

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

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

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MICHAEL MULGREW, ADVOCATES FOR JUSTICE
LEGAL FOUNDATION, COREY HAMILTON, ERICA
NAIRNE-HAMILTON, ELIZABETH WEINERT, AUDRA FOX,

Petitioner,

INDEX NO. 152847/2023

MOTION DATE 03/28/2023

MOTION SEQ. NO. 001

- v -

THE BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK, DAVID C.
BANKS,

Respondent.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 29, 34, 35, 47, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 87, 88, 89, 90

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR.

Petitioners seek an order from this Court (1) declaring that Respondents’ failure to comply with Education Law §2590-h, §2590-g, §2853, and Chancellor’s Regulation A-190 is arbitrary and capricious; (2) annulling the votes of the Panel for Educational Policy (“PEP”) to change the utilization of challenged buildings in Brooklyn and Queens; and (3) ordering Respondents to comply with their obligations under Education Law §2590- h, §2590-g, §2853 and Chancellor’s Regulation A-190. Respondents cross-move to dismiss the petition on various grounds including that petitioners have failed to exhaust administrative remedies and that petitioners have failed to join a necessary party. For the following reasons, the respondents cross-motion is granted.

Exhaustion Doctrine

Preliminarily, respondents contend that petitioners have failed to exhaust its administrative remedies pursuant to Education Law § 310(7) before proceeding to court.

Respondents aver that the instant petition involves a dispute regarding education policy that must be addressed in the “first instance by the Commissioner.” In support of this argument, respondents cite to the First Department's decision in *Mulgrew v Board of Educ. of the City School Dist.*, 88 AD3d 72 [1st Dept 2011] (“*Mulgrew II*”), where the Court held that Article 78 relief may not be granted where the petitioner has failed to exhaust administrative remedies.

Petitioners contend that this petition is based on statutory interpretation, thus it does not fall within the purview of the Commissioner of Education. In support of this argument, petitioners rely on the First Department’s decision in *Mulgrew v Bd. of Educ. of the City Sch. Dist. of the City of NY*, 75 AD3d 412, 414 [1st Dept 2010] (“*Mulgrew I*”), where the Court nullified a PEP vote because the Department of Education failed to comply with the education law. However, to this Court, *Mulgrew II*, which was decided later, is controlling in this instance.

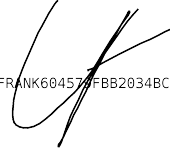
Education Law § 310(7) provides in pertinent part that an aggrieved party "may appeal by petition to the commissioner of education" regarding any action taken by "any officer, school authorities, or meetings ... or any other act pertaining to common schools."

Respondents urge this Court to read the statute as compulsory. The First Department explicitly held in *Mulgrew II* that exhaustion was required for complaints, even without the “explicit sole and exclusive remedy clause section 211-d (2) (b) (ii)” *Mulgrew* 88 AD3d at 80.

The Court finds that the legislature has made it clear, and as is emphasized in *Mulgrew II*, the State Commissioner of Education, an independent actor not within the government in which petitioners are aggrieved by, maintains original jurisdiction over claims of alleged failure to comply with the Education Law. Accordingly, the Court does not reach the parties remaining contentions and it is hereby

ORDERED that the temporary restraining order issued by this Court is hereby lifted; and
it is further

ORDERED that the petition is dismissed.


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8/10/2023

DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE