

**Advocates for Children of N.Y. v New York City Dept.
of Educ.**

2011 NY Slip Op 33118(U)

November 29, 2011

Supreme Court, New York County

Docket Number: 107312/11

Judge: Alexander W. Hunter Jr

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

PRESENT: _____

PART 33

Justice

Index Number : 107312/2011

ADVOCATES FOR CHILDREN

vs.

NYC DEPARTMENT OF EDUCATION

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-36; 37-56

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

57-62; 63

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

See memorandum decision and judgment annexed hereto.

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).

Dated: 11/29/11



ALEXANDER W. HUNTER JR J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33**

-----X
Advocates for Children of New York, Inc. and,
Asian American Legal Defense and Education Fund,

Index No.: 107312/11

Petitioner,

Decision and Judgment

-against-

The New York City Department of Education and
Dennis Walcott, as Chancellor of the New York
City Department of Education,

UNFILED JUDGMENT
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141B).

Respondents.

-----X

HON. ALEXANDER W. HUNTER, JR.

The application by petitioners for an order pursuant to C.P.L.R. § 7804, 1) compelling respondents to perform the duties required by New York Public Officers Law § 84 *et seq.*, § 1401.5 of the Rules and Regulations of the State of New York and the Department of Education's Regulation of the Chancellor by producing documents requested in petitioners' Freedom of Information Law ("FOIL") requests; 2) enjoining further unilateral extensions of all FOIL requests on the part of respondents; and 3) awarding petitioners their attorney's fees and costs, is denied.

Petitioner Advocates for Children of New York, Inc. ("AFC") is a public interest not-for-profit corporation that works to promote access to the best education New York City can provide for all students. Petitioner Asian American Legal Defense and Education Fund ("AALDEF") is a public interest not-for-profit corporation dedicated to protecting and promoting the civil rights of Asian Americans. Respondent the New York City Department of Education ("DOE") is the largest system of public schools in the nation. Respondent Dennis Walcott is the Chancellor of the DOE and is responsible for the administration of the city's public schools.

On February 24, 2010, petitioners submitted Request #6762 to Joseph Baranello, the Central Records Access Officer and Agency Attorney of the DOE. Request #6762 sought documents from the 2008-2009 and 2009-2010 academic years regarding English Language Learners and Limited English Proficient students enrolled in certain DOE high schools. Respondent acknowledged receipt of the request on February 25, 2010. The letter also indicated that a response would be sent to petitioners by March 25, 2010. The DOE sent a succession of letters to petitioners extending its time to comply with Request #6762. On November 10, 2010, the DOE responded by providing a list of ESL and bilingual teachers in the specified high schools. On December 21, 2010, the DOE provided a copy of the master schedules for the requested schools. This was deemed as its final response to Request #6762. Petitioners found this response to be inadequate and wrote an appeal letter dated February 4, 2011. Respondent

DOE denied this appeal on February 22, 2011.

On April 29, 2010, petitioner AFC submitted Request #6890 to Joseph Baranello. Request #6890 sought documents concerning students enrolled in District 75 schools in New York City from 2007-2008 through 2009-2010 academic years. Specifically, petitioner AFC sought information regarding whether or not these students had access to the required credits and testing to obtain Regents, Advanced Regents, and local diplomas. On May 7, 2010, the DOE acknowledged receipt of Request #6890. The letter also indicated that a response would be sent by June 7, 2010. The DOE sent a succession of letters to petitioners extending its time to comply with the request. Petitioner AFC found DOE's responses only partially responsive to its requests. Due to respondent DOE's failure to provide responsive documents, petitioner AFC filed a letter of appeal on February 1, 2011. The DOE denied the appeal on February 24, 2011, stating that Request #6890 was not constructively denied.

Petitioners assert that they are entitled to the outstanding documents responsive to Requests # 6762 and #6890 under Public Officers Law § 84 *et seq.*, § 1401.5 of New York State Rules and Regulations and Regulations and the Chancellor's Regulation D-110. Petitioners further assert that both requests were duly served on respondent DOE and respondent DOE did not invoke any FOIL exemptions at that time. Therefore, petitioners argue that this court must compel respondents to produce documents responsive to its two requests. Petitioners also argue that respondent DOE has improperly and unreasonably extended its time to respond to Requests #6762 and #6890. Finally, petitioners contend that respondent DOE has consistently engaged in a pattern or practice of violating its FOIL obligations by unilaterally extending its time to respond to FOIL requests and should be enjoined by this court from doing so in the future.

Respondents oppose petitioners' application in its entirety and move to dismiss the proceeding on the grounds that 1) this court lacks subject matter jurisdiction to review the claims concerning Request #6762 and 2) the claims concerning Request #6890 are time-barred. Respondents assert that petitioners' claims concerning Request #6762 are not properly before this court because petitioners failed to bring a timely appeal within the statutory period of thirty days. **See, Public Officers Law § 89(4)(a).** Respondents assert that it indicated its December 21, 2010 response as final. Petitioners submitted its administrative appeal forty-five days later on February 4, 2011. The administrative appeal was denied as untimely by the DOE Records Access Appeals Officer ("RAAO") Michael Best.

As to Request #6890, respondents contend that this proceeding is time-barred pursuant to C.P.L.R. § 217(1). Respondents assert that petitioner filed an administrative appeal by letter dated February 1, 2011. RAAO Best denied the administrative appeal by letter dated February 15, 2011. The appeal determination was mailed to petitioner AFC on February 15, 2011. C.P.L.R. § 217(1) provides that a proceeding against a body or officer must be commenced within four months after the determination becomes final and binding upon the petitioner.

Respondents also argue in the alternative that even if this Article 78 proceeding was

timely this court lacks subject matter jurisdiction to review the claims concerning Request #6890 because the petition is in large part moot and petitioners failed to exhaust its administrative remedies. Respondents contend that the DOE has fully responded to Request #6890. Respondents argue that the DOE provided many records after the February 15, 2011 denial of the administrative and therefore the petition is moot. In addition, petitioners have not filed any administrative appeals of respondent DOE's post-February 15, 2011 denials of partial or complete access to records. As such, respondents argue that petitioners have failed to exhaust all administrative remedies and are therefore not entitled to judicial review of these claims.

Finally, as to petitioners' allegations of respondents' pattern and practice of violating the FOIL statute, respondents argue that petitioners have failed to state a cause of action. Petitioners seek injunctive relief encompassing all future FOIL requests made to respondent DOE. Respondents argue that such a remedy is not available under the FOIL statute. Public Officers Law §§ 89(3) and (4) provide that the exclusive remedy to review the denial or constructive denial of a FOIL request is a judicial proceeding under C.P.L.R. Article 78. Therefore, respondents conclude that petitioners have failed to assert a cause of action for injunctive relief.

In reply, petitioners argue that this action was commenced on June 22, 2011 and is in fact timely with respect to both Requests #6890 and 6762. As to Request #6890, petitioners assert that respondents mistakenly used the date of the letter, February 15, 2011, instead of the postmark date of February 24, 2011 in calculating the relevant four month time period. As to Request #6762, petitioners used respondents' constructive denial of its request, and not the receipt of the December 21, 2010 letter, as the basis of its appeal.

Petitioners also contend that Request #6890 is not moot because respondents have yet to produce documents responsive to requests 1, 3, 5-25, 27, 33 and 34. Petitioners further allege that respondents have produced only some of the documents responsive to requests 4, 28, 29, 31, 32, and 35. Petitioners also state that they exhausted their administrative remedies as to Requests #6762 and 6890 by appealing respondent DOE's constructive denials. Respondent DOE's numerous unilateral extensions of time to respond the requests constituted constructive denials of both Requests. Petitioners contend that respondent DOE made eight extensions for Request #6890 prior to petitioner AFC's appeal, dated February 1, 2011. Respondent DOE denied the appeal by letter dated February 24, 2011. Respondents made eleven extensions for Request #6762 before petitioner AFC filed its appeal, dated February 4, 2011. Therefore, petitioners argue that they have exhausted their administrative remedies before commencing this action.

In response, respondents reiterate their previous arguments and assert that petitioners have failed to exhaust its administrative remedies in reference to Request #6890. Respondents also argue that petitioners' administrative appeal of Request #6762 was untimely.

The Court of Appeals has stated that FOIL was enacted "to provide the public with a means of access to governmental records in order to encourage public awareness and understanding of and participation in government and to discourage secrecy." Matter of

Newsday, Inc. v. Sise, 71 N.Y.2d 146, 150 (1987); see also, Public Officers Law § 84.

Pursuant to Public Officers Law § 89(3), within five days of receiving a FOIL request, an agency must either make the record available, deny the request, or provide an approximate future date when the request will be granted or denied. Failure to follow the aforementioned provision constitutes a denial of the request. Any person denied access to a request has thirty days in which to appeal the denial in writing. The agency then has ten days in which it must provide the requesting party in writing the reasons for the denial or provide access to the responsive records.

Public Officers Law § 89(4)(a). A person denied access to records may commence an a proceeding under C.P.L.R. Article 78 to review the agency's denial of the FOIL request. **Public Officers Law § 89(4)(b).** However, before the requesting party can resort to judicial review of the respective agency's determination, he must have exhausted his administrative remedies. See, **Matter of Newton v. Police Dept. of City of N.Y., 183 A.D.2d 621 (1st Dept. 1992); Matter of Kurland v. McLaughlin, 122 A.D.2d 947 (2nd Dept. 1986).**

Pursuant to C.P.L.R. § 217(a), a proceeding against a body or officer must be commenced within four months after the determination becomes final and binding upon the petitioner. "An administrative determination becomes final and binding when the petitioner seeking review is aggrieved by it." **In the Matter of Yarbough v. Franco, 95 N.Y.2d 342, 346 (2000).**

Petitioners' appeal of Request # 6890 was denied by respondent DOE on February 15, 2011. Courts have held Article 78 proceedings as time-barred even when commenced one day after the four month statute of limitations has expired. See, **Matter of Magat v. County of Rockland, 265 A.D.2d 483 (2nd Dept. 1999); Matter of Tuxedo Conservation and Taxpayers Ass'n v. Town Bd., 213 A.D.2d 655 (2nd Dept. 1995).** Petitioner commenced this special proceeding more than four months after the expiration of the statute of limitations on June 22, 2011. Accordingly, the claims concerning Request #6890 must be dismissed as time-barred pursuant to C.P.L.R. 3211(a)(5).

This court also finds that respondent DOE properly denied petitioners' appeal concerning Request #6762 as untimely. Public Officers Law § 89(4)(a) clearly provides that a requesting party has thirty days to appeal an agency's denial of its FOIL request. Here, respondent DOE issued its final response on December 21, 2010. Petitioners administratively appealed that decision more than thirty days after the statutory time period on February 4, 2011. Therefore, this court does not have subject matter jurisdiction over petitioners' claims concerning Request #6762.

Petitioners are seeking permanent injunctive relief on behalf of all future FOIL requesters to prevent respondents from granting itself unilateral extensions. C.P.L.R. § 7806 outlines the types of relief permitted in an Article 78 proceeding. Petitioners' requested relief for a permanent injunction is not permitted under C.P.L.R. Article 78.

As to petitioners' requests for attorney's fees and expenses, Public Officers Law § 89(4)(c) provides that a court may award reasonable attorney's fees and costs if the agency unreasonably denied the request or if the agency failed to respond to a request or appeal within

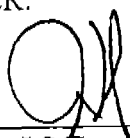
* 6]
the statutory time period. Neither of these factors apply in the instant application and therefore, petitioners' request for attorney's fees and expenses is denied.

Accordingly, it is hereby,

ADJUDGED, that the application by petitioners for an order pursuant to C.P.L.R. § 7804, 1) compelling respondents to produce documents requested in petitioners' FOIL requests; 2) enjoining further unilateral extensions of all FOIL requests on the part of the DOE; and 3) awarding petitioners their attorney's fees and costs, is denied.

Dated: November 29, 2011

ENTER:



J.S.C.

UNFILED JUDGMENT

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