



THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, NY 12234

Counsel and Deputy Commissioner Legal Affairs  
Tel. 518-474-6400  
Fax 518-474-1940

January 5, 2009

**VIA FACSIMILE & REGULAR MAIL**

Marie Pollicino  
312 Cherry Street  
Douglaston, NY 11363

Erik M. De Paula, Esq.  
Community Dist. Education Council 26  
70-11 174<sup>th</sup> Street  
Fresh Meadows, NY 11365

Adam S. Rose, Esq.  
United Federation of Teachers, Special Counsel  
52 Broadway  
New York, NY 10004

Melvyn L. Meer  
33-04 214<sup>th</sup> Place  
Bayside, NY 11361

Re: Appeal of MARIE POLLICINO, COMMUNITY DISTRICT  
EDUCATION COUNCIL 26, UNITED FEDERATION OF  
TEACHERS and MELVYN L. MEER from action of the New  
York City Department of Education and Joel I. Klein, Chancellor,  
regarding the issuance of a Chancellor's regulation.

Dear Petitioners:

Enclosed is a copy of the decision of the Commissioner of Education in the above-entitled matter.

A duplicate original and a copy of the decision have been mailed today to the Department of Education, the Department's Counsel and the Chancellor.

Sincerely,

Kathy A. Ahearn

Enclosure



No. 15858

# The University of the State of New York

## The State Education Department

Before the Commissioner

Appeal of MARIE POLLICINO, COMMUNITY DISTRICT EDUCATION COUNCIL 26, UNITED FEDERATION OF TEACHERS and MELVYN L. MEER from action of the New York City Department of Education and Joel I. Klein, Chancellor, regarding the issuance of a Chancellor's regulation.

Erik M. De Paula, Esq., attorney for petitioner-intervenor  
Community District Education Council 26

Adam S. Ross, Esq., attorney for petitioner-intervenor  
United Federation of Teachers

Michael A. Cardozo, Esq., Corporation Counsel, attorney for  
respondents, Emily Sweet, Esq., of counsel

Petitioners challenge amendments made to a regulation of the Chancellor of the New York City Department of Education ("Chancellor") governing school and district leadership teams in New York City. The appeal must be sustained in part.

On December 3, 2007, the Chancellor issued a revised version of Chancellor's Regulation A-655 ("A-655"), the New York City Department of Education's Plan for the Participation of Parents, Teachers and Administrators in School-Based Planning and Shared Decision-Making (the "Plan"). Thereafter, petitioner Marie Pollicino ("Pollicino") initiated this appeal challenging A-655 on behalf of herself and all parents of New York City public school children. Pollicino is a district resident, a member of Community District Education Council 26 ("CDEC 26") and a parent of a child enrolled in P.S. 98Q.

On January 17, 2008, Melvyn Meer, a parent of two children in P.S. 188Q and then a member of its school leadership team ("SLT") requested to intervene.<sup>1</sup> CDEC 26 and the United Federation of Teachers ("UFT") requested to intervene on February 7 and February 11, 2008, respectively. Pursuant to §275.1 of the Commissioner's regulations and by letter dated April 25, 2008, my Office of Counsel notified the parties that the intervention requests of CDEC 26, UFT and Meer (collectively referred to as "petitioners-intervenors") had been granted. All requests for interim relief were denied.

Pollicino and petitioners-intervenors (collectively referred to as "petitioners") allege that A-655 gives each principal final decision-making authority over both the school comprehensive education plan ("CEP") and the school-based budget, in violation of Education Law §§2590-h and 2590-r, Commissioner's regulation §100.11 and Chancellor's regulation B-801.

Petitioners also challenge the process by which A-655 was revised. Specifically, petitioners allege that the community district education councils ("CDECs") were not consulted in the amendment of the regulation, nor were any parent groups. Petitioners request that I annul the language in A-655 which states: "The principal makes the final determination on the CEP and the school-based budget" and the statement, "The principal shall consult with the SLT in developing the school-based budget" and replace them with: "The responsibilities of the SLT are to develop and review the school's CEP, including annual goals and objectives, and to consult with the principal in developing a school based budget and staffing plan aligned with the CEP." Petitioners further request that if any amendments to the regulations governing the rights and responsibilities of SLTs are proposed, the process of developing those amendments must be initiated by and include CDECs.

Respondents argue that the principal, as the "administrative and instructional leader of the school" and the individual "responsible for the day to day operations of the school" under Education Law §2590-i, and as the individual responsible for proposing a school budget under Education Law §2590-r, must have final decision-making

---

<sup>1</sup> On February 15, 2008, P.S. 188Q's SLT voted to remove Meer.

authority over the school-based budget. In addition, respondents argue that it is entirely appropriate and consistent with State law for the principal to make a final determination as to the CEP if the SLT is unable to reach a consensus. Respondents further allege that the Chancellor has the power to promulgate regulations, pursuant to Education Law §2590-h(16), and was not required to follow any particular process in revising A-655. Respondents also allege that §100.11 of the Commissioner's regulations only applies to "district plans" and not to any overall city-wide plan. Finally, respondents contend that Pollicino, CDEC 26 and Meer lack standing and that the intervention requests were untimely.

I will first address several procedural matters. Pollicino's request for class status is denied. An appeal may only be maintained on behalf of a class where the class is so numerous that joinder of all members is impracticable and where all questions of fact and law are common to all members of the class (8 NYCRR §275.2; Appeal of Hempstead Parents/Community United, 45 Ed Dept Rep 381, Decision No. 15,357; Appeal of Hempstead Parents/Community United, 45 id. 354, Decision No. 15,346; Appeal of Ockimey, 44 id. 169, Decision No. 15,136). Pollicino has not established that the issues of fact and law in this appeal are the same for all members of the proposed class of parents. Moreover, petitioner has failed to set forth the number of individuals he or she seeks to represent and that all questions of law and fact would be common to all members of the class (Appeal of Hempstead Parents/Community United, 45 Ed Dept Rep 381, Decision No. 15,357; Appeal of Hempstead Parents/Community United, 45 id. 354, Decision No. 15,346; Appeal of Garmaeva, 43 id. 253, Decision No. 14,988). Therefore, class status is denied.

An individual may not maintain an appeal pursuant to Education Law §310 unless aggrieved in the sense that he or she has suffered personal damage or injury to his or her civil, personal or property rights (Appeal of Ramroop, 45 Ed Dept Rep 473, Decision No. 15,385; Appeal of Samuel, 45 id. 418, Decision No. 15,371; Appeal of Hubbard, 45 id. 266, Decision No. 15,316). Only persons who are directly affected by the action being appealed have standing to bring an appeal (Appeal of Ramroop, 45 Ed Dept Rep 473, Decision No. 15,385; Appeal of Samuel, 45 id. 418, Decision No. 15,371; Appeal of Hubbard, 45 id. 266, Decision No. 15,316). The purpose of shared decision-making is to

foster communication among all parties involved in educating children (Appeal of Trombley, 39 Ed Dept Rep 115, Decision No. 14,189). As district residents and parents of children in New York City, Pollicino and Meer have an interest in ensuring that shared decision-making is implemented according to the Plan and that parents are represented in the process. Accordingly, I find that Pollicino and Meer have standing.

Pollicino alleges that the Chancellor improperly amended A-655 by a process that was not initiated by the CDECs. She maintains that §100.11(f) of the Commissioner's regulations requires the CDECs to begin the amendment process. I, therefore, find that CDEC 26 has an interest in this appeal and has standing on the issue of whether A-655 was improperly revised.<sup>2</sup>

I find that UFT also has standing. There is an elected UFT chapter leader in every school and, pursuant to Section III of A-655, that chapter leader, or his or her designee, is a mandatory member of every SLT. Moreover, one-half of each SLT is comprised of school staff members, which includes UFT-represented educators. Therefore, respondents' alleged improper limitation on an SLT's involvement in the shared-decision making process would affect UFT and its members.

Lastly, I find no merit to respondents' objections to intervention. An appeal to the Commissioner must be commenced within 30 days from the making of the decision or the performance of the act complained of, unless any delay is excused by the Commissioner for good cause shown (8 NYCRR §275.16; Appeal of O'Brien, 44 Ed Dept Rep 43, Decision No. 15,092; Appeal of Spina, 43 *id.* 354, Decision No. 15,016). Although petitioners-intervenors did not file their petitions within 30 days of the actions complained of, respondents' limitation of an SLT's involvement in the shared decision-making process, if improper, constitutes a continuing wrong (Appeal of Sadue-Sokolow, 39 Ed Dept Rep 6, Decision No. 14,155). The continuing wrong doctrine applies when the ongoing action is itself an unlawful action, such as unlawful appointments to a district's shared decision-making team (Appeal of Sadue-Sokolow, 39 Ed

---

<sup>2</sup>Pursuant to Education Law §§2590-b and 2590-c and Chapter 123 of the Laws of 2003, CDECs were established in each community school district and they possess the same powers as their predecessors, the community boards.

Dept Rep 6, Decision No. 14,155) or certain ongoing expenditures under an austerity budget that did not comply with the law (Appeal of Aarseth, 32 Ed Dept Rep 506, Decision No. 12,901). Moreover, respondents did not demonstrate that intervention would unduly delay a determination or that any prejudice would result from any delay. Rather, the record indicates that petitioners-intervenors raised arguments identical to Pollicino's timely claims.

I disagree with petitioners' claim that Section II of Chancellor's Regulation A-655 violates Education Law §§2590-h and 2590-r and §100.11 of the Commissioner's regulations by giving principals final decision-making authority over the budget. Section II of A-655 provides, in pertinent part:

School Leadership Team Rights and Responsibilities

The responsibility of the SLT is to develop an annual school Comprehensive Educational Plan (CEP) that is aligned with the school-based budget. The principal shall consult with the SLT in developing the school-based budget

...

To ensure alignment of the CEP with the school-based budget, the principal shall provide the SLT with a report from the DOE Galaxy budgeting system within a reasonable period of time after the school receives it .... The principal makes the final determination on the CEP and the school-based budget.

As the instructional leader of a school, the principal is authorized to create a school budget. Specifically, Education Law §2590-r requires the Chancellor to establish regulations with a comprehensive process of school-based budgeting which shall include provisions for:

the principal of each school to propose a school-based expenditure budget, after soliciting input pursuant to twenty-five hundred ninety-h, and

twenty-five hundred ninety-i of this article on budget priorities from all members of the school community ....

While A-655, as revised, reserves to principals the final authority to develop school budgets, it also properly requires principals to consult with SLTs in developing the school budgets before making final decisions on those budgets. Therefore, I do not find that A-655 violates any applicable laws and/or regulations by giving the principal final decision-making authority over the budget.

To the extent, however, that A-655 gives principals final decision-making authority over the CEP, I find that A-655 must be revised. Section 2590-h(15)(b-1) of the Education Law provides that school based management teams (known as SLTs in New York City) shall possess the following powers and duties:

(i) develop an annual school comprehensive educational plan that is aligned with the school based budget. Such plan shall be submitted to the district superintendent and be made available for public inspection ....

A-655, as revised, strips the SLT of this basic, statutorily mandated authority and allows the principal to make the "final determination on the CEP," thus allowing the principal to override any judgment of an SLT.

Respondents argue that the intent of A-655 is for the principal to make a determination only in the event that the SLT does not reach consensus. That is not, however, how the regulation reads. Moreover, the allegedly offending language is in Section II of the regulation, which governs the SLT's rights and responsibilities, rather than in Section VIII of the regulation, which explicitly deals with conflict resolution strategies. Its placement thus undermines respondents' argument that the principal's authority is limited to breaking a logjam where consensus is not possible. I, therefore, find that the revised language, providing the principal with final authority over the CEP, violates Education Law §2590-h(15)(b-1).

Petitioners also argue that the process by which A-655 was amended was flawed because neither the CDECs nor an

official parent group was involved. Respondents argue that the Chancellor has the power to promulgate regulations pursuant to Education Law §2590-h(16) and was not required to follow any particular process to revise A-655. I disagree. A-655 constitutes "the New York City Department of Education's Plan for the Participation of Parents, Teachers and Administrators in School-Based Planning and Shared Decision-Making" and, as such, must be amended in compliance with §100.11 of the Commissioner's regulations. Section 100.11(f) of the Commissioner's regulations provides, in pertinent part:

Any amendment or recertification of a plan shall be developed and adopted in the manner prescribed by subdivision (b) and paragraphs (d)(1) and (2) of this section.

Section 100.11(b) of the Commissioner's regulations addresses the roles of the central board and community school districts in the shared decision-making process. Specifically, §100.11(b) provides, in pertinent part:

In the City School District of the City of New York, the superintendent of each community school district ... shall develop a plan in the manner prescribed by this subdivision, and each such plan shall be incorporated into a plan by the central board of education, which plan shall comply with this section.

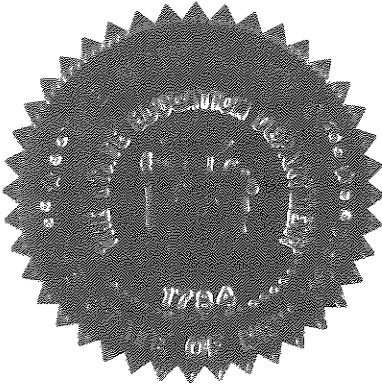
This provision of the Commissioner's regulations requires that each community school district develop a plan for incorporation into the district's central plan. Although respondents argue that a mayoral task force was convened for this purpose, the revisions made to A-655 were never undertaken by superintendents of the community school districts in New York City, nor did they collaborate with any "committees" composed of administrators, teachers and parents, as required. Because of the foregoing deficiencies, I find that A-655 was not amended in accordance with the provisions of §100.11 of the Commissioner's regulations.

In light of this disposition, I need not address the parties' remaining contentions.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that respondents revise the language of Chancellor's Regulation A-655, the New York City Department of Education's Plan for the Participation of Parents, Teachers and Administrators in School-Based Planning and Shared Decision-Making (the "Plan"), in accordance with this decision.

IT IS FURTHER ORDERED that respondents submit the Plan to the representatives designated in §100.11 of the Commissioner's regulations for consultation and endorsement as required by §100.11.



IN WITNESS WHEREOF, I, Richard P. Mills, Commissioner of Education of the State of New York for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 31<sup>st</sup> day of December, 2008.

*Richard P. Mills*  
Commissioner of Education