



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ROY DEN HOLLANDER, :
on behalf of himself and all :
others similarly situated, :

Plaintiff, :

-against- :

10 Civ. 9277 (LTS) (HBP)

ORDER

MEMBERS OF THE BOARD OF REGENTS :
OF THE UNIVERSITY OF THE STATE OF :
NEW YORK, in their official :
and individual capacities; :
CHANCELLOR OF THE BOARD OF :
REGENTS, MERRYL H. TISCH, in her :
official and individual capacity; :
NEW YORK STATE COMMISSIONER OF :
THE DEPARTMENT OF EDUCATION, :
DAVID M. STEINER, in his official :
and individual capacity; :
ACTING PRESIDENT OF THE NEW YORK :
STATE HIGHER EDUCATION SERVICES :
CORP., ELSA MAGEE, in her official :
and individual capacity; :
U.S. DEPARTMENT OF EDUCATION, and :
U.S. SECRETARY OF EDUCATION, ARNE :
DUNCAN, in his official capacity, :

Defendants. :

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PITMAN, United States Magistrate Judge:

All defendants have moved to dismiss the complaint, and all parties have submitted materials that go beyond the face of the complaint. It is not at all clear whether defendants are moving under 12(b)(1) or 12(b)(6) of the Federal Rules of Civil

Procedure. This difference is material, because the former permits consideration of materials beyond the face of the complaint while the latter generally does not.

Fed.R.Civ.P. 12(d) provides that: "[i]f, on a motion under Rule 12(b)(6) . . . matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Because all parties have submitted materials that go beyond the face of the pleading, it is my intention to convert the motion to a motion for summary judgment pursuant to Fed.R.Civ.P. 12(d). If the parties wish to submit additional materials in connection with the motion, they are directed to do so no later than June 30, 2011.

Dated: New York, New York
June 3, 2011

SO ORDERED


HENRY PITMAN
United States Magistrate Judge

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