SUPREME COURT OF THE STATE OF NEW YORK
ALBANY COUNTY

In the Matter of an Article 78 Proceeding

Nidia Cortes, Virgil Dantes, AnnMarie Heslop, Curtis Witters, On Behalf of Themselves and their Children,

Index No.05102-16
Hon. Kimberly A. O'Connor

Petitioners,

-against-

ROBERT MUJICA, Director, New York State Division of Budget; NEW YORK STATE DIVISION OF BUDGET, MARYELLEN ELIA, New York State Commissioner of Education, NEW YORK STATE EDUCATION DEPARTMENT

Respondents.

MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENTS MUJICA'S AND DIVISION OF BUDGET'S MOTION TO DISMISS

I. PRELIMINARY STATEMENT

Petitioners are parents of students in three New York State public schools: Roosevelt High School, Yonkers; William S. Hackett Middle School, Albany; and JHS 80 Mosholu Parkway Middle School, Bronx, New York City. Petitioners brought this Article 78 mandamus proceeding seeking a court order to compel 1) Respondents Director Robert Mujica ("Mujica") and the Division of Budget ("DOB") to release to these schools the second year of Transformation Grant funding pursuant to a two year, $75 million appropriation by the Legislature pursuant to Chapter 53 of

the Laws of 2015; and 2) Respondents Commissioner MaryEllen Elia ("Elia") and the State Education Department ("SED") to release those funds to the schools.

On September 29, 2016, Respondents Elia and SED submitted papers in response to Petitioners Verified Petition, opposing only Petitioners' request that these Respondents immediately release all funds, upon receipt, to the subject schools. Respondents explained that, since Chapter 53 Transformation Grants are processed on a reimbursement basis, they opposed immediate release of all funds.[1] Respondents Elia and SED, however, support Petitioners request for an order compelling Respondents Mujica and DOB to immediately release the second year Transformation Grant funding SED.

Respondents Mujica and DOB also submitted a response to this Court, which included a motion to dismiss the Petition, affidavits, and a memorandum of law with exhibits.

This Court held oral argument on the matter on September 30, 2016. By the parties' consent, the oral argument addressed all issues raised in the Petition – both procedural and substantive -- and the Respondents' responsive filings, respectively. However, upon Petitioners' request, the Court permitted the Petitioners to file a supplementary written response to two procedural issues raised by Respondents Mujica and DOB in their September 29th filing: statute of limitations and standing. On all other issues raised by Respondent Mujica and DOB, Petitioners rely on their Petition, Affirmation and Exhibits, and oral argument, along with the response and oral argument of Respondents Elia and SED.

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[1] At argument on the Petition before this Court September 30th, Petitioners withdrew their request to have the second year Grant funding released immediately by SED to the schools, accepting the SED's position that the funding, upon receipt from DOB, would continue to be provided on a reimbursement basis.

II. STANDARD FOR A MOTION TO DISMISS

Under New York law, in assessing the adequacy of a complaint or petition on a motion to dismiss, the court must give the pleading a liberal construction, accept the facts alleged in the complaint to be true, and afford the plaintiff the benefit of every possible favorable inference. Landon v. Kroll Laboratory Specialists, Inc., 3. N.Y.3d 1, 5 (2013); J.P. Morgan Securities, Inc. v. Vigilant Insurance Company, 21 N.Y.3d 324, 334 (2013). Thus, in evaluating Respondent Mujica and DOB's motion to dismiss, Petitioners' allegations must be accepted as true.

III. THE STATUTE OF LIMITATIONS DOES NOT BAR THIS ARTICLE 78 PETITION

A. The Statute of Limitations is Not a Bar Because Respondents Mujica and DOB are Under a Continuing Statutory Duty To Release the Second Year Grant Funding

It is well established that when an agency or official is under a continuing statutory duty to perform an action, the Statute of Limitations is not a defense to claims based on breaches of that duty during the limitations period. New York State Psychiatric Ass'n v. New York State Dept. of Health, 71 A.D.3d 852,856 (2d dep't 2010); DeCintio v. Cohalan, 18 A.D.3d 872 (2d Dep't 2005); Policemen's Benevolent Ass'n of Village of Spring Valley v. Goldin, 266 A.D.2d 294 (2d Dep't 1999); Lippold v. Board of Ed. of City of New York, 67 Misc.2d 499, 503 (Sup. Ct, NY County, 1971); Janke v. Community School Bd. of Community School Dist. No. 19, 186 A.D.2d 190 (2d Dep't 1992). Each new violation of that continuing duty gives rise to a corresponding new right to demand compliance with the statute. New York State Psychiatric Ass'n v. New York State Dept. of Health, 71 A.D.3d at 856.

For example, in Janke v. Community School Bd. of Community School Dist. No. 19, 186 A.D.2d 190 (2d Dep't 1992), a teacher was informed in a letter that he was placed on medical leave without pay more than four months before he filed an Article 78 petition. However,

teacher contended he was improperly suspended without pay, in violation of statute, prior to the date of that letter. Because the petitioner alleged that the respondents were under a continuing statutory duty to pay the teacher, the court held that there was no Statute of Limitations bar. As the court held, "[w]here the claim is that a public official has failed to perform a continuing statutory duty, the right to relief will not be barred by the four month Statute of Limitations." Janke, 186 A.D.2d at 193.

Similarly, in New York State Psychiatric Ass'n v. New York State Dept. of Health, 71 A.D.3d 852, (2d Dep't 2010), the petitioner contended that the respondents had an ongoing duty under the Social Services Law to reimburse Medicare fees. The Appellate Division held that this ongoing statutory duty barred the application of the Statute of Limitations because each day respondents did not comply with the statute created a new violation upon which the petitioner could bring an Article 78 proceeding. New York State Psychiatric Ass'n v. New York State Dept. of Health, 71 A.D.3d at 856.

In the case before this Court, Petitioners' contend that Respondents Mujica and DOB have a continuing duty under Chapter 53 of the Laws of 2015 to release the second year of Transformation Grant funding throughout any Statute of Limitations period. Each day that these funds are not released – and continue to be withheld by DOB -- gives rise to a corresponding new right to demand compliance with Chapter 53. Therefore, the well-established principle of a continuing governmental duty removes the four-month Statute of Limitations as a bar to Petitioners' Article 78 proceeding before this Court.

B. Even if the Statute of Limitations Applied, Respondents Mujica and DOB Failed to Meet their Burden to Notify Petitioners of the Statute of Limitation Period

Under New York Law, it is axiomatic that a party seeking to assert the Statute of Limitations as a defense has the burden of establishing that the petitioner was provided notice of the determination more than four months before an Article 78 proceeding was commenced. Romeo v. Long Island R.R. Co., 136 A.D.3d 926 (2d Dep't 2016); Bill's Towing Service, Inc. v. County of Nassau, 83 A.D.3d 698 (2d Dep't 2011); Berkshire Nursing Center, Inc. v. Novello, 13 A.D.3d 327 (2d Dep't 2004). Moreover, the notice required under New York law must leave no doubt that the agency has reached a definitive position and that there would be no further administrative action. Matter of Best Payphones, Inc. v Department of Info. Technology and Telecommunication, 5 N.Y.3d 30, 34 (2d Dep't 2005); Matter of Essex County v Zagata, 91 N.Y.2d 447, 454 (1998).

In Bill's Towing Service, Inc. v. County of Nassau, 83 A.D.3d 698 (2d Dep't 2011), petitioner, a bidder for a County contract, was aware that there was a higher bidder. However, the County proffered no evidence that the petitioner was advised that the bid was accepted by the County on the date asserted as a defense, or on any other date more than four months before this proceeding was commenced. Accordingly, the Appellate Division held that the respondent failed to meet its burden of establishing that the petitioner was notified of its action.

In Berkshire Nursing Center, Inc. v. Novello, 13 A.D.3d 327 (2d Dep't 2004), plaintiffs challenged an agency regulation and defendants moved to dismiss based on the Statute of Limitations. The Appellate Division held that the defendants failed to meet their burden of notice to the plaintiffs because the record contained only a series of ambiguous communications between the parties. As the court also made clear, any "ambiguity created by the defendants

must be resolved against them" when the issue pertains to a statute of limitations bar to bringing an action. Berkshire 13 A.D.3d at 328; see also, LaSonde v. Seabrook, 89 A.D.3d 132, 136 (1st Dep't 2011)(Appellate Division holding that although the respondents wrote to petitioners, their communication "lacked the clarity of an actual determination required for the statute of limitations to start running").

In this matter, Respondents DOB and Mujica candidly conceded at oral argument that they never notified the schools directly that the second year Transformation Grant funding would be withheld. Rather, Respondents DOB and Mujica asserted that this Court should rely on two actions they claim triggered the Statute of Limitations period.

First, Respondents cite to the affidavit of Respondent Mujica filed on September 29, 2016 in which Director Mujica makes the assertion – without any evidentiary support -- that at some point on or before April 20, 2016 "a determination was made" that the schools removed from the "persistently failing" list "were not eligible to receive Transformation Grant Funding for the 2016-17 school year." Mujica Affidavit, ¶5. This post hoc, self-serving statement in no way constitutes proper notice that can serve to bar Petitioners from bringing this Article 78 proceeding. Respondent Mujica provides no specifics as to the unnamed individual or group of individuals who made this determination and proffers no support to show that this determination was publicly issued to anyone, let alone in a manner sufficient to put the Petitioners on notice for statute of limitations purposes.

Second, Respondents assert that the Statute of Limitations began to run in April when a DOB spokesperson made a statement "to a reporter" that releasing the second year Grant funding to those schools removed from the "persistently failing" list "would be contrary to law."

Mujica Affidavit, ¶5, Respondents DOB's and Mujica's Memorandum of Law, p.18. This press statement of the Respondents' opinion simply does not – and cannot – qualify as a notification of the agency's determination on the matter, nor was this notice communicated to the affected schools or in any other manner sufficient to put Petitioners on notice that the Statute of Limitations period to challenge that determination had begun. As in Bill's Towing Service, Inc. v. County of Nassau, 83 A.D.3d 698 (2d Dep't 2011), even if Petitioners read the media account containing the DOB spokesperson's statement, it is wholly insufficient to meet Respondents burden to provide public notice to the affected schools of the agency's determination on the availability of second year Grant funding. The record before this Court makes clear that Respondents Mujica and DOB failed to meet their burden of demonstrating the requisite notice for commencing the Statute of Limitations period.

In fact, Petitioners contend that the Respondent DOB did not make – and still has not made -- a final determination that would constitute triggering the four-month Statute of Limitations in this matter. Respondents Elia and SED conceded at oral argument that SED, the agency charged by the Legislature with implementing the Chapter 53 grant program, never sent written notification to the schools that the second year Grant funding would not be forthcoming. Nor should they have issued such notice, given that these Respondents agree with Petitioners that Respondents Mujica and DOB have no statutory authority to withhold these funds for the 2016-17 school year. Moreover, the SED did not even remove the schools in question from the "persistently failing" list until June 30, 2016. Respondents Elia's and SED's Memorandum of Law, p. 25. Thus, the event which, in the opinion of Respondents Mujica and DOB justified the decision

in April to withhold the Transformation Grant Funding – SED removal of the schools from the "persistently failing" list -- did not even occur until June 30, 2016.

Further, the public confusion over the controversy between the Respondents DOB and SED regarding the release of the second year Grant funding led Petitioners' counsel to write to Respondent Mujica on July 28, 2016 requesting a clear and final statement on whether DOB would release the funds. Petitioners' Exhibit M. Yet neither Respondent Mujica nor DOB has, to date, responded to Petitioner's request.

It is clearly evident on this record that Respondents Mujica and DOB failed to meet their burden to establish of providing unambiguous notice to affected schools and the public of the agency's final determination that the second year Grant funding would not be released. The Respondents' rely on post hoc assertions made for the first time before this Court that a news media account of their spokesperson's statement serves to start the Statute of Limitations period for this action. If anything, the Statute of Limitations period still has not begun given the failure to notify the affected schools and the Respondent Mujica's and DOB's failure to respond to Petitioner's July 28, 2016 demand letter. Thus, even if the Statute of Limitations did apply in this action, Respondents provide no basis for concluding that they have met their burden to demonstrate proper and sufficient notice of the agency's determination regarding the status of the second year of Grant funding.

IV. PETITIONERS HAVE STANDING TO BRING THIS ARTICLE 78 PETITION

A. Petitioners have established harm within the zone of interest protected by Chapter 53

To establish standing, a petitioner need only show that the administrative action will have a harmful impact on the petitioner and that the interest asserted is arguably within the zone of

interest to be protected by the statute. Dairylea Cooperative, Inc. v. Walkley, 38 N.Y.2d 6,9 (1975). Both the Court of Appeals and the Third Department have evinced a liberal view of standing, emphasizing that "[t]he increasing pervasiveness of administrative influence on daily life... necessitates a concomitant broadening of the category of persons entitled to a judicial determination" of administrative actions." Dairylea, 38 N.Y.2d at 10; see also, New York State Society of Surgeons v. Axelrod, 157 A.D.2d 54, 56 (3d Dep't 1990); McKinney v. Commissioner of New York State Dept. of Health 15 Misc.3d 743, 752 (Sup. Ct, Bronx Co, 2007) (noting that Court of Appeals and Third Department take a liberal view of standing for decisions by administrative agencies). Moreover, New York law accords a broad view of standing when it is consistent with legislative intent of the statute at issue. Matter of Douglaston Civic Assn. v Galvin, 36 N.Y.2d 1 (1974).

In this matter, it is clear that Respondents Mujica's and DOB's refusal to release the second year of Transformation Grant funding directly impacts the education program in Petitioners' children's schools, and that the withholding of those funds is causing -- and will continue to cause -- harm to those children. Moreover, the interest asserted is clearly within the ambit of the zone protected by Chapter 53, the statute appropriating the Transformation Grants. The Legislature enacted this statute to advance the interests, and improve outcomes, for students in the low-performing twenty schools receiving the Transformation Grants. The goal of the Grant funding is to provide supports to enable children in these schools, including Petitioners' children, to improve their academic performance over a two school year period. Moreover, the Grant funding enabled these schools to provide services and programs to Petitioners children and their fellow students during the first school year that would otherwise not be available but

for these funds. Denying the second year of this funding will unquestionably cause harm to Petitioners' children and their classmates for the duration of the 2016-17 school year.

Respondents Mujica and DOB assert that Petitioners' interest is no different than other taxpayers. The nature of this Grants under Chapter 53 belie this assertion. The Grant funding at issue are expressly intended to improve education programs and outcomes in Petitioners' children's schools. Thus, not only do Petitioners have an interest unique and distinct from taxpayers in general, they also have an interest distinct from parents in their respective school districts whose children are not enrolled in the affected schools.

Respondents Mujica and DOB rely on Matter of Clean Water Advocates of N.Y., Inc. v New York State Department of Environmental Conservation, 103 A.D.3d 1006 (2013), to support their claim that Petitioners lack standing. In that case, the petitioners belonged to an association whose membership included one homeowner with property near a proposed stormwater pollution prevention plan challenged by the association. The court ruled that the proximity of the property to the plant alone did not show harm to the property, and the remaining association members could not establish that the proposed plant would harm their use of natural resources in a way different from the rest of the public. The Petitioners' position in this case is far from the diffuse harm to petitioners in Clean Water. Here, Petitioners' children will suffer direct -- and not diffuse or speculative -- harm as a result of their schools' inability to continue to provide a second year of essential programs and services to improve their performance in schools. Clearly, the harm here is direct, immediate and ongoing, implicating the opportunities made available to Petitioners children this school year, which, when completed next June, cannot be recovered.

B. Respondents Mujia and DOB Misuse a Claim of Lack of Standing to Shield their Actions from Judicial Scrutiny

It is clear that "[s]tanding principles, which are in the end matters of policy, should not be heavy-handed" and should be applied to favor judicial review. Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of the Town of North Hempstead, 69 N.Y.2d 406,413 (1987). Moreover, a claim of standing cannot be asserted in an attempt to shield an agency's decision from judicial review. Matter of Har Enters. v Town of Brookhaven, 74 N.Y.2d 524, 529. (1989).

Indeed, at oral argument, Respondents Mujica and DOB baldly asserted that their "decision" to withhold the second year Grant funding is completely shielded from judicial scrutiny. These Respondents contend that Petitioners' only recourse to secure the Grant funding is to seek redress from the Legislature or to petition Respondents Elia and SED to reverse their decision to remove the schools from the "persistently failing" list. Thus, at bottom, Respondents Mujica and DOB contend that their actions are beyond the purview of this Court's review.

This position distorts both Respondents' Mujica's and the DOB's actions -- and Petitioners' claim in this matter. Petitioners, along with Respondents Elia and SED, contend that Respondents Mujica and DOB have violated Chapter 53 by creating an additional requirement for DOB approval for the second year of Grant funding that does not exist in the statute. While Respondents Mujica and DOB assert that they at some point decided the schools removed by SED on June 30 from the "persistently failing' list were no longer eligible for the second year Gant funding, Petitioners and Respondents Elia and SED contend that they have no statutory or constitutional authority to make that decision in the first place. As Petitioners and the Respondent Elia and SED demonstrate, the Transformation Grant is a two-year grant with no

provision for a second approval by anyone- neither Respondent Mujica, DOB nor Respondent Elia or SED – mid-way through the grant period.

Petitioners and Respondents Elia and SED underscore the clear language of Chapter 53 appropriating the Transformation Grants for two years; the requirement to read that statute so as to harmonize it with its companion legislation; New York Education Law Section 211-f; the statutorily-mandated spending plan approved by Respondent DOB; and the Legislature's intent for the Grant program. All of these matters of statutory construction are clearly the duty and within the power of the judicial branch. Claim of Lintz, 89 A.D.2d 1038 (3d Dep't 1982); see also, Meier v. Ma-Do Bars, Inc., 106 A.D.2d 143 (1985). Moreover, Petitioners' further claim that Respondents Mujica and DOB exceeded their authority and infringed on the Legislature's prerogatives by impounding funds already appropriated by the Legislature for twenty-one months. This issue, too, is subject to judicial review. Oneida County v. Berle, 49 N.Y.2d 515 (1980); Matter of City of New York v New York State Div. of Budget, 160 Misc.2d 1028 (Sup. Ct, N.Y. County, 1994). The attempt by Respondents Mujica and DOB to use standing in order to shield their actions from judicial scrutiny must fail.

C. Petitioners Have Standing Because the Actions of Respondents Mujica and DOB are of Great Public Interest

It is well established that when a citizen seeks to compel a public officer to perform his/her public duty, that citizen can bring a proceeding to compel that officer to do so, even absent personal aggrievement. Police Conference of New York, Inc. v. Municipal Police Training Council, 62 A.D.2d 416 (3d Dep't 1978); Albert Elia Bldg. Co. v New York State Urban Dev. Corp., 54 A.D.2d 337 (4th Dep't 1976). Standing is particularly important when the matter is of great public interest. Police Conference, 62 A.D.2d at 416.

In the instant case, two matters of vital public interest are at stake. First, Petitioners seek to ensure that public officials and agencies, such as Respondents Mujica and DOB, act within the bounds of their express constitutional and statutory power. Furthermore, Petitioners seek to safeguard the educational well-being and rights of their own children and children in the affected schools. In New York, there is a "unanimous recognition of the importance of education in our democracy." Campaign for Fiscal Equity v. State, 100 N.Y. 893 (2003). Thus, even if the court were to find that somehow, Petitioners do not have standing to challenge the acts that have directly harmed the educational welfare of their children, the court should find that these matters of vital public interest compel a finding that Petitioners have standing to bring this Article 78 proceeding.

V. CONCLUSION

For the reasons stated above, and for the reasons articulated in the oral arguments by Petitioners and Respondents Elia and SED, as well as the Petition and Affirmation in support of the Petition and Exhibits, and the responsive filing by Respondents Elia and SED, this Court should deny the Respondents Mujica and DOB motion to dismiss.

Dated: October 3, 2016

Respectfully Submitted,

David G. Sciarra, Esq.
Wendy Lecker, Esq.
Education Law Center
60 Park Place Suite 300
Newark, NJ 07102
(973) 624-1815
wlecker@edlawcenter.org
Attorneys for Petitioners