



No. 17070

# The University of the State of New York

## The State Education Department

### Before the Commissioner

Appeal of FUSION ACADEMY-BROOKLYN  
from action of the New York City  
Department of Education regarding  
transportation.

Whiteman Osterman and Hanna, LLP, attorneys for petitioner,  
Kevin P. Quinn and Erin M. Callahan, Esqs., of counsel

Zachary W. Carter, Corporation Counsel, attorney for  
respondent, James M. Dervin, Esq., of counsel

Petitioner appeals the actions of the New York City  
Department of Education ("respondent"), relating to the  
provision of transportation. The appeal must be sustained  
in part.

Fusion Academy is a nonpublic school which operates  
three campuses in New York City: Lincoln Center, Park  
Avenue, and Brooklyn. Petitioner, Fusion Academy-Brooklyn,  
is a nonpublic high school offering one-to-one instruction  
to approximately 24 students in grades six through twelve.

Respondent, through its Office of Pupil Transportation  
("OPT"), coordinates transportation services for eligible  
New York City resident students attending both public and  
nonpublic schools. OPT requires that requests for  
transportation services for students attending a nonpublic  
school be submitted by the nonpublic school. Upon the  
school's filing of a request, along with the submission of  
a "request for service" form, a Certificate of Occupancy,  
and a curriculum certificate, OPT provides the nonpublic  
school with an online access code for the purpose of:  
requesting transportation services on behalf of students,

identifying specific students who may be eligible for transportation, and identifying the type of transportation for which a student may be eligible.

In accordance with these procedures, on January 21, 2015, Fusion Academy submitted a request for OPT access codes for its schools to begin the process of requesting transportation for students attending its schools, including Fusion Academy-Brooklyn, in the 2015-2016 school year. On January 23, 2015, OPT requested additional information from Fusion Academy, specifically copies of the Certificates of Occupancy for each school. Fusion Academy provided such Certificates of Occupancy on January 26, 2015. The record indicates that on April 17, 2015, OPT issued petitioner an online access code. Thereafter, petitioner submitted its transportation request and supporting documents to OPT. On June 22, 2015, petitioner received correspondence from OPT confirming that the transportation request had been received and that OPT "looked forward to a good working relationship for the upcoming school year...."

On July 9, 2016, Fusion Academy was notified by Robert Carney, OPT's Chief of Staff, that, due to a defect in petitioner's Certificate of Occupancy, petitioner's online access code had been erroneously issued; petitioner's access code was thereupon rescinded. As an explanation for revoking the access code, OPT cited, for the first time, a three-pronged test that respondent applies whereby it determines whether a requesting organization meets its definition of a "school" eligible for transportation and, therefore, qualifies to request transportation services for its students. The record indicates that the following requirements were set forth by OPT:

The organization has to meet the definition of a 'school' as found in NYC Zoning resolution 12-10,

The organization has to have a 'BEDS Number'<sup>1</sup> issued by the NYS Education [sic] (which generally goes hand-in-

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<sup>1</sup> The Basic Educational Data System ("BEDS") is maintained by the New York State Education Department.

hand with being a 'school' as found in the Zoning Resolution), and

The organization must also have a Certificate of Occupancy appropriate to the Department of Buildings group occupancy standard for a 'school' in force at the time of the building's construction or last recorded renovation.

OPT explained that, although Fusion Academy-Brooklyn meets the definition of a "school" as outlined in the New York City Zoning Resolution and has a BEDS code issued by the New York State Education Department ("Department"), its Certificate of Occupancy was not classified as "Educational Group E" - the type required by OPT. According to the record, it was for this reason that OPT revoked petitioner's access code. Without the access code, petitioner is unable to request transportation services for eligible students, as per OPT's procedure, and such requests for transportation were effectively denied. This appeal ensued.

Petitioner asserts that OPT's refusal to provide it with a required access code to obtain transportation services for its students, based solely on the type of Certificate of Occupancy that petitioner holds, is not authorized by law and is otherwise arbitrary, capricious and unreasonable. Petitioner asserts that such action is arbitrary in light of: the school's recognized status as a nonpublic high school registered by the Board of Regents; its educational program; and its possession of a valid Certificate of Occupancy issued by the New York City Department of Buildings, deeming its campus safe for occupancy and use in its unique one-to-one educational setting.

As relief, petitioner seeks an order requiring respondent to provide transportation services to petitioner's eligible students. Petitioner further seeks a finding that respondent may not limit transportation services based on its type of Certificate of Occupancy and must implement transportation services consistent with the Education Law.

Respondent contends that petitioner's appeal is untimely. It also asserts that OPT's decision to revoke petitioner's transportation access code was neither arbitrary nor capricious because Fusion Academy-Brooklyn does not possess a Certificate of Occupancy for building use categorized by the New York City Department of Buildings as Educational Group E.

I must first address several procedural matters. An appeal to the Commissioner must be commenced within 30 days from the making of the decision or the performance of the act complained of, unless any delay is excused by the Commissioner for good cause shown (8 NYCRR §275.16; Appeal of Lippolt, 48 Ed Dept Rep 457, Decision No. 15,914; Appeal of Williams, 48 id. 343, Decision No. 15,879). The Commissioner has previously held that an appeal is timely when commenced within 30 days of receiving the determination (Appeal of C.S., 48 Ed Dept Rep 497, Decision No. 15,929; Appeal of M.H. and E.H., 47 id. 274, Decision No. 15,694).

The record indicates that OPT corresponded with Fusion Academy staff and counsel relating to Fusion Academy's three New York City campuses several times subsequent to the initial request for the access code, as well as after OPT's revocation of petitioner's access code. However, petitioner Fusion Academy-Brooklyn (a nonpublic school separate from the other nonpublic Fusion Academy campuses) was notified by email dated July 9, 2015 that OPT had revoked its access code. The revocation of petitioner's access code on July 9, 2015 is the action which precluded petitioner from obtaining transportation services for petitioner's students. Petitioner commenced the appeal on August 3, 2015, within 30 days of OPT's July 9, 2015 action. Thus, I find the appeal timely.

I will next address the issue of standing, although not raised by respondent as an affirmative defense. It is well-settled that standing is a jurisdictional prerequisite for maintaining an appeal pursuant to Education Law §310, and as such the Commissioner may dismiss an appeal for lack of standing even where it has not been raised as an affirmative defense (Appeal of Jlava, 55 Ed Dept Rep, Decision No. 16,817; Appeal of Ransom et al., 54 id.,

Decision No. 16,647; Appeal of Kackmeister, 39 id. 466, Decision No. 14,825). In any event, the parties have been permitted to address the issue of standing in their memoranda of law. Respondent argues that petitioner does not have standing to appeal a denial of transportation services on behalf of its students. Petitioner asserts that it has standing because it is not appealing the denial of transportation to any individual student; rather, it is appealing respondent's refusal to issue it an access code, and challenging OPT's unpublished policy requiring a specific type of Certificate of Occupancy before a school may even request access to respondent's system and request transportation for its students.

An individual may not maintain an appeal pursuant to Education Law §310 unless aggrieved in the sense that he or she has suffered personal damage or injury to his or her civil, personal or property rights (Appeal of Waechter, 48 Ed Dept Rep 261, Decision No. 15,853; Appeal of Erickson, 47 id. 261, Decision No. 15,689). Only persons who are directly affected by the action being appealed have standing to bring an appeal (Appeal of Waechter, 48 Ed Dept Rep 261, Decision No. 15,853; Appeal of Erickson, 47 id. 261, Decision No. 15,689).

To the extent that petitioner appeals, on behalf of students, from a denial of transportation, petitioner does not have standing to do so, and such claim is dismissed (see e.g., Appeal of International Charter School of Schenectady, 43 Ed Dept Rep 408, Decision No. 15,034; Appeal of Lucente, 39 id. 244, Decision No. 14,277). However, under Education Law §3635(1), transportation must be provided to students "to and from the school they legally attend." For attendance at a nonpublic school to be lawful, the instruction provided must be substantially equivalent in amount and quality to that required in the public schools (Education Law §§3204[2], 3210[2][d]). Therefore, I find that OPT's decision to rescind petitioner's transportation system access code, based on its Certificate of Occupancy is, in effect, a denial of petitioner's status as a school that students may legally attend. Petitioner is therefore aggrieved by such denial and has standing to challenge it in an appeal. Such a determination has implications for the school that go far

beyond the provision of transportation. Therefore, petitioner may maintain this appeal.<sup>2</sup>

The Commissioner of Education will uphold a district's transportation determination unless it is arbitrary, capricious, unreasonable or an abuse of discretion (Appeal of Lippolt, 48 Ed Dept Rep 457, Decision No. 15,914; Appeal of A.P., 48 id. 380, Decision No. 15,891). A city school district may, but is not required to, provide transportation to students (Education Law §3635[1][c]). Where such district elects to provide transportation, it must do so equally to all students in like circumstances (Education Law §3635[1][c]; Sands Point Academy, et al. v. Bd. of Educ., 63 Misc 2d 276; Appeal of A.P., 48 Ed Dept Rep 380, Decision No. 15,891).

Neither Education Law §3635 nor Chancellor's regulation A-801 require a particular Certificate of Occupancy in order for students attending a nonpublic school to obtain transportation services. Respondent contends that, because a board of education has broad discretion to determine how transportation will be provided pursuant to Education Law §3635, requiring a particularly designated type of Certificate of Occupancy is within such discretion, as it relates to ensuring the health and safety of students.

It appears from the record that on July 11, 2012, Fusion Academy obtained an interpretation of the applicable building codes for a site in Manhattan from a Deputy Borough Commissioner of the New York City Buildings Department in Manhattan using Form CCD1. That interpretation concluded that, because of the unique educational methodology used by Fusion Academy (one-to-one instruction without standard operating hours with 26 tutors and 26 students), applying the building code requirements for schools contained in Educational Group E was not

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<sup>2</sup> Although I note that I do not permit appeals from nonpublic schools challenging the denial of transportation services on behalf of nonpublic school students, as the school lacks standing in such cases (see e.g., Appeal of Lucente, 39 Ed Dept Rep 244, Decision No. 14,227), in this instance it is OPT's decision to rescind petitioner's access code that petitioner is appealing. Consequently, I will not dismiss for lack of standing. To conclude otherwise would leave petitioner with no recourse with respect to respondent's decision.

compatible with Fusion Academy's pattern of occupancy. Therefore, the Deputy Borough Commissioner concluded that Fusion Academy is a business and its use for instruction was consistent with New York City Building Code BC 304 Business Use Group B. In other words, the Deputy Borough Commissioner appears to have concluded that Fusion Academy was providing tutoring services and could provide such services in its office space, consistent with the New York City Building Code.

I take administrative notice that, on or about July 1, 2014, Fusion Academy-Brooklyn was issued a BEDS code by the Department. Issuance of a BEDS code relies upon the submission of required documentation which includes incorporation papers, a Certificate of Occupancy, and a fire inspection report from within the last twelve months. In December 2014, petitioner had submitted an application to become a registered nonpublic high school which would allow petitioner to administer Regents examinations and issue Regents diplomas. As part of the application process, Department staff conducted a site visit on July 14, 2015. Thereafter, at its July 2015 meeting, pursuant to Education Law §210 and 8 NYCRR §100.2(p), the Board of Regents approved Fusion Academy-Brooklyn as a registered nonpublic high school, authorized to administer Regents examinations and award Regents diplomas.

On July 9, 2015, as noted above, after an email exchange indicating that petitioner's request for an OPT code had been erroneously created, OPT's Chief of Staff advised petitioner that it was ineligible for transportation at its three sites due to the lack of an appropriate Certificate of Occupancy, indicating that they must have a Certificate of Occupancy specifically for Educational Group E. No explanation was offered for the reversal of the New York City Buildings Department's 2012 interpretation of the Building Code. Although the record is not clear, the affidavit of respondent's Borough Commissioner for the Manhattan Office of the New York City Department of Buildings suggests that petitioner did not seek a request for interpretation or clarification for its Brooklyn site, and he asserts that a separate application must be made to the Brooklyn Borough Commissioner. He also alleges that Educational Group occupancy was required for Fusion Academy-Brooklyn, although he states that such

educational uses were actually under Group "G" of the New York City Building Code at the time the Certificate of Occupancy was issued for the building.

I lack jurisdiction under Education Law §310 to review the determinations of officers of the New York City Department of Buildings with respect to the interpretation of the New York City Building Code, as they are neither school officers nor school authorities (see Education Law §310[7]). However, I do have jurisdiction to review OPT's determination, as requested by petitioner, since it is an office within the New York City Department of Education. Respondent's refusal to provide petitioner an online access code is premised on its position that Fusion Academy-Brooklyn holds the wrong type of Certificate of Occupancy for operation at the Brooklyn location.

I agree with respondent that requiring a Certificate of Occupancy is necessary to protect the health and safety of students attending nonpublic schools. In fact, the Department imposes such a requirement upon issuance of a BEDS code and registration of a nonpublic high school. The authority for linking student transportation to such a requirement is found in Education Law §3635(1) which requires transportation to and from the school that a student "legally attends," along with Education Law §§3204(2) and 3210(2)(d) which provide that a student lawfully receives instruction at other than a public school, if the instruction provided is substantially equivalent to that provided in the public schools. Thus, in registering Fusion Academy-Brooklyn as a nonpublic high school, the Board of Regents determined that it is providing substantially equivalent instruction; such State action divests respondent of authority to determine substantial equivalence locally (see Appeal of Lazar, 6 Ed Dept Rep 7, Decision No. 7,661). To hold otherwise would be in derogation of the Board of Regents statutory authority under Education Law §210 to register institutions in terms of New York State standards; registration by the Board of Regents establishes the fact that the program of instruction is substantially equivalent to the public program (Appeal of Lehman, et al., 22 Ed Dept Rep 124, Decision No. 10,903). Thus, such school is the school the student legally attends (Appeal of Lehman, et al., 22 Ed Dept Rep 124, Decision No. 10,903; Appeal of Lazar, 6 id.



7, Decision No. 7,661;), entitling its students to transportation services (Education Law §3635, Appeal of Lehman, et al., 22 id. 124; Appeal of Henry, 6 id. 50, Decision No. 7,691). As a result, OPT may not apply its policy of denying transportation to a registered nonpublic high school, such as petitioner, based upon the lack of an appropriate Certificate of Occupancy. The New York City Department of Buildings may, of course, take appropriate action to enforce the Building Code and should submit any final determination by the New York City Department of Buildings relating to petitioner's use of its building to the Department for consideration by the Board of Regents.

Finally, I note that Education Law §3635(2) requires that an application for transportation to a nonpublic school must be submitted no later than the first day of April preceding the school year for which transportation is requested or, if the parents or guardian of a child did not reside in the district on April 1, within 30 days after establishing residency in the district. A district may not reject a late request for transportation if there is a reasonable explanation for the delay (Education Law §3635[2]; Appeal of a Student with a Disability, 48 Ed Dept Rep 207, Decision No. 15,837). With respect to the April 1, 2017 deadline for transportation to Fusion Academy-Brooklyn for the 2017-2018 school year, the issuance of this decision after April 1, 2017 shall constitute a reasonable explanation for the submission of a late request, as long as such request is made within 30 calendar days of the posting of this decision by respondent, as described below.

Both petitioner and respondent are directed to post a copy of this decision on their respective websites no later than April 15, 2017, together with notice to parents and guardians of the ability to submit a late request for transportation in accordance with this decision.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that until and unless a determination of lack of substantial equivalence is made, respondent New York City Department of Education grant Fusion Academy-Brooklyn an online access code through which the registered nonpublic school may request transportation services for

eligible students while such school remains a registered nonpublic high school, commencing with the 2017-2018 school year; and

IT IS FURTHER ORDERED that both petitioner and respondent post a copy of this decision on their respective websites no later than April 15, 2017, together with notice to parents and guardians of the ability to submit a late request for transportation to Fusion Academy-Brooklyn in the 2017-2018 school year in accordance with this decision.



IN WITNESS WHEREOF, I, MaryEllen Elia, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this *5th* day of *April* 2017.

*MaryEllen Elia*

Commissioner of Education