SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN PART 12

Justice

LISA STEGLICH, individually and as parent and natural guardian of ALEXANDER HERLIHY, infant, et al.
Plaintiffs,

- v -

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK a/k/a THE PANEL FOR EDUCATIONAL POLICY, THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, et al.,
Defendants,

UPPER WEST SUCCESS ACADEMY CHARTER SCHOOL a/k/a SUCCESS ACADEMY CHARTER SCHOOL, MATTHEW MOREY, inidividually and as parent and natural guardian of THOMAS MOREY and CLAIRE MOREY, et al.
Intervenor-Defendants.

INDEX NO. 101173/2011

The papers enumerated in the annexed decision and order were read on this motion for partial summary judgment.

Cross-Motion: ☐ Yes ☒ No

It is hereby

ORDERED that the motion for partial summary judgment brought by plaintiffs is decided in accordance with the annexed DECISION and ORDER.

Dated: 8/12/2011

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION
☐ DO NOT POST ☐ REFERENCE
☐ Preliminary Conf. _____ ☐ Compliance Conf. _____

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

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LISA STEGLICH, individually and as parent and natural guardian of ALEXANDER HERLIHY, infant, RIC CHERWIN, individually and as parent and natural guardian of MARLEY CHERWIN, infant, CAROL BARKER, individually and as parent and natural guardian of OMAR BROWN, infant, GINA DEMETRIUS, individually and as parent and natural guardian of SEBASTIAN DEMETRIUS, KIMBERLY JARNOT, individually and as parent and natural guardian of MARGARET THOMAS, infant, NYDIA JORDAN, individually and as parent and natural guardian to HARRY D. JORDAN, infant, KAVERY KAUL, individually and as parent and natural guardian of ASHOK KAUL, infant, RUBIN and GERALDINE LOPEZ, individually ans as parents and natural guardians of SHANE LOPEZ, infant, MADELINE OLMEDA, individually and as parent and natural guardian of CRISTINA JULIA CRUZ, infant, LAZARA QUINONES, individually and as parent and natural guardian of DORIS ALCANTARA, infant, and MARILYNN SARJEANT, individually and as parent and natural guardian of ALIYA CLUNIE, infant,

Plaintiffs,

-against-

Index No. 107173/11

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK a/k/a THE PANEL FOR EDUCATIONAL POLICY, THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, and DENNIS M. WALCOTT, as Chancellor-Designate of theCity School District of the City of New York,

Defendants.

UPPER WEST SUCCESS ACADEMY CHARTER SCHOOL a/k/a SUCCESS ACADEMY CHARTER SCHOOL, MATTHEW MOREY, individually and as parent and natural guardian of THOMAS MOREY and CLAIRE MOREY, MARTIN AARES, individually and as parent and natural guardian of in-

fant SABINE BALOU-AARES, GABRIEL BAEZ, individually and asparent and natural guardian of infant of CHRISTOPHER BAEZ, LISBETH DELOSSANTOS, individually and as parent and natural guardian of infant MIYAH MUZO, ELANA KILKENNY, individually and as parent and natural guardian of infant LIAM KILKENNY, ELISSA KLEIN, individually and as parent and natural guardian of infant AVA KLEIN, REBECCA KUHAR, individually and as parent and natural guardian of infant ROBERT MAXWELL KUHAR, LATISHA SINGLETARY, individually and as parent and natural guardian of infant RANIYA GARRETT-WELLS, MICHAEL SUCHANEK, individually and as parent and natural guardian of infants SALLY SUCHANEK and AMELIA SUCHANEK, and DAVID TURNOFF, individually and as parent and natural guardian of infant HUNTER KIM-TURNOFF,

Intervenor-Defendants.

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Papers considered on plaintiffs' motion for partial summary judgment:

PAPERS	E-FILING DOCUMENT NO.
Notice of Motion for Partial Summary Judgment[1]	84, 94 (Ret. for correction)
Memorandum of Law in Support of Plaintiffs' Motion	85
Plaintiffs' Statement of Uncontested Facts	86
Defendants' Responses to Plaintiffs' Statement of Uncontested Facts	90
Rouhanifard Aff. in Opposition	91
Defendants' Memorandum of Law in Opposition	92
Defendants' Verified Answer & Rouhanifard Aff.	97, 97-1
Intervenor-Defendants' Response to Plaintiffs' Statement of Uncontested Facts	93
Kim Aff. in Opposition	93-1 through 93-16
Intervenor-Defendants' Memorandum of Law in Opposition	93-17, 95
Intervenor-Defendants' Verified Answer	96
Reply Memorandum of Law in Support of Plaintiffs' Motion	98
Appendix to Plaintiffs' Reply Memorandum	99

[1] Apparently the Motion Support Office has rejected the Notice of Motion. Because of time exigencies, and because all parties were desirous of a prompt resolution of the issues raised, the court agreed to hear oral argument on the motion on the papers filed before it left on vacation on July 21, 2011 notwithstanding the Motion Support Office's rejection of the Notice of Motion and the lack of a motion sequence number being assigned. Because all parties were fully heard on the motion and the court has had an opportunity to review all the enumerated papers, the Clerk of Court is directed to accept the Notice of Motion e-filed as Document No. 84 and to assign this motion an appropriate sequence number forthwith and accept this decision and order as resolving said motion.

APPEARANCES:

Plaintiffs
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PAUL G. FEINMAN, J. :

Plaintiffs in this action are concerned parents of school-age children who attend one of the public schools currently located at the Brandeis Educational Campus (Brandeis Campus). Defendants are the Chancellor of the New York City public school system as well as the executive branch agency charged with overseeing educational policy for the City of New York. Intervenor-defendant Success Academy Charter School (Success Academy) is a charter school which is intended to serve kindergarten and elementary school children. In this lawsuit, plaintiffs seek, among other things, to prevent the co-location of Success Academy at the Brandeis Campus during the 2011-2012 school year. Brandeis Campus currently houses five public high schools.[2] The court previously denied plaintiffs' application for a temporary restraining order and motion for a preliminary injunction. The plaintiffs now seek partial summary judgment. Upon a search of the record, the court denies plaintiffs' motion and dismisses the action in its entirety.

I. Background and Arguments

The first attempt to halt this proposed co-location was made in response to a vote of the

[2]There is a dispute as to whether the Young Adult Borough Center, which is housed at Brandeis, is a "school" or a "program," as discussed *infra*.

Panel for Educational Policy (PEP) made on February 2, 2011 (February PEP vote), approving the co-location. On April 8, 2011, plaintiffs brought an Article 78 proceeding against defendants challenging the co-location, entitled *Steglich v Board of Education*, Index No. 104300/11 (Steglich 1). Defendants opposed the challenge.

On June 1, 2011, defendants abandoned the original PEP vote, and provided, in the same month, a new notice of the proposed co-location, with a revised Educational Impact Statement (EIS), and revised Building Utilization Proposal (BUP). On June 27, 2011, after public hearings were duly held on the revised proposal, PEP again voted to approve the co-location (June PEP vote).

Following these revisions, and before the June PEP vote, plaintiffs commenced the present action. On June 30, 2011, plaintiffs filed an amended complaint, seeking to have the June PEP vote declared a nullity.[3]

Plaintiffs argue that (1) the Department of Education (DOE) lacked the authority to revise the EIS and BUP after the February PEP vote, in that the February PEP vote was a final determination of the issue on the administrative level; (2) the revised EIS and BUP are improper, because, under the Education Law (EL), they are untimely, having been brought less than six months before the start of the school year; (3) the revised EIS impermissibly includes a school not mentioned or addressed in the original EIS; and (4) defendants did not comply with EL notice requirements prior to the June PEP vote, by providing a notice of hearing in English only, and then, purportedly in an untimely manner, published the notice in Spanish. On this motion, plaintiffs seek partial summary judgment voiding the June PEP vote.

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[3]All parties agree that Steglich 1 has been abandoned as moot.

In response, defendants, and intervenor-defendants (all parents of school-age children who are slated to attend Success Academy, and who, as a result, support the co-location), argue that the Success Academy would be placed in an under-utilized space within Brandeis, and so cause no harm to the existing schools. For example, some of the rooms allocated to Success Academy are currently being used to store file cabinets and extra furniture. They maintain that this court lacks jurisdiction over plaintiffs' action and the present motion, because (1) the Commissioner of the State Education Department (SED) has exclusive, original jurisdiction over the issue; (2) plaintiffs have failed to exhaust their administrative remedies, in that they did not refer their grievance with the PEP vote to the Commissioner, in derogation of the EL; or (3) that the court should defer to the Commissioner as a matter of primary jurisdiction.

On the merits, defendants argue that (1) they had the right to revise the EIS and BUP after the February PEP vote; (2) the revised EIS and BUP were timely brought; (3) the revised EIS did not include a new school, as the Young Adult Borough Center (YABC) is a "program" not a "school"; and (4) defendants complied with all statutory notice requirements, in that the notice of hearing concerning the revised EIS and BUP was timely, despite the fact that a Spanish version appeared later than the original notice.

II. Discussion

In a recent decision of this court (*Mulgrew v Board of Education*, ___Misc 3d___, 2011 NY Slip Op 21252 [Sup Ct, NY County 2011]) (*Mulgrew*), this court found that it had concurrent jurisdiction with the Commissioner to address the validity of a PEP vote, despite language in EL §§ 2853 (3) (a-5) and 310, citing that a dispute under these sections "may" be directed to the Commissioner.

In a totally different lawsuit between the same parties, concerning class size, *Mulgrew v Board of Education* (___AD3d___, 2011 NY Slip Op 06088 [1st Dept 2011]) [*Mulgrew 2*), the Appellate Division, First Department, very recently released a decision which makes findings and reaches conclusions which necessarily require this court to reconsider its earlier interpretation of the EL provisions concerning the SED Commissioner's jurisdiction. This court's earlier analysis was conducted without benefit of controlling or persuasive appellate authority interpreting the relevant EL provisions.

In *Mulgrew 2*, the Appellate Division found that an action brought to decide a dispute involving Education Law § 211-d should have been brought before the Commissioner before it was brought before the court. The language of the statute was extremely specific as to this point, and so, the Court's determination is not surprising.

EL § 211-d, denominated the Contract for Excellence, is concerned with the allocation of funds to the goal of reducing class sizes in New York City. Reduction of class size was to be accomplished "through creation or construction of more classrooms and school buildings, placement of more than one teacher per classroom, or by other means (Education Law § 211-d [2] [b] [ii])." *Mulgrew 2*, 2011 NY Slip Op 06088, at *2. The statute provides that "the 'sole and exclusive remedy' for violation of this paragraph would be a petition to the State Education Department Commissioner, whose decision would be 'final and unreviewable.'" *Id.*, citing EL § 211-d (2) (b) (ii).

Inasmuch as this is not the section of the EL at issue in the present case, were this all the Appellate Division had held, this court would have no more guidance as to how to proceed in this action than it did previously. However, the Court went on to determine that the plaintiffs in the

Mulgrew 2 class size case had also failed to exhaust their administrative remedies in approaching the court in the first instance, even if EL § 211-d (2) (b) (ii) did not apply, because under EL § 310 (7), a statute which lists the issues which "may" be brought to the attention of the Commissioner, the matter was particularly within the expertise of the Commissioner. The Court reflected that EL § 310 (7) "does not provide for exclusive or original jurisdiction," but that, it would be "consistent with the statute's scheme to require those petitioner-organizations whose complaints do not fall under section 211-d (7) to exhaust their remedies under Education Law § 310 (7) before proceeding to court." *Id.* at *6.

The Court reasoned that:

> the issue raised by petitioners is whether the Board of Education improperly utilized funds allocated for the particular purpose of reducing class size to make up for reductions from its other funding sources. Determination of this point falls squarely within the purview of the State Education Department, as it will require review and comparison of budgets, expenditures and funding allocations.

Id.

In the present action, the court is faced with issues regarding how the Department of Education allocates its resources for the purpose of placing new schools within already existing schools, with emphasis on fairness of the allocations. Although, as this court previously found, and the Appellate Division clarifies, there is indeed concurrent jurisdiction over these issues, the determination in *Mulgrew 2* appears to show a decided reluctance on the part of the higher Court to take on disputes of this nature. In other words, the Appellate Division's decision makes clear that, in the first instance, disputes of this nature should be heard by the executive branch agency with the relevant expertise, here the State Education Department Commissioner. In short, it appears that the issues raised by the co-location of Success Academy in the Brandeis Campus

should be heard *in the first instance* by the Commissioner, and not by the court. If aggrieved by the Commissioner's final determination, the parties have appropriate remedies at that juncture to seek judicial review of his actions.

III. Conclusion

For the reasons explained above, plaintiffs' motion must be denied, and upon a search of the record pursuant to CPLR 3212(b), intervenor-defendants' informal request for summary judgment granted, and the action dismissed. It should be emphasized that this dismissal does not constitute any factual finding by this court as to the propriety of the planned co-location; rather, the action is dismissed because procedurally, the court finds that in light of *Mulgrew v Board of Education* (___AD3d___, 2011 NY Slip Op 06088 [1st Dept 2011]), the State Education Department Commissioner should be permitted to exercise his concurrent jurisdiction in the first instance. Upon a final determination by the Commissioner, any aggrieved party may, of course, exercise any right to judicial review it may have by statute.

Accordingly, it is

ORDERED that the Motion Support Office and the Clerk of Court are directed to accept the Notice of Motion e-filed as Document No. 84 as properly filed and to assign this motion an appropriate motion sequence number forthwith and to then file this decision and order as resolving said motion; and it is further

ORDERED that the motion for partial summary judgment brought by plaintiffs is denied; and it is further

ORDERED that, pursuant to CPLR 3212 (b), summary judgment dismissing the complaint is granted to defendants and intervenor-defendants; and it is further

ORDERED that the complaint is dismissed with costs and disbursements to be accorded to defendants and intervenor-defendants as taxed by the Clerk of the Court, upon presentation of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: August 12, 2011

J.S.C.