UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007 IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of October, two thousand nineteen.

PRESENT:

JOHN M. WALKER, JR.,
SUSAN L. CARNEY,
Circuit Judges,
JOHN G. KOELTL,
District Judge.*

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* Judge John G. Koeltl, of the United States District Court for the Southern District of New York, sitting by designation.

DR. SHIMON WARONKER,

Plaintiff-Appellant,

v.

No. 19-407

HEMPSTEAD UNION FREE SCHOOL DISTRICT, BOARD OF EDUCATION OF THE HEMPSTEAD SCHOOL DISTRICT, DAVID B. GATES, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, RANDY STITH, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, LAMONT E. JACKSON, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, PATRICIA WRIGHT, AS A NECESSARY PARTY IN HER CAPACITY AS CLERK OF THE HEMPSTEAD SCHOOL DISTRICT,

Defendants-Appellees.

FOR PLAINTIFF-APPELLANT:	FREDERICK K. BREWINGTON, Law Offices of Frederick K. Brewington, Hempstead, NY.
FOR DEFENDANTS-APPELLEES:	JONATHAN L. SCHER (Austin Graff, *on the brief*), The Scher Law Firm, LLP, Carle Place, NY.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Hurley, *J.*).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on January 18, 2019, is **AFFIRMED**.

Shimon Waronker appeals from a judgment of the United States District Court for the Eastern District of New York (Hurley, *J.*), dismissing his claims under Federal Rule of Civil Procedure 12(b)(6) and denying him leave to amend his complaint. We assume the parties' familiarity with the underlying facts, procedural history, and arguments on appeal, to which we refer only as necessary to explain our decision to affirm.

We draw the following factual allegations from Waronker's complaint, taking them as true for the purposes of evaluating a motion to dismiss. This action stems from Waronker's work as superintendent for the Hempstead Union Free School District (the "School District"). The School District has a long history of academic problems and financial mismanagement. Waronker, however, believed that "[his] past successful transformative efforts in [other] schools . . . would enable him to do what was necessary for [the] School District." Joint App'x 3-4. Accordingly, when he was hired as the School District's superintendent in 2017, Waronker took several steps towards "reshaping the structure of administration, services[,] and education in the District." *Id.* at 17. These included hiring and firing personnel, forming collaborations with outside educational organizations, contracting with "a Forensic Auditing Firm" to review the School District's

books, and hiring "[s]pecial investigators to . . . root out the corruption and mismanagement." *Id.* at 26.

At some point, however, the Board of Education of the Hempstead School District (the "Board") started to resist Waronker's reform efforts, and in November 2017, it fired "the Special Investigators who were looking at abuse, mismanagement and possible corruption." *Id.* at 29. In response, Waronker sent an email to the Board on December 6, 2017 (the "Board Email"), advising that he had "consulted with several law enforcement agencies" about "matters [that] . . . appear to be both unlawful and unethical." *Id.* Three weeks later, the Board suspended Waronker's authority to act as superintendent. The Board's action prompted Waronker to distribute an open letter to the Hempstead community (the "Community Letter") in which he urged members to "collaborate with me to make Hempstead Schools thrive again" and warned that "[p]olitics, self-interest[ ], patronage, vendettas, threats, and cover-ups cannot rule the day." *Id.* at 31. Four days later, on January 9, 2018, the Board placed Waronker on paid administrative leave. It did so without prior notice to Waronker and without providing him a pre-suspension hearing.

On January 19, 2018, Waronker sued the School District, the Board, and several School District employees (collectively, "Defendants-Appellees"), alleging claims under (1) the Due Process Clause, for deprivation of both property and liberty interests; (2) the First Amendment, for unlawful retaliation; and (3) New York law, for breach of contract and retaliation. After

Defendants-Appellees moved to dismiss the complaint, Waronker sought leave to amend his complaint to add allegations concerning certain "Specifications and Charges" that the School District had recently filed against Waronker in what appears to be an administrative proceeding. Less than three weeks later, in January 2019, the District Court dismissed Waronker's federal-law claims under Rule 12(b)(6). It further declined to exercise supplemental jurisdiction over his state-law claims and denied Waronker leave to amend his complaint on futility grounds.

We "review *de novo* the grant of a Rule 12(b)(6) motion to dismiss for failure to state a claim, accepting all factual allegations as true and drawing all reasonable inferences in favor of the plaintiff." *Montero v. City of Yonkers*, 890 F.3d 386, 394 (2d Cir. 2018) (citation omitted). We review "a district court's denial of leave to amend for abuse of discretion, unless the denial was based on an interpretation of law, such as futility, in which case we review the legal conclusion *de novo.*" *Panther Partners Inc. v. Ikanos Commc'ns, Inc.*, 681 F.3d 114, 119 (2d Cir. 2012).

1. First Amendment Retaliation

Waronker asserts that Defendants-Appellees violated his First Amendment right to free speech when they retaliated against him for speaking out about corruption and academic mismanagement occurring in the School District. His claim is based on three communications: (1) the Board Email, (2) the Community

Letter, and (3) the set of communications between Waronker and several law enforcement agencies that was referenced in the Board Email.

To state a retaliation claim under the First Amendment, a public employee must plausibly allege that "[he] spoke as a citizen on a matter of public concern." *Matthews v. City of New York*, 779 F.3d 167, 172 (2d Cir. 2015) (citation omitted). A plaintiff speaks as a government employee, rather than as a citizen, when "[his] remarks were made pursuant to his official employment responsibilities." *Montero*, 890 F.3d at 398. Whether a plaintiff spoke as a citizen is a question of law for the court to decide. *See Singer v. Ferro*, 711 F.3d 334, 339 (2d Cir. 2013). We have cautioned, however, that "[this] inquiry . . . is not susceptible to a brightline rule," *Ross v. Breslin*, 693 F.3d 300, 306 (2d Cir. 2012), because "speech can be pursuant to a public employee's official job duties even though it is not required by, or included in, the employee's job description," *Weintraub v. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 593 F.3d 196, 203 (2d Cir. 2010) (internal quotation marks omitted). We have therefore adopted "a functional approach toward evaluating an employee's duties," *Matthews*, 779 F.3d at 173, framing the "[u]ltimate . . . question . . . [as] whether the employee's speech was part-and-parcel of that person's concerns about his ability to properly execute his duties," *Montero*, 890 F.3d at 398 (internal quotation marks and alterations omitted).

In this case, Defendants-Appellees do not dispute that Waronker's statements concerned matters of public concern, but they contend that Waronker's

statements were made pursuant to his official duties as superintendent. However, Waronker does not plausibly allege that he was speaking as a citizen when he publicly accused the School District of corruption. The complaint makes clear that "root[ing] out [] corruption and mismanagement" was "part-and-parcel" (in the *Montero* formulation) of Waronker's daily responsibilities as superintendent, even if, as Waronker claims on appeal, it was not part of his formal job description. Joint App'x 26. Waronker's factual allegations further make evident that he sent the Board Email and Community Letter pursuant to his official employment responsibilities. Not only do both of these communications focus on Waronker's efforts as superintendent to reform the School District, but Waronker signed the Board Email using his official job title, "Superintendent of Schools," and he posted the Community Letter on the School District's website.

As for the communications between Waronker and law enforcement agencies that he referenced in the Board Email, nothing in the complaint suggests that he consulted with these agencies as a private citizen. Instead, as he explains in the Board Email, Waronker felt "compelled" to contact law enforcement because (1) the Board failed to take "corrective action" after Waronker "rais[ed] questions about suspected illegal financial activity," and (2) Waronker had "[a] professional, moral and legal obligation to serve the District." Joint App'x 29. Waronker therefore framed his consultations with law enforcement as "a means to fulfill, and undertaken [sic] in the course of performing,

his primary employment responsibilit[ies]." *Weintraub*, 593 F.3d at 203 (internal citations and quotation marks omitted). Indeed, Waronker all but concedes this point when he notes that he consulted law enforcement "[a]s a fiduciary and as a guardian of the public trust." Joint App'x 29.

Nor is Waronker's reliance on *Lane v. Franks*, 573 U.S. 228 (2014), persuasive. In that case, the Supreme Court held that a state employee spoke as a citizen when he gave sworn testimony in a judicial proceeding, even though his testimony concerned certain corrupt activities that he uncovered while acting pursuant to his official duties. The Court explained that "[s]worn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth." *Id.* at 238. Thus, the Court emphasized, it is this obligation to tell the truth—an obligation that stands "distinct and independent" from any obligation that a public employee might owe to his employer—that "renders sworn testimony speech as a citizen and sets it apart from speech made purely in the capacity of an employee." *Id.* at 239. Here, by contrast, Waronker did not bear an obligation as a private citizen to communicate with law enforcement about the School District's corruption and mismanagement. Instead, as expressed in the complaint, Waronker felt "compelled" to contact law enforcement by "[his] professional, moral and legal obligation to serve the District." Joint App'x 29.

Accordingly, we affirm the District Court's dismissal of Waronker's First Amendment claim on the grounds that he failed to plausibly allege that he spoke as a private citizen on a matter of public concern.

2. Procedural Due Process Claims

Waronker asserts two procedural due process claims, one alleging deprivation of a protected property interest, the other alleging deprivation of a protected liberty interest. Neither survives review.

a. *Property-Interest Claim*

To establish a property-based procedural due process claim, "[a] plaintiff must show that state action deprived her of a property interest protected by the Fourteenth Amendment." *Velez v. Levy*, 401 F.3d 75, 85 (2d Cir. 2005). We engage in "a two-step process" to determine whether a property interest is constitutionally protected. *O'Connor v. Pierson*, 426 F.3d 187, 196 (2d Cir. 2005). First, we determine "whether some source of law other than the Constitution, such as a state or federal statute, confers a property right on the plaintiff." *Id.* Then, "[o]nce such a property right is found, we determine whether that property right constitutes a property interest for purposes of the Fourteenth Amendment." *Id.* (internal quotation marks omitted).

In this case, Waronker's property-based procedural due process claim rests on the Board's decision to place him on a paid administrative leave of absence. Under this Circuit's precedents, however, an employee

who is suspended is not deprived of a protected property interest "[so] long as the employee is receiving a paycheck equivalent to his normal salary." *Tooly v. Schwaller*, 919 F.3d 165, 173 (2d Cir. 2019) (internal quotation marks omitted). Thus, while "an employee who is placed on unpaid leave has been deprived of a protected property interest," an employee who is placed on paid leave "has only been deprived of a property interest triggering due process when he suffers a financial loss." *Id.* (emphasis omitted) (internal quotation marks omitted). Waronker does not assert, either in his complaint or on appeal, that he was paid less than his full salary while on administrative leave. His suspension therefore does not provide an adequate basis for his procedural due process claim.

Nor can this claim rest on the allegations that Waronker was suspended without "a prompt and meaningful pre-suspension hearing." Waronker's Br. 47. Although Waronker was entitled to such process under his employment contract, a pre-suspension hearing is "not an end in itself," but instead "has value only because it may lead to something valuable," namely, avoiding suspension. *McMenemy v. City of Rochester*, 241 F.3d 279, 287 (2d Cir. 2001); *see also Martz v. Incorporated Village of Valley Stream*, 22 F.3d 26, 31 (2d Cir. 1994) ("Thus, where a breach of contract does not give rise to a deprivation of a protectible property interest, plaintiff's exclusive remedy lies in state court for breach of contract." (internal quotation marks omitted)). Procedural due process, however, "protects only important and substantial expectations in life,

liberty, and property"; it "does not protect "trivial and insubstantial interests." *N.Y. State Nat'l Org. for Women v. Pataki*, 261 F.3d 156, 164 (2d Cir. 2001) (internal quotation marks and alterations omitted). Thus, because a pre-suspension hearing does not constitute an independent substantive right, much less one that implicates "important and substantial" property interests, Defendants-Appellees did not deprive Waronker of a constitutionally protected interest when they suspended him without a hearing. *Id.*

Accordingly, we affirm the District Court's dismissal of Waronker's property-based procedural due process claim.

b. *Liberty-Interest Claim*

Waronker also brings a "stigma-plus" claim, which we have described as "a species within the phylum of [liberty-based] procedural due process claims." *Segal v. City of New York*, 459 F.3d 207, 213 (2d Cir. 2006). To prevail on such a claim, a plaintiff must plausibly allege "(1) the utterance of a statement sufficiently derogatory to injure his or her reputation, that is capable of being proved false, and that he or she claims is false, and (2) a material state-imposed burden or state-imposed alteration of the plaintiff's status or rights." *Sadallah v. City of Utica*, 383 F.3d 34, 38 (2d Cir. 2004) (internal quotation marks omitted).

The District Court dismissed Waronker's claim on the first prong of the stigma-plus test, correctly concluding that the complaint failed to identify any "false,

stigmatizing statements" that Defendants-Appellees made about Waronker. *Waronker v. Hempstead Union Free Sch. Dist.*, No. 2:18-cv-393(DRH)(SIL), 2019 WL 235646, at *5 (E.D.N.Y. Jan. 16, 2019). On appeal, Waronker does not seriously contest this conclusion, nor can he: beyond conclusory assertions that Defendants-Appellees "subjected [Waronker] to scandalous claims and investigations," Joint App'x 34, the complaint is devoid of any specific statements made about him, much less ones capable of supporting a stigma-plus claim. Instead, Waronker argues that, if the District Court had permitted him leave to amend his complaint, he would have alleged statements that were sufficiently stigmatizing.

We need not resolve, however, whether Waronker's proposed amendments to the complaint would satisfy the "stigma" requirement of a stigma-plus claim, because even assuming they would, the complaint still fails to satisfy the "plus" requirement. To plead an adequate "plus" factor, a plaintiff must identify "some tangible and material state-imposed burden" that is separate from the deleterious effects flowing directly from the stigmatizing statement. *Velez*, 401 F.3d at 87 (internal citation omitted); *see also Sadallah*, 383 F.3d at 38 ("[The] deleterious effects flowing directly from a sullied reputation, standing alone, do not constitute a plus under the stigma plus doctrine." (internal quotation marks and alterations omitted)). Burdens that satisfy the "plus" prong include "the deprivation of a plaintiff's property and the termination of a plaintiff's government employment." *Sadallah*, 383 F.3d at 38

(internal citations omitted). By contrast, our precedent instructs that a plaintiff's temporary suspension from work does not constitute an adequate "plus" factor if the plaintiff suffers no financial loss. *See Patterson v. City of Utica*, 370 F.3d 322, 332 (2d Cir. 2004) ("It cannot, as a matter of law, be viewed as a significant alteration of plaintiff's employment status when, in fact, he was quickly hired back in the same position from which he was supposedly fired."); *Dobosz v. Walsh*, 892 F.2d 1135, 1137-38, 1140 (2d Cir. 1989) (holding that plaintiff's five-month suspension did not constitute a sufficient plus factor because plaintiff was later reinstated with back pay and seniority credit).

Waronker's placement on administrative leave does not satisfy the "plus" requirement because, as noted above, nothing in the complaint suggests that he suffered a financial loss as a result of his suspensions. Nor can Waronker avoid dismissal of his stigma-plus claim by simply alleging that he suffered "public abuse and humiliation" at the hands of Defendants-Appellees. Waronker's Br. 41. Instead, Waronker must identify "a state-imposed burden or alteration of status . . . [that is] *in addition* to the stigmatizing statement." *Sadallah*, 383 F.3d at 38 (internal quotation marks omitted). Because the complaint fails to do so, Waronker's stigma-plus claim does not survive. Thus, even assuming *arguendo* that Waronker plausibly alleged a stigmatizing statement, we would nevertheless affirm the District Court's dismissal of his liberty-based procedural due process claim for failure to plead an adequate "plus" factor.

3. State-Law Claims

The District Court dismissed Waronker's state-law claims for retaliation and breach of contract on two grounds. First, it held that the claims were barred by section 3813(1) of the New York Education Law, which provides, in essence, that a plaintiff may not maintain an action against a school district unless the plaintiff has previously filed a "written verified claim" with the school district within three months after the accrual of the action. N.Y. Educ. Law § 3813(1). The District Court then proceeded to conclude that, even if section 3813(1) did not bar Waronker's state-law claims, dismissal was warranted because the Court had decided not to exercise supplemental jurisdiction over Waronker's remaining state-law claims.

It is preferable for the court to address the matter of its own jurisdiction before considering the substance of a claim. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430-31 (2007) ("[A] federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit. . . ."). Indeed, because the District Court declined to exercise supplemental jurisdiction over Waronker's state-law claims, it had no jurisdiction to decide the state law question of whether section 3813(1) precluded Waronker from bringing these claims against Defendants-Appellants.

In the past, we have vacated and remanded where (1) "it [was] unclear whether the dismissal of . . . [a state-law claim] was on the merits or based on a

decision not to exercise supplemental jurisdiction," and (2) the district court's judgment did not specify whether the state-law claim was "dismissed with or without prejudice." *Wegner v. Upstate Farms Coop., Inc.*, 560 F. App'x 22, 27 (2d Cir. 2014). Here, however, the District Court explicitly declined to exercise its supplemental jurisdiction; its remarks leave no doubt that it intended to dismiss Waronker's state-law claims without prejudice so that they could "be re-filed in state court where the Parties will be afforded a surer-footed reading of applicable law." *Waronker*, 2019 WL 235646, at *8 (internal quotation marks and alterations omitted). Moreover, we find no abuse of discretion in the District Court's decision not to exercise supplemental jurisdiction. *See Denney v. Deutsche Bank AG*, 443 F.3d 253, 266 (2d Cir. 2006) ("A district court usually should decline the exercise of supplemental jurisdiction when all federal claims have been dismissed at the pleading stage."). Accordingly, we affirm the District Court's dismissal of Waronker's state-law claims, emphasizing that this dismissal is without prejudice. We do not express any view on the application of section 3813 of the New York Education Law to the facts at hand.

4. Leave to Amend the Complaint

Finally, Waronker asserts that the District Court erred by denying him leave to amend his complaint so as to add allegations concerning certain "Specifications and Charges" filed against him by the School District. These Specifications and Charges are relevant,

Waronker contends on appeal, to his allegations that Defendants-Appellees made stigmatizing statements about him. As we explained above, however, even if the complaint alleged a sufficiently stigmatizing statement, Waronker's stigma-plus claim would still fail as a matter of law because he did not allege facts satisfying the "plus" (burden) requirement under this doctrine. Nothing else in Waronker's motion to the District Court, or in his briefs on appeal, suggests that the Specifications and Charges contain facts that would save his complaint from dismissal on that ground. Where, as here, "the plaintiff is unable to demonstrate that he would be able to amend his complaint in a manner which would survive dismissal, opportunity to replead is rightfully denied." *Hayden v. County of Nassau*, 180 F.3d 42, 53 (2d Cir. 1999). We therefore conclude that the District Court did not err by denying Waronker's motion to amend his complaint.

* * *

We have considered Waronker's remaining arguments and conclude that they are without merit. For the foregoing reasons, the District Court's judgment is **AFFIRMED**.

FOR THE COURT:

Catherine O'Hagan Wolfe,
Clerk of Court

[SEAL]

/s/ Catherine O'Hagan Wolfe

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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SHIMON WARONKER,

Plaintiff,

- against -

HEMPSTEAD UNION FREE SCHOOL DISTRICT, BOARD OF EDUCATION OF THE HEMPSTEAD SCHOOL DISTRICT, DAVID B. GATES, in his individual and official capacity, RANDY STITH, in his individual and official capacity, LAMONT E. JACKSON, in his individual and official capacity, PATRICIA WRIGHT, in her official capacity as Clerk of the Hempstead School District,

Defendants.
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MEMORANDUM AND ORDER
2:18-cv-393
(DRH)(SIL)

(Filed Jan. 16, 2019)

APPEARANCES

LAW OFFICES OF FREDERICK K. BREWINGTON
Attorneys for Plaintiff
556 Peninsula Boulevard
Hempstead, NY 11550
By: Frederick K. Brewington, Esq.
Cathryn Harris-Marchesi, Esq.
Julissa M. Proano, Esq.

THE SCHER LAW FIRM, LLP
Attorney for Defendant
1 Old Country Rd., Suite 385
Carle Place, NY 11514
By: Austin R. Graff, Esq.

HURLEY, Senior District Judge:

INTRODUCTION

Plaintiff Dr. Shimon Waronker ("Plaintiff") brought this action against Defendants Hempstead Union Free School District ("School District"), the Board Of Education of the Hempstead School District ("Board"), David B. Gates ("Gates"), in his individual and official capacity, Randy Stith, in his individual and official capacity, Lamont E. Jackson ("Jackson"), in his individual and official capacity, and Patricia Wright, in her official capacity as Clerk of the Hempstead School District (collectively, "Defendants") for violations of his rights under 42 U.S.C. § 1983, the First and Fourteenth Amendments of the U.S. Constitution, and state whistleblower protections, as well as breach of contract.

Presently before the Court is Defendant's motion to dismiss pursuant to Fed. R. Civ. P. ("Rule") 12(b)(1) for lack of subject matter jurisdiction, and Rule 12(b)(6) for failure to state a claim. For the reasons discussed below, the motion to dismiss is granted as to all claims. Additionally, the Court has considered Plaintiff's request to supplement his previously filed opposition to Defendants' Motion to Dismiss, and to amend the Complaint. As explained below, Plaintiff's request is denied.

BACKGROUND

The following relevant facts come from the Amended Complaint and are assumed true for purposes of this motion.

The School District has had a fraught history of violence, gang activity, low graduation rates, inadequate resources, and dilapidated facilities. (Compl. [DE 1] ¶ 32.) Plaintiff has successfully "transformed" schools with academic, funding, and leadership challenges in the South Bronx, Brownsville, and East Flatbush. (*Id.* ¶ 14.) When the School District posted an opening for a new superintendent in 2017, Plaintiff submitted an application. (*Id.* ¶ 15.) Plaintiff was scheduled for an in-person interview with the Board on April 4, 2017. (*Id.* ¶ 16.) Upon his arrival for the interview he was informed that a minority of the Board had put in a restraining order against the majority of the Board because of the location of the interview. (*Id.*) Thereafter, Plaintiff had two interviews with all five members of the Board. (*Id.* ¶¶ 17–18.) The Board expressed interest in hiring Plaintiff and began negotiating a contract. (*Id.* ¶ 19.) In negotiating the contract, Plaintiff "expressed the importance of having the ability as Superintendent of working with organizations that he ha[d] worked with or been affiliated with in the past when transforming schools." (*Id.* ¶ 20.) As such, Plaintiff's employment contract specifically provides that he had established professional or financial relationships with four delineated organizations, and that he [sic] while he may recommend that the District "enter into transactions" with these organizations he would not draw any

compensation from these entities to eliminate possible conflicts of interest. (*Id.*) The four organizations were: (1) The Harvard Graduate School of Education; (2) The National Board for Professional Teaching Standards; (3) The New American Initiative; and (4) The New York City Leadership Academy. (*Id.*)

In 2017, after Plaintiff took the job as Superintendent for the District, he brought in special investigators and a forensic auditing firm to review the school's entrenched financial woes, as well as a deputy superintendent to deal with the violence plaguing the school. (*Id.* ¶ 120.) Plaintiff himself conducted a review of over 1,500 high school students' transcripts and discovered that 75% would not graduate and receive a high school diploma. (*Id.* ¶ 51.) Additionally, students in the ninth grade were taking eleventh grade history, and only 17% of students were passing the exam. (*Id.* ¶ 55.) Plaintiff also learned that students in the middle school were allowed to continue to the next grade even if they failed all of their classes. (*Id.* ¶ 53.) Plaintiff provides many other such examples of academic mismanagement in the Complaint. In addition to the academic review, Plaintiff also oversaw a facilities review in 2017. (*Id.* ¶ 71.) As part of this review, Plaintiff found that 1,600 students were studying "in crumbling and moldy trailers, some of which [were] 34 years old" and that the buildings had vermin infestations, decaying boilers, flooding, burst pipes, and graffiti. (*Id.*) An examination of the District's payroll revealed 295 distributions to 129 individuals who were not active employees of the District at the time of the payroll

distribution, in addition to other financial mismanagement. (*Id.* ¶ 77.) Notably, "a great deal of the financial records were burned prior to [Plaintiff's] arrival" when the documents were due to be presented to the forensic auditors. (*Id.* ¶ 122.)

In June 2017, with the Board's approval, Plaintiff hired New American Initiative to help improve the school. (*Id.* ¶ 125.) Additionally, four Master teachers "were hired to help improve the pedagogy of the District." (*Id.* ¶ 125.) Also in June, Plaintiff terminated the Assistant Superintendent for Business & Operations due to his inability to disclose to Plaintiff the amount of money in the budget. (*Id.* ¶ 127.) Thereafter, Plaintiff terminated High School Principal Stephen Strachan for undisclosed "serious issues." (*Id.* ¶ 128.) During this time, an independent group named "Hempstead for Hempstead" founded by former Board member Thomas Parsley[1] began sowing opposition to Plaintiff. (*Id.* ¶ 130. Hempstead for Hempstead told Plaintiff when he terminated Principal Strachen [sic] that "there would be war." (*Id.* ¶ 129.)

In July 2017, Board Member Jackson was removed from the Board after a hearing. (*Id.* ¶ 131.) In August 2017, Plaintiff arranged a conflict mediation training for the Board and Cabinet-level officers; three of the Board members attended, but the other two refused to attend. (*Id.* ¶ 134.) When Plaintiff asked Board

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[1] Mr. Parsley was allegedly removed from the Board after being convicted for Grand Larceny as well as a sexual offense. (Compl. ¶ 130.)

member Gates why he missed the training, Gates responded: "I don't trust you, you are my enemy." (*Id.* ¶ 135.) In September 2017, the Commissioner of Education appointed Dr. Jack Bierwirth as a "Distringuished Educator" to oversee the District. (*Id.* ¶ 142.) Only one other school district in New York State was subject to this type of oversight. (*Id.*)

On November 29, 2017, the Board called an emergency session and fired the Special Investigators looking into abuse, mismanagement, and possible corruption. (*Id.* ¶ 144.) In response, Plaintiff sent an e-mail to each of the Board members on December 6, 2017 (hereinafter "Board E-mail"), which stated in relevant part:

> I am advising the Board that after raising questions about suspected illegal financial activity to members of the District, no corrective action has taken place. As a fiduciary and as a guardian of the public trust I have been compelled to consult with several law enforcement agencies on the local, state, and federal level about disturbing facts which have become apparent to me, which I felt could not and should not be occurring. These matters are of a nature that endanger the public health, welfare, and safety of our district and appear to be both unlawful and unethical, and required disclosure to, and an evaluation by, governmental offices outside the confines of the Hempstead School District.
>
> The need to provide this information was mandated by two factors: first, the fact that instead of corrective action, I am seeing the

> opposite; and second, my professional, moral, and legal obligation to serve the District and those who are truly the consumers – our children – and the community at large.

(*Id.* ¶ 145.) The next day, in a meeting with the Board, Plaintiff recommended that the District tear down a building and issue a bond to rebuild a school on that site. (*Id.* ¶ 146.) The Board voted down the resolution 3 to 2. (*Id.*) On December 22, 2017, without any notice, the Board suspended Plaintiff's authority, fired the expert teachers Plaintiff had hired, and terminated the School District's contract with the New American Initiative. (*Id.* ¶¶ 147–48.)

On January 5, 2018, Plaintiff distributed an open letter to the community and posted the same on the District website. (*Id.* ¶150.) The letter, entitled "Collaborate and Elevate" (hereinafter "Collaborate and Elevate Letter"), summarized the work that had been accomplished in the first six months, and went on to state:

> Collaborate with me to make Hempstead Schools thrive again. If we are honest, the need of working together on all these levels must be admitted as something that is obvious. Politics, self-interests, patronage, vendettas, threats, and cover-ups cannot rule the day. Our collective goal must be to elevate the standards for all involved in and attached to the Hempstead School District. The transformation which is necessary in Hempstead will not happen without hard work, transparency,

> honesty, and commitment to meaningful change.

(*Id.* ¶ 151.) The letter went on to ask every member of the community to help in this effort. (*Id.*)

On January 9, 2017 [sic], the Board voted 3 to 2 to place Plaintiff on "Administrative Leave of Absence with Pay, Effective Immediately." (*Id.* ¶ 152.) There was no hearing, and no charges were brought against Plaintiff. (*Id.* ¶ 153.) The same night, the Board adopted a modified Administrative Leave of Absence with Pay Policy, which it then used against Plaintiff. (*Id.* ¶ 154.) Also on January 9, 2018, the master teachers who the Board had fired decided to volunteer their time to complete an application for a $5.4 million grant for the District. (*Id.* ¶ 155.) In response, the Board issued a resolution directing the District's Superintendent to "prohibit the Master Teachers who were excessed on December 21, 2017, and are no longer employees of the District, effective December 22, 2017, from volunteering to provide services or rendering any services to the District." (*Id.* ¶ 156.)

Plaintiff brought the instant action by Order to Show Cause on January 19, 2018, seeking a temporary restraining order ("TRO") vacating the Board's January 9, 2018 resolutions and restoring Plaintiff to his position. (Proposed Order to Show Cause [DE 3] at 1.) The Court held an initial hearing that day, and then asked the Parties to brief the issue of subject matter jurisdiction. The Court held a further hearing on January 30, 2018, and denied the TRO as Plaintiff had

failed to state a claim upon which relief could be granted. Defendants filed the fully briefed motion to dismiss on April 16, 2018.

DISCUSSION

I. Plaintiffs' Claims

In the Complaint, Plaintiff sets forth five causes of action: (1) a Monell claim for municipal liability for violations of Plaintiff's Fourteenth Amendment rights pursuant to 42 U.S.C. § 1983 ("§ 1983"); (2) violations of Plaintiff's due process rights pursuant to the Fourteenth Amendment; (3) violations of Plaintiff's First Amendment rights; (4) violations of state law whistleblower protections; and (5) breach of Plaintiff's employment contract.

II. The Motion to Dismiss Pursuant to Rule 12(b)(6) is Granted

A. Rule 12(b)(6) Legal Standard

In deciding a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court should "draw all reasonable inferences in Plaintiff['s] favor, assume all well-pleaded factual allegations to be true, and determine whether they plausibly give rise to an entitlement to relief." *Faber v. Metro. Life Ins. Co.*, 648 F.3d 98, 104 (2d Cir. 2011) (internal quotation marks omitted). The plausibility standard is guided by two principles. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)); *accord Harris v. Mills*, 572 F.3d 66, 71–72 (2d Cir. 2009).

First, the principle that a court must accept all allegations as true is inapplicable to legal conclusions. Thus, "threadbare recitals of the elements of a cause of action supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. Although "legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* at 679. A plaintiff must provide facts sufficient to allow each named defendant to have a fair understanding of what the plaintiff is complaining about and to know whether there is a legal basis for recovery. *See Twombly*, 550 U.S. at 555.

Second, only complaints that state a "plausible claim for relief" can survive a motion to dismiss. *Iqbal*, 556 U.S. at 679. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but asks for more than a sheer possibility that defendant acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line' between possibility and plausibility of 'entitlement to relief.' " *Id.* at 678 (quoting *Twombly*, 550 U.S. at 556-57) (internal citations omitted); *see In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2d Cir. 2007). Determining whether a complaint plausibly states a claim for relief is "a context specific task that requires the reviewing court to draw on its

judicial experience and common sense." *Iqbal*, 556 U.S. at 679; *accord Harris*, 572 F.3d at 72.

B. The Motion to Dismiss is Granted as to Claims One and Two: Procedural Due Process Claim

1. Applicable Law

To state a claim for a procedural due process violation a plaintiff must "first identify a property right, second show that the [government] has deprived him of that right, and third show that the deprivation was effected without due process." *Local 342, Long Island Pub. Serv. Emps., UMD, ILA, AFL-CIO v. Town Bd. of Huntington*, 31 F.3d 1191, 1194 (2d Cir. 1994) (citation omitted).

Applying this test to the facts at bar, the Court must first consider whether Plaintiff had a property right. Here, Plaintiff claims that as a public employee he had "a constitutionally protected property interest in his tenure" that could not be terminated without due process. (Compl. ¶ 162.) This argument is unavailing. While the due process clause secures private interests against public deprivation, "governmental powers are not themselves private property [as] [t]hey do not exist independently of the government and are not secured against governmental interference." *Batagiannis v. West Lafayette Community School Corp.*, 454 F. 3d 738, 741–42 (7th Cir. 2006). As the Seventh Circuit has noted, "[e]very appellate decision that has addressed the subject accordingly has held that a contractual

right to be a superintendent of schools creates a property interest in the salary of that office but not the ability to make decisions on behalf of the public. *Id.* (*citing Royster v. Bd. of Trustees*, 774 F.2d 618 (4th Cir. 1985); *Kinsey v. Salado Independent School Dist*, 950 F.2d 988 (5th Cir. 1992); *Holloway v. Reeves*, 277 F.3d 1035 (8th Cir. 2002); *Harris v. Bd. of Educ.*, 105 F.3d 591, 596–97 (11th Cir. 1997) (dictum; appeal was resolved on immunity grounds)). While the Second Circuit has not specifically considered this question, other district courts in this Circuit have held that no liberty or property interest was infringed when a superintendent was suspended with pay and lost only "the ability to fulfill the function of superintendent[.]" *See Watkins v. McConologue*, 820 F. Supp. 70, 72 (S.D.N.Y. 1992). Moreover, it is well-established precedent in this Circuit that an employee who continues to be paid "cannot sustain a claim for deprivation of property without due process even if relieved from job duties." *See Ingber v. New York City Dep't of Educ.*, No. 14-CV-3942, 2014 WL 6888777, at *2 (S.D.N.Y. Dec. 8, 2014).

In addition to his standard procedural due process claim, Plaintiff also asserts a "stigma plus" claim for an infringement of his liberty interest. A liberty interest is a "broad notion" that encompasses the freedom "to engage in any of the common occupations of life." *Donato v. Plainview-Old Bethpage Cent. Sch. Dist.*, 96 F.3d 623, 630 (2d Cir. 1996). "Special aggravating circumstances are needed to implicate a liberty interest[,]" such as when the state fires an employee and publicly charges that she or he acted dishonestly or

immorally. *Id.* In *Patterson v. City of Utica*, the Second Circuit established a stigma plus claim that can invoke the Due Process Clause when the "[l]oss of one's reputation . . . is coupled with the deprivation of a more tangible interest, such as government employment." 370 F.3d 322, 330 (2d Cir. 2004) (citing *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 573 (1972)). For a government employee, a stigma plus claim "may arise when an alleged government defamation occurs in the course of dismissal from government employment." *Id.* The Second Circuit later explained that a stigma plus claim requires stigmatizing false statements that are publicized. *O'Connor v. Pierson*, 426 F.3d 187, 195–96 (2d Cir. 2005) (finding that plaintiff had alleged "the plus without the stigma, and [rejecting the argument] that the plus alone has created the stigma" because negative inferences by the community based on a suspension were not enough to make out a stigma-plus claim). "Courts have consistently held that statements announcing personnel decisions, even when leaked to the press, and even when a reader might infer something unfavorable about the employee, are not actionable." *Weise v. Kelley*, 2009 WL 2902513, at *4 (S.D.N.Y. Sept. 10, 2009). Moreover, "true public statements that a party is under investigation" are not stigmatizing for purposes of a stigma-plus claim. *Id.*

2. The Motion to Dismiss is Granted as to Claims One and Two

With regards to Plaintiff's procedural due process claim, Plaintiff was suspended with pay so the question of whether he had a property interest in his position as a superintendent is effectively academic. Plaintiff cannot sustain a due process claim in light of the undisputed fact that he was suspended *with pay.* However, even if Plaintiff had been terminated or suspended without pay, the Court is persuaded by the consensus in other Circuits and district courts in this Circuit that superintendents have no property right in their position.

Plaintiff argues that in determining whether he has a property interest in his position for purposes of procedural due process, the Court should look to whether his interest would be protected under state law. (Mem. in Opp. at 10 (citing *Harhay v. Town of Ellington Bd. of Educ.*, 323 F.3d 206, 212 (2d Cir. 2003)). Plaintiff then attempts to manufacture a property interest by connecting the provision in N.Y. Educ. Law § 1711(3) that "a board of education may enter into a contract with [a] superintendent . . . upon such terms as shall be mutually acceptable to the parties, including but not limited to fringe benefits and procedures for termination by either party[,]" with the language in his contract that provides that he cannot be suspended or terminated without just cause and a hearing before an impartial hearing officer. (*See* Mem. in Opp. at 10–11.) The Court is not swayed by this argument as "[n]ot every contractual benefit rises to the

level of a constitutionally protected property interest." *Harhay*, 323 F.3d at 212 (citing *Ezekwo v. New York City Health & Hospitals Corp.*, 940 F.2d 775, 782 (2d Cir. 2003)). More fatally still, Plaintiff's reasoning fails to address the profound constitutional issues with establishing a property interest in "the ability to make decisions on behalf of the public." *See Batagiannis*, 454 F. 3d at 741–42. Accordingly, the Court finds that Plaintiff did not have a property interest in the superintendent position as distinct from his superintendent salary.

Alternatively, Plaintiff sets forth a stigma-plus claim that his liberty interest was infringed upon by his suspension. A stigma-plus claim requires false, stigmatizing statements. Here, the Complaint does not set forth any such allegations. Even if Defendants made statements that they were investigating Plaintiff, these statements are true and therefore do not meet the requirement of a "false, stigmatizing claim." *See Weise*, 2009 WL 2902513, at *4. Since the suspension alone cannot give rise to a stigma-plus claim, this claim must be dismissed.

As Plaintiff did not have a property interest in his superintendent position or a liberty interest that was violated by his suspension, the Court will not proceed to consider the other elements of a procedural due process violation. Defendants' motion to dismiss is granted as to Plaintiff's first and second claims.

C. The Motion to Dismiss is Granted as to Claim Three: First Amendment

1. Applicable Law

To prevail on a First Amendment retaliation claim, a plaintiff must prove "(1) [his or her] speech or conduct was protected by the First Amendment; (2) the defendant took an adverse action against [him or her]; and (3) there was a causal connection between this adverse action and the protected speech." *Cox v. Warwick Valley Cent. Sch. Dist.*, 654 F.3d 267, 272 (2d Cir. 2011).

"When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). However, there are times when a public employee's speech falls within the ambit of the First Amendment. To determine whether a public employee's speech is protected, courts conduct a two-step inquiry. *Matthews v. City of New York*, 779 F.3d 167, 172 (2d Cir. 2015). First, the court "determin[es] whether the employee spoke as a citizen on a matter of public concern. *Id.* (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006)). An employee speaks as a citizen if the speech fell outside of the employee's official responsibilities, and a civilian analogue existed. *Matthews*, 779 F.3d at 172 (citing *Weintraub v. Bd. of Educ.*, 593 F.3d 196, 203–04 (2d Cir. 2010)). This is a conjunctive test. "If an employee did not speak as a citizen on a matter of public concern, the inquiry ends—the speech was not constitutionally protected."

Alvarez v. Staple, 2018 WL 5312901, at *7 (S.D.N.Y. Oct. 26, 2018).

2. The Motion to Dismiss is Granted as to Claim Three

Plaintiff claims that Defendants retaliated against him when he exercised his right to free speech by sending the aforementioned Board E-mail and Collaborate and Elevate Letter to the community. Here, Plaintiff is a public employee so the Court must evaluate whether he spoke as a citizen on a matter of public concern. Based on the *Matthews* test, the Court finds that Plaintiff did not speak as a citizen. As set forth in the Complaint, the Board e-mail: (1) was sent by Plaintiff in his capacity as Superintendent; (2) was signed by Plaintiff using his Superintendent title; (3) explicitly discussed his role and duties ("since my arrival here in Hempstead, my primary focus has been to raise the bar for us in the District in terms of our effective delivery of services for our children") in the context of the letter's subject matter; and (4) was sent solely to the Board as a means of providing counsel based on Plaintiff's experience and position as Superintendent. (*See* Compl. ¶ 145.) Likewise, the Collaborate and Elevate Letter was posted on the District website by Plaintiff in his capacity as superintendent. (*Id.* ¶ 151.) To wit, the Complaint states that Plaintiff posted the Collaborate and Elevate Letter "as part of [his] pledge to be transparent and keep the Community involved[.]" (Compl. ¶ 150.) The Complaint does not provide the full letter, so the Court does not know whether Plaintiff signed

the letter using his title or further discussing his role. However, this is inconsequential because there is no civilian analogue to the Superintendent posting a letter directly on the District website. Thus, Plaintiff sent the Board E-mail and Collaborate and Elevate Letter as a public employee pursuant to his official duties.

In sum, Plaintiff was hired to transform the District into an appropriately functioning educational institution. (*See* Compl. ¶ 14 ("[Plaintiff's] past successful transformative efforts in schools located in the South Bronx, Brownsville, and East Flatbush would enable him to do what was necessary for the Hempstead School District").) In an effort to accomplish that core mission, he contacted members of law enforcement concerning perceived ongoing financial malfeasance within the District and, as the District's Superintendent, informed Board members of his actions in the Board E-mail. (*Id.* ¶ 145.) Similarly, in the Collaborate and Elevate Letter, Plaintiff, as the Superintendent, sought the assistance of the community to "[c]ollaborate with [him] to make Hempstead Schools thrive again." (*Id.* ¶ 151.) In each instance, he spoke as an employee for First Amendment purposes. Accordingly, the Court need not proceed further with this inquiry and Defendants' motion to dismiss is granted as to Plaintiff's third claim.

D. The Motion to Dismiss is Granted as to Claim Four: N.Y. Civ. Serv. Law § 75-B; N.Y. Lab. Law §§ 215, 740; and N.Y. Ed. Law § 3028-D

Plaintiff asserts a retaliation claim under New York law, however this claim is barred for failure to file a written verified claim with the School District and/or the Board three months after the accrual of such claim and before filing the instant action. *See* N.Y. Educ. Law § 3813(1). Plaintiff argues that there is no prejudice to Defendants as a result of his failing to give the proper notice, and that the "absence of an acceptable excuse [for this oversight] is not necessarily fatal to the application." (Mem. in Opp. at 28 (citing *Lewin v. County of Suffolk*, 239 A.D.2d 345, 246 (2nd Dep't 1997)). The Court finds that, on the contrary, Plaintiff's failure to comply with the explicit directives of N.Y. Educ. Law § 3813(1) is fatal because it prevented Defendants from having an opportunity to investigate and cure their alleged violation. *See Chem. Const. Corp. v. Board of Ed. of City of New York*, 430 N.Y.S.2d 771, 772 (N.Y. Sup. Ct. 1980) ("section 3813 is clearly intended to afford a school district the opportunity to investigate the claims of all kinds to obtain the evidence promptly while it is still readily available, and to adjust or make payments before litigation is commenced" (internal quotations and citations omitted)). This is especially true in light of the circumstances of this case; namely that Plaintiff was suspended *with pay*, and he was therefore in a position to be able to follow the proper procedures. Moreover, Plaintiff commenced this matter

by way of a request for an Order to Show Cause hearing for a Temporary Restraining Order. In other words, he sought immediate injunctive relief to alter the status quo before Defendants even had a chance to answer the Complaint. In so doing, he usurped Defendants' statutorily-provided opportunity to investigate and cure the alleged violation. Plaintiff points to two exceptions § 3813(1)'s requirements, namely: (1) if the proceeding is a matter of public interest; and (2) if another statute or contract either provides similar notice to the school *or* if the school contracted away its right to notice. (Mem. in Supp. at 30 (citing *Matter of Grey v. Board of Educ. Of Hudson Falls Cent. School Dist.*, 60 A.D.2d 361, 363 (1978)). Neither exception is applicable here. This is a case for Plaintiff to recover his Superintendent position, and while he may believe that is in the public interest, that is not the meaning of a proceeding that is a matter of public interest. "Although all actions brought to enforce civil rights can be said to be in the public interest, only actions that seek relief for a similarly situated class of the public are entitled to relief from the notice of claim requirement." *Augustin v. Enlarged City School Dist. Of Newburgh*, 616 F. Supp. 2d 422, 446 (S.D.N.Y. 2009) (citing *Bloom v. N.Y. City Bd. of Educ.*, 2003 WL 1740528, at *4 (S.D.N.Y. Apr. 2, 2003)) (internal quotation marks and citations omitted). A claim can be characterized as enforcement of a private right—as opposed to a matter of public interest—where the "allegations of discriminatory conduct on the part of the School District refer only to conduct as it relates to [the plaintiff]." *Id.* Here, Plaintiff seeks enforcement of a private right, as he

seeks relief on the basis that he alone was denied his position as Superintendent in retaliation for exercising his right to free speech. Thus, Plaintiff's claim does not fall within the public interest exception to the § 3813(1) requirements.

Finally, Plaintiff has not pointed to any other statute or provision in his contract that replaced the notice requirement of § 3813(1). As such, Defendants' motion to dismiss is granted as to Plaintiff's fourth claim.

E. The Motion to Dismiss is Granted as to Claim Five: Breach of Contract

Plaintiff's final claim is for breach of his employment contract. As with his retaliation claim, this claim is likewise barred for failure to file a written verified claim with the School District and/or the Board three months after the accrual of such claim and before filing the instant action. *See* N.Y. Educ. Law § 3813(1). Accordingly, Defendants' motion is granted as to Plaintiff's fifth claim, and the entire matter is hereby dismissed.

As a final matter, the Court notes that even if Plaintiff had met his obligation under N.Y. Educ. Law § 3813(1), "[i]t would [] be clearly inappropriate for the district court to retain jurisdiction over the state law claims when there is no basis for supplemental jurisdiction." *See*, *e.g.*, *Cave v. East Meadow Union Free School Dist.*, 514 F.3d 240, 250 (2d Cir. 2008) (affirming a district court decision to dismiss state claims after dismissing all federal claims related to a student's

individualized education plan under the Individuals with Disabilities Education Act). A District Court may, in its discretion, retain jurisdiction in certain circumstances over state claims even after dismissing all federal claims. The Court declines to do so here. "[I]f federal law claims are dismissed before trial . . . the state law claims should be dismissed as well" unless federal policy concerns "argue in favor of exercising supplemental jurisdiction even after all original-jurisdiction claims have been dismissed." *Kolari v. New York-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966)). Here, the crux of this matter concerns issues of New York state law. There are no commingled questions of federal law or overriding federal policy concerns that remain. Therefore, this matter should be "re-filed in state court where [the Parties] will be afforded a 'surer-footed reading of applicable law." *Id.*

III. The Motion to Dismiss Pursuant to Rule 12(b)(1)

The Court need not consider whether it has jurisdiction over this matter as it has already dismissed all claims pursuant to Rule 12(b)(6).

IV. Plaintiff's Request for Leave to Supplement/ Amend

On December 28, 2018, Plaintiff asked the Court for leave to supplement his previously filed opposition to Defendants' Motion to dismiss, as well as to amend the Complaint. Plaintiff asserts that this is necessary

because he filed the Complaint and his opposition before receiving 41 "Specifications and Charges" brought against him by Defendants in August 2018. Plaintiff also avers that Defendants' delay in selecting a Hearing Officer has some impact on this matter. While the Court is sympathetic to Plaintiff's frustrations, his request is denied because there is no information related to the delay or the charges that will alter the Court's decision. With or without the delay and the charges, Plaintiff was still suspended with pay, he still likely has no property interest in his superintendent position, and he will still fail to meet the *Matthews* test for a First Amendment claim. The significance of the delay and charges to Plaintiff's state claims, if any, is irrelevant because the Court has declined to exercise jurisdiction over those claims.

CONCLUSION

Notwithstanding the deeply troubling allegations brought against the School District and the Board, both with regards to their conduct toward Plaintiff as well as the long history of apparent corruption and neglect in the discharge of their duties, this is a Court of limited jurisdiction and Plaintiff has not set forth any actionable federal claims. Accordingly, Defendants' motion to dismiss is granted in toto. The Clerk of Court is directed to enter judgment and close the case.

SO ORDERED.

Dated: Central Islip, New York
January 16, 2019

/s/
Denis R. Hurley
United States District Judge