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

PRESENT: ALICE SCHLESINGER Schlesinger Justice

IA PART 16

PART 16

R.B.

-v-

NYC DEPT OF EDUCATION

INDEX NO. 100738/13

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

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~~ Article 78 petition is denied and the proceeding is dismissed in accordance with the accompanying memorandum decision.

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: AUG 01 2013

Alice Schlesinger

ALICE SCHLESINGER J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 16

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In the Matter of the Application of

R.B. on behalf of his minor child L.B.; A.K. on behalf of his minor child S.K.; S.R. on behalf of his minor child H.R.; L.W. on behalf of her minor child E.W., individually and on behalf of all other similarly situated,

Petitioners,

Index No. 100738/13
Mot. Seq. Nos. 001 & 002

for Judgment pursuant to CPLR Art. 78 and common law claims,

-against-

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK f/k/a THE BOARD OF EDUCATION OF THE CITY OF NEW YORK; DENNIS WALCOTT, as Chancellor of the Department of Education of the City of New York; GENTIAN FALSTROM, as Director of elementary enrollment of the Department of Education of the City of New York; ROBERT SANFT, as Director of the Office of Student Enrollment of the Department of Education of the City of New York;

Respondents.

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SCHLESINGER, J.S.C.:

At issue in this case is the process used by the Department of Education (DOE) to admit four-year-old children to the "gifted and talented" (G&T) program in the New York City public schools. Specifically, the four petitioners, who are parents of children seeking admission to the program, contend that the admission process is arbitrary and capricious and violates the Equal Protection clause of the New York State Constitution by giving preference to applicants who already have siblings in the G&T program. In addition to seeking Article 78 and declaratory relief, petitioners have asked this Court to enjoin respondents from selecting students for the 2013-14 academic year using the DOE's current sibling preference policy and scoring methodology for determining admission to the G&T program.

After extensive argument on the record on May 17 and June 7, 2013, which included strong opposition by respondents, this Court declined to grant a temporary restraining order or a preliminary injunction, though the DOE's timetable for issuing admission decisions did allow petitioners an opportunity to go to the Appellate Division. On July 9, 2013, the Appellate Division denied a preliminary appellate injunction. Motion No. M-3181, Slip Op. No.: 2013 NY Slip Op 79124(U)(First Dep't). By Affirmation dated June 17, 2013, petitioners' counsel advised the Court that the DOE had selected the students for its G&T programs and had notified petitioners that two of the children had been offered placement in a district G&T program but not the more expansive Citywide program, and the remaining two children had not been offered placement into any type of G&T program, despite their high scores on the assessment exams.

While the proceedings were pending, petitioners also moved for discovery, seeking certain information about the methodology used by the DOE to rank the applicants to the G&T program and determine the placement offers. The DOE opposed that request, arguing among other things that ample need had not been demonstrated for discovery in this special proceeding. All matters have been fully briefed and are ripe for a determination.

Relevant Facts

It appears that this controversy was sparked by a proposed change to the G&T program that was potentially beneficial to the petitioners but was derailed due to community opposition and the turmoil created by Hurricane Sandy. Primarily, that proposed change eliminated the preference given to children with siblings in an existing G&T program. Encouraged by the proposal, petitioners — all of whom are exceptionally bright children without siblings in a program — effectively seek to compel the DOE to adopt the

proposal by having this Court invalidate the present program, which they claim gives an unfair advantage to children with G&T siblings and deprives them of a public school education suited to their particular talents and needs.

The G&T admission process is somewhat complex. Generally speaking, placements are made according to the child's percentile rank on G&T assessment tests, with eligible siblings of students currently enrolled in G&T programs placed first, and then non-sibling applicants placed by percentile rank. (See Affidavit of Respondent Robert Sanft, Answer Exhibit 1 ¶ 2). The policy is codified in Chancellor's Regulation A-101, which governs admission processes. Each year the community is notified of the deadlines for each stage of the application and admission process in a Program Handbook published and distributed by the DOE.

In the fall of 2012, the DOE decided to propose a policy change affecting two aspects of the admission process: it proposed the elimination of the sibling preference; and it proposed changing the scoring method used from percentile ranking to composite scoring. However, because the existing policy was codified in the Chancellor's Regulation, the proposed change could not be implemented without a notice and comment period and the approval of the Panel for Educational Policy (PEP). The PEP vote was scheduled for December 20, 2012. (Sanft Aff. at ¶ 3).

Pursuant to Education Law § 2590-g, the DOE posted notice of the proposed change on its website on October 26, 2012 and invited public comment. Additionally, the new policy was included in the printed copies of the 2012-2013 Gifted and Talented Handbook. *Id.* However, it is undisputed that the DOE failed to include any statement in the Handbook that the policy set forth there was a proposal only, and information was provided at public meetings that was consistent with the Handbook. Petitioners further

contend (¶ 28) that the October 26 notice mentioned only the proposed elimination of the sibling preference, without mentioning any changes to the scoring methodology. Some members of the public were nevertheless aware of the proposed changes from the website, and significant public comment was submitted to the DOE that largely opposed the proposed elimination of the sibling preference. The DOE posted a summary of those comments on its website on December 19, 2012, the day before PEP was scheduled to vote. *Id.* at ¶ 4.

In addition to concerns raised by the negative public comments, the DOE was concerned about changing the scoring methodology from percentile ranking to composite scoring, an issue that petitioners address in detail in their papers. As indicated in the affidavit of Adina Lopatin, the DOE's Deputy Chief Academic Officer for Performance, the DOE was concerned that the proposed composite scoring would not further the G&T objectives. (Answer, Exh 2).

Lopatin explains (at ¶ 4) the scoring methodology as follows. Since at least 2008 (and today), the DOE has used percentile ranks to determine admission into G&T programs. First, two assessment exams are given to the child: the Otis-Lennon School Ability Test (OSLAT-8) and the Naglieri Non-Verbal Ability Test (NNAT-2).[1] The raw scores are normalized and combined to create an overall percentile rank, which is the student's standing relative to other students of the same age within a range of three months. The percentile ranks are determined based on independent national norm studies, as no study exists on a population of this age in New York City that has taken precisely the same two

[1] While two assessment tests were always used, the NNAT-2 was used for the first time in 2013. According to Sanft (¶ 5), the DOE was also concerned about making a policy change when the NNAT-2 assessment test, while nationally recognized, was being used by the DOE for the first time.

assessment tests. After eligible siblings are placed, the DOE conducts a lottery to determine, among students within a given percentile rank, which students receive offers to the G&T programs.

Lopatin further explains (at ¶¶ 5-6) that in the fall of 2012 the DOE proposed using composite scores, rather than percentile ranks, to determine eligibility for 2013 admissions. A composite score is a numeric value that provides a description of a student's combined performance on both assessment exams. Because composite scores provide greater differentiation based on test results and therefore would have obviated the need for a lottery system, the DOE initially proposed changing to that methodology. However, the DOE ultimately determined to continue using its tried and true percentile ranking system because it concluded that a small difference in a composite score — based, for example, on a single wrong answer on a test — could unfairly exclude equally gifted students from participating in the G&T program.

For all these reasons, the DOE determined on December 19 not to implement the proposed policy change until further analysis had been completed and to instead determine 2013 admissions using the policy that had been in effect since at least 2008. Sanft ¶ 6. The DOE communicated this decision to interested parties — including petitioners — in an email from Chancellor Walcott to all families who had submitted a Request for Testing, which was the necessary first step in the admission process. (Answer, Exh D). There Chancellor Walcott indicated that in 2013 the DOE would use the "same process and policy" that had been used in 2012, and he summarized the policy as follows:

- eligible siblings of currently enrolled students will be placed first
- for citywide programs, siblings scoring at or above the 97th percentile will be placed first, by percentile rank. For district programs, siblings scoring at or above the 90th

percentile will be placed first, by percentile ranks. ***After all eligible siblings have been placed, non-sibling applicants will be placed by percentile rank.*** (Emphasis added).

- in the event of a tie and insufficient seats, offers will be made based upon random assignment.

In addition to the email, the DOE sent a similar letter by first class mail to all families who had requested testing notifying them that the proposed change would not be put into effect. Further, the DOE posted the information on its website on December 19, and it later posted an updated version of the Handbook online. (Sanft ¶ 7). The necessary information was disseminated before testing began in January 2013 and before families were required to submit their application with their rankings of programs in May 2013.[2] The DOE made its admission determinations in June 2013 while these proceedings were pending. As previously noted, the decisions were made using the same sibling preference rule and percentile ranking system that has been in effect since 2008.

Discussion

Petitioners challenge the DOE's G&T admission process for four-year olds, claiming that it is arbitrary and capricious and violates equal protection in primarily three ways. First, petitioners suggest that, whereas the DOE Handbook originally published and distributed for the 2013-14 academic year indicated a particular methodology that would be used to determine admissions, the DOE ultimately used a different methodology, which resulted

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[2] To the extent the Petition alleges (¶ 40) that an amendment to the Chancellor's Regulation was approved on December 20 without notice to the public, the claim appears to be simply wrong, as the DOE has documented both its decision not to implement the proposed change and its notice to the public of that decision, while Petitioners have cited nothing.

in "deliberately sandbagging the children without sibling priority without notice." (Petition ¶ 37, 199).

Secondly, via affidavits from various well-credentialed mathematicians, petitioners challenge the DOE's use of percentile rankings, rather than composite scores, as part of its selection process. More specifically, they contend that the percentile numbers generated by the DOE methodology are "statistically flawed and so cannot be used to select and identify, with sufficient degree of accuracy, those students who are more academically gifted and so should be given preference to school admissions into the New York City G&T programs." Thus, petitioners contend, the percentile ranking system is "not a legitimate mechanism by which to rank the qualifying students for admission in the G&T Programs." (Petition, ¶ 108).

Lastly, petitioners assert that the DOE's methodology gives "preferential treatment" to children with siblings already enrolled in G&T programs in violation of the Equal Protection Clause of the State Constitution. (¶ 203). More specifically, they contend that, because the DOE "methodology has wrongly inflated the percentile ranks of many students who took the G&T Test, it would have also incorrectly elevated many siblings to the [eligible] percentile rank, guaranteeing them placement" into the G&T programs without leaving sufficient seats for eligible students without siblings. (¶ 143).

In addition to relief enjoining the DOE's use of its current methodology, petitioners ask this Court to direct that placement in the G&T program be made based upon the composite scores of students and that sibling preference only be used when two or more students have the same composite score.

In response, the DOE has addressed the merits in detail, offering voluminous exhibits and the above-discussed affidavits from two DOE officials in charge of the City's

G&T programs. Before addressing those arguments, however, the Court will address the threshold issues raised by the DOE.

Citing the First Department's decision in *Mulgrew v Board of Educ. of the City School Dist.*, 88 AD3d 72 (2011), the DOE correctly argues that Article 78 relief may not be granted where the petitioner has failed to exhaust administrative remedies. The administrative remedy available here, the DOE claims, is an appeal to the State Commissioner of Education pursuant to Education Law § 310(7), which provides 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."

This Court agrees with petitioners that this principle of law is not an absolute bar to the relief requested here. First, the cited statute uses the word "may," rather than "shall," suggesting that the remedy is not a mandated condition precedent to judicial relief. In this regard, *Mulgrew* is distinguishable because it involves financing and Education Law §211-d(2)(b)(ii), which by its terms expressly limits the remedy of an aggrieved party to a petition to the State Education Commissioner. Further, as petitioners assert in reply, an exception exists to the exhaustion of remedies doctrine where, as here, pursuit of the administrative remedy may be futile or lead to irreparable harm due to processing delays. *See, Matter of Community School Bd. Nine v Crew,* 224 AD2d 8 (1st Dep't 1996), *lv denied* 89 NY2d 807 (1997). Based on petitioners' need for prompt certainty as to the schooling arrangements for their children for this September, this Court finds that petitioners were not obligated to pursue administrative remedies before commencing this proceeding.

Nor is this proceeding barred by the four-month statute of limitations for Article 78 proceedings set forth in CPLR § 217. Admittedly, the DOE has demonstrated that it

implemented the scoring methodology and sibling preference policy challenged here in 2007 and codified them in a Chancellor's Regulation available to the public years ago. Further, petitioners have acknowledged receipt of an email from Chancellor Walcott on December 19, 2012 notifying them that the proposed policy change reflected in the Handbook would not, in fact, be implemented. Thus, the DOE argues, this proceeding should have been commenced in April 2013, at the latest, and it was not commenced until mid-May. However, petitioners persuasively argue that they did not qualify as "aggrieved" parties until they received their children's test scores in April 2013, which confirmed that they were eligible to apply for admission to the G&T program. Further, the DOE did not publish the updated G&T Handbook setting forth the details of the correct policies and procedures that it would use until February 25, 2013. Using either of those dates, this proceeding is timely.

Turning to the merits, no basis exists to sustain petitioners' claim that the DOE somehow failed to provide adequate notice of its proceedings. As the DOE ultimately decided to maintain the status quo and not make any changes to the G&T admission process described in the Chancellor's Regulation, there can be no violation of the Education Law notice provisions. (See, Sanft Aff., ¶ 8).

In any event, the record demonstrates adequate notice to petitioners of all proceedings. Petitioners acknowledge that the DOE issued the October 26, 2012 Notice of the proposed amendments in accordance with Education Law §2590-g and sought public comment. (Petition ¶ 25). More details about the proposed change in the scoring methodology were not required; as the methodology is not spelled out in the Regulation, it does not require approval by the Panel for Education Policy (PEP) as did the sibling

preference policy. See Educ. Law §2590-g(1)(c). Although the Handbook originally published did not explicitly state that it was a proposal only, the October 26 Notice, as well as the Chancellor's emails sent directly to petitioners and other parents, provided ample notice of the proposal, the comment period, and the DOE's decision not to refrain from proceeding with the proposed changes and to instead make admission decisions pursuant to the policies in effect since 2007.

Nor does this Court find any violation of the Equal Protection Clause of the State Constitution. The applicable provision, Article I, Section 11, states that: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof." This provision is no broader than the 14th Amendment to the U.S. Constitution. *See, Matter of Esler v Walters,* 56 NY2d 306, 313-14 (1982). Absent a "suspect" classification that raises the level of judicial scrutiny, a policy withstands a constitutional challenge if it "rationally furthers some legitimate, articulated state purpose ..." *Archbishop Walsh High School v Section VI of the N.Y. State Pub. High School Athletic Ass'n,* 88 NY2d 131 (1996).

Wholly without merit is petitioners' attempt to classify their children as a "suspect" class "based on lineage." That classification refers to a party's racial or national background, and not to the child's status as a sibling. *See, Korematsu v United States*, 323 US 214 (1944). Thus, the DOE need only demonstrate a rational basis for its admission policy, which it has done to the satisfaction of this Court by explaining that the sibling preference is intended to relieve City families with two or more siblings of the burdens and complications inherent in having the children attend two different schools. (See Sanft Aff. ¶5).

Equally unavailing is petitioners' challenge to the DOE policy pursuant to Article 78 of the CPLR, which requires a showing that the policy was "arbitrary and capricious or an abuse of discretion." CPLR § 7803(3). First, petitioners' sole statutory right is a right to a "sound basic education" and not to a particular type of educational program. *New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 178 (2005); *see also*, Educ. Law §3202. While petitioners may well be correct that the No Child Left Behind Act of 2001 requires that schools address the needs of gifted children, it does not mandate that a student be admitted to a particular type of program.

Indeed, school administrators like the Chancellor have broad discretion to determine how educational programs are designed, and the courts should not interfere absent a showing that the administrators have acted in violation of law. As the Court of Appeals stated in *Matter of New York City School Bds. Assn. v Board of Educ. of City School Dist. of City of N.Y.*, 39 NY2d 11, 121 (1976) when affirming the dismissal of an Article 78 challenge to the Board's modification of the school day: "The courts may not under the guise of enforcing a vague educational public policy ... assume the exercise of educational policy vested by constitution and statute in school administrative agencies."

The sibling preference policy being implemented here, as well as the scoring methodology used to rank eligible G&T students, is an educational policy that falls within the DOE's discretion. Although the policy and methodology may not be perfect, and although alternative policies and methodologies may exist that are more accurate in identifying and placing gifted students, petitioners have not established that the present policy is arbitrary and capricious or in violation of law. Thus, their challenge must fail.

Accordingly, it is hereby

ADJUDGED that this Article 78 petition is denied and the proceeding is dismissed; and it is further

ORDERED that petitioner's motion for discovery is denied as moot. The Clerk may enter judgment in favor of respondents dismissing the proceeding with prejudice.

Dated: August 1, 2013

AUG 01 2013

J.S.C.
ALICE SCHLESINGER

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).