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United States District Court, E.D. New York.

Donna SCHULER, Board Member, Central Islip Union Free School District; "John Doe" and "Jane Doe," residents, citizens and taxpayers of the Central Islip Union Free School District; Patrick O'Brien, former School Board Member, Deidra O'Brien, resident; Michael Schuler, resident; Stephen Backsay, resident; John Lehecka, resident taxpayer, homeschooler; Pro se Ink, association, Plaintiffs,
v.
BOARD OF EDUCATION OF THE CENTRAL ISLIP UNION FREE SCHOOL DISTRICT; Howard M. Koenig, Superintendent of Schools; Margaret A. Spach, District Clerk of the Central Islip Union Free School District; Richard P. Mills, Commissioner of Education, State of New York; Fred Phillips, President of the Board of Education; Sandra Townsend, Vice President of the Board of Education; Helen Brannon, Board Member; Joseph Leoncavallo, Board Member; Daniel M. Devine, Board Member; Barbara Goldstein, Board Member; Nick Nicholas, Treasurer; Candice Miller, President of the Civil Service Employment Association of the Central Islip Union Free School District/Political Action Committee; Robert S. Abrams, of R.S. Abrams & Co., LLP, Auditor of Central Islip Union Free School District; Ralph Borzello, Instructional Coordinator of Central Islip Union Free School District; Manuel Ramos, Associate Superintendent of the Central Islip Union Free School District; and Jerry Jackson, Assistant to the Superintendent of the Central Islip Union Free School District, Defendants.

No. 96-CV-4702 (JG).
|
Feb. 1, 2000.

Attorneys and Law Firms

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Dennis C. Vacco, Attorney General of the State of New York, New York, By Martin Bienstock, Esq., Assistant Attorney General, for Defendant Richard P. Mills, Commissioner of Education, State of New York.

Robert Reilly, Esq., Civil Service Employees Association, Inc., Albany, for Defendant Civil Service Employees Association, Inc.

MEMORANDUM AND ORDER

GLEESON, District J.

***1** Plaintiffs consist of taxpayers and property owners from within the Central Islip Union Free School District ("CIUFSD").[1] Apparently aggrieved by the general state of public education within the CIUFSD, and particularly by the educational opportunities provided to minority children and children with disabilities, plaintiffs initiated this action on September 24, 1996. An Amended Complaint (the "complaint") was filed on April 18, 1997. The complaint names the following parties as defendants: the Board of Education of the CIUFSD and twelve past or present school officials or board members (collectively, the "School District defendants")[2]; Candice Miller, the President of the Civil Service Employees Association, Inc. ("CSEA"); Richard P. Mills, the Commissioner of Education of the State of New York (the "Commissioner"); Jacob S. Feldman of the law firm of Ehrlich, Frazer & Feldman[3]; and Robert S. Abrams of R.S. Abrams & Company, LLP, the auditor for the CIUFSD.[4]

Construed liberally, plaintiffs' complaint alleges eight causes of action against all defendants. Plaintiffs contend that: (1) the level of education provided in the CIUFSD is inadequate, thereby violating New York Education Law, the New York Constitution, the Individuals with Disabilities Education Act, and the First, Fifth and Fourteenth Amendments to the United States Constitution; (2) defendants have violated the Family Educational Rights and Privacy Act of 1974; (3) defendants have violated Title VI of the Civil Rights Act of 1964; (4) defendants have violated "federal election law"; (5) defendants, acting under color of state law, have deprived plaintiffs of their federal constitutional or statutory rights in violation of 42 U.S.C. § 1983; (6)

defendants have engaged in a conspiracy to misuse and misapply taxpayer dollars in violation of the Racketeer Influenced and Corrupt Organizations Act; (7) the existing property tax scheme used to fund education in the State of New York is unconstitutional; and (8) defendants' illegal conduct has led to the devaluation of personal and business property within the CIUFSD.

Plaintiffs' complaint, construed liberally, also alleges three causes of action against individual School District defendants. Specifically, plaintiffs allege that certain of these defendants (1) conspired to commits acts under color of state law to deprive plaintiffs of their right to equal protection under the laws, in violation of 42 U.S.C. § 1985(3); (2) wasted municipal, state and federal resources in violation of New York General Municipal Law § 51; and (3) violated the Rehabilitation Act of 1973.[5]

The School District defendants, the Commissioner and the CSEA have each moved, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss this action for failure to state a claim upon which relief can be granted. Each moving defendant has also set forth individual grounds in support of its motion to dismiss. The School District defendants contend that this Court lacks subject matter jurisdiction to hear plaintiffs' claims, that plaintiffs lack standing, and that the individual School District defendants are entitled to qualified immunity. The Commissioner asserts Eleventh Amendment immunity from plaintiffs' claims relating to the violation of the New York Constitution and New York statutory law. Finally, the CSEA contends that personal jurisdiction is lacking due to insufficient process and insufficient service of process.

***2** For the reasons set forth below, the complaint is dismissed as to the moving defendants.

DISCUSSION

A. *Lack of Subject Matter Jurisdiction*

1. *The Tax Injunction Act*

The School Board defendants and the Commissioner each argue that, pursuant to the Tax Injunction Act, 28 U.S.C. § 1341, this Court lacks subject matter jurisdiction. The Commissioner contends that the Tax Injunction Act precludes this Court from considering any claims that relate to New York's state and local tax system, including claims arising under the federal constitution. The School Board defendants appear to adopt a more sweeping position, arguing that the Tax Injunction Act strips this Court of jurisdiction over all of plaintiffs' claims.[6]

The Tax Injunction Act provides as follows: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state." 28 U.S.C. § 1341. As the Supreme Court has stated, the Tax Injunction Act Tax "restricts the power of federal district courts to prevent collection or enforcement of state taxes." *Arkansas v. Farm Credit Servs.,* 520 U.S. 821, 823 (1997). "The statute 'has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." ' *Rosewell v. LaSalle Nat'l Bank,* 450 U.S. 503, 521 (1981) (quoting *Tully v. Griffin, Inc.,* 429 U.S. 68, 73 (1976)). The Tax Injunction Act thus serves "to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Id.*

a. *The Constitutionality of New York's Property Tax*

Defendants are correct that the Tax Injunction Act precludes this Court from considering plaintiffs' challenge to New York's property tax scheme. Plaintiffs apparently would have this Court declare that New York's property tax violates the state and federal constitutions. Plaintiffs further request that I require defendants to submit a plan that would allow taxpayers in the CIUFSD "to openly apply their tax revenues to the educational units of their own choosing," and to submit periodic reports regarding the implementation of such a plan. (Complaint ¶ 118(D)-(E).) Plaintiffs plainly seek a "federal-court ruling on a local tax matter," and this is "precisely the type of suit the Tax Injunction Act was designed to limit as to both declaratory and injunctive relief." *Bernard v. Village of Spring Valley,* 30 F.3d 294, 297 (2d Cir.1994); *see also Barringer v. Griffes,* 964 F.2d 1278, 1280 (2d Cir.1992) (Tax Injunction Act "prohibits declaratory as well as injunctive relief"). Provided that state remedies are sufficient to redress plaintiffs' claims, I may not so interfere with New York's property tax.

It is well-settled that New York provides a "plain, speedy and efficient" remedy for plaintiffs' claim. *See Tully,* 429 U.S. at 76 ("New York provides a 'plain, speedy and efficient' means for the redress" of constitutional challenge to New York sales tax); *see also Long Island Lighting Co. v. Town of Brookhaven,* 703 F.Supp. 241, 245 (E.D.N.Y.) (because declaratory judgment action is available in New York state courts for taxpayer's constitutional claims, "New York provides a plain, speedy

and efficient remedy within the meaning of the Tax Injunction Act."), *aff'd,* 889 F.2d 428 (2d Cir.1989); *423 South Salina Street, Inc. v. City of Syracuse,* 566 F.Supp. 484, 491-493 (N.D.N.Y.) (discussing methods for challenging validity of real property tax assessments under New York law, and finding that "New York offers an entire range of proceedings in which taxpayers may challenge" such assessments), *aff'd,* 724 F.2d 26 (2d Cir.1983). Accordingly, this Court lacks subject matter jurisdiction over plaintiffs' challenge to New York's property tax scheme.

b. *42 U.S.C. § 1983*

***3** The School Board defendants next argue that the Tax Injunction Act strips this Court of jurisdiction over plaintiffs' claim under 42 U.S.C. § 1983. In support of this contention, the School Board defendants rely primarily on *Fair Assessment in Real Estate Association, Inc. v. McNary,* 454 U.S. 100 (1981), and *Hickman v. Wujick,* 488 F.2d 875 (2d Cir.1973). In *Fair Assessment,* a nonprofit corporation formed by taxpayers filed suit under 42 U.S.C. § 1983, alleging that various state tax officials had deprived them of equal protection and due process by unequal taxation of real property. 454 U.S. at 105-106. The Supreme Court determined that, because the plaintiff's § 1983 action in effect sought a declaratory judgment that the administration of the state tax system was unconstitutional, the action was barred by the same principles of comity that had given rise to the Tax Injunction Act. *Id.* at 113-114.

In *Hickman,* plaintiffs were the parents of children attending private school. 488 F.2d at 876. Plaintiffs sought a declaratory judgment that they were entitled to a tax credit in the amount of their school property taxes, on the grounds that otherwise their federal constitutional right to control the education of their children would be violated. *Id.* The Second Circuit affirmed the dismissal of plaintiffs' claim, finding that the federal courts lacked subject matter jurisdiction under the Tax Injunction Act. *Id.* In so ruling, the court rejected plaintiffs' argument that they were not challenging the legality of the assessment, and stated that "[b]asing a complaint upon alleged violation of civil rights ... or of the Federal Constitution will not avoid the prohibition contained in Section 1341." *Id.*

Upon careful examination of plaintiffs' complaint, I find that the Tax Injunction Act and the decisions in *Fair Assessment* and *Hickman* are inapplicable to plaintiffs' § 1983 claim. The purpose of the Tax Injunction Act, as previously noted, is to limit federal court interference with "so important a local concern as the collection of taxes." *Rosewell,* 450 U.S. at 503. Moreover, as the Supreme Court has explained, critical to the holding in *Fair Assessment* was the fact that the § 1983 action in that case "was based on the unconstitutional application of a state tax law, and the award of damages [would have] turned first on a declaration that the state tax was in fact unconstitutional." *Quackenbush v. Allstate Ins. Co.,* 517 U.S. 706, 719 (1996). Here, plaintiffs' § 1983 claim does not require a determination that New York's property tax scheme is unconstitutional, nor does it raise the possibility of a federal court interfering with a state tax system. Rather, plaintiffs' claim under § 1983 appears to be premised upon the argument that the allegedly substandard level of education in the CIUFSD violates plaintiffs' rights under federal statutes and the United States Constitution. Regardless of the merits of such a claim, it need only be noted at this point that the resolution of such a claim would not threaten New York's ability to collect its property tax. Because principles of comity and the purposes of the Tax Injunction Act are not at stake, this Court has subject matter jurisdiction over plaintiffs' § 1983 claim.

c. *Plaintiffs' Remaining Claims*

***4** The School Board defendants further contend, based on the Tax Injunction Act, that this Court lacks subject matter jurisdiction over all of plaintiffs' remaining claims. According to the School Board defendants, the Tax Injunction Act has long been given "broad application to preclude jurisdiction over matters involving state or local taxing schemes" (Bd. of Ed. Mem. at 11), and cannot be avoided by attacking the administration or implementation of a taxing scheme rather than attacking the validity of the tax itself.

Such arguments have no application to plaintiffs' remaining claims. The only claim that implicates New York's taxing scheme, either directly or indirectly, is plaintiffs' constitutional challenge to the state property tax. The rest of plaintiffs' claims relate not to a tax or the administration of that tax, but rather to allegations of fraud, mismanagement or discrimination in the provision of educational services within the CIUFSD. This Court has jurisdiction over such claims.

B. *Eleventh Amendment Immunity*

As the Commissioner correctly argues, the Eleventh Amendment precludes this Court from hearing plaintiffs' claim that the Commissioner violated the Education Article of the New York State Constitution. In *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89 (1984), the

Supreme Court held that "a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when ... the relief sought and ordered has an impact directly on the State itself." *Id.* at 117. Such suits against state officials are deemed to have an impact on the State-and thus in fact to be a suit against the State itself-"if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act." ' *Id.* at 102 n. 11 (quoting *Dugan v. Rank,* 372 U.S. 609 (1963)).

Plaintiffs seek a declaratory judgment that defendants, including the Commissioner, have failed to provide children in the CIUFSD with the minimal level of education required under Article IX, Section I of the New York State Constitution. (Compl.¶ 118(C).) Moreover, although the Commissioner has not sought to invoke the Eleventh Amendment to claims beyond the state constitutional claim, plaintiffs also allege that the Commissioner has violated the provisions of New York's Education Law. (Compl.¶ 1.) I find that any declaratory judgment against the Commissioner on such claims, while nominally against an individual official, would compel the state government to act or restrain it from acting. *See Everett v. Schram,* 587 F.Supp. 228, 235 n. 11 (D.Del.1984) (because a declaratory judgment would aid plaintiffs "only to the extent state officials saw fit to draw upon state funds in conformity with this Court's decree ... a suit for declaratory judgment regarding the obligations of state officials under state law places a federal court in a position where its resolution of the controversy will either be pointless or will conflict 'directly with the principles of federalism that underlie the Eleventh Amendment." ') (quoting *Pennhurst,* 465 U.S. at 106), *aff'd,* 772 F.2d 1114 (3d Cir.1985). Accordingly, as they relate to the Commissioner, plaintiffs' claims under the New York Constitution and New York Educational Law are in fact asserted against the state of New York and thus are barred by the Eleventh Amendment.[7]

C. *Lack of Standing and Failure to State a Claim*

***5** Each of the moving defendants assert one or more further grounds in support of their motion to dismiss. The School Board defendants argue that plaintiffs lack standing, that plaintiffs have failed to state a claim upon which relief can be granted, and that individual school officials and board members are entitled to qualified immunity. The Commissioner contends that plaintiffs have failed to state a claim under Title VI, and the CSEA asserts that it is referred to by name in only one conclusory assertion.[8] After discussing the applicable law relating to standing and motion to dismiss under Rule 12(b)(6), I will assess each of plaintiffs' claims.

1. *Relevant Legal Standards*

a. *Standing Requirements*

"To establish standing in federal court, any party bringing a lawsuit must allege an actual case or controversy." *Deshawn E. v. Safir,* 156 F.3d 340, 344 (2d Cir.1998); *see also Jaghory v. New York State Dep't of Educ.,* 131 F.3d 326, 329 (2d Cir.1997) ("Article III of the U.S. Constitution requires that a 'case' or 'controversy' be present in order to confer jurisdiction on federal courts for a particular claim; standing to sue is an essential component of that requirement.") The issue of standing is a "threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin,* 422 U.S. 490, 498 (1975). Accordingly, even if a defendant does not raise issues of standing-or, as here, raises it only with respect to certain claim and not as to others[9]-a court "must examine the issue *sua sponte* when it emerges from the record." *Pashaian v. Eccelston Properties, Ltd.,* 88 F.3d 77, 82 (2d Cir.1996); *see also Boeing Co. v. Van Gemert,* 444 U.S. 472, 488 n. 4 ("Although respondents have not challenged [plaintiff's] standing, we are obligated to consider the issue *sua sponte,* if necessary.")

"The party seeking to invoke the jurisdiction of the court bears the burden of establishing that he has met the requirements of standing." *Jaghory,* 131 F.3d at 329 (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992)). In order to meet this burden, a plaintiff must show the following three elements:

> (1) that she suffered an 'injury in fact-an invasion of a legally protected interest' that is 'concrete and particular,' and not merely hypothetical; (2) that there is 'a causal connection between the injury and the conduct complained of;' and (3) that it is 'likely that the injury will be redressed by a favorable decision .'

United States v. Vazquez, 145 F.3d 74, 80 (2d Cir.1998) (quoting *Lujan,* 504 U.S. at 560-61). Moreover, "[a] plaintiff seeking injunctive or declaratory relief cannot rely on past injury to satisfy the injury requirement but must show a likelihood that he or she will be injured in the future." *Deshawn E.,* 156 F.3d at 344 (citing *City of Los Angeles v. Lyons,* 461 U.S. 95, 105-06 (1983)). However, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific

facts that are necessary to support the claim." ' *Lujan,* 504 U.S. at 561 (quoting *Lujan v. National Wildlife Fed'n,* 497 U.S. 871, 889 (1990)).

b. *Dismissal Standards*

***6** Upon a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), the factual allegations of the complaint are presumed to be true, and all inferences must be drawn in the plaintiffs' favor and against the defendants. *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974). A motion under Rule 12(b)(6) should be granted where it appears beyond any doubt that plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. *H.J. Inc. v. Northwestern Bell Tel. Co.,* 492 U.S. 229, 249-250 (1989). Particularly when a plaintiff acts *pro se,* a court must be quite liberal in its analysis of the sufficiency of the complaint. *See Haines v. Kerner,* 404 U.S. 519 (1972) (upon motion to dismiss, *pro se* pleadings held "to less stringent standards than formal pleadings drafted by lawyers"); *see also Burgos v. Hopkins,* 14 F.3d 787, 790 (2d Cir.1994) (pleadings of *pro se* plaintiff read liberally and interpreted "to raise the strongest arguments that they suggest"). "It is not, however, proper to assume that the [plaintiff] can prove facts that it has not alleged." *Associated Gen. Contractors, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 526 (1983); *accord Electronics Communications Corp. v. Toshiba Am. Consumer Prods., Inc.,* 129 F.3d 240, 243 (2d Cir.1997).[10]

2. *Plaintiffs' Claims*

a. *Inadequate Education Claims*

Applying the requirements set forth above, plaintiffs lack standing to challenge the educational services provided in the CIUFSD. With regard to the first standing requirement, plaintiffs have failed to establish that the allegedly inadequate level of education in the CIUFSD has caused them any "injury in fact." As the Supreme Court has stated, a plaintiff "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth,* 422 U.S. at 499. In the present case, only seven of the purported twenty-three plaintiffs[11] are described as "parents"; none of these plaintiffs claim to be parents of children who attend public schools within the CIUFSD, let alone the parents of minority children or children with disabilities. Because all of the plaintiffs bring this suit on their own behalf, rather than on behalf of their children, they have not suffered the requisite injury in fact. Moreover, even if the parents purported to bring the action on behalf of their children, the case would be dismissed. A parent may not appear *pro se* on behalf of her child. *See Wenger v. Canastota Cent. Sch. Dist.,* 146 F.3d 123, 124-25 (2d Cir.1998) (*per curiam*), *cert. denied,* 199 S.Ct. 1267 (1999).

Even if plaintiffs had established standing to challenge the educational opportunities provided by the CIUFSD, they have failed to state a claim upon which relief can be granted. First, plaintiffs contend that the allegedly inadequate level of education in the CIUFSD violates the New York State Constitution. Article XI, Section One of the New York State Constitution provides that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all children of this state may be educated." As the New York Court of Appeals recently decided, the terms of this Education Article are not merely hortatory. *Campaign for Fiscal Equity, Inc. v. State,* 86 N.Y.2d 307, 315 (1995). Rather, "the Education Article imposes a duty on the Legislature to ensure the availability of a sound basic education to all the children of the State." *Id.* A "sound basic education" is described as one that consists of "the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury." *Id.* Thus, if the "physical facilities and pedagogical services and resources made available ... are adequate to provide children with the opportunity to obtain these essential skills, the State will have satisfied its constitutional obligation." *Id.*

***7** Plaintiffs' complaint fails to allege any specific facts regarding the state of education in the CIUFSD, let alone any facts suggesting that children educated in the district will "not be able to function productively as civic participants." Plaintiffs instead fill their complaint with conclusory allegations and unsupported assertions. *See* Compl. ¶ 2 ("The gravamen of plaintiff's [sic] complaint is that as a matter of constitutional practice, defendants have failed to provide for the Constitutional guarantee in Article XI section one of the Constitution of the State of New York."); Compl. ¶ 63 ("We believe that children are being damaged and that long term societal effects are devastating. Nothing is more important than the children!") Regardless of how deeply felt plaintiffs' concerns may be, they fall far short of stating a claim under the Education Article.

Second, plaintiffs claim that the level of education provided to all students in the CIUFSD violates the Fourteenth Amendment to the United States Constitution. This claim is untenable. It is well-settled that there is no federal constitutional right to a public education. *See*

Plyler v. Doe, 457 U.S. 202, 221 (1982) ("Public education is not a 'right' granted to individuals by the Constitution.") (citing *San Antonio Ind. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 35 (1973)). Thus, to the extent plaintiffs allege that the general level of education in the CIUFSD is inadequate, only the state constitution would be implicated.[12]

Third, plaintiffs' complaint can be construed as alleging that the defendants have violated the Equal Protection Clause of the Fourteenth Amendment by providing inadequate educational services to minorities and students with handicaps. Equal protection principles guarantee that similarly-situated persons will be treated alike. *See Disabled American Veterans v. United States Dep't of Veterans Affairs,* 962 F.2d 136, 141 (2d Cir.1992). To state a claim for denial of equal protection, a plaintiff "must allege 'purposeful and systematic discrimination' by specifying instances in which [plaintiff] [was] 'singled out ... for unlawful oppression' in contrast to others similarly situated." *Contractors Against Unfair Taxation Instituted on New Yorkers v. City of New York,* No. 93 Civ. 4718, 1994 WL 455553, at *6 (S.D.N.Y.Aug.19, 1994) (quoting *Albert v. Carovano,* 851 F.2d 561, 573 (2d Cir.1988)) (alterations in original). Here, plaintiffs have failed to set forth factual allegations sufficient to state an Equal Protection claim, instead relying on wholly conclusory allegations devoid of factual support. Even affording plaintiffs liberal treatment in light of their *pro se* status, such allegations fail to state an Equal Protection claim. *See, e.g., Katz v. Klehammer,* 902 F.2d 204, 207 (2d Cir.1990) (dismissing conclusory equal protection claim contained in *pro se* complaint).

Fourth, plaintiffs allege that defendants have violated the Individuals with Disabilities Education Act, 20 U.S.C. § 1401 et seq. ("IDEA"), and New York Education Law §§ 4401-4410-a.[13] The Second Circuit has described IDEA in the following terms:

> ***8** "In an effort to increase access to education for handicapped children, Congress passed IDEA, a statute which provides federal funding to states to help defray the costs of educating [handicapped] children. In order to receive federal money, the state must submit a plan which demonstrates that there is a state policy in effect which assures that all handicapped children have a right to a FAPE ["free and appropriate public education"]. States must provide a FAPE for all children with disabilities between the ages of three and eighteen within the state."
> *Catlin v. Sobol,* 93 F.3d 1112, 1121 (2d Cir.1996) (citations and quotation marks omitted). Sections 4401-4410-a of the New York Education Law also entitle disabled children in New York to a free and appropriate public education. *See Judge Rotenburg Educ. Center v. Maul,* 91 N.Y.2d 298, 300 (1998).

Plaintiffs' complaint contains little more than conclusory allegations that the IDEA and the New York Education Law have been violated. The only factual allegation is set forth in paragraph 108 of the complaint:

> "Defendants have directly or through contractual or other arrangements with BOCES[14] and other center-based special education programs systematically excluded minority students by use of academic criteria or no criteria at all or other methods which have the effect of subjecting minority children and other children to discrimination because of their race, color or national origin, and have the effect of defeating or substantially impairing accomplishment of the objectives of IDEA and its New York State counterpart, New York Education Law sections 4401-4416."

To the extent this statement can be deciphered, it apparently alleges that defendants have prevented handicapped minority students from receiving a free and appropriate public education. This again is a conclusory allegation, devoid of any factual basis for the claim that handicapped children generally, or minority handicapped children in particular, are not receiving the level of education to which they are entitled under federal and state law. Because the Court may not presume that plaintiffs will be able to prove facts not alleged in their pleading, *see Associated Gen. Contractors,* 459 U.S. at 526, plaintiffs have failed to state a claim.[15]

b. *Rehabilitation Act*

Plaintiffs also claim that individual School Board defendants violated the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* Section 504 of the Rehabilitation Act provides, in pertinent part:

> "No otherwise qualified person with a disability in the United States ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to

> discrimination under any program or activity receiving Federal financial assistance."

29 U.S.C. § 794(a). The purpose of the Rehabilitation Act " 'is to prevent old-fashioned and unfounded prejudices against disabled persons from interfering with those individuals' rights to enjoy the same privileges and duties afforded to all United States citizens." ' *Morrison v. Commissioner of Special Servs.,* No. CV 94-5796, 1996 WL 684426, at *3 (E.D.N.Y. Nov. 18, 1996) (quoting *Galloway v. Superior Court,* 816 F.Supp. 12, 20 (D.D.C.1993)). A cause of action lies under the Rehabilitation Act when a person shows that (1) he is an individual with a disability; (2) he is otherwise qualified to participate in a particular program; (3) he was denied that participation based upon his disability; and (4) the program receives federal funds. *See D'Amico v. City of New York,* 132 F.3d 145, 149 (2d Cir.), *cert. denied,* 118 S.Ct. 2075 (1998). Although claims under the Rehabilitation Act are similar to those under the IDEA, the crux of a claim under the Rehabilitation Act-and a necessary element of such a claim-is discrimination against a person because of his disability. *See* Rehabilitation Act Section 504, 29 U.S.C. § 794 (prohibiting discrimination against an "otherwise qualified individual with a disability ... solely by reason of her or his disability."); *see also Castellano v. City of New York,* 142 F.3d 58, 70 (2d Cir.1998) (Section 504 of the Rehabilitation Act "prohibit[s] discrimination only on the basis of disability."). As one court has noted, "Section 504 [of the Rehabilitation Act] provides relief from discrimination, whereas the IDEA provides relief from inappropriate educational placement decisions, regardless of discrimination." *Wenger v. Canastota Cent. Sch. Dist.,* 961 F.Supp. 416, 422 (N.D.N.Y.1997), *aff'd in part and vacated in part on other grounds,* 146 F.3d 123 (2d Cir.1998), *cert. denied,* 119 S.Ct. 1267 (1999).

***9** For several reasons, plaintiffs have not alleged a viable claim under the Rehabilitation Act. First, plaintiffs sue on their own behalf rather than on behalf of any children they may have, and in any event the complaint contains no indication that plaintiffs are the parents of disabled children who have been denied participation in a federally funded program. As a result, plaintiffs not only lack standing, but have failed to state a claim under the Rehabilitation Act. Moreover, the parents could not bring actions on behalf of their children *pro se. See Wenger,* 146 F.3d at 124-25. Additionally, plaintiffs have not set forth any factual allegations sufficient to state a claim of discrimination based on disability. *See Mr. and Mrs. "B" v. Board of Educ.,* 96-CV-5752, 1998 WL 273025, at *5 (E.D.N.Y. Jan. 15, 1998) (dismissing Rehabilitation Act claim due to plaintiff's reliance on conclusory rather than factual allegations). Accordingly, plaintiffs' claim under the Rehabilitation Act must be dismissed.

c. *Family Educational and Privacy Rights Act of 1974*

The Family Educational and Privacy Rights Act of 1974, 20 U.S.C. § 1232(g) ("FERPA"), "itself does not give rise to a private cause of action." *Fay v. South Colonie Cent. Sch. Dist.,* 802 F.2d 21, 33 (2d Cir.1986). However, "FERPA creates an interest that may be vindicated in a section 1983 action." *Id.* Based on plaintiffs' complaint, the FERPA provision relevant to this case appears to be 20 U.S.C. § 1232g(b)(1), which provides, in pertinent part:

> "No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein ...) of students without the written consent of their parents to any individual, agency, or organization."

Pursuant to 20 U.S.C. § 1232g(g), the Secretary of Education is instructed to establish or designate an office and review board for the purpose of investigating and adjudicating all FERPA violations.

Plaintiffs allege in their complaint that they learned of a purported FERPA violation on May 11, 1996. According to plaintiffs, on that day "a letter was received by the parents of students protected under the FERPA Act. This letter was political in nature [and] used the United States mail." (Compl.¶ 67.) Plaintiffs further explain this allegation in paragraph 24 of their "Answer in Opposition to Motion to Dismiss." According to plaintiffs' allegations, defendant Ralph Borzello "consciously violated the federal FERPA law by giving the names and addresses of a confidential list of special education student's [sic] parents directly to the CSEA Union in order to influence the upcoming CIUFSD school board election." Plaintiffs further complain that the Superintendent of Schools, "fellow conspirator Howard Koenig," wrote only a "week [sic] letter of reprimand" to Borzello. (Answer in Opposition to Motion to Dismiss ¶ 24.)

***10** For present purposes I will assume that plaintiffs

properly seek to vindicate the interests created by FERPA through their § 1983 claim. Nonetheless, plaintiffs have failed to establish standing to challenge the alleged FERPA violation, because none of the plaintiffs assert that they are parents of the children whose names were improperly disclosed. Moreover, based on the facts as alleged, plaintiffs have failed to state a cause of action. The relevant FERPA provision is violated only when there is a "policy or practice" by which student information is disclosed without parental authorization. 20 U.S.C. § 1232g(b)(1). The single incident set forth in plaintiffs' submissions appears to be just that-one violation that resulted in a reprimand. Plaintiffs have not set forth any facts suggesting that there was a "policy or practice" of disclosing such information, nor have they even alleged that improper disclosures occurred on any other occasion. Accordingly, plaintiffs' FERPA claim, as asserted through § 1983, will be dismissed.

d. *Title VI*

Section 601 of Title VI of the Civil Rights Act of 1964 provides:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

42 U.S.C. § 2000(d). Under Title VI, a recipient of federal financial assistance, such as a local Board of Education, may not "provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program" on the basis of race, color, or national origin. 34 C.F.R. § 100.3(b)(1)(ii). A recipient of federal financial assistance is also precluded from "utiliz[ing] criteria or other methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin." 34 C.F.R. § 100.3(b)(2). Thus, as the Supreme Court has noted, there is a cause of action under Title VI for both disparate treatment and disparate impact. *See Alexander v. Choate,* 469 U.S. 287, 293 (1985).

"In order to establish standing to sue under [Title VI] plaintiffs must be the intended beneficiaries of the federal spending program." *Scelsa v. City Univ.,* 806 F.Supp. 1126, 1140 (S.D.N.Y.1992); *see also Coalition of Bedford-Stuyvesant Block Ass'n, Inc. v. Cuomo,* 651 F.Supp. 1202, 1208 n. 2 (E.D.N.Y.1987) (Title VI "does grant private parties the right to sue, but only if they are either the intended beneficiaries of the federal program or the discrimination that the plaintiffs are suffering will negatively impact upon those intended beneficiaries.") "The intended beneficiaries of a federally funded public school program are school children, not their parents." *Jackson v. Katy Ind. Sch. Dist.,* 951 F.Supp. 1293, 1298 (S.D.Tex.1996). Thus, while parents (through counsel) may bring a Title VI action on behalf of a child who is the intended beneficiary of a funding program, parents may not bring the action on their own behalf. Because plaintiffs in this action have sued in their individual capacity, the Title VI claim will be dismissed for lack of standing.[16]

***11** Even assuming, *arguendo,* that defendants had standing to bring their Title VI claim, I would nonetheless be compelled to dismiss that claim pursuant to Rule 12(b)(6). "To state a claim under Title VI ... a complaint must adequately allege discrimination based on a protected category (race, color, or national origin); and must do so with the same degree of specificity as required in civil rights cases generally." *Dartmouth Review v. Dartmouth College,* 889 F.2d 13, 17 (1st Cir.1989); *see also Fundator v. Columbia Univ.,* No. 95 Civ. 9653, 1996 WL 197780, at *2 (S.D.N.Y. Apr. 23, 1996) (same). The Second Circuit has held that a plaintiff bringing claims under the Civil Rights Act must include in the complaint some allegations of fact indicating a deprivation of civil rights. *See Hankard v. Town of Avon,* 126 F.3d 418, 423 (2d Cir.1997) ("[P]laintiffs must make specific allegations that indicate a deprivation of constitutional rights; general, indirect and conclusory allegations are not sufficient."); *Koch v. Yunich,* 533 F.2d 80, 86 (2d Cir.1976) ("Complaints relying on the civil rights statutes are plainly insufficient unless they contain some specific allegations of fact indicating a deprivation of civil rights, rather than state simple conclusions.")

Plaintiff have set forth only conclusory allegations rather than specific facts in support of their Title VI claim. For example, plaintiffs assert that "[m]inority children have been intentionally excluded from participation in, denied the benefits of, and have been subjected to discrimination in receipt of regular and special education services at the Central Islip Union Free School District, in receipt of federal assistance." (Compl.¶ 107.) Plaintiff further claim, without specific supporting facts, that defendants have "systematically excluded minority students by use of academic criteria or no criteria at all or other methods which have the effect of subjecting minority children and other children to discrimination because of their race,

color or national origin." (Compl.¶ 108.) Such vague and conclusory allegations are insufficient to state a claim under Title VI.

e. *"Federal Election Law"*

Plaintiffs allege as a cause of action against all defendants that "federal election law" has been violated. (Compl.¶ 17.) Because plaintiffs have not specified-and I am unable to determine-the precise federal statute plaintiffs believe has been violated, I have attempted to decipher this claim based on the facts presented.

Plaintiffs appear to allege that various acts of misconduct tainted CIUFSD elections held on May 21, 1996 and March 21, 1997. (Compl.¶¶ 64-84.) First, plaintiffs assert that on or about May 18, 1996, members of the CSEA posted a flier throughout the School District that was intended "to create confusion in the minds of potential voters." (Compl.¶ 66.) Plaintiff Patrick O'Brien was an incumbent running for re-election to the School Board. However, the flier displays a photograph of man who is alleged to be a CSEA employee also named Pat O'Brien. Underneath the photograph of this second Mr. O'Brien, the text of the flier states that "Pat O'Brien" is not a candidate for the Central Islip Board of Education, and requests that voters not cast their ballots for him. (Answer in Opposition to Motion to Dismiss Ex. 5-6.) Plaintiffs apparently claim that the CSEA purposefully used this flier to confuse voters as to whether plaintiff O'Brien was actually a candidate, thereby causing plaintiff O'Brien to lose his seat on the School Board. (Answer in Opposition to Motion to Dismiss Ex. 5.)

***12** Second, plaintiffs again refer to their allegation that defendant Ralph Borzello, acting in violation of FERPA, provided the names of special education students to the CSEA, which then sent a letter to the parents of such students.[17] (Compl.¶ 67.) The letter requested that students vote for three specific candidates in the May 21, 1996 elections. (Answer in Opposition to Motion to Dismiss Ex. 3.) Each of those candidates are named as defendants in this suit.

Third, plaintiffs allege several examples of miscounting and other irregularities during the 1996 elections. Specifically, plaintiffs contend that certain individuals voted more than once, that persons who resided outside the CIUFSD were permitted to vote, and that three hundred votes were cast by persons lacking appropriate identification. (Compl.¶ 70.) Plaintiffs also claim that absentee ballots were not properly counted. (Compl.¶ 71.) In the May 21, 1996 election, the school budget was defeated by 52 votes. (*Id.* ¶ 72.) Plaintiff Schuler states that she then sent letters to the Commissioner and to the Attorney General of the State of New York in which she complained of widespread patterns of election fraud. (*Id.* ¶¶ 73-74.) Although Schuler apparently did not receive a favorable response, the School Board scheduled a budget revote for September 21, 1996. (*Id.* ¶ 890.) The results of this revote are not set forth in plaintiffs' complaint. Finally, plaintiffs argue that in an election of March 21, 1997, there was "a conscious fraud" perpetrated on taxpayers within the CIUFSD, resulting in the approval of a 13 million bond issue. (*Id.* ¶ 83.)

Based upon these allegations and the vagueness of plaintiffs' assertion that the "federal election law" was violated, I construe plaintiffs' claim as one under 42 U.S.C. § 1983. Specifically, it appears that plaintiffs are claiming that election irregularities in the 1996 and 1997 elections rose to the level of a federal constitutional violation.[18] The Second Circuit addressed such a cause of action in *Powell v. Power,* 436 F.2d 84 (2d Cir.1970). In *Powell,* voters alleged that state officials had abridged their rights to due process and equal protection by permitting unqualified voters to case ballots in a primary. The Second Circuit recognized that an action to remedy election irregularities lies under 42 U.S.C. § 1983, but only when the state action constituted "intentional or purposeful discrimination." *Id.* at 88; *see also Gold v. Feinberg,* 101 F.3d 796, 801 (2d Cir.1996) (election irregularities constitute due process violation under section 1983 only if there are "substantiated allegations of any wrongful intent on the part of state officials"); *Bodine v. Elkhart County Election Bd.,* 788 F.2d 1270, 1271-72 (7th Cir.1986) ("The Constitution is not an election fraud statute .... It is not every election irregularity ... which will give rise to a constitutional claim and an action under section 1983 .... [S]ection 1983 is implicated only when there is *willful* conduct which undermines the organic processes by which candidates are elected.") (citations and quotation marks omitted) (emphasis in original).

***13** As an initial matter, I find that with regard to the election of May 21, 1996, only plaintiff O'Brien has standing to bring a cause of action. Accepting as true the allegation that a misleading flier cost O'Brien his position on the School Board, he would plainly have been injured as a result of such misconduct. None of the other plaintiffs have suffered any direct injury that would provide them with standing in this action. As regards the approval of a 13 million bond issue in the election of March 1997, none of the named plaintiffs have standing to bring a § 1983 claim. The pleadings are devoid of any facts suggesting that the passage of this initiative directly injured the plaintiffs in any manner or that it would not have passed but for the vaguely alleged fraud.

Moreover, even if I were to find that any plaintiffs other than O'Brien had standing, all plaintiffs have failed to state a cause of action. In the aforementioned decisions of *Powell* and *Gold,* the Second Circuit sharply limited the circumstances under which local election irregularities will give rise to a federal cause of action. In *Gold,* the court of appeals stated that when

> there exists a state remedy to the election irregularities that is fair and adequate, human error in the conduct of elections does not rise to the level of a Fourteenth Amendment violation actionable under § 1983 in the absence of willful action by state officials intended to deprive individuals of their constitutional right to vote.

101 F.3d at 802. Here, many of plaintiffs' allegations do not refer to "willful action." Based on the facts as pleaded, there is no indication that the alleged miscounting of absentee ballots, the voting of persons without proper identification, and voting by individuals from outside the CIUFSD were the result of willful action by state officials. As for those actions that would require willfulness, such as the distribution of a misleading flier or the sending of a letter to students within the CIUFSD, such actions were allegedly committed by the CSEA rather than state officials, and thus cannot support a § 1983 action. *See Chan v. City of New York,* 1 F.3d 96, 106 (2d Cir.1993) ("An action under § 1983 cannot, of course, be maintained unless the challenged conduct was attributable at least in part to a person acting under color of state law."); *see also Jackson v. Temple Univ.,* 721 F.2d 931, 933 (3d Cir.1983) (dismissing § 1983 claim against union because the plaintiff had not "set forth any facts suggesting that the state was responsible for the Union or that the Union was acting under color of state law."). Finally, the remaining allegation-that of alleged fraud regarding the issuance of the bonds-is stated in conclusory terms and without any factual allegations that might show "inten[t] to deprive individuals of their constitutional right to vote." *Gold,* 101 F.3d at 802. Accordingly, plaintiffs' claim under the "federal election law" is dismissed.

f. *42 U.S.C. § 1983*

***14** Plaintiffs' claim under 42 U.S.C. § 1983 is premised on the argument that students in the CIUFSD are forced into accepting a "substandard education which violates their fourteenth amendment rights under the Constitution." (Compl.¶ 59.) Elsewhere, plaintiffs appear to complain that the defendants, acting under color of state law, have deprived "plaintiff taxpayers and students" of the rights to "a free appropriate public education" in violation of the First and Fifth Amendments and the IDEA. (*Id.* ¶¶ 1, 105.) Given the fact that plaintiffs are proceeding *pro se,* I will also construe their action under § 1983 as alleging deprivation of the rights, privileges and immunities secured by the remaining federal statutes plaintiffs have cited in support of their educational claims-namely, FERPA, Title VI, and the Rehabilitation Act.

Even given this liberal construction of the complaint, plaintiffs have failed to state a claim. "To state a claim under 42 U.S.C. § 1983, a plaintiff must allege (1) that the challenged conduct was attributable at least in part to a person acting under color of state law, and (2) that such conduct deprived the plaintiff of a right, privilege or immunity secured by the Constitution or the laws of the United States." *New Yorker Magazine v. Metropolitan Transit Auth.,* 136 F.3d 123, 127-128 (2d Cir.1998) (quotation marks omitted). Thus, whether plaintiffs have failed to state a claim "depends upon whether plaintiff [s] ha[ve] adequately alleged constitutional [or statutory] violations actionable under § 1983." *Hill v. City of New York,* 45 F.3d 653, 664 (2d Cir.1995); *see also Daniels v. Williams,* 474 U.S. 327, 330 (1986) ("[I]n any given § 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right."). As discussed in the foregoing sections, plaintiffs have not adequately alleged the deprivation of rights secured by the First, Fifth and Fourteenth Amendments, nor by the IDEA, FERPA, Title VI, or the Rehabilitation Act. Accordingly, plaintiffs' § 1983 claim will be dismissed.[19]

g. *42 U.S.C. § 1985(3)*

Plaintiffs' claim under 42 U.S.C. § 1985(3) is similar to their claim under § 1983 in that it is predicated upon the contention that the inadequate level of education in the CIUFSD have deprived plaintiffs of federally protected rights. Specifically, plaintiffs have set forth the following allegations:

> "[D]eprivations [of equal protection of the laws] arose by reason of unlawful agreement(s) and fiduciary negligence at various programs and/or budgetary planning meetings among defendants Koenig and/or Ramos and/or Jackson, which agreement(s) was (were) expressly or tacitly approved by defendants Phillips and/or Goldstein and/or Bannon and/or Devine and/or Leoncavallo. Said defendants knew of [sic] such

> planned activities were violative of disabled students' rights to equal protection of the law."
>
> "[T]he real motivations behind such conduct ... [was to] deprive, either directly or indirectly, children, taxpayers, property owners and disabled students in the Central Islip Union Free School District ... of the equal protection of the laws ... for the convenience and profit of the Central Islip [sic] and its employees."

***15** (Compl.¶¶ 107-108.) For purposes of the present motion, I will again liberally construe plaintiffs' complaint as alleging that defendants' intended to deprive not just disabled students of their rights under the Equal Protection clause, but minority students as well.

"In order to state a claim under § 1985(3), a plaintiff must establish '(1) a conspiracy, (2) motivated by racial or other invidiously discriminatory animus, (3) for the purpose of depriving any person or a class of persons of equal protection or privileges and immunities under the law, (4) that the conspirators committed some act in furtherance of the conspiracy, and (5) that the plaintiffs were injured." *Mishk v. Destefano,* 5 Supp.2d 194, 199 (S.D. N.Y.1998) (quoting *Wintz v. Port Authority,* 551 F.Supp. 1323, 1325 (S.D.N.Y.1982).[20]

Plaintiffs have failed to meet the requirements for stating a claim under § 1983(5). The allegations contained in the complaint, as quoted above, utterly fail to set forth specific facts in support of plaintiffs' claims that individual school board members conspired on the basis of race or mental disability, let alone that they committed acts in furtherance of a conspiracy. The vague and conclusory allegations relied upon by plaintiffs cannot suffice, especially in a claim predicated upon discrimination. *See Temple of the Lost Sheep, Inc. v. Abrams,* 930 F.2d 178, 185 (2d Cir.) (affirming dismissal of § 1985(3) claims "since they were couched in terms of conclusory allegations" and failed to demonstrate invidiously discriminatory animus), *cert. denied,* 502 U.S. 866 (1991).

Even if plaintiffs had stated a claim under § 1985(3), they lack standing as well. It is by now a familiar defect in their pleading that plaintiffs have not alleged that they are the parents of minority students or students with disabilities. The rights of such students can be vindicated by the students themselves or by the parents of such students suing (through counsel) on their behalf. However, there is no indication that the alleged conspiracy has injured any of the plaintiffs in this action, thereby providing an independent ground for dismissal.

h. *Racketeer Influenced and Corrupt Organizations Act ("RICO")*

i. *Failure to State a Claim*

Plaintiffs have failed to state a claim under civil RICO. The threshold pleading requirements for a private RICO action are as follows:

> "To state a claim for damages under RICO, a plaintiff has two pleading burdens. First, he must allege that the defendant has violated the substantive RICO statute, 18 U.S.C. § 1962 (1976), commonly known as 'criminal RICO.' In so doing, he must allege the existence of seven constituent elements: (1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an 'enterprise' (7) the activities of which affect interstate or foreign commerce .... Plaintiff must allege adequately defendant's violation of section 1962 before turning to the second burden-i.e. invoking RICO's civil remedies of treble damages, attorneys fees and costs .... To satisfy this latter burden, plaintiff must allege that he was injured in his business or property by reason of a violation of section 1962."

***16** *Moss v. Morgan Stanley, Inc.,* 719 F.2d 5, 17 (2d Cir.1983).

Plaintiffs' RICO claim, while not easily deciphered, appear to turn on two sets of allegations. First, plaintiffs state that the defendants have engaged in a "conscious chain conspiracy ... to misuse and misapply taxpayer dollars into illegally created funds and into funds not statutorily authorized by the voters." (Compl.¶ 3.) Specifically, plaintiffs contend that the taxpayers of the CIUFSD were defrauded into "pass[ing] a 13 million Bond in an election held on March 21, 1997." (Compl.¶ 83.) Second, plaintiff Schuler asserts various allegations in support of her claim that, while she was a member of the Board of Education for the CIUFSD, "information

required for me to perform my duties was intentionally hidden from me." (Compl.¶ 92.) In essence, Schuler contends that the defendants obstructed her investigation into financial and election irregularities in the CIUFSD, and that this obstruction violated RICO. (*See* Com pl. ¶¶ 88-95; Answer in Opposition to Motion to Dismiss ¶¶ 6-7, 11, 27, 48.)

In light of these allegations, plaintiffs' complaint fails to meet the RICO pleading requirements in at least two ways. First, plaintiffs have not established the requisite "pattern of racketeering activity." To establish such a pattern, "a plaintiff must plead at least two predicate acts, and must show that the acts are related and that they amount to, or pose a threat of, continuing criminal activity." *GICC Capital Corp. v. Technology Finance Group, Inc.,* 67 F.3d 463, 465 (2d Cir.1995) (citations omitted). Plaintiffs have set forth a litany of acts and omissions that aggrieve them, and that they contend are racketeering acts under RICO. Among these are the following: the "misuse and misappl[ication] of taxpayer dollars into illegally created funds" (Compl.¶ 3); "the active defrauding of the electorate to gain the approval of a 13 million bond vote" (*id.* ¶ 35(B)); the failure to discuss a state report critical of special education in the CIUFSD during a presentation made to CIUFSD board members (Answer in Opposition to Motion to Dismiss ¶ 2); the arrest of plaintiff Schuler for attempting to attend a Budget Advisory Committee meeting (*id.* ¶ 6); the hiding of a policy paper from School Board members (*id.* ¶ 11); the holding of an illegal meeting regarding the bond vote, the purpose of which was to defraud CIUFSD taxpayers (*id.* ¶ 14); the "illegal transfer of tax funds" by CIUFSD Superintendent Harold Koenig (*id.* ¶ 21); the "send[ing] of a flyer" to high school seniors with the purpose of "control[ing] a school board election" (*id.* ¶ 22); the provision by a teacher to the CSEA of a list of special education students (*id.* ¶ 24); the CIUFSD's refusal to allow plaintiff Schuler to see the names and addresses of "new hires" (*id.* ¶ 27); and the failure of the CIUFSD to provide a 1099 tax form (*id.* ¶ 33).

***17** Plaintiffs' list of purported racketeering acts continues, and is too extensive to reproduce in full. Nonetheless, having carefully examined all of plaintiffs' allegations, I find that plaintiffs have failed to allege a single act of "racketeering activity" as defined in 18 U.S.C. § 1961(1).[21] It is thus unnecessary to reach the issue of whether plaintiffs have shown that the acts are related or that they pose a continuing threat. Obviously, by failing to allege a single racketeering act, plaintiffs have failed to state a RICO claim.

Second, were I to assume that plaintiffs properly alleged a pattern of racketeering activity, they have not established the existence of a RICO enterprise. 18 U.S.C. § 1961(4) defines an "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." The Supreme Court has held that a RICO enterprise is "proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *United States v. Turkette,* 452 U.S. 576, 583 (1981). Plaintiffs' complaint is devoid of any factual allegations that would support a finding that the School District defendants, the Commissioner and the CSEA constituted any form of ongoing organization or functioned as a continuing unit. Indeed, the complaint fails to tie these entities and individuals together in any manner. Accordingly, defendants have failed to allege the existence of an enterprise, and have fallen far short of meeting the threshold pleading requirements for a private RICO action.

ii. *RICO Standing*

"[A] RICO plaintiff 'only has standing if, and can only recover to the extent that, he has been injured in his business or property by [reason of] the conduct constituting the violation." ' *Holmes v. Securities Investor Protection Corp.,* 503 U.S. 258, 279 (1992) (O'Connor, J., concurring) (alterations in original) (quoting *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 496 (1985)); *see also Hecht v. Commerce Clearing House,* 897 F.2d 21, 23 (2d Cir.1990) (to satisfy RICO standing requirements, plaintiff must establish "(1) a violation of section 1962; (2) injury to business or property; and (3) causation of the injury by the violation."). "[T]he requirement of injury in one's 'business or property' limits the availability of RICO's civil remedies to those who have suffered injury in fact." *Holmes,* 503 U.S. at 279 (O'Connor, J., concurring). Moreover, causation is not established by a mere showing that the RICO violation was a cause in fact of an injury; rather, a RICO plaintiff must establish that the violation was a proximate cause of the injury suffered. *Id.* at 268.

I have already found that plaintiffs failed to allege a violation of 18 U.S.C. § 1962, thereby depriving them of standing to bring their RICO claim. Plaintiffs also fail to plead an injury to their business or property and a causal relationship between the injury and the RICO violation. As noted, plaintiffs' RICO claims turn on the allegations that defendants have illegally raised or diverted tax funds and have obstructed plaintiff Schuler from investigating such conduct. Assuming for present purposes that these amounted to a violation of § 1962, the only conceivable

manner in which such violations might have harmed plaintiffs' "business or property" is by the waste of tax dollars or the devaluation of property values in the CIUFSD.

***18** To the extent defendants' fraudulent actions may have wasted tax dollars or harmed property values, these are not sufficiently direct injuries to sustain a RICO action. Both a waste of tax dollars and a decline in property values are injuries that are not unique to these individual plaintiffs, but are common injuries shared by all inhabitants and taxpayers in the CIUFSD. As the Supreme Court held in *United States v. Richardson,* 418 U.S. 166 (1974), standing cannot be premised upon such "generalized grievance[s]" that are "plainly undifferentiated and 'common to all members of the public." ' *Id.* at 176-77 (quoting *Ex parte Levitt,* 302 U.S. 633, 634 (1937)).

Moreover, plaintiffs have failed to establish the requisite causation between defendants' alleged acts and any waste of tax dollars or decline in property values. There is no indication that any alleged fraud regarding a bond issue or the misappropriation of tax monies was the proximate cause of increased taxation or any other harm. Similarly, the causal link between defendants' alleged conduct and any drop in the property values in the CIUFSD-presuming such a drop even occurred-is far too speculative to support a RICO claim.

i. *Devaluation of Property*

Plaintiffs' complaint alleges, as an independent cause of action, that plaintiffs have suffered the "devaluation of property" due to the inadequacy of the public school system in the CIUFSD. (Compl. at 17.) Plaintiffs expand upon this claim as follows:

> "Plaintiffs further complain that the 'objective' and 'external' criteria with which school districts are judged has directly led to a devaluation of personal and business property within the Central Islip Union Free School District which has severely damaged the financial future of the residents, students, property owners and business owners of the same CIUFSD geographical area in violation of the various sections of the NYSC and the USC."

(Compl.¶ 6.)

Plaintiffs lack standing to bring such a claim. As previously discussed, there is no allegation in the complaint-nor any specific facts-regarding whether and to what extent property values have declined in the CIUFSD. Plaintiffs have also failed to set forth any factual basis for their belief that the allegedly inadequate level of education in the CIUFSD-as opposed to any other of a multitude of possible factors-has led to the purported decline in property values. Moreover, even if property values had declined due to defendants' alleged actions, plaintiffs would merely be asserting a "generalized grievance" upon which standing cannot properly be premised. *See Richardson,* 418 U.S. at 176-77.

Had plaintiffs established standing, I would nonetheless dismiss the property valuation claim pursuant to Rule 12(b)(6). As the above quote makes clear, plaintiffs allege in an entirely conclusory manner that the inadequate education provided by the public schools in the CIUFSD has led to a decrease in property values, and cite to the "NYSC" and the "USC" in support of their claim. I am unable to determine whether plaintiffs intend "NYSC" to refer to the New York State Constitution or the statutory law of New York, nor can I determine whether "USC" refers to the United States Code or the United States Constitution. In any event, I have been unable to locate any provision in the constitution or statutory law of the United States or New York State-or any reported case-that would permit recovery on this claim. There is no basis for plaintiffs' apparent belief that when children in a school district receive an allegedly substandard educational, taxpayers and residents can recoup the resulting decline in real property values.

j. *General Municipal Law § 51*

***19** New York Municipal Law § 51, which is entitled "Prosecution of Officers for illegal acts," provides in pertinent part that

> "All officers, agents, commissioners and other persons acting, or who have acted, for and on behalf of any county, town, village or municipal corporation in this state ... may be prosecuted, and an action may be maintained against them to prevent any illegal official act on the part of any such officers, agents, commissioners or other persons, or to prevent waste or injury to, or to restore and make

> good, any property, funds or estate of such county, town, village or municipal corporation by any person or corporation whose assessment, or by any number of persons or corporations, jointly, the sum of whose assessments shall amount to one thousand dollars who shall be liable to pay taxes on such assessment in the county, town, village or municipal corporation."

The New York Court of Appeals has observed that, based on the phrasing of the statute, it would appear that a cause of action under Section 51 would lie either to prevent illegal official actions or to prevent waste of public resources. *See Korn v. Gulotta,* 72 N.Y.2d 363, 371 (1988). However, the Court of Appeals has interpreted Section 51 as creating a cause of action "only when the acts complained of are fraudulent, or a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes." *Mesivta of Forest Hills Inst. v. City of New York,* 58 N.Y.2d 1014, 1016 (1983) (quoting *Kaskel v. Impellitteri,* 306 N.Y. 73, 79 (1953)). Moreover, while Section 51 "provides for personal liability of public officials who commit illegal acts in their official capacities 'by collusion or otherwise,' " the statute allows for personal liability "only if the illegal acts were collusive, fraudulent, or motivated by personal gain." *Stewart v. Scheinert,* 47 N.Y.2d 826, 828 (1979).

Applying these standards, plaintiffs have failed to state a cause of action under Section 51. First, plaintiffs' allegations of illegal acts are wholly conclusory and turn on alleged manner in which they were fraudulent. *See Mills v. Polar Molecular Corp.,* 12 F.3d 1170, 1175 (2d Cir.1993) (To satisfy Federal Rule of Civil Procedure 9(b), a complaint alleging fraud must: "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.")

Finally, the complaint is devoid of any factual allegations that the actions or inaction of the individual school board defendants were motivated by personal gain. Accordingly, the Section 51 claim is dismissed.

D. *Leave to Amend*

Federal Rule of Civil Procedure 15(a) provides that leave to amend a complaint "shall be freely given when justice so requires." It is within the sound discretion of the court whether to grant leave to amend. *See Foman v. Davis,* 371 U.S. 178, 182 (1962). Leave to amend may be denied in cases of undue delay, bad faith, dilatory motive, failure to cure deficiencies in previous amended complaints, undue prejudice to the opposing party, or futility of the amendment. *See Hemphill v. Schott,* 141 F.3d 412, 420 (2d Cir.1998) (citing *Foman,* 371 U.S. at 182).

***20** Plaintiffs have filed two complaints, and have set forth numerous other factual allegations in their opposition to this motion to dismiss. Nonetheless, plaintiffs have failed to survive the present motion, and there is no indication based on the facts alleged thus far that plaintiffs will be able to make out a colorable claim for relief. Thus, because I find that it would be futile and a waste of judicial resources to allow further amendment, leave to amend and replead is denied.

CONCLUSION

For the reasons set forth above, the complaint is dismissed with prejudice as to the School Board defendants, the Commissioner, and the CSEA. The Clerk is advised that the only remaining defendant is Robert S. Abrams.

So Ordered.

All Citations

Not Reported in F.Supp.2d, 2000 WL 134346

Footnotes

1 Plaintiffs present their case as a class action, in which the named plaintiffs appear on behalf of all similarly situated resident taxpayers within the CIUFSD.

2 The individual School District defendants consist of Howard M. Koenig, Margaret Spach, Fred Philips, Sandra Townsend, Helen Brannon, Joseph Leoncavallo, Daniel M. Devine, Barbara Goldstein, Nick Nicholas, Ralph Borzello, Manual Ramos, and Jerry Jackson.

3 Pursuant to a Stipulation and Order signed by the Court on July 15, 1997, plaintiffs' claims against Jacob S. Feldman have been dismissed with prejudice.

4 Robert S. Abrams has neither answered the complaint nor moved to dismiss. Abrams is thus in default.

5 Plaintiffs do not explicitly set forth a separate cause of action under the Rehabilitation Act. However, in support of their claim under New York Municipal Law, plaintiffs allege that certain School Board defendants have engaged in illegal actions that violated the Rehabilitation Act. (Compl.¶ 113.) In light of the obligation to construe plaintiffs' complaint liberally, I will treat it as alleging a separate claim under the Rehabilitation Act.

6 The precise scope of the School Board defendants' argument regarding subject matter jurisdiction is less than clear. At one point in their brief the School Board defendants state that this Court lacks jurisdiction only over plaintiffs' "tax claims." (Bd. of Ed. Mem. at 3.) Subsequently, they state that this Court "lacks jurisdiction to hear plaintiff's [sic] action," and "lacks subject matter jurisdiction over plaintiff's [sic] claims." (Bd. of Ed. Mem. at 9.) I construe the latter statements as arguing that this Court lacks subject matter jurisdiction over all of plaintiffs' claims.

7 By contrast, this Court retains jurisdiction over plaintiffs' claims that the educational services available in the CIUFSD violate federal law and warrant declaratory relief against the Commissioner. As the Second Circuit has noted, "[u]nder *Ex parte Young,* 209 U .S. 123 (1908), acts of state officials that violate federal constitutional rights are deemed not to be acts of the state and may be the subject of injunctive or declaratory relief in federal court." *Berman Enters., Inc. v. Jorling,* 3 F.3d 602, 606 (2d Cir.1993). In addition, because plaintiffs' claim under 42 U.S.C. § 1983 seeks damages from the Commissioner in his individual rather than his official capacity, the Eleventh Amendment does not preclude that claim. *See Berman,* 3 F.3d at 606 (refusing to dismiss § 1983 claim asserted against state officials in their individual capacities because "the mere fact that the state may reimburse them does not make the state the real party in interest. Whether or not a state would choose to reimburse an official for damages for constitutional harm he caused in his individual capacity is a matter of no concern to a federal court.")

8 The CSEA also contends that personal jurisdiction is lacking due to insufficient process and insufficient service of process, and because the caption of the complaint refers to an entity-the "Civil Service Employment Association of the Central Islip Union Free School District/Political Action Committee"-that does not exist. Because I am dismissing the complaint against the CSEA on other grounds, I do not reach these arguments.

9 The School Board defendants have challenged plaintiffs' standing only with regard to plaintiffs' claims for violation of General Municipal Law § 51, devaluation of personal and business property, failure to provide the required minimum level of education, and violation of Title VI.

10 The School District defendants argue that plaintiffs have failed to state a claim under the New York State Constitution, the Equal Protection clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, RICO, 42 U.S.C. §§ 1983 and 1985(3), and New York General Municipal Law § 51. The School District defendants do not explicitly argue that plaintiffs have failed to state a claim as to their remaining causes of action. However, this Court will address the sufficiency of the remaining claims *sua sponte. See Wachtler v. County of Herkimer,* 35 F.3d 77, 82 (2d Cir.1994) (affirming district court's dismissal of *pro se* complaint because, *inter alia,* "[t]he district court has the power to dismiss a complaint *sua sponte* for failure to state a claim, so long as the plaintiff is given notice and an opportunity to be heard .") (quotation marks and citations omitted). Here, the procedural concerns are satisfied because plaintiffs are on notice of three motions to dismiss under Rule 12(b)(6), have had the chance to submit opposing papers, and have participated in oral argument. *See id.* (requirements of notice and opportunity to be heard met by defendants' motion to dismiss, plaintiff's submission of written response, and opportunity for oral argument.).

11 The caption on the complaint lists only nine plaintiffs, but the portion of the complaint entitled "parties" lists generically (but does not name) twenty-three purported plaintiffs.

12 Plaintiffs also allege that the general inadequacies of schooling within the CIUFSD violate the "First Amendment rights of freedom of Association and Privacy, and Fifth Amendment rights of Due Process of Law." (Compl.¶ 1.) Plaintiffs have failed to provide any explanation as to how the Fifth Amendment has been violated; as such, that claim is dismissed. Plaintiffs' First Amendment claim appears to be based on the theory that New York "force[s students] into a system of education ... by its compulsory education law and further abridges their right to contract and association by the same vehicle." (Compl.¶ 60.) This claim is also without merit. As the Commissioner correctly points out, New York requires only that its students receive an education that meets state prescribed standards, not that such an education be provided by the state's public

schools. *See* N.Y. Educ. Law § 3204.1 ("A minor required to attend upon instruction ... may attend at a public school or elsewhere.")

13 These sections constitute Article 89 of the New York Education Law, which is entitled "Children with Handicapping Conditions."

14 BOCES apparently refers to the Board of Cooperative Education Services.

15 I also note that a plaintiff is required to exhaust administrative remedies before seeking relief under the IDEA, and that monetary damages are not an appropriate form of relief under the statutory scheme. *See Babicz v. School Bd.,* 135 F.3d 1420, 1421 (11th Cir.) (complaint alleging IDEA violation dismissed for failure to exhaust administrative remedies), *cert. denied,* 119 S.Ct. 53 (1998); *Sellers v. School Board,* 141 F.3d 524, 527 (4th Cir.) ("Tort-like damages are simply inconsistent with IDEA's statutory scheme."), *cert. denied,* 119 S.Ct. 168 (1998). Plaintiffs do not appear to have made any effort to obtain relief through the IDEA's administrative scheme, and appear to seek damages-pursuant to 42 U.S.C. § 1983-for the alleged violation of the IDEA. (Complaint ¶ 118(A).) Such defects provide further grounds for dismissing the IDEA claim.

16 The proper defendant in a Title VI action is also an entity, not an individual. *Jackson,* 951 F.Supp. at 1298. The only entity named by plaintiffs is the Board of Education of the CIUFSD. Thus, even if defendants had standing and had stated a claim upon which relief could be granted, the Title VI claim would be dismissed as to all defendants other than the Board.

17 On its face, the letter is addressed to the students themselves, not their parents. (Answer in Opposition to Motion to Dismiss Ex. 3.)

18 I base this interpretation, in part, on the fact that plaintiff is alleging a federal cause of action for fraud and other irregularities in a purely local election. The Fifth Circuit has noted that purely local elections are beyond the reach of Congressional regulation. *See United States v. Bowman,* 636 F.2d 1003, 1011 (5th Cir.1981) ("[U]nder the Constitution, Congress may regulate 'pure' federal elections, but not 'pure' state or local elections; when federal and state candidates are together on the same ballot, Congress may regulate any activity which exposes the federal aspects of the election to the possibility of corruption.") Accordingly, plaintiffs' only viable claim appears to be that the local elections deprived them of federal constitutional rights in violation of § 1983.

19 Given plaintiffs' failure to state a claim, I do not reach the School Board defendants' argument regarding qualified immunity.

20 The statute that is now codified as § 1985(3) was originally part of the Ku Klux Klan Act and was enacted to address conspiratorial efforts to undermine federal rights and impede Reconstruction. *See Great American Fed. Savings & Loan Ass'n v. Novotny,* 442 U.S. 366, 394 (White, J., dissenting). In *People by Abrams v. 11 Cornwell Co.,* 695 F.2d 34 (2d Cir.1982), *modified on other grounds,* 718 F.2d 22 (1983), the Second Circuit extended the protections of § 1985(3) to people with mental disabilities, noting that "[c]ases ... have been generous in applying § 1985(3) to nonracial classifications." 695 F.2d at 42. Other circuits have divided on whether § 1985(3) applies to discrimination against the handicapped. *Compare Lake v. Arnold,* 112 F.3d 682 (3d Cir.1997) (disabled within purview of § 1985(3)), *with D'Amato v. Wisconsin Gas Co.,* 760 F.2d 1474 (7th Cir.1985) (disabled not protected under § 1985(3)), and *Wilhelm v. Continental Title Co.,* 720 F.2d 1173 (10th Cir.1983) (same).

21 I also note that, with regard to those supposed predicate acts that are apparently grounded in fraud, plaintiffs have failed to comply with the pleading requirements of Federal Rule of Civil Procedure 9(b).