

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SG, by and through her parent and next friend, LA,
on behalf of herself and all others similarly situated,

Plaintiffs,

vs.

NEW YORK CITY DEPARTMENT OF
EDUCATION; NEW YORK CITY BOARD OF
EDUCATION; JOEL KLEIN, in his individual and
official capacity as Chancellor of the New York City
School District; LUCILLE SWARNS, in her
individual and official capacity as Regional
Superintendent of Region 10; ENID MARGOLIES,
in her individual and official capacity as Principal of
Martin Luther King, Jr. High School; and KATHY
ANDREWS, in her individual and official capacity as
Principal of the Martin Luther King, Jr. High School
for Law, Advocacy and Community Justice,

Defendants.

Civ. No.:

COMPLAINT

PRELIMINARY STATEMENT

1. This is a class action for declaratory and injunctive relief and compensatory and punitive damages based upon defendants' illegal exclusion, expulsion and discharge of high school students from the Martin Luther King, Jr. High School for Law, Advocacy and Community Justice ("MLK") 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.

JURISDICTION

2. 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.

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

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

5. Plaintiffs have no adequate remedy at law. Unless the 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.

6. 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

7. Plaintiff SG is a 15-year-old student who attended MLK until September 2003. She brings this action by her mother, LA.

8. 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.

9. 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.

10.

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 LUCILLE SWARNS is the Superintendent of Region 10 (“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 ENID MARGOLIES is the Principal of Martin Luther King, Jr. 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.

14. Defendant KATHY ANDREWS is the Principal of the Martin Luther King, Jr. High School for Law, Advocacy and Community Justice (the “Principal”) 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.

ENTITLEMENT TO INSTRUCTION AND INTERVENTION SERVICES UNDER NEW YORK STATE LAW AND REGULATIONS

15. 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).

16. 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.

17. 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.

18. 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.

19. 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).

20. 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.

21. 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).

22. 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).

23. 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).

24. English Language Learners 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 Chancellor's Regulations. 8 N.Y.C.R.R. § 100.2(ee).

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

25. 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.

26. A student cannot be suspended or expelled from school unless he is disruptive or violent as defined by N.Y. Educ. 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.

27. 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.

28. The 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).

29. 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).

30. 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).

31. 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).

32. 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).

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

34. 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.

CLASS ACTION ALLEGATIONS

35. Plaintiff's claims for relief are brought on her own behalf and on behalf of all those similarly situated pursuant to Rules 23(a) and 23(b), Fed. R. Civ. P. Defendants have acted and refused to act on grounds generally applicable to the named and class plaintiffs, making appropriate declaratory and injunctive relief as to the class as a whole.

36. The class represented by the named Plaintiff is comprised of all students who have been barred from attending, excluded, expelled or discharged (hereinafter "excluded") from MLK for reasons of age, lack of sufficient credits, failure to pass Regents' exams, poor grades, truancy or pregnancy within the last 3 years and who were not afforded the procedural and substantive protections of the U.S. Constitution and State and local law and students who are at risk of such exclusion from MLK in the future.

37. The class is so numerous that joinder of all members is impractical.

38. There are questions of law and fact in common between the named Plaintiff and the members of the class he seeks to represent, *e.g.*, whether the defendants have violated the law by illegally excluding students from MLK.

39. The claims of the named Plaintiff are similar to those of the class he seeks to represent, in that he, like the other members of the class, maintains that Defendants violated the law by illegally expelling, excluding or discharging him from school in violation of the rights afforded him under federal, state and local law. Accordingly, the claims of the named Plaintiff are typical of those of the class.

40. The named Plaintiff will adequately represent and protect the interests of the class. Counsel for the named Plaintiff are experienced in federal class action litigation and will vigorously pursue this action in the interest of the class.

FACTUAL ALLEGATIONS OF THE NAMED PLAINTIFF

41. SG is a 15-year-old student who attended MLK located in Manhattan, New York. SG was born on May 28, 1988.

42. Upon information and belief, SG entered MLK as a 9th grader in September 2002 and attended MLK for the 2002-2003 school year. In September 2002, SG's mother, who was sick, went into the hospital. In January 2002, SG's father passed away. SG went through depression due to this loss. In February 2002, SG became pregnant.

43. Upon information and belief, throughout the 2002-2003 school year, SG struggled with academics and attendance. MLK did not offer SG any tutoring, counseling or other services to help her improve her grades, pass her tests or improve her attendance.

44. Upon information and belief, when SG returned to MLK in September 2003 to pick up her program card and begin classes, SG was provided a schedule. However, when the Principal saw her, she contacted SG's mother, LA, and told her to come and pick her up because she could not attend classes at MLK. According to SG, the Principal told SG that she was not running a school for pregnant people and that MLK was no place for SG to be. The principal told SG and LA that SG had to be transferred to a special school for pregnant girls.

45. Upon information and belief, AP and SG went to visit the pregnancy school. When they got there, they were told by the staff that MLK could not force SG to attend the special school and gave her a copy of Title IX to bring back to MLK. AP brought the law back to MLK, where they made copies. She was told someone would get back to her.

46. Upon information and belief, following that, AP had a conversation on the phone with the Principal, who said, among other things, that SG could not return.

47. Upon information and belief, the principal told SG that she may as well bring a lawsuit because everyone would be on the school's side in light of the circumstances.

48. On October 9, 2003, accompanied by Ana Espada, a Parent Advocate from Advocates for Children of New York, LA attempted to reenroll SG in classes at MLK. Ms. Espada, LA and SG met with Ms. Hazzard, who, upon information and belief, is employed as a guidance counselor at MLK.

49. Ms. Espada explained to Ms. Hazzard that SG had a legal right to attend classes at FKL and should be immediately permitted to attend classes. Ms. Hazzard refused to allow SG to attend classes and informed Ms. Espada that it was the principal's decision and she was not allowing SG to attend.

50. SG never received a written notice or other procedures required by the U.S. Constitution and the New York Education Law, including notice, opportunity to stay in school or a hearing before she was excluded from school.

51. At no time did any school official inform SG or her mother that she had the right to stay in school until she was 21 or tell her she had the right not to be excluded from school in this manner.

52. LA never received or signed a letter stating that she agreed to SG's exclusion.

53. MLK has already forced SG to miss the first part of the school year (at least three weeks). SG has lost valuable time in her education because the school did not and will not allow her to attend.

54. Since the time when SG was excluded from MLK, she has been staying at home. SG wanted to return to MLK immediately.

FURTHER ALLEGATIONS

55. Upon information and belief, Defendants resolved to phase-out the Martin Luther King, Jr. High School beginning in September 2002 and to establish two new schools which opened in September 2002: the Martin Luther King, Jr., High School for Law, Advocacy and Community Justice and the Martin Luther King, Jr., High School for Arts and Technology, which opened in September 2002. These schools are located in the Martin Luther King Jr. High School building located at 122 Amsterdam Avenue in Manhattan.

56. 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. Those profiles reveal MLK has an extremely high rate of discharging students.

57. The profile indicates that MLK discharged 730 students in 2000-2001 (approximately 29.1% of students enrolled), 872 students in 1999-2000 and 704 students in 1998-1999. These reports do not break down the reasons for discharges.

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

59. 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.

60. 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.

61. According to MLK's School Report Card, while MLK has a 9th grade class of 1095 students, there are only 131 students who are 12th graders at the school. Out of a cohort of 280 students, there were only 97 students in the cohort graduated in 2002.

62. MLK also has a significantly high number of students and parents whose first language is not English. A School Report Card issued by Defendants indicated that 27.1% of students enrolled in MLK for the 2002-2003 school year are English Language Learners.

63. Upon information and belief, based upon reports from students and professionals across the city, many students are being wrongfully pushed out, expelled, discharged and transferred 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.

64. Defendants have not developed adequate policies and systems to ensure that schools like MLK inform students of their rights and stop illegally excluding, expelling, transferring and discharging students from its school 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.

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

66. 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. In a Daily News Article published on November 9, 2002 entitled “Shocker of Booted Students,” that described a policy report co-authored by Advocates for Children, a Department of Education spokesperson was quoted as saying that high schools are not illegally discharging or excluding students. The policy report was sent to certain Defendants.

67. In recent months, school and city officials finally 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, while declining to speak on the details of this action, has publicly admitted that the problem faced by Plaintiffs 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.

68. Despite this knowledge, Defendants failed to take immediate and adequate steps to ensure that schools are not engaging in these illegal practices. Defendants have failed to train, supervise and monitor school employees in spite of their knowledge that school employees would confront situations such as the one at bar and training or supervision would reduce the likelihood of employees mishandling the situation.

69. In fact, Defendants allege they have already implemented citywide policy changes, which they allege are 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.

70. Defendants’ actions continue to conform to a policy and custom of illegally excluding, expelling or discharging students.

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

CAUSES OF ACTION

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

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

74. Defendants have violated SG’s rights under Title IX of the Education Amendments of 1972, by discriminating against her on the basis of her status as a pregnant student.

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

76. Defendants have violated the rights of SG 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 SG to school immediately and to refrain from illegally excluding, discharging or transferring 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, expelled or discharged in the past 3 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 classwork; and (c) receive remedial tutoring and other support services; and (ii) ordering them to refrain from illegally excluding, discharging students on register at MLK.
- 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, discharged and transferred;
- 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 MLK 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 transferring, discharging or expelling students from MLK 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, suspended, expelled, discharged or disciplined, and the development of procedures and policies;

- v. Directing Defendants to provide equitable relief to SG and class members who were illegally excluded in the form of compensatory educational and support services and opportunities to earn additional credits;
- vi. Directing Defendants to compensate SG in compensatory and punitive damages pursuant to U.S.C. § 1982 and 42 U.S.C. § 1985, in an amount that is just and reasonable;
- vii. Appointing a special master or independent monitor to oversee and monitor Defendants' implementation of the requirements of this Order;
- viii. 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: October 10, 2003
New York, New York

Respectfully submitted,

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