SUPREME COURT
STATE OF NEW YORK COUNTY OF ALBANY

AYUBE HUSSEIN, PARENT OF A STUDENT IN THE ALBANY SCHOOL DISTRICT AS REPRESENTATIVE OF HER MINOR CHILD, et al.,

Plaintiffs,

-against-

DECISION/ORDER
Index No. 8997-08

STATE OF NEW YORK,

Defendant.

Appearances:

The Biggerstaff Law Firm, L.L.P.
By: Robert Biggerstaff
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Attorneys for the Plaintiffs

Hon. Andrew M. Cuomo
Attorney General of the State of New York
By: David Fruchter
The Capitol
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Attorney for the Defendant

Devine, J.:

Plaintiffs commenced the instant action for a declaratory judgment seeking a determination and declaration that 11 small city school districts are so substantially underfunded that they are unable to provide a sound basic education to the plaintiffs' children as required by Article XI, § 1 of the New York State Constitution. Plaintiffs consist of a number of parents and students in each of the 11 school districts. Defendant has moved to dismiss the action on the ground that it is premature and not ripe for adjudication because the State Legislature has

increased funding to the subject school districts and that the passage of time may show that such funding was sufficient to achieve schools which are capable of providing a sound basic education. Defendant has not moved to dismiss for failure to state a cause of action and, for the purposes of this motion, it will be assumed that the complaint states a valid cause of action.[1]

The doctrine of ripeness is intended to prevent courts from issuing advisory opinions. The role of the judiciary is to determine actual cases and controversies such that its judgments have an immediate impact upon the parties.[2] Judicial involvement is inappropriate when the harm envisioned by a plaintiff is contingent upon the happening of some future event, which may never occur and which is not within the control of the parties.[3] However, where the happening of the event is indeed likely to occur, a declaratory judgment action may be appropriate.[4] Defendant contends that a possible future event – namely that the current and planned future increased funding levels provided by Chapter 57 of the Laws of 2007 may successfully improve the subject school districts to the point where they attain acceptable student performance –

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[1] A prior similar action involving many of the subject school districts was dismissed for failure to state a cause of action on the ground that the complaint did not contain specific factual allegations with respect to each school district (New York State Assn. of Small City School Dists., Inc. v State of New York, 42 AD3d 648 [3d Dept 2007]). The complaint herein includes numerous specific factual allegations of deficiencies in each subject school district.

[2] see Cuomo v Long Is. Light. Co., 71 NY2d 349, 354 [1988]; New York Pub. Interest Research Group v Carey, 42 NY2d 527, 530-531 [1977].

[3] see Lewis v City of Gloversville, 246 AD2d 804, 804-805 [3d Dept 1998]; Matter of Town of Coeymans v City of Albany, 237 AD2d 856, 857-858 [3d Dept 1997].

[4] see Capital Dist. Enters., LLC v Windsor Dev. of Albany, Inc., 53 AD3d 767, 769-770 [3d Dept 2008]; Saratoga County Chamber of Commerce v Pataki, 275 AD2d 145, 158 [3d Dept 2000]; Prodell v State of New York, 211 AD2d 966 967-968 [3d Dept 1995].

renders the instant litigation premature. This Court concludes, however, that defendant's argument stands the doctrine of ripeness on its head. Plaintiffs' complaint is based upon past and current *actual* conditions. Defendant in effect contends that a possible future contingency may render the action moot. Accepting such a position could preclude judicial review whenever a defendant takes any step, no matter how meager, to ameliorate the conditions giving rise to the litigation.

Defendant also relies upon dicta in Campaign for Fiscal Equity, Inc. v State of New York, (8 NY3d 14, 20 [2006]), in support of its claim that the increased school funding is sufficient to meet constitutional requirements and likely to result in adequate student performance. However, plaintiffs were not parties to that litigation, the litigation was limited to schools in the City of New York and the dicta addressed upstate schools in general and did not specifically refer to the subject school districts. It is further unclear how much information was included on the record with respect to the actual cost of providing a sound basic education in the subject school districts. In addition, plaintiffs have shown that the state has frozen the increases in school aid and delayed implementation of the increases provided by chapter 57 of the Laws of 2007. While defendant's memorandum of law states that "the centerpiece of [Chapter 57] is the institution of Contracts for Excellence," which require school districts to expend state aid in specific new areas, plaintiffs allege that due to the freeze, they have insufficient funds to comply with such additional new expenses and meet their basic expenses. Thus the complaint alleges that the statute relied upon by defendant is actually responsible for exacerbating the lack of funding.

The complaint specifically alleges that the subject school districts currently have available funding below the per pupil spending levels necessary to provide a sound basic

education and that the state has failed to provide sufficient funding for a sound basic education in the subject school districts. It is further alleged that the state has failed to conduct a cost study to determine the actual cost of a sound basic education in the subject school districts and that the schools need an additional $270,000,000 per year to provide a sound basic education. In effect, the specific allegations of the complaint give rise to a strong inference that the future happening relied upon by defendant, namely that student performance may meet constitutional requirements, is unlikely to occur, that is, it is likely that the alleged constitutional violations will continue.

Finally, defendant has failed to submit any evidence with respect to the actual costs of providing a sound basic education in the subject districts and has thus clearly failed to show that the increased aid provided by Chapter 57 of the Laws of 2007 is sufficient or likely to result in acceptable student performance. Thus the claim that the action is premature is not supported by any facts contained in the record. In any event, it would clearly be inappropriate to make such a factual determination on a motion to dismiss on the ground that the action is not ripe. Defendant will certainly have an opportunity to establish that the funding levels are sufficient if and when the merits are reached.

It is therefore determined that the complaint is based upon allegations of current conditions and thus raises an actual case or controversy, the determination of which will immediately impact the parties. Accordingly, defendant's motion to dismiss is hereby denied.

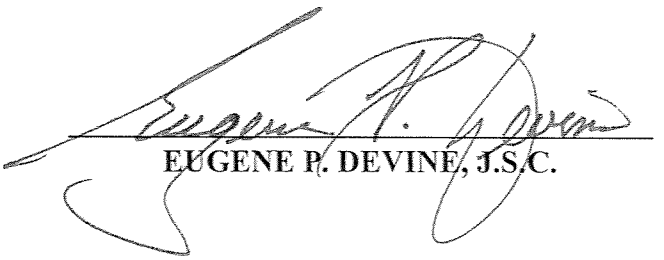
This memorandum constitutes both the DECISION and ORDER of the Court. This Original DECISION/ORDER is being sent to the attorneys for the plaintiffs. The signing of this DECISION/ORDER shall not constitute entry or filing under CPLR 2220. Counsel for the

plaintiffs is not relived from the applicable provision of that section with respect to filing, entry and notice of entry.

SO ORDERED

ENTER

Dated: July 21, 2009
Albany, New York



EUGENE P. DEVINE, J.S.C.

cc: David Fruchter

Papers Considered:

1. Defendant's Notice of Motion, dated March 27, 2009.
2. Affidavit of Alisa Timoney, with exhibits, sworn to March 27, 2009.
3. Defendant's Memorandum of Law, dated March 27, 2009.
4. Affirmation of Attorney Biggerstaff, dated May 5, 2009.
5. Affidavit of Eva Joseph, sworn to May 5, 2009.
6. Affidavit of John Xanthis, sworn to May 6, 2009.
7. Plaintiffs' Memorandum of Law dated May 7, 2009.
8. Defendant's Reply Memorandum of Law, dated June 11, 2009.