

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

PRESENT: Hon. Peter H. Moulton
Justice

PART 40 B

Shaw, et al

INDEX NO. 100393/13

MOTION DATE _____

Walcott, et al^{v.}

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Papers Numbered

Notice of Motion/Order to Show Cause — Affidavits— Exhibits _____

Answering Affidavits — Exhibits _____

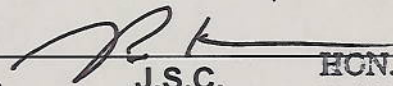
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that the

Dated: 6/7/13

New York, New York


J.S.C. HON. PETER H. MOULTON
PETER H. MOULTON SUPREME COURT JUSTICE

- 1. Check one: Case Disposed Non-Final Disposition
 - 2. Check as Appropriate: Motion is: Granted Denied Granted in Part Other
 - 3. Check if Appropriate:: Settle Order Submit Order
- Do Not Post Fiduciary Appointment Reference

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Supreme Court: New York County
Part 40B

-----X
In the Matter of the Application of

LISA SHAW, KAREN SPROWAL, SHINO TANIKAWA,
ISAAC CARMIGNANI, on behalf of themselves
and their children

Petitioners,

For a Judgment under Article 78 of the
Civil Practice Law and Rules,

-against-

Index No. 100393/13

DENNIS WALCOTT, CHANCELLOR, NEW YORK CITY
DEPARTMENT OF EDUCATION, NEW YORK CITY
DEPARTMENT OF EDUCATION

Respondents.

-----X
Peter H. Moulton, Justice

In this Article 78 proceeding petitioners seek to compel respondents to perform what they consider to be ministerial acts concerning New York's City's proposed "Contract for Excellence" for the 2012-13 school year. The Contract for Excellence Law, Education Law § 211-d, was passed by the state legislature in 2007. It contains provisions to promote transparency and accountability in the deployment of funding increases to public schools in certain school districts in the State. The statute also seeks to direct funding increases to "support new programs and new activities or expand the use of programs and activities demonstrated to improve

student achievement.” (Education Law § 211-d(2)(a)(v).) Each school year, school districts covered by the law must draft a Contract for Excellence that specifies how they will spend increases in funding for the district in that year.

BACKGROUND

Petitioners are parents of children in New York City public schools, suing on behalf of themselves and their children. It is undisputed that the Contract For Excellence Law applies to the school district of the City of New York.

Petitioners seek to compel the City’s Department of Education (“DOE”) to hold hearings in each of the five boroughs concerning the 2012-13 Contract for Excellence, to extend the deadline for public comment on the contract, to post transcripts of the hearings on its website, to post the final Contract for Excellence on its website and to submit a final Contract for Excellence to the state’s Commissioner of Education.

Pursuant to regulations promulgated by the Commissioner of Education, by September 14, 2012 the DOE had to publicize the City’s proposed 2012-13 Contract for Excellence and post the Contract on its website for a thirty-day public comment period by September 14, 2012.

The DOE missed that deadline, and did not post its proposed Contract for Excellence until February 14, 2013. Petitioners fault

the DOE for failing to clearly post on its website the deadline for comments on the proposed Contract. Respondents subsequently extended the comment period to March 22, 2013.

Respondents contend in their motion papers that they will post the transcripts of meetings, the public comments, and the Contract for Excellence on DOE's website and forward it to the State Commissioner of Education for approval. It appears that respondents did execute those actions. The public comments, DOE's assessments of public comments, the transcripts of Community Education Council meetings where the Contract for Excellence was discussed, and the final Contract for Excellence, have all gone up on DOE's website. The court was not able to determine from the website whether the Contract for Excellence has been forwarded to the State Commissioner.

The parties' primary disagreement in this lawsuit concerns the number and nature of public forums that must be held concerning the DOE's proposed annual Contract for Excellence while it is in formation.

Petitioners argue that the statute requires 1) that a public hearing on the Citywide proposed Contract for Excellence be held in each of the five boroughs, and 2) that public hearings on district Contracts for Excellence must be held in each of the City's

community school districts.¹

According to respondents, the first category of meeting, the county meeting, is not necessary. Respondents contend that their statutory duty to hold public hearings on a proposed Contract for Excellence is discharged when the topic is discussed at meetings of each of the City's thirty-two Community Education Councils and at one meeting of the Citywide Council for High Schools.

DISCUSSION

A. Exhaustion of Administrative Remedies

As a threshold matter respondents assert that this action is not ripe because petitioners allegedly did not exhaust the administrative appeals allowed by the Contract for Excellence Law. Respondents first invoke section 211-d(2)(b) for the proposition that "all challenges" to the Contract for Excellence program have been reserved to the Commissioner of Education.

That is not what that section says. Rather, section 211-d(2)(b) states that the "sole and exclusive remedy for a violation of the requirements of this paragraph" shall be a petition to the State Education Commissioner. (Emphasis supplied.) In Mulgrew v Board of Education of the City School Dist. of the City of New York, (88 AD3d 72) the First Department interpreted this language

¹Section 211-d(4)(c) provides that community school districts' Contracts for Excellence must be "consistent with the citywide contract for excellence."

to apply to all three subsections of paragraph 211-d(2) (b), but not to other portions of the Contract for Excellence Law. The petitioners' claims herein do not have anything to do with those three subsections. Rather, petitioners challenge the process by which the City's 2012-13 Contract for Excellence was formulated.

However, Mulgrew does not end with that holding. While the Mulgrew court interpreted the petitioners' claim in that case as arising under section 211-d(2) (b) -- and therefore subject to that provision's administrative appeal requirements -- it went on to discuss how other claims under the Contracts for Excellence should be handled by trial courts.

This portion of the decision could be interpreted as dicta, but the fact remains that the Mulgrew court went out of its way to state that any challenge to a Contract for Excellence, whether it be to the formulation or to the implementation of a Contract for Excellence, is subject to administrative appeals provisions found elsewhere in the Contract for Excellence Law and in Education Law § 310(7). With respect to implementation of a Contract for Excellence, the Mulgrew court found that section 211-d(7) provides an appropriate means of administrative review. The court also opined that Education Law § 310(7) could be a desirable means of administratively appealing other claims that concern Contracts for Excellence. Mulgrew states that

in this context, it would be consistent with the [Contract for Excellence] 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.

(88 AD3d at 80.)²

Accordingly, it would appear that Mulgrew stated a preference, albeit in dicta, that aggrieved parties seek administrative appeals of any adverse decisions concerning Contracts for Excellence. As petitioners' challenge here is to the formulation of the 2012-13 Contract for Excellence, not to its implementation, section 310(7), and not section 211-d(7), would be the means by which petitioners could conceivably pursue an administrative appeal.

It is clear that petitioners did not pursue the option of administrative appeal, under section 310(7) or under any of the

² Education Law § 310 is a kind of catch-all administrative appeals provision. It provides in relevant part:

Any party conceiving himself aggrieved may appeal by petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article. The petition may be made in consequence of any action:

7. By any other official act or decision of any officer school authorities, or meetings concerning any other matter under this chapter or any other act pertaining to public schools.

other sections discussed above.³

Nonetheless, as the Mulgrew court acknowledged, Education Law § 310 does not afford exclusive or original jurisdiction to the Commissioner. (Mulgrew, supra 88 AD3d at 80.) The court finds that as the instant matter concerns a simple matter of statutory construction, and does not invoke the Commissioner's expertise, it is proper that this court exercise its concurrent jurisdiction over this dispute. Accordingly, the court declines to dismiss the petition for failure to exhaust administrative remedies.

B. Public Hearings

Education Law § 211-d(4) (a) provides that annual Contracts for Excellence "shall be developed through a public process, in consultation with parents or persons in parental relation, teachers, administrators, and any distinguished educators appointed

³A letter dated February 21, 2013, from petitioners' counsel to the Commissioner of Education complaining about development of the City's Contract for Excellence, does not qualify as a "petition" for purposes of section 310. The letter requests that the State Education Department "correct the timeline" for districts' submissions of their Contracts for Excellence consistent with the Contract for Excellence Law. It also seeks, for the 2013-14 school year, to include a hearing in each county of New York City.

Neither party has briefed whether this letter constitutes a "petition" under Education Law § 310. Indeed, petitioners' papers do not deal with the exhaustion requirement at all. In any event, the regulations governing such appeals make it clear that the letter does not qualify as a petition. (8 NYCRR §§ 275.3 - 275.18.) Therefore, the letter could not commence an administrative appeal under section 310.

pursuant to section two hundred eleven-c of this chapter." This public process includes public hearings.

Section 211-d(4) (b) continues:

Such process shall include at least one public hearing. In a city school district in city of one million or more inhabitants, a public hearing shall be held within each county of such City. A transcript of the testimony presented at such public hearings shall be included when the contract for excellence is submitted to the commissioner, for review when making a determination pursuant to subdivision 5 of this section.

A second series of public meetings is required by subsection © of section 211-d(4), which states:

In a city school district in a city of one million or more inhabitants, each community district contract for excellence shall be consistent with the citywide contract for excellence and shall be submitted by the community superintendent to the community district education council for review and comment at a public meeting.

The existence of these two separate sections demonstrates that petitioners are correct: the DOE must hold two types of public hearings: 1) a county-wide public hearing in each of the City's five counties on the City's proposed annual Contract for Excellence and 2) public hearings in each of the City's community school districts concerning each community district's own Contract for Excellence.

Respondents contend that the public hearings at the Community Education Council meetings can serve two purposes. According to

the DOE its statutory duty to hold public hearings on the City's annual Contract for Excellence is discharged when the topic is discussed at meetings of each of the City's thirty-two Community Education Councils and one hearing at the Citywide Council for High Schools. This argument would render subsection 211-d(4)(b) into surplusage. If the legislature believed that public hearings at Community Education Council meetings would discharge DOE's duty to hold public hearings there would have been no need for it to include subsection 211-d(4)(b) in the statute. It is an axiom of statutory construction that all sections of a statute must be given meaning. (See New York State Superfund Coalition Inc. v New York State Dep't of Environmental Conservation, 18 NY3d 289.) Additionally, the discussions at the Community Education Councils are supposed to be focused on district Contracts for Excellence. To require these Community Education Council meetings to do double duty dilutes that focus.

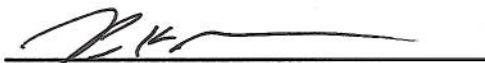
As the 2012-13 public school year is nearly at a close, there would be no point in directing the DOE to hold five borough-wide public hearings on the 2012-13 Contract for Excellence.

However, the Contract for Excellence Law, as currently written, mandates that the DOE hold such public hearings in each of the five boroughs in future school years. The DOE may not rely on its CEC meetings to satisfy its statutory duty in future years.

CONCLUSION

For the reasons stated it is DECLARED and ADJUDGED that Education Law § 211-d(4)(b), and its implementing regulations, require respondents to hold timely public hearings in each of the five boroughs concerning the City's proposed annual Contract for Excellence. It is further DECLARED and ADJUDGED that this duty is not discharged by Community Education Council meetings mandated by Education Law § 211-d(4)(c). This constitutes the decision and judgment of the Court.

DATE: June 7, 2013



A. J. S. C.

**RONALD H. MOULTON
SUPREME COURT JUSTICE**