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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: RAKOWER Justice PART 15

FORT GREENE COUNCIL, INC.

-v-

CITY OF N.Y.

INDEX NO. 111682/10

MOTION DATE

MOTION SEQ. NO. 01

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 ...	1, 2
Answering Affidavits — Exhibits	3, 4, 5, 6
Replying Affidavits	7, 8, 9, 10, 11, 12

Cross-Motion: ☐ Yes ☒ No

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

Dated: 11/29/10

HON. EILEEN A. RAKOWER J.S.C.

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

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: PART 15

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FORT GREENE COUNCIL, INC. and BEDFORD AVENUE DAY CARE CENTER, MARIEM ARBAOUI-NIANG

Petitioners,

-against-

THE CITY OF NEW YORK, MICHAEL BLOOMBERG, in his capacity as Mayor of the City of New York, JOHN B. MATTINGLY, in his capacity as Commissioner of the New York City Administration for Children's Services, and THE NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES,

Respondents.

Index No. 111682/10

DECISION and ORDER

Mot. Seq. 001

HON. EILEEN A. RAKOWER:

Petitioners bring this Article 78 proceeding for an order annulling Respondents' July 26, 2010 determination to terminate the lease and cease program operations at Bedford Avenue Day Care Center ("the Center" or "the subject Center"), run by Fort Green Council, Inc. ("FGC"). Petitioners claim that Respondents' determination (1) was arbitrary and capricious in that it lacked a sound basis in reason supported by the facts; (2) was in violation of Social Services Law ("SSL") §390-h; and (3) was the product of unlawful discrimination. With respect to the third claim, Petitioners allege that "Respondents targeted [the Center] because it serves children and families primarily from communities of color and low income populations in Bedford Stuyvesant and surrounding areas in Brooklyn, New York."

According to the affidavit of FGC Chairman Sam Pinn, the Center consists of a five-classroom program for 75 children aged 2-6. The program provides instruction in academics, computers, music and dance, and also ensures that the children receive proper nourishment. Pinn states that, during the week of January 25, 2010, he received a telephone call from Larry Thomas, Acting Assistant

Commissioner of the New York City Administration for Children's Services ("ACS"). Thomas advised Pinn that the City and ACS were considering closing the Center due to excessive rent and under-enrollment. Pinn further states that, in a meeting with himself and other staff from the Center on or around April 27, 2010, Thomas informed them that ACS intended to close the Center. During this meeting, Thomas reiterated that the Center was being closed due to excessive rent and under-enrollment. Pinn states that he disputed that the Center's rent was excessively high and noted that the City negotiated the lease with the landlord. In addition, Pinn noted that, contrary to Thomas's belief that the Center had 95 slots, the Center actually had only 75 slots (after complying with an ACS directive to lower the slots from 95 to 75), 67 of which were filled. Petitioners also annex a printout of annual lease costs of ACS centers throughout the City showing that, out of 116 centers, the subject Center's annual lease of $352,580.01 is lower than 84 other centers.

Petitioners thus argue that the City and ACS's purported reasons for closing the Center were clearly refuted, and claim that the real reason for the closure is that the Center is located in a minority and low-income area which voted overwhelmingly against Mayor Bloomberg in the 2009 election.

Respondents submit a Verified Answer, a memorandum of law, and the affidavit of Maria Benejan, Associate Commissioner of Program Development in ACS's Division of Child Care Head Start. Benejan states that in November 2009, she was advised that ACS would have to undergo agency-wide budgetary reductions, with her Division given a reduction target of $11,000,000.00. ACS determined that one way to reduce its costs would be to discontinue funding to certain city-leased child care center sites. Benejan states that, to this end, ACS studied child care centers to ascertain their overall costs. This entailed consideration of the cost of the center's lease, maintenance, foreseeable repairs, and utilities. In addition, ACS paid close attention to the "service-to-need ratio" in particular communities. In other words, ACS compared the number of available slots in a particular community with the number of children in that community who were eligible for placement in a child care center.

Benejan states that the subject Center was identified by ACS using the above criteria. According to her affidavit, the Center's lease was high per number of children served by the Center; ACS anticipated that repairs to the Center would be

required; and the service-to-need ratio in the community where the Center is location was "far higher than the City-wide average."

By letter dated July 26, 2010, ACS informed FGC that it would be closing the Center on September 30, 2010, and that the Center would have to terminate child care services by September 10, 2010. The letter further provided that "[t]o facilitate this transition, an enrollment freeze at [the Center] will remain in effect through September 10, 2010." That same day, ACS also sent letters to parents whose children attended the Center, advising them of the Center's impending closure, and providing them with material and information to assist them in finding alternate child care arrangements in the community.

On August 30, 2010, SSL 390-h was signed into law by Governor Paterson. That law provides that, prior to closing a child care center, the social services district "shall provide at least six months written notice to the child day care center and the parents... prior to the closing."

By letter dated September 9, 2010, ACS advised FGC that, in compliance with the newly-enacted SSL 390-h, ACS would continue to fund the Center until March 1, 2011. The letter further stated that the enrollment freeze will remain in effect until that time. ACS also sent a letter (dated September 9, 2010) to any parents whose children were still enrolled at the Center, advising them of the changed date of closing[1].

Petitioners argue that ACS has violated SSL §390-h, notwithstanding ACS's extension of funding for the Center until March 2011, because ACS has effected a "virtual closure" of the Center by prohibiting any children from enrolling (or re-enrolling) in the Center since July 26, 2010.

It is well settled that the "[j]udicial review of an administrative determination is confined to the 'facts and record adduced before the agency'." (*Matter of Yarborough v. Franco*, 95 N.Y.2d 342, 347 [2000], quoting *Matter of Fanelli v. New York City Conciliation & Appeals Board*, 90 A.D.2d 756 [1st Dept. 1982]). The reviewing court may not substitute its judgment for that of the agency's determination but must decide if the agency's decision is supported on any reasonable basis. (*Matter of Clancy -Cullen Storage Co. v. Board of Elections*

[1]Benejan states that, on September 9, 2010, 27 children were still enrolled at the Center.

of the City of New York, 98 A.D.2d 635,636 [1st Dept. 1983]). Once the court finds a rational basis exists for the agency's determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v. Glasser*, 30 N.Y. 2d 269, 277-278 [1972]). The court may only declare an agency's determination "arbitrary and capricious" if it finds that there is no rational basis for the determination. (*Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 231 [1974]).

Here, the Court finds that ACS's actions were supported by a rational basis, and thus cannot be disturbed on judicial review. The record indicates that the decision to close the subject Center was a legitimate exercise of ACS's discretion in allocating limited resources amid budgetary constraints. Aside from the Benejan affidavit, the record contains an ACS report titled "Hearing on the Mayor's Fiscal Year 2011 Executive Budget." In this report, ACS states that "[t]he proposed budget for child care for Fiscal 2011 is approximately $50 million less than the Fiscal 2010 Adopted Budget," which was due "almost entirely to a decrease in City funding..." The report further specifies that, in order to account for $9 million of that shortfall, ACS would eliminate 15 child care centers, including the subject Center. The report stated that selection of the targeted centers "was based on an analysis of all centers within the current system. The major factors considered were duration and costs of the leases, condition of facilities, vacancies/use of actual physical space within centers, and the community need within districts." Moreover, review of a spreadsheet of ACS child care centers contained in the record demonstrates that Council District 36, the district containing the subject Center, has approximately 1,400 child care slots. This makes it one of largest district councils in terms of available child care center clots. Accordingly, it was rational for ACS to conclude that Council District 36 would be relatively well positioned to provide alternative child care arrangements for children attending the Center.

Nor does the Court find that ACS's "virtual closure" of the Center was contrary to law. SSL §390-h was not in effect on the date of the initial decision to close the Center, and shortly after passage of §390-h, ACS advised FGC and parents with children at the Center that the closure would not be effected until March 2011, and that any children currently enrolled at the Center could remain there until that time. ACS neither closed the Center, nor reduced enrollment or services at the time of §390-h's passage. Rather, it maintained the status quo, and provided the required six months notice. Thus, the Court finds that ACS's actions did not violate the SSL.

Lastly, the Court rejects Petitioners' discrimination claims. It is well settled that claims of racial discrimination are assessed through the burden shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 [1973]: First, the party alleging discrimination must make a *prima facie* showing of discrimination. Thereafter, the responding party must demonstrate a legitimate, non-discriminatory basis for its action. If such a showing is made, the burden then shifts back to the complaining party to demonstrate that the legitimate bases advanced by the responding party are pretextual (*id.; see also Koester v. New York Blood Ctr.*, 2008 NY Slip Op 8166 [1st Dept. 2008]). Here, Respondents have demonstrated that the Center was selected for closure due to a significant reduction in ACS's budget which necessitated, among other things, the closure of several ACS child care centers throughout the City. In the face of this legitimate, non-discriminatory basis for ACS's decision, Petitioner's fail to provide any evidence that this justification was pretextual.

Wherefore, it is hereby

ADJUDGED that the Petition is denied and the proceeding is dismissed.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: November 29, 2010

EILEEN A. RAKOWER, J.S.C.