

**Success Academy Charter Schs. - NYC v New York
City Dept. of Educ.**

2021 NY Slip Op 30464(U)

February 18, 2021

Supreme Court, New York County

Docket Number: 159181/2020

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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INDEX NO. 159181/2020

SUCCESS ACADEMY CHARTER SCHOOLS - NYC,

MOTION DATE 12/15/2021

Petitioner-Plaintiff,

MOTION SEQ. NO. 001

- v -

NEW YORK CITY DEPARTMENT OF EDUCATION,

DECISION + ORDER ON MOTION

Respondent-Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER)

ORDER

Upon the foregoing documents, it is

ADJUDGED that to the extent that the petition-complaint of Success Academy Charter School pursuant to Article 78 (Motion Seq. 001) seeks an order (1) enjoining and restraining respondent-defendant and any and all persons acting at its direction and/or on its behalf, from blocking, preventing, obstructing, or impeding petitioner-plaintiff and any and all persons acting on petitioner's-plaintiff's behalf from accessing, using, for recreation, physical training, athletic programing, or other extended uses, any of respondent's-defendant's school buildings, grounds, facilities and/or designated outdoor spaces for which petitioner-plaintiff has sought a permit or other authorization; and (2) enjoining or restraining respondent-defendant and any and

all persons or parties acting at its direction and/or on its behalf from imposing an in-person instruction requirement as a condition of such use, such petition is denied on the grounds that this court lacks jurisdiction over the subject matter; and to the extent that such petition-complaint seeks an order (3) enjoining and restraining respondent-defendant and any and all persons acting at its direction and/or on its behalf, (a) from blocking, preventing, obstructing, or impeding petitioner-plaintiff and any and all persons acting on petitioner's-plaintiff's behalf from accessing or using for extended use any of respondent's-defendant's school buildings, grounds, facilities and/or designated outdoor spaces for test administration for which petitioner-plaintiff has sought a permit or other authorization and (b) from demanding payment of fees and/or costs as a condition of any use, such applications are denied, as moot; and the proceeding in entirety is dismissed, with costs and disbursements to respondent; and it is further

ADJUDGED that respondent, having an address at 52 Chambers Street, New York, New York 10007, do recover from petitioner, having an address at 95 Pine Street, New York, New York 10005, costs, and disbursements in the amount of \$ _____, as taxed by the Clerk, and that respondent have execution therefor.

DECISION

There is no dispute that respondent granted petitioner's application, without charge, for an extended use permit for the administration of the SAT exam on various dates during the 2020 fall/winter school semester. In addition, respondent represents, throughout this proceeding, that it does not seek to impose extended use permit fees upon petitioner. Respondent states that such prior efforts were in error and arose from a change in respondent's policy due to the pandemic. As relief in the foregoing regard is not needed, such portion of petitioner's application is denied as moot.

In any event, the court lacks subject matter jurisdiction over the proceeding/action at bar, as petitioner's application for an order compelling respondent to grant petitioner extended use permit or permits for extracurricular in-person programming for students who are not physically present at their co-located school during the school day under the New York City Department of Education's School Reopening Plan is a non-justiciable controversy. See Matter of New York State Inspection, Security & Law Enforcement Employees, District Council 82, AFSME, AFL-CIO v Cuomo, 64 NY2d 233, 238-240 and 241 n 3 (1984); Roberts v Health & Hospitals Corporation, 87 AD3d 311, 325-326 (1st Dept 2011). See also Corwin v City of New York, Supreme Court, New York County, Index No. 157166/2020, NYSCEF No. 41 (Edmead, J).

Assuming arguendo that the public safety of students using school building recreational fields in the these pandemic times does not implicate political questions (i.e., "those controversies which revolve around policy choices and value determinations committed for resolution to the legislative and executive branches'" [Roberts, supra, at 323]), it is uncontroverted that all students are suffering harm from the lack of youth sports¹. However, petitioner has not established a likelihood of success on the merits of its claims. This court concurs with respondent that its denial of petitioner's application for an extended use permit was neither arbitrary and capricious, nor an abuse of discretion, nor unlawful.

Petitioner has chosen to have all its students receive remote rather than "in person" learning, as the safest choice to prevent viral spread. As for after school hours athletic activities, petitioner has applied for extended use permits to use the facilities of school buildings where its students are not physically present for the school day, but where public school students, considered "cohorts" of each other, are learning "in person". Respondent denied such application on the grounds that its guidelines, for the health and safety of all

¹ **"Everything is Closed Down." The Lack of Youth Sports is a Crisis.** Despite the glut of sports on TV, the lack of youth leagues and teams in the pandemic could cost us for years to come.", Kurt Streeter, New York Times, October 12, 2012.

students, limits access to school facilities for extra-curricular activities to those students physically present in the school on the day such use is sought. This court agrees with respondent that such determination is consistent with New York State Department of Education's pandemic guidance that in re-opening, schools "enact measures to prevent the intermingling across cohorts, to the greatest extent possible." By preventing the intermingling of students physically present at the school during the school day and in some cases, after school, with "remote learning" charter school students, respondent, in accordance with state guidelines, is preventing intermingling across cohorts "to the greatest extent possible."

This court concurs with respondent that Education Law § 2853(4)(c) applies to the use of school facilities, without cost, for school-based programming only by charter school students who, when learning in person, are co-located at the particular school building. Therefore, the respondent's denial of petitioner's application to provide an extended use permit or

permits for use of facilities by students, who, not only are physically absent from the school in question on the particular days such use is sought, but also, were never co-located at the particular school, is lawful.

2/18/2021
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT		