

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ERIE

X

In the Matter of

EVE SHIPPENS, AMY STEINER, JOHN P. SMITH,  
TIMOTHY LYON, and DONNA DELANO-KERR,

Petitioners,

VERIFIED PETITION

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

- against -

Index No.:

BOARD OF EDUCATION OF THE CITY  
SCHOOL DISTRICT OF THE CITY OF  
BUFFALO,

Assigned Justice:

Respondent.

Oral Argument Requested

X

Petitioners, EVE SHIPPENS, AMY STEINER, JOHN P. SMITH, TIMOTHY LYON,  
and DONNA DELANO-KERR, as and for a petition against Respondent, BOARD OF  
EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF BUFFALO ("District"),  
sets forth as follows:

**INTRODUCTORY STATEMENT**

1. This is a special proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR") in the nature of mandamus to compel Respondent District to comply with their statutory duty, pursuant to 8 NYCRR 100.1-100.16, 100.1(t)(v)(a), 100.2(h)(1) and (2), and 100.5(q)(1).

2. Respondent acted in violation of express law, excess of lawful authority, and arbitrarily and capriciously, when Respondent:

(a) failed to provide all District students with the legally required opportunity to complete a three- or five-unit sequence in the Arts during the 2019 – 2020 school year; and

, (b) failed to offer students equitable opportunities and resources to study the Arts as specifically required by law.

3. Petitioner herein seeks an Order and Judgment directing the District to comply with the plain provisions and requirements of the law by offering proper Arts course sequences to its students and doing so equitably throughout the District, together with such other and further relief if any that this Court deems just and appropriate.

### **PARTIES TO THIS PROCEEDING**

4. At all times hereinafter mentioned, Petitioners EVE SHIPPENS, AMY STEINER, JOHN P. SMITH, TIMOTHY LYON, and DONNA DELANO-KERR, were resident taxpayers of the District and employed as teachers and professional staff by Respondent District. In addition, Petitioners SHIPPENS and SMITH were and are parents of District students.

5. Respondent District is the governing body of the Buffalo Public Schools, a public school district located in the County of Erie, State of New York, organized and duly existing pursuant to and under the laws of the State of New York, and operated public schools throughout the City of Buffalo, New York.

### **STATEMENT OF FACTS**

#### **a. New York State Arts Education Legal Requirements:**

6. The District has a duty to educate public school children pursuant to Education Law §2554.

7. Part 100 of the New York State Regulations of the Commissioner of Education requires all New York State pre-kindergarten through twelfth grade students to receive

instruction in the Arts. Those regulations define the "arts" as “visual arts, music, dance *and* theatre.” See 8 NYCRR 100.1(t)(v)(a) (*Emphasis added*).

8. 8 NYCRR 100.2(h)(1) and (2) specifically mandate that, beginning in grade 9, a district shall offer students the opportunity to complete a three- or five-unit sequence in the arts. See also 8 NYCRR 100.5(b)(7)(v)(c).

9. Further, 8 NYCRR 100.5(a)(3)(v), requires all high school students to complete one unit of study in “visual arts and/or music, dance, or theatre.” A unit of study “means at least 180 minutes of instruction per week throughout the school year, or the equivalent.” See 8 NYCRR 100.1(a).

10. These graduation requirements are acknowledged by the District in a document that it posts on its website called the “Buffalo Public Schools Graduation Requirements (Pt. 100).” A copy is annexed hereto as Exhibit A. It states therein that in lieu of the three required credits of “Language Other Than English (LOTE)”, a student may substitute a 5 credit sequence in Art, Fine Arts, Business, Technology or Career Education.

11. The District’s guidance counselors set each student’s path to obtaining these graduation requirements in the student’s freshman year (Thomas Affidavit Exhibit 2).

12. Further, 8 NYCRR 100.1-100.16 requires the District equitably implement arts learning opportunities and resources for all students in the district during the school day.

13. In that regard, 8 NYCRR 100.5(q)(1) requires the District to “make available to their students all the options for earning a diploma which are specified in section 100.5 of this Part.” 8 NYCRR 100.5(b)(7)(v)(c), in turn, provides that students wishing to complete a Regents diploma with advanced designation can do so by completing a five-unit sequence in the Arts.

14. Additionally, 8 NYCRR 100.5(d)(2)(i)(a) provides that students may obtain the unit of credit in visual arts and/or music, dance or theatre required for high school graduation “by participating in a school’s major performing group, such as band, chorus, orchestra, dance group or theatre group.”

15. Regarding this area of study, the New York State Education Department (NYSED) amended the learning standards for the Arts and the State Board of Regents approved the “*Revised Learning Standards for the Arts*” in 2017. As to those revisions, NYSED published the “*Guidance on Implementing the NYS Revised Learning Standards for the Arts*” (“*Revised Standards Guidelines*”). A copy of the same is attached as Exhibit B.

16. As explained in the Revised Standards Guidelines, students in pre-kindergarten through twelfth grade “are required to receive instruction in the Arts, including access to Dance, Music, Theater, Visual (and Media) Arts.” Students starting in pre-kindergarten must receive “standards based sequential curricula and instruction that is delivered by certified arts teachers and is grounded in NYS Arts Syllabi and curriculum.” See Exhibit B at 16.

17. As explained in the Revised Standards Guidelines, a district must provide students with sufficient time in the school day for developing artistic literacy, equitable arts learning opportunities, the opportunity to complete an Arts sequence, and the opportunity to complete any and all Regents requirements in the Arts. See Exhibit B at 9, 12, 21-22 and 36.

**b. Arts Sequence in the District during the 2019 – 2020 school year:**

18. The 2019 – 2020 District school year commenced on September 6, 2019 (Steiner Affidavit ¶23).

19. There are 10,014 high school students in the District. A copy of the number of enrolled District students by grade level is found on the District's website and attached hereto as Exhibit C.

20. Attached as Exhibit D is a copy of the District's high school application form from the District's website for this school year ("Bilingual High School Application 2019 – 2020").

21. As reflected in Exhibit D, there are 20 high schools in the District. As further indicated on that document (p.12 thereof), the District only offers students the opportunity to complete a sequence in all of the Arts (visual art, music, dance and theatre) at one of the 20 District high schools, that is, at Buffalo Academy of Visual and Performing Arts, PS# 192 ("BAVPA") (See also Steiner Affidavit ¶43).

22. BAVPA is what is classified by the District as a "criteria-based school" for students in fifth through twelfth grade (Exhibit D; Smith Affidavit ¶3). To enter criteria-based schools like BAVPA, students must apply and be accepted based on a consideration of their talent and grades (Smith Affidavit ¶5). Only a percentage of students who apply and audition are accepted essentially making criteria-based schools an option for a select few (Smith Affidavit ¶3). The majority of students, who are accepted, enter BAVPA at the beginning of fifth grade (Steiner Affidavit ¶48). Only around 30 – 40 ninth graders are accepted to BAVPA each year (Smith Affidavit ¶3).

23. As further indicated by Exhibit D (p.13), Lewis J. Bennett High School of Innovative Technology PS# 363 ("Bennett") is the only other school currently offering students the opportunity to complete a sequence in any of the Arts.

24. Thus, only one District high school offers students the opportunity to take the sequence in all of the Arts and only two District high schools offer students an opportunity to complete an Arts sequence in any respect. (Exhibit D; Smith Affidavit ¶¶6-7).

25. A copy of the District's Attendance Category Report by School and Grade ("Attendance Report") found on the District's website is attached hereto as Exhibit E.

26. According to the Attendance Report, Bennett admitted 106 students into its 2019 – 2020 freshman class (Exhibit E at 12).

27. The Attendance Report further shows that with the addition of the 38 new students at BAVPA, there are 120 students in the 2019 – 2020 BAVPA freshman class (Exhibit E at 9).

28. Accordingly, of the 2,676 in the District's 2019 – 2020 freshman class, only 8.4% are offered the opportunity to complete a sequence in the Arts (Exhibits C and E).

**c. Music, Dance and Theatre in the District:**

29. For the 2019 – 2020 school year, the District only offers students the opportunity to complete a unit of study in music by taking concert band or orchestra at four high schools, Frederick Law Olmsted PS#156 ("Olmsted"), BAVPA, City Honors PS#195 ("City Honors"), and South Park High School PS#206 ("South Park") (Steiner Affidavit ¶¶43-46).

30. Olmsted, BAVPA, and City Honors are "criteria-based schools" that a student must apply to and audition for or take an entrance exam (Exhibit D; Steiner Affidavit ¶43). Only a percentage of students who apply are admitted (Steiner Affidavit ¶48; Smith Affidavit ¶5). Most students who attend these criteria based schools enter at the beginning of fifth grade (Steiner Affidavit ¶48; Smith Affidavit ¶5).

31. As such, the opportunity to participate in concert band and orchestra is limited to a select group of District students.

32. Further, dance and theatre courses are only offered at one criteria-based high school, BAVPA (Exhibit D; Steiner Affidavit ¶¶17; Lyon Affidavit ¶¶6 and 19; Delano-Kerr Affidavit ¶10; Stephan Affidavit ¶6).

**d. Impact of District's non-compliance with Arts Education Regulations:**

33. As a direct result of the District's failure to comply with arts education regulations, District students have been denied the opportunity to participate in All County, All State, the New York State School Music Association (NYSSMA), Erie County Music Educators Association (ECMEA), Grammy Youth Jazz Band, Jesse Ketchum Award Ceremony, Dr. Martin Luther King Jr. Celebration at Kleinhan's Music Hall, Starring Buffalo, Buffalo State College Vocal Jazz Performance & Workshop, Music is Art Youth Jazz Band Showcase at the Riviera Theatre, Workshops at the Colored Musicians Club, Battle of the Bands, Darien Lake Musical Festival and countless engagements throughout the City of Buffalo (Delano-Kerr Affidavit ¶¶19–20; Stephan Affidavit ¶¶20–22).

34. District students were denied the opportunity to obtain a Regents diploma with advanced designation through an Arts sequence and instead were forced to continue to take foreign language classes (Thomas Affidavit ¶15; O'Connor Affidavit ¶10).

35. District students wishing to pursue a music, dance or theatre sequence only have one option for high school and not all students are accepted (Steiner Affidavit ¶¶43 and 48; Smith Affidavit ¶5).

36. As a result, students are denied any opportunity to study any music during four years of high school in the District (Shippens Affidavit ¶ 3).

37. When the music program was eliminated at one District high school, parents reported students were visibly angry and crying (O'Connor Affidavit ¶9).

38. One parent stated that her son has lost all interest in school now that he can no longer study music (O'Connor Affidavit ¶11).

**e. Prior notice of deficiencies and acknowledgement by the District:**

39. On November 7, 2018, Buffalo Teachers Federation President Philip Rumore sent a memo to District Superintendent Dr. Kriner Cash informing Superintendent Cash that the Federation would be surveying teachers due to concerns raised that the District was out of compliance with the requirements for Arts education under New York State law. A copy of that memo is annexed hereto as Exhibit F.

40. On March 13, 2019, Federation President Rumore sent a memo sharing the results of the survey conducted by the Federation. A copy of that memo is annexed hereto as Exhibit G. As stated in the memo, the survey revealed that the District was not meeting the Arts education requirements (Exhibit G).

41. On May 10, 2019, by memo, Chief of Staff Darren Brown responded stating that while the District met the graduation requirement for "an arts credit", the District was still working "to formalize the NYSED requirement regarding sequencing at the grade 9-12 level, into the School Based Budget (SBB) process for future school years." A copy of that memo is annexed hereto as Exhibit H.

42. On October 31, 2019, a letter was sent to Superintendent Cash on behalf of the Petitioners demanding the District offer Arts to District students in compliance with Education Law. A copy of that letter is annexed hereto as Exhibit I.



43. Petitioners presented a written verified claim upon which this proceeding is based to the District on or about November 14, 2019. A copy of that notice of claim is annexed hereto as Exhibit J.

44. More than thirty (30) days has elapsed and the claim has not been adjusted or resolved.

**AS AND FOR THE FIRST CAUSE OF ACTION AND CLAIM:**

45. By only providing the opportunity to complete a sequence in music, dance and theatre at one District high school, which is a criteria-based school, the District is not in compliance with 8 NYCRR 100.2(h)(1) and (2) and 8 NYCRR 100.1(t)(v)(a).

46. By only providing the opportunity to complete any arts sequence at two District high schools, the District is not in compliance with 8 NYCRR 100.2(h)(1) and (2) and 8 NYCRR 100.1(t)(v)(a).

47. By reason of the foregoing, Respondent is acting in violation of express law, excess of lawful authority, and arbitrarily and capriciously.

**AS AND FOR THE SECOND CAUSE OF ACTION AND CLAIM:**

48. Only one of the District's criteria-based schools offers students the opportunity to complete an arts sequence in music, dance, and/or theatre.

49. Only one District criteria-based school allows District students the opportunity to complete an arts sequence in visual arts.

50. Only one District criteria-based school and one high school allow District students the opportunity to complete an arts sequence in media arts.

51. Of the District's 20 high schools, only three criteria-based schools and one high school offer students the opportunity to participate in concert band and orchestra.

52. Only one of the District's criteria-based schools offers students the opportunity to take dance and theatre classes.

53. Only offering students the opportunity to complete sequences at two District high schools in the District is not offering students equitable opportunities and resources to study Arts.

54. Only offering students the opportunity to take concert band and orchestra at three criteria-based schools and one community high school in the District is not offering students equitable opportunities and resources to study Arts.

55. Only offering students the opportunity to take dance and theatre classes at one criteria-based school in the District is not offering students equitable opportunities and resources to study Arts.

56. By failing to offer students all paths to graduation as required by 8 NYCRR 100.5(q)(1), Respondent is not offering students equitable opportunities and resources to study the Arts.

57. By failing to offer students equitable opportunities and resources to study the Arts during the 2019 – 2020 school year, Respondent is not in compliance with 8 NYCRR 100.1-100.16.

58. By reason of the foregoing, Respondent is acting in violation of express law, excess of lawful authority, and arbitrarily and capriciously.

59. There is no adequate remedy at law and no prior application has been made for the relief requested herein.

**WHEREFORE**, Petitioners respectfully requests an Order and Judgment, pursuant to CPLR Article 78, declaring that Respondent has not complied with 8 NYCRR 100.1-100.16, 100.1(t)(v)(a), 100.2(h)(1) and (2), and 100.5(q)(1); directing the District to offer Arts courses and sequences in accordance with New York State law during the school day and equitably throughout the District; together with any additional or further relief that this Court deems just and appropriate, together with the costs and disbursements of this proceeding.

Dated: December 17, 2019  
Buffalo, New York

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