely on March 23, 2020. 2/17/21 Tr. p. 24-25. At the unemployment hearing, the DOE was unable to provide any information about how many substitutes were utilized after the schools went remote on March 23, 2020 and thus could not say how many substitutes were utilized for remote learning. Tr. 3/9/21 p. 39. While some substitutes in long-term assignments continued in those positions remotely, many day-to-day substitutes, such as the claimant, did not have work and, according to Subcentral, would not have work "in the foreseeable future." *Id.* p. 73-74; Hrg. Ex. 6. Subcentral informed substitutes regarding opportunities at Regional Enrichment Center (Recs) that would serve children of essential workers. Hrg. Ex. 6. The claimant was offered work assignments at two different Rec Centers both of which were supposed to last a week. Tr. 3/9/21 p. 74. However, the claimant only worked a few days at both sites because Rec Centers were consolidated, and substitute teachers were let go as a result. *Id.*

On June 10, 2020, the NYC DOE decided that there would be three models of instruction for the 2020/2021 school year. Tr. 2/17/21 p. 30. The first model would occur "if the school had enough room and schools could open with, ...a certain amount of social distancing, that the school could open and the children...would be taking instruction live and in person in school. " *Id.* The second model was "hybrid “where "the class or...grade would be ... split in half, with half the students attending a certain number of days a week, and the other half of the class at home receiving their instruction remote and then those groups would rotate .. the ones.. receiving remote instructions would come into the classroom and receive live instruction, and the ones who were receiving live instruction would go home and ... would have remote learning." *Id.* 31. The third model was fully remote learning for schools that could not open safely. Which model would be utilized for any given school or the school system as a whole was wholly dependent on the positivity rate for Covid in New York City. Tr. 3/9/21 p. 7.

At the time that the "reasonable assurance" letter was sent in June, 2020, the NYC DOE did not know when they would reopen as reopening was dependent on health indicators that would "ensure that it is safe to return to school buildings and offices." Hrg. Ex. 8 p. 2. Due to the pandemic, "the timing of return to buildings, and under what circumstances building might be closed or have limited access, will be established in close coordination with NYC Health and based on health and safety indicators." *Id.* On June 9, 2020, NYC DOE Chancellor Carranza stated, "we cannot yet predict what September will look like." *Id.* p. 1.

On July 1, 2020, Chancellor Carranza wrote to school personnel including the claimant regarding budget reductions for the NYC DOE of over a billion dollars for fiscal years 2020 and 2021. Hrg. Ex. *9*, p. 2. According to Chancellor Carranza, the economic situation "could require furloughs or layoffs across city government" and he stated that "this uncertainty is very worrisome." Id. p. 3

When asked what impact the Department of Education anticipates the Covid-19 pandemic will have on the economic terms and conditions of the '20/'21 school year compared to the "19/'20 school year, Mr. Clinton responded that the DOE still has the same number of full-time teachers, students and number of schools. Tr. 2/17/21 p. 31-32. Mr. Clinton stated that the DOE was able to cover 85 percent of the absences in the '19/'20 school year. Id. p. 24. However, the DOE provided no information about why those absences were not filled such as how many of the unfilled absences occurred because substitutes who had accepted jobs later cancelled or that absences may have been filled by administrators. According to the DOE witness, subcentral doesn't always know that substitutes are working because administrators fill absences with their own chosen substitutes outside of the subcentral system. *Id.* p. 41-42.

**ARGUMENT**

**I. The DOE failed to demonstrate with competent testimony that the economic terms and conditions of continued employment in the new school year would be substantially similar in the new school year**

Under NYLL Section 590.10, earnings from an educational institution cannot be used for entitlement purposes during the period between academic years (break) if the educational institution has provided reasonable assurance that the claimant will be offered similar work in the next academic year. Reasonable assurance exists only if the employer expressed an intention to make a good-faith effort to continue to employ a claimant following the end of the break **and** when the economic terms and conditions of the continued employment will be substantially similar to economic terms and conditions of the employment prior to the break. AB 983064 (April 12, 2018). Determining whether the economic terms and conditions will be substantially similar includes comparing the rates of pay; staffing level changes; and hiring practices. UIAB, Chapter 8 Reasonable Assurance, Bench Manual (January 2020), 195. Budget and staffing cuts must also be considered when determining whether economic terms and conditions will be substantially similar. AB 983064; AB 551663 (March 17, 2011); AB 553642 (May 3, 2011). The employer has the responsibility to demonstrate with competent testimony from knowledgeable witnesses that the above basic conditions have been met. *Id.* The DOE witness in this case failed to demonstrate with competent testimony that the economic conditions in the '20/'21 school year were not expected to be substantially less favorable.

The Covid 19 pandemic had an unprecedented impact on the DOE schools including how substitute teachers would be utilized. DOE schools closed on March 18, 2020 and opened remotely on March 23, 2020. Tr. 2/17/21 p. 24-25. The DOE's witness could not provide any information about the numbers of substitutes that were working after the schools closed in March Tr. 3/9/21 p. 39. It appears that while some long-term substitutes may have continued to teach remotely, most day- to-day substitutes, such as the claimant, were not offered positions to teach remotely. *Id.* p. 73-74; Hrg. Ex. 6. The only evidence of any work offered to day-to-day substitutes after the schools close were opportunities at Regional Enrichment Center (Recs) that would serve children of essential workers. Hrg. Ex. 6. In fact, the claimant was offered work at two different Rec Centers both of which assignments were supposed to last a week. Tr. 3/9/21 p. 74. However, the claimant only worked a few days at both sites because Rec Center sites were consolidated, and substitute teachers were let go as a result. *Id.* The DOE's witness failed to sufficiently rebut the claimant's evidence that the only opportunities for day-to-day substitutes, after the schools closed in March, 2020, was in Rec Centers and that Rec Center work dried up very quickly.

In order to determine whether economic conditions would be less favorable in the '20/'21 school year, it is necessary to determine exactly how substitutes were utilized after the pandemic shut down in March, 2021, and in what numbers. If few substitutes were used after the shutdown, then few substitutes would be needed in the '20/'21 school year. At the time that the reasonable assurance letter was sent on June 17, 2020, the DOE did not know when or if schools would be open or whether the schools would be fully remote, in a hybrid model, or providing full-time in person learning. Tr. 2/17/21 p. 30; Hrg. Ex. 8. School reopening was dependent on health indicators that would "ensure that it is safe to return to school buildings and offices." *Id.* p. 2. On June 9, 2020, DOE chancellor Carranza stated: "the timing of return to buildings, and under what circumstances building might be closed or have limited access, will be established in close coordination with NYC Health and based on health and safety indicators." *Id.* At the unemployment hearing, the DOE failed to provide evidence that day-to-day substitute teachers were used for anything other than a small number of rec center positions after the schools went remote in March, 2020. Since the Covid 19 pandemic was continuing into the next school year, the DOE could not assure substitutes that they would have the same work as the previous school year (since the pandemic started towards the end of the '19/'20 school year).

Moreover, on June 17, 2020, the DOE could not have provided good faith reasonable assurance of continued work since due to the uncertainty not only about when and how schools would reopen in the Fall but also about whether the budget cuts might affect staffing levels. On July 1, 2020, Chancellor Carranza wrote to school personnel including the claimant regarding budget reductions for the NYC DOE of over a billion dollars for fiscal years 2020 and 2021. Hrg. Ex. *9* p. 2. According to Chancellor Carranza, the economic situation "could require furloughs or layoffs across city government" and he stated that "this uncertainty is very worrisome." Id. p. 3

Finally, Judge Ferrigno erred in utilizing the alleged fill rate of 85 percent of the absences in the '19/'20 school year (meaning 15% of assignments went unfilled) to support her finding that expected earnings in '20/'21 would be 90% of the earnings from the '19/'20 school year. As argued above, there was no basis to determine that the conditions, including the alleged fill rate, would be the same after the pandemic closed the schools in March, 2020. Moreover, the DOE provided no details regarding how the fill rate of 85% was determined including no information about why absences were not filled. Unfilled absences may have occurred because substitutes who had accepted jobs cancelled them at time that was too late for subcentral to reassign. In addition, absences may have been filled by administrators rather than subcentral and subcentral may not have captured the filling of the absence in its system. According to the DOE witness, subcentral doesn't always know that substitutes are working because administrators fill absences with their own chosen substitutes outside of the subcentral system. Tr. 2/17/21, p. 41-42.

**CONCLUSION**

For all of the above reasons, we the Appeal Board should reverse the ALJ's decision and find that the economic conditions were not substantially similar to support reasonable assurance of continued employment in the new school year. The Appeal Board should also reverse the overpayment.

Very truly yours,

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