

M.A. v Strosberg

2011 NY Slip Op 31388(U)

May 25, 2011

Supreme Court, Albany County

Docket Number: 1795-11

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

M.A., an infant by his mother and
natural guardian SUE H.R. ADLER,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 1795-11
RJI NO. 01-11-103195

RAMI STROSBURG, individually and as Head of
School; BET SHRAGA HEBREW ACADEMY OF
THE CAPITAL DISTRICT; PATRICIA BULMER;
individually and as Elementary School Principal;
RUTH MALKA; individually and as a 5th Grade Teacher;
UNIDENTIFIED PARENT 1; and UNIDENTIFIED PARENT 2;

Defendants.

Supreme Court Albany County All Purpose Term, April 22, 2011
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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individually and as Elementary School Principal; Ruth Malka; individually
and as a 5th Grade Teacher*
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TERESI, J.:

M.A. is currently a fifth grade student at Bet Shraga Hebrew Academy of the Capital
District (hereinafter "BSHA"). On January 17, 2011, M.A.'s parents filled out and executed the
"2011-2012 Enrollment Contract" (hereinafter "contract") BSHA had provided to them for

M.A.'s sixth grade enrollment. They delivered, and BSHA accepted, the signed contract with the requisite deposit. Shortly thereafter, BSHA informed M.A.'s parents that they will not to allow M.A. to enroll in its sixth grade class.

Plaintiff commenced this action for, in part, a declaratory judgment and specific performance of the contract. Prior to issue being joined, Plaintiff moves for preliminary injunctive relief: "enjoining defendants from further retaliating against and/or targeting plaintiff and from breaching their contract with plaintiff's parents, for the benefit of plaintiff."¹ Defendants² oppose the motion. Because Plaintiff demonstrated his entitlement to the relief he seeks, his motion is granted.

"Preliminary injunctive relief is a drastic remedy which is not routinely granted." (Marietta Corporation v. Fairhurst, 301 A.D.2d 734, 736 [3d Dept. 2003]). It is well settled that in order to prevail on a motion for a preliminary injunction, the movant has the burden of demonstrating "a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor." (Green Harbour Homeowners' Ass'n, Inc. v. Ermiger, 67 AD3d 1116, 1117 [3d Dept. 2009], quoting Nobu Next Door, LLC v. Fine Arts

¹ To the extent Plaintiff seeks "in the alternative, a Declaratory Judgment" such relief is unauthorized in this procedural context. Such relief, in essence, seeks summary judgment. However, as issue was not joined at the time this motion was made, a summary judgment motion is premature. (CPLR §3212[a]).

² "Defendants" refers collectively to: Rami Strosberg, individually and as Head of School; Bet Shraga Hebrew Academy of the Capital District; Patricia Bulmer; individually and as Elementary School Principal; Ruth Malka; individually and as a 5th Grade Teacher. To the extent that Defendants opposition seeks Plaintiff's attorney's disqualification, because they made no motion for such relief the request is denied without prejudice. (CPLR §2211; Matter of Briger's Estate, 95 AD2d 887 [2d Dept. 1983]; New York State Div. of Human Rights v. Oceanside Cove II, 39 AD3d 608 [2d Dept. 2007]).

Housing, Inc., 4 NY3d 839 [2005]; Melvin v. Union College, 195 AD2d 447 [2d Dept.]; CPLR §§6301 and 6312).

Plaintiff first demonstrated a sufficient probability of success on the merits.

It is well established that a private school's discipline of one of its students must "substantially adhere[] to its own published rules and guidelines for disciplinary proceedings." (Hyman v. Cornell University, 82 AD3d 1309, 1310 [3d Dept. 2011], quoting Matter of Warner v Elmira Coll., 59 AD3d 909 [3d Dept. 2009]; see Tedeschi v Wagner Coll., 49 NY2d 652 [1980]). Additionally, a private school's disciplinary determinations must be "rationally based upon the evidence; otherwise the determination is arbitrary and capricious." (Matter of Warner v Elmira Coll., supra at 910; see Basile v Albany Coll. of Pharm. of Union Univ., 279 AD2d 770 [3d Dept. 2001]; Rensselaer Socy. of Engrs. v Rensselaer Polytechnic Inst., 260 AD2d 992 [3d Dept. 1999]).

Here, it is uncontested that BSHA's decision not to enroll M.A. is a disciplinary determination. M.A.'s parents submit an affirmation and affidavit in support of this motion, along with the verified complaint executed by M.A.'s mother. While these supporting documents contain some hearsay and speculation, they are based in large measure upon personal knowledge of the facts alleged. Both parents recount their separate meetings with BSHA's "Head of School" Rami Strosberg (hereinafter "Strosberg"). In both meetings, the parents were informed that M.A. would not be allowed to enroll for his sixth grade year. Strosberg, however, allegedly refused to give a reason for such determination. As of the making of this motion, although M.A.'s parents believed his non-enrollment was based upon a disciplinary reason, no reason supported the non-enrollment determination. Such proof, based upon the personal

knowledge of M.A.'s parents, establishes BSHA's lack of reason or rationality in denying M.A.'s enrollment, a prima facie arbitrary and capricious showing.

In opposition to this motion Strosberg filed an affidavit explaining his decision to deny M.A.'s enrollment for next year. As explicitly stated by Strosberg, his enrollment denial determination was "[d]ue solely to plaintiff M.A.'s continuing disruptive behavior." To establish the factual underpinning to such determination, Defendants properly submitted the incident reports contained in M.A.'s student file. (CPLR §4518). Reviewing such reports, it appears that while M.A.'s behavior in the fifth grade has required numerous interventions, compared to years past, his behavior has improved. Defendants offer no explanation for the current non-enrollment determination, as opposed to their past practice. In light of M.A.'s markedly worse behavior in years past and BSHA's continuous prior acceptance of M.A.'s enrollment, this gap in explanation creates the appearance of an arbitrary and capricious decision. Nor do Defendants explain how their enrollment denial determination complies with their code of conduct, instead relying on their broad discretion to expel a student.

While this court will not substitute its judgment for that of BSHA, its discretion must be exercised in a non-arbitrary and capricious manner, in accord with its own disciplinary code. (Hutcheson v. Grace Lutheran School, 132 AD2d 599 [3d Dept. 1987]; Carr v. St. John's University, New York, 17 AD2d 632 [2d Dept. 1962]).

BSHA also failed to refute the proof and allegations supporting Plaintiff's motion. Plaintiff attached to his motion his first and second quarter report cards. The report cards contain both grades and extensive teacher comments. Not only are M.A.'s grades quite good, but the comments are also very favorable. While the comments are not all positive, they contain praise

such as: M.A. “has shown growth and maturity”, he is “willing to listen”, is “a real pleasure to teach”, is “a great participant”, “is “doing a great job in class”, although he “struggled in the beginning of the year [he] has steadily been making improvements”, he is an “enjoyable student to teach”, and “[k]eep up the great work [M.A.]” Defendants offer no proof contradicting the substantial praise M.A.’s teachers, including Strosberg, gave in the report cards. Similarly unrefuted are Plaintiff’s allegations that Strosberg offered to move M.A. from the fifth grade to the sixth grade immediately, just prior to announcing that M.A. would not be allowed to re-enroll for his sixth grade year. Rather, Defendants confirmed (in an e-mail correspondence included within their submitted incident reports) that such offer was made. Such offer directly contradicts Strosberg’s current assertion that M.A.’s behavior is the reason for his decision to deny M.A.’s enrollment at BSHA for the 2011-2012 school year.

Plaintiff further demonstrated the arbitrary and capricious nature of BSHA’s determination by submitting the affidavits of two of M.A.’s current teachers. Both state that M.A. is “not disruptive” in their class. He is an “exceptional” / “excellent” student.

From the foregoing, while Plaintiff by no means demonstrated his entitlement to judgment as a matter of law in this action, he sufficiently demonstrated his probability of success.

Turning next to whether Plaintiff will suffer an “irreparable injury in the absence of an injunction”, on this record Plaintiff set forth sufficient proof to establish such irreparable injury.

Defendants do not contest the basic premise that Plaintiff, a fifth grade student, would be injured by BSHA’s alleged retaliatory/targeting conduct or non-enrollment for his sixth grade year. Instead, Defendants affirmatively claim that M.A. could attend two other comparable learning institutions in this geographic area. Although such assertion is based upon Strosberg’s

personal knowledge of these institutions, Plaintiff sufficiently rebutted Defendants' proof.

Plaintiffs offered affidavits from individuals involved in both allegedly "comparable" institutions, and thereby established the substantial differences between the institutions.

Moreover, contrary to Defendants' characterization, this is not a "monetary damages" case.

The equities also balance in M.A.'s favor. Defendants claim that if the injunction sought is issued they will be curtailed in disciplining M.A., other students will suffer because of M.A.'s poor conduct and BSHA will be hurt financially because M.A.'s continuation at the school will cause other students to leave. Not one of these assertions, however, is supported with evidentiary facts. First, in arguing that they would be curtailed in disciplining M.A., BSHA misconstrues the injunction sought. Rather than banning discipline, Plaintiff seeks only to enjoin BSHA's retaliatory/targeting conduct. Next, on this record, Defendants proffered no proof that any other BSHA students will appreciably suffer by M.A.'s continued enrollment. Similarly undemonstrated is BSHA's alleged financial loss. While Strosberg's allegations about BSHA's finances are based upon personal knowledge, his analysis is fundamentally flawed and unsupported. Strosberg's claim that BSHA's loss of one student, due to M.A.'s continuing enrollment, would cause the school to lose one full tuition neither accounts for BSHA's loss of M.A.'s tuition nor the possibility that the leaving student pays less than full tuition. Moreover, Strosberg provides no foundation for his conclusion that M.A.'s continued enrollment will cause another student to leave. Compared to such speculative and unsubstantiated loss, M.A.'s potential injury is clear.

Accordingly, Plaintiff's motion for a preliminary injunction is granted. This grant is conditioned upon Plaintiff providing Defendants with an undertaking in the amount of \$12,500.

(CPLR §6312). Such amount is equal to the loss of one student's full tuition for one sixth grade year. Although the loss Strosberg claimed was overinflated and unsubstantiated, his allegations of potential loss were not wholly unreasonable. As such, this amount provides a balance between Defendants potential loss and their lack of proof on this record. (Cooperstown Capital, LLC v. Patton, 60 AD3d 1251 [3d Dept. 2009]). Upon Plaintiff's giving the above undertaking, Defendants are hereby ordered: not to retaliate against and/or target M.A. and not to refuse M.A.'s enrollment as a student at BSHA for the 2011-2012 school year.

This Decision and Order is being returned to the attorneys for the Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
May 25, 2011


Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause, dated March 15, 2011, Affirmation of Alan Adler, dated March 13, 2011, Affidavit of Sue Adler, dated March 14, 2011, with attached Exhibits A-D; Summons, dated March 13, 2011; Verified Complaint, dated March 13, 2011.
2. Affirmation of Peter Balouskas, dated April 7, 2011, with attached Exhibits 1 (Affidavit of Rami Strosberg, dated April 6, 2011, with attached Exhibits A-C) - 2.
3. Affirmation of Sue Adler, dated April 21, 2011, with attached Exhibits A-D; Affirmation of Alan Adler, dated April 15, 2011, with attached Exhibits A-C; Affidavit of Kaitlin Baker, dated April 14, 2011; Affidavit of Shara Siegfeld, dated April 14, 2011; Affidavit of Micah Waldman, dated April 15, 2011; Affidavit of Dan Ornstein, dated April 17, 2011; Affidavit of Kaitlin Baker, dated April 14, 2011; Affidavit of Mayer Kirshner, dated April 15, 2011.