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**PETER DOLAN , et al. and
CITY OF GLOUCESTER,
Plaintiffs,**

**Essex Superior Court Civil Action
2010-01378-B**

v.

**MITCHELL D. CHESTER, et al.
Defendants**

**RULING ON DEFENDANTS' MOTION TO DISMISS AND PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION**

The plaintiffs, the City of Gloucester and fifteen parents of children enrolled in various elementary and middle schools in Gloucester, Massachusetts seek a declaratory judgment against the Commissioner of Elementary and Secondary Education, Mitchell D. Chester, the Massachusetts Board of Elementary and Secondary Education, the Massachusetts Department of Elementary and Secondary Education, and the Gloucester Community Arts Charter School (GCA). Claiming that the Board of Education awarded a charter to the GCA in "blatant violation of its own rules and regulations", the plaintiffs seek a preliminary injunction prohibiting the GCA Charter School from opening next week and enjoining the state defendants from authorizing or distributing any funds to this new charter school. The defendants respond with the heavy artillery of a motion to dismiss the entire lawsuit due to plaintiffs' lack of standing. The defendants also vigorously oppose any interference with the opening and funding of the GCA Charter School.

After settlement negotiations between the two sides collapsed, the plaintiffs promptly moved for the preliminary injunction. Both sides filed voluminous pleadings and exhibits and a hearing was held last Thursday. The arguments on both sides are strong and sophisticated; the legal issues are difficult and complex; the requested rulings will have profound affect on all the parties. While a judge might wish to study and reflect upon these issues for a period of time, the reality is that school starts next Tuesday and all sides need a prompt decision. Here, shorn of the citations and polish, is that decision.

What should be noted at the outset is that this case is not a typical attempt to inject the courts into a political decision. In our democracy, a court should avoid

situations where losers of a hard fought political issue seek judicial intervention to reverse or revisit that decision. See *United States v. Richardson*, 418 U.S. 166, 183 (1974) (Powell, J., concurring). The Supreme Judicial Court, in interpreting the Charter School statute and regulations, G.L. c. 71, Section 89, clearly stated that the Superior Court was not to review the factual basis of the Board's grant of a charter or to delay charter process by unnecessary litigation. *School Committee of Hudson v. Board of Education*, 448 Mass. 565 (2007). The Commonwealth, through the Legislature, has made the political and societal choice to adopt charter schools as a means by which to improve public education. Thus, a lawsuit brought by disappointed parties alleging that a charter should or should not have been granted by the Board usually would be summarily dismissed given the Board's "broad discretion" in making these educational decisions. *Id.* This lawsuit, however, presents more than a disagreement over whether a proposed school deserved a charter. The plaintiffs present considerable evidence to the effect that the Board and the Commissioner blatantly ignored and violated state law when granting the GCA charter for political reasons. This evidence includes: 1) the Department's Charter School Office's determination that none of the final applicants, including GCA, met the legally required educational criteria; 2) a follow-up e-mail from the Secretary of Education to defendant Commissioner Chester stating that "our reality is that we have to show some sympathy in this group of charters or we'll get permanently labeled as hostile and that will cripple us with a number of key, moderate allies like the Globe ... so that leaves Gloucester; and 3) a subsequent report from the Inspector General concluding that the GCA charter was "never validly awarded and should be deemed void ab initio." The plaintiffs claim that they have a direct stake in this controversy and that this court must require the defendants to obey state law for the plaintiffs have no other legal remedy. The defendants respond that the plaintiffs lack standing and this court has no jurisdiction over the Board's discretionary decision to grant a charter no matter how corrupt or illegal. As set forth below, this judge concludes that the plaintiff parents have standing to contest the Board's grant of this particular charter on limited grounds. Given the balance of harms, the requested preliminary injunction presently is not appropriate. Such relief may well be appropriate at a later date.

STANDING AND JURISDICTION

Claiming that the *Hudson* case is controlling, the defendants argue that the

plaintiffs have no standing to contest the Board's decision and that this court has no jurisdiction over this case. In *Hudson*, the Supreme Judicial Court ruled that a School Committee had no standing to contest the Board's decision to grant a charter and explained that the statute provided a limited role to the School Committee in relation to the charter decision (i.e. a "Commonwealth charter" school). "The Legislature did not intend that school committees, in these circumstances, should be able to seek judicial review of the board's decision to grant a charter for a Commonwealth charter school." *Id.* at 581. It is difficult to distinguish the *Hudson* holding from the claims of the City of Gloucester. Even though the City has detailed the specific and devastating harms that may result from the allegedly defective grant of a charter, it would be peculiar if a city had standing to contest a charter but not the arm of the city most involved in school decisions, i.e. the school committee. Therefore, *Hudson* compels a finding that the City lacks standing and the motion to dismiss is allowed as to the City's claims.

The parents' claims are a different matter. The parents stand in the shoes of various students who will be attending the Gloucester elementary and middle schools in the upcoming years. Their affidavits and related affidavits set forth in great detail the specific, individualized harm that those students are likely to suffer if the allegedly illegal charter school is permitted to open. Those harms include the closing of schools, the firing of teachers, a great loss of funding for their respective schools, larger class sizes, less individualized attention from their teachers, and a disproportionate number of special education students (who are more expensive to educate) in their classes. The plaintiffs contend that these harms, which will begin after the initial first year when the Commonwealth no longer completely subsidizes the effect of opening the charter school, will adversely impact the education of their children. See *Villages Dev. Co. v. Secretary*, 410 Mass. 100, 106 (1991) (particularized financial harm provides standing). The defendants claim that these specified harms are "speculative" in that they have yet to occur or are based on "multiple layers" of speculation. The court finds this argument specious. The plaintiffs have convincingly shown the *likelihood* of future harm; 90 students from the traditional Gloucester public schools have pre-enrolled in GCA (with a disproportionately small percentage -- 5% at GCA versus 22% district wide -- of special education students) and that migration is likely to increase in future years. See Affidavits of Jeff Wulfson and Christopher Farmer. To argue that less state funding for traditional public district education will result in less funding to the traditional public schools is hardly speculative; rather, it is a logical deduction. It is equally logical that less money

spent on education will result in larger class size and less effective education. To be sure (to use an example offered by GCA), the Gloucester schools would suffer similar financial harm if there was suddenly a huge spike in the number of public school students who were accepted by and could afford schooling at Groton, Saint Marks, or Phillips Exeter. But this unlikely scenario is speculative in comparison to the realistic future harm detailed by the plaintiffs.

The Commonwealth responds that particularized injury alone does not provide standing; instead, the plaintiffs must prove that the statute provided some duty that specifically benefitted them. *Enos v. Secretary of Environmental Affairs*, 432 Mass. 132, 135 (2000). Here the statute and regulations impose at least two duties upon the state defendants: first, to “ensure” that the proposed charter school meets delineated educational and functional criteria and that the Board review and evaluate the charter applications according to those criteria (603 CMR Sections 1.04(3)(a) and 1.05(1)); second, “the board ensures that at least one of its members attends any public hearing on the final application.” *Hudson*, supra at 582, citing 603 CMR Section 1.04(3)(b). The plaintiffs, armed with considerable evidence, contend that the state defendants violated both of these duties. The plaintiffs point to the fact that the Department’s Charter School Office recommended against granting a charter to GCA and allege that the Commissioner hid this fact from the Board and/or the public and never himself made an independent assessment of the GCA application. The plaintiffs also point to the fact that the final public meeting regarding the GCA application was not attended by any Board member and allege that the meeting was crucial and any later attempted waiver of the regulatory requirement was invalid.

These duties exist to benefit Massachusetts public school students, i.e. to improve the public elementary and secondary educational system with “innovative” programs, learning and assessments which encourage “greater options in choosing schools” and enhance “performance-based educational programs” while providing competition to improve “other public schools.” G.L. 71 Section 89(d). The charter school statute and its accompanying regulations are specifically designed to benefit the public school students in the Commonwealth. Thus, in this case, the duties to charter only qualified applicant schools and for the Board to hold and attend hearings flow to the benefit of the public school students of Gloucester and, ergo, to the plaintiff parents in this suit. It is difficult to see who would have standing to contest illegal conduct in the granting of a charter other than the students/parents of the public school district in question. Perhaps recognizing this truth, the Commonwealth argues, in essence, that no one

has standing to contest even the most blatant violation of Chapter 71 Section 89. According to this argument, the Board's discretion is not only broad, but unbounded. At the hearing, the Commonwealth argued that there was no way to enforce the statutory duties except for the unusual situation where the Attorney General brought a criminal prosecution for bribery or corruption. Contrast *Enos*, supra at 142 (finding a lack of standing when alternative means exist to *judicially* challenge certification). There is no indication that the legislature intended to completely exclude students/parents from enforcing the charter school statute against blatant abuses. Nor does the *Hudson* case does not stand for such a startling result. If the Legislature is to immunize a state actor from all legal restraint and judicial supervision, the Legislature, at least, must state that clearly.

Standing is not to be construed narrowly and it is important not to confuse the standing determination with a judge's view of the merits of the case. In this case, the parent plaintiffs have standing to contest the charter grant.

The defendants also claim that the lawsuit must be dismissed because the plaintiff have not established a "consistently repeated" violation pursuant to the second sentence of G.L. c. 231A, Section 2. Whether or not the "consistently repeated" language applies to a lawsuit that seeks to enforce state regulations, there are sufficient allegations that the Commission and the Board "re-affirmed" their positions and, hence, "consistently repeated" their alleged violations of state law.

APPLICATION FOR PRELIMINARY INJUNCTION

The plaintiffs attempt to enjoin the imminent opening of the GCA Charter School. The defendants claim that the plaintiffs lack any probability of success on the merits of the case while the plaintiffs trumpet defendant's alleged repeated and blatant violations of state law. In certain limited areas, the plaintiffs have displayed a probability of success. As to the failure of any Board member to attend the final public hearing, the violation of the state regulation is relatively clear cut. There is evidence that the meeting was an important one and one that was represented as a substantive, final hearing on the application. The Board's later attempted waiver may not meet the regulatory requirements. The scales also appear to tip in favor of the plaintiffs on their other claim; i.e. that the Department

did not ensure that the GCA charter application met the required criteria. The plaintiffs are erroneous in arguing that the Office of Charter Schools' negative recommendation was somehow the position of the Department of Education and binding upon the Commissioner. Nevertheless, there is a strong factual showing that the Commissioner, despite his affidavit to the contrary, did not perform his own independent evaluation of the GCA application but, to the contrary, ignored the state regulations and caved into political pressure to recommend the project to a Board eager to approve at least one charter application regardless of its merit. If the plaintiffs can prove a lack of any independent investigation/consideration by the Commissioner involving whether the GCA met the minimum criteria, they have proven a regulatory violation. Note that this claim would not involve any type of reassessment by the court as to whether the GCA actually met the regulatory criteria. Instead, it is a rather simple inquiry into whether the Commissioner made an independent and informed decision in accordance with his duties under the regulations.

Having established a probability of success, the next issue is the existence of any irreparable harm. The plaintiffs clearly have shown irreparable harm to the funding of the public schools attended by the plaintiffs' children should the GCA charter school open. See Affidavits of Christopher Farmer, Brian Tarr, and the individual plaintiffs. There is little doubt that the traditional public elementary and secondary schools in Gloucester will receive significantly reduced funding and that this lack of funds may well result in a negatively impacting the education received by the plaintiffs' children. But this harm is not imminent. As the defendants point out, during the first year of GCA's existence, the Gloucester's current public schools will not lose a cent of funding from the State. Of course, this begins to change during the second year of GCA's existence. It is at that time that the funding mechanism will result in decreased state funds for the traditional City schools.

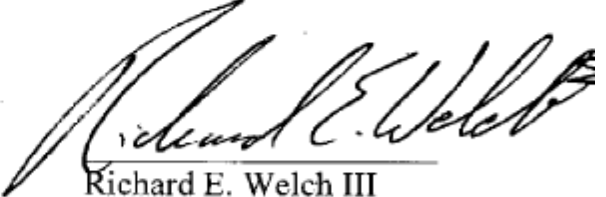
The balance of the harms is particularly important in any determination as to whether to issue a preliminary injunction in the sensitive area of public education. As noted earlier, the Legislature has made the judgment that legitimately approved charter schools are a substantial benefit to the public and to public education in general. Such schools not only benefit those who wish to attend their innovative classes, but the competition of charter schools is hoped to benefit overall public education. These public benefits, of course, only apply to schools that have been the product of legitimate charter application review and approval. It benefits no one if the charter school is substandard and/or the product of a corrupt bargain.

The GCA forcefully argues that it, and its staff, will be harmed immeasurably should an injunction issue. The GCA responsibly has relied upon the grant of the charter and leased space for classrooms, hired staff, and employed teachers. If an injunction issues today, numerous educational professionals who have been hired will be out of work and large sums of money will have been wasted on lease space. These are very legitimate concerns. The plaintiffs, on the other hand, can point to no immediate irreparable harm. Balancing the harms, this judge determines that no preliminary injunction should issue at this time.

As the court stated at the hearing on this matter, the calculus regarding preliminary injunctive relief changes markedly during the next academic year. At that time, the traditional Gloucester public schools will suffer significant financial harm. The GCA cannot claim any justifiable reliance regarding financial commitments/staffing if this court reconsiders the injunctive request early enough to allow planning by both sides for the next academic year. Likewise, any student who chooses to attend GCA this September will be aware of the inherent uncertainty involving the next academic year. Therefore, should this case not reach a beneficial resolution before next year, this Court will hold a hearing on any renewed motion for preliminary injunction (should the plaintiff file such a pleading) in early January 2011.

The defendants' motion to dismiss is allowed only as to plaintiff City of Gloucester. The plaintiffs' motion for a preliminary injunction is denied without prejudice at this time.

So ordered



Richard E. Welch III
Justice, Superior Court

August 23, 2010, 4 P.M.