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

PRESENT: MOULTON Justice

PART MFP

INDEX NO. 102054/12

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

SOUTHSIDE Community Schools - v - Coalition for Brooklyn Success Academy Y Charter School

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition is denied and the proceeding is dismissed in accordance with the written decision of this date.

(V)

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 5/31/12

HON. PETER H. MOULTON J.S.C.
SUPREME COURT JUSTICE

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Supreme Court: New York County
Part 40B

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In the Matter of:
SOUTHSIDE COMMUNITY SCHOOLS COALITION, et al.,

Petitioners,

Pursuant to Article 78,

-against- Index No. 102054/12

Brooklyn Success Academy 4 Charter School, The Board of Trustees of the State University of New York, and Dennis Walcott, in his Official Capacity as Chancellor of the New York City Board of Education,

Respondents.

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Peter H. Moulton, Justice

Petitioners in this Article 78 proceeding challenge the issuance of a charter to respondent Brooklyn Success Academy 4 ("BSA 4"), which enables BSA 4 to open a charter school in a building in Williamsburg, Brooklyn that currently houses several City public schools. The proposed building is located in Community School District 14. The petitioners are comprised of elected officials and community organizations from Williamsburg and nearby portions of Brooklyn, and numerous parents of children who attend District 14 schools. Petitioners oppose the siting of this Charter

School in their community.

Petitioners seek declarative and injunctive relief arising from the respondents' alleged failure to shoulder their statutory duty to seek meaningful input, and gauge support, from the relevant community, before deciding to award a charter to BSA 4.

Petitioners brought this proceeding seeking a temporary restraining order to enjoin the Panel on Education Policy, the relevant decision-making body of the New York City Department of Education, from voting to allow BSA 4 to "co-locate" with traditional public schools in the school building denominated K050. This court declined to issue this temporary restraining order, the vote went forward, and the DOE has determined that BSA 4 may co-locate in the building.

Respondents contend that they did seek meaningful input from the relevant community and that this input revealed substantial support for BSA 4. They argue that BSA 4 has demonstrated that its outreach revealed that it can more than meet its enrolment targets, which is the fundamental measure for approval of a charter school under the state's Education Law. Respondents also point to the success of other charter schools run by BSA 4's parent, and to the high demand for placements in these sister schools, to justify the award of a charter to BSA 4. Apart from their argument that the

charter award was not arbitrary and capricious, respondents raise the threshold arguments that petitioners do not have standing to challenge the decision awarding the charter, and that this proceeding is time-barred.

BACKGROUND

The sequence of events that led to the issuance of a charter to BSA 4 is not in dispute and is summarized below.

On January 3, 2011, the Charter Schools Institute ("Institute"), an arm of The State University of New York ("SUNY), issued a request for proposals for 63 new charter schools in the state. The Institute serves as staff to the SUNY Trustees on matters pertaining to charter schools.

On February 28, 2011, BSA 4 submitted a joint application with two other schools, Brooklyn Success Academies 2 and 3, concerning proposed charter schools for Community School Districts 13 and 14. All three charter schools are managed by Success Academy Charter Schools ("Success Academy") a non-profit education organization that operates a network of charter schools in New York City. The application made a number of representations concerning outreach conducted by Success Academy to parents, office holders, and other stakeholders in Community School Districts 13 and 14. It attached

over 1500 petitions for each of the three schools.

On May 26, 2011, respondent Dennis Walcott, Chancellor of the New York City Department of Education, recommended to the Institute that the charters for BSA 2-4 be granted.

On June 5, 2011, the Institute recommended the three schools for approval. The SUNY Trustees voted to approve the charters on June 15, 2011. On June 27, 2011, the SUNY Trustees posted on its website a notice of its approval. The SUNY Trustees issued provisional charters to the three schools on August 11, 2011. The Board of Regents approved the charters on September 13, 2011. As of that date, none of the schools had been assigned to a specific building. Thereafter, the Board of Regents posted online minutes from the meeting in which BSA 4's charter was approved.

On December 12, 2011, the Department of Education issued a public notice proposing to locate BSA 4 in building K050 in Community School District 14. Two schools currently occupy the building. On January 17 and February 16, 2012, the DOE held public meetings in order to solicit public comments on the co-location proposal. On March 1, 2012, The DOE's Panel for Educational Policy ("PEP") voted to approve the co-location of BSA 4 at building K050.

DISCUSSION

A. Threshold Defenses

The respondents raise two threshold defenses: lack of standing and statute of limitations.

1. Standing

Respondents challenge petitioners' standing to bring this Article 78 proceeding. They argue that petitioners have articulated no harm to them if the school opens. Therefore, BSA 4 argues, petitioners can state no injury in fact. BSA 4 also argues that petitioners are not within the "zone of interests" protected by the Education Law sections invoked by petitioners.

"[A] party has standing to enforce a statutory right if its abuse will cause him injury and it may fall within the 'zone of interests' protected by the legislation." (Schwartz v Morgenthau, 7 NY3d 427, 432 [2006], quoting Matter of District Attorney of Suffolk County, 58 NY2d 436, 442 [1983].)

Petitioners sue under Education Law §§ 2851(2)(q), 2852(9-a)(b). According to petitioners these two provisions of the Education Law mandate that any charter school applicant gauge community support and opposition to a charter school, and assess the impact of a charter school on other schools in a given area.

Petitioners argue that they were "silenced" by BSA 4's failure to properly solicit views of their community.

Education Law § 2851(2)(q) provides that a charter school applicant must provide:

> Evidence of adequate community support for and interest in the charter school sufficient to allow the school to reach its anticipated enrollment, and an assessment of the projected programmatic and fiscal impact of the school on other public and nonpublic schools in the area.

This section contains two clauses. The first clause requires charter school applicants to gauge "adequate community support" to determine if the school can "reach its anticipated enrollment." This portion of the statute requires evidence of support for the school. Accordingly, petitioners - who are opposed to BSA 4 - are not within the zone of interests protected by this portion of the statute. As long as there is sufficient evidence of support - it does not matter what petitioners' views are.

In its second clause, the statute does not explicitly require respondents to consider the views of community residents in assessing "the projected programmatic and fiscal impact of the school on other public and nonpublic schools in the area." Respondents are directed to consider "the projected programmatic and fiscal impact of the school on other public and nonpublic

schools in the area" but the statute does not direct respondents to any particular source of information. Petitioners allege that they are concerned about a diversion of resources, including school space, away from standard public schools and towards BSA 4. They allege that their views, and those of other opponents of BSA 4, were ignored by BSA 4. However, by its terms, § 2851(2)(q) does not confer standing on petitioners to raise this claim.

Petitioners state a similar claim under Education Law § 2852(9-a)(b). That section states in relevant part:

> The board of regents and the board of trustees of the state university of New York shall each develop such request for proposals in a manner that facilitates a thoughtful review of charter school applications, considers the demand for charter schools by the community, and seeks to locate charter schools in a region or regions where there may be a lack of alternatives and access to charter schools would provide new alternatives within the local public education system that would offer the greatest educational benefit to students. Applications shall be evaluated in accordance with the criteria and objectives contained within a request for proposals. The board of regents and the board of trustees of the state university of New York shall not consider any applications which do not rigorously demonstrate that they have met the following criteria:
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> ***
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> (ii) that the applicant has conducted public outreach, in conformity with a thorough and meaningful public review process prescribed by the board of regents and the board of trustees

> of the state university of New York, to solicit community input regarding the proposed charter school and to address comments received from the impacted community concerning the educational and programmatic needs of students.

Petitioners have standing under this section. "Community" is not a defined term in the Education Law. However, if this section concerning "community input" is to have any meaning, it must refer to input from residents of the very City neighborhood in which the charter school is to be sited, and from parents who send their children to the very school building where the charter school will be housed. Such people are the nucleus of the affected "community," however broadly that term is defined.

2. **Statute of Limitations**

As held above, the only statute under which petitioners have standing is Education Law § 2852(9-a)(b). The applicable limitations period for this Article 78 proceeding is four months. (CPLR 217). The parties disagree concerning the date that the four month period began to accrue.

Respondents assert that petitioners' claims are barred because they were not brought until eight months after the SUNY Trustees approved BSA 4's charter on June 15, 2011. At the latest,

respondents argue, the accrual date is the date that the decision was published on the website of the SUNY Charter Schools Institute, which was June 27, 2011. If either June 2011 date is the correct accrual date the petitioners' remaining claim is time-barred.

For their part, petitioners argue that the relevant accrual date is December 12, 2011, when the Department of Education first issued a public notice proposing to locate BSA 4 in building K050 in Community School District 14. According to petitioners they had no prior notice that Success Academy had plans to open a charter school in Williamsburg. Petitioners also assert that they were not injured by the issuance of a charter until this announcement, because up to the date of the announcement it was not clear where BSA 4 would be sited.

A petitioner may challenge an administrative decision pursuant to Article 78 when it is final and binding. (CPLR 217[1].) The accrual date for limitations purposes is often hotly disputed in Article 78 proceedings. It can be particularly difficult to determine the accrual date where, as is the case here, the petitioners were not parties to the challenged administrative decision and were not entitled to personal notice of the final decision. It is further complicated, as is the case here, where there is more than one administrative decision maker. The Court of

Appeals has provided a two step inquiry that aids courts' analyses in such cases.

> First the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party.

(Matter of Best Payphones, Inc. v Dep't of Information Technology and Telecom. of the City of New York, 5 NY3d 30, 34 [2005].)

Additionally, petitioners must have some notice of the administrative decision they wish to challenge. (Metropolitan Museum Historic Dist. Coalition v De Montebello, 20 AD3d 28 [2005].) Public notice can come in a variety of forms, including public meeting (see Branch v Riverside Park Community LLC, 74 AD3d 634 [1st Dept 2010], lv denied 15 NY3d 710) or publication on the agency's website (see Town of Olive v City of New York, 63 AD3d 1416 [3rd Dept 2009]).

Petitioners do not wish simply to speak against BSA 4; they seek to void its charter and keep it from opening in District 14. It is true that petitioners call for a vetting process that they say would reveal overwhelming community opposition to the school. But they seek such a vetting process for the purpose of convincing the SUNY Trustees that the school should not open at all. In their

prayer for relief, petitioners seek an injunction that would permanently enjoin "respondent Brooklyn Success Academy 3 Charter School from opening, operating and maintaining [BSA 4] in School District 14."

Accordingly, the administrative action that allegedly inflicted harm on petitioners was the decision to allow BSA 4 to open. At first glance, the relevant decision would appear to be the decision to grant BSA 4's charter. This would appear to support respondents' argument that the relevant date for accrual of the four month limitations period is June 15, 2011, the day the SUNY Trustees voted to approve the charter.

However, as set forth in the Background section above, there was more administrative action after the June 15 vote. The final gatekeeper appears to have been the Board of Regents, an entity separate from the SUNY Trustees. The Board of Regents is not a party to this proceeding.

Pursuant to Education Law § 2852(5) the "charter entity," here, the SUNY Trustees, had to submit the proposed Charter Agreement to the Board of Regents for review. While the Board of Regents cannot reject the proposed charter, they are empowered to either approve the charter or to return the charter to the charter entity with comments for reconsideration. If the charter is

returned the charter entity, the charter entity must consider the Board of Regents' comments.

> Thereafter, the charter entity shall resubmit the proposed charter to the board of regents with modifications, provided that the applicant consents in writing to such modifications, resubmit the proposed charter to the board of regents without modifications, or abandon the proposed charter.

(Education Law § 2852[5-b].)

These sections of the Education Law contemplate an iterative process, short in duration, between the SUNY Trustees and the Board of Regents. While the Regents cannot reject a charter, under Education Law § 2852(5-b) their returning the charter to the charter entity (here the SUNY Trustees) can result in the charter entity abandoning the proposed charter. Therefore, the decision to grant a charter is not truly final until one of three events occurs: 1) the Regents approve a proposed charter, 2) the Regents take no action on a proposed charter for ninety days, in which case the charter is "deemed" approved (Education Law 2852(5-a); or 3) the charter entity (here the SUNY Trustees) resubmits the charter application to the Regents, at which point the Regents' approval is essentially a rubber stamp, with no further power to delay or alter the application.

BSA 4's charter became final under the first of the above

scenarios. The operative date is September 13, 2011, the date the Board of Regents voted to approve BSA 4's charter. At that point, there was no further possibility that the charter might be abandoned by the SUNY Trustees.

The final question is: when did the Board of Regents or the respondents give notice of this final and binding decision? It appears that the Board of Regents' approval was publicly announced on the Regents' website on October 4, 2011.[1] The question thus arises whether this was sufficient notice of the final decision of the Regents. Petitioners do not contend that they were entitled to individual notice.

It is undisputed that Success Academy did conduct some outreach in the relevant communities which would be serviced by BSA 4. Success Academy attended meetings with the relevant community boards and community education council, wrote letters to elected officials, and collected petition signatures. Success Academy's proposal was covered in the press, and the progress of the application was reported on the Institute's website. The proposal to open BSA 4 in either Community School District 13 or 14 was not

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[1]The Memorandum accompanying the September 13, 2011 minutes is dated October 4, 2012. The memo and the minutes appear on the Regents' website at: www.regents.nysed.gov/meetings/October2011/1101bra2.pdf

a secret. Particularly as it came after this outreach, and after a long public decision-making process, the notification of the final decision on the Regents' website was sufficient. (See Town of Olive v City of New York, 63 AD3d 1416, supra; Johns v Rampe, 23 AD3d 283 [1st Dept 2004], lv denied 6 NY3d 715 [2006]; Matter of Cohen v State of New York, 2 AD3d 522 [2d Dept 2003].) What matters is when the decision was made public, not when some members of the general public, unidentifiable in advance, happened to learn of the decision. As the Regents' notice occurred more than four months prior to the date the petition was filed (February 29, 2012), this proceeding is time-barred.

Petitioners rely on Mulgrew v Bd. of Educ. of the School Dist. of the City of New York, (28 Misc3d 204 [Sup Ct, New York County, aff'd 75 AD3d 412 [1st Dept 2010) in arguing that publication of a final decision on a website is insufficient. However, in Mulgrew the respondents did not adhere to a specific statutory requirements for filing educational impact statements. There is no similar statute here that requires a particular method of publicizing the final decision to the general public.[2]

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[2]Education Law § 2857(1) does impose some notification duties on the Board of Regents and the charter entity (SUNY Trustees). That section states in relevant part: "At each significant stage of the chartering process, the charter entity

For the reasons stated, this proceeding is barred by the applicable statute of limitations.

B. The Merits of the Petition

Even if this proceeding was not time-barred, on the merits respondents have demonstrated that the decision to grant a charter to BSA 4 was not arbitrary or capricious or in violation of Education Law § 2852(9-a)(b), the only statute that confers standing on petitioners.

Petitioners argue that Success Academy's community outreach was essentially a walk through a Potemkin Village of parents eager to send their children to BSA 4. According to petitioners, Success Academy falsely stated that there was no opposition to the school, when in fact such opposition was stated at a meeting with school representatives on April 14, 2011. Further, overwhelming opposition would have been expressed, petitioners imply, if only Success Academy had sought to conduct true community outreach in the relevant portions of Brooklyn that would be served by BSA 4.

[here, the SUNY Trustees] and the board of regents shall provide appropriate notification to the school district in which the charter school is located and to the public and nonpublic schools in the same geographic area as the proposed charter school." Respondents are not among the groups entitled to notification under this section.

Instead, petitioners assert, BSA 4 conducted "community outreach" that was calculated to obscure the level of community opposition.

Petitioners correctly note that BSA 4's charter application does not address some of the suggestions of the guidelines that accompany the SUNY Trustees' request for proposals ("RFP"). The guidelines for the RFP seek "explicit support" for the proposed school from "community stakeholders or others" and state that "generic support for charter schools ... is not sufficient." Petitioners fault BSA 4 for invoking support for its existing schools, located elsewhere in the City, as having nothing to do with support for BSA 4. Petitioners also argue that Success Academy's petitions, which were signed by 4500 people, were too generic to provide any useful evidence that the relevant communities in Brooklyn were interested in the type of schools that Success Academy was planning. The petitions do not contain information suggested by the instructions for the RFP, such as whether the signatory has school-age children. Petitioners note that a number of signatures are from individuals who reside outside of Community School Districts 13 and 14. However, petitioners do not quantify this number. In any event the relevant "community" from which input must be solicited is greater than Community School District 13 and 14.

Petitioners correctly argue that the instructions for the RFP elaborate on section 2852(9-a)(b)(ii)'s requirement of community input. The instructions for the RFP include the following:

> Per Education Law subdivision 2852(9-a)(b)(ii) the SUNY Trustees are not to consider any proposal that does not reflect a meaningful public review process designed to solicit community input regarding the proposed charter school and address comments received from the impacted community concerning the educational and programmatic needs of students. In order to recommend a school for approval, the [charter school application must demonstrate (1) the community was informed of the proposed school in a timely fashion; (2) the community had meaningful opportunities for input; and (3) there was a thoughtful process for considering community feedback and incorporating it into the final proposal.
>
> Please note that seeking input about the proposal is distinct from seeking support for the proposed school. While the application must also show evidence of community interest in and support for the school, this support alone is not adequate in demonstrating that the community was given the opportunity to provide input into the design of the proposed school and that input was carefully considered by the applicant.

Petitioners state that Success Academy flouted this provision by failing to discuss in its proposal a single concern about the proposed school in the "impacted community." There does not appear to have been any input solicited concerning the "design" of the school.

Petitioners are correct that Success Academy could have engaged in a more thorough-going canvas of the relevant neighborhoods in Brooklyn to surface concerns and opposition to BSA 4. However, the statute does not require that charter applicants conduct such an exhaustive survey of support and opposition.

The community outreach required by the statute is weak. In the first place, as described above, the word "community" is not defined. This fact leaves to the SUNY Trustees a great deal of discretion in determining whose views must be taken into account. Additionally, the statute requires community input on the "educational and programmatic needs of students" without in any way suggesting how to solicit, organize or record such input. Finally, the statute does not bar the issuance of a charter even where the relevant community, however defined, mounts serious or even overwhelming opposition to a proposed school during the course of the public input required by Education Law § 2852(9-a)(b). Where the legislature wishes to create a more detailed process for community involvement in schools-related decision making, it has done so. The statute governing school co-location is an example. (See Education Law § 2853[3].)

It was not arbitrary and capricious for the SUNY Trustees to find that Success Academy complied with the community input

requirements of Education Law § 2852(9-a)(b). The petitions, though they do not provide much detail about the nature of BSA 4, provide some evidence of interest. The application also recounts Success Academy's correspondence sent to elected officials and other interested parties in the area concerning plans to open the school. Success Academy officials attended community meetings with the community boards that serve the relevant communities, and the Education Councils for Districts 13 and 14. The SUNY Trustees are afforded deference in interpreting the Education Law provisions governing charter schools. (See Bd. of Educ. Of Riverhead Central Sch. Dist v Board of Regents of the Univ. of the State of New York, 301 AD2d 919 [3rd Dept 2003]; International High School: a Charter School at LaGuardia Community College v Mills , 276 AD2d 165 [3 rd Dept 2000.) The SUNY Trustees could rationally find that the level of community outreach exercised by Success Academy was sufficient to meet the very general requirements of Education Law § 2852(9-a)(b).

CONCLUSION

For the reasons stated, IT IS ADJUDGED that the petition is denied and this Article 78 proceeding is dismissed. This constitutes the decision and judgement of the court.

Date: May 31, 2012

J.S.C.

HON. PETER H. MOULTON
SUPREME COURT JUSTICE