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

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NEW YORK CITY PARENTS UNION; CLASS SIZE MATTERS; NEW YORK COMMUNITIES FOR CHANGE; and LEONIE HAIMSON, NOAH GOTBAUM, STEPHANIE FIELDS, LASHAWN CHERRY, JACQUELINE PEREZ, CHRIS MOSS, AMANDA JACOBS, REGINA TIMBER, JERMAINE BLIGEN, NATASHA HOOPER, CHERYL AND ANGELO BLUE, SHARLENE HALE HALL, AMANDA COLON, ANGELA BALTIMORE, SANDRA E. HARPER, CYNTHIA GRIFFIN, HELENA CLAY, SONYA HAMPTON, ELLIOT WOFSE, HENRY CLEMENTE, YVONE WALKER, CYNTHIA BONANO, FAYE HODGE, and MUBA YAROFULANI, on Behalf of Their Children and Others Similarly Situated,

Plaintiffs,

-against-

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK and DENNIS M. WALCOTT, as Chancellor of the City School District of the City of New York,

Defendants.

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AFFIRMATION OF DEFENDANTS' COUNSEL IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Index No. 108538/11

EMILY SWEET, an attorney admitted to practice law in the State of New York, pursuant to CPLR § 2106 and subject to the penalty of perjury, affirms as follows:

1. I am an Assistant Corporation Counsel in the Office of Michael A. Cardozo, Corporation Counsel of the City of New York, attorney for the defendants Board of Education of the City School District of the City of New York (also known as the Department of Education, or "DOE") and Chancellor Dennis M. Walcott (collectively, "Defendants"). I submit this

affirmation in opposition to Plaintiffs' motion for a preliminary injunction directing the DOE to collect approximately 100 million dollars in rent from charter schools housed in DOE facilities.

2. The Intervenor-Defendants are also submitting papers in opposition to Plaintiffs' motion for preliminary injunctive relief, including a memorandum of law addressing the legal issues. Rather than submit a duplicative memorandum of law, we rely on the positions asserted by the Intervenor-Defendants in their memorandum of law.

Standards for Preliminary Injunctive Relief

3. To prevail on a motion for a preliminary injunction, the movant has the burden of demonstrating (1) a likelihood of success on the merits, (2) irreparable injury absent the granting of the injunction, and (3) a balance of the equities in favor of the movant. W.T. Grant Co. v. Srogi, 52 N.Y.2d 496, 517, 438 N.Y.S.2d 761 (1981). See CPLR 6301, 6311. Proof establishing these elements must be by affidavit and other competent proof, with evidentiary detail; if key facts are in dispute, the relief will be denied. See Faberge Int'l v. DiPino, 109 A.D.2d 235, 240, 491 N.Y.2d 345 (1st Dep't 1985). In this case, Plaintiffs seek to reverse a nearly decade-long practice of providing space to co-located public charter schools free of charge. In order to alter the status quo and receive the ultimate relief sought, *pendent lite*, the circumstances must be "extraordinary." St. Paul Fire and Marine Ins. Co. v. York Claims Service, 308 A.D.2d 347, 765 N.Y.S.2d 573 (1st Dep't 2003).

4. For the reasons set forth below and in the Intervenor-Defendants' accompanying memorandum of law, Plaintiffs have not met their burden overall or on any of the individual prongs. Accordingly, their request for preliminary injunctive relief must be denied.

Plaintiffs Have Not Established, and Cannot Establish, Irreparable Harm

5. "Irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." GFI Sec. LLC v. Tadition Asiel Sec. Inc., 873 N.Y.S.2d 511 (Sup. Ct., N.Y. Co., 2008) (citation, internal quotation, and subsequent history omitted). As an initial matter, Plaintiffs are challenging a practice of the DOE that has been in practice since at least 2002. See Affidavit of Recy Dunn ("Dunn Aff."). The fact that Plaintiffs waited until August of 2011 to commence this action undermines their contention of irreparable harm.

6. Second, since the relief sought by Plaintiffs is essentially monetary relief, as a matter of law, they cannot establish irreparable harm. See J.O.M. Corp. v. Department of Health, 173 A.D.2d 153, 154 (1st Dep't 1991); see also Intervenor-Defendants' Memorandum of Law at Point I.

7. In addition, as a matter of logic, their theory of harm is far too attenuated to establish an actual injury. Specifically, Plaintiffs contend that if the DOE received approximately 100 million dollars in rent, that amount "could fund the hiring of 1,000 to 2,000 teachers for a system which is suffering a decrease of 2,500 teachers in the upcoming school year" and "could allow the established educational deficiencies of the NYC Public School system to be addressed." See Pls. Memo at pp 5, 7. This is clearly speculative. As set forth in the Affidavit of Susan Olds, even assuming that Plaintiffs have correctly calculated the payments purportedly due to the DOE, such payments would have a limited effect on the DOE's 19 billion dollar budget and there is no guarantee that the funds would be spent on teachers, rather than other educational expenses.

8. Finally, Defendants dispute Plaintiffs' calculation of "costs" as set forth by Plaintiffs in the Affidavit of Leonie Hamson. The statute is silent as to how costs are to be

calculated. As explained in the Affidavit of Recy Dunn, there is no marginal cost to the DOE when it provides available space in DOE buildings to co-located public charter schools without charging the charter school for the use of the building, or for the operation and maintenance of the charter school. This is because students attending public charter schools co-located in DOE buildings would most likely attend DOE schools in DOE buildings if the charter school no longer existed. In light of this factual dispute, a preliminary injunction can not be issued. See Faberge Int'l, 109 A.D.2d at 240.

9. In short, Plaintiffs have fallen far short of carrying their high burden in demanding a mandatory injunction.

Plaintiffs Have Not Established a Likelihood of Success

10. Nor can Plaintiffs show a likelihood of success on the merits of their claim.

Plaintiffs Lack Standing

11. As a threshold matter, Plaintiffs lack standing to demand the payment of rent from public charter schools. As described above, Plaintiffs have not established an actual injury arising from the DOE's alleged failure to collect rent. Any purported injury is so generalized that it cannot, as a matter of law, constitute the concrete and particularized injury in fact required to establish standing. See Intervenor-Defendants' Memorandum of Law at Point II.

The Statute Does Not Require the DOE to Collect Rent in Co-locations

12. Plaintiffs contend that Education Law § 2853(4)(c) requires the DOE to enter into a contractual relationship in which the DOE receives rent in return for the provision of space and services to charters co-located with district schools in DOE buildings. However, the language of this provision is permissive: "A charter school *may* contract with a school district or the governing body of a public college or university for the use of a school building and grounds,

the operation and maintenance thereof. Any such contract shall provide such services or facilities at cost." Education Law § 2853(4)(c) (emphasis added). Nothing in this provision mandates that the DOE enter into a contractual relationship or prohibits it from providing space to public charters free of charge.

13. A review of the pertinent provisions of the Education Law demonstrates that the Legislature did not intend for subsection 4(c) to require either contracts or rent payments for co-locations. The Legislature's intent can be seen in other parts of the Education Law which, unlike subsection (4)(c), directly relate to the co-location process.

14. As the Court is aware, co-locations in New York City are governed by the detailed provisions set forth in Education Law § 2853(3)(a-3)-(a-5). The Legislature added these subsections to the Education Law in 2010, following many years of co-locations in the City School District. See Dunn Aff. The amended subsections set forth many new planning and disclosure requirements for co-locations. Yet, notably, these subsections did not require districts and charters to enter into contracts before commencing a co-location, nor did they obligate charters to pay rent. Subsection 3(a-3)-(a-5) does not contain any reference to subsection 4. Indeed, subsection 3 does not use the word "contract" at all. It is fair to infer that if the Legislature wished to change a longstanding practice of the DOE in this regard, it would have specifically done so in the most recent revisions to the public charter school law.

15. Instead, the Legislature merely added the building usage plan requirement and a requirement to match building upgrades made to accommodate charter schools with equivalent upgrades for district schools in the same building. Id. Because the Legislature created a separate subsection governing co-locations which did not mandate a contract or

payment of rent, the Court should conclude that the Legislature intended to allow co-locations which did not involve contracts or rent.

16. Finally, the purpose of § 2853 is to encourage and facilitate the creation of charters as an educational option available to families. The provision of free space to public charters furthers this important public interest in contrast to Plaintiffs' theory of mandatory rent, which would hinder the development of public charter schools in the State of New York and run contrary to the statutory purpose.

No Private Right of Action

17. In demonstrating a likelihood of success on the merits, Plaintiffs face an additional hurdle in being unable to establish that the statute provides for a private right of action. See Intervenor-Defendants' Memorandum of Law at Point II.B (explaining why Plaintiffs have not satisfied the three prong test set forth in Sheehy v. Big Flats Community Day, 73 N.Y.2d 629, 633 (1989)).

The Equities Weigh Heavily in Favor of Defendants

18. As noted above, public charters serve an important public function in providing educational options to New York families. As described by the Intervenor-Defendants, an order requiring the immediate payment of rent would have devastating consequences on many of the schools, forcing some of them to shut down and others to drastically curtail services. Accordingly, the equities strongly favor Defendants.

Conclusion

19. For these reasons, the Plaintiffs can not demonstrate irreparable harm, a likelihood of success on the merits, or that the equities favor them. The request for a temporary restraining order and preliminary injunction should be denied.

Dated: New York, New York
September 12, 2011

EMILY SWEET