SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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In the Matter of,

JOANNE ADAMS, individually, and on behalf of her child, Y.A., who attends P.S. 25; SHAMEKA ARMSTEAD, individually, and on behalf of her child, D.M., who attends P.S. 25; and CRYSTAL WILLIAMS, individually, and on behalf of her two children, H.T. and K.T, both of whom attend P.S. 25,

Index No. 506124/18

Petitioners,

- against -

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Respondent,

For an Order Pursuant to Article 78 of the CPLR and Section 2590-e(11) of the Education Law, Annulling the Decision to Close P.S. 25 in the County of Kings.

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MEMORANDUM OF LAW IN OPPOSITION TO PETITIONERS' ORDER TO SHOW CAUSE AND IN SUPPORT OF RESPONDENT'S VERIFIED ANSWER

PRELIMINARY STATEMENT

This is not a case about zoning. This is also not a case about the power of the Community District Education Council (CEC) to approve zoning lines for schools under the community district's jurisdiction. Nonetheless, Petitioners attempt to characterize this case as a zoning case because they cannot challenge the rationality of a

decision by the New York City Board of Education's Panel on Education Policy (PEP) to close P.S. 25, the Eubie Blake School, based on its declining attendance and low demand.

Petitioners, three parents acting on behalf of their minor children, bring this Article 78 proceeding by Order to Show Cause, asking that the Court: (1) declare that the New York City Department of Education (DOE) violated section 2590-e(11) of the Education Law – which identifies the CEC's power to approve zoning lines – by voting to close P.S. 25; (2) preliminarily stay and annul the vote made by the Board of Education's Panel on Education Policy (PEP) to close P.S. 25; (3) direct that the issue of closure of P.S. 25 be submitted to Community District Education Counsel No. 16 (CEC or "CEC 16"); and (4) direct the PEP to renotice and revote on whether to close P.S. 25, if the CEC votes to remove P.S. 25 from the attendance zone.

On March 28, 2018, the parties agreed that the DOE would not mail the offer letters to the parents and guardians of grade 1-5 students[1] from P.S. 25 or any of the other closing schools until May 4, 2018, or upon further order of the Court.[2]

Respondent asserts that the Verified Petition should be dismissed because the decision to close P.S. 25 was not arbitrary or capricious or in violation of section 2590-e(11) of the Education Law.

STATEMENT OF FACTS

Respondent respectfully refers the Court to the Verified Answer, verified on April 12, 2018, and the affidavits of Rebecca Rawlins and Lianna Wright, sworn to

[1] The offer letters to all kindergarten students were mailed before the instant proceeding commenced. This agreement applies to students entering grades 1-4, as well as any 5th graders who are required to repeat the grade.

[2] Absent this agreement, as discussed below at Point I, Petitioners are not entitled to interim relief in the form of staying the voted by the PEP to close P.S. 25.

April 12, 2018, and the attached exhibits, for a complete statement of the pertinent and material facts.

ARGUMENT

POINT I

PETITIONERS ARE NOT ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF SINCE THEY HAVE NOT, AND CANNOT, ESTABLISH A LIKELIHOOD OF SUCCESS ON THE MERITS, IRREPARABLE HARM IF AN INJUNCTION IS NOT GRANTED, AND THAT THE EQUITIES WEIGH IN FAVOR OF PETITIONERS.

To obtain the extraordinary remedy of a preliminary injunction, under Article 63 of the CPLR, Petitioners bear the burden of showing that they have satisfied each of the following prerequisites: (1) a clear right to the relief sought (also articulated as a likelihood of success on the merits); (2) that they will suffer irreparable injury if the preliminary injunction is not granted; and (3) that the balance of the equities tip in their favor. W.T. Grant v. Srogi, 52 N.Y.2d 496 (1981); Cohen v. State Dep't of Social Services, 37 A.D.2d 626 (2d Dep't 1971), aff'd, 30 N.Y.2d 571 (1972).

An application for preliminary injunctive relief is addressed to the sound discretion of the court. See CPLR § 6301. Such relief is a drastic remedy which should not be granted unless a clear legal right to it is established under law. Orange County v. Lockey, 111 A.D.2d 896, 897 (2d Dep't 1985); see also Graham v. Wisenburn, 39 A.D.2d 334, 335 (3d Dep't 1972) (preliminary injunction may not be granted unless a party has stated a prima facie cause of action which would justify a permanent injunction); Rodgers v. Rodgers, 30 A.D.2d 548, 549 (2d Dep't 1968) (same), app. denied, 22 N.Y.2d 643 (1968). As will be demonstrated herein, Petitioners fail to meet

the three prerequisites for a preliminary injunction, and thus their request for injunctive relief should be denied.

A. Petitioners Are Unlikely To Succeed on the Merits.

As discussed below at Point II, Petitioners are unlikely to succeed on the merits as the decision is rational and the zoning provision of the Education Law is not implicated, thus their request for preliminary injunctive relief should be denied.

B. Petitioners Will Not Suffer Irreparable Harm.

Petitioners' burden includes a demonstration establishing that they will sustain irreparable harm absent the grant of a preliminary injunction. Aetna Ins. Co., v. Capasso, 75 N.Y.2d 860, 862 (1990). The threatened irreparable injury must be actual and imminent – not remote or speculative. Golden v. Steam Heat, 216 A.D.2d 440, 442 (2nd Dep't. 1995).

In this case, Petitioners have not suffered, and will not suffer, any irreparable injury if Respondents are not immediately enjoined from going forward with the placement process for students who attended schools that are closing. The school could close at the end of June 2018 and so their grades will be completed. In the interim, DOE staff will be working with families in order to transfer students to other high quality schools. Finally, if the Court reverses the decision on the merits it can order the school to continue in its present form.

As Petitioners have failed to establish that they will suffer immediate and irreparable injury, loss or damage if a preliminary injunction is denied, they are not entitled to such relief.

C. The Equities Favor Respondent

Petitioners seeking a preliminary injunction must also demonstrate that the balance of the equities tip in their favor. Here, the balance of the equities tips decidedly against Petitioners. Granting a preliminary injunction would prejudice, and have a widespread negative impact upon the approximately 3,000 student applicants in New York City whose schools are closing and need a new placement for the upcoming 2018-2019 school year.

There are approximately 3,000 New York City schoolchildren – including Petitioners' children – whose schools are closing at the end of the 2017-2018 school year for various reasons. Like Petitioners' children, these other children submitted their applications and ranked their preferred schools. If the DOE is permitted to go ahead with its placement process, the DOE will complete the placement process by the end of April 2018 and these students will be notified at which school they will be placed in May 2018. See Affidavit of Lianna Wright dated April 18, 2018 at ¶¶10, 17, 18. If the DOE is enjoined from proceeding with its placement process, then these children, and their families, will be prevented from making final plans for the education of these children for September 2018.

This is particularly inequitable because only the three Petitioners, on behalf of their children, have been heard by the Court on these matters. To enjoin the DOE from notifying the parents or guardians of each of these students as to their placement results would be unfair and inequitable to these parents and children. These parents and their children want and need to know which school they will be attending in the fall.

D. Petitioners are Guilty of Laches

The timing problem has been created by Petitioners, who are guilty of laches, by waiting until the eleventh hour to seek such disruptive relief. The disruption would be greatly exacerbated by their delay. Petitioners failed to make their demand – and file the petition herein – within a reasonable amount of time "after the right to make the demand occurs or . . . where the petitioner has been misled by the respondent's conduct, within a reasonable time after he becomes aware of the facts which give rise to his right of relief." In re Rapess v. Ortiz, 99 A.D.2d 413, 414 (1st Dep't 1984) (internal quotation marks and citation omitted). See also Austin v. Bd. of Higher Ed., 5 N.Y.2d 430, 442 (1959).

Here, Petitioners waited until March 27, 2018 to file their petition, which is a month after the PEP voted to close P.S. 25 and four weeks before the placement decisions were scheduled to be mailed to parents and guardians of students who attended schools that are closing. Waiting even a month to file the petition herein is unreasonable where this Court's decision, if unfavorable to Respondent, would affect the placement of 3,000 students this fall. A party that is guilty of laches has "unclean hands," and is not entitled to equitable relief. See SportsChannel America Assoc. v. National Hockey League, 186 A.D.2d 417, 418 (1st Dep't. 1992).

In short, the facts of this case render it manifestly inequitable for this Court to delay the placement of 3,000 of New York City's schoolchildren *at the request of three Petitioners*. As such, Petitioners' application for a preliminary relief should be denied.

POINT II

THE DECISION TO CLOSE P.S. 25 WAS NOT ARBITRARY OR CAPIRICOUS OR DONE IN VIOLATION OF SECTION 2590-E(11) OF THE NEW YORK STATE EDUCATION LAW

In an effort to challenge indirectly what Petitioners are unable to challenge directly, they argue that the DOE's decision to close P.S. 25 violated section 2590-e(11) of the Education Law. However, the PEP's vote to close P.S. 25 did not violate the zoning laws under section 2590-e(11) of the Education Law. Moreover, the determination to close P.S. 25 is within the DOE's discretion and was not arbitrary or capricious.

A. The Decision to Close P.S. 25 Did Not Violate section 2590-e(11) of the Education Law

Because Petitioners cannot successfully challenge the decision to close P.S. 25 on the basis that the decision was arbitrary or capricious (as discussed below at Point I.B), they attempt to characterize the decision to close the school as a decision to alter zoning lines without the CEC 16's approval in violation section 2590-e(11) of the Education Law. This argument fails. There is simply no legal support or case law authority for such an argument. Petitioners cannot seek to challenge a decision made in accordance with lawful procedure and not affected by an error in law, by attempting to challenge the validity of the decision by focusing on the incidental impact of the decision on the attendance zone, and no impact on the actual zoning lines. The CEC routinely exercises its powers to change zoning lines and there is a DOE process in place for such instances. No such decision has been made in this case. The CEC 16 did, however, approve the proposed closure of P.S. 25. A copy of the CEC 16's letter outlining the

reasons for its approval of the closure is attached to the Affidavit of Rebecca Rawlins dated April 18, 2018 as Exhibit A. This body certainly did not consider its recommendation to close P.S. 25 to be a zoning issue. See id. As the CEC, which holds the power to alter zoning lines, approved the closure of P.S. 25 in this case, Petitioners' argument must fail. Accordingly, Petitioners have not met their burden of demonstrating a clear legal right to the relief requested.

Accordingly, Petitioners' argument that Respondent's decision to close P.S. 25 violated section 2590-e(11) of the Education Law is without basis and the Petition should be dismissed.

B. The Decision to Close P.S. 25 was Neither Arbitrary nor Capricious or Done in Violation of Any Law

It is well established that decisions about school district reorganization and the closing of school buildings are within the discretion of a board of education and will not be set aside unless they are shown to lack a rational basis. In particular, pursuant to Education Law sections 1709(3), (33) and 1804(1), a board of education has the authority and responsibility to manage and administer the affairs of the school district, including the assignment of pupils to schools therein. In such cases, a board's discretion is broad. Older v. Bd. of Educ., 27 N.Y.2d 333 (1971). A board's decision to reorganize its schools will not be overturned unless it is arbitrary, capricious or contrary to sound educational policy. In this case, the DOE's actions in preparing the proposal and engaging the community, and the ultimate decision to close P.S. 25, were neither arbitrary nor capricious and were at all times lawful, proper, and in compliance with applicable law.

On January 5, 2018, the DOE issued and publicly posted a notice of the Proposed Closure of P.S. 25 at the end of the 2017-2018 school year. A copy of this

notice is attached to the Rawlins Affidavit as Exhibit B. As described in the "Rationale for Closure" section of the notice, "P.S. 25 has struggled with declining enrollment and low demand by students and families, despite increasing test scores over the last three years and multiple prior interventions, such as programmatic changes at the school, recruitment and re-branding support, and school re-design." Id.

Under Education Law section 2590-h(2-a), the DOE is required to prepare an Educational Impact Statement (EIS) regarding any proposed school closing or significant change in school utilization. The statute requires the EIS to address enumerated issues and provide specific information. While the DOE must provide "more than boilerplate information," it has a "considerable measure of discretion" under Education Law section 2590-h(2-a)(b) to "determine which information an EIS should contain to describe the impact of a proposed action." Mulgrew v. Bd. of Educ. of the City School Dist. of the City of N.Y., 75 A.D.2d 412 (1st Dep't 2010).

In compliance with the Education Law, on January 5, 2018, the DOE issued and publicly posted the EIS concerning the proposed closure of P.S. 25. This EIS is annexed to the Rawlins Affidavit as Exhibit C. The EIS contains each of the required categories of information under the Education Law section 2590(h)(2-a) for the proposed school closing, so as to inform public comment on the proposal. Id. The EIS was amended on January 26, 2018 to reflect the space used in building K025 by Urban Dove, a community based organization. See Rawlins Aff. at Ex. D.

The notice of the proposed closure issued and publicly posted on January 5, 2018 informed the community that a joint public hearing regarding this proposal would be held at the school building on February 5, 2018. See Rawlins Aff. at Ex. B. A DOE

representative was listed in the notice who could provide further information, and submission of public comment was encouraged, whether prior to the hearing in oral or written form or at the hearing. Id. Notice of the date and location of the PEP meeting at which the proposal would be considered was also provided. Id. at 4.

Before beginning the public comment process, calls were made and letters were "backpacked" home to P.S. 25 families on December 18, 2017 to notify them in advance of the proposed closure and community meeting. In addition to the joint public hearing, dedicated phone line and email address for public comment, and PEP meeting, a community meeting was scheduled for January 2018, led by the Superintendent along with representatives from DOE Central and Field offices, to discuss the proposals and take questions.

At the joint public hearing on February 5, 2018, there were 75 members of the public in attendance, and there were 16 public speakers, including P.S. 25's principal, Anita Coley, and CEC 16 President Nequan Mclean. After hearing the comments from the public at the hearing, and receiving additional written comments through the dedicated e-mail address, DOE prepared a Public Comment Analysis, dated February 27, 2018, which was made available to the PEP. A copy of the Public Comment Analysis is attached to the Rawlins Affidavit as Exhibit E. In its Public Comment Analysis, DOE summarized the comments received and responded to all the issues raised and the significant alternatives proposed. Id. at 3-10.

On February 28, 2018, the PEP heard additional comments from the public on the proposals for significant changes in school utilization it was scheduled to consider, and then voted to approve the proposal. The proposal and determination to

close P.S. 25 met all requirements set forth in Education Law section 2590(h)(2-a), and Petitioners have not produced – and cannot produce – any evidence to indicate that DOE acted arbitrarily. The fact that Petitioners disagree with DOE's determination does not render it arbitrary, capricious, or contrary to sound educational policy. And their attempt to frame this dispute as one dealing with changing zoning lines also fails.

Accordingly, the DOE's determination to close P.S. 25 should be upheld.

CONCLUSION

WHEREFORE, Respondent respectfully requests that Petitioners' order to show cause be denied in all respects, and that the Petition be dismissed in its entirety.

Dated: New York, New York
April 12, 2018

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