New York City Parents Union v Board of Educ. of the City Sch. Dist. of the City of N.Y.
2013 NY Slip Op 32890(U)
April 30, 2013
Sup Ct, New York County
Docket Number: 108538/2011
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA JAFFE J.S.C. Justice PART 12

Amended Decision

New York City Parents Union

-v-

Board of Education of the City School District of the City of New York

INDEX NO. 108538/2011

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for Dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	24 to 26-19
Answering Affidavits — Exhibits	24, 35
Replying Affidavits	39

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: APR 30 2013

BARBARA JAFFE J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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NEW YORK CITY PARENTS UNION; CLASS SIZE MATTERS; NEW YORK COMMUNITIES FOR CHANGE; and LEONIE HAIMSON NOAH GOTBAUM, STEPHANIE FIELDS, LASHAWN CHERRY JACQUELINE PEREZ, CHRIS MOSS, AMANDA JACOBS, REGINA JACOBS, REGINA TIMBER, JERMAINE BLIGEN, NATASHA HOOPER CHERYL AND ANGEL BLUE, SHARLENE HALE HALL AMANDA COLON, ANGELA BALTIMORE, SANDRA E. HARPER, CYNTHIA GRIFFIN, HELENA CLAY, SONYA HAMPTON, ELLIOT WOFSE, HENRY CLEMENTE, YVONE WALKER, CYNTHIA BONANO, FAYE HODGE, and MUBA YAROFULANI, on Behalf of Their Children and Others Similarly Situated,

Plaintiffs,

- against -

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, and DENNIS M. WALCOTT, as Chancellor of the City School District of the City of New York,

Defendants,

- and -

HARLEM SUCCESS ACADEMY CHARTER SCHOOL 1, HARLEM SUCCESS ACADEMY CHARTER SCHOOL 4, OCEAN HILL COLLEGIATE CHARTER SCHOOL, EMPOWER CHARTER SCHOOL, DEMOCRACY PREPARATORY CHARTER SCHOOL, NEW VISIONS CHARTER HIGH SCHOOL FOR HUMANITIES, NEW VISIONS CHARTER HIGH SCHOOL FOR ADVANCED MATH AND SCIENCE, TEACHING FIRMS OF AMERICA CHARTER SCHOOL, INVICTUS PREPARATORY CHARTER SCHOOL, SUMMIT ACADEMY CHARTER SCHOOL, DREAM CHARTER SCHOOL, BROOKLYN CHARTER SCHOOL, INWOOD ACADEMY FOR LEADERSHIP CHARTER SCHOOL, LA CIMA ELEMENTARY CHARTER SCHOOL, CONEY ISLAND PREPARATORY CHARTER SCHOOL, SOUTH BRONX CLASSICAL CHARTER SCHOOL, GIRLS PREPARATORY CHARTER SCHOOL, and NEW YORK CITY CHARTER SCHOOL CENTER,

Intervenor-Defendants.

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Index No. 108538/11

Mot. seq. nos. 002, 003
Argued: 1/30/13
Subm.: 2/13/13

AMENDED DECISION & ORDER

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In this action brought by two public school parent advocacy groups, an organization of New Yorkers, parents of children who attend New York City public schools where charter schools have been "co-located," parents of children attending non-co-located charter schools, and parents of children in public schools without co-located students, plaintiffs seek declaratory and injunctive relief. In the two instant motion sequences, consolidated for decision, intervenor-defendants move pursuant to CPLR 3211(a)(3), (5), and (7) for an order dismissing the complaint on the grounds that plaintiffs lack capacity to sue, failed to exhaust their administrative remedies, and fail to state a cause of action, and defendants Board of Education of the City School District of the City of New York (DOE) and Dennis M. Walcott, as Chancellor of the City School District of the City of New York, move for judgment on the pleadings on the grounds cited by intervenor-defendants. Plaintiffs oppose.

I. FACTUAL BACKGROUND

There is no dispute that charter schools, through public funding and private donations, have access to more financial resources than those available to traditional public schools. Charter schools enjoy refurbished accommodations and up-to-date amenities, such as computers and smart boards, which are not offered in traditional public schools. (Affirmation of David W. Brown, Esq., dated Feb. 29, 2012 [Brown Aff.], Exh. 1). The accommodations and amenities, moreover, are furnished within public school buildings where the charter schools are co-located, alongside the classrooms and within the full view of traditional public school students. (*Id.*). Parents of public school students thus understandably bristle not only at the disparate treatment of the students, but at how open and notorious it is. They assert that their children are not treated

equally, and insist that they be afforded the same educational amenities. (*Id.*). Their allegations have been addressed in several decisions before this and other courts. (*See Mulgrew v Bd. of Educ. of the City School Dist. of the City of N.Y.*, 88 AD3d 72 [1st Dept 2011] [*Mulgrew II*]; *Steglich v Bd. of Educ. of the City School Dist. of the City of N.Y.*, 33 Misc 3d 304, 2011 NY Slip Op 21282 [Sup Ct, New York County 2011]; *Mulgrew v Bd. of Educ. of the City School Dist. of the City of N.Y.*, 28 Misc 3d 204, 902 NYS2d 882 [Sup Ct, New York County 2010], *affd* 75 AD3d 412 [1st Dept 2010] [*Mulgrew I*]).

Here, plaintiffs raise new issues arising from DOE's "long-standing practice" of allowing charter schools to operate within public school buildings free of charge. (Brown Aff., Exh. 1; Intervenor-Defendants' Mem. of Law). Presently, DOE charges neither rent nor costs to any charter school for the use of space and maintenance in any public school and ordinarily enters into no written agreements with any of the co-located charters.[1] Plaintiffs thus maintain that not only does the co-location of charter schools result in "separate and unequal facilities" for traditional public school children but, to make matters worse, the fresher accommodations are provided to charter schools free of charge, which they allege is unlawful, and thus seek, pursuant to Education Law § 2853(4)(c), an order compelling DOE to collect significant rents from charter schools co-located in public school buildings. (*Id.*). With the funds raised in rent revenues, plaintiffs claim that DOE could hire more teachers for public schools, and thereby reduce class sizes, resulting in a small, but meaningful, step towards "an adequate education" and equality with the charter schools. (*Id.*).

In their answer, defendants claim that requiring charter schools to pay rent for the space

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[1] Plaintiffs, however, have discovered a "Facility Shared Use Agreement" between DOE and Girls Preparatory Charter School, dated June 1, 2005, which calls for no costs to be paid over its five-year term. (Affirmation of Arthur Z. Schwartz, Esq., in Opposition to Defendants' Motion to Dismiss, dated Apr. 23, 2012, Exh. B).

they occupy in public school buildings would require most charters to close their doors, resulting in the return of thousands of children to traditional public schools, thereby increasing class sizes, the antithesis of plaintiffs' objective. (*Id.*, Exh. 2).

Assuming for these purposes that the payment of rent by charter schools would result in the hiring of more school teachers and smaller class sizes for traditional public schools, the substantive issue raised here is whether Education Law § 2853(4)(c) permits the co-location of charter schools within public schools at no cost to the charter schools.

II. PROCEDURAL BACKGROUND

On July 25, 2011, plaintiffs commenced the instant proceeding with the filing of a summons and complaint. (*Id.*, Exh. 1). In their first cause of action, they allege that DOE's failure to charge co-located charter schools rent and costs violates Education Law § 2853(4)(c) and results in an annual loss to it of more than $96 million which, if collected, would save teaching positions at risk of being lost. (*Id.*). In their second cause of action, plaintiffs allege that DOE has failed to "seriously consider and incorporate the input and critique of the parents from the impacted public schools" in addressing issues arising from co-location, thereby depriving students at traditional public schools of an adequate education in violation of Article XI of the New York State Constitution and Education Law § 2853(3)(a-3). (*Id.*). They additionally contend that DOE has not addressed "long term inadequacies of each school district," resulting in overcrowded schools, eliminating the possibility of class size reduction, and providing charter schools with unlawful subsidies, citing, by way of example, the conditions at four schools where charters have or will be co-located. (*Id.*). And in their third cause of action, plaintiffs assert that Walcott has failed to comply with Education Law §§ 2590-h and 2853(3) by filing "formulistic and boilerplate Educational Impact Statements [ ] and Building Utilization Plans [ ] at the last

lawfully allowable moment," thereby denying them meaningful involvement in decisions regarding co-location. (*Id.*). They assert that the administrative appeals process also deprives them of meaningful input as it is "onerous" and "difficult, if not impossible for a non-lawyer parent to accomplish without expert advice and/or counsel." (*Id.*). They claim that they have been irreparably damaged insofar as their children have been deprived of an adequate education, they have been deprived of "their right to a meaningful input into the process," and co-located charter schools have been provided with an "unrecoverable subsidy." (*Id.*).

By decision and order dated December 28, 2011, the justice previously assigned to this part denied plaintiffs a preliminary injunction compelling DOE to collect more than $100 million in rents and costs from co-located charter schools. (*Id.*, Exh. 7).

III. CONTENTIONS

Defendants and intervenor-defendants (collectively defendants) advance several threshold arguments which they claim pose insurmountable obstacles to addressing the merits of plaintiffs' claims: plaintiffs' alleged failure to exhaust administrative remedies, their alleged lack of standing, and the alleged absence of a private right of action under Education Law § 2853(4)(c). In any event, they deny that DOE has violated Education Law § 2853(4)(c). (Intervenor-Defendants' Mem. of Law; Affirmation of Chlarens Orsland, ACC, dated Feb. 29, 2012 [Orsland Aff.]).

More specifically, defendants assert that plaintiffs' sole avenue of relief is an Article 78 proceeding and that their plenary action for declaratory and injunctive relief must therefore be dismissed. Moreover, they claim that, as section 2853(4)(c) is intended to protect charter schools from price gouging by DOE, it must be read as affording DOE the option of choosing whether it will enter into a contract with a charter school and charge it costs, or permit it to co-locate for

free. (Intervenor-Defendants' Mem. of Law; Orsland Aff.).

In opposition, plaintiffs argue that the relief they seek need not be obtained by way of an administrative proceeding and, citing *Campaign for Fiscal Equity v State of New York,* 86 NY2d 307 (1995) (*CFE I*) and *Campaign for Fiscal Equity v State of New York*, 100 NY2d 893 (2003) (*CFE II*), claim that they proceed properly, having asserted state constitutional claims. Additionally, they assert that section 2853(4)(c) is a fund-raising measure intended to benefit DOE, as guardian of all public schools, and that "costs" constitute a benefit to traditional public schools by providing for more teachers and smaller class sizes. They thus maintain that when DOE chooses to permit a charter school to co-locate with a traditional public school, that choice constitutes a contract obliging it to collect rent and costs from the charter school. (Pls.' Mem. of Law in Opp.).

In reply, defendants observe that plaintiffs concede their failure to exhaust their administrative remedies and abandon the statutory claims set forth in their second and third causes of action. Moreover, they argue that plaintiffs, having alleged only that their children are not receiving an education equivalent to that afforded charter school students, fail to allege the deprivation of a "sound basic education," and thus fail to state a claim pursuant to Article XI of the state constitution. They also maintain that, to state a claim pursuant to Article XI, "district-wide failures" must be at issue, that such claims may only be brought against the state, not a defendant here, and that a causal link must be established between the present funding system and any proven failure to provide a sound basic education to New York City school children. And they note that plaintiffs' interpretation of section 2853(4)(c) is inconsistent with its plain language. (Intervenor-Defendants' Reply Mem. of Law; Defendants' Reply Mem. of Law).

At oral argument, plaintiffs clarified that they are not abandoning the statutory claims in

their second and third causes of action.

IV. ANALYSIS

A party may move for judgment dismissing one or more causes of action asserted against it on the ground, *inter alia*, that the pleading fails to state a cause of action. (CPLR 3211[a][7]). On a motion to dismiss, the court must liberally construe the pleading, "accept the alleged facts as true, accord [the non-moving party] the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable theory." (*Leon v Martinez*, 84 NY2d 83, 87 [1994]).

It is well-settled that "one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law." (*Town of Oyster Bay v Kirkland*, 81 AD3d 812, 815 [2d Dept 2011], *affd* 19 NY3d 1035 [2012], *cert denied* ___US___, 133 S Ct 1502 [2013] [quoting *Watergate II Apartments v Buffalo Sewer Auth.*, 46 NY2d 52, 57 (1978)]; *see also Matter of Frumoff v Wing*, 239 AD2d 216, 217 [1st Dept 1997]). That administrative remedies must first be exhausted before turning to the courts for relief:

> furthers the salutary goals of relieving the courts of the burden of deciding questions entrusted to an agency, preventing premature judicial interference with the administrators' efforts to develop, even by some trial and error, a co-ordinated, consistent and legally enforceable scheme of regulation and affording the agency the opportunity, in advance of possible judicial review, to prepare a record reflective of its "expertise and judgment."

(*Watergate II Apartments*, 46 NY2d at 57).

However, administrative remedies need not be exhausted when, as here, "an agency's action is challenged as unconstitutional . . . [or] when resort to an administrative remedy would be futile." (*Id.*; *see also Town of Oyster Bay*, 81 AD3d at 815).

A. Constitutional claims

Article XI of the New York State Constitution provides, in pertinent part, that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." Adopted "when there were more than 11,000 local school districts in the State, . . . offering disparate educational opportunities" (*Bd. of Educ., Levittown Union Free School Dist. v Nyquist*, 57 NY2d 27, 47 [1982]), the absence of any "egalitarian component" (*Reform Educ. Fin. Inequities Today v Cuomo*, 86 NY2d 279, 284 [1995]) in this provision reflects that it was not intended to ensure educational equality throughout the state but to establish a "State-wide system assuring minimal acceptable facilities and services in contrast to the unsystemized delivery of instruction then in existence . . . " (*Levittown*, 57 NY2d at 47; *accord Reform Educ. Fin. Inequities Today*, 86 NY2d at 284). Accordingly, Article XI has been interpreted as requiring the state to provide a "sound basic education" to public school students (*Levittown*, 57 NY2d at 48; *CFE I,* 86 NY2d at 315; *CFE II*, 100 NY2d at 909; *N.Y. Civ. Liberties Union v State of New York*, 4 NY3d 175, 179 [2005]), one which provides "the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civil participants capable of voting and serving on a jury." (*CFE I*, 86 NY2d 316). Such an education entails the provision to students of "minimally adequate physical facilities and classrooms which provide enough light, space, heat and air to permit children to learn[,] . . . . minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks[,] . . . . and minimally adequate teaching of reasonably up-to-date curricula . . . ." (*CFE I*, 86 NY2d at 317).

Consequently, to state a claim pursuant to Article XI, a party must allege "the deprivation of a sound basic education and causes attributable to the State" (*N.Y. Civ. Liberties Union*, 4

NY3d at 178-79), and the alleged deprivation must be district-wide (*id.* at 182).

Here, although plaintiffs allege that children attending traditional public schools do not receive an "adequate education" insofar as the facilities, materials, and instruction provided them are of a lesser quality that those provided charter school students, and even assuming that the conditions at the schools referenced in the complaint are representative of schools across the district, plaintiffs do not plead facts tending to demonstrate that this inequality deprives traditional public school students of their right to an education sufficient to prepare them for productive civil engagement. Plaintiffs thus fall short of stating a constitutional claim. (*See Reform Educ. Fin. Inequities Today*, 86 NY2d 279 [plaintiff's claim that "extreme disparity" in per pupil expenditures between wealthy and poor districts demonstrates "a gross and glaring inadequacy in the State's school financing scheme" dismissed as they failed "to state a claim that these disparities have caused students in the poorer districts to receive less than a sound basic education"]).

B. Statutory claims

"The determination of the amounts, sources, and objectives of expenditures of public moneys for education[] . . . presents issues of enormous practical and political complexity, and resolution appropriately is largely left to the interplay of the interests and forces directly involved and indirectly affected, in the arenas of legislative and executive activity." (*Levittown*, 57 NY2d at 38-39). Accordingly, it is ordinarily "inappropriate [ ] for the courts to intrude upon such decision-making." (*Id.* at 39).

The court in *Mulgrew v Bd. of Educ. of the City School Dist. of the City of N.Y.*, 88 AD3d 72 [1st Dept 2011] (*Mulgrew II*), was asked to adjudicate issues pertaining to DOE's fiscal decision-making. At issue there was whether DOE's alleged failure to comply with Education

Law § 211-d, a provision pertaining to its allocation of funds to reduce class sizes, is subject to judicial review without first having been raised before the State Education Commissioner (Commissioner). The court held that such a challenge must be brought before the Commissioner in the first instance, as section 211-d reflects, and the Legislature intended, that the Commissioner possesses original jurisdiction over challenges brought pursuant to that statute. (*Id.* at 78-80). The court held, moreover, that "[e]ven if the State Education Department had not been given original jurisdiction . . . , the doctrine of exhaustion of administrative remedies" requires that the matter first be heard by the Commissioner, as "review and comparison of budgets, expenditures, and funding allocations" "falls squarely within the purview of the State Education Department." (*Id.* at 81).

In *Steglich v Bd. of Educ. of the City School Dist. of the City of N.Y.*, 33 Misc 3d 304, 2011 NY Slip Op 21282 (Sup Ct, New York County 2011), the previously assigned justice relied on *Mulgrew II* in determining that a challenge to DOE's decisions regarding co-location must be adjudicated by the Commissioner before judicial review is permitted. Although the court acknowledged that a different statutory scheme was at play in *Mulgrew II*, he held that, in light of the *Mulgrew II* court's finding that budgetary issues fall within the Commissioner's purview, the decision "makes clear that, in the first instance, disputes of this nature should be heard by the . . . Commissioner." (33 Misc 3d at 308, 2011 NY Slip Op at *4).

Here, all of plaintiffs' statutory claims pertain to the budgetary decisions made in permitting charter schools to co-locate without charging costs, and thus, as in *Steglich*, the instant matter falls within the aegis of the Commissioner. Accordingly, it must be heard, in the first instance, at the administrative level.

C. Futility

Resort to administrative remedies is futile where "the agency head ha[s] either explicitly made a determination that negatively affected the petitioners, or practicality has dictated that such a determination [is] the only possible outcome of administrative appeals." (*Matter of Pyramid Co. of Onondaga v Hudacs*, 193 AD2d 924, 925 [3d Dept 1993]).

Here, although plaintiffs do not expressly claim that resort to the administrative appeals process would be futile, they imply it by asserting that, absent the assistance of counsel, the process is too onerous and complicated to manage and would not afford them the relief they seek. Absent an explanation as to how the administrative process is any more onerous and complicated than a plenary action, plaintiffs do not establish futility. Moreover, they only speculate that the Commissioner will not find in their favor. Thus, there is an insufficient basis for finding that plaintiffs cannot obtain the relief they seek at the administrative level. If plaintiffs are aggrieved by the Commissioner's determination, they may then seek judicial review by way of an Article 78 proceeding, and the issues raised here would then be reviewable.

In light of this determination, the parties' remaining contentions need not be addressed.

IV. CONCLUSION

The instant matter presents questions of fiscal policy and statutory interpretation that have not been addressed at the administrative level, and plaintiffs have not demonstrated why this matter should not be so addressed. This is not to say that plaintiffs' claims are without merit and that their "efforts to secure the best education possible for their children" do not warrant remedy. (*Paynter v State of New York*, 100 NY2d 434, 443 [2003]). Rather, even if there exists an educational inequality between public school students and charter school students which could be remedied by charging costs to co-located charter schools, "[i]t would neither serve the purposes of

orderly government nor honor the role of the judiciary to lay aside standards of judicial review . . . because in this instance corrective measures may . . . be much needed . . . ." (*Levittown*, 57 NY2d at 50). Therefore, at this juncture, plaintiffs' remedy lies, in the first instance, in administrative review.

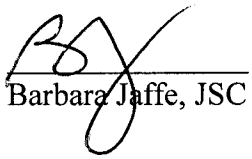
Accordingly, it is hereby

ORDERED, that intervenor-defendants' motion to dismiss the complaint is granted; it is further

ORDERED, that defendants' motion to dismiss the complaint is granted; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment accordingly.

ENTER:



Barbara Jaffe, JSC

Dated: April 30, 2013
New York, New York