

**Mulgrew v Board of Educ. of the City Sch. Dist. of  
the City of N.Y.**

2014 NY Slip Op 31016(U)

April 14, 2014

Supreme Court, New York County

Docket Number: 156561/13E

Judge: Jr., Alexander W. Hunter

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

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

Index No.: 156561/13E

Decision and Order

Plaintiff,

-against-

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

Defendants.

-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  
Envision Charter School, Explore Envision Charter  
School, Kipp Star College Prep Charter School,  
Kelly Blauvelt-Alday, Khadijah Patrick-Pickel,  
Carmen Melendez, Liane Barnes-Jackson,  
Heather Terry, and Losseni Dosso,

Proposed Intervenor-Defendants.

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**HON. ALEXANDER W. HUNTER, JR.**

The motion to dismiss, designated as motion sequence 001, and the motion to intervene, designated as motion sequence 002, are consolidated for joint disposition and decided herein.

The motion by defendants for an order pursuant to CPLR 3211(a)(4) and (a)(7), dismissing the verified amended complaint in its entirety, is granted pursuant to CPLR 3211(a)(4) and the action is hereby dismissed. The motion by proposed intervenor-defendants for an order pursuant to CPLR 1012(a)(2) and 1013, permitting movants to intervene in this action as party defendants, is

hereby deemed moot.

Plaintiff Michael Mulgrew, as the President of the United Federation of Teachers, Local No. 2 American Federation of Teachers, AFL-CIO (“UFT”), commenced this declaratory judgment action to challenge the validity of certain determinations made by defendants the Board of Education of the City School District of the City of New York (“BOE”), and Dennis M. Walcott, as the Chancellor of the City School District of the City of New York to either co-locate public charter schools in public school buildings or expand the grades served by the public charter schools. Plaintiff seeks a declaration that Education Law § 2590-h(2-a)(c) prohibits the submission of Educational Impact Statements for proposed changes that take affect after the first day of the school in the succeeding school year. Plaintiff commenced a nearly identical companion Article 78 proceeding, entitled *Matter of Mulgrew v. Board of Education of the City School District of the City of New York*, index no. 101038/13, Supreme Court, New York County, challenging the same proposals at issue herein.

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.” In its verified amended complaint, plaintiff alleges that defendants violated Education Law § 2590-h(2-a)(c) by issuing numerous EISs far in advance of when they would go into effect, thereby preventing any meaningful dialogue as to the proposed changes. None of the changes are slated to go into effect before the 2014-15 school year. All of the proposals at issue herein were approved by the Panel for Educational Policy in 2013.

Defendants argue that the instant action must be dismissed because it contains the same allegations as the verified amended petition in the companion article 78 proceeding involving the same parties. Defendants aver that where an action by an agency or officer is challenged, a declaratory judgment action is not the proper vehicle when judicial review by way of an article 78 proceeding is available. Defendants further argue that plaintiff lacks standing to challenge the validity of the EISs as the proposed co-locations would not affect the interests of the UFT or its members. Finally, defendants assert that plaintiff has failed to exhaust administrative remedies by not challenging the determinations before the State Commissioner of Education pursuant to Education Law § 310(7).

In opposition, plaintiff first avers that the action properly seeks a declaratory judgment action as it presents a purely legal question of statutory construction. Second, plaintiff argues that it has organizational standing to maintain the instant action. Plaintiff maintains that the actions by defendants have deprived all UFT members of the opportunity to meaningfully participate in the public comment and dialogue process. Third, as this case involves a purely legal question of statutory interpretation, there is no question of fact to be decided by the State Commissioner of

Education. Plaintiff further notes that defendants have mischaracterized the crux of the verified amended complaint. Plaintiff does not take issue with the substance of the EISs. Instead, plaintiff claims a procedural violation of Education Law § 2590-h(2-a)(c) where defendant failed to provide the appropriate notice to the community by publishing and voting on proposals far in advance when they would go into effect.

Plaintiff argues that the plain reading of Education Law § 2590-h(2-a)(c) prohibits the submission of proposals scheduled to take effect after the first day of the school in the succeeding school year. Plaintiff points out that the statute does not read “at least six months in advance of the first day of school [in the school] year it will be implemented.” (Plaintiff’s Mem. of Law at 13). The interpretation by defendants is not only contrary to the legislative intent of the statute but it would also lead to absurd results. Taken to the extreme, defendants would be permitted to legally submit EISs that do not take effect for twenty years.

In reply, defendants note that plaintiff has failed to cite a single case to support their contention that this declaratory judgment action was properly commenced. Should the court find that this action should not be dismissed on this ground, the complaint still fails to state a cause of action and should be dismissed pursuant to CPLR 3211(a)(7). Defendants reiterate that plaintiff lacks standing because neither he nor the members of the UFT have suffered an injury in fact. A change in school utilization does not harm plaintiff since it only involves adding or expanding grades in a public school building. No teacher would lose his or her employment or have his or her responsibilities curtailed as a result. At most, a member of the UFT might be inconvenienced by others utilizing the same building.

Defendants agree that where the language of a statute is clear and unambiguous, the interpretation thereof will be governed by the plain meaning of the words used. It is undisputed that all of the EISs at issue herein were timely filed within the six month period outlined in Education Law § 2590-h(2-a)(c). The analysis by the court should end at this point. Even if the statute was ambiguous, the interpretation by both the BOE and the State Commissioner of Education would be entitled to deference.

CPLR 3001 provides the court with the discretion to consider an action for a declaratory judgment. The court may decline to consider such relief where other remedies, including an article 78 proceeding, are available. See, Greystone Management Corp. v. Conciliation and Appeals Bd. of the City of New York, 62 N.Y.2d 763 (1984); Matter of Morgenthau v. Erlbaum, 59 N.Y.2d 143 (1983); Rosenthal v. City of New York, 283 A.D.2d 156 (1<sup>st</sup> Dept. 2001); Jackson v. Biderman, 151 A.D.2d 400 (1<sup>st</sup> Dept. 1989); Gable Transport, Inc. v. State, 29 A.D.3d 1125 (3<sup>rd</sup> Dept. 2006); Clarity Connect Inc., v. AT & T Corp., 15 A.D.3d 767, 767 (3<sup>rd</sup> Dept.2005).

Plaintiff has filed an almost identical article 78 proceeding involving the same parties, set of facts, and legal issues. Plaintiff also seeks essentially the same relief in the article 78 proceeding, namely, a judgment nullifying the approval of the proposals based upon a violation of Education Law § 2590-h(2-a)(c). This court finds that this declaratory judgment action is duplicative and wholly unnecessary in light of the companion article 78 proceeding. Therefore, the motion to dismiss the verified amended complaint is granted.

Proposed intervenor-defendants (“proposed intervenors”) are thirteen existing or proposed public charter schools or charter school organizations and a group of parents whose children either currently attend, will attend in the 2013-14 school year, or expect to attend, the public charter schools identified in the verified amended complaint. If plaintiff is successful in this action, numerous public charter schools will be prevented from proceeding with their plans to provide high quality education to countless numbers of students in New York City. Annuling the approvals would also prove disastrous for parents of children at the charter schools identified in the verified amended complaint as they would be forced to enroll their children in the very schools they sought to avoid by seeking enrollment elsewhere. Proposed intervenors argue that they should be permitted to intervene pursuant to CPLR 1012(a)(2) and 1013.

In support, proposed intervenors submit eight affidavits from the group of parents seeking leave to intervene in this action. (Proposed intervenors’ Exhibits B-I). Proposed intervenors also submit a copy of their proposed verified answer. (Proposed intervenors’ Exhibit J).

In opposition, plaintiff argues that proposed intervenors are not entitled to intervene as a matter of right or as a matter of discretion. Plaintiff notes that proposed intervenors knew of the instant action since its inception in July 2013. Based upon their initial intention to intervene, counsel for all parties involved devised motion schedules so that intervention could be on consent. On or about September 18, 2013, a briefing schedule, which included proposed intervenors, was made. On October 4, 2013, counsel for plaintiff was advised that proposed intervenors would not be intervening. Thereafter, the parties to this action agreed to proceed with the agreed upon briefing schedule, which was so-ordered by this court. A few short weeks before the return date of the motion to dismiss, proposed intervenors now belatedly seek to intervene. Proposed intervenors had an opportunity to join this case at least six months ago. Had they done so, plaintiff would have had the opportunity to address any potential arguments raised by proposed intervenors. Plaintiff has little idea as to what arguments proposed intervenors wish to raise regarding the merits of this action which have not already been raised in the motion to dismiss filed by defendants. Intervention at this point would only work to prejudice plaintiff and delay resolution of this matter.

Contrary to the assertions made by proposed intervenors, plaintiff avers that any judgment rendered in this case will not bind them. Therefore, proposed intervenors are not entitled to intervene as a matter of right. In addition, there is nothing about the ruling of this court which will prevent proposed intervenors from operating their respective public charter schools. Moreover, there is no evidence to demonstrate that the students will not receive the supports they need or have access to courses unless they attend the public charter schools.

In reply, proposed intervenors aver that they meet the standard for intervention pursuant to CPLR 1012(a)(2) because 1) the parties presently in this action do not fully represent their interests and 2) they will be bound by the judgment. Proposed intervenors also assert that they are entitled to intervene pursuant to CPLR 1013 because their defenses are based upon the same set of facts and legal issues set forth in the verified amended complaint. Proposed intervenors note that plaintiff has failed to show how the UFT will be prejudiced if they are permitted to intervene. Proposed intervenors argue that they have a substantial interest in the outcome of this litigation and therefore the court should grant the motion to intervene.

CPLR 1012(a)(2) permits, upon timely motion, any person to intervene as a matter of right “when the representation of the person’s interest by the parties is or may be inadequate and the person is or may be bound by the judgment. CPLR 1013 permits the court, upon timely motion, discretion to permit intervention “when the person’s claim or defense and the main action have a common question of law or fact.” When considering a motion to intervene pursuant to CPLR 1013, the court must “consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.” **CPLR 1013.** Regardless of whether a party moves to intervene as a matter of right or as a matter of discretion, “the motion to intervene shall be accompanied by a proposed pleading setting forth the claim for which intervention is sought.” **CPLR 1014.**

As this court has granted the motion by defendants to dismiss the verified amended complaint, the motion to intervene has been rendered moot. Even if the verified amended complaint was not dismissed at this juncture, this court would still deny intervention. Although proposed intervenors will be affected by the judgment and have an interest in the outcome of this action, they have failed to show how their interests and the interests of defendants are so divergent where the representation by defendants would prove inadequate. A review of the proposed pleading reveals that proposed intervenors oppose the verified amended complaint on precisely the same grounds as defendants. In this instance, intervention would be unnecessary and only work to delay the final disposition of this action.

Accordingly, it is hereby

**ORDERED** that the motion by defendants to dismiss the verified amended complaint is granted and the action is dismissed; and it is further

**ORDERED** that the motion by proposed intervenor defendants to intervene in this action as party defendants is deemed moot.

This constitutes the decision and order of this court.

Dated: April 14, 2014

ENTER:



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-J.S.C.

**ALEXANDER W. HUNTER JR**