Community Charter Sch. v Board of Regents of the Univ. of the State of N.Y.
2013 NY Slip Op 33840(U)
June 18, 2013
Supreme Court, Erie County
Docket Number: 1359/13
Judge: John A. Michalek

[* 1]

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

COMMUNITY CHARTER SCHOOL; SHEENA JOSEY, as Parent and Natural Guardian of RICKELLE JONES and QUMIR JOSEY, Infants; REBECCA BARTNIK, as Parent and Natural guardian of BRAXTON HAWKINS and KAMRON HAWKINS, Infants; and LOVETTA L. JAMES, as Parent and Natural Guardian of ZION BEAL, Z'NAI BEAL, and ZANE BEAL, Infants,

Plaintiffs,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK; NEW YORK STATE EDUCATION DEPARTMENT; JOHN B. KING, JR., in his Capacity as Commissioner of Education, and CITY SCHOOL DISTRICT OF THE CITY OF BUFFALO,

Defendants.

Memorandum Decision
Index No. 1359/13

BEFORE: **HON. JOHN A. MICHALEK**

APPEARANCES:

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John B. King, Jr., in His Capacity as Commissioner
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MICHALEK, J.:

Community Charter School (CCS) and the parents of seven children who attend it seek a preliminary injunction against Defendants the Board of Regents of the University of the State of New York (hereafter BOR); the New York State Education Department (NYSED); and John B. King, Jr., in His Capacity as Commissioner of Education (hereinafter referred to collectively as "the State defendants"), barring them from taking any steps to enforce the non-renewal determination of the BOR concerning CCS's charter or the closure of the school. Plaintiffs allege imminent and irreparable harm, in that SED already has begun implementing its closing procedures for the School: formation of a transition team to begin enrolling CCS's students in new schools, securing student records, and notifying the public; requiring CCS to begin to terminate its contracts with vendors and contractors, notify employees of their termination and the like. Plaintiff parents allege that they have no free educational alternatives for their children other than the allegedly "failing, unsanitary and violent" City School District of the

City of Buffalo (BPS) (Plaintiffs' Memo of Law at 3).

On May 3, 2013, after hearing counsel for both sides, the Court granted a temporary restraining order under which, pending a return date on May 16, the defendants were enjoined from executing and enforcing the determination of the BOR dated April 23, 2013 not to renew the charter and to maintain the status quo as if the determination of non-renewal had not taken place. The parties thereafter adjourned the return date on consent to May 30. After extensive oral argument, and the submission of a lengthy record, the matter was reserved for a written decision.

Initially, the court notes that this motion requires analysis of serious issues concerning charter school accountability for student academic achievement, and the constitutional and statutory limitations on the authority of the BOR and the NYSED to decide not to renew a school charter a fourth time, and to close such a school. These issues arise in the interstices of statute, regulation and case law, and unfortunately the precise issues have not been ruled on before, to the court's knowledge, by any other court of this state except this one (*see* Coppola Affid. Ex. A *[Pinnacle Charter School v BOR*, Index No. 2012/1532], Memo Dec'n, May 2012).[1] In addition, in the court's view,

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[1] *Cf. Matter of Williamsburg Charter High School v New York City Dept. of Educ.*, 36 Misc3d 810, 827-832 [Sup Ct Kings County June 28, 2012] [revocation of charter]).

both sides lay responsibility at the hands of the other for failures to overcome with regard to these students and the other BPS students what are two of society's most intransigent problems: inner city violence among young people, and persistent failures of inner city school programs, despite infusion of money and consistent efforts. The court's tools in dealing with such issues remain extremely limited, and the court reiterates that the granting of injunctions against reasoned actions of state decision-makers should be measures of last resort (*see generally Donohue v Copiague Union Free School Dist.*, 47 NY2d 440, 444 [1979]). The question, as stated by plaintiffs' counsel at oral argument, is whether the BOR used lawful parameters to make a decision – not whether it made the correct one.

I. CONTENTIONS

Plaintiffs assert a likelihood of success on the merits of their claims under the State Administrative Procedure Act (SAPA), because the BOR and SED allegedly violated SAPA by 1) not promulgating any rules and regulations governing its procedures and substantive review of charter school renewal applications in order to preserve its unfettered discretion over charter schools; 2) the allegedly illegal application of so-called Emergency Regulations concerning such processes to CCS; and 3) without the public input or notice provided by SAPA, by dramatically raising the bar for student achievement goals by modifying cut scores

without warning.

In addition, plaintiffs allege a likelihood of success on the merits on their fourth, fifth and seventh causes of action. The fourth cause of action alleges that defendants violated CCS's substantive and procedural due process rights under the New York State Constitution, art 1, section six, in that it was deprived of a property interest in its continued existence and in the "essential attributes" of its charter. The fifth cause of action asserts similar allegations under the United States Constitution's due process clause. Finally, in the seventh cause of action under the federal constitutional due process clause, the infant plaintiffs assert that defendants have deprived them of the right to be educated in a safe and secure environment.

II. FACTS IN THE RECORD

CCS is a K-6 school located on the East Side of the City of Buffalo; 90 percent of its students are inner city African-Americans, and 93 percent of the students receive free or reduced price lunches (Ricigliano Affid. ¶ 2, Luka Affid. ¶ 19). The school applied in the fall of 2012 for its fourth charter renewal: its first charter ran from 2001 through 2006, although the school did not open until 2002 allegedly due to the absence of a facility, and ran as a K-4 school from 2002 through 2004; a fifth grade was added in the 2004-2005 school year, and a sixth grade in 2005-2006 (Clarke Affid. Ex. R, Attachment 2 [Community Charter

School Renewal Recommendation Report, April 2013, by SED] [hereafter "Nonrenewal Report"] at 3). CCS was put on probation by the Commissioner in May 2005 for failure to comply with several requirements including the provision of alternative instruction to suspended students, documentation of employee background clearances and certifications, and the qualifications of the director (Nonrenewal report at 3). The probation term extended beyond its initial end date of September 2005 due to continued lack of compliance, until June 30, 2006 (*id.* at 3).

Thereafter, the BOR granted CCS a one-year extension from 2006 to 2007, to allow the school to obtain and analyze a third consecutive year of student achievement data given the delay in opening. The second short term renewal was for August 1 2007 to July 31, 2009. Thereafter in 2008, the BOR granted CCS a four (4) year charter term, from August 1, 2009 through June 30, 2013 (see Clarke Affid. Ex. F). In the SED recommendation to the BOR in December 2008, the report indicated that CCS had shown a "generally steady academic progress," outperforming the BPS "on most State assessment variables in most years" (*id.* at 3). In addition, staff turnover had been 8 percent for 2008-2009 and membership on the Board of Trustees had been stable since the school's inception, with little turnover (*id.* at 4).

The court found no copy of that 2009-2013 charter in the record.

The Nonrenewal report notes that the absolute goal articulated by CCS for the charter was that "[a]t the end of year 4 ..., 75 percent of all students in Grades 3-6 will score at or above Level 3 [proficient] in all NYS Assessments for ELA and Math" (Nonrenewal Report at 4).

In fact, CCS admits that, with the 2009-2010 school year, its student assessment scores began to decline, and declined in each of the next two school years (2010-2011 through 2011-2012). Allegedly to address this, CCS's Board of Trustees (Board) began working with the Center for Education Innovation - Public Education Association (CEI-PEA) a New York City-based nonprofit organization, funded by Federal education dollars, that works with many schools in New York City and other states to implement quality public school programs. Seymour Fliegel, the Director of CEI-PEA, submits an affidavit in support of the plaintiffs' motion, in which he states that CCS joined the Partnership for Innovation in Compensation for Charter Schools (PICCS) program in 2010 and is now in its third year of implementing the PICCS model. CCS had joined with other Buffalo charter schools in obtaining a five-year Teacher Incentive Fund grant to help implement the PICCS Project (Fliegel Affid. ¶ 3).

In July of 2010, the BOR had changed the so-called "cut scores," the level of raw score necessary to obtain a level 3, or proficiency on the state-wide assessments in English Language Arts (ELA) and

mathematics for students in grades 3 to 8. This change was made after the students statewide had already sat for the 2009-2010 tests. Jeremy D. Finn, PhD., the Associate Dean for Research and a Professor in the Graduate School of Education at SUNY Buffalo, submits an affidavit as an expert hired by plaintiffs to "examine data regarding the recent conditions and student performance" at CCS (Finn Affid. sworn to May 1, 2013 [Finn 1st Affid.], ¶ 1 & 4). Dr. Finn asserts that

> The increase from the "old cut scores" to "new cut scores" affected low - and middle-scoring students in particular. These students were largely African American, which is almost all the enrollment of Community Charter

(Finn. 1st Affid. ¶ 18). At CCS, school wide, only 30 percent of 3rd through 6th graders were scored at least proficient on the ELA test and only 42 percent on the math test (Nonrenewal report at 6). The scores declined again in 2010-2011 (*id.* at 6): only 25 percent performed at or above proficiency in ELA and 36 percent in Math, and in 2011-2012, only 16 percent scored at or above proficiency in ELA and 27 percent in math (NonRenewal report at 6 [chart]). CCS was identified as a school in need of improvement for failure to meet Adequate Yearly Progress (AYP) in 2009-2010 and 2010-2011 (see *id.* at 5, and 8 NYCRR 100.18 et seq.).

In 2011-2012, CCS' Board of trustees retained the services of Frank Herstek, Ed.D, an educational consultant who works with CEI-PEA, to work directly with the administration, the Head of school and

the Board (Herstek Affid. ¶ 4). After Dr. Herstek found concerns with the then-Head's leadership, the Board placed that person on administrative leave and later terminated her. An interim head was hired in early 2012 to develop and begin to implement a school improvement plan, called the "Restart" plan (Herstek Affid. ¶ 6). The interim head was replaced by the current head Denise Luka, formerly a classroom teacher for 19 years and a school administrator for over six years. She was hired in September 2012 (Luka Affid. ¶ 2). The Board, which at times had operated illegally without a full quota of trustees, was re-constituted, with nine (9) new members in 2012-2013 (Herstek Affid. ¶ 7; Ricigliano Affid. ¶ 9).

In August 2012, SED officials began writing to CCS's board of trustees, raising issues about every aspect of CCS's operations. The August 2012 letter from Assistant Commissioner Sally Bachofer stated:

> The academic record of the school during its current recent charter term is sufficient to question if it would be in the best interest of students to continue the school's program. However, when combined with the other concerns at the school, including but not limited to the leadership and governance issues identified above, a 2012 Office of the State Comptroller Audit Report identifying weaknesses concerning controls over potential conflicts of interest, and outstanding formal complaints filed against the school, the school's board of trustees must carefully weigh its motivations for seeking renewal of the school's charter

(Clarke Affid. Ex. I).

On August 10, 2012, CCS submitted its charter renewal

application (Clarke Affid. ¶ 16 & Ex. K). Three weeks later the chairman of the Board of Trustees Carmen J. Iannaccone, Ed. D., resigned. In his resignation letter, after praising the Board, the administrative leadership team, faculty and staff who had "worked arduously to correct a host of deleterious factors ...[i]n effect, despite a total lack of support and constructive involvement on the part of [SED's Charter School Office] and its officers," and stated that "disparaging, unwarranted and negatively toned written messages and telephone interactions were characteristic of the [their] communication" (Clarke Affid. Ex. N).

SED made a site visit to CCS in September 2012 (Ricigliano Affid. ¶ 14). In February 2013, a draft site report was provided to CCS (Clarke Affid. Ex. P). In addition to the declining results on the state assessments, SED observers noted what they considered to be universally mediocre teaching methods and lack of involvement by students; further, SED noted what they deemed instability: going through two new heads of school in 2012 alone, and at times operating without the required minimum of at least five members on the Board of Trustees (*id.*).

In addition, in an issue that involves the public fisc, the Office of the State Comptroller (OSC) conducted an audit in 2012 of CCS's conflict of interest policies, noting that the principal of a construction company hired to perform capital improvements was paid $2.4 million

by the school, while his some-times business partner served as the President of the Board of trustees, without the Board having conducted a formal conflict of interest review or competitive bidding (Clarke Affid. Ex. G).[2] According to the SED's summary of aspects of the OSC's report, "there is a risk that the former Board President could have improperly benefitted from his position as a trustee and that the school could have paid more than necessary for construction" (Non-renewal report at 11). Plaintiffs vigorously oppose these allegations though affidavits of the contractor, copies of the written contracts involved, and the affidavit of an alleged expert that the payments to the contractor were reasonable. That former board president resigned during the 2010-2011 school year (Clarke Ex. G).

After receiving the site visit report, CCS petitioned SED for a second site visit (Ricigliano Affid. ¶ 16 & Ex. C). William Clarke, director of the Charter School Office, made the visit with staff in March 2013 (*id.*). On March 4, 2013, Mr. Clarke told the school in a phone call that SED would recommend that the charter renewal application be granted but only for one year; the next day, Mr. Clarke called back to report that the school would be hearing from Deputy Commissioner Slentz (*id.* ¶ 17 & Ex. D).

On March 15, 2013, CCS received formal notice that SED was

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[2] Competitive bidding was used for all subcontractors (Ricigliano Reply Affid. ¶ 3; Lamparelli Affid.)

recommending non-renewal; CCS was offered an opportunity to submit a paper response. That response was submitted on April 15, 2013 (id. ¶¶18-139 & Plaintiffs' Memo of law at 21 n. 11 [citing Sed website]). On April 11, 2013, SED issued a non-renewal recommendation to the BOR (*see* Ricigliano Affid. ¶ 19). The non-renewal report stated:

> In short, [CCS'] performance on NYS ELA and mathematics assessments over the most recent charter term can be described as declining from year to year, being among the lowest in the State and in the City of Buffalo. While the School has implemented some programmatic changes and proposes changes that are described as designed to improve performance in future years, the possibility of future promise is insufficient to overcome the School's cumulative record of low academic achievement, legal non-compliance, inability to operate in an organizationally sound manner and is not enough to support a recommendation to approve the renewal application.

(*Id.* at 4).

The Non-renewal recommendation contains several references to the SED's continued efforts "to improve day-to day charter school oversight and accountability work," beginning with the attempt to only award charters to the best founding groups. Further, in November 2012 (after the site visits at issue here), the Board of Regents approved the Charter School Renewal Policy and School Performance Framework, outlining performance benchmarks by which charter schools will be evaluated in the future when they apply for renewal (*id.* at 2; *see* NY State Register, vol. XXXV Issue 13, Mar. 27, 2013, Emergency proposed rule 8 NYCRR 119.7,at 7).

However, none of these frameworks or standards were used in considering CCS's charter renewal application: Deputy Commissioner Kenneth Slentz wrote in CCS's nonrenewal report:

> While future initial and renewal charters authorized by the Regents will each include a Performance framework against which a school's performance can be analyzed and assessed, [CCS's] current short-term renewal charter was approved by the Regents in 2009 prior to the approval of the Regents Renewal Policy and regulations and the development of the performance Framework. **Therefore the renewal recommendation before the Regents concerning Community Charter school is not based upon analysis of the School's performance in relation to the benchmarks and criteria in the Performance Framework. Rather the [SED's] recommendation... is based upon an analysis of the School's records over the eleven years that the School has been in operation and its success in meeting the terms of its charter.**

(NonRenewal report at 2-3 [emphasis supplied]).

Plaintiffs sought the opportunity to make a fifteen minute presentation to the BOR, which was denied by the Commissioner (Clarke Affid. ¶¶28-29 & Ex. T). The BOR voted unanimously to decline the 2013 charter renewal, on April 23, 2013 (Clarke Affid. Ex. V). SED officers assured the P-12 Committee of the BOR before that Committee's vote that there were plenty of other charter and public schools for CCS's students to attend. In fact, the charter school lottery for City of Buffalo Students took place three weeks before that vote (April 1), and plaintiffs' evidence shows few places left at charter schools in the City for the 2013-2014 school year (Coppola Affirm,

dated May 1, 2013, ¶¶23-24).

III. STANDARDS FOR PRELIMINARY INJUNCTION

"Preliminary injunctive relief is a drastic remedy that will not be granted unless a clear right to it is established under the law and upon undisputed facts found in the moving papers" (*Zanghi v State*, 204 AD2d 313, 314 [2nd Dept 1994]). The moving party must establish by clear and convincing evidence a likelihood of success on the merits of the cause or causes of action upon which that party relies, a danger of irreparable injury if the injunction does not issue, and a balance of the equities in its favor (*see RG & RH Inc. v Schmidt's Auto Body & Glass*, 106 AD3d 1455 [4th Dept 2013]).

IV. STATE EDUCATION LAW and SAPA: POWERS OF REGENTS AND SED

A. IN GENERAL

Under Education Law § 207,

> Subject and in conformity to the constitution and laws of the state, **the regents shall exercise legislative functions concerning the educational system of the state, determine its education policies, and**, except, as to the judicial functions of the commissioner of education, **establish rules for carrying into effect the laws and policies of the state, relating to education, and the functions, powers, duties and trusts conferred or charged upon .... the education department**

(Educ. Law § 207 [emphasis supplied]).

In *Board of Education of Northport*, the Appellate Division considered the power of the BOR and the Commissioner of SED to deny

high school diplomas to two mentally handicapped students. The AD stated:

> Indisputably, control and management of educational affairs is vested in the Board of Regents and Commissioner of Education ... and determinations of the commissioner, unless patently violative of statutory or constitutional mandate, are beyond the range of judicial oversight.... **The adoption of regulations with respect to graduation requirements, including basic competency examinations**, to establish a standard that would make a high school diploma in this State a meaningful credential of the graduate, **is clearly within the authority and power of respondents**

(*Board of Educ. of Northport-East Northport Union Free School Dist. v Ambach,* 90 AD2d 227, 231-232 [3rd Dept 1982], *aff'd* 60 NY2d 758 [1983] [emphasis supplied]).

The crux of plaintiffs' suit is not the extent of the State defendants' power, but the fair and transparent exercise of that power. The State Defendants define CCS as "perhaps the worst school in this state". It is not for the court to determine whether that judgment is correct – although from the size of the record laid before it, it is not clear that the parties agree with that view. Rather, the court's role is limited, given the causes of action raised by this complaint, to reviewing whether plaintiffs have a likelihood of success on the merits of their claims that 1) unpromulgated "guidelines" have been applied to CCS's charter renewal application, in violation of SAPA, and 2) that plaintiffs have been denied due process. The question is not whether the

Regents have the power to ensure "educational accountability" by charter schools, but the way that power has been exercised during CCS' most recent charter, from 2009 to the present. Although the State defendants refer repeatedly to the "short term" renewal that they granted CCS in 2009, that renewal was only one year short of the maximum possible (*see* Educ Law § 2851 [4]).

B. SAPA

1. **State Defendants Failed to Comply with SAPA in the Use of the Guidelines in the Charter Renewal Process**

Plaintiffs' complaint asserts three causes of action under SAPA against the State defendants. The first cause of action is based upon SAPA's requirement that, absent a specific exemption, State agencies must adopt rules in a uniform manner (SAPA § 100) including rules governing the process and evaluation of charter schools pursuant to Article 56 of the Education Law. In this case, CCS submitted its renewal application on August 10, 2012 on a form derived from the SED's "Application for Charter Renewal Guidelines for New York State Charter Schools Authorized by The Board of Regents" (hereafter the "Guidelines for Renewal") (Clarke Affid. Ex. CC).[3] As noted by plaintiffs,

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[3] The Guidelines as of June 2012, stated in the Introduction and overview that "[a]ny application that does not conform to these *Guidelines* may be returned to the school for revision and may constitute evidence that the school has not met requirements for renewal". Thus, it appears that the use of the Guidelines was at least strongly encouraged – if not required.

the Guidelines for Renewal contain 25 "standards" by which the State defendants were to evaluate CCS's application. Plaintiffs assert that these "guidelines" were never, but should have been, promulgated as rules under SAPA; and that SED improperly drafted them with the assistance of entities that are not affiliated with New York state government (Plaintiffs' Memo of law at 34, citing Guidelines p. 2).

In addition, plaintiffs challenge SED's reliance in its non-renewal recommendation upon Education Law § 2852, which dictates allegedly "vague" – certainly broad – findings the Commissioner must make in order to approve a new charter school application (*see id*. 2852 [2]). Because these standards are "vague", plaintiffs allege that rulemaking is required to provide objective, measurable standards by which charter schools can be evaluated (Complaint ¶ 62). Plaintiffs conclude that the State Defendants' violations of SAPA, by failing to promulgate necessary rules, have deprived Community of its "statutorily-guaranteed protections" and that plaintiffs have been damaged by the revocation of the charter.

The State Defendants contend, in opposition, that the BOR's discretionary authority to deny renewal under these circumstances derives from statute and the terms of CCS's charter, and therefore the SED is not required to promulgate a rule to define the review process. SED asserts that whatever criteria it used were derived directly from

statute, were applied as a matter of deliberation and judgment to the facts of CCS' record, and involved the exercise of discretion as to what weight to give to which factors.

Defendants assert that the fact that the BOR "can" or "may" make a determination pursuant to their discretionary authority under certain facts or circumstances is not a "rule" (citing *Matter of Alca Indus. v Delaney,* 92 NY2d 775, 778 [1999]).

a. SAPA in the Courts

Under SAPA section 102, a "rule" is defined as "the whole or part of each agency **statement, regulation or code of general applicability that implements or applies law**, ... or the procedure or practice requirements of any agency, including the amendment, suspension or repeal thereof" (section 102 [2] [a] [i]). Expressly exempt from rulemaking are "interpretive statements and statements of general policy which in themselves have no legal effect but are merely explanatory" (SAPA § 102 [2] [b] [iv]). "[O]nly a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers constitutes a rule or regulation" (*Matter of Roman Catholic Diocese of Albany v New York State Dept. of Health*, 66 NY 2d 948, 951 [1985]; see also *Matter of Schwartfigure v Hartnett*, 83 NY2d 296, 301 [1994]).

In 1985, Planned Parenthood applied to the Department of Health (DOH) for a license to operate a nonhospital abortion clinic in the Albany area. DOH's granting of the license was challenged in an article 78 proceeding by certain individuals, and the Third Department, with one dissenter, vacated the DOH decision, based upon the alleged "50 percent" policy applied by the DOH, that at least 50 percent of the available abortion providers be in non-hospital settings, a policy that had not been promulgated as a regulation under SAPA (*Matter of Roman Catholic Diocese v NYDOH*, 109 AD2d 140 [3rd Dept 1985], *rev'd* by 66 NY2d 948). The Court of Appeals reversed primarily for the reasons stated by Justice Levine in dissent, in which he differentiated between an agency's quasi-legislative rulemaking powers and its development of "evolv[ing] guidelines to aid in making ad hoc decisions in performing their adjudicative function". Justice Levine stated:

> Most, if not all, of the foregoing matters considered by DOH fall within **the factors set forth in the regulations concerning its certificate of need review procedures** (10 NYCRR 709.1). Thus, even if DOH may have found "particularly relevant" to its need determination that less than 50% of all abortion procedures in the subject area were performed out-of-hospital, **the standard was not used as a "legislative or quasi-legislative norm or prescription which establishes a pattern or course of conduct for the future**" (*People v Cull*, 10 NY2d 123, 126 [emphasis supplied]). Nor was it a **"preset, rigid numerical policy *** which foredoomed" the result** without reference to the facts and merits of the application (Matter of Sturman v. Ingraham, 52 AD2d 882, 885). It is only in such instances, i.e., where a fixed, general principle is applied by the administrative agency without regard to

> other facts and circumstances relevant to the underlying statutory regulatory scheme, that the agency can be said to have invoked its quasi-legislative, rule-making authority and, hence, to have become obliged to file the rule or regulation with the Secretary of State and apply it only prospectively.

(*Matter of Roman Catholic Diocese*, 109 AD2d at 147).[4]

This type of analysis is difficult, however. As recognized by the Court of Appeals, "[o]ur cases show that there is no clear bright line between a 'rule' or 'regulation' and an interpretative policy" (*Cubas v Martinez*, 8 NY3d 611, 621 [2007]).

b. The "Guidelines" and Statutory Standards

Education Law § 2851 (4) provides that "[c]harters may be renewed, upon application, for a term of up to five years in accordance with the provisions of this article for the issuance of such charters pursuant to section [2852]." Thus, the Education Law requires the SED and BOR to apply the dictates of section 2852 – related to <u>new applications</u> for charters – to charter <u>renewals</u> as well. Section 2852 (2) provides:

> An application for a charter school shall not be approved unless the charter entity finds that:
>
> (a) the charter school described in the application meets the requirements set out in this article and all other applicable laws, rules and regulations;

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[4] SAPA requires, when promulgating a rule, that the agency submit a notice of proposed rulemaking to the Secretary of State, to be published in the State Register; after which a 45 day period must be held for public comments (SAPA § 202).

> (b) the applicant can demonstrate the ability to operate the school in an educationally and fiscally sound manner;
>
> (c) **granting the application is likely to improve student learning and achievement and materially further the purposes set out in subdivision two of section twenty-eight hundred fifty** of this article; and
>
> (d) in a school district where the total enrollment of resident students attending charter schools in the base year is greater than five percent of the total public school enrollment of the school district in the base year (i) **granting the application would have a significant educational benefit to the students expected to attend the proposed charter school** or (ii) the school district in which the charter school will be located consents to such application.
>
> In reviewing applications, the charter entity is encouraged to give preference to applications that demonstrate the capability to **provide comprehensive learning experiences to students identified by the applicants as at risk of academic failure.**

(Education Law § 2852 [2] [emphasis supplied]). Thus since the BPS has not consented to CCS's charter, the BOR was required to consider whether granting the renewal application "would have a significant educational benefit to the students expected to attend the proposed charter school" as well as whether the school demonstrates the "capability to provide comprehensive learning experiences to students identified by the applicants as at risk of academic failure".

Finally, under Education Law § 2851(4), a renewal application must include "[a] report of the progress of the charter school **in achieving the educational objectives set forth in the charter**"

(emph. supplied).

The court notes, initially, that despite the State Defendants' protests, it is clear that the Guidelines for Renewal were the standards applied by the SED to determine non-renewal: the introduction to the Guidelines states that the "school's performance goals and the CSO's Renewal Standards, **outlined in these Guidelines, provide the analytical framework used to hold a charter school accountable for performance in these areas** and to inform whether a charter should be renewed". When the Guidelines were first promulgated does not appear in the record. In any event, they comprise 25 standards that appear nowhere in statute or regulations prior to that time. The Guidelines for Renewal are clearly a "prescription setting a course of conduct" for each applicant for renewal (*see Matter of Alca*, 92 NY2d at 778, [case relied upon by defendants, distinguishing between "ad hoc decision making based on individual facts and circumstances[,] and rulemaking, meaning 'any kind of legislative or quasi legislative norm or prescription which establishes a pattern or course of conduct for the future'"], quoting *People v Cull*, 10 NY2d 123, 126 [1961]; *cf. National Assn. Of Ind. Insurers v State*, 207 AD2d 191, 203-204 [3rd Dept 1994], *aff'd on other grounds* 89 NY2d 950 [1997]). Requiring that CCS meet the standards of the Guidelines – only a few lines of which actually refer to the school's charter goals – constitutes rule-making without

compliance with SAPA's requirements.

Therefore, plaintiffs have demonstrated a likelihood of success on the merits of their first cause of action.

2. Plaintiffs Lack Standing to Challenge Emergency Regulation § 119.7

In the second cause of action, plaintiffs challenge the application of the emergency regulation on Renewal of Charters (8 NYCRR 119.7, eff. Mar.12, 2013, expires June 9, 2013). Plaintiffs assert that SED and the BOR followed the procedural elements of this emergency regulation in their consideration of CCS' renewal application. According to the SED's notice in the State register, the emergency regulation "clarifies renewal of charters" (NY State register Vol. XXXV, Issue 13, March 27, 2013, 8 NYCRR 119.7 at 7). The regulation at section (e) provides:

> Performance benchmarks. Each renewal charter for a charter school authorized by the Board of Regents shall include the performance benchmarks set forth in the Charter School Performance Framework, as issued by the Department, as part of the oversight plan in the charter school's charter agreement. **For each such renewal charter, the analysis of qualitative and quantitative data and evidence concerning a charter school's performance, for purposes of the Department's renewal recommendation pursuant to paragraph (c)(3) of this section, shall be based on the charter school's achievement in each of the performance benchmarks set forth in the Charter School Performance Framework; provided that the charter school's performance under student academic achievement, as set forth in Benchmark 1: Student Performance shall be paramount when determining to renew a school's charter.**

(8 NY ADC 119.7 [e], eff. Mar. 12, 2013] [emphasis supplied]). It appears from this provision that the "benchmarks" in the Charter School Performance Framework – which Defendants insist was not applied in the process of considering CCS' renewal application – will be incorporated into each charter, upon its renewal, and thereafter, upon a further application for renewal under this regulation, the school's performance will be judged based upon its achievement of those performance benchmarks found in its charter.

Plaintiffs assert that there was no basis to promulgate this rule on an emergency basis, as defendants have been reviewing charter renewal applications for a decade. Plaintiffs seek to have this court enjoin the outcome of the review of their charter renewal, because it was carried out through this allegedly unenforceable regulation.

Based upon the record before it, the court determines that plaintiffs have failed to establish a likelihood of success on the merits of this cause of action because 1) it appears that the regulation was not applied to CCS's charter renewal and 2) therefore, they lack standing to challenge it (*see generally Matter of New York State Assn. of Nurse Anesthetists v Covello*, 2 NY3d 207, 211 [2004]).

3. Cut Scores

In the third cause of action, plaintiffs allege that, without rule-making, SED and the BOR now consider how a charter school's students

score on ELA and Math State assessments as the overwhelming factor on whether to renew a charter. In the spring of 2010, the BOR changed the so-called "cut scores" - the level of raw score necessary to obtain a level 3, or proficiency level, on the state-wide assessments in ELA and mathematics for students in grades 3 to 8. Plaintiff's expert Dr. Finn (*see supra*, at pages 7-8), asserts that this change "affected low - and middle-scoring students in particular .... [including] African American [children], which is almost all the enrollment of Community Charter" (Finn 1st Affid. ¶ 18).

According to plaintiffs, if the old method of scoring had been used for the 2009-2010 school year, the first year of CCS' charter renewal, in grades three to six, 58 percent would have achieved proficiency in ELA and 85 percent proficiency in Math (rather than the actual percentage of 29 percent and 40 percent, respectively); for the 2010 to 2011 school year under the old method of scoring, the students would have achieved 58 percent proficiency in ELA and 85 percent in math (instead of the actual 25 percent and 38 percent respectively); for 2011 -2012, under the old method, the school would have achieved 58 percent proficiency in ELA and 75 percent proficiency in Math (rather than approximately 15 and 27 percent, respectively) (Finn Affid. Exs. V - AA). Under the most recent charter, renewed in 2009 – prior to the un-announced change in cut scores – CCS stated as its "absolute goal" for student performance:

> At the end of year 4 of the renewed Charter, 75% of all students in Grades 3-6 will score at or above Level 3 in all NYS assessments for ELA and Math

(Ahlstrom 1st Affirm. Ex. A at 4). If the former cut scores had defined "proficiency" therefore, CCS's statistics would have met its absolute goal by 2010-2011 in Math but not in ELA.

The State defendants do not deny that they did not promulgate (until this spring) any rules concerning the importance of State assessments, or one detailing how the levels of proficiency will be set and altered with respect to the State assessments at issue and whether outcomes for charter school students will be compared at face value or based upon further statistical analysis, as apparently was done here.

However, defendants assert that plaintiffs are barred by the four-month statute of limitations in challenging the raising of the cut scores, which took place in 2010 (Clarke Affid. ¶ 36 & Ex. X; *see* CPLR 7803 & 217 [1]), as the cause of action allegedly accrued when SED's "definitive position or interpretation" was issued and plaintiffs received notice (D's Memo of Law at 27, citing *New York Coalition for Quality Assisted Living v Novello*, 53 AD3d 914, 916 [3rd Dept 2008], *lv denied* 11 NY3d 715 [2009]).

Under *NY Coalition*, the statute of limitations based upon issuance of "an interpretive statement that is merely explanatory" is four months under CPLR article 78 (*id*. at 916). In the memo upon which the

defendants rely as notice to CCS, issued in September 2010 by Assistant Commissioner for Accountability Ira Schwartz, Mr. Schwartz stated:

> In July 2010, the [BOR] made the decision to raise Grades 3-8 ELA and mathematics achievement standards so that academic proficiency in New York state will now mean that a student is on track to meet high school exit examination requirements and pass first year college courses in ELA and mathematics without the need for remediation. In revising academic achievement standards, the Regents recognized that in many schools...there will be a significant decline in the percentage of students who will demonstrate proficiency...

(Clark AFfid. Ex. X at 1). A brief review of that statement indicates a significant policy shift by the BOR and the SED, to demonstrate to schools, as Mr. Schwartz further stated "the dimensions of the challenges they must address going forward" (*id*. at 2). The court determines that the most likely interpretation of this change in cut scores is not "interpretive", but rather "a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers" and thus a "rule or regulation" (*Matter of Roman Catholic Diocese of Albany v New York State Depart of Health*, 66 NY2d at 951; *cf. Securities Comm. v Chenery Corp.*, 332 US 194, 202 [1995]). Where an agency is alleged to have acted in violation of SAPA, the challenge is a declaratory judgment action, not a CPLR article 78 proceedings (*see e.g. Chavis v New York Temp. State Comm. on*

Lobbying, 16 AD3d 886 [3rd Dept 2005]).

In March 2013, the BOR adopted a regulation, which in its entirety, gives the SED with the approval of the BOR the authority to change the cut scores (*see* 8 NYCRR 8.3, Explanatory notes [the regulation "clarifies the Regents' authority to set state assessment scores"]). In the court's view, the likely outcome will be that a court would determine that this regulation clarifies nothing except the SED and BOR's absolute power to change the rules without notice.

The cited goals for raising the cut scores are admirable if not essential, if New York State students are to meet the challenges of the 21st century. But the fact of great intentions is insufficient to overlook the agency's exercise of unfettered discretion without regard to the stability of the institutions and the children whom their great ideas most deeply affect, particularly given plaintiffs' assertion that, because the BOR's decision not to renew CCS's charter was made only after the charter school lottery for all other charter schools for which these children would be eligible had already passed,[5] its students are relegated only to other persistently failing schools which purportedly lack the safety and high attendance rates and dedicated staff they have

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[5] Plaintiffs' counsel asserts that Asst Commissioner Bachofer argued for closing the school by telling the P12 committee that there were plenty of other charter schools for CCS' children to go to – which was in fact, according to the record, not correct for 2013-2014.

at CCS.

Upon consideration, the court determines that plaintiffs have established a likelihood of success on the merits of their third cause of action with respect to the BOR's 2010 raising of the cut scores and the resultant effect on CCS in the first year of its most recent charter renewal, without having complied with SAPA.

V. DUE PROCESS

A. COMMUNITY CHARTER SCHOOL'S DUE PROCESS CLAIMS

CCS asserts that its third and fourth causes of action, seeking an injunction based upon an alleged violation of its rights to due process under the New York State Constitution art. I, § 6 and the fourteenth amendment of the United States Constitution, are the same as the causes of action asserted by another charter school in the City of Buffalo, Pinnacle Charter School, which sought an injunction from this court in May 2012 (Coppola Affid. Ex. A [Pinnacle Order] at 3). In that decision, the court determined that Pinnacle had "some property interest" in its charter, and was entitled to "at least 30 days notice and an opportunity to be heard consistent with due process" prior to a non-renewal determination (Coppola Affid. Ex. A at p. 32-35, citing Education Law §§ 2853 [1] & 2855). Further, CCS asserts that its process of applying for and being denied a renewal charter was essentially identical with respect to the process in the *Pinnacle* case.

The circumstances, of course, are not identical, and no application of collateral estoppel is appropriate (*see generally Buechel v Bain*, 97 NY2d 295, 303-304 [2001]).

However, as in *Pinnacle*, this court again declines to state on an incomplete record, what process was due. The court notes that, under a regulation promulgated by SED, section 3.17, governing due process on revocation of charters (as opposed to renewals):

> (3) The charter school shall, upon request, be provided an opportunity for oral argument before a panel of the Board of Regents consisting of at least three Regents designated by the chancellor or the Board of Regents.

8 NY ADC 3.17[a][3]).

In any event, given the evidence that since August 2012 members of the SED failed to review any submissions by CCS prior to encouraging it not to reapply for a new charter; making a site visit; and determining to recommend non-renewal, CCS has established a likelihood of success on the merits of its claim that it was not given a real opportunity to be heard (*see e.g. Matter of Williamsburg Charter High School v New York City Dept. of Educ.*, 36 Misc3d 810, 827-832 [Sup Ct Kings County June 28, 2012]; *see generally Uniform Firefighters of Cohoes v City of Cohoes*, 94 NY2d 686, 691-692 [2000]).[6] As stated by CCS, its limited

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[6] The former head of the charter School Office at SED, Clifford Chuang, admitted not having read CCS' renewal application when he made the site visit in September 2012; and assistant commissioner Slentz also admitted he had not read the application when he told CCS' head of school that SED would

opportunity to respond to the SED's view of it as "the worst school in New York State" was essentially illusory.

B. CHILDREN'S CLAIMS

In the seventh cause of action, the infant plaintiffs allege violations of their rights under the due process clause of the United States Constitution (US Const. Amend 14, § 1, cl 2). The infant plaintiffs assert that if CCS's charter is revoked, because they have missed the deadline for applying to other charter schools by the SED/BOR's unexplained delay in making their decisions, at least for the 2013-2014 school year, the only free alternatives for them are persistently low achieving elementary schools in their neighborhood in the City of Buffalo. As to those schools, they allege, under No Child Left Behind (20 USC § 6301 et seq.) their parents are entitled to demand – and the BPS must provide – a transfer to a different public school. However, according to the plaintiffs, the better schools in Buffalo are filled to capacity (Complaint ¶ 150).

Plaintiffs' concern here is for the infant plaintiffs' physical safety, and they allege that they have established a likelihood of success on the merits of their claim that their children's liberty interests in bodily

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recommend denial (Luka Affd sworn to May 1, 2013 at ¶¶28, 31). Nor did SED consider CCS' rebuttal to the non-renewal decision, because its report to the BOR was issued four days before that rebuttal was due and delivered to SED (Coppola Affd. ¶¶33-35).

integrity, personal autonomy and self dignity would be violated by being forced out of the safe environment of CCS to the allegedly violent BPS schools in their neighborhood (*see e.g.* Education Law § 12 [Dignity for all Students Act]; *see generally Matican v City of New York*, 524 F3d 151, 155 [2nd Cir], *cert denied* 555 US 1047 [2008]).

Defendants label plaintiffs' allegations as mere speculation, and both sides cite statistics of violent incidents in the BPS and at CCS as well.[7]

The request for an injunction on this basis must be denied. Plaintiff parents do not know which schools their children would attend were CCS to close, and therefore no assumption can be made that the State would therefore be putting their children in danger.

This request is denied.

VI. IRREPARABLE HARM

Defendants contend that to continue to provide public funds to CCS and to subject the infant plaintiffs and their peers to one of the "worst" schools in New York State would itself be irreparable academic harm. However, the court notes that the parents of CCS's students have chosen CCS over the Buffalo Public Schools (see Bartnik Affid. ¶¶3-5; James Affid. ¶¶3-12; Josey Affid. ¶¶2-3), and the record shows

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[7] See e.g. Violent and Disruptive Incident Report [VADIR] at http://www.p12.nysed.gov/irs/school_safety_/school_safety_reporting.html, [2010-2011] cited by Plaintiffs' Memo of law at 53 n. 17.

that only one child voluntarily left CCS for BPS in 2012-2013 (Luka Affid., sworn to May 28, 2013 ¶ 6).

The court determines that plaintiffs have established that they will suffer irreparable harm if the preliminary injunction is not granted. The clear and convincing evidence of likely SAPA violations and the likelihood of success on the merits of their claims that SED failed to accord them due process in the charter renewal determinations cannot be cured if CCS as an entity ceases to exist by June 30, 2013. Further, "[w]hen an alleged deprivation of a constitutional right is involved, ... no further showing of irreparable injury is necessary" (*Red Earth LLC v United States,* 728 FSupp2d 238, 244 [WDNY 2010], *aff'd* 657 F3d 138 [2nd Cir 2011], quoting *Mitchell v Cuomo*, 748 F2d 804, 806 [2d Cir 1984]).

VII. BALANCING OF THE EQUITIES

The timing of the decision is unfair to the parents and the students, given that the charter school lottery for the City took place on April 1, 2013, and many of the neighborhood elementary schools have poor records (see Plaintiffs' Memo in Further Support at pp. 27-39 & citations). On the other hand, defendants' clear drive to succeed in the eyes of the administrators of its federal grants program cannot be harmed by this court's action. In any event, the status quo can only be maintained through an injunction.

Therefore, Defendants the Board of Regents of the University of the State of New York; the New York State Education Department; and John B. King, Jr., in His Capacity as Commissioner of Education, shall be enjoined and barred from taking any steps to enforce the non-renewal determination of the Board of Regents concerning the charter of Community Charter school, made on April 23, 2013, until further order of this court.

Plaintiffs to submit an order on notice to defendants.

Buffalo, N.Y.

Dated: June 18 2013

HON. JOHN A MICHALEK, JSC