STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

JAMES SHULTZ, RENEE CHEATHAM, TERIA YOUNG, and STEVEN ALLORE,
Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

-against-

NEW YORK STATE EDUCATION DEPARTMENT, SHANNON TAHOE, in her official capacity as Interim Commissioner of Education of the New York State Education Department, and TEMITOPE AKINYEMI, in her official capacity as Chief Privacy Officer of the New York State Education Department,
Respondents,

LOCKPORT CITY SCHOOL DISTRICT,

Intervenor-Respondent.

JUDGMENT
Index No.: 904134-20
RJI No.: 01-20-ST-1019

(Supreme Court, Albany County, Article 78 Term)

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HON. JAMES H. FERREIRA, Acting Justice:

Petitioners are residents of Lockport, New York and are parents and/or grandparents of students currently attending schools in Intervenor-Respondent Lockport City School District (hereinafter Lockport CSD) in Lockport, New York.[1] In this CPLR article 78 proceeding, petitioners challenge a determination by respondents which, petitioners allege, permits Lockport CSD to begin using biometric face recognition technology in its schools. Lockport CSD has filed an answer to the amended petition. Respondents, in lieu of an answer, have filed a motion to dismiss the amended petition on several grounds, including on the ground that it has been rendered moot by recent legislation. Petitioners oppose the motion and respondents have submitted a reply. The Court heard oral argument in this matter on May 5, 2021, via Microsoft Teams teleconferencing technology.

Facts/Background

In 2016, Lockport CSD filed an application to use New York State Smart Schools Bond Act funds to acquire a face recognition system for all eight of its K-12 schools. Face recognition technology identifies a human face "through the automated, computational analysis of its facial features" (Amended Petition ¶ 34). Respondent New York State Education Department (hereinafter SED) approved the application and Lockport CSD proceeded to contract for the installation of the surveillance cameras and other components of a face recognition system in its schools. Lockport CSD's system uses closed-circuit cameras installed on school property which take biometric measurements of all faces that appear in the frame of the cameras. The system analyzes the facial images and compares them with a database of non-student individuals who have been determined

[1] By Order dated July 23, 2020, the Court, upon consent, granted the motion of Lockport CSD to intervene as a respondent in this proceeding.

by Lockport CSD to present an immediate or potential threat to the school community. The system then reports any matches to appropriate district officials for verification.

During 2018 and 2019, SED communicated with Lockport CSD with respect to its plans to commence using this face recognition technology. In response to directions from SED with respect to privacy concerns raised with respect to the use of the technology, Lockport CSD made several revisions to its policy pertaining to its operation of the face recognition system (District Policy # 5685). By letter dated September 20, 2019, Lockport CSD advised SED that it had adopted an amendment to District Policy # 5685 which ensures that "no student data will be created or maintained by the operation of" the system and that its position is that its use of the system does not violate Education Law § 2-d (Affirmation in Support of Amended Petition, Exhibit 17 [emphasis omitted]).[2] Lockport CSD further advised that it did not believe that any further approval from SED was required with respect to its implementation of the face recognition system and that it "intends to continue with the initial implementation phase" of the system (id.).

In response, by letter dated November 27, 2019, respondent Temitope Akinyemi, Chief Privacy Officer at SED acknowledged Lockport CSD's decision that "no student data will be created or maintained by the operation of the District's facial recognition system" and proposed additional revisions to District Policy # 5685 to "make it even clearer that students have been removed from the operation of the facial recognition system completely" (Affirmation in Support of Amended Petition, Exhibit 1). She stated:

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[2] Education Law § 2-d, entitled "Unauthorized release of personally identifiable information," concerns, among other things, the privacy and security of student data, which is defined as "personally identifiable information from student records of an educational agency" (Education Law § 2-d [1] [I]). Among other things, Education Law § 2-d prohibits the sale of personally identifiable information, requires educational agencies to post a parents bill of rights and provides procedures with respect to the unauthorized release of such information.

> "With these additional revisions, the Department believes that the Education Law § 2-d issues it has raised to date relating to the impact on the privacy of students and student data appear to be addressed. However, the Department recommends that the District work with its local counsel to ensure that all other applicable laws and regulations are met and that the civil rights of all individuals are also protected when it comes to the District's use of technology. We thank you for your cooperation throughout this process and please continue to provide us with any updates on the use of such technology in your schools" (Affirmation in Support of Amended Petition, Exhibit 1).

Lockport CSD activated its face recognition system on January 2, 2020; petitioners allege that it did so without making any of SED's proposed revisions to District Policy # 5685.

Petitioner commenced this proceeding in June 2020, challenging respondents' November 27, 2019 determination. Petitioners characterize the November 27, 2019 letter as finding that Lockport CSD's face recognition technology system does not implicate "student data" as defined in Education Law § 2-d and giving Lockport CSD permission to activate the system. Petitioners argue that the determination was arbitrary and capricious and an abuse of discretion because it is not supported by the record, constitutes a reversal of SED's prior position on the matter and is based upon a misunderstanding of the way that the technology works; petitioners assert that the face recognition system, in fact, captures and retains student data as that phrase is used in Education Law § 2-d. Petitioners also argue that SED acted in an arbitrary and capricious manner by allowing Lockport CSD to activate its system without incorporating the policy changes required by SED. Petitioners seek an order annulling and vacating the determination, declaring that SED's determination was affected by an error of law and that respondents abused their discretion and acted in an arbitrary and capricious manner and revoking the determination and directing Lockport CSD to de-activate its face recognition system.

After this proceeding was commenced, the Legislature enacted State Technology Law

§ 106-b, effective December 22, 2020. This statute provides that, with two exceptions not relevant here,

> "public and nonpublic elementary and secondary schools, including charter schools, shall be prohibited from purchasing or utilizing biometric identifying technology for any purpose, including school security, until July [1, 2022] or until the commissioner of education authorizes such purchase or utilization as provided in subdivision three of this section, whichever is later" (State Technology Law § 106-b [2][a]).

Subdivision 3, in turn, provides that the commissioner of education

> "shall not authorize the purchase or utilization of biometric identifying technology, including but not limited to facial recognition technology, without the [D]irector [of the Office of Information Technology Services] first issuing a report prepared in consultation with [SED], making recommendations as to the circumstances in which the utilization of such technology is appropriate in public and nonpublic elementary and secondary schools, including charter schools, and what restrictions and guidelines should be enacted to protect individual privacy, civil rights, and civil liberty interests" (State Technology Law § 106-b [3]).

The statute defines "biometric identifying technology" as "any tool using an automated or semi-automated process that assists in verifying a person's identity based on a person's biometric information," including facial characteristics (State Technology Law § 106-b [1]).

Analysis

In their motion, respondents argue, among other things, that petitioners' claims are moot and must be dismissed due to the enactment of State Technology Law § 106-b. Upon review, the Court agrees. "Typically, the doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy" (Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach, 98 NY2d 165, 712 [2002]). Generally, a proceeding "will be considered moot unless the rights of the parties will be directly affected by the determination of the [proceeding] and the interest of the parties is an immediate consequence of the judgment" (Matter of Hearst Corp. v Clyne, 50 NY2d 707, 714 [1980]).

Here, the determination that petitioners challenge is a letter from SED to Lockport in which SED: (1) acknowledged the position of Lockport CSD that no student data will be created or maintained by the operation of the face recognition system, (2) proposed revisions to Lockport CSD's policy that clarifies this position and (3) found that, with the additional revisions, its Education Law § 2-d concerns appeared to have been addressed. Petitioners contend that, by this letter, SEC effectively found that Lockport CSD's face recognition system/policy does not implicate "student data" within the meaning of Education Law § 2-d and gave Lockport CSD permission to activate the system. Petitioners seek annulment of the purported finding as to the applicability of Education Law § 2-d and an order directing Lockport CSD to de-activate its system.

Upon review, the Court finds that petitioners have received, by the enactment of State Technology Law § 106-b, all of the relief that they seek. Pursuant to State Technology Law § 106-b, Lockport CSD discontinued its use of the face recognition system and is currently prohibited from using its face recognition technology until, at the very earliest, July 1, 2022, and only after the Commissioner of SED authorizes it.[3] Moreover, inasmuch as State Technology Law § 106-b requires the Commissioner to affirmatively authorize the utilization of face recognition technology following the issuance of a comprehensive report by the Director of the Office of Information Technology Services, any future use of the technology by Lockport CSD would necessarily be analyzed and/or authorized pursuant to new regulations, rules or policies issued by the Commissioner, and not the November 2019 determination. Under these circumstances, the Court finds that the SED's November 27, 2019 letter no longer has any legal effect and that any ruling the

[3] In a Memorandum of Law in support of its Answer, Lockport CSD agrees that, pursuant to State Technology Law § 106-b, it cannot use its face recognition technology "unless and until specifically authorized to do so by the Commissioner of Education" (Memorandum of Law in Support of Answer, at 4).

Court would issue as to the determination would not directly affect the rights of the parties to this proceeding, rendering it moot.

Petitioners argue that they have not received all of the relief that they seek and this proceeding is not moot because the November 2019 determination – characterized by petitioners as finding that "student data" is not implicated by the use of the face recognition system and Education Law § 2-d does not apply – is causing them ongoing and immediate harm inasmuch as it leaves the data collected by Lockport CSD during the period that the system was operational – from January 2, 2020 until December 22, 2020 – unprotected and leaves petitioners with no recourse in the event of a breach. The Court disagrees. Petitioners did not specifically request any relief with respect to any "student data" collected and/or stored by Lockport CSD after the November 2019 letter was issued. Moreover, the November 2019 letter does not – either expressly or implicitly – authorize or approve of Lockport CSD's collection and/or storage of "student data" and does not establish that such collection and/or storage would not trigger the protections of Education Law § 2-d. To the contrary, in its November 2019 letter, SED proposed revisions to Lockport CSD's policy in order to "make it even clearer that students have been removed from the operation of the facial recognition system completely," including adding, for example, a "scope" section to the policy which would provide that "the facial recognition system will never be used to create or maintain student data" (Affirmation in Support of Petition, Exhibit 1). Therefore, the Court is not persuaded that the November 27, 2019 determination has the effect of rendering any student data collected and retained by Lockport CSD from January 2, 2020 until December 22, 2020 unprotected by Education Law § 2-d, or rendering petitioners without recourse if such data collection/retention occurred and the information is released.

The Court is also unpersuaded by petitioners' contention that an exception to the mootness doctrine applies here. An exception to the doctrine may be found where all of the following factors are met: "(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues" (Matter of Hearst Corp. v Clyne, 50 NY2d 707, 714-715 [1980]; see Shelton v New York State Liq. Auth., 61 AD3d 1145, 1147 [3d Dept 2009]). Here, petitioners have not demonstrated that there is a likelihood of repetition with respect to the issues raised in this proceeding. To the contrary, the recent legislation ensures that, going forward, these issues will be analyzed under a new legal framework, if schools are permitted to use the face recognition technology at all. Petitioners have also failed to demonstrate that the issues raised herein present a phenomenon typically evading review. Finally, even assuming that the issues raised herein present novel issues not previously passed on, it is neither necessary nor prudent for the Court to rule on such issues because they are to be the subject of a comprehensive and statutorily-mandated report and further evaluation and determination by the Commissioner of Education. Based upon the foregoing, the Court grants respondents' motion to dismiss the proceeding on the ground that it is moot.

Accordingly, it is hereby

ORDERED AND ADJUDGED that respondents' motion is granted and the petition is in all respects dismissed without costs.

The foregoing constitutes the Judgment of the Court.

SO ORDERED AND ADJUDGED

ENTER.

Dated: Albany, New York
August 27, 2021

James H. Ferreira
Acting Justice of the Supreme Court

Papers Considered:

1. Amended Notice of Petition, dated July 23, 2020;
2. Amended Verified Petition, sworn to July 23, 2020;
3. Memorandum of Law in Support by Beth Haroules, Esq., dated July 23, 2020;
4. Affirmation in Support by Stefanie D. Coyle, Esq., dated July 23, 2020, with attached exhibits;
5. Affidavit in Support by Daniel Schwarz, sworn to July 23, 2020, with attached exhibits;
6. Affidavit in Support by James Shultz, sworn to July 23, 2020, with attached exhibits;
7. Affidavit in Support by Rene Cheatham, sworn to July 23, 2020, with attached exhibit;
8. Affidavit in Support by Teria Young, sworn to July 23, 2020;
9. Affidavit in Support by Steven Allore, sworn to July 23, 2020;
10. Verified Answer of Intervenor-Respondent, sworn to July 8, 2020;
11. Memorandum of Law in Support of Answer by Charles W. Malcomb, Esq., dated March 11, 2021;
12. Notice of Motion to Dismiss, dated March 12, 2021;
13. Affirmation in Support by Henry M. Greenberg, Esq., dated March 12, 2021, with attached exhibits;
14. Memorandum of Law in Support by Henry M. Greenberg, Esq., dated March 12, 2021 ;
15. Affirmation in Opposition by Stefanie D. Coyle, Esq., dated March 25, 2021, with attached exhibits;
16. Memorandum of Law in Opposition by Beth Haroules, Esq., dated March 25, 2021;
17. Memorandum of Law in Reply by Henry M. Greenberg, Esq., dated April 1, 2021; and
18. Written Transcript of Oral Argument, held on May 5, 2021.