

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

----- X
NEW YORK STATE SENATOR CARL KRUGER of the
27th Senatorial District, individually, and on behalf of the
Parents of children attending Public Schools in the City of
New York and JOANN SAVAGE of District 22

Plaintiffs,

-against-

Index No. 102510/03
(I.A.S. Part 62)
(Ling-Cohan, J.)

MICHAEL R. BLOOMBERG as MAYOR OF THE CITY
OF NEW YORK, JOEL KLEIN as CHANCELLOR OF
THE NEW YORK CITY DEPARTMENT OF
EDUCATION, and THE NEW YORK CITY
DEPARTMENT OF EDUCATION,

Defendants.

----- X
STEVEN SANDERS, New York State Assemblyman, et al.,

Proposed Petitioners – Intervenors,

for order and judgment pursuant to
Article 78 of CPLR,

-against-

MICHAEL R. BLOOMBERG as Mayor of the City of New
York, JOEL I. KLEIN, as chancellor of the New York City
School district, and BOARD OF EDUCATION of the city
school district of the City of New York,

Respondents.

----- X

**MEMORANDUM OF LAW OF THE
ASSOCIATION OF THE BAR OF THE
CITY OF NEW YORK, AMICUS CURIAE**

Table of Contents

Interest of the Amicus Curiae 1

Preliminary Statement 2

Statement of Facts 4

Argument

THE IMPLEMENTATION OF CHILDREN FIRST IS
WELL WITH THE EXPANDED AUTHORITY OF
THE CHANCELLOR AND DOES NOT VIOLATE
ANY PROVISION OF THE EDUCATION LAW
CONCERNING COMMUNITY SCHOOL DISTRICTS..... 7

Conclusion..... 12

INTEREST OF THE AMICUS CURIAE

The Association of the Bar of the City of New York (the “Association”) is a professional association with more than 22,000 members. It was founded in 1870 with a view that a professional organization of attorneys could and should contribute a positive voice in the life of the community. With the goal of establishing New York City as an example to others, the Association has from the outset been active in City government and affairs.

The Association has had a longstanding interest in educational issues as demonstrated by the fact that one of its standing committees is the Committee on Education and the Law. One of the central concerns of that Committee, and of the Association, has been the governance of the New York City school system. Indeed, when the issue of reforming the school system was being considered last year, the President of the Association sent a letter to Governor George Pataki, Speaker Sheldon Silver and Majority Leader Joseph Bruno urging passage of legislation that would provide for mayoral control and accountability. Although such changes in governance do not guarantee that the City’s children will receive a better education, the Association believes that they are a necessary condition for fundamental improvement in the quality of the educational services delivered at the school level. Accordingly, the Association has a strong commitment to ensuring that the Mayor and the Chancellor are able to take full advantage of the changes made to the Education Law last year in order to achieve the purpose behind those changes – better schools for all of our children.

PRELIMINARY STATEMENT

Recognizing the continuing failure of the New York City school system to provide an adequate education to many of the children of our City, the State Legislature enacted a landmark reform less than one year ago that granted vastly increased authority and accountability to the Mayor and the Chancellor. In sum, the new law made the following changes to the Education Law:

- The Mayor was given the power to appoint a majority of the members of the Board of Education and the Chancellor. Sections 2590-b(1)(a) and 2590-h.
- The powers of the Board of Education were limited largely to city-wide educational policy issues. Sections 2590-g(1)(a) and 2590-h(17).
- The administrative powers of the Board of Education were transferred to the Chancellor. Sections 2590-g and 2590-h(17).
- The Chancellor was granted the authority to select and appoint superintendents, thereby depriving community school district boards of any involvement in process of selecting superintendents. Section 2590-h(30) and repeal of Section 2590-e(1).
- The community school district boards were abolished effective June 30, 2003 (since extended to June 30, 2004, L.2003, c.6), and a public process was created to lead to legislation replacing them with some other model. Sections 2590-b(2) (repealed until June 30, 2009); L.2002, c.91, § 24.

The 2002 legislation continued the work begun in the 1996 reform law, which increased the powers of the Chancellor and the community superintendents, at the expense of the community boards, in the following ways:

- The community boards were explicitly denied any executive or administrative powers or functions. Section 2590-e.
- The community boards were deprived of their power to select superintendents, although until 2002 they retained the power to employ them. Instead, the Chancellor was authorized to select superintendents from a group of not more

than 4 candidates chosen and recommended by the community boards pursuant to procedures and consistent with qualifications established by the Chancellor. Section 2590-e(1).

- The executive and administrative powers and duties of the community superintendents were vastly increased. Section 2590-f.

After an exhaustive study, including extensive parental and expert consultation, Chancellor Klein has announced a comprehensive educational reform agenda called “Children First”, which includes three components (1) instructional, (2) parental involvement and (3) administrative reorganization. Instructionally, Children First includes a single system-wide approach in reading, writing and math, for which teachers will receive appropriate assistance and supervision. With respect to parental involvement, Children First establishes a new parent support system to make schools more user-friendly and to give parents the structures and information they need to be full partners in the education of their children. Administratively, Children First creates 10 instructional divisions and 6 operations centers in order to streamline the current cumbersome and inefficient structure and focus resources and attention on the core mission of teaching and learning.

Plaintiffs and proposed petitioners-intervenors (hereafter “Plaintiffs”) challenge the implementation of Children First and seek to maintain the status quo, arguing, in essence, that it’s fine for the new law to increase the power of the Mayor and the Chancellor as long as they don’t actually use it. The legal “hook” to this argument is their claim that Children First will effectively abolish the 32 statutorily mandated community school districts and deprive them of the authority granted by existing law. As set forth below, that argument, in all of the iterations proposed by Plaintiffs, is without merit. The educational problems addressed by Children First

are city-wide in nature and scope, and the new law provides the Mayor and the Chancellor with city-wide powers to solve them. The community school districts remain intact, and the powers and duties assigned to the community boards and superintendents will be carried out in a manner consistent with the law.

STATEMENT OF FACTS

The essential background facts relating to the Children First reform agenda are set forth in the affidavit of Chancellor Joel Klein and need not be repeated here. Instead, the Association wishes to put this matter in perspective by calling the Court's attention to the well documented educational problems that Children First is designed to remedy. Not to put too fine a point on it, the New York City school system is failing to provide an adequate education to vast numbers of its students.

New York City has the largest public school system in the country, with 1,291 schools and programs serving 1.1 million students. <http://www.nycenet.edu/stats/>. Those students include an extraordinarily high percentage of at-risk youth. *Campaign for Fiscal Equity v. State of New York*, 187 Misc. 2d 1, 19 (Sup. Ct., New York Co. 2001) (“*CFE*”), *rev'd on the law*, 295 A.D.2d 1 (1st Dept. 2002). The statistics are telling:

- As of December 31, 2002, 134,417 students were receiving special education services. <http://www.nycenet.edu/stats/>. New York City spends more than 25% of its total budget on special education. *CFE*, 187 Misc. 2d at 94.
- In the 1998-99 school year, approximately 442,000 students came from families receiving Aid to Families with Dependent Children, and in the 1997-98 school year, 73% of students from kindergarten through sixth grade were eligible to participate in the free lunch program. *CFE*, 187 Misc. 2d at 22. In comparison, during the same time period, only 5% of the students in the rest of the State were eligible for free lunch. *CFE*, 187 Misc. 2d at 22.

- For students in the graduating class of 2002, 35.7% were African American, 33.0% were Hispanic, 16.9% were White, 14.1% were Asian, and less than 1% were American Indian/Alaskan Natives. *See* The Class of 2002 Four-Year Longitudinal Report and 2001-2002 Event Dropout Rates, dated April 2003 (“Class of 2002 Report”), at 4.
- For students in the graduating class of 2002, 22% were recent immigrants coming from 140 different countries. *Class of 2002 Report*, at 4.
- As of December 31, 2002, 134,103 students were categorized as English learners. <http://www.nycenet.edu/stats/>.

The New York City school system also faces considerable financial problems. The economic downturn has hit New York particularly hard, due to both reductions in local revenues and cutbacks on the State level. Accordingly, the fiscal year 2004 budget of the New York City Department of Education has been cut \$ 112.6 million.

Despite these ominous numbers, many New York City school students do succeed. However, such individual success stories do not compensate for the aggregate data demonstrating that New York City’s students overall are faring quite poorly. In 2002, for all third through seventh grade students, only 35.3% met or exceeded standards in math and only 39.3% met or exceeded standards in reading. *See* Report on the 2002 Results of the State Elementary and Intermediate English Language Arts Tests and the City Reading and Math Assessments, dated July 10, 2002 (the “2002 Test Report”). Put a different way, 29.1% of the students lacked basic proficiency in math, and 17.3% lacked basic proficiency in reading. 2002 Test Report. In fact, in 2002, there was one school in which only 11.8% of third through sixth grade students met the English standard. *See* 2002 Ranking of Elementary and Middle Schools by English Language Arts Achievement.

It is unacceptable that the City's elementary and middle school students lack basic skills in reading and math. One logical result is that the dropout rates are astounding. Since the late 1980s, approximately 30% of the approximately 60,000 students who entered ninth grade each year do not receive any type of diploma. *CFE*, 187 Misc. 2d at 60-61; *see also* Class of 2002 Report, at 20 and The Class of 1999 Final Longitudinal Report, dated April 2003 (the "Class of 1999 Report"), at 1 (31.4% of the Class of 1999 failed to earn a diploma within 5 years). Of students in the Class of 2002, only slightly more than half (50.8%) graduated on time and 20.3% had left school altogether. Class of 2002 Report, at 1. Furthermore, of the Class of 2002 students who did graduate, only 35.4% (or 18% of the total class population) received a Regents diploma. Class of 2002 Report, at 5; *see also* Class of 1999 Report (20.9% of the Class of 1999 earned a Regents diploma). Even those students who are able to graduate are likely to require remedial help in reading or mathematics in college. *CFE*, 187 Misc. 2d at 63.

The reasons for such poor student performance are many and complex, but undoubtedly include the failure of the City's 30-year experiment in school decentralization. As the *CFE* trial court found, "[t]he evidence demonstrates that decentralization of the governance of the New York City school district led to inefficiency, mediocrity and corruption in some of the City's school districts" which in turn caused "demoralization of school staff and inattention to educational issues." 187 Misc. 2d at 92-93.

ARGUMENT

THE IMPLEMENTATION OF CHILDREN FIRST IS WELL WITHIN THE EXPANDED AUTHORITY OF THE CHANCELLOR AND DOES NOT VIOLATE ANY PROVISION OF THE EDUCATION LAW CONCERNING COMMUNITY SCHOOL DISTRICTS

The Education Law provides ample authority to the Chancellor to implement Children First in order to tackle the enormous problems facing the New York City school system. Under the law as it existed prior to last June, the Chancellor had the power to “[p]romulgate minimum clear educational standards, curriculum requirements and frameworks, and mandatory educational objectives applicable to all schools and programs throughout the city district.” Section 2590-h(8). The new law added not only the sole power to appoint community superintendents, Section 2590-h(30), but also the powers and duties of a board of education (subject only to the power of the city board to make city-wide educational policy). Section 2590-h(17). These include the following powers:

- “To create, abolish, maintain and consolidate such positions, divisions, boards or bureaus as, in its judgment, may be necessary for the proper and efficient administration of its work”, Section 2554(2).
- “To authorize the general courses of study which shall be given in the schools and to approve the content of such courses before they become operative”, Section 2554(11).
- “To perform such other duties and possess such other powers as may be required to administer the affairs placed under its control and management, to execute all powers vested in it, and to promote the best interests of the schools and other activities committed to its care”, Section 2554(15)(a).

It cannot be seriously disputed that these sweeping delegations of power are sufficient to enable the Chancellor to implement the reforms set forth in Children First.

Plaintiffs argue instead that Children First falls outside the Chancellor's powers because he is required to exercise those powers "in a manner not inconsistent with the provisions of [Article 52-A] and the city-wide educational policies of the city board." Section 2590-h(17). At the outset, it is noteworthy that Plaintiffs do not point to any provision within Article 52-A of the Education Law, which governs the New York City Community School District System, that prohibits any aspect of Children First or that is directly violated by that initiative. Rather, they advance the much weaker arguments that Children First is inconsistent with the structure of the community school district system and interferes with the ability of the community school districts to exercise their powers and to perform their duties. Neither argument has merit.

Children First adheres to the requirements of Article 52-A. No community school district has been abolished; no boundaries have been changed; the community boards remain in place; every community district will have an office staffed to provide a liaison with the community board and parents; and educational funds are allocated along district lines as required by law. Although personnel and resources will be reallocated, there is nothing in the law that requires a specific level of support to each district. In fact, the 32 community districts have historically received widely varying levels of support both over time and among themselves. There is no reason why, in a time of severe fiscal crisis, such expenses should not be subject to appropriate and necessary cuts, especially in light of the redundancy and waste that has long existed.

Thus, Plaintiffs' structural argument really boils down to a complaint that the 32 community superintendents will be replaced by 10 regional superintendents whose instructional divisions will each cover 2-4 districts. However, there is nothing in Article 52-A

that mandates a different superintendent for each district. By contrast, Section 2590-b(2)(a) does explicitly require that “[t]here shall be a community board for *each* community school district created by this article.” (Emphasis supplied.) Clearly, when the legislature wanted to ensure a one-to-one ratio, it knew how to do so. The absence of similar language in the section governing community superintendents is therefore strong evidence of the lack of any intent to require that each district must have its own, different superintendent. Thus, it is entirely consistent with the statute for the same person to serve as superintendent for more than one district.

To be sure, this never occurred before for the obvious reason that prior to last year’s change in the law, superintendents were appointed (before 1996) or nominated (after 1996) by the community school district boards, each of which naturally wished to make its own selection. However, now that superintendents are appointed solely by the Chancellor, and by necessity therefore must have a city-wide and not just a district perspective, there is no reason why superintendents should not be permitted to cover more than one district if the Chancellor determines that it is in the best interest of the school system and the children it serves.

Indeed, the flaw in the structural argument is apparent from the fact that plaintiffs would have to concede that the Chancellor is authorized to create 10 regional superintendents as long as they exercised their powers (delegated by the Chancellor) by supervising an additional 32 district superintendents. Fortunately, nothing in the law mandates such an absurd and wasteful result.

Similarly without merit is the argument that the Children First initiative prevents the community school districts from functioning in accordance with Article 52-A. In fact, the law does not assign powers and duties to “districts”, but rather to community boards and superintendents. The powers and duties of the community boards are set forth primarily in

Section 2590-e. Nowhere in their papers do Plaintiffs point to any aspect of Children First that interferes with the specific powers and duties of the community boards enumerated in the statute. They do make several references to the general issue of school-based budgeting and the need for resources for the operation of community districts, but the fact is that it is the superintendents, not the community boards, who approve both the proposed school-based budgets and the proposed budget for administrative and operational expenses of the superintendent and the community board which are then submitted to the Chancellor. Section 2590-r(d).

Indeed, the remarkable thing about the functional arguments advanced by Plaintiffs is that they rely entirely on statutory provisions relating to the powers and duties of the superintendents and the Chancellor, not the community boards. However, as demonstrated above, it is consistent with Article 52-A for a superintendent to be responsible for more than one district. Accordingly, it is also consistent with Article 52-A for those superintendents to exercise the powers and perform the duties set forth in Section 2590-f. Nothing in the Children First reform agenda suggests that the 10 regional superintendents will be unable to do so.

As for the Chancellor, he or she is explicitly authorized to “[d]elegate any of his or her powers and duties to such subordinate officers or employees as he or she deems appropriate.” Section 2590-h(19). Here, the Chancellor has determined that it is appropriate to delegate his powers as outlined in Children First. In any event, there is nothing in the provisions dealing with the Chancellor’s powers and duties that could conceivably support the argument that he lacks the power to implement Children First.

It is true that in some of the provisions dealing with the Chancellor (and to a lesser extent the community superintendents), there are references to the community boards. However, those references occur most frequently in the context of the Chancellor or superintendent acting

upon the community districts. For example, the Chancellor is granted the following powers: to require community boards and superintendents to make periodic reports), Section 2590-h(11); to provide technical assistance to community districts and schools, Section 2590-h(13); to require community school board members to participate in training, Section 2590-h(33); to appoint an internal control officer for each community district, Section 2590-h(37); and, with the consent of the superintendent, to transfer a high school from the jurisdiction of the city board to the jurisdiction of the community district in which it is located, Section 2590-i(3). Similarly, superintendents are granted the powers to appoint teachers and supervisory personnel within a district from eligible lists of candidates, Section 2590-j(4)(c) and (d); and to transfer teaching and supervisory personnel within the district, Section 2590-j(7). There is no aspect of the Children First reform agenda that is inconsistent with such provisions.

References to community boards can also be found in the context of requirements that the Chancellor or superintendents provide information to community boards. For example, the Chancellor is required to submit a five-year educational facilities capital plan to each community board, Sections 2590-o and 2590-p; and to annually advise the community boards with respect to the form and content of the budget requests and accompanying fiscal documents required to be submitted by the Mayor, Section 2590-q(1). Again, there is nothing in Children First that is inconsistent with those provisions.

CONCLUSION

For the foregoing reasons, the implementation of the Children First reform agenda is consistent with the provisions of the Education Law, and the complaint and proposed intervenor petition should be dismissed.

Dated: New York, New York
May 28, 2003

Respectfully submitted,

Frederick P. Schaffer, Chair
Committee on Education and the Law
Association of the Bar of the City of
New York
42 West 44th Street
New York, New York 10036-6690
212-382-6600

Of Counsel:
Laura Himmelstein