



Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

November 15, 1996

Judith Kay, Esq.
First Deputy Counsel to the Chancellor
Office of Legal Services
New York City Board of Education
110 Livingston Street
Brooklyn, New York 11201

Dear Ms. Kay:

This refers to the temporary replacement of all nine board members elected to Community School Board District 12 with three appointed trustees and the permanent replacement of all nine board members elected to Community School Board District 12 with five appointed trustees who will govern until the next regularly scheduled school district election in Bronx County, New York, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on September 16, 1996; supplemental information was received on October 29, 1996.

We have carefully considered the information you have provided, as well as information and comments from other interested persons. The city informs us that the reason for replacing the elected board for Community School Board District 12 (hereinafter "CSB 12") is that the board breached its agreement to "jointly seek and select" the superintendent for CSB 12. While we have considered the proffered reasons for the actions taken, our review focuses upon whether the city has sustained its burden of showing that the replacement of the elected board with an appointed board is free of the proscribed discriminatory purpose and effect. See, *e.g.*, 28 C.F.R. 51.52(a), 51.55, 51.56. It is with these standards in mind that we have reviewed and analyzed the submitted voting change.

According to data provided in the submission, there are 46,918 registered and "parent voters" in CSB 12. Together, black and Hispanic persons comprise the vast majority of the electorate (90 percent of the total). Persons of Hispanic descent represent

over half the electorate (54 percent). Black persons represent more than a third (36 percent) of the eligible voters. CSB 12 is governed by a nine-member board elected by proportional voting. All of the board members to be replaced were elected in May 1996 and are either black (two) or Hispanic (seven). In contrast, according to 1990 Census data, Hispanic and black persons combined represent approximately 49 percent of the City of New York's total population; of the five boroughs, four are plurality white in total population and one is plurality Hispanic in total population.

The city replaced CSB 12 board members on August 19, 1996, with three appointees from the staff of the Chancellor's office for the New York City Public School System. The three appointed trustees currently operate CSB 12 and exercise all of the authority of the now-replaced elected board, including the board's budget approval function. Five permanent appointees are to be selected by the Chancellor at some point in the future with the participation of the temporary appointees and, to a much lesser extent, three representatives of the presidents' council. The presidents' council is a group composed of the presidents of parent associations within the school district. Our investigation indicates that the three temporary appointees may continue to serve after the permanent board is selected.

The practical effect of this change is that the constituency selecting school board members for CSB 12 has changed from an electorate composed almost entirely of Hispanic and black persons to all of the voters in the City of New York because it is they who select the mayor and borough presidents who select the city school board that, in turn, appoints the Chancellor. Thus, it appears that Hispanic and black voters will have considerably less influence over the selection of CSB 12 board members through the choices of the appointing authority than they have under the direct-election system currently in place for CSB 12.

In this regard, our analysis indicates that the minority community literally had no input into the Chancellor's selection of the three temporary trustees. In addition, we note that minority voters did not have any meaningful input into the process that led to the procedures that will be used to select the permanent trustees and that the proposed procedures severely curb the ability of minority voters to participate in the selection of the permanent trustees. For example, of twenty-four parent associations only the presidents of three will be invited to participate in the screening of trustee applicants. Moreover, they may only observe the interviews conducted by the temporary

trustees; they may not participate in the questioning of the applicants themselves. In addition, the temporary trustees will be responsible for making the ultimate decision with regard to the permanent trustee pool of names forwarded to the Chancellor and have at their complete discretion the decision to forward names recommended by parent voters. It is noteworthy about the process that the temporary trustees have already declined names recommended by the minority community.

According to the Chancellor's office, the school board agreed to jointly seek and select a superintendent with the Chancellor because of the difficulties the previous board had in selecting a superintendent. However, CSB 12 board members have indicated that while they agreed to abide by the procedures established by the Chancellor (e.g., they met with the Chancellor to discuss the process of selecting a superintendent, included him in the interview process, and asked the questions of the prospective candidates that the Chancellor wanted asked), they did not abdicate to the Chancellor their authority under state law to select the superintendent for CSB 12. Although it appears that the Chancellor may set the criteria and/or the procedures for the selection of the superintendent under state law, he may not select the superintendent unless the board members have violated Section 2590-1 of the New York Education Law or failed to follow the criteria stated with regard to the selection of the superintendent. See Community School Board Twenty-Nine v. Fernandez, 588 N.Y.S. 2d 869 (Sup. Ct. 1992), aff'd, 601 N.Y.S. 2d 56 (Ct. App. 1993) and Community School Board Nine v. Cortines, 611 N.Y.S.2d 453 (Sup. Ct. 1994). It appears that the board members for CSB 12 have done neither, nor has the city provided any evidence of other misconduct or wrongdoing on the board's part. See also, Maldonado v. Crew, Civil Action No. 20803/96 (N.D.N.Y. August 23, 1996). Yet, the Chancellor has replaced them and has done so in a manner that has not provided meaningful opportunities to Hispanic and black persons in the school district to participate in the appointment process and determine those who will be selected to replace the elected board.

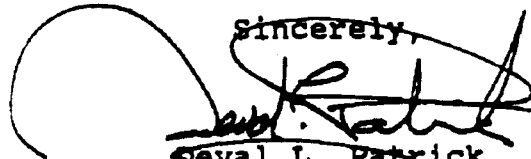
In light of the considerations discussed above, I cannot conclude that the city has met its burden under Section 5 of the Voting Rights Act to demonstrate that the proposed change is free of a discriminatory purpose and will not "lead to a retrogression in the position of . . . minorities with respect to their effective exercise of the electoral franchise." Beer v. United States, 425 U.S. 130, 141 (1976). See Georgia v. United States, 411 U.S. 526 (1973); Procedures for the Administration of Section 5, 28 C.F.R. 51.52. Therefore, on behalf of the Attorney General, I must object to the temporary replacement of all nine board members elected to Community School Board District 12 with three appointed trustees and the permanent replacement of all

nine board members elected to Community School Board District 12 with five appointed trustees.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed change has neither a discriminatory purpose nor effect. 28 C.F.R. 51.44. In addition, you may request that the Attorney General reconsider the objection. See 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the replacement of the elected board members of CSB 12 by appointed trustees, whether temporary or permanent, continues to be legally unenforceable. See Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action that the City of New York plans to take concerning this matter. If you have any questions, you should call Zita Johnson-Betts, a Deputy Chief in the Voting Section (202-514-8690).

Sincerely,

A handwritten signature in black ink, appearing to read "Seval L. Patrick", is written over a large, stylized circular flourish.

Seval L. Patrick
Assistant Attorney General
Civil Rights Division