STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
SHERI G. LEDERMAN, Ed. D.

Petitioner,

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

Index No. 5443-14
RJI No. 01-14-ST6183

-against-

JOHN B. KING, JR., Commissioner, New York State Education Department, CANDACE H. SHYER, Assistant Commissioner, Office of State Assessment of the New York State Education Department

Respondents,

TO DECLARE PETITIONER'S GROWTH SCORE AND RATING FOR THE 2013-2014 SCHOOL YEAR (RATING PETITIONER AS "INEFFECTIVE") TO BE ARBITRARY AND CAPRICIOUS AND AN ABUSE OF DISCRETION.

Supreme Court, Albany County Article 78 Term

Appearances:

D'Agostino, Levine, Landesman & Lederman, LLP
Attorneys for Petitioner
345 Seventh Avenue, 23rd Floor
New York, NY 10001
(Bruce Lederman, Esq., of Counsel)

Eric T. Schneiderman
Attorney General
State of New York
Attorney for Respondents
The Capitol
Albany, NY 12224-0341
(Colleen D. Galligan, Esq., Assistant Attorney General)

DECISION AND ORDER

Roger D. McDonough, Justice

Petitioner seeks a Judgment: (1) setting aside or vacating the Growth Score and Rating ("growth score") of Petitioner of 1 out of 20, and the identification of petitioner as an "Ineffective" education for school year 2013-2014; (2) declaring that the New York State Growth

Measures ("growth measures") as implemented by the Office of Assessment are arbitrary and capricious and an abuse of discretion; and (3) permanently enjoining the use of said "growth measures" unless they are modified to rationally evaluate teacher performance. Respondents seek dismissal of the petition based upon petitioner's purported lack of standing. Specifically, respondents maintain that petitioner has not suffered a harm in fact.

Petitioner cross-moves for discovery and to supplement her petition. Respondents oppose the discovery relief but have not opposed the request to supplement the petition.

BACKGROUND

Petitioner is a fourth (4th) grade teacher employed by the Great Neck Public School District in the State of New York. She has been so employed since September of 1997. For the school year 2013-2014, she received a "growth score" of 1 out of a possible 20 points. Said score correlates to a rating of "Ineffective". The score/rating sheet with petitioner's 1 point score defines "Ineffective" as: "Results are well-below State average for similar students". For the school year 2012-2013, she received a "growth score" of 14 out of 20 points. Said score correlates to a rating of "Effective", defined as: "Results meet State average for similar students". Petitioner, via her counsel, confirmed with the New York State Education Department ("Education Department") that neither an administrative appeal nor an appeal to the Education Commissioner was available. The instant proceeding ensued.

Counsel for the parties appeared before the Part I Justice (Justice Platkin) as to the issues of temporary relief and discovery. Justice Platkin struck all temporary relief from the Order to Show Cause as well as the relief seeking discovery. The parties appeared before this Court for oral argument as to respondents' motion to dismiss and petitioner's cross-motion to conduct discovery.

DISCUSSION

Standing

In order to have standing, a petitioner must have something truly at stake in a genuine controversy (Saratoga County Chamber of Commerce v. Pataki, 100 N.Y.2d 801, 812 [2003]). Petitioner bears the burden of establishing an injury in fact as well as that said injury is within the zone of interests to sought to be protected by the statute that has allegedly been violated (Matter

of Association for a Better Long Is., Inc. v. New York State Dept. of Envtl. Conservation, 23 N.Y.3d 1, 6 [2014]).[1] The injury in fact component must rise above the level of conjecture or speculation (*see*, Matter of Animal Legal Defense Fund, Inc. v Aubertine, 119 AD3d 1202, 1203 [3rd Dept. 2014]). Petitioner must demonstrate an actual legal stake in this litigation's outcome, meaning "an injury in fact worthy and capable of judicial resolution" (Matter of La Barbera v. Town of Woodstock, 29 A.D.3d 1054, 1055 [3rd Dept. 2006]).

Respondents maintain that petitioner's allegations are insufficient to confer standing because they do not allege an injury in fact. In support, respondents note that petitioner's 1 point "growth score" is confidential and cannot be disclosed even pursuant to a Freedom of Information Act request. Respondents also point out that petitioner is the only one publicizing her otherwise confidential "growth score". They further argue that petitioner's overall composite rating is "Effective" and that said rating would not give rise to any adverse employment or disciplinary actions. Finally, respondents characterize petitioner's claims of potential harm as highly speculative.

In opposition, petitioner asserts that the 1 point growth score has had a direct, personal adverse impact by: (1) lowering her overall Annual Professional Performance Review ("APPR") rating from Highly Effective to Effective; (2) impugning her reputation among certain parents; (3) defaming her directly to her employer; (4) putting her ability to earn the designation of Master Teacher at risk as well as her eligibility for certain bonus pay; and (5) demoralizing her as a professional based on her prior track record of top ratings. In sum, petitioner maintains that she has a direct and personal stake in challenging her 1 point "growth score" because it directly and adversely affects her career, professional standing, reputation and self-image.

In reply, respondents re-emphasize the speculative and hypothetical nature of petitioner's purported injuries. Additionally, respondents note that petitioner is now improperly raising injuries that were not set forth in the petition. Finally, respondents argue that being demoralized is not a sufficiently real and concrete injury to warrant standing.

The Court finds that petitioner has standing to bring the instant proceeding. Petitioner has adequately demonstrated that she has suffered an injury in fact in the form of her precipitous

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[1] Respondents' submissions make clear that respondents are solely arguing that petitioner has neither asserted nor suffered an injury in fact.

drop in her growth score from 14 points out of 20 (or 70%) to 1 point out of 20 (or 5%) from the 2012/2013 year to the 2013/2014 year. Said drop directly correlates to a drop in her growth score rating from "Effective" to "Ineffective". Additionally, said drop directly resulted in petitioner's drop in her APPR from "Highly Effective" to "Effective". The drastic, statistically significant drop in a component that makes up 20% of petitioner's 100 point annual rating strikes the Court as adequate to constitute an injury in fact. Additionally, respondents have not established that said injury in fact is either incapable or unworthy of judicial resolution. Accordingly, the Court finds that petitioner has adequately established the threshold issue of standing.

Discovery

The Court will reserve on the issue of discovery until after respondents have submitted their answer and administrative record. The Court has not been persuaded, at this stage of the proceeding, that any need for discovery exists in this Article 78 matter (*see generally*, Matter of Cohn Chemung Properties, Inc. v Town of Southport, 108 AD3d 928, 930 [3rd Dept. 2013]).[2]

Based on the foregoing, the motion to dismiss based on lack of standing is denied and the Court reserves decision on the cross-motion for discovery. That portion of the motion seeking permission to supplement the petition with affidavits from "parents and experts" is hereby granted. Respondents are directed to serve their answer within thirty (30) days of receipt of notice of entry of this Decision and Order. Petitioner may have fifteen (15) days from service of the answer to serve a reply as well as a further submission on the discovery cross-motion.[3]

SO ORDERED.

This shall constitute the Decision and Order. The original Decision and Order is being

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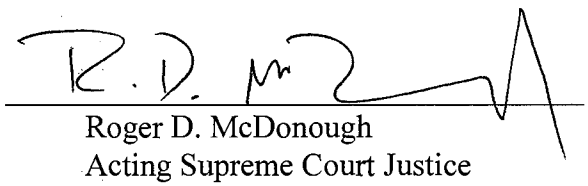
[2] The Court notes that petitioner has already, without the benefit of the record, procured four expert affidavits wherein the authors conclude that respondents have acted irrationally herein as to the ratings, processes at calculating the ratings, etc.

[3] Upon completion of the briefing schedule, the parties are directed to confer and submit to the Court four potential dates for oral argument.

returned to the counsel for petitioner who is directed to enter this Decision and Order without notice and to serve respondents' counsel with a copy of this Decision and Order with notice of entry. The Court will transmit a copy of the Decision and Order to the County Clerk. The Court will retain the papers considered at this time. The signing of the Decision and Order and delivery of a copy of the Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: Albany, New York
May 28, 2015



Roger D. McDonough
Acting Supreme Court Justice

Papers Considered[4]:

Order to Show Cause, executed on October 27, 2014 by Justice Platkin;
Affirmation of Bruce H. Lederman, Esq., dated October 23, 2014, with annexed exhibits;
Petitioner's Affidavit, sworn to October 24, 2014;
Affidavit of Sharon Fougner, sworn to October 20, 2014;
Affidavit of Thomas P. Dolan, sworn to October 20, 2014;
Verified Petition, dated October 24, 2014, with annexed exhibits;
Respondents' Notice of Motion, dated February 2, 2015;
Affirmation of Colleen D. Galligan, Esq., A.A.G., dated February 2, 2015, with annexed exhibits;
Petitioner's Notice of Cross-Motion, dated March 3, 2015;
Affirmation of Bruce H. Lederman, Esq., dated March 3, 2015;
Petitioner's Affidavit, sworn to March 3, 2015, with annexed affidavits "from experts and parents";
Affirmation of Colleen D. Galligan, Esq., A.A.G., dated March 13, 2015.

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[4] Petitioner and respondents also submitted memoranda of law.