

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

RV, on behalf of himself and all others similarly
situated,

Plaintiffs,

vs.

NEW YORK CITY DEPARTMENT OF
EDUCATION; NEW YORK CITY BOARD OF
EDUCATION; JOEL KLEIN, in his official capacity
as Chancellor of the New York City School District;
REYES IRIZARRY, in his official capacity as
Regional Superintendent of Region 4; and ANA
SANTIAGO, in her official capacity as Principal of
Bushwick High School,

Defendants.

Civ. No.:

COMPLAINT

PRELIMINARY STATEMENT

1. This is a class action for declaratory and injunctive relief and equitable relief in the form of compensatory educational and support services based upon Defendants' illegal exclusion, expulsion and discharge of high school students from Bushwick High School ("Bushwick") in violation of the U.S. Constitution, Federal Law and New York State Law. Defendants have denied Plaintiffs' due process by adopting a policy that results in their exclusion from school and denial of their right to educational services afforded to them by New York State law.

2. The named Plaintiff in this action is an 18-year-old student with 20 high school credits. He has been out of school since the end of the 2002-2003 school year. While in school, the Plaintiff was a School Leadership student, a Yearbook Staff

member, a Junior Achievement participant, President of the Dance Committee, a member of the swimming team and a mentor for abused elementary children. Although he is barred from attending classes, he remains active in school through the School Leadership program and the Dance Committee and serves as Volunteer Deacon Assistant at his church, even though the school will not permit him to pursue his education.

JURISDICTION

3. This Court has jurisdiction under 28 U.S.C. § 1331, in that claims are asserted under the laws of the United States; under 28 U.S.C. § 1343(a), in that claims are asserted under laws providing for the protection of civil rights; and under 42 U.S.C. § 1983. This Court has jurisdiction over Plaintiffs' pendent state law claims pursuant to 28 U.S.C. § 1367. Plaintiffs also seek declaratory relief pursuant to 28 U.S.C. § 2201 and 2202.

4. Venue is proper under 28 U.S.C. § 1391(b).

5. If successful, Plaintiffs are entitled to costs and attorneys fees under 42 U.S.C. § 1988.

6. Plaintiffs have no adequate remedy at law. Unless Defendants and their agents, representatives and employees are preliminarily and permanently restrained, plaintiffs will continue to suffer immediate and irreparable harm from the conduct of which they complain.

7. Plaintiffs are not required to exhaust administrative procedures because they are challenging policies and practices of general applicability that are contrary to numerous Federal and State laws, because plaintiffs are threatened with irreparable harm, and because exhaustion of such remedies is futile and will not provide adequate relief.

PARTIES

8. Plaintiff RV is an 18-year-old student who attended Bushwick until June 2003.

9. Defendant The NEW YORK CITY DEPARTMENT OF EDUCATION (“Department”) is the newly formed official body charged with the responsibility for developing policies with respect to the administration and operation of the public schools in the City of New York. N.Y. Educ. Law §§ 2590, 2590-g (McKinney 1980). It is a recipient of federal financial assistance.

10. Defendant The NEW YORK CITY BOARD OF EDUCATION (“the Board of Education” or “the Board”) was or continues to be the official body charged with the responsibility for developing policies with respect to the administration and operation of the public schools in the City of New York. N.Y. Educ. Law §§ 2590, 2590-g (McKinney 1980). It is a recipient of federal financial assistance.

11. Defendant JOEL KLEIN is the Chancellor of the New York City School District (“the Chancellor”) and as such is entrusted with the specific powers and duties set forth in N.Y. Educ. Law § 2590-h (McKinney 1930), including the power and duty to control and operate all academic and vocational senior high schools in the city school district.

12. Defendant REYES IRIZARRY is the Superintendent of Region 4 (“the Superintendent”) and as such is entrusted with the specific powers and duties set forth in N.Y. Educ. Law § 2590-f (McKinney 1930), including the duty to evaluate the performance of principals for every school in the district with respect to educational

effectiveness and school performance, including effectiveness of promoting student achievement.

13. Defendant ANA SANTIAGO is the Principal of Bushwick High School and as such is entrusted with the specific powers and duties set forth in N.Y. Educ. Law § 2590-i (McKinney 1930), including the duty to promote an equal educational opportunity for students in the school.

CLASS ACTION ALLEGATIONS

14. Plaintiff sues on behalf of himself and all other similarly situated individuals, and seeks to represent, pursuant to Rule 23 (a), Rule 23(b)(2) and (b)(3) of the Federal Rules of Civil Procedure, the class of students who had been or will be subject to the illegal city-wide practices and policies resulting in their exclusion from Bushwick.

15. The class period commences on the date three years prior to the date of the initial complaint in this case and extends to the date on which Defendants are enjoined from, or otherwise cease, enforcing their unconstitutional policies and practices.

16. The members of the class are so numerous as to render joinder impracticable. Defendants have already acknowledged that there is a city-wide problem of schools excluding children.

17. Upon information and belief, joinder is impracticable given the number of absent class members and because many members of the class are low-income students and parents, many of whom do not speak English well, and likely would have great difficulty in pursuing their rights individually.

18. There are questions of law and fact common to the class including that class members have common rights under the Fourteenth Amendment to be free from unconstitutional denial of their right to educational services guaranteed to them under New York State Law and whether Defendants have violated the law by illegally excluding students.

19. The named Plaintiff is an adequate representative of the class. The violations of law alleged by the named Plaintiff stems from the same course of conduct by Defendants that violated and continues to violate the rights of members of the class; the legal theory under which the named Plaintiff seek relief is the same or similar to that on which the class will rely. In addition, the harm suffered by the named Plaintiff is typical of the harm suffered by absent class members.

20. Counsel for the named Plaintiff are experienced in federal class action litigation and will vigorously pursue this action in the interest of the class.

21. A class action is superior to other available methods for the fair and efficient adjudication of this controversy because: (a) the prosecution of hundreds or thousands of separate actions would be inefficient and wasteful of legal resources; (b) the members of the class may be scattered throughout New York City and are not likely to be able to vindicate and enforce their Constitutional and statutory rights unless this action is maintained as a class action; (c) the issues raised can be more fairly and efficiently resolved in the context of a single class action than piecemeal in many separate actions; (d) the resolution of litigation in a single forum will avoid the danger and resultant confusion of possible inconsistent determinations; (e) the prosecution of separate actions would create the risk of inconsistent or varying adjudications with respect to individuals

pursuing claims against Defendants which would establish incompatible standards of conduct for Defendants; (f) Defendants have acted and will act on grounds applicable to all class members, making final declaratory and injunctive relief on behalf of all members necessary and appropriate; and (g) questions of law and/or fact common to members of the class especially on issues of liability predominate over any question, such as that of individual damages, that affect individual members.

FACTUAL ALLEGATIONS OF THE NAMED PLAINTIFF

22. RV is an 18-year-old student who attended Bushwick located in Brooklyn, New York. RV was born on November 13, 1984.

23. Upon information and belief, RV entered Bushwick as a 9th grader in September 1999. By the end of the 2002-2003 school year, RV had accumulated 20 credits.

24. Upon information and belief, throughout his time at Bushwick, RV struggled with academics and attendance in class.

25. At the beginning of the 2003-2004 school year, when RV intended on returning to Bushwick High School, he called 311, New York City's helpline. He spoke to an official at the Department of Education who informed him that Bushwick could kick him out of school because of his age, more specifically because he was 18 years old and because he only had 20 credits.

26. Because RV did not believe that he had the option of returning to Bushwick, in early September 2003, RV and his mother tried to look for other programs, including

both GED and other high school programs, but they were not able to find an appropriate program or procure admission.

27. RV then attempted to get back into Bushwick. The new guidance counselor at Bushwick, Mr. Cielie, sent RV to see Mr. Torres, the Assistant Principal of Guidance at Bushwick. Mr. Torres told RV that he had to join the GED program at Bushwick and did not give him the option of remaining in the regular high school program at Bushwick. Mr. Torres stated that because of RV's age and lack of credits, it was not possible for him to stay at Bushwick.

28. RV then asked Mr. Torres if there was any way that he could continue to attend Bushwick and Mr. Torres said no. Mr. Torres gave RV a program print out that contained the word "GED" filled in throughout the day. Mr. Torres said RV had to attend a GED program and referred RV to open houses for GED programs and the Job Corps.

29. After about a week out of school, RV decided to try out the GED program at Bushwick. He did not think the program was appropriate for him. RV then spoke to Mr. Torres again and asked him if he could return to the high school program. Mr. Torres refused to let RV return.

30. RV continued to go to the school building because he has always been active in student leadership activities and wanted to remain active in them, even though he was excluded from attending classes at the school. For example, RV remains active in Student Leadership and the Dance Committee. He is also a Volunteer Deacon Assistant at his church. Previously at Bushwick, RV was also a Yearbook Staff member, a Junior Achievement participant and a mentor for abused elementary school children.

31. On or about the end of October 2003, RV's mother called Bushwick to express her concern that he was spending time at the school every day but being barred from taking classes and pursuing an education.

32. Upon information and belief, on the morning following RV's mother's phone call to Bushwick, Mr. Torres, Mr. Dye, the Assistant Principal of Security at Bushwick, Ms. Young, the Coordinator of Student Activities and Ms. Santiago, the Principal, held a meeting. According to RV, he learned of this meeting because Ms. Young informed him that his mother had called the day before and complained that he was not being allowed to attend classes. Ms. Young informed RV that, at the meeting, Mr. Torres claimed that RV only had less than 10 credits, when in fact he had earned 20 credits.

33. RV then went to speak with Mr. Dye. During this conversation, Mr. Dye reviewed RV's records and informed RV that he should never have been kicked out of Bushwick. However, RV was still not permitted to return to Bushwick and no arrangements were made to provide him with a program.

34. On or about the beginning of November 2003, RV's brother went to Bushwick and spoke with Mr. Torres. Mr. Torres informed RV's brother that if RV passed the Math Regents in January 2004, the school would give him four credits for Math. However, the school still refused to let RV attend classes. Instead, RV understood that he was to study for the Regents exam at home and come to school only to register for the exam.

35. RV never received a written notice or other procedures required by the U.S. Constitution and the New York Education Law, including prior written notice stating the

reasons for Bushwick's decision to exclude RV, the opportunity to stay in school, or a hearing or offer for a hearing before the discharge.

36. At no time did any school official inform RV that he had the right to stay in school until he was 21.

37. RV never voluntarily agreed to his exclusion from Bushwick.

38. RV received services as a disabled student in Junior High School, but he did not receive any of these services in high school.

39. RV was not transferred to an appropriate high school setting where he was afforded the opportunity to take courses to prepare him for high school graduation.

40. Bushwick has already forced RV to miss the first two months of school this year. RV has lost valuable time in his education because the school did not and will not allow him to attend.

41. RV wants to return to high school as soon as possible and receive the instruction and services he is entitled to and needs in order to graduate.

FURTHER ALLEGATIONS

42. Defendants' website contains documents called "school profiles" for the school years 2000-2001, 1999-2000 and 1998-1999. Those profiles contain information about the number of students who are discharged from each school each year.

43. The profile indicates that Bushwick discharged 541 students of the 1843 students enrolled in Bushwick during the 2000-2001 school year (29.35%), discharged 600 of 1909 students (34.1%) in 1999-2000 and 766 of 2015 (38%) students in 1998-1999. These reports do not break down the reasons for discharges.

44. Upon information and belief, based on facts learned in the related action of Ruiz v. Pedota, 1:03-cv-00502 (E.D.N.Y. 2003), the discharge figures in these reports actually underestimate the number of discharges at schools.

45. Defendants have not publicly released school profiles for the 2001-2002 or 2002-2003 school years. However, upon information and belief, the trend of continuing to discharge large numbers of students has continued.

46. Upon information and belief, some of the discharges were not illegal and were made because students moved out of New York City, transferred to other diploma-granting schools or dropped out voluntarily. Upon information and belief, however, some of the discharged students are class members.

47. According to Bushwick's 2001-2002 School Report Card, Bushwick 9th grade class as of October 2002 consisted of 687 students, and its 12th grade class consisted of only 120 students.

48. Bushwick also has a significantly high number of students and parents whose first language is not English. The School Report Card indicated that 29.4% of students enrolled in Bushwick for the 2002-2003 school year were English Language Learners.

49. Upon information and belief, based upon reports from students and professionals across the city, many students are being wrongfully excluded in this similar manner. Many students are "counseled-out" of the system and are signing "voluntary discharge" forms because they are being provided incorrect information about their rights to attend school.

50. Defendants have not developed adequate policies and systems to ensure that schools like Bushwick inform students of their rights and stop illegally excluding

students from its schools and to ensure that principals and other staff are held accountable for complying with federal, state and local laws that protect the rights of students to stay in school.

51. Defendants are on notice that a policy of excluding students from school would violate students' constitutional rights.

52. Defendants have been repeatedly made aware of the recurring violations that were resulting from deficiencies in training by recent news articles and policy reports detailing the problem.

53. In recent months, school and city officials recognized that the problems raised by this action are occurring and may be affecting public high schools throughout New York City. New York City schools' Chancellor, Joel Klein, has publicly admitted that the problem of students being pushed out is "a real issue," and a "tragedy." Tamar Lewin and Jennifer Medina, *To Cut Failure Rate, Schools Shed Students*, New York Times, July 31, 2003, at A1. Mayor Michael Bloomberg's office has also stated that, "for any child being pushed out, we need to correct the problem." *Id.* In spite of such assurances, the problem remains uncorrected.

54. Defendants allege they have already implemented citywide policy changes designed to address this situation. According to a report in the New York Times on September 15, 2003, "[t]he New York City Department of Education has revamped its procedures for keeping track of students who are discharged from the school system, reacting to charges that a growing number of school administrators had been pushing struggling students out of the system." Tamar Lewin, *City to Track Why Students Leave School*, New York Times, September 15, 2003, at B1.

55. Yet, whatever changes have been made they have not been effective in remedying the problem, ensuring that responsible staff are trained and that relevant officials are monitoring and tracking schools' practices. Defendants' actions continue to conform to a policy and custom of illegally excluding students on a citywide basis.

56. Class members are being irreparably harmed, in that they are being denied access to school.

ENTITLEMENT TO INSTRUCTION AND INTERVENTION SERVICES

UNDER NEW YORK STATE LAW AND REGULATIONS

57. New York State Education Law provides that any person over five and under 21 years of age, who lives in New York City and has not received a regular high school diploma, is entitled to attend a public school. N.Y. Educ. Law § 3202(1).

58. New York State Education Law also mandates full-time instruction for students until the age of 16 and allows certain jurisdictions to extend the age of required school attendance. N.Y. Educ. Law § 3202. New York City had opted to extend the compulsory school age to 17; the New York City Chancellor's Regulation A-101 provides that all students who turn 17 after July 31st are required to attend school for the following school year under the compulsory education law.

59. New York State regulations define "full-time instruction" to mean at least 5 ½ hours of instruction per day. 8 N.Y.C.R.R. § 175.5.

60. Academic standards for high school graduation were substantially revised by a relatively new State and City policy and, upon information and belief, are now significantly more stringent than in previous years.

61. The New York State Commissioner's Regulations require that each school district offer all students the opportunity to meet the requirements to receive a Regents high school diploma. Students must have the opportunity to take Regents courses in grades 9 through 12 and, when appropriate, in grade eight. 8 N.Y.C.R.R. § 100.2(e).

62. In addition to affording students the right to attend school and receive instruction toward the Regents diploma, New York State law spells out a number of services to be provided to students if they are struggling academically, truant, or having behavior problems.

63. Students in grades 7 through 12 are supposed to receive Guidance Services, which should entail an annual review of their educational progress and career plans by school counselors (individually or in small groups) and instruction at each grade level about careers and career planning skills. In addition, students are entitled to advisory and individual or group counseling to enable them to benefit from the curriculum and help them develop and implement postsecondary education and career plans. Guidance services can also be used to assist students who exhibit any attendance, academic, behavioral or adjustment problems and to encourage parental involvement. 8 N.Y.C.R.R. § 100.2(j).

64. Students who are truant or struggling academically can also be provided Educationally Related Support Services (ERSS). These services may include counseling, speech and language improvement services, small group instruction, modified curricula, individualized tutoring, and other such strategies that have demonstrated success. N.Y. Educ. Law § 3602(32); 8 N.Y.C.R.R. § 100.2(v).

65. Students in grades 9 through 12 are entitled to receive Academic Intervention Services. Academic intervention services are intended to assist students who are at risk of not achieving the State learning standards in English language arts, mathematics, social studies and/or science, or who are at risk of not gaining the knowledge and skills needed to meet or exceed designated performance levels on State assessments. 8 N.Y.C.R.R. § 101.1(g).

66. English Language Learners (“ELLs”) are entitled to be enrolled in either a bilingual or ESL program, and are required, at a minimum, to receive ESL services. 8 N.Y.C.R.R. § 154. Title III of the No Child Left Behind Act as well as the New York State Commissioner’s Regulations require that ELLs be taught English and provided services that will help them meet State standards. 20 U.S.C. § 6801 et seq.; 8 N.Y.C.R.R. §§ 100.2(f), 154. ELLs that are potentially at-risk of not achieving State learning standards are further entitled to academic intervention services under New York State Commissioner’s Regulations. 8 N.Y.C.R.R. § 100.2(ee).

PROTECTIONS FROM EXCLUSION, EXPULSION AND DISCHARGE UNDER FEDERAL, STATE & LOCAL LAW

67. The Due Process Clause of the 14th Amendment to the Constitution of the United States prohibits schools from expelling and suspending students from school without due process.

68. A student cannot be suspended or expelled from school unless s/he is disruptive or violent as defined by New York Education Law §3214. Section 3214 sets forth due process protections that must be provided to students and parents before they

are expelled or expelled from school, which include written notice and an opportunity for a hearing and an appeal.

69. Section 3214 directed Defendants to develop a Code of Conduct that, among other things, sets out the conduct for which students can be subject to disciplinary proceedings.

70. Defendants have adopted Citywide Standards of Disciplinary and Intervention Measures (the Discipline Code) and adopted New York City Chancellor's Regulation A-443, which contains the procedures and standards for student suspensions and expulsions. Some of these provisions were enacted to comply with the terms of a settlement of another federal case called BOE v. Board of Education, 80 Civ. 2829 (S.D.N.Y. 1982).

71. A school principal may initiate an involuntary school transfer where it is believed that a student would benefit from the transfer, or when the student would receive an adequate and appropriate education in another school program or facility. N.Y. Educ. Law § 3214(5).

72. The principal cannot initiate such a transfer until the student and a person in parental relation to the student have been sent written notification of the consideration of transfer recommendation. Such notice shall set a time and place of an informal conference with the principal and shall inform the student and person in parental relation of their right to be accompanied by counsel or an individual of their choice. N.Y. Educ. Law § 3214(5).

73. After the conference, if the principal concludes that the student would benefit from a transfer or that the student would receive an adequate and appropriate education in another school program or facility, the principal may issue a recommendation of transfer

to the superintendent. Such recommendation shall include a description of behavior and/or academic problems indicative of the need for transfer and a description of alternatives explored and prior action taken to resolve the problem. A copy of that letter shall be sent to the person in parental relation and to the student. N.Y. Educ. Law § 3214(5).

74. Upon receipt of the principal's recommendation for transfer and a determination to consider that recommendation, the superintendent shall notify the person in parental relation and the student of the proposed transfer and of their right to a fair hearing. Such hearing should include the right to subpoena evidence and cross-examine witnesses. The notice shall also list community agencies and free legal assistance that may be available. The written notice shall include a statement that the student or person in parental relation has ten days to request a hearing and that the proposed transfer shall not take effect, except upon written parental consent, until the ten day period has elapsed, or, if a fair hearing is requested, until after a formal decision following the hearing is rendered, whichever is later. N.Y. Educ. Law § 3214(5).

75. Parental consent to a transfer shall not constitute a waiver of the right to a fair hearing. § 3214.

76. Under certain circumstances, schools are permitted to drop from enrollment a student over compulsory school age (between the ages of 18-21) if the student has been absent 20 consecutive school days. N.Y. Educ. Law § 3202(1)(a). Before the student is dropped from the register, the following procedures must be followed:

- a. The principal or superintendent shall schedule and notify, in writing at the last known address, both the student and the person in parental relation of

an informal conference. At the conference, the school administrator shall determine both the reasons for the absences and whether reasonable changes in the student's educational program would encourage and facilitate his or her re-entry or continuance of study.

- b. The student and the person in parental relation shall be informed orally and in writing of the student's right to re-enroll at any time in the public school maintained in the district where he or she resides.
- c. If the student and the person in parental relation fail, after reasonable notice, to attend the informal conference, the student may be dropped from enrollment provided that the student and the person in parental relation are notified in writing of the right to re-enter at any time, if otherwise qualified under Section 3202 of New York State Education Law.

CAUSES OF ACTION

77. Defendants have violated the rights of RV and class members under the due process clause of the 14th Amendment to the Constitution of the United States.

78. Defendants have violated the constitutional rights of RV and class members under 42 U.S.C. § 1983.

79. Defendants have violated the rights of RV and class members under New York State Education Law §§ 3202, 3214, and the regulations promulgated thereunder.

80. Defendants have violated the rights of RV and class members under the New York City Chancellor's Regulations.

RELIEF

WHEREFORE, Plaintiffs request that this Court:

- a. Assume jurisdiction of this case;
- b. Issue a temporary restraining order directing Defendants to re-admit Plaintiff RV to school immediately and to refrain from illegally excluding other students;
- c. Certify a class of similarly situated students;
- d. Issue a preliminary injunction (i) directing Defendants to identify and contact class members who have been illegally excluded in the past 2 years by letter in appropriate languages, which will be drafted and approved by plaintiffs' counsel, and offer the opportunity to (a) immediately re-enroll in the school from which they were removed or excluded or in another appropriate program of their choice; (b) receive make-up class work; and (c) receive remedial tutoring and other support services; and (ii) ordering them to refrain from illegally excluding, discharging students on register at Bushwick.
- e. Issue a declaratory judgment that Defendants have violated Plaintiffs' rights as set forth above and enter an injunction restraining Defendants from excluding class members from school without due process and denying them educational services to which they are entitled under law.
- f. Enter a judgment
 - i. Requiring Defendants to change the citywide policies and practices to ensure that students are not illegally excluded;

- ii. Requiring Defendants to design, to submit to plaintiffs and the Court for approval, and to implement an effective plan to ensure that class members will be afforded the substantive and procedural protections to which they are entitled under federal, state and local law and not excluded from school in violation of their rights. The plan should include training for all relevant personnel in Bushwick High School and the Superintendent's Office to ensure that they are provided training on the mandates of due process, state and local law and policies that relate to the claims in question;
- iii. Requiring Defendants to ensure that all written and other notices and procedures and policies that Defendants wish to utilize in connection with excluding students from Bushwick High School comport with federal, state and local law and are designed to ensure that the class members' rights are protected;
- iv. Requiring Defendants to submit to counsel for Plaintiffs and the Court regular periodic reports on the implementation of the plans, data about children who are excluded, and the development of procedures and policies;
- v. Directing Defendants to provide equitable relief to RV and class members who were illegally excluded in the form of compensatory educational and support services and opportunities to earn additional credits;

- vi. Appointing a special master or independent monitor to oversee and monitor Defendants' implementation of the requirements of this Order;
- vii. Retaining jurisdiction of this action for all purposes, including entry of such additional orders as may be necessary or proper;
- g. Award to Plaintiffs their costs and attorneys fees; and
- h. Grant such other and further relief as may be appropriate.

Dated: November 7, 2003
New York, New York

Respectfully submitted,

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