

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

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In the Matter of the Application of

Letitia James as the Public Advocate
for the City of New York; and C.P.,
a minor by his next friend, Robin Ponsolle;
R.S., a minor by his next friend, Catherine
Boward-Simone;

INDEX NO.

Petitioners,

For Judgment Pursuant to Article 78
of the Civil Practice Law & Rules,

VERIFIED PETITION

-against-

City of New York; New York City Department
of Education; and Carmen Farina, Chancellor, in
her official capacity,

Respondents.

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PRELIMINARY STATEMENT

1. This is a proceeding brought pursuant to Article 78, § 7801 and § 7803(1), and Article 60, § 6001, of the Civil Practice Law and Rules, seeking to compel the Respondents to enforce Administrative Code §§ 6-102 and 19-605 by immediately providing functioning air conditioned buses for children with disabilities who attend New York City schools, and to establish systems to affirmatively monitor contract compliance of bus companies. The suit is brought by the Public Advocate for the City of New York, Letitia James, and two minor children with disabilities, by their parents as next friends.

2. Temperatures inside buses for children with disabilities have been recorded as high as 85 and 90 degrees this summer. Many of these children have health issues that

necessitate air conditioning. These are simply unacceptable conditions for children to endure, and this failure to provide air-conditioning violates City law.

3. These children with disabilities attend District 75 schools, and due to the nature of their disabilities, many are not able to verbalize complaints about the temperature inside their buses. These children are harmed, year after year, by the heat on their buses, and the City has failed to provide the statutorily required air conditioning.

4. The City must set up a system to affirmatively monitor bus temperatures, rather than maintaining the status quo which relies on parents to report high temperatures after-the-fact when their children have already been harmed. The City should not place oversight responsibility on the backs of these children – it is a New York City Department of Education responsibility.

5. The Petitioner Letitia James is the city-wide elected Public Advocate for the City of New York. In her position as Public Advocate, Petitioner is responsible for monitoring and reporting on the performance of city agencies.

JURISDICTION

6. The Court has jurisdiction over Petitioner's claims pursuant to C.P.L.R. § 7801.

VENUE

7. Venue is properly laid in this Court under C.P.L.R. §§ 506(b), 7804(b), and 503 as Respondents all have principal offices in this county.

PARTIES

8. Petitioner LETITIA JAMES is the duly elected Public Advocate for the City of New York, with a principal place of business in the borough of Manhattan.

9. C.P. is a minor and is diagnosed with autism. Due to his disability, he attends a District 75 school and has an Individualized Education Plan (IEP) required by federal law to ensure that he receives appropriate educational services. His next friend, Robin Ponsolle, is his mother. They reside in Queens, New York.

10. R.S. is a minor and is diagnosed with autism. Due to his disability, he attends a District 75 school and has an Individualized Education Plan (IEP) required by federal law to ensure that he receives appropriate educational services. His next friend, Catherine Boward-Simone, is his mother. They reside in Queens, New York.

11. Respondent City of New York is a municipal corporation with its principle place of business in the borough of Manhattan.

12. Respondent New York City Department of Education (DOE) is the largest school district in the United States, serving 1.1 million students in over 1,800 schools. DOE has a principal place of business in Manhattan.

13. Respondent Carmen Farina is the Chancellor of the DOE, and has a principal place of business in Manhattan.

STATUTORY AND REGULATORY FRAMEWORK

14. The Public Advocate for the City of New York, Letitia James, is a citywide elected official, the immediate successor to the Mayor, and an *ex officio* member of the New York City Council. New York City Charter (“Charter”) §24, 10, 24(9)(e).

15. The Public Advocate is charged with monitoring, investigating, and reviewing the actions of City agencies. She is also responsible for identifying systemic problems, recommending solutions, and publishing reports concerning her areas of inquiry. She has the power to introduce legislation and hold oversight hearings on legislative matters.

16. The Office of the Public Advocate was created to serve as a “watchdog” against the inefficient or inadequate operation of City government.

17. The Petitioners Ponsolle and Boward-Simone, as well as other parents, have complained of the recurrent lack of air-conditioning to the DOE through their Office of Pupil Transportation, and have found repeated complaints to be futile.

18. NYC Administrative Code § 19-601 provides, “Safety measures on school buses; declaration and findings,” states as follows:

The council hereby finds that a serious emergency exists as to the safety of handicapped children transported to and from schools in school buses and other vehicles. ... The council finds that in order to prevent further tragedies to our handicapped school children the provisions of this section are declared necessary and are designed to protect, the safety, health and general welfare of our school children.

19. NYC Administrative Code § 19-605, “Air-conditioning,” provides as follows:

a. Any bus or other motor vehicle transporting a child with a disability to and from a school in the city pursuant to any agreement or contract shall be air-conditioned when the ambient outside temperature exceeds seventy degrees Fahrenheit. Driver of all such vehicles shall utilize such air conditioning systems in order to make the internal climate of such vehicles comfortable to passengers in order to protect or enhance the health of children with disabilities. Any failure, mechanical or otherwise, of an air-conditioning system required by this section shall be repaired and restored to operable condition as soon as is practicable, but in no event more than three business days subsequent to the failure. For purposes of this section, "child with a disability" shall mean a child with a disability as defined in section 4401(1) of the education law who requires an air-conditioned environment for health reasons.

b. The penalty provisions set forth in section 19-607 of this chapter shall not apply to any violation of the provisions of this section. Any owner, operator or contractor responsible for transporting a child with a disability to and from a school in the city pursuant to any agreement or contract shall be liable for a civil penalty of four hundred dollars for each violation of this section.

20. NYC Administrative Code § 6-102 provides that city agencies each have the responsibility for making sure their contractors actually perform on contracts, and when they fail, the City must provide the service itself. It reads as follows:

Performance of contracts. a. Each agency shall require and enforce the faithful performance of every contract made by it. b. If the contractor or contractors shall fail in any respect to fulfill the contract within the time limited for its performance, then the agency in charge thereof shall complete the same in the manner provided for in the contract. The cost of such completion shall be a charge against such delinquent contractor or contractors.

21. Title 8 of the New York City Administrative Code § 8-101 *et seq.* prohibits discrimination based on disability. New York City Administrative Code §8-107(5)(a)(1) requires the granting of reasonable accommodations based on disability.

22. Petitioners C.P. and R.S. are persons with disabilities as that term is defined in the New York City Administrative Code § 8-102(16).

23. New York City Administrative Code §8-502 provides that aggrieved persons are entitled to actual damages, punitive damages, injunctive relief, and reasonable attorneys' fees and costs.

STATEMENT OF FACTS

Weather Conditions in the Summer and Early Fall

24. New York City is hot every summer. The New York City government's tourist guide warns "[t]he summer months can bring stifling heat and humidity to the city. Even at night, temperatures may remain in the 90s."¹

25. The ambient temperature has reached above 70 degrees Fahrenheit in New York City for every day in July of 2015, and in August so far, triggering a legal requirement to provide air-conditioned busing to children with disabilities.² NYC Admin. Code § 19-605.

¹ New York City's official tourist guide, at http://www.nyc.com/visitor_guide/weather_facts.75835/editorial_review.aspx

26. This September the average ambient temperature is expected to be above 70 degrees every school day,³ and last October air temperatures were above 70 degrees on ten of the school days that month.⁴

Background Regarding Services Required to be Provided by DOE

27. Children with disabilities may have an IEP which describes the type of educational and other services to which they are entitled. The IEP is required by the Individuals with Disabilities Education Improvement Act of 2004 (IDEA) and New York State Education Law § 4402.

28. An IEP may mandate that the child have a temperature-controlled environment or other conditions conducive to that child's learning. Petitioners Ponsolle and Boward-Simon's children have such conditions in their IEPs. Affidavit of Robin Ponsolle (hereinafter "Ponsolle Aff.") at ¶ 8, Affidavit of Catherine Boward-Simone (hereinafter "Boward Simone Aff.") at ¶ 7.

29. Children with disabilities may also attend a District 75 school. District 75 provides citywide educational, vocational, and behavioral support programs for students who are on the autism spectrum, have significant cognitive delays, are severely emotionally challenged, sensory impaired and/or multiple disabled. All of the children in District 75 schools have IEPs.

30. The DOE is responsible for ensuring that children with disabilities who need air conditioning for health reasons have air-conditioned buses so that they may attend summer programs. Affidavit of Letitia James (hereinafter "James Aff.") at ¶ 3.

31. The Department of Education contracts with bus companies to provide transportation to students who need it, including children with disabilities who have health needs for air conditioning. James Aff. at ¶ 11, and exhibit 3 (bus contract).

² National Weather Service: <http://w2.weather.gov/climate/index.php?wfo=okx>

³ <http://www.accuweather.com/en/us/new-york-ny/10007/september-weather/349727>

⁴ <http://www.accuweather.com/en/us/new-york-ny/10007/month/349727?monyr=10/01/2014>

32. The City's contracts with the bus companies mandate that the buses provide air conditioning. The City's contracts with bus companies read as follows:

By June 30, 2010, one hundred percent (100%) of Small School Buses operated by the Contractor under this Contract must be equipped with air conditioning/climate control systems... the Contractor must cause and permit each such air conditioning/climate control system to be operated on any and all warm weather periods and/or at any time as necessary for the medical needs of any passengers.

James Aff. ¶ 11, exhibit 3, (bus contract Page 19, section 8(c)).

33. The DOE posted the following notice on its website⁵ this summer:

“SUMMER 2015 - WARM WEATHER ADVISORY As we prepare for hotter weather it is important for schools and parents to note the capacity and limits of school bus air conditioning systems: Climate control systems on school buses are only capable of cooling a vehicle to approximately 15-20 degrees below the outside temperature, therefore, if it is 100 degrees outside, the bus can only be expected to cool to about 80 degrees. For some students who are medically fragile and/or sensitive to temperature changes, it may be in the student's best interest not to ride on extremely hot days. The decision of whether a student rides or not (as with extremely cold temperatures as well) will remain with the principal and/or the parent. We have sent a memo to all bus companies so that they will ensure operability of their vehicles, vents, cooling and, when necessary, students with severe issues can be moved closer to the front if that part of the bus is cooler.

34. Sending “a memo” to bus companies falls short of DOE's legal obligation to ensure that buses have air conditioning and that children are not harmed by dangerous bus temperatures.

35. The DOE warm weather advisory notably suggests that proper air conditioning will be “capable of cooling a vehicle to approximately 15-20 degrees” below the outside temperature. However, as discussed further within, buses this summer have often been as hot, or hotter, than the outside temperature. Ponsolle Aff. ¶¶ 12-19, Boward-Simone Aff. ¶¶ 6, 9-20, James Aff. ¶¶ 7-10, 18- 23. On the days where the buses were 90 degrees, it certainly was not 110 degrees outside and there is simply no excuse for the heat condition on the buses.

⁵ DOE website at: <http://www.optnyc.org/public1/default.aspx?logout=1>

36. Also troubling is the fact that the warm weather advisory implies that children with disabilities may just be better off staying home on hot days. In fact, the DOE is required by federal law to ensure that extended school year services are available for children whose IEPs state a need for the services. 34 C.F.R. 300.106. Children with disabilities should not be expected to stay home; rather, DOE is expected to provide air-conditioned buses.

37. This Court must mandate that the DOE have systems to affirmatively check the bus temperatures and fine the bus companies for violations of the law.

38. Instead, historically, DOE has relied on parents of children with disabilities – some of whom are non-verbal and cannot complain about the heat – to notify the DOE of hot buses after the fact, when children have already been harmed. Boward-Simone Aff. ¶¶11-21, Ponsolle Aff. ¶ 8-18.

39. The complaint-based system, which is wholly reactive, has repeatedly failed to remedy the problem. Boward-Simone Aff. ¶¶11-21, Ponsolle Aff. ¶ 12. Logic dictates that the government cannot put a reporting responsibility on these families. A proactive system must be Ordered to ensure that the buses all have functioning air conditioning. Petitioners request that the Court direct the DOE to comply with the law by routinely monitoring temperatures and fining bus companies that violate the law.

The Public Advocate Attempted to Obtain Compliance from DOE

40. As explained above, Administrative Code § 19-605 mandates that children with disabilities who have health reasons for air conditioning must be provided with air conditioning on every day that the ambient temperature is more than 70 degrees. The City is required to ensure the bus contractors perform on their contracts. NYC Admin. Code § 6-102.

41. Despite this clear law, and despite the predictability of summer heat, every summer parents find their children subjected to excessively hot temperatures on their bus rides. Ponsolle Aff. ¶ 12, 15-23, Boward-Simone Aff. ¶ 22-25.

42. Numerous parents have complained to the Office of the Public Advocate that their children with disabilities are subjected to overly hot and dangerous temperatures on City school buses. James Aff. ¶ 7, 18-25.

43. The Public Advocate notified the DOE in the summer of 2014 that this problem was serious, systemic, and needed to be remedied. James Aff. ¶ 8-10, exhibit 2 (letter).

44. On September 14, 2014, the Public Advocate wrote a letter to the DOE explaining, "... this summer, a special needs child who is autistic was stuck on a school bus in sweltering heat without any air conditioning. The extreme heat caused the child to become dehydrated and the police were called and the student had to be taken to the emergency room." James Aff. ¶ 8-10, exhibit 2 (letter).

45. The Public Advocate also explained, "[o]f the many complaints that my office received, I am particularly concerned about the transportation of children who attend District 75 schools, as many have severe medical challenges and are nonverbal." James Aff. ¶ 8-10, exhibit 2 (letter).

46. The Public Advocate asked for a number of documents and assurances, and offered to work with the DOE in the 2014/2015 school year to ensure that the problem got resolved. James Aff. ¶ 8-10, exhibit 2 (letter). DOE did not provide the requested information or resolve the problem.

47. Despite the Public Advocate's efforts, DOE has not ensured that the buses are air-conditioned.

Parents' Unsuccessful Attempts to Obtain Compliance from DOE

Despite Excessive Heat This Summer

48. The Petitioner children are people with disabilities, and the requirements under their IEPs that they receive air-conditioned transportation to and from services are a reasonable accommodation designed to ensure that these children receive an appropriate education. Ponsolle Aff. ¶¶ 4, 8, Boward-Simone Aff. ¶¶ 3, 7.

49. This summer, as in most summers, the ambient temperatures in New York City have been well above 70 degrees Fahrenheit. Boward-Simone Aff. ¶ 6, Ponsolle Aff. ¶ 7. Bus temperatures have climbed to unacceptable levels this summer, and air conditioning has simply not been dependable. Ponsolle Aff. ¶¶ 14-25, Boward-Simone Aff. ¶¶ 9-21.

50. Parents have continued to complain to our office, and to the DOE's Office of Pupil Transportation (OPT), yet the problem of lack of air conditioning recurs and recurs.

51. The Public Advocate has worked to help parents who have children on these buses. She helped parents document what DOE was not affirmatively tracking – the parents placed thermometers in their children's book bags in order to determine the exact temperature of the buses that were not properly air-conditioned. Parents have submitted logs which detailed hot temperatures on their children's buses this summer. James Aff. ¶¶ 5, 15-17.

52. Temperature readings were taken by placing thermometers in the child's backpack, with an antenna sticking out to measure the ambient air in the bus. Bus aides then logged the readings. Ponsolle Aff. ¶ 13.

53. For example, for July 14, 2015, we received logs of temperatures including an 8 a.m. reading of 91.5 degrees and a 3:35 p.m. reading of 87.6 degrees for one child. James Aff. ¶ 19.

54. For the period of July 13 to July 24, we received logs of temperatures ranging from 80 to 91.5 for one child. James Aff. ¶ 20.

55. For the period of July 22 through July 24, we received logs of 77.1 to 90.2 for another child. James Aff. ¶ 21.

56. Petitioner Ponsolle's child has endured multiple days of excessive heat on the bus, and on August 4, 2015, a bus ride home that was 83 degrees. James Aff. ¶ 22.

57. As detailed in her affidavit, Ponsolle's son was extremely agitated after that bus ride and engaged in self-harm behavior including biting his own arm to break the skin. Ponsolle Aff., ¶¶15-18, and exhibits. Nine other children endured that day's bus ride with him. Due to their disabilities and younger ages, they may not have even been able to make their parents aware of the heat. Ponsolle Aff. ¶¶ 19.

58. Petitioner Boward-Simone's son A.S. has not had one bus ride this summer where he was on a bus equipped with air conditioning. Boward-Simone Aff. ¶ 9.

59. Petitioner Boward-Simone has also made numerous complaints to both the bus company and various people at the DOE. Boward-Simone Aff. ¶¶ 11-22.

60. Petitioner Ponsolle, like many other parents, has made repeated complaints to DOE about the hot bus temperatures which cause her child harm. Ponsolle Aff. ¶ 21, exhibits (example of email correspondence).

61. Ponsolle explained in correspondence to Chancellor Farina on July 13, 2014, "[t]he summer busing situation of our children has become intolerable. There are long rides, bus breakdowns and no air conditioning on many of the runs. I am sure you are aware of Letitia James' press conference this past Friday ..." Ponsolle Aff. at ¶21.

62. Ponsolle explained that when inspectors are sent out after parent complaints, the bus company will switch to a better bus for a few days, then the situation reverts back to an unacceptable bus. Ponsolle Aff. ¶ 22-26.

63. The inspection system is flawed, to the extent that it allows shuffling rather than repair of buses. The buses without functioning air conditioning are used for other children while a better bus temporarily takes over the route.

64. A system that is set up only to respond to complaints, but does not affirmatively oversee performance on the contracts, is failing to protect these children as required by Administrative Code § 19-605. Likewise, by repeatedly failing to provide the reasonable accommodation, the system discriminates against these children based on their disability.

CLAIMS

65. Respondents have violated Administrative Code § 19-605.

66. Respondents have failed to ensure that the bus companies perform on contracts as the Respondents are required to do under Administrative Code § 19-605.

67. Respondents have violated a duty to perform the services they had delegated to DOE contractors, when the contractors fail. NYC Administrative Code § 6-102.

68. By violating Administrative Code § 19-605 and 6-102, Respondents have caused Petitioners C.P. and R.S. to be harmed physically and emotionally, and Petitioners C.P. and R.S. continue to be put in situations that risk their health and safety.

69. Respondents have violated Title 8 of the New York City Administrative Code § 8-101 *et seq.* which prohibits discrimination based on disability, and specifically Administrative Code §8-107(5)(a)(1) requires the granting of reasonable accommodations based on disability.

70. Petitioners C.P. and R.S. are persons with a disability as that term is defined in the New York City Administrative Code § 8-102(16). The services C.P. and R.S. are entitled to under their IEPs are reasonable accommodations based on their disabilities. Deprivation of the reasonable accommodation of air-conditioned buses required by Petitioners' IEPs is discrimination under Administrative Code §8-107(5)(a)(1).

71. New York City Administrative Code §8-502 provides that aggrieved persons, such as Petitioners C.P. and R.S., are entitled to actual damages, punitive damages, injunctive relief, and reasonable attorneys' fees and costs.

RELIEF SOUGHT

WHEREFORE, Petitioners seek an Order:

1. **Declaring** that Respondents have violated NYC Administrative Code § 19-605(a);
2. **Declaring** that Respondents have violated the New York City Human Rights Law, Administrative Code § 8-101 *et seq.*, by denying reasonable accommodations;
3. **Directing** all Respondents to immediately enforce Administrative Code § 19-605(b) by providing functioning air-conditioned buses for children with disabilities who attend New York City schools by ensuring that all contractors and the entire fleet of buses used by children with disabilities who are enrolled in District 75 school have functioning air conditioners;
4. **Directing** all Respondents to immediately enforce Administrative Code § 19-605(b) by establishing adequate systems to monitor all bus companies' performance under their contracts with the City, (i.e. the temperatures on the buses) to ensure children with disabilities

are not transported on buses without air conditioning on days when the ambient temperature is above 70 degrees and present such plan for court approval no later than 10 days after the entry of this Order;

5. **Directing** all Respondents to immediately enforce Administrative Code § 19-605(b) by penalizing the bus companies pursuant to the Administrative Code's provisions;

6. **Directing** that Respondents pay to Petitioners C.P. and R.S., actual damages, punitive damages, and reasonable attorneys' fees and costs pursuant to Administrative Code §8-502; and

7. **Granting** such other and further relief as the Court may deem just and proper.

Dated: August 19, 2015
New York, New York

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