

**Mount Vernon City School Dist. v New York State
Educ. Dept.**

2012 NY Slip Op 30768(U)

March 28, 2012

Supreme Court, Albany County

Docket Number: 457-12

Judge: Joseph C. Teresi

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of

MOUNT VERNON CITY SCHOOL DISTRICT
and BOARD OF EDUCATION OF THE MOUNT
VERNON CITY SCHOOL DISTRICT

Petitioners/Plaintiffs,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

DECISION and ORDER
INDEX NO. 457-12
RJI NO. 01-12-ST3338

-against-

NEW YORK STATE EDUCATION DEPARTMENT;
JOHN B.KING, JR., in his capacity as Commissioner of
the NEW YORK STATE EDUCATION DEPARTMENT;
THE REGENTS OF THE UNIVERSITY OF THE STATE
OF NEW YORK; OFFICE OF THE STATE COMPTROLLER,
THOMAS P. DINAPOLI, in his capacity as STATE
COMPTROLLER; and AMANI PUBLIC CHARTER SCHOOL;

Respondents/Defendants.

Supreme Court Albany County All Purpose Term, March 9, 2012
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Ingerman Smith, LLP
David F. Kwee, Esq.
Attorneys for Petitioners/Plaintiffs
150 Motor Parkway, Suite 400
Happauge, New York 11788

Eric T. Schneiderman, Esq.
Attorney General of the State of New York
*Attorney for the Respondents/Defendants New York State Education Department;
John B. King, Jr.; The Regents of the University of the State of New York;
Office of the State Comptroller; Thomas P. Dinapoli*
(Roger W. Kinsey, Esq. AAG)
The Capitol
Albany, New York 12224

DLA Piper, LLP
David E. Nachman, Esq.
Attorneys for Respondent/Defendant Amani Public Charter School
1251 Avenue of the Americas
New York, New York 10020

TERESI, J.:

By Decision and Order, dated October 11, 2011 (hereinafter “Decision and Order”), this Court vacated the charter that the Board of Regents of the State of New York (hereinafter “Regents”) granted to Amani Public Charter School (hereinafter “Amani”). The vacatur was based upon two specific defects. First, the Regents’ wrongfully accepted Amani’s application in the first instance because the application failed to include “an assessment of the projected programmatic and fiscal impact of [Amani’s] school on other public and nonpublic schools in the area.” (Education Law § 2851[2][q]). Second, the Regents’ charter grant failed to make the requisite Education Law §2852(2)(c) finding that Amani was “likely to improve student learning and achievement.”

Five days after the Decision and Order was executed, Amani submitted to the Regents an “addendum” to their charter entitled “October 16, 2011 Fiscal and Programmatic Impact Statement.” Two days later, on October 18, 2011, the Regents approved Amani’s charter *nunc pro tunc* to December 14, 2010.

Petitioners/Plaintiffs (hereinafter “Petitioners”) commenced this hybrid action/proceeding seeking to nullify the Regents’ October 18, 2011 charter approval and its *nunc pro tunc* designation, an injunction prohibiting future payments, and a judgment recouping the payments

Amani has already received. The State Respondents¹ all answered, set forth a number of objections in point of law and submitted the record before the agency below. Amani also answered, setting forth ten affirmative defenses and two counterclaims.² Petitioners sufficiently opposed the counterclaims.³ Because Petitioners demonstrated that the Regents' October 18, 2011 charter approval was violative of lawful procedure it is vacated, and the State Respondents are enjoined from disbursing future payments to Amani. However, Petitioners are precluded from recouping those monies already paid to Amani. Additionally, Amani failed to demonstrate its entitlement to mandamus relief.

On this record, Petitioners failed to demonstrate that the Regent's did not make the necessary Education Law §2852(2)(c) finding. (*compare* Bd. Of Educ. Of Roosevelt Union Free School Dist. v Bd. Of Trustees Of State Univ. Of New York, 287 AD2d 858 [3d Dept 2001] and Bd. of Educ. of Riverhead Cent. School Dist. v Bd. of Regents of Univ. of State of New York, 301 AD2d 919 [3d Dept 2003]). The State Respondents submitted a video of the Regents'

¹ Respondents/Defendants New York State Education Department; John B. King, Jr.; The Regents of the University of the State of New York; Office of the State Comptroller; Thomas P. Dinapoli are all hereinafter collectively referred to as the "State Respondents."

² Amani's mandamus counterclaim is made within this Article 78 proceeding, is fully submitted and disposed of herein. However, because its declaratory judgment counterclaim sets forth the basis of an action and no dispositive motion has been made, this Decision and Order will not address it.

³ Although Petitioners' Verified Reply, dated March 12, 2012, is rejected for purposes of this Article 78 proceeding as untimely filed, Petitioners' March 7, 2012 Affirmation and prior submissions, liberally construed, sufficiently oppose and reply to Amani's mandamus counterclaim. (CPLR §§3011). Also, as Petitioners served their Verified Reply within twenty days of their March 7, 2012 Affirmation, the Verified Reply effectively amended and replaced their March 7, 2012 Affirmation as their reply to Amani's declaratory judgment counterclaim. (CPLR §§3011 and 3025[a]).

succinct and unanimous vote to approve Amani's charter on October 18, 2011. While the Regents voted on the required Education Law §2852(2)(c) finding, the actual vote's summary nature did not include an inquiry into whether Amani was "likely to improve student learning and achievement and materially further the purposes set out in subdivision two of section 2850 of the Education Law." Nor was the vote based upon newly submitted factual information relevant to a Education Law §2852(2)(c) finding. However, the Regents' vote was based, at least in part, upon the OISM's⁴ December 2010 Findings and Recommendations. Such Findings contained a synopsis of Amani's "Educational Plan," which sufficiently supports the Regents' October 18, 2011 finding that Amani "is likely to improve student learning and achievement and materially further the purposes set out in subdivision two of section 2850 of the Education Law." As such, the Regents "discharged its statutory obligation." (Bd. of Educ. of Riverhead Cent. School Dist. v Bd. of Regents of Univ. of State of New York, supra at 920).

Amani has not, however, cured its charter application's Education Law §2851(2)(q) defect. Education Law §2851(2)(q) specifically required that Amani's charter application "include:... an assessment of the projected programmatic and fiscal impact of [its] school on other public and nonpublic schools in the area." As the Decision and Order found, Amani's application contained no such assessment. This defect was not a mere technicality, but rather a specific violation of a statutory mandate which the Regents had no authority to ignore. Amani's belated and cursory attempt to cure such defect is unavailing. While Amani's "October 16, 2011 Fiscal and Programmatic Impact Statement" explicitly shows its fiscal impact on the Petitioner,

⁴ "OISM" hereinafter refers to New York State Education Department-Office of Innovative School Models.

its programmatic analysis is wholly conclusory. No facts are proffered to substantiate either its “modeling” conclusion or its “high level perpar[ation]” thesis. Conspicuously absent from Amani’s “programmatic... impact” analysis is any assessment of Amani’s actual impact on the programs both public and nonpublic schools’ currently offer. (*see generally* Lakeshore Nursing Home v Axelrod, 181 AD2d 333 [3d Dept 1992]). Moreover, because Amani’s filing of this October 16, 2011 “addendum” is a “significant stage of the chartering process” the Regents’ one day notice failed to comply with Education Law §2857(1)’s notice provision.

Because Amani’s charter application remains defective the Regents’ acceptance and approval of it violates Education Law §§2851(2)(q) and 2852(9-a)(g) lawful procedure; again requiring the Regents’ approval of Amani’s charter to be vacated. (Town of Hunter v City of New York, 46 AD3d 1197 [3d Dept 2007]). Because Amani’s charter is vacated, Amani is not entitled to future charter school tuition payments pursuant to Education Law §2856 unless they obtain a valid charter in accord with all of Education Law Article 56’s provisions.

Accordingly, Amani’s charter is vacated and this matter is remanded to the Regents for further consideration in accord with this Decision and Order.

Despite such vacatur, because of the Regents’ “broad policy-making function” (Moore v Bd. of Regents of Univ. of New York, 44 NY2d 593, 601 [1978]) their October 18, 2011 “nunc pro tunc” determination was not arbitrary and capricious. It is uncontested that Amani has actually been educating approximately eighty children, since September 2011, in Petitioner’s school district. Nor is it contested that the charter school tuition payments Amani received were based upon the educational services it was, and is, currently providing to those students. The Regents’ October 18, 2011 “nunc pro tunc” determination effectively validated and retroactively

authorized the payment of the educational services Amani actually provided. As Petitioner obtained no stay prohibiting these tuition payments and failed to show that Amani did not reasonably rely upon such payments, the Regents' "nunc pro tunc" determination was not arbitrary and capricious. It was wholly equitable. As such, Petitioners cause of action seeking a judgment in the amount of charter school tuition payments Amani received, as an incidental damage of its Article 78 claim, is dismissed.

Turning to Amani's mandamus counterclaim, it failed to demonstrate its entitlement to such relief. "Mandamus to compel is available only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law." (Glenman Indus. & Commercial Contr. Corp. v New York State Off. of State Comptroller, 75 AD3d 986, 989 [3d Dept 2010], quoting Matter of Schmitt v. Skovira, 53 AD3d 918 [3d Dept 2008]). Because, as set forth above, Amani's charter was invalidly granted, Amani demonstrated no "clear legal right" that Petitioner failed to perform. As such, Amani's mandamus to compel counterclaim is dismissed.

This Decision and Order is being returned to the attorneys for the Petitioners. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: March 28, 2012
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause, dated January 24, 2012; Affirmation of David Kwee, dated January 13, 2012; Summons, dated January 11, 2012; Verified Petition/Verified Complaint, dated January 11, 2012; Affidavit of Timothy Costello, dated January 13, 2012, with attached Exhibits "A" - "I".
2. Answer, dated February 7, 2012, with attached Exhibits "1" - "7(1-23)"; Affidavit of Sara Bachofer, dated February 6, 2012.
3. Verified Answer and Counterclaims, dated February 24, 2012, Affidavit of Debra Stern, dated February 24, 2012, with attached Exhibits "A" - "Q."
4. Affirmation of David Kwee, dated March 7, 2012.