Matter of Mulgrew v Board of Educ. of the City School Dist. of the City of N.Y.
2014 NY Slip Op 30996(U)
April 14, 2014
Supreme Court, New York County
Docket Number: 101038/13
Judge: Jr., Alexander W. Hunter
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[*1]

SCANNED ON 4/17/2014

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 101038/2013
MULGREW, MICHAEL
vs
NYC BOARD OF EDUCATION
Sequence Number : ~~001~~
ARTICLE 78

PART 33

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-25
Answering Affidavits — Exhibits _____ | No(s). 26-29
Replying Affidavits _____ | No(s). 30-31

Upon the foregoing papers, it is ordered that this motion is

decided in accordance with the 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).

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

Dated: 4/14/14

_____, J.S.C.
ALEXANDER W. HUNTER JR

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

----------X

In the Matter of the Application of
Michael Mulgrew, as President of the United
Federation of Teachers, Local 2, American Federation of
Teachers, AFL-CIO,

Index No.: 101038/13

Petitioner,

Decision and Judgment

-against-

The Board of Education of the City School District of the
City of New York, and Dennis M. Walcott, as Chancellor
of the City School District of the City of New York,

Respondents,

-and-

Success Academy Charter Schools - NYC (d/b/a
Success Academy Charter School - Harlem 1,
Success Academy Charter School - Harlem 2,
Success Academy Charter School - Hell's Kitchen, and
Success Academy Charter School - Union Square),
Success Academy Charter School - Bronx 1,
Success Academy Charter School - Bronx 2,
Success Academy Charter School - Upper West,
Harlem Prep Charter School, Achievement First Apollo,
Achievement First Brownsville, Boys Preparatory Charter
School, Explore Envision Charter School, KIPP Starr
College Prep Charter School, Kelly Blauvelt-Alday,
Khadijah Patrick-Pickel, Carmen Melendez, Liane
Barnes-Jackson, Francis Lenihan, Shamona Kirkland,
Heather Terry, and Losseni Dosso,

Proposed Intervenor-Respondents.

----------X

HON. ALEXANDER W. HUNTER, JR.

Two separate applications were filed in this matter under motion sequences 001 and 002. Both applications will be decided herein.

The application by petitioner for an order pursuant to CPLR Article 78, (1) declaring that the failure of respondents to comply with Education Law § 2590-h(2-a)(c) is arbitrary and

capricious; (2) annulling all votes of the Panel for Education Policy ("PEP") during the 2012-13 school year that approved co-locations and changes in school utilization scheduled to take effect beginning with the 2014-15 school year and beyond; and (3) ordering respondents to comply with Education Law § 2590-h(2-a), is denied and the proceeding is hereby dismissed.

The application by proposed intervenor-respondents is denied.

Pursuant to Education Law Article 52-A, when a school is co-located or its utilization significantly changes, the Chancellor must conduct a substantive study of the potential impacts of such closing on current and prospective students as well as the surrounding community. The analysis thereof must be reported in an Educational Impact Statement ("EIS"). In conjunction with the EIS, the Chancellor must develop a building usage plan ("BUP") for each school proposed to be located or co-located. Both EISs and BUPs must be made publicly available. **Education Law §§ 2583(3)(a-3)(5), 2590-h(2-a)(c)**. Education Law § 2590-h(2-a)(c) reads in pertinent part as follows: "Such educational impact statement shall be made publicly available…at least six months in advance of the first day of the school in the succeeding school year."

On various dates between November 2012 and May 2013, respondents submitted 13 EISs and BUPs in connection with the co-location of 13 public charter schools in existing public school buildings for the 2014-15 school year (the "proposals"). Respondents also submitted EISs and BUPs for grade expansions of four co-located public charter schools. The co-locations were approved by the governing body of the Board of Education, PEP, on January 16, 2013; March 11, 2013; March 20, 2013; May 22, 2013; and June 19, 2013.

Petitioner opposes the co-location of the public charter schools with existing public school buildings on the grounds that: (1) there is not enough space for the co-locations and/or there are other related logistical issues; (2) the underlying statistical data used in making the proposals will be stale by the time the co-locations are implemented; and (3) contingencies and assumptions contained in some of the proposals are irrational. Petitioner avers that: (1) respondents have failed to comply with Education Law § 2590-h(2-a)(c), as the proposals take effect far beyond the start of the current school year; (2) respondents failed to follow substantive and procedural requirements necessary prior to voting to approve the determinations; and (3) the failure of respondents to comply with its statutory obligations under Education Law § 2590-h(2-a)(c) is arbitrary and capricious and the PEP votes to approve the proposals should be annulled.

Respondents deny the allegations of petitioner and move to dismiss the proceeding. Respondents assert the following affirmative defenses: (1) petitioner lacks standing to challenge the co-locations and grade expansions, as members of the United Federation of Teachers ("UFT") are not injured by the implementation of the proposals; (2) the claims of petitioner with respect to the proposals approved on January 16, 2013 are barred by the four-month statute of limitations; and (3) petitioner has failed to exhaust administrative remedies by not challenging the determinations before the State Commissioner of Education, as required by Education Law §

310(7). Respondents aver that, in the past, co-locations and changes in school utilization have been approved beyond the current school year without opposition from petitioner. Respondents further contend that they have complied with the requirements of Education Law § 2590-h(2-a)(c).

In reply, petitioner avers that the UFT has organizational standing to bring forth the instant action and Education Law § 2590-h(2-a)(c) prohibits the premature submission of EISs and BUPs.

To establish standing, a plaintiff must show that: (1) the challenged action will cause him an "injury in fact" and (2) the injury falls "within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted." **N.Y. State Assn. of Nurse Anesthetists v. Novello, 2 N.Y.3d 207, 211 (2004)**. The claimed injury suffered by a plaintiff must be more than conjectural. **Id**. The injury must be "direct and personal" and "distinct from that of the general public." **Silver v. Pataki, 96 N.Y.2d 532 (2001); Roberts v. Health & Hosps. Corp., 87 A.D.3d 311 (1st Dept. 2011)**. The "zone of interests" test is to ensure that parties "whose interests are only marginally related to, or even inconsistent with, the purposes of the statute cannot use the courts to further their own purposes at the expense of the statutory purposes." **Roberts, 87 A.D.3d at 319**. To establish organizational standing, a plaintiff must show "that at least one of its members would have standing to sue, that it is representative of the organizational purposes it asserts and that the case would not require the participation of individual members." **Novello, 2 N.Y.3d at 211**.

Here, UFT members who work at the proposed co-located public schools would suffer a change in workplace conditions due to the changes in school utilization. Additionally, the interests of UFT members fall within the zone of interests protected by Education Law § 2590-h(2-a)(c). Moreover, the UFT meets the requirements of organizational standing. Accordingly, the court finds that petitioner has standing to bring forth the suit.

Education Law § 310(7) gives the State Commissioner of Education authority over appeals for actions "[b]y any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools." "This broad review power exists so as to make all matters pertaining to the general school system of the state within the authority and control of the department of education and to remove the same so far as practicable and possible from controversies in the courts." **Board of Education v. Ambach, 70 N.Y.2d 501, 510 (1987)**. Education Law § 310(7) requires petitioner to exhaust his administrative remedies before permitting judicial review. **See CPLR 7801; Mulgrew v. Board of Educ. of the City School Dist. of the City of New York, 88 A.D.3d 72, 80 (1st Dept. 2011)**.

Disputes of this nature should be heard in the first instance by the State Commissioner of Education and not by the court. As petitioner failed to avail his claim before the State Commissioner of Education, the proceeding must be dismissed for failure to exhaust

administrative remedies. Were this court to review the merits of the case, the court would find that respondents substantially complied with Education Law § 2590-h(2-a)(c). Furthermore, the court would not conclude from the record before it, that the determinations were arbitrary, capricious or lacked a rational basis. It is rational for respondents to plan for co-locations and the proposals were issued in accordance with the plain language of Education Law § 2590-h(2-a)(c). There is no basis for the claim that the proposals were issued prematurely.

Although, intervention of proposed intervenor-respondents in this proceeding is appropriate under CPLR 7802(d), the application by proposed intervenor-respondents is denied, as the underlying Article 78 proceeding has been dismissed.

Accordingly, it is hereby

ADJUDGED, that the application by petitioner for an order pursuant to CPLR Article 78, (1) declaring the failure of respondents to comply with Education Law § 2590-h(2-a)(c) is arbitrary and capricious; (2) annulling all votes of the PEP during the 2012-13 school year that approved the co-locations and changes in school utilization scheduled to take effect beginning with the 2014-15 school year and beyond; and (3) ordering respondents to comply with Education Law § 2590-h(2-a), is denied and the proceeding is hereby dismissed; and it is further

ADJUDGED, that the application by proposed intervenor-respondents is denied.

Dated: April 14, 2014

ENTER:

J.S.C.

ALEXANDER W. HUNTER JR