

M.F. v New York State Board of Regents

2023 NY Slip Op 34766(U)

July 13, 2023

Supreme Court, Albany County

Docket Number: Index No. 908359-22

Judge: Denise A. Hartman

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

M.F. ON BEHALF OF HERSELF AND HER CHILD
A.A.M., N.C. ON BEHALF OF HERSELF AND HER
CHILD A.C; T.G. ON BEHALF OF HERSELF AND
HER CHILD S.R.; M.V. ON BEHALF OF HERSELF
AND HER CHILD M.F.; R.E. ON BEHALF OF
HERSELF AND HER CHILD A.O., R.L. ON
BEHALF OF HIMSELF AND HIS CHILD I.L.; D.R.
ON BEHALF OF, HERSELF AND HER CHILD E.R.;
I.M. ON BEHALF OF HERSELF AND HER CHILD
J.S.; E.F. ON BEHALF OF HERSELF AND HER
CHILD D.E., CHARTER SCHOOL OF
EDUCATIONAL EXCELLENCE,

**DECISION AND
ORDER**

Index No. 908359-22

July 13, 2023

Plaintiffs,

-against-

NEW YORK STATE BOARD OF REGENTS,
NEW YORK STATE EDUCATION
DEPARTMENT, BETTY A. ROSA, AS NEW
YORK STATE COMMISSIONER OF EDUCATION,
Defendants.

HON. DENISE A. HARTMAN, AJSC

APPEARANCES

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Hartman, J.

Plaintiffs M.F., N.C., T.G., M.V., R.E., R.L., D.R., I.M., and E.F. are parents of children attending schools in or near the City of Yonkers, Westchester County (the parents), all of whom reside within the Yonkers City School District (the District). They claim their children (A.A.M., A.C., S.R., M.D., A.O., I.L., E.R., J.S., and D.E., respectively) were improperly denied admission to plaintiff Charter School of Educational Excellence (CSEE or the school), a school chartered by defendant New York State Board of Regents (the Regents) and located within the District. CSEE is also a plaintiff in this action. Claiming CSEE had an unlawful admissions and enrollment policy foisted upon it by the Regents and defendants New York State Education Department (SED) and Betty A. Rosa, as Commissioner of Education, plaintiffs sue for declaratory and injunctive relief.

Defendants move, pre-answer, to dismiss complaint. Plaintiffs oppose. The motion is granted. The complaint is dismissed.

Background

From 2005 to 2018, CSEE served children from kindergarten through eighth grade, but in 2018, CSEE applied to the Regents for approval of a material change in its charter expand the school to the 12th grade. Negotiations between CSEE and SED ensued, and, as part of its expansion, CSEE ultimately agreed to change its admission and enrollment policy so that

50% of all new students in all grades would come from outside the District, while 50% would be from within the district—an arrangement plaintiffs refer to as the 50/50 rule. On May 1, 2018, the Regents voted to approve the change to CSEE’s charter adding the high-school grades and adopting the 50/50 rule, transitioning CSEE to a “regional school.” As envisioned, CSEE’s 13-grade total enrollment would eventually be evenly split by implementing the 50/50 rule: 50% of the students would reside within the District, and 50% would reside outside of the district. In real numbers, CSEE’s total enrollment from the District across all 13 grades would be 565 students, which was “164 fewer students than the present K-8 enrollment.”

On February 13, 2019, CSEE sent to SED a revised admissions and enrollment policy incorporating the 50/50 rule but providing for sibling preference before applying the 50/50 rule. The policy read, in relevant part,

“As specified in CSEE’s Charter, preference and exemptions from the lottery will be given in the following order:

- “1. Currently enrolled students who have submitted their commitment notice.
- “2. Siblings of admitted students who have submitted their application.
- “3. 50% of open seats to Yonkers School District students.
- “4. 50% of open seats to students residing outside of the Yonkers School District.” (Emphasis omitted.)

By letter dated August 30, 2019, David Frank, Executive Director of the Charter School Office for SED, appeared to acknowledge receipt of the policy

and granted CSEE permission “to provide instruction to students in accordance with the plan provided in [CSEE’s] Charter.”

Interpreting Frank’s email as approval, CSEE applied the revised enrollment policy for the 2019-2020 academic year, which resulted in the admission of an additional 30 new kindergartners from within the District, all of whom were siblings of enrolled CSEE students. Those extra kindergartners pushed new admissions from within the District above 50%. On September 30, 2019, SED sent CSEE a notice of deficiency for its failure to comply with the 50/50 rule and requested a corrective action plan. Citing CSEE’s violation of the 50/50 rule, the District refused to provide funding to cover the 30 kindergartners. Likewise, SED declined CSEE’s application to “intercept” funds to cover the kindergartners.

CSEE submitted a second revised enrollment policy on October 15, 2019, reordering the admission priorities in accordance with defendants’ instructions and the charter revision. The policy reads, in relevant part,

“As specified in CSEE’s Charter, preference and exemptions from the lottery will be given in the following order:

- “1. Currently enrolled students who have submitted their commitment notice.
- “2. 50% of open seats to Yonkers School District students.
- “3. 50% of open seats to students residing outside of the Yonkers School District.
- “4. Siblings of admitted students who have submitted their applications.”

The October 15, 2019 proposed revised enrollment policy also read, “With the exception of siblings, 50% of open seats will be available to [District] residents and 50% of open seats will [be] available to students who reside outside of [the District] who have submitted an application.” By email dated October 21, 2019, an SED official directed CSEE to “[r]emove the phrase ‘[W]ith the exception of siblings.’”

Between 2019 and 2021, CSEE and SED attempted to negotiate a revision the 50/50 rule. According to plaintiffs, they eventually agreed to limit the 50/50 rule’s application to the high school grades. But by email dated April 12, 2022, SED informed CSEE that it was “not able to approve the requested revision to CSEE’s enrollment policies at this time.”

Plaintiffs commenced this action with the filing of a summons and complaint on November 4, 2022, supported by numerous exhibits comprised of documents, correspondence, and affidavits from each of the parents. The 24-page complaint nominally interposes only two causes of action. The first alleges that, in “brokering a political compromise instead of following the text of the [New York Charter Schools] Act,” defendants’ conduct violated the NY Constitution’s guarantee of a sound basic education by denying children from the District access to “a highly performing public school within their community” (*see* NY Const, art XI, § 1; Education Law art 56).

The second cause of action alleges that “the Regents’ creation and enforcement of a 50/50 admissions policy that prioritizes admission of students from outside of Yonkers goes against the explicit text of the [New York Charter Schools] Act,” in particular, Education Law § 2854. According to that provision, where, as with CSEE, the number of charter school applications exceeds capacity, an enrollment preference shall be given to students who reside in the charter school’s district and siblings of students enrolled in the charter school:

“[S]tudents shall be accepted from among applicants by a random selection process, provided, however, that an enrollment preference shall be provided to pupils returning to the charter school in the second or any subsequent year of operation and pupils residing in the school district in which the charter school is located, and siblings of pupils already enrolled in the charter school.” (Education Law § 2854 [2] [b].)

Plaintiffs posit that Education Law § 2854 requires charter school admissions to prioritize returners first, District residents second, and siblings of returners third (hereinafter statutorily preferred applicants). In plaintiffs’ view, Education Law § 2854 does not permit the admission of children from outside of the District until CSEE exhausts its pool of statutorily preferred applicants. Supported by documents, they claim the 50/50 rule requires CSEE to deny District children admission once the school’s 50% District quota is met. CSEE then fills the remaining 50% of the seats with nonresidents, shutting out statutorily preferred applicants—in particular, any children from the District

remaining on the list of applicants. Plaintiffs say that defendants' insistence on the 50/50 rule must be declared unlawful.

Defendants filed this motion on January 4, 2023, seeking dismissal of the complaint on multiple grounds: 1) a declaratory judgment action is the improper form for plaintiffs' claims, and thus must be converted to a CPLR article 78 proceeding and, upon conversion, dismissed as untimely; 2) plaintiffs' claims are barred by laches and estoppel; 3) the complaint fails to state a claim; 4) the parents lack standing to bring suit; and 5) plaintiffs failed to join the District as a necessary party. Defendants also reject plaintiffs' attempt to avoid the res judicata effect of this action on a future suit seeking money damages. Plaintiffs oppose defendants' motion, arguing against each of the asserted grounds for dismissal in a memorandum of law filed March 7, 2023. Defendants replied by legal memorandum filed April 3, 2023.

Analysis

"In a motion to dismiss pursuant to CPLR 3211, a court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide the plaintiff the benefit of every possible inference" (*F.F. v State of New York*, 194 AD3d 80, 83 [3d Dept 2021] [internal quotation marks, brackets and citations omitted], *appeal dismissed & lv denied* 37 NY3d 1040 [2021], *cert denied* 142 S Ct 2738 [2022]). And in light of the evidentiary material accompanying the complaint, the Court observes that it "may freely consider

affidavits submitted by the plaintiff to remedy any defects in the complaint, since the ultimate criterion is whether the proponent of the pleading has a cause of action, not whether he or she has stated one” (*Carr v Wegmans Food Mkts., Inc.*, 182 AD3d 667, 669 [3d Dept 2020] [internal quotation marks and citations omitted]).

Although cast as a declaratory judgment action, plaintiffs’ claim sounds in the nature of mandamus to review pursuant to CPLR article 78—relief no longer available because the statute of limitations has elapsed. “Where, as here, governmental activity is being challenged, the immediate inquiry is whether the challenge could have been advanced in a CPLR article 78 proceeding” (*New York Ins. Assn., Inc. v State of New York*, 145 AD3d 80, 87 [3d Dept 2016] [internal quotation marks and citations omitted], *lv denied* 29 NY3d 910 [2017]). “This inquiry into the true nature of the dispute—and the time limitation applicable thereto—requires the court to examine the substance of that action to identify the relationship out of which the claim arises and the relief sought” (*Doyle v Goodnow Flow Assn., Inc.*, 193 AD3d 1309, 1310 [3d Dept 2021], *lv denied* 37 NY3d 911 [2021]).

Plaintiffs assert two causes of action: first, that defendants’ actions requiring implementation of the 50/50 rule for all newly enrolled students deprive plaintiffs of a sound basic education under of the Education Article of the State Constitution; and second, that defendants’ demand for and

maintenance of the 50/50 rule contravenes Education Law § 2854. And applying the requisite liberal construction to the complaint and accompanying documents and affidavits (*see Matter of Goldberg v Elia*, 174 AD3d 1214, 1214 [3d Dept 2019], *appeal dismissed* 34 NY3d 1174 [2020]), that claim could flow from defendants' role in forcing the 50/50 rule into CSEE's charter revision, which the Regents ratified on May 31, 2018; *or* from the arguable approval of CSEE's revised admissions and enrollment policy applying the 50/50 rule for new applicants only after giving a preference to returning students and their siblings by email correspondence on August 30, 2019; *or* from SED's rejection of CSEE's proposed revised policy limiting the 50/50 rule to the high school grades, which was communicated on April 12, 2022.¹

But the proper vehicle to challenge the legality of defendants' actions with respect to any of these decision points is a CPLR article 78 proceeding in the nature of mandamus to review, "and the applicable standard is whether the agency determination was arbitrary and capricious or affected by an error of law" (*Matter of Posada v New York State Dept. of Health*, 75 AD3d 880, 882 [3d Dept 2010] [internal quotation marks and citation omitted], *lv denied* 15

¹ The parent and student plaintiffs have not challenged CSEE's determinations denying their enrollment applications—CSEE is not a defendant and plaintiffs do not identify specific dates their applications were denied. And, to the extent that CSEE challenges the Regents' resolution and arguable approval of their proposed policy revision in the Frank email, those claims are dubious because CSEE agreed to or even proposed the disputed terms.

NY3d 712 [2010]; *see* CPLR 7803 [3]). Accordingly, the action must be converted (*see* CPLR 103 [b]). And because these decisions became binding more than four months before plaintiffs filed their pleading, this converted CPLR article 78 proceeding must be dismissed as untimely (*see* CPLR 217 [1]).

Plaintiffs cannot avoid conversion by casting their challenge as one to *ultra vires* governmental action. Plaintiffs allege that defendants—in particular, the Regents—went beyond the scope of their statutory authority and exercised “pseudo legislative” power when they passed a resolution approving CSEE’s charter that also “purported to create a new class of schools designated as regional charter school” (internal quotation marks omitted). Under the right circumstances, an alleged violation of the constitutional separation of governmental powers may be sued as a declaratory judgment action (*see generally Boreali v Axelrod*, 71 NY2d 1, 6 [1987]). But there is no need to go down that procedural path because the essence of plaintiffs’ claim is that defendants’ requirement that CSEE cap enrollment of new students from the District at 50% of all available seats violates the statutory preference for District students (*see* Education Law § 2854 [2] [b]). And the claim that defendants’ actions violated Education Law § 2854 (2) (b) could have been raised in a timely CPLR article 78 proceeding.

Likewise insufficient is the portion of the complaint alleging a violation of the Education Article (*see* NY Const, art XI, § 1). Plaintiffs allege that

defendants have run the education system in a way that is “illegal and unjust,” thus running afoul of the Education Article and denying “the children of Yonkers the right to attend a highly performing public school within their community.” But the Education Article does not guarantee any child the right to attend the school of his or her choice, but instead an “opportunity to obtain a sound basic education” (*Campaign for Fiscal Equity v State of New York*, 86 NY2d 307, 316 [1995]). Nothing in the complaint, exhibits, and affidavits of the parents can be read to allege that the students here have been deprived of that opportunity (*see Paynter v State*, 100 NY2d 434, 439-440 [2003]). Accordingly, to the extent plaintiffs interpose an Education Article theory, it must be dismissed for failure to state a claim (*see Matter of New Covenant Charter School Educ. Faculty Assn. v Board of Trustees of the State Univ. of N.Y.*, 30 Misc 3d 1205[A], 2010 NY Slip Op 52287[U], *2 [Sup Ct, Albany County 2010]).

Plaintiffs’ remaining arguments in opposition to dismissal based upon CPLR 103 (b), 3001, and 3211 (a) (5) and (7) are meritless. Defendants’ other grounds for dismissal are academic.²

Accordingly, it is

ORDERED that defendants’ motion is granted; and it is


² Notably, CSEE’s charter expired in June 2023, and presumably is up for renewal at this time.

ORDERED that this action is converted to a proceeding pursuant to CPLR article 78; and it is

ORDERED that the converted proceeding is dismissed.


This constitutes the Decision and Order of the Court, the original of which is being uploaded to NYSCEF for electronic entry by the Albany County Clerk. Upon such entry, counsel for defendants shall promptly serve notice of entry on all other parties entitled to such notice.

Dated: Albany, New York
July 13, 2023



HON. DENISE A. HARTMAN
Acting Justice of the Supreme Court

Papers Considered
NYSCEF Doc Nos. 1-49



07/14/2023