

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY**

THE PARTNERSHIP FOR THE HOMELESS,

Petitioner,

vs.

NEW YORK STATE EDUCATION DEPARTMENT,

Respondent.

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

Index No.

VERIFIED PETITION

PRELIMINARY STATEMENT

This proceeding is brought under Article 78 of the New York Civil Practice Law and Rules (“CPLR”) and seeks to vindicate the right of the public and of the Petitioner, The Partnership for the Homeless (the “Partnership” or “Petitioner”), to obtain information regarding the means by which the New York State Department of Education (“NYSED” or “Respondent”) is seeking to fulfill its obligation to provide for the education of homeless students in New York City. Pursuant to the New York Freedom of Information Law (“FOIL”), the Partnership, via its counsel Simpson Thacher & Bartlett LLP, submitted FOIL requests (the “Requests”) to the NYSED, seeking documents and records concerning the education of homeless children that are possessed or maintained by the NYSED under the McKinney-Vento Homeless Assistance Act of 1987, 42 U.S.C. §§ 11301 *et seq.* (the “McKinney-Vento Act”). Specifically, subtitle VII-B of the McKinney-Vento Act pertains to the education of homeless children and youths. *See* 42 U.S.C. §§ 11431–11435.

Among other things, the McKinney-Vento Act requires state educational agencies to review policies and practices that may act as barriers to the enrollment, attendance, and school

success of homeless children and youths. *See* McKinney-Vento Act §§ 721, 722(g)(1)(I), 42 U.S.C. §§ 11431, 11432(g)(1)(I). Additionally, the McKinney-Vento Act requires the Coordinator for Education of Homeless Children and Youths to gather reliable, valid, and comprehensive information concerning various challenges facing homeless students. *See* McKinney-Vento Act § 722(f)(1), 42 U.S.C. § 11432(f)(1). Moreover, pursuant to the Elementary and Secondary Education Act, 20 U.S.C. §§ 6301 *et seq.* (the “ESEA”), the NYSED is required to include homeless children in the state’s academic assessment programs and to report on such information to the U.S. Department of Education. *See* ESEA §§ 1111(b)(2)(vii), 1111(h)(1)(C)(ii)-(iii), 20 U.S.C. §§ 6311(b)(2)(vii), 6311(h)(1)(C)(ii)-(iii). The data collected in compliance with the McKinney-Vento Act is not only important to the Partnership’s mission of supporting homeless families, but is also of great public interest, because homelessness has been shown to have significant negative impacts on the education of youth.

The Partnership formally submitted the Requests to Respondent on December 6, 2016. On January 26, 2017, the NYSED responded in part to the Requests, providing a limited set of links to various online materials. On February 14, 2017, the Partnership sent a letter explaining deficiencies in the NYSED’s response and providing detailed descriptions of the documents and records sought. When the NYSED did not respond to this letter, the Partnership submitted a formal appeal of the NYSED response on February 24, 2017. On May 10, 2017, the Partnership’s appeal was denied (the “Administrative Order”).

The NYSED’s denial lacked merit, and Respondent has failed to comply with its obligations under FOIL. The McKinney-Vento Act requires the NYSED to oversee compliance with the Act’s directives which, among other things, allow homeless students to stay in their schools of origin and to otherwise have access to public education equal to that of students who

are permanently housed. Notwithstanding these clear mandates, the NYSED's January 26 response and the May 10 Administrative Order claim that the NYSED does not possess data or records that are critical to this oversight role, including data on homeless students' schools of origin, where the families of homeless students are placed in shelter, and the transportation provided to homeless children. At the same time, the NYSED provides no explanation for why this information is not available, instead providing only a blanket contention that it has no obligation to create such records. This empty statement does not satisfy the NYSED's obligations under FOIL to explain its refusal to provide the records requested.

Having exhausted all other administrative remedies, and having no other remedy at law, Petitioner seeks relief from this Court.

RELIEF SOUGHT

1. Petitioner brings this proceeding pursuant to Article 78 of the CPLR and requests this Court direct the NYSED to provide Petitioner with information, documents, and records responsive to its December 6, 2016 FOIL Requests.

2. More specifically, as originally filed, the Requests consisted of 24 specific items. Via this proceeding, Petitioner requests that the Court (a) direct the NYSED to provide Petitioner with documents and records responsive to Requests 1-4 and 10-23, or (b) provide specific written explanations for why the requested information is unavailable.

PARTIES

3. Petitioner, The Partnership for the Homeless, is a national public-interest, not-for-profit corporation dedicated to providing support services for New Yorkers experiencing homelessness, at risk for homelessness, or who are rebuilding their lives after leaving shelters in

New York City. Petitioner is headquartered at 305 Seventh Avenue, 14th Floor, New York, New York 10001.

4. Respondent, the New York State Education Department, is the department of the New York State government responsible for the supervision of all public schools in New York State. The NYSED is a public agency subject to the requirements of the Freedom of Information Law, New York Public Officers Law § 84 *et seq.* The NYSED's principal office is located at 89 Washington Avenue, Albany, New York 12234.

JURISDICTION AND VENUE

5. This Court has jurisdiction under CPLR § 7801 *et seq.* to review administrative decisions made by the NYSED.

6. Venue lies in Albany County pursuant to CPLR § 506(b) and § 7804(b) because this proceeding is brought within the judicial district where Respondent made the determination that is the subject of this petition and where Respondent's principal office is located.

BACKGROUND

7. The McKinney-Vento Act requires that state educational agencies ensure "each homeless youth has equal access to the same free, appropriate public education" as provided to his or her peers in permanent housing and that the state seek to remove any "barrier to the enrollment, attendance, or success in school of homeless children or youth." McKinney-Vento Act § 721, 42 U.S.C. § 11431.

8. The McKinney-Vento Act provides that the local education agencies shall "to the extent feasible, keep a homeless child or youth in the school of origin, except when doing so is contrary to the wishes of the child's or youth's parent or guardian" and that the state and local

education agencies adopt policies and practices to ensure that transportation is provided to and from the school of origin. *See* McKinney-Vento Act §722, 42 U.S.C. § 11432.

9. These goals and directives are echoed in New York State Education Law § 3209. *See generally* N.Y. EDUC. L. § 3209. The provision requires the Commissioner to “periodically monitor local school districts to ensure their compliance with the provisions of this [law], and that such districts review and revise any local regulations, policies, or practices that may act as barriers to the enrollment or attendance of homeless children in school or their receipt of comparable services . . .” N.Y. EDUC. L. § 3209(5)(b). For example, under New York Education Law § 3209, the parent or guardian of the homeless child “shall have the right” to designate the school district of origin for attendance and “the child shall be entitled to return to the school building where previously enrolled.” N.Y. EDUC. L. § 3209(1)(c), (2)(a).

10. According to statistics gathered and maintained by the New York City Department of Homeless Services, as of July 5, 2017, there are over 58,000 individuals in the shelter system in New York City, over 22,000 of whom are children. In the 2011 Fiscal Year, the average length of stay in the shelter system of families with children was 258 days. This number increased significantly in the past five years: in the 2016 Fiscal Year the average length of stay in the shelter system of families with children was 431 days.

11. In October 2016, the New York City Independent Budget Office issued a report entitled “Not Reaching the Door: Homeless Students Face Many Hurdles on the Way to School” (the “IBO Report”). The Report states that, during the 2013-2014 school year, only 34% of children living in shelters had a good attendance record (defined as attending greater than 90% of the school year), as compared to a 73% good attendance rate among permanently-housed students. The report also noted that, during that same school year, 34% of children living in

shelters were severely chronically absent (defined as being absent more than 40 days—20 percent of the school year).

12. According to a report from the New York City Department of Homeless Services on the Fiscal 2017 Preliminary Budget and the Fiscal 2016 Preliminary New York City Mayor's Management Report, families placed in the shelter system according to their youngest school-aged child's school address has declined from 70.5% in fiscal year 2013 to 52.9% in fiscal year 2015. In other words, according to the foregoing statistics, for fiscal year 2015, over 47% of families placed in shelter did not receive a shelter placement in the same borough where the family's youngest school-aged child is enrolled in school.

13. It is clear that even where transportation is provided, the placement of children in shelters that are long distances from the schools they are attending causes a number of difficulties, including exceedingly long travel times, late arrivals, and reduced opportunities to participate in extra-curricular activities.

PROCEDURAL HISTORY

14. In an effort to obtain information regarding the means by which the NYSED undertakes to fulfill its obligation to provide for the education of homeless students, the Partnership has requested documents from the NYSED.

15. On December 6, 2016, the Partnership, via its counsel Simpson Thacher & Bartlett LLP, submitted the Requests to the Records Access Officer of the NYSED in a letter listing 24 individual, specific requests for information.

16. The NYSED acknowledged receipt of the Requests on January 11, 2017.

17. On January 26, 2017, the NYSED responded to the Requests. The NYSED's response took the form of an email that included several links to documents available online.

18. On February 14, 2017, Petitioner sent a letter to the NYSED conveying its position that the “responses provided do not adequately address the FOIL Requests” and further detailing the information requested. The NYSED did not respond to the Partnership’s February 14 letter.

19. On February 24, 2017, Petitioner appealed the NYSED’s January 26, 2017 response to the Requests, via a letter to NYSED Commissioner MaryEllen Elia.

20. On May 10, 2017, the NYSED denied the Partnership’s appeal in full and rejected the Partnership’s request that the NYSED provide additional information in response to the Requests.

21. The NYSED’s denial of the Partnership’s appeal recited statutory language from FOIL provisions that purportedly exempted the requested records from being disclosed. The NYSED stated, *inter alia*, that the Requests required no response pursuant to FOIL, because: (i) FOIL does not require an agency to “itemize or identify each and every record that has been withheld”; (ii) “FOIL does not compel an agency to answer questions, prepare new records, offer explanations for their governmental activities, or perform legal research in an effort to be responsive”; and (iii) “an agency may choose to answer questions or to provide information by responding to questions, but those steps represent actions beyond the scope of the requirements of FOIL.”

22. NYSED’s blanket denial of several of Petitioner’s Requests is without merit, and the NYSED failed to fulfill its obligations under FOIL.

23. Petitioner timely commenced this Article 78 proceeding seeking an order compelling the NYSED to comply with its obligations under FOIL and provide Petitioner with documents and information responsive to the Requests. *See* CPLR § 217 (“a proceeding against

a body or officer must be commended within four months after the determination to be reviewed becomes final and binding upon the petitioner”).

**CAUSE OF ACTION: ARTICLE 78 REVIEW OF
WRONGFUL DENIAL OF FOIL REQUESTS**

24. Petitioner incorporates and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

25. Article 78 is the appropriate method for judicial review of agency determinations concerning FOIL requests.

26. Petitioner has a right under Public Officers Law § 89 *et seq.* to the records, documents, and information requested.

27. Respondent has not produced the records, documents, and information sought by Petitioner and has failed to properly invoke any valid exemptions under FOIL.

28. Respondent has not carried its burden to provide a valid, specific and particularized justification for withholding or otherwise not producing the requested records, documents, and information the Partnership requested in the Requests.

29. Respondent, in its Administrative Order, failed to fully explain in writing to the Petitioner the reasons for further denial of the Requests.

30. Petitioner has exhausted its administrative remedies and has no other remedy at law.

PRIOR APPLICATION

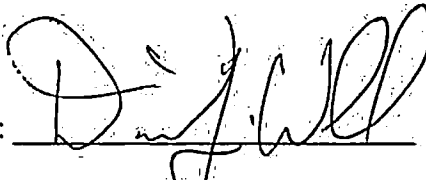
31. Petitioner has not made a prior application for the relief requested herein.

RELIEF REQUESTED

WHEREFORE, Petitioner respectfully requests this Court enter an Order:

- a) Directing Respondent to provide Petitioner with records responsive to Requests 1-4 and 10-23 in Petitioner's December 6, 2016 FOIL requests or provide specific written explanations for why the requested information is unavailable; and
- b) Granting Petitioner such other relief as this Court may deem just and proper.

Dated: New York, New York
July 10, 2017

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