

How 30 ATRs Are Fighting for Over 100,000 NYCDOE Employees

BY FRANCESCO PORTELOS, JUNE 18, 2018

<http://educatorfightsback.org/how-30-atrs-are-fighting-for-over-100000-nycdoe-employees/>

It comes down to this... **salary matters**. Experience not so much. Or at least the DOE's budgeting system discourages the hiring of higher salaried and more experienced staff. It wasn't always like this in the New York City Department of Education. Before 2007 the salary of a teacher, paraprofessional, secretary, assistant principal, school psychologist, guidance counselor, social worker, physical therapist and occupational therapist didn't matter to a principal. There are over 100,000 of these employees and their salary was paid centrally by the NYC DOE. Their salary did not come out of the school's budget.

In 2007 though, former Chancellor Joel Klein, and others, helped implement the "Fair Student Funding" budgeting system. Among other things this system made salary matter. Whether you are a permanently placed tenured teacher making \$100,000, or a new teacher that will make \$100,000 at some point, your salary will matter under the FSF. This is a big problem and it has led to salary (age) discrimination.

Imagine a principal needs to fill a vacancy and two teachers apply. One has 18 years of experience and makes over \$100,000 and the other is fresh out of school and makes \$54,000. What will matter here? With tight budgets, probably not experience. Time and time again, we see that the new (younger and cheaper) teacher is hired. When it comes time to push out teachers and, as one principal told me, "trim the fat from the meat." it's the older and higher salaried teachers that are the target.

Recently, 30 educators, from the Absent Teacher Reserve pool, have decided to do something about this and are taking a stand. They filed a complaint with the NY State Division of Human Rights. This complaint, filed by the [Teacher's Lawyer Bryan Glass](#), is shared below. I'm proud to be a part of it myself. All the mainstream media headlines around the ATR subject are missing the facts from this in their stories.

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May 3, 2018
Via hand delivery
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Re: Age Discrimination Complaints on behalf of NYCDOE ATRs
Dear Mr. LaMot:

This firm represents a group of experienced educators (“complainants”) who are employed by the New York City Department of Education (NYCDOE). Copies of their individual SDHR complaints are enclosed. These complaints are filed as a group based on a theory of age discrimination on both a disparate treatment and disparate impact theory.

At one point, these NYCDOE employees were permanently hired, but have since been assigned to a limbo state of rotating temporary placement within the NYCDOE. The group is called the Absent Teacher Reserve (ATR) and is comprised of teachers and clinicians, such as school psychologists, social workers, and guidance counselors. These ATRs are used and treated like substitutes, instead of being hired into permanent and steady placements again within the DOE. The average age of this large group, ranging from 1,300 to over 2,000 employees, is 52 years old (based on a survey conducted). We believe the reason for this high average age is explained below and is aligned with the discriminatory practices in the NYCDOE, including its budget system and hiring practices. While this large group is without permanent placement, we believe the NYCDOE has been hiring tens of thousands of new younger teachers, counselors, and clinicians for permanent placement, despite their lower experience and qualifications.

ATRs are NYCDOE employees that at one time were permanently hired placements in schools or district offices of the NYCDOE. Instead of ATRs working as permanent employees of a school or district office, these very experienced professionals are instead placed in locations to temporarily cover short or long-term vacancies, instead of permanently filling them. They are often roving from assignment to assignment with virtually no choice as to the location and grade level, and sometimes are given changed assignments on very short notice. Despite these ATRs being experienced, and licensed, in a specific field of education, they are instead often placed to cover and engage in duties outside of their licenses. Many times, they are misused or underutilized to monitor the hallway, cafeteria, and bathrooms in a school. ATRs report that they are left in school staff rooms or school libraries with no assignment, while the school calls in, and pays for, per diem substitutes. Despite being paid their full salary, ATRs’ damages include loss of pensionable overtime and pensionable per session, including after school work, exam scoring, and summer school pay. Damages also include unnecessary stresses and mental anguish because of the negative treatment experienced by these ATRs.

There are typically two reasons permanent employees become ATRs:

Budgetary Reasons: If enrollment in a school, or district decreases, causing programs and classes to close, or a school is closed down entirely, employees of those schools are placed in the

rotating ATR pool to be used in other locations on a temporary basis. In the case that school does not close, but budgetary reasons are causing schools to have to let employees go, those excessed employees are released into the ATR pool in reverse seniority order. In other words, the United Federation of Teachers (UFT) union and NYCDOE follow a “last in, first out” system. Despite the reverse seniority method used in excessing, which should give way to a relatively young ATR pool, the average age of ATRs is 52 years old. This average age was acquired by a sample set poll conducted by a group called the ATR Alliance (atralliance.org). This is an astonishing average age that speaks to the age discrimination alleged. See Exhibit 1 and 2 for the 2016 and 2017 surveys conducted, which are attached hereto. Among other things, the surveys show that over 60% of ATRs polled were assigned to schools to cover temporary vacancies, while permanent positions, matching their license, were available and they were not hired. It also shows that the average years of experience is 20 and the years rotating as an ATR is 4.

Disciplinary Reasons: In some cases, tenured employees are brought up on charges of misconduct or incompetence and go through a hearing pursuant to New York State Education Law 3020-a. If they are not terminated by an independent arbitrator, and are instead are fined or suspended, the employees become part of the roving ATR pool of educators. We believe that the average age of alleged incompetence or misconduct is also relatively higher.

The NYCDOE’s Discriminatory “Fair Student Funding” Budget System

Former NYCDOE Chancellor Joel Klein adopted Fair Student Funding (FSF) in 2007. Among other changes to a school’s budget, the FSF implementation made an employee’s actual salary part of each school’s budget. Prior to the implementation of the FSF, the hiring of an employee was factored in as a “unit” and his or her salary was paid centrally. In other words, we believe a principal looking for a teacher to hire would simply not have to be concerned about an applicant’s salary before FSF. With the FSF in place, an employee’s salary now mattered and, with tight budgets, a principal would be much more likely to take younger and less experienced (lower salary) over older and more experienced (higher salary) employees to balance their budget. To put it simply, the Fair Student Funding incentivizes school and district administration to hire younger and lower salaried teachers, as explained below by NYCDOE’s hiring practices and history.

NYCDOE Hiring Practices

A NYCDOE central office that manages both the ATRs and new hires is the Office of Teacher Recruitment and Quality (TRQ). According to news articles and press releases, the NYCDOE has hired upwards of 6,000 new teachers a year for the last five years. We believe these tens of thousands of new hires are younger, less experienced, and at the bottom of the salary scale. According to the salary steps posted online, the difference between a first-year teacher and top salary is over \$50,000. That is \$50,000 that a school principal needs to factor into filling a vacancy in their school and manage their budget. The TRQ office works along other offices to hold job fairs. Many of the job fairs have been “invite only” and, on many occasions, ATRs (older teachers) were not invited. When ATRs did appear to give resumes, they were not permitted entrance. As the ATRs are older teachers that are turned away, we believe the job fairs organized by NYCDOE office engaged in discriminatory practices.

The complainants here are all veteran educators that are approximately 40 to 67 years old. They have applied, and been highly qualified candidates for permanent hire, sometimes applying for years to dozens of vacancies. However, they and the over 1,000+ other ATRs, who did not join this action, do not get hired, and most of the time are not even called for an interview. Many of them have been passed over for permanent hire by younger and less experienced educators. Some have been boldly told that a principal liked their work, while they were temporarily placed at their school, but that they were “too expensive” to be hired permanently. Others have applied to over 200 vacancies and not received one call back for an interview. On many occasions, when another applicant is chosen, the name of that hired applicant is run through the publicly available online NY State Teacher Certification Lookup, and it is found that the hired teacher just finished school. Sometimes, the new teachers do not have the proper credentials to teach the class that the passed over ATR has had for years. ATRs have been temporarily assigned at schools that have vacancies in their specialty and still are not hired permanently.

Targeted Harassment

On top of the discriminatory hiring process depicted above, many ATRs have been targeted with sudden and unwarranted disciplinary allegations and poor evaluations, even after many documented years of prior satisfactory service. Depending on the length of their temporary assignment, ATRs can be evaluated by the school administration or a Field Supervisor. A Field Supervisor is a supervisor that has many ATRs on their caseload to observe and rate. Field Supervisors can be retired school administrators or even ATR administrators themselves from schools that have closed down.

Field Supervisors come in under the guise that they are “supporting” ATRs and assisting them in finding permanent positions. However, they have been known to target older ATRs. By “targeting,” it is meant that the Field Supervisors come to evaluate an ATR, most of the time unannounced and in a setting that is outside of the ATR’s license. To ensure a poor rating, the Field Supervisors observe the ATR in a class of students that the ATR just met. There are many obstacles in today’s classroom for permanent teachers, including behavior and cell phone distractions. Coupling those obstacles with the negative behavior changes that take place when a new and temporary teacher enters creates a recipe for disaster. To give an example, one field supervisor is Justin Stark. Mr. Stark is given a caseload that, according Freedom of Information Law records, appears to be only older teachers. Despite being sent to “support” ATRs, Mr. Stark usually winds up rating veteran ATRs poorly. To align this allegation of Field Supervisor targeting to age discrimination, Field Supervisor James Quail gave one veteran ATR an Unsatisfactory rating for the year. He then told that ATR that if he “retires,” he would then change the rating to a Satisfactory. The ATR agreed and was then given a new Satisfactory end of the year rating. The ATR then rescinded his retirement and held on to both ratings. For additional information on Field Supervisor harassment, please see www.atralliance.org/fs. Unfortunately, these field supervisors are not alone in this behavior. Many Field Supervisors are targeting a disproportionate number of veteran and experienced educators.

In addition to the harassment methods alleged above, ATRs also have been unnecessarily moved far from their former locations. Transfer requests are then unilaterally denied. This causes additional stress and aggravation. Other denials come in the form of denying medical requests and accommodations. It is almost as if the practices across the board are an attempt to have the

veteran ATRs retire or resign. One ATR among this group was hit by a chair that was thrown by a student. Instead of the school administration approving her temporary leave, so she can be paid while healing, the principal delayed the processing of the paperwork and the NYCDOE later denied the leave. In sum and substance, ATRs are often treated inhumanely, with no private storage area to keep their coats and belongings, not given bathroom keys and often spoken to in an unprofessional manner. One principal was quoted as saying to an ATR, "You are an ATR and I will do with you what I want."

It appears that there is an agenda to rid the employee pool of veteran, high salaried educators. The means to do so are through unjustified excessing in violation of the "last in, first out" method where veteran teachers are pushed out before younger and less senior teachers. Also, trumped up disciplinary charges against veteran teachers often send them before an arbitrator in a 3020-a termination hearing. Both tactics push veteran teachers into the ATR pool. We believe once in the ATR pool, school administrators, and Field Supervisors, work in tandem to set up veteran ATRs with additional trumped up misconduct charges and incompetency. In one case, a veteran ATR was charged with not returning a parking pass and poorly teaching a science lesson when he was licensed in high school social studies. Similarly, another ATR was assigned to teach Italian when the ATR did not speak Italian. He was then rated poorly during an observation teaching a language he did not speak. In another case, a 70 year old ATR, licensed in theater, was assigned to walk the hallway and patrol for 5 periods a day.

It is an unlawful discriminatory practice for an employer to discriminate against an employee in the terms and conditions of employment on the basis of age. See New York State Human Rights Law §296.1(a). A complainant has the initial burden to prove a prima facie case of discrimination. He or she must show that they are a member of a protected class, that they were qualified for their position, that they suffered an adverse employment action, and that the adverse action occurred under circumstances giving rise to an inference of discrimination. *Ferrante v. American Lung Association*, 90 N.Y. 2d 623, 629, 665 N.Y.S. 2d 25,29 (1997). If Complainant makes such a showing, the burden shifts to the employer to present a legitimate, non-discriminatory reason for its action. If the employer does so, Complainant must show that the reason the employer has presented was merely a pretext for discrimination. In this case, the employer must show a legitimate reason as to why tens of thousands of new and younger teachers are permanently hired the last 5+ years, while over 1,000 experienced and veteran educators are passed over for the same permanent positions. See Exhibit 3 annexed hereto for documents showing the number of ATRs.

The targeting of senior teachers has had a most detrimental effect on NYC's student population. These teachers are receptive to early mediation to attempt to resolve their age discrimination and/or retaliation claims against the NYCDOE. These claims are brought both on disparate treatment and disparate impact theories of discrimination. A copy of their individual SDHR charges are enclosed and being brought on a group basis. Parent groups have also taken notice that the Fair Student Funding Formula and the ATR pool are not appropriate for their children. See attached 2017 article by NYC Public School Parents blog annexed hereto as Exhibit 4. It also should be noted that the Fair Student Funding does not just discriminate against veteran employees in the ATR pool, but also current permanent employees who wish to transfer to another school. Our firm has recently submitted another set of 13 veteran pedagogue complaints

from the NYCDOE Office of Adult and Continuing Education. There is little doubt that the age discriminatory Fair Student Funding is also a factor in the unwarranted attacks there as well.

During your investigation of this serious allegation, we encourage the New York State Division of Human Rights to ask the NYCDOE the following questions:

1. How many ATRs, including provisionally placed ones, have there been at the beginning of each school year for the last 5 years?
2. What are the average ages of the ATRs during those 5 years?
3. How many new employees have been permanently hired the last 5 years and what are their average ages?
4. How many ATRs have been brought up on 3020-a charges in the last 5 years and what are their ages?
5. How many job fairs have been conducted by the NYCDOE the last 5 years and how is the invitation list derived? What is the average age of the applicants invited to the job fairs?
6. How many Field Supervisors are there and how is it decided which ATRs is assigned a Field Supervisor?
7. What mechanism is in place to assign ATRs to locations? (Random computer program or by requests from administration?)
8. How has the Fair Student Funding not assisted in the discrimination of veteran and higher paid employees?

Thank you for your consideration and efforts on behalf of the enclosed group.

Respectfully submitted,
s/

Bryan D. Glass, Esq.
Attorney for Complainants

Enclosures (4)