E-Notice

2017-CH-02157

CALENDAR: 03

To: Michael Thomas Dierkes
mdierkes@atg.state.il.us

NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

BD EDUCATION CITY CHICAGO v. RAUNER BRUCE
2017-CH-02157

The transmission was received on 06/30/2017 at 1:21 PM and was ACCEPTED with the Clerk of the Circuit Court of Cook County on 06/30/2017 at 2:01 PM.

MEMORANDUM IN SUPPORT OF MOTION FILED (Defendants' Memorandum in Support of their Section 2-619.1 Motion to Dismiss Plaintiffs' Amended Complaint with Exhibit A)

Filer's Email:	mdierkes@atg.state.il.us
Filer's Fax:	(312) 814-4425
Notice Date:	6/30/2017 2:01:05 PM
Total Pages:	29

DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
COOK COUNTY
RICHARD J. DALEY CENTER, ROOM 1001
CHICAGO, IL 60602

(312) 603-5031
courtclerk@cookcountycourt.com

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

BOARD OF EDUCATION OF THE CITY OF CHICAGO, *et al*.	)	
	)	Case No. 17-CH-02157
Plaintiffs,	)	
v.	)	Hon. Franklin U. Valderrama
BRUCE RAUNER, *et al.*	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR SECTION 2-619.1 MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

INTRODUCTION

This Court dismissed plaintiffs' original complaint for failure to state a claim, and plaintiffs' amended complaint contains similar defects. As before, plaintiffs rely solely on the Illinois Civil Rights Act of 2003 (ICRA) and do not assert any constitutional claims. They again allege that the State of Illinois "enacts legislation" (the Pension Code) and "appropriates money" (pension funding) in a manner that discriminates against the Chicago Public Schools, which are predominantly minority. They add new claims under section 5(a)(1) of ICRA, but their amended complaint fails to plead facts demonstrating the required intentional discrimination. And they clarify that the "criteria or methods of administration" they purport to challenge under section 5(a)(2) of ICRA are provisions in the Pension Code, an argument that this Court has already squarely rejected.

Plaintiffs' claims are misdirected to the judicial branch. Even plaintiffs' counsel concedes that "[t]here's nothing in the Pension Code that mandates the disparities that we are challenging." *See* Ex. A at 53:18-20; *see also id.* at 52:21:24, 53:8-10, 55:6-8. According to plaintiffs' counsel (but not necessarily their amended complaint), the issue is "not really the Pension Code," but rather "the State's appropriations bills" for the Chicago Teachers' Pension Fund (CTPF) and Teachers' Retirement System (TRS). *Id.* at 56-6:12. Yet plaintiffs cannot state a claim on this basis either—the legislature's appropriations are not subject to judicial review under ICRA, a state statute. Plaintiffs' amended complaint should be dismissed because plaintiffs have not adequately alleged intentional discrimination or identified "criteria or methods of administration" that disparately impact minorities. Moreover, ICRA cannot override the Pension Code or the legislature's appropriations bills. Finally, plaintiffs' claims are barred by sovereign immunity and separation of powers principles.

FACTUAL BACKGROUND

This Court's April 28, 2017 Memorandum Opinion and Order provides relevant background regarding education and teacher pension funding in Illinois. Defendants' memorandum in support of their motion to dismiss plaintiffs' original complaint also provides background information at pages 2-6, which defendants incorporate by reference. In their amended complaint, plaintiffs assert that the Illinois Pension Code, 40 ILCS 5/1-101, *et seq.*, creates "two separate teacher pension systems," one for cities and school districts with populations less than 500,000 (TRS) and another for cities and school districts with populations more than 500,000 (CTPF, for Chicago), and claim that this constitutes a "criteria or method of administration" under ICRA. Am. Compl. at ¶¶8-9. They allege that CPS has 20% of the State's students but receives 15% of the State's "education" funding, which they define to include contributions to CTPF and TRS. *Id.* at ¶¶43-46. (When pension funding is excluded, plaintiffs' allegations show that CPS receives about 24% of the State's funding, or, put another way, $1.24 for each dollar that the State spends on non-CPS students.[1]) They assert intentional discrimination claims under section 5(a)(1) of ICRA (Counts I and II) and disparate impact claims under section 5(a)(2) of ICRA (Counts III and IV).

ARGUMENT

MOTION PURSUANT TO SECTION 2-615

I. COUNTS I AND II FAIL TO STATE A CLAIM FOR INTENTIONAL RACIAL DISCRIMINATION UNDER SECTION 5(a)(1) OF ICCRA.

Illinois is a fact-pleading state, and legal conclusions will not suffice to state an adequate cause of action. *People ex rel. Fahner v. Carriage Way West, Inc.*, 88 Ill.2d 300, 308 (1981). In Counts I and II of their new complaint, plaintiffs allege claims of intentional racial

[1] These calculations are explained in detail in defendants' memorandum in support of their motion to dismiss plaintiffs' original complaint at pages 4-6.

discrimination, but the factual allegations in Counts I and II do not establish that the legislature, the State Board of Education, or the Governor have engaged in any conduct motivated by racial animus. No overt racial classifications exist on the face of the challenged laws that would indicate intentional discrimination, and nothing in the categories used by the law, such as distinctions between Chicago and the rest of the State, indicate some sort of hidden proxy for an intent to discriminate based on race. Plaintiffs' claims should be dismissed.

The amended complaint cites statistics which allegedly show the Chicago Public Schools get less than their pro rata share of state funding, but the bottom-line allegation of Count II is that CPS has 20% of the school age population but only gets 15% of the state aid. Am. Compl. at ¶¶6-7. Count III focuses on the Chicago teachers' pension fund, and the central allegation is that under Illinois law the Chicago teachers' pension fund is funded and administered separately from the pension fund covering all the other teachers in the State (applying to cities over 500,000 population—only Chicago) and is now allegedly being funded inadequately, causing CPS to divert resources away from needed educational funding. *Id.* at ¶54.

Counts I and II are brought under section 5(a)(1) of the Illinois Civil Rights Act, 740 ILCS 23/5(a)(1). This is a significant departure from the approach taken in the initial complaint, which based its claims only on the disparate impact provisions of section 5(a)(2) of ICRA. Section 5(a)(2) prohibits units of state, county, or local government from "utiliz[ing] criteria or methods of administration that have the effect of subjecting individuals to discrimination" based on race, color, national origin, or gender. Section 5(a)(1), by contrast, speaks in the language of disparate treatment, *i.e.*, intentional discrimination: that units of government shall not "*exclude* a person from participation in, *deny* a person the benefits of, or *subject* a person to discrimination

under any program or activity *on the grounds of* that person's race, color, national origin, or gender." (emphasis added).

This Court has already briefly canvassed the history of ICRA in its April 28, 2017 opinion at 34-35, but we will briefly summarize ICRA's origins to show that section 5(a)(1), the operative standard for Counts I and II, in fact requires a showing of intentional discrimination. ICRA is modeled after Title VI of the Civil Rights Act of 1964. 42 U.S.C. § 2000d. Section 601 of Title VI provides, in language nearly identical to section 5(a)(1) of ICRA, that no person shall "on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity" covered by Title VI. In *Alexander v. Sandoval*, 532 U.S. 275 (2001), the Court held that Section 601 "prohibits only intentional discrimination," *id.* at 281, and "proscribes only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Id.* (citation omitted). *See also Dunnett Bay Consruction Co. v. Borggren,* 799 F.3d 676, 697 (7th Cir. 2015). The other important holding of *Alexander* was that the regulations promulgated under Title VI by the Department of Justice, which prohibited disparate impact discrimination, and which had been widely applied by the federal courts of appeals in civil litigation, were found not to create a private right of action. *Id.*at 293.

Alexander's elimination of the disparate impact theory in Title VI led to the State's passage of ICRA, which restored disparate impact as a theory in section 5(a)(2) of the Act, as well as adopting nearly verbatim the text of Section 601, which targeted intentional discrimination. The sponsors of the bill in the General Assembly made it clear that the reach of ICRA was simply to codify in state law the legal standard of Title VI and its disparate impact regulations as it was before *Alexander*. *Illinois Native American Bar Association v. University of*

Illinois, 368 Ill. App. 3d 321, 327 (1st Dist. 2006) (quoting remarks of Sen. Harmon that ICRA "does not break any new legal ground nor create any new rights"). The proper scope of section 5(a)(1), then, is identical to Section 601 and is co-extensive with the equal protection clause. If there is no intentional discrimination targeting a suspect classification such as race, then the law will be upheld if it is rationally related to a legitimate state interest, a deferential standard. *In re Estate of Jolliff,* 199 Ill.2d 510, 520 (2002). Thus, when section 5(a)(1) says a unit of government shall not "exclude," "deny," or "subject a person to discrimination," a successful plaintiff must show intentional discrimination, just as that person would have to do if suing under the equal protection clause itself, or Title VI.

Counts I and II do not contain factual allegations to support such a theory. In *Hearne v. Board of Education of the City of Chicago,* 185 F.3d 770 (7th Cir. 1998), the Chicago Teachers Union challenged the school-reform law directed at the Chicago Board of Education. The law only applied to schools in cities with more than 500,000 population, and in Illinois only Chicago meets that description. State laws with this population designation are common, as the court understood. *Id.* at 774. The union alleged that a majority of the bargaining unit was African American and an even larger percentage comprised of minorities. *Id.* at 772-73. The union further alleged the school reform law diminished civil service protections for its members, that the law's purpose was retaliatory, and that the law was designed to have an adverse racial impact. Ruling on the defendants' motion to dismiss, the court first held that the plaintiff had to show an actual intent to discriminate. The plaintiff asserted that its allegations to that effect sufficed, but the court disagreed, citing *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256 (1979). That case holds that a discriminatory purpose "implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a

state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 279. The court in *Hearne* noted that "there is nothing here to indicate that the Illinois General Assembly structured the Chicago school reform legislation specifically because it wanted to disadvantage African Americans," *id.* at 776, and that "[t]here are substantial numbers of African Americans in many other cities in the state, and it is simply too great a stretch to say that the population represented by the Chicago school system is such a good proxy for African Americans that the ostensibly neutral classification is 'an obvious pretext for discrimination.'" *Id.* at 776, quoting *Feeney,* 442 U.S. at 272; *see also Latham v. Bd. of Educ. City of Chicago,* 31 Ill. 2d 178, 184 (1964) (upholding law with population restrictions applicable just on Chicago).

It is true that a facially neutral law is not insulated from scrutiny just because it is facially neutral. Sometimes, for example, legislative history, or statistics demonstrating a clear pattern unexplainable on grounds other than discriminatory ones, or the specific sequence of events leading up to a challenged decision, or a defendant's departures from its normal procedures or substantive conclusions, may be enough to infer intentional discrimination. But such showings of intentional discrimination based on impact alone will be rare. *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 266 (1977). Plaintiffs here plead no such allegations that would suffice to show intentional discrimination.

Section 5(a)(1) should not, and cannot, be read so broadly. For an equal protection violation to be made out, "intent to discriminate must be present." *SECSYS, LLC v. Vigil*, 686 F.3d 678, 684 (10th Cir. 2012). In Illinois, factual allegations demonstrating deliberate discrimination must be pled.

A similar education law focused just on Chicago was recently upheld against an equal protection challenge in *Quinn v. Board of Education of the City of Chicago,* --F.Supp.3d-- (N.D. Ill. 2017), 2017 WL 569163. Plaintiffs challenged a provision of the Illinois School Code which permitted the mayor to appoint members of the Chicago Board of Education. Plaintiffs believed the board members should be elected, and that race discrimination was the reason why the board is not elected. The court found it well-established that that equal protection clause "does not prohibit legislation merely because it is special, or limited in its application to a particular geographical or political subdivision of the state." *Id.* at *5, citing *Holt Civic Club v. City of Tuscaloosa,* 439 U.S. 60, 70-71 (1978). The court further relied on *Hearne* and *Latham* to dismiss the claims of race discrimination and to uphold the law targeting just the Chicago system alone as meeting the rational basis test, because the size and complexity of the Chicago educational system justified differential treatment. *Id.* at *6.

We turn now to an examination of the factual allegations contained in Counts I and II. Plaintiffs allege that Chicago receives less money than other school districts, in that it receives 15% of the funding but has 20% of the students. Even assuming the truth of this allegation, there is no allegation that the alleged disparity was imposed by the legislature *because it would harm racial minorities.* Funding formulas are complex, and because Chicago gets a block grant for various programs, unlike the rest of the state's school districts, which instead receive categorical grants, the amounts do not line up exactly the same across hundreds of school districts. The legislation provides the current allocations as the allocations to be made across all school districts, which have different local property tax bases, even if perfect equality is unattainable. There is absolutely no requirement under the rational basis test that every school district must receive exactly the same amount of state aid in proportion to the students it educates. These are

issues for the legislature. Any hypothesized rationale will justify a legislative classification under the rational basis test. *Cutinello v. Whitley,* 161 Ill. 2d 409, 421-22 (1994); *see also FCC v. Beach Communications, Inc.,* 508 U.S. 307, 315 (1993). Unless plaintiffs can allege, not just with legal conclusions but in factually specifically terms, that the legislature, the Illinois State Board of Education, and the Governor are actively engaged in *deliberate, consciously chosen* racial discrimination in funding Chicago schools, the claims in Count I should be dismissed.

The pension claims in Count II fail for the same reason. Illinois law has had two pension systems for the State's teachers for decades, and there has never been a hint (and certainly nothing is alleged in the complaint) that this legislative division was enacted because the State was *deliberately* intending to discriminate on the basis of race. As *Hearne* notes, there are minority students and teachers all over the State, and the creation of a separate teacher pension system for Chicago's teachers is hardly a sufficient proxy for race to suggest the system is motivated by a racial animus. Many laws apply only to Chicago, and it is entirely rational for the legislature to have believed that it was necessary to aggregate the pension system for hundreds of much smaller school districts into one while allowing Chicago, with its larger system and independent taxing authority, to control and fund its own. If the Chicago pension system is underfunded, that is a matter for the legislature to address, but it is not a section 5(a)(1) ICRA claim for this Court to address. At bottom, the amended complaint is completely lacking in showing that the history of the two systems was racially motivated.

In their original complaint, plaintiffs limited themselves to bringing disparate impact claims under section 5(a)(2) of ICRA. In the amended complaint, they have chosen to bring claims demanding an even higher standard of proof—not just unintentional discrimination, but intentional discrimination. Although they have elevated the seriousness of the allegations in the

amended complaint (leaving one to wonder why they waited until their original complaint was dismissed to raise these claims), the factual allegations have not changed. The statistical presentation is the same, but "their naked statistical argument," *Jefferson v. Hackney,* 406 U.S. 435, 548 (1972), identical to the one rejected in *Hearne,* falls far short of establishing valid claims of intentional discrimination—that is, that adverse actions were taken by the defendants *on the grounds* of race. Counts I and II should be dismissed.

II. COUNTS III AND IV FAIL TO STATE A CLAIM FOR DISPARATE IMPACT DISCRIMINATION UNDER SECTION 5(a)(2) OF ICRA.

Counts III and IV of plaintiffs' amended complaint purport to state disparate impact claims under ICRA. ICRA applies to "units" of state, county, or local government, and prohibits them from utilizing "criteria or methods of administration" that "have the effect of subjecting individuals to discrimination because of their race, color, national origin or gender." 740 ILCS 23/5(a)(2). To state an ICRA claim, it is not enough to simply allege a bottom-line disparate impact or a "generalized policy" that leads to such an impact. *Swan v. Bd. of Educ. of City of Chicago*, 2013 WL 4401439, at *19 (N.D. Ill. Aug. 15, 2013). Instead, plaintiffs must isolate and identify specific policies or practices of a "unit" of government that allegedly cause a disparate impact. *Id.*; *see also Coal. for Safe Chicago Communities v. Vill. of Riverdale*, 2016 WL 1077293, at *12-13 (Ill. Cir. Ct. Feb. 25, 2016) (dismissing ICRA claim for failure to challenge "an identifiable, facially-neutral policy" utilized by the defendants).

A. The Court Previously Dismissed Plaintiffs' Claims under Section 5(a)(2) of ICRA.

i. Plaintiffs' Original Section 5(a)(2) Claims

In their original complaint, plaintiffs asserted two claims under section 5(a)(2) of ICRA: Count I alleged that the State's discriminatory funding for public education (including pension

funding) has a disparate impact on CPS and its students; Count II alleged that the State's discriminatory pension funding alone has a disparate impact on CPS and its students. Plaintiffs' original complaint did not cite any state education funding statute. Nor did plaintiffs allege that defendants' administration of either education funding or pension funding resulted in a disparate impact on plaintiffs. Although the original complaint did not specifically allege the necessary "criteria or methods of administration" to state a claim under Section 5(a)(2), at oral argument, plaintiffs' counsel attempted to articulate that necessary allegation:

> The State of Illinois is providing pension funding and total educational funding using criteria, basically creating two systems. And that's what we have.
>
> We have a system for funding CPS, where the students are 90 percent African American, Hispanic, or other children of color, and another system for the rest of the state.
>
> That is a means of administration.
>
> And if you look at the statute, "Utilize criteria or methods of administration."

Ex. A at 61:13-21.

ii. Defendants' Motion to Dismiss

Defendants moved to dismiss plaintiffs' original section 5(a)(2) claims, arguing that plaintiffs failed to identify or allege that defendants used any specific criteria or method of administering either "education funding" (which included pension funding) or pension funding alone. Defendants further argued that plaintiffs' citation to the Pension Code and the legislature's education and pension funding decisions could not amount to "criteria or methods of administration" actionable under ICRA.

iii. The Court's Dismissal of Plaintiffs' Disparate Impact Claims

In its Memorandum Opinion and Order dated April 28, 2017, the Court dismissed both of plaintiffs' claims under ICRA. The Court held:

> Plaintiffs in their Complaint fail to allege that Defendants use any criteria or method of administering the State's funding of public schools pursuant to the School Code or public school teacher pension funds pursuant to the Pension Code that results in the disparate impact discrimination of which Plaintiffs complain.
>
> The *sine que non* of a section 5(a)(2) ICRA challenge, from this Court's perspective, is a program or activity that utilizes criteria or methods of administration which results in a disparate impact on a protected class. Since Count I of Plaintiffs' complaint fails to identify any program or activity that utilizes criteria or methods of administration, Plaintiffs fail to state a cause of action in Count I under ICRA.
>
> ….
>
> Similar to the analysis in Count I, Plaintiffs [in Count II] do not tie their allegation to any program or activity, as required to state an ICRA claim. While the Complaint alleges "discriminatory practices"… Plaintiffs do not connect the allegation to criteria or methods of administration. Instead, Plaintiffs merely recite the requirements of the Pension Code and posit that the Pension Code imposes discriminatory obligations on CPS. **At bottom, the Complaint is, in effect, a challenge to the Pension Code. The Complaint is not a challenge to the method by which the Pension Code is administered or applied. Thus, Plaintiffs fail to allege facts to sustain a cause of action under section 5(a)(2) of ICRA.**

Mem. Op. and Order at 41 (emphasis added).

B. Plaintiffs' Section 5(a)(2) Claims in the Amended Complaint Are Unchanged and Should Be Dismissed.

Plaintiffs' disparate impact claims under section 5(a)(2) of ICRA remain the same as those the Court dismissed from their original complaint, with slightly more focus. Plaintiffs now specify that the "criterion or method of administration for teacher pension benefits" relates to two separate sections of the Illinois Pension Code – Article 16, which applies to cities and school districts with a population of *less* than 500,000, and Article 17, which applies to cities and school districts with a population of *greater* than 500,000." Am. Compl. at ¶¶8, 9, 83, 89. Thus, just as plaintiffs' counsel argued was implicit in their original complaint, plaintiffs now claim that the

separate provisions of the Pension Code – a legislative statute – amount to the legislature's "criteria or methods of administration" that violate ICRA. Am. Compl. at ¶¶83, 89.[2]

The same arguments the Court found persuasive to dismiss the original complaint once again defeat plaintiffs' amended claims. Both Count III and Count IV "fail[ ] to identify any program or activity that utilizes criteria or methods of administration." Mem. Op. and Order at 41. And to the extent that plaintiffs now explicitly tie their section 5(a)(2) claims to the separate sections of the Pension Code, Count IV must be dismissed for the same reasons as the original complaint:

> Plaintiffs do not connect the allegation to criteria or methods of administration. Instead, Plaintiffs merely recite the requirements of the Pension Code and posit that the Pension Code imposes discriminatory obligations on CPS. At bottom, the Complaint is, in effect, a challenge to the Pension Code. The Complaint is not a challenge to the method by which the Pension Code is administered or applied. Thus, Plaintiffs fail to allege facts to sustain a cause of action under section 5(a)(2) of ICRA.

Id.

C. Plaintiffs' Section 5(a)(2) Claims in the Amended Complaint Fail for Additional Reasons.

Plaintiffs' claims against ISBE also fail for additional reasons. First, plaintiffs have not alleged that any discretionary conduct by ISBE caused a disparate impact. *See Munguia v. State of Ill.*, 2010 WL 3172740, at *7 (N.D. Ill. Aug. 11, 2010); Opinion at 33 (agreeing that "section 5(a)(2) of ICRA applies only to discretionary administrative actions and does not apply to actions in compliance with statutory mandates"). ISBE does not administer the Pension Code, see 105 ILCS 5/18-7, and the amount of educational funding that ISBE distributes to CPS each year is not within ISBE's discretion, but instead is determined by statute and legislative

[2] While Counts III and IV primarily assert ICRA violations against the State regarding the Pension Code, plaintiffs' Prayer for Relief seeks to enjoin all defendants "from distributing State funds in a manner that discriminates against Plaintiffs," and "from imposing on CPS a pension-funding obligation that discriminates against Plaintiffs." Am. Compl., Prayer for Relief at p. 31.

appropriations. *See* 105 ILCS 5/18-8.05 (General State Aid); 105 ILCS 5/1D-1 (block grants for CPS). Second, based on plaintiffs' own allegations, pension funding is excluded (again, ISBE does not administer teacher pension funding), CPS receives significantly more State funding that other districts; thus plaintiffs' amended complaint does not and cannot trace any disparate impact to any conduct by ISBE. Third, plaintiffs cannot state an ICRA claim against ISBE based on their allegation that educational funding "does not compensate for" the alleged disparity in teacher pension funding (see Am. Compl. at ¶83). *Coal. for Safe Chicago Communities*, 2016 WL 1077293, at *13 ("[T]he Court finds that Plaintiffs impermissibly rely upon Defendants' lack of identifiable policies, practices, criteria or methods of administration to support their claim under ICRA.").

Finally, plaintiffs have not alleged valid claims against Governor Rauner or Comptroller Mendoza. Plaintiffs allege only that that Governor vetoed Amended Senate Bill 2822, and plaintiffs "expressly disclaim that they seek to challenge or override the Governor's veto" (Opinion at 32), so they do not challenge any conduct on the Governor's part.[3] Likewise, as to the Comptroller, plaintiffs allege only that she is responsible for "maintaining the State's fiscal accounts and ordering payments into and out of State funds" (Am. Compl. at ¶39), and this single allegation does not state an ICRA claim against her. The Comptroller may not disburse funds absent a legislative appropriation or other expenditure authority. *See* 15 ILCS 405/9(c); *Bd. of Trustees of Cmty. Coll. Dist. No. 508 v. Burris*, 118 Ill. 2d 465, 479 (1987). Conversely, she cannot be held liable under ICRA merely for fulfilling her statutory obligation to order

[3] Separation of powers principles and sovereign immunity preclude any challenge to the Governor's exercise of his constitutional veto authority, especially through an ICRA claim. *See* Ill. Const. Art. II, § 1; *Ex Parte Perry*, 483 S.W.3d 884, 901 (Tex. Crim. App. 2016); *Johnson v. Carlson*, 507 N.W.2d 232, 235 (Minn. 1993); *Barnes v. Sec'y of Admin.*, 586 N.E.2d 958, 960-62 (Mass. 1992); *O'Hara v. Kovens*, 606 A.2d 286, 289-95 (Md. App. 1992); *Ill. Collaboration on Youth v. Dimas*, 2017 Ill. App. (1st) 16274, at ¶¶28-41 (Jun. 15, 2017).

payment of funds that are appropriated by the legislature. *See* 15 ILCS 405/2; 40 ILCS 5/16-158 (b-1); *Munguia*, 2010 WL 3172740, at *7.

III. PLAINTIFFS' CLAIMS FAIL BECAUSE ICRA CANNOT OVERRIDE THE PENSION CODE OR THE LEGISLATURE'S APPROPRIATIONS.

In addition, all counts should be dismissed because ICRA cannot override the Pension Code or the legislature's appropriations. Plaintiffs have not asserted a constitutional claim. They have asserted an ICRA claim, and ICRA does not trump other state statutes. In a case like this one, the proper inquiry is whether the statutes at issue irreconcilably conflict. *Ill. Native Am. Bar Ass'n*, 368 Ill. App. 3d 321, 326-27 (1st Dist. 2006). Here, there is no conflict between ICRA and the Pension Code. They do not relate to the same subject matter at all, and there is no indication that the legislature intended for ICRA to supersede the Pension Code. As plaintiffs recognize, Section 5/17-129 expressly requires CPS to make sufficient contributions to CTPF to ensure adequate funding. *See* 40 ILCS 5/17-129.[4] The legislature is presumed to have been aware of this provision when it enacted ICRA, and still let it stand, which shows that there is no conflict here. *See Ill. Native Am. Bar Ass'n*, 368 Ill. App. 3d at 328 (no conflict between ICRA and the University of Illinois Act); *Munguia*, 2010 WL 3172740, at *7 (no conflict between ICRA and the RTA Act). This is "particularly difficult to argue against" because the legislature amended Section 5/17-129 in 2010, more than six years after the passage of ICRA, without mentioning any conflict. *Munguia*, *id.* at *7.

Moreover, even if there were a conflict, Section 5/17-129 would take precedence. ICRA was enacted in 2003, while Section 5/17-129's "present mandate" relating to CPS's obligation to fund the CTPF was established in 2010. Am. Compl. at ¶49. As the more-specific and later-

[4] Further, Section 5/17-127 of the Pension Code announces that the State's "goal and intention" is to contribute to CTPF between 20% and 30% of the amount it contributes to TRS. *See* 40 ILCS 5/17-127. This aspirational language confirms that the legislature did not intend to *guarantee* State contributions to CTPF in a specific amount.

passed statute, the Pension Code would govern. *See Munguia*, 2010 WL 3172740, at *7 ("Even if the statutes could conflict, the 2008 RTA Act amendments were both later in time and more specific, so they would govern over ICRA.").

Finally, to the extent that plaintiffs purport to challenge the legislature's appropriations for the CTPF and TRS pension funds or for education (rather than then Pension Code itself), their claims fail for the same reasons as above, because the appropriations are enacted into law, so the same analysis applies. On top of this, plaintiffs' claims would also fail because the General Assembly in 2003 (when ICRA was enacted) had no legal authority to subject the appropriations decisions of itself and all future legislatures to judicial review under ICRA: "[T]he actions of one legislature cannot bind future legislatures." *A.B.A.T.E. of Ill., Inc. v. Giannoulias*, 401 Ill. App. 3d 326, 335 (4th Dist. 2010). The General Assembly "is not required to—and cannot—adopt 'standards' to control its legislative discretion." *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 858 n.4 (7th Cir. 2008).

MOTION PURSUANT TO SECTION 2-619

IV. PLAINTIFFS' CLAIMS AGAINST THE STATE OF ILLINOIS ARE BARRED BY ICRA'S PLAIN LANGUAGE AND SOVEREIGN IMMUNITY.

Plaintiffs' claims against the "State of Illinois" are barred by ICRA's plain language and the doctrine of sovereign immunity.[5] ICRA applies to "unit[s] of State, county, or local government in Illinois," and only permits claims against "the offending unit of government." 740 ILCS 23/5. (emphasis added). The State itself is not a "unit" of State government, and thus is not a proper defendant. This is essentially a matter of statutory interpretation, albeit one informed by principles of sovereign immunity.

[5] Because this argument applies sovereign immunity principles, it is included under the "Section 2-619" heading. But plaintiffs' claims against the State of Illinois also fail under Section 2-615 because ICRA's plain language does not permit claims against the State itself.

ICRA must be interpreted in light of the State Lawsuit Immunity Act, which provides that "the State of Illinois should not be made a defendant or party in any court." 745 ILCS 5/1. (There are exceptions, but ICRA is not one of them. *Id.*) The starting presumption is that the State is immune from suit, and waivers of this immunity must be "clear and unequivocal" and must "appear in affirmative statutory language." *In re Special Educ. of Walker*, 131 Ill. 2d 300, 303-306 (1989); *see also Watkins v. Office of the State Appellate Defender*, 2012 Ill. App. (1st) 11756, at ¶¶17-29 (1st Dist. 2012); *People ex rel. Madigan v. Excavating & Lowboy Services, Inc.*, 388 Ill. App. 3d 554, 563-64 (1st Dist. 2009); *Lynch v. Dep't of Transp.*, 2012 Ill. App. (4th) 111040, at ¶¶23-30 (4th Dist. 2012). "If a statute is susceptible to more than one reasonable interpretation, including an interpretation that preserves sovereign immunity," then the Court should "conclude that the state has not waived its sovereign immunity." *Sossamon v. Tex.*, 563 U.S. 277, 287 (2011); *see also U.S. v. Nordic Vill.*, 503 U.S. 30, 37-38 (1992); *Dellmuth v. Muth*, 491 U.S. 223, 232 (1989).

Here, because ICRA's plain language does not permit claims against the State of Illinois itself (or, put another way, does not "waive" the State's immunity), plaintiffs cannot proceed under ICRA against the State.[6] *See Chicago Urban League v. State of Ill.*, 2009 WL 1632604, at*11 (Cir. Ct. Ill. Apr. 15, 2009) (holding that ICRA "does not provide an explicit waiver of the State's sovereign immunity" so "the State cannot be made a party to a Civil Rights Act claim

[6] Where, as here, the State is "actually made a party in the case," sovereign immunity applies "in the first instance." *Parmar v. Madigan*, 2017 Ill. App. (2d) 160286, at ¶20 (2d Dist. April 17, 2017); *see also Smith v. Jones*, 113 Ill. 2d 126, 132 (1986). Plaintiffs' claims against the "State of Illinois" are not permitted under ICRA's plain language and are barred by the State Lawsuit Immunity Act. Moreover, plaintiffs seek money damages as well as injunctive relief that "could operate to control the actions of the State" by effectively requiring the General Assembly to either appropriate additional funding for CTPF or, at the very least, to reallocate the pension funding for CPS versus other districts. *Westshire Retirement & Healthcare Center v. Dep't of Pub. Aid.*, 276 Ill. App. 3d 514, 520-522 (1st. Dist. 1995); *see also PHL, Inc. v. Pullman Bank & Trust Co.*, 216 Ill. 2d 250 (Ill. 2005). Plaintiffs cannot proceed against the State of Illinois and their claims against the State should be dismissed.

under the doctrine of sovereign immunity"). *Chicago Urban League* is directly on-point and remains good law after *Grey v. Hasbrouck*, which merely held that because the Director of the Department of Public Health could be sued under Section 5(a) of ICRA—a point that the parties did not dispute—he could also be liable for attorneys' fees under Section 5(c) of ICRA. 2015 Ill. App. (1st) 130267 (May 22, 2015). The plaintiffs in *Grey* did not assert an ICRA disparate impact claim, the State of Illinois was not a defendant, and the case did not address the issue presented here, which is whether the State of Illinois is a "unit" of State government subject to suit under ICRA. *Id.*

V. PLAINTIFFS' CLAIMS ARE BARRED BY SEPARATION OF POWERS PRINCIPLES.

Plaintiffs' claims against all defendants are also barred by separation of powers principles because they purport to challenge the legislature's appropriations for pension or educational funding. As the Illinois Supreme Court explained, "[t]he power to appropriate for the expenditure of public funds is vested exclusively in the General Assembly; no other branch of government holds such power." *State (CMS) v. AFSCME*, 2016 IL 118422, ¶42 (2016); citing Ill. Const., art. VIII, § 2(b). Plaintiffs do not assert any constitutional claims, nor do they identify a clear statutory funding mandate for State contributions to CTPF. Any relief ordered by this Court would run afoul of the separation of powers doctrine by impermissibly interfering with the legislature's exclusive authority to appropriate funds. *See* Ill. Const., art. II, § 1; *AFSCME v. Netsch*, 216 Ill. App. 3d 566, 568 (4th Dist. 1991); *People ex rel. Carr v. Chicago & N.W. Ry. Co.*, 308 Ill. 54 (1923) ("The courts, as a rule, will not interfere with the legislative discretion as to making appropriations."); *see also Committee for Educational Rights v. Edgar*, 174 Ill. 2d 1, 23-24, 39-40 (1996) (emphasizing that "the process of reform must be undertaken in a legislative forum rather than the courts").

CONCLUSION

For the foregoing reasons, plaintiffs' amended complaint should be dismissed with prejudice pursuant to 735 ILCS 5/2-619 and 735 ILCS 5/2-615.

Dated: June 30, 2017

LISA MADIGAN

Attorney General of Illinois
Atty. Code: 99000

Respectfully submitted,

/s/ Michael T. Dierkes

Gary S. Caplan
Thomas A. Ioppolo
Michael T. Dierkes
Office of the Illinois Attorney General
100 W. Randolph Street, 13th Floor
Chicago, Illinois 60601
Tel.: (312) 814-3600
Fax: (312) 814-4425

EXHIBIT A

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

BOARD OF EDUCATION OF THE CITY OF CHICAGO; MARLON GOSA ON BEHALF OF A.G., C.G., and J.G.; LISA RUSSELL ON BEHALF OF F.R. and L.R.; WANDA TAYLOR ON BEHALF OF K.S.; VANESSA VALENTIN ON BEHALF OF E.R. and J.V.; and JUDY VAZQUEZ ON BEHALF OF K.V., J.V., and J.V.,	)	
Plaintiffs,	)	
-vs-	)	No. 17 CH 2157
BRUCE RAUNER, Governor of Illinois; STATE OF ILLINOIS; ILLINOIS STATE BOARD OF EDUCATION; REVEREND JAMES T. MEEKS; DR. TONY SMITH; and SUSANA A. MENDOZA,	)	
Defendants.	)	

REPORT OF PROCEEDINGS at the hearing of the above-entitled cause before the Honorable FRANKLIN U. VALDERRAMA, Judge of said court, on Wednesday, April 19, 2017, at 10:30 a.m.

Reported by: Laura L. Kooy, CSR, RDR, CRR
CSR No. 84-002467

APPEARANCES:

JENNER & BLOCK LLP by
MR. DAVID W. DeBRUIN
1099 New York Avenue NW
Suite 900
Washington, DC 20001-4412
(202) 639-6015
DDeBruin@Jenner.com

on behalf of all Plaintiffs;

BOARD OF EDUCATION OF THE CITY OF CHICAGO
LAW DEPARTMENT by
MR. RONALD L. MARMER
General Counsel
One North Dearborn Street
Suite 900
Chicago, Illinois 60602-2502
(773) 553-1785
RMarmer@CPS.edu

on behalf of the Plaintiff Board of Education of the City of Chicago;

OFFICE OF THE ILLINOIS ATTORNEY GENERAL by
MR. GARY S. CAPLAN
Assistant Chief Deputy Attorney General
MR. MICHAEL T. DIERKES
Assistant Attorney General
100 West Randolph Street
13th Floor
Chicago, Illinois 60601
(312) 814-5661 (GSC)
(312) 814-3672 (MTD)
GCaplan@ATG.State.IL.US
MDierkes@ATG.State.IL.US

on behalf of the Defendants.

* * * * *

the word "efficient" didn't mean that there could not be any disparities. But, more importantly, it said, in terms of the Constitutional mandate for a, quote, high-quality education, the Courts were not competent to measure and evaluate whether or not education was, quote, a high quality or not a high quality. And that that was properly in the realm of the legislative branch.

Again, that's not what we're talking about here.

ICRA is very clear. Very specific. It has a long history that draws on Title VI. Disparate impact litigation is well-established and well-defined.

So as to the separation of powers argument, again, I submit that there is no bar to action under the Civil Rights Act.

Lastly, let me just address the Pension Code, which I think came up perhaps more in the initial remarks.

Again, we are not asking this Court to declare any portion of the Pension Code as, somehow, superceded by ICRA or illegal under ICRA. There is no need for the Court to do that.

When faced with two statutes, what the State basically is saying, well, we don't have to comply with ICRA. Even if we're not sovereign immune and we're subject to ICRA, we don't have to comply with the Civil Rights Act because the Pension Code allows us to distribute funds in a way that has this discriminatory disparate impact.

There's nothing in the Pension Code that mandates the disparate impact that we are challenging in this case.

THE COURT: So there has to be an administration, does there not, of the Pension Code?

In other words, you can't just be talking about the Pension Code, per se. You have to be then talking about how the Pension Code is being administered to bring it under the realm of ICRA, wouldn't you?

MR. DeBRUIN: Well, but my point is, there's nothing in the Pension Code that mandates the disparities that we are challenging.

So if you're faced with two statutes, which this is, I think, basically what the State argues in their papers. If you're faced with two statutes, that one party, here the State, contends, we cannot

is the intention of the State, in the Pension Code, and this is cited in the papers, it is Section 40 ILCS 5/17-127(b), to continue to fund CTPF in the same percentages, 20 to 30 percent, as had been funded historically.

So there is nothing in the Pension Code that makes it impossible for the State of Illinois to comply with the Civil Rights Act.

THE COURT: So let me ask you a follow-up on that then.

Does the Civil Rights Act recognize a claim, on a disparate impact theory, for a challenge to a statute or a statutory scheme, as opposed to the administrative implementation of a statute or statutory scheme?

MR. DeBRUIN: I believe it does both. Either one.

THE COURT: Okay. What authority supports that proposition?

MR. DeBRUIN: The language of the statute.

The State cannot -- let me go --

THE COURT: The language of the statute, as you have indicated in your papers, and you have indicated here today as well, talks about the administration of

a program or activity. So doesn't that bring us back to, then, what is the program or activity that is being administered, via the Pension Code, that bears or causes disparate impact on a protected class?

Isn't that really the issue?

MR. DeBRUIN: Well, I think it is. I think it's not really the Pension Code. I think it is more what my colleague described as the State's appropriations bills that have chosen to appropriate $4 billion to TRS and $12 million to the Chicago Teachers Pension Fund. 0.3 percent of the total pension funding in the State.

And so what the State, I think, is really contending is that the State of Illinois is free to appropriate money and spend money however it wants to, and there's nothing that this Court or the Civil Rights Act would do to constrain that.

So if the State said, we are going to enact legislation that provides $100 to every white citizen in the State, and we are not going to enact legislation that provides the same money to African American and Hispanic residents in the State, we can do that under the Civil Rights Act. That's an appropriation. That's another statute. And it is

that while facially, perhaps neutral, bore a disparate impact on minorities? And, therefore, potentially presented a violation of ICRA because of the administration of that program?

MR. DeBRUIN: Yes. But my point is the Civil Rights Act does not say, this Act applies to policies.

It applies to regulations. It applies to all governmental action whether laws, regulations, policies, practices, whatever it may be, if that governmental action is utilizing criteria that has a disparate impact. And that's exactly what is happening here. The State of Illinois is providing pension funding and total educational funding using criteria, basically creating two systems. And that's what we have.

We have a system for funding CPS, where the students are 90 percent African American, Hispanic, or other children of color, and another system for the rest of the state.

That is a means of administration.

And if you look at the statute, "Utilize criteria or methods of administration."

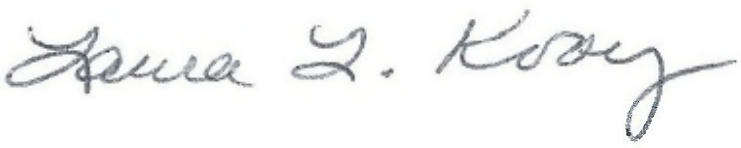
THE COURT: So what is the criteria here?

Re: Board of Education, etc., et al., vs. Bruce Rauner, etc., et al.
No. 17 CH 2157

I, LAURA L. KOOY, do hereby certify that the foregoing Report of Proceedings was recorded stenographically by me and was reduced to computerized transcription under my direction, and that the said transcript constitutes a true record of the proceedings.

I further certify that I am not a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office this 19th day of April, 2017.



LAURA L. KOOY, CSR, RDR, CRR
Notary Public
CSR License No. 084-002467

Chancery DIVISION

Litigant List

Printed on 06/30/2017

Case Number: 2017-CH-02157

Plaintiffs

Plaintiffs Name	Plaintiffs Address	State	Zip	Unit #
BD EDUCATION CITY CHICAGO			0000	
GOSA MARLON			0000	
RUSSELL LISA			0000	
TAYLOR WANDA			0000	
VALENTIN VANESSA			0000	
VAZQUEZ JUDY			0000	
CHICAGO CITY COUNCIL			0000	
LATINO CAUCUS			0000	
AMICUS CURIAE			0000	

Total Plaintiffs: **9**

Defendants

Defendant Name	Defendant Address	State	Unit #	Service By
RAUNER BRUCE		0000		
STATE ILLINOIS		0000		
IL STATE BD EDUCATION		0000		

MEEKS	REV JAMES	0000
SMITH	DR TONY	0000
MEMDOZA	SUSANA	0000

Total Defendants: **6**