

Matter of King v Board of Educ. of the City Sch. Dist. of the City of N.Y.
2021 NY Slip Op 30477(U)
February 19, 2021
Supreme Court, New York County
Docket Number: 161077/2020
Judge: Frank P. Nervo
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART IV

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In the Matter of the Application of
CHARMAINE KING et al,

DECISION AND ORDER

Petitioners,

Index Number

-against-

161077/2020

BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK et al,

Mot. Seq. 001

Respondents.

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NERVO, J.

In this Article 78 action, petitioners challenge the respondents' determination that charter schools are not entitled to the COVID-19 screening tests administered in public schools. Petitioners seek an order enjoining the Board of Education defendants' (hereinafter collectively "the Board") determination and requiring the Board to provide and administer tests in charter schools upon identical terms as public schools. Respondents oppose, contending that Education Law § 912 does not apply to the COVID-19 testing at issue, and that the Boards' determination is not arbitrary and capricious.

BACKGROUND

The Board provides COVID-19 screening tests at public schools, whereby a statistically significant sample of students and staff are tested for COVID-19 in order to determine the risk of contracting COVID-19 through community transmission at the school. If the percentage of positive tests exceeds a set standard, the school will be closed for in-person learning. These tests are not provided to charter schools, as the Board contends the tests are a "form of surveillance," not a health or welfare service

contemplated by Education Law § 912, and testing at charter schools is logistically difficult (NYSCEF Doc. No. 40 at p. 9 [NYSCEF numbering]). The Board further contends the testing provided benefits only to the particular child subjected to the test, not the children of the school, and thus is not a service under Education Law § 912.

Petitioners contend that the Board's determination to provide COVID-19 testing at public schools -while refusing to provide testing at charter schools- is arbitrary and capricious. They argue that the distinctions drawn by the Board between charter and public schools are without statutory support and contrary to the directives of Education Law § 912. While petitioners make a valid point regarding collateral estoppel in light of Justice Ozzi's decision on the statute at issue here, the Court addresses the merits of the petition (*see* transcript of February 18, 2021 oral argument; *see Department of Education of The Archdiocese of New York et al v. Carranza et al*, 2020 WL 7422858 [Sup. Ct., Richmond Cnty., Ozzi, J.] [November 23, 2020]).

STANDARD OF REVIEW

The standard by which this Court must evaluate the instant application is well settled; whether the action taken by the Board was without sound basis in reason or fact, contrary to law, or otherwise arbitrary and capricious (*see e.g. Ward v. City of Long Beach*, 20 NY3d 1042 [2013]; *Pell v. Board of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 231 [1974]). "Rationality is what is reviewed under the ... arbitrary and capricious standard" (*Pell v. Board of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231). However, absent a finding that the Board's

decision is arbitrary and capricious, this Court may not substitute its judgment for that of the respondents (*Diocese of Rochester v. Planning Bd. of Town of Brighton*, 1 NY2d 508, 520 [1956]).

New York is “deeply concerned that all its school children receive adequate health and welfare services” (*Matter of Richard K. v. Petrone*, 131 AD3d 181 [2d Dept 2006]).

In accordance with this concern, Education Law § 912 reads, in pertinent part:

[the] [b]oard of education of every school district shall, upon request of the authorities of a school other than public, provide *resident children* who attend such school with any or all of the health and welfare services and facilities which are made available by such ... board of education to or for children attending the public schools of the district. Such services may include, *but are not limited to* all services performed by a physician, physician assistant, dental hygienist, registered professional nurse, nurse practitioner, school phycologist, school social worker or school speech therapist, and may also include dental prophylaxis, vision and hearing screening examinations, the taking of medical histories and the administration of health *and screening tests*, the maintenance of cumulative health records and the administration of emergency care programs for ill or injured students (emphasis added).

In the instant matter, the Board’s determination to exempt charter schools from COVID-19 testing fails to consider that public schools and charter schools may share the same physical building, commonly referred to as “co-location,” and students from these co-location schools may share facilities or recreation time and areas. At oral argument, the Board conceded that testing only one group of students at these co-locations would be futile (i.e. testing only public-school children at a location shared by charter-school children), as community transmission risks could not be adequately ascertained (*see* transcript of February 18, 2021 oral argument).

As discussed below, the Board's determination attempts to differentiate services provided to schools based upon the type of schools and type of health service, distinctions which are not found in the statute.

The distinction between services intended to benefit one child and services intended to benefit all children at a school, as urged by the Board, finds no support in the statute. Education Law § 912 is unambiguous, the Board must provide health services *and screening tests*. It requires the Board to provide services that benefit resident *children*, it does not distinguish between services for a single student or the aggregate. Likewise without statutory support, is the Board's contention that the analysis of § 912 must be guided by whether a student may request the health service. Whether a particular student requests COVID-19 testing is entirely irrelevant. Education Law § 912 requires the service be provided "upon request of the authorities of a school," not upon the request of individual students.

The Board's contention that COVID-19 testing is merely for surveillance purposes, and therefore does not constitute a health and welfare service for resident children under Education Law § 912, is illogical. The Board admits that students who test positive are: excluded from the school, instructed to seek medical care, and their parents and health authorities are notified. The exclusion of a student testing positive for COVID-19 from in-person learning serves to protect the students remaining at the school from infection due to community transmission. The contention that testing for a virus, which has caused a global pandemic and claimed hundreds of thousands of American lives, is merely a surveillance tool, is beyond incredulous. The Boards'

submission of a self-serving affidavit by a medical doctor does not refute this conclusion.

Finally, at oral argument, the Board admitted its determination to exclude charter schools from COVID-19 testing is based upon the logistical difficulties in administering the testing program in those schools. The Board also conceded that testing public-school students while not testing charter-school students would be futile, especially where these schools share facilities, notwithstanding its determination to exclude these charter schools from testing. The conclusion that the Boards' determination arbitrarily differentiates between public and charter schools is, consequently, inescapable.

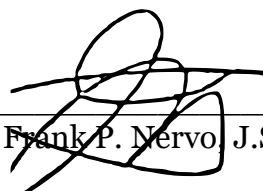
Accordingly, it is
ORDERED that the petitioners' application is granted; and it is further

ORDERED that respondents shall provide and administer COVID-19 screening tests to students and staff of charter schools upon identical terms as testing provided to public schools.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: February 19, 2021

ENTER:



Hon. Frank P. Nervo J.S.C.