

Red Apple Child Development Center v The Chancellor's Board of Review
2002 NY Slip Op 30069(U)
September 30, 2002
Supreme Court, New York County
Docket Number:
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUIS B. YORK
Justice

PART 2

Red Apple Child Develop
ment
- v -
Ch.

Chancellor's Board of Review

INDEX NO. 107 686/02
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

SCANNED
OCT 28 2002

Upon the foregoing papers, it is ordered that this motion

motion is decided in accordance
with accompanying memorandum ~~decision.~~

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: 9/30/02

Juis B. YORK
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 2
..... X

RED APPLE CHILD DEVELOPMENT CENTER,

Petitioner,

INDEX NO.
107686102

-against-

THE CHANCELLOR'S BOARD OF REVIEW and
COMMUNITY SCHOOL DISTRICTS 24 AND 28,

Respondents.

----- X

For petitioner: Joseph C. Cacciato, Esq., Brooklyn, NY
For respondent: Michael A. Cardozo, Corporation Counsel, New York, NY, by
Arthur H. Shaw, Assistant Corporation Counsel
For intervenor-petitioner: Jeffrey S. Karp, P.C., New York, NY

SCANNED
OCT 28 2002

LOUIS YORK, J.:

Motions seq. nos. 001, 002 and 003 are consolidated for disposition.

This action seeks to have the respondent Chancellor's Board of Review ("the Review Board") consider the application of the petitioner, a learning center for pre-school children, for authorization to operate as a child development center. The respondent had previously rejected petitioner's application as untimely. For the reasons that follow, the court rejects the Review Board's decision and remands the application for respondents' consideration on the merits.

In motion seq. no. 001, petitioner Red Apple Child Development Center ("the Center") moves for a judicial ruling: (i) pursuant to CPLR 7803(1), that the Review Board failed to perform its legal duty and must review the rejection of the Center's submissions in response to two requests for proposals ("RFP"); (ii) pursuant to CPLR 7803(3), that the Review Board arbitrarily and capriciously denied the Center's request for a rehearing, and must grant it; and, "in

addition or in the alternative," (iii) that the Center has exhausted its administrative remedies with respect to the rejection of their RFP and other issues, and that respondents Community School Districts 24 and 28 must review the Center's RFP.

In motion seq. no. 002, the Center moves, pursuant to CPLR 402, for leave to submit additional information in response to a defense asserted by respondents in their answer

In motion seq. no. 003, the Red Apple Child Development Center Parents Association ("the Parents Association") moves pursuant to CPLR 1013 for leave to intervene in this proceeding as a petitioner, and thereupon to have the court order respondents to approve the Center as a provider of universal pre-kindergarten ("UPK") services.

Background

The Center is a private educational corporation which has provided day care and pre-kindergarten services for over ten years through several facilities in Manhattan, Queens and Brooklyn. The majority of the children enrolled at the Center are Asian, and the programs at several of the Center's facilities are specifically tailored to Chinese children and include bilingual education. Indeed, as of last year, the Center was one of the largest bilingual day schools in the country, and its programs have been lauded by educators and politicians alike. The Center has been a participant in New York state's UPK program (Education Law § 3602-e) since it was enacted in 1997. The state funds the UPK program by giving money to the individual community school districts, each of which in turn awards at least ten percent of the funds it receives to private participating agencies through a competitive contract process (8 NYCRR 151-1.9) managed for the school districts by the City's Board of Education ("the Board"), which signs a separate contract for each district. As a result of the Center's participation in the UPK program, four-year-

old children receive pre-kindergarten education free of charge and the Center receives a certain amount of money for each eligible child enrolled, calculated according to a statutory formula.

Everything seems to have gone smoothly with the Center's participation in the UPK program, without any complaints about the quality of the Center's services or its contractual performance, until June 2001, when one of the Center's executives was arrested for allegedly bribing a Fire Department inspector to ignore defects in the certificate of occupancy filed for one of the Center's facilities. At that time, the Center had UPK renewal contracts through June 2004 with various community school districts, including the two at issue in this proceeding. Those contracts required the Center to have valid certificates of occupancy and various other permits and licenses. In the wake of the executive's arrest, the City's Department of Health (the "Health Department") examined all of the Center's certificates of occupancy and compared them to the ones filed in connection with the Center's application for health permits. Finding discrepancies, the Health Department suspended all the Center's health permits pending administrative review, whereupon the Board terminated all of the Center's UPK contracts, effective August 27, 2001, on the ground that the Center had breached the contracts by failing to maintain valid permits throughout the contract term.

In July 2001, the Center commenced negotiations with the Health Department, with the result that by early September 2001, the requisite permits for all but one of the Center's facilities had been reinstated. Despite this and the fact that the bribery charges against the Center's executive were dismissed prior to trial, the Board refused to reinstate the Center's UPK contracts, claiming the community school districts had already made alternate arrangements with other UPK providers. In October 2001, the Center brought an Article 78 proceeding against the Board and

four community school districts, including 24 and 28 (index no. 117470/01).

As alleged in the petition, while that proceeding was pending in Supreme Court, the Center decided to submit a response to the community school districts' RFPs for 2002-2003 so that it would be eligible to receive new contracts if the court upheld the Board's termination of the Center's 2001-2004 contracts. The Center filed a timely response to Community School District 24's RFP on February 8, 2002, the deadline for filing in that district. On that same day, February 8, 2002, the court (Solomon, J) issued a decision in which she held that the Board had improperly terminated the Center's UPK contracts, but declined to affirmatively enforce the contracts because the Center had not exhausted its administrative remedies. Since the decision reinstated the Center's UPK contracts through 2004, the Center withdrew its response to District 24's RFP on February 11, 2002. Community School District 28's deadline was February 15. The Center does not allege that it filed a timely response in District 28.

On February 19, 2002, the Board "informed [the Center] that it would appeal the Supreme Court's decision, but would let [the Center] submit the new proposal for the coming year" (petition, ¶ 10). The Center then immediately submitted another RFP response to District 24. Allegedly because the premises were closed for mid-winter recess the week of February 19, the Center did not submit its response to District 28's RFP until February 26. By letter dated March 7, 2002, District 28 rejected the Center's proposal as untimely submitted and informed the Center that it could appeal that decision by making a formal request to the Review Board within five days. By a similar letter dated March 12 which provided more specific instructions for the appeal, District 24 rejected the Center's proposal as untimely. By letters dated March 12 and March 19, the Center's counsel wrote to the Review Board and asked it for a hearing and determination on

the school districts' rejection of the Center's late proposals and also of the matters raised in the prior proceeding which Justice Solomon ruled were subject to administrative rather than judicial review. It is unclear what, if any, response the Center or its counsel received from the Review Board.

On April 18, the Center obtained an order to show cause and commenced this proceeding, alleging that the Review Board wrongly failed to hold hearings or review the community school districts' rejection of the Center's RFP responses, and that the school districts' rejections of those responses as untimely were in themselves irrational, capricious and an abuse of discretion.

Submission of Additional Information

After respondents answered the petition, the Center moved pursuant to CPLR 402 for leave to submit additional information in response to respondents' defense that they properly exercised their discretion in rejecting the Center's late submissions. CPLR 402 provides that "[t]here shall be a reply to a counterclaim denominated as such and there may be a reply to new matter in the answer in any case."

In opposition, respondents argue that the defense asserted in the answer merely states that respondents rationally exercised their discretion in refusing to accept the Center's late RFP submissions, and thus no new matter is raised.

It is true that the issue of whether respondents abused their discretion or were otherwise irrational in rejecting the Center's RFP responses as untimely lies at the core of the petition herein. In that respect, it is not new, although it is arguable that by choosing to affirmatively assert it as a defense in their answer, respondents voluntarily took on a burden of proof on the issue that before was borne exclusively by the Center, and hence opened the door for a reply by the Center.

Nonetheless, it is not necessary to reach this issue because the "new" information is either not new, already before the court or otherwise inadmissible on evidentiary grounds.

The additional information which the Center seeks to submit is an "additional verified petition in opposition to respondents[sic] answer" which is in essence the affidavit of Ana Con, an executive of the Center attesting to facts also alleged in the original petition and in the moving papers of the Parents Association, along with seven exhibits. The exhibits consist of: various photographs (exhibits A, C and G), which while interesting are not probative of any issue material to respondents' defense; Justice Solomon's decision in the Center's first Article 78 proceeding (exhibit F), which is part of the court's records and which this court had already considered since that decision plays a crucial role in the instant proceeding; a letter of commendation for the Center's UPK program from Community School District 1 dated June 19, 2000 (exhibit B), which is mentioned in Justice Solomon's decision and is otherwise not pertinent to this proceeding since it predates the Board's termination of the Center's contracts and respondents are not impugning the excellence of the Center's educational services; two pages from an RFP (exhibit E); and, more than a ream of undated petitions from parents asking "Ms. Payne" to allow the Center to provide UPK services so their children could be enrolled there (exhibit H), which are not relevant to the timeliness of the Center's applications. What is most troubling about this last exhibit is that there does not seem to be any reason why the Center did not submit the parents' letters with the original petition. While they are undated, many of them bear a fax date of September 7, 2001, and were probably submitted by the parents in connection with the Board's initial termination of the Center's contracts. Hence, they were relevant to the proceeding adjudicated by Justice Solomon, not to the instant petition.

The excerpt from the RFP is the most significant information, since it states in bold type that "a late proposal may only be accepted where it is determined by the community school district that it is in the best interest of the community school district to do so." However, although the cover sheet indicates that it is Community School District 28's RFP for 2002-2003, the page containing the quoted language clearly indicates that it is the RFP of Community School District 30, which is not at issue in this proceeding. In this context, the court notes that neither side has submitted a copy of the RFP for Community School District 24 or 28.

In view of the foregoing, the Center's motion must be denied, with the exception that Justice Solomon's decision, with which this court and the parties are independently familiar, will be considered by the court. --

Parents' Motion to Intervene

The Parents Association, allegedly representing over 1800 parents whose children attend the Center, moves pursuant to CPLR 1013 to intervene in this proceeding as a petitioner.

The Center's counsel supports the motion, arguing that the Parents Association is, if not a necessary party under CPLR 1001(a), at least a party that should be allowed to intervene as of right under CPLR 1012(a).

Respondents argue that the motion must be denied because: (i) Steven Yan ("Yan"), the individual who verified the petition on behalf of the Parents Association, has not demonstrated he, is their president or treasurer as required by General Associations Law § 12; (ii) none of the members of the Parents Association would have standing to assert the claims sought to be interposed; and, (iii) the Parents Association is not an "appropriate representative" because its

members do not have a proven common interest in the subject matter of this proceeding.

This is an Article 78 proceeding rather than a plenary action. CPLR 7802(d) "grants the court broader authority to allow intervention in an article 78 proceeding than is provided pursuant to CPLR 1013 in an action" (Matter of Greater New York Health Care Facilities Association [DeBuono], 91 NY2d 716, 720 [1998]). Under CPLR 7802(d), "the court ... may allow other interested persons to intervene." Hence, those who "have a direct and substantial interest in the outcome of th[e] litigation" should be allowed to intervene (Matter of Rent Stabilization Association of New York City [DHCR], 252 AD2d 111, 116 [3d Dept 1998], citations omitted).

As alleged in the moving papers, the reason for the Parents Association's motion to intervene is to bring to the court's attention how the interests of the children and their parents, and the Asian American community at large, are being adversely affected by respondents' refusal to allow the Center's continued participation in the UPK program.

It is clear that the parents of the children who were enrolled in the Center's UPK program are happy with the Center's services, and want their children to continue there enough to get actively involved. In May 2002, 1,017 parents, primarily members of the city's Asian American community, petitioned the Mayor to reinstate the Center as a UPK participating provider, and subsequently held a rally in front of the Board's headquarters in support of their petition, which was nonetheless unheeded (see exhibit A to Karp reply affirmation in motion seq. no. 003). Now, the parents, acting as a loosely formed association, are petitioning this court for the same relief. The court finds that the parents have sufficiently established a "direct and substantial interest in the outcome" of this proceeding.

The next issue is whether the Parents Association itself has the standing to represent those

parents whose interests are affected by this proceeding. The proposed intervenors argue that not every member of the Parents Association is an interested party because only those parents of a four-year-old child eligible for the UPK program are affected by the outcome of this matter, and conversely, that there are many parents who would wish to enroll their eligible child in a UPK program at the Center but are not represented by the Parents Association because they do not currently have a child in attendance at the Center, and finally that there are parents of eligible children at the Center who chose not to be members of the Parents Association.

The court does not find respondents' arguments sufficient to deprive the Parents Association of standing to intervene in this proceeding. Given the time-sensitive nature of this proceeding, it would be ill-advised for the court to engage in the kind of analysis more appropriate to a motion to certify a class than to the situation at hand. Since there is no entity more appropriate than the Parents Association to represent the interests of the parents whose lives will be affected by the outcome of this litigation, to preclude the Parents Association from intervening would be tantamount to depriving the parents of a voice.

The last question is whether Yan is legally authorized to represent the Parents Association. Under Gen Assns L § 12, where an association "does not have any officer denominated 'president' or 'treasurer' ..., a presiding officer ... who exercises all the functions usually exercised by a president and who in fact is the chief executive officer of the association" has standing to represent the association in a legal proceeding (Matter of Pasch [Chemoleum Corporation], 26 Misc 2d 918 [Sup Ct, NY Co, 1960], affd 13 AD2d 470 [1st Dept 1961], rearg den 13 AD2d 623 [1st Dept 1961], lv granted 9 NY2d 965 [1961]). Counsel for the Parents Association avers that the Parents Association has neither a president nor a treasurer, but is

instead governed collectively by officers who represent each of the eight facilities of the Center, and "Yan is the representative-officer of the Elmhurst, Queens ... Center" (Karp reply affirmation, ¶ 3). Since it appears that Yan, at least in part, performs the functions of a chief executive officer, the court finds that he is an appropriate person to represent the Parents Association.

The proposed intervenors' petition is verified by Yan, who avers to be an officer and authorized representative of the Parents Association, and that he and his family are representative of the families whose lives have been disrupted by the Center's disqualification from the UPK program. Yan and his wife both work full time. They have two children, aged two and four, who attend day care from early morning to late afternoon in one of the Center's facilities in Community School District 24. Their elder child, Jonathan, is eligible to attend a UPK program starting this month. The Yans have been "extremely satisfied with the educational, cultural and socialization services" provided by the Center thus far and found the staff to be "highly professional and dedicated to the welfare, education and development of the children" (¶ 10), and were looking forward to Jonathan's enrollment in the 2-1/2 hour UPK program this year at the Center, where his younger brother is enrolled in the toddler program. If the Center is prevented from participating in the state's UPK programs, the Yans will have the Hobson's choice of paying for Jonathan's attendance at the Center's pre-kindergarten program or having to shuttle Jonathan back and forth between the Center and another facility which is a participating UPK provider and having to make separate transportation arrangements for their younger son to attend the Center.

Respondents' substantive opposition to the petition boils down to the argument that "the policy of competitive procurement statutes" should be paramount to the parents' "views on the merit of the [Center's] program and the convenience of attending those programs for individual

members" (Shaw affirmation, ¶ 13). The court disagrees. As discussed below, the rights of the parents in this litigation come directly out of the UPK enabling legislation.

Respondents' Rejection of the Center's Untimely Submissions

The primary case relied on by respondents, Matter of George A. Nole & Son, Inc. [Board of Education] (129 AD2d 873 [3d Dept 1987]), deals with a competitive bidding situation, where the sanctity of a deadline is of particular importance in order to avoid a late bidder becoming the lowest bidder due to unfair advantage based on knowledge of the prior, timely, bids. (See Sinram-Marnis Oil Company, Inc. v. City of New York, 74 NY2d 13, 18 [1989]). In this case, those considerations are less relevant since the amount payable under the contracts at issue is fixed by statute rather than by the bidding process. Furthermore, as counsel points out, the Center's UPK program has already been vetted by the community school districts which first granted and then extended the Center's contracts through 2004, so the competitive aspect of the process has in a sense already been met.

Decision

In considering this proceeding, the court is mindful that "the laws requiring competitive bidding were designed to benefit taxpayers rather than corporate bidders and, thus, should be construed and administered with sole reference to the public interest" (Matter of Acme Bus Corp. [Board of Education], 91 NY2d 51, 54 [1997]), citation omitted), which in this case is the interest of the communities served by the community school districts. The Board has the discretion to accept or reject late bids, but it may not exercise that discretion in a manner that is "irrational, dishonest or otherwise unlawful" (Matter of Conduit and Foundation Corporation [Metropolitan Transportation Authority], 66 NY2d 144, 149 [1985]). In this case, the court finds that the

primary legal consideration in any exercise of discretion must be that expressed by the UPK program's enabling legislation. Hence, any decision made by the community school districts about any aspect of the UPK program should be based on the statute.

Education Law § 3602-e(3)[b] provides that each community school district's plan for implementation of the UPK program is to be based on six factors: (i) the number of children that will be eligible for the UPK program in each of the following four years; (ii) the benefits to eligible children who would participate in the program; (iii) "the needs of the parents of the eligible children," including needs resulting from their being working parents; (iv) "the ease of utilization and accessibility of the program to parents"; (v) "the availability and existing facility capacity of existing eligible agencies"; and, (vi) "the most appropriate and effective manner in which to provide prekindergarten programs which most efficiently utilize the resources of the school district and the community, including eligible agencies."

Each of these elements is cited by the Parents Association's petition as a reason to grant the relief sought by it and by the Center. By contrast, respondents have not even addressed these factors, or even attempted to fit their decisions to reject the two Center proposals into the legislative framework. Most significantly, respondents have not addressed how the needs of the Asian American population served by the Center are going to be met if the Center is not allowed to even propose a UPK program to meet those needs, especially the need for bilingual education. Under the rules of the state's Education Department, a UPK program is defined as "a program which provides curriculum and activities which are appropriate to the age level and individual needs of eligible children and which promote cognitive, linguistic, physical, cultural, emotional and social development. Activities shall be learner-centered and shall be designed and provided in

a way that promotes the child's total growth and development in all areas including emergent English literacy" (8 NYCRR § 151-1.2[i]; see also 8 NYCRR § 151-1.9). Again, respondents have not even argued that their decisions are consistent with any of these components.

Finally but foremost, equitable considerations also militate in petitioners' favor. Although the petition in this action seeks relief properly awarded through a special proceeding, it cannot be considered in a vacuum, but must be looked at by the court in the context of another, prior proceeding. Under Justice Solomon's decision, the contracts held by petitioner through 2004 were reinstated, and the Center should currently be able to provide UPK services. However, respondents appealed that decision, which has been automatically stayed (see CPLR 55 19). The Center's motion to dismiss the appeal or, alternatively, vacate the automatic stay, was granted by the Appellate Division, First Department only to the extent of vacating the automatic stay if respondents fail to perfect their appeal for that court's December 2002 term.

Under ideal circumstances, the decision this court renders herein would only have relevance if the First Department grants respondents' appeal of Justice Solomon's decision in the prior proceeding. Unfortunately, circumstances weigh heavily against the Center and, more importantly, against the children and their parents. Since respondent's time to perfect the appeal for the December term has not yet elapsed, the Center is in the unenviable position of losing even if it wins the appeal, because if the children do not enroll in a UPK program at the Center immediately, they will already be enrolled in programs elsewhere by the time the appeal is decided or even worse, the stay is vacated because respondents failed to perfect their appeal. The children and parents like the Yans will be in an even more untenable position, since they will either be out of pocket money they shouldn't have had to spend, or will, at great inconvenience to themselves

and their children. have enrolled their four-year-olds in less desirable programs not of their choosing. It will be especially detrimental to the Asian American children who may not be able to get a convenient placement where bilingual education is offered for them.

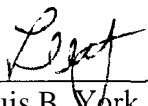
In short, if the Appellate Division denies the appeal, this proceeding will be factually mooted, since the Center will be able to provide services under its existing contracts and submit timely applications in response to the RFPs for the next UPK program. However, because of the timing of the appeal, unless this court grants the relief sought herein, the Center will not be able to provide uninterrupted UPK service to those children who need them now, even if the Appellate Division eventually rules in the Center's favor. Given the clear legislative intent discussed above, this court cannot turn a deaf ear to the plight of these children and their parents.

Accordingly, it is

ORDERED and ADJUDGED that the Center's motion (seq. no. 002) *is* denied and the Parents Association's motion to intervene (seq. no. 003) is granted. In sequence no. 001, the petition is granted to the extent that respondents' decision to reject as untimely the Center's responses to the RFPs for Community School Districts 24 and 28 is hereby vacated and respondents are directed to immediately consider the Center's submissions on the merits and render their decision thereon forthwith.

Dated: Apr 30, 2002

Enter:



Louis B. York, J.S.C.