State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

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A copy of the administrative law judge's decision is enclosed.

This decision was mailed to the parties on APR 13 2010

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 01637-09
AGENCY DKT. NO. 380-12/08

ELIZABETH EDUCATION ASSOCIATION, ROSE CARRETO AND MARIA G. DEJESUS DIAS,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,
Respondent.

Aileen O'Driscoll, Esq., for petitioners (Zazzali, Fagella, Nowak, Kleinbaum and Friedman, attorneys)

Nicole Morgan, Esq., for respondent

Record Closed: March 22, 2010 Decided: April 12, 2010

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

Petitioners, the Elizabeth Education Association (the Association), Rose Carreto and Maria DeJesus Dias, assert that the respondent, the Elizabeth Board of Education

(the Board), has maintained class sizes that violate the provisions of N.J.A.C. 6A:13-3.1. Petitioners have filed for summary decision, and seek an order directing that the Board comply with the requirements of the regulation. The Board urges that this matter is not ripe for summary decision, and further asserts that the petitioners lack standing to bring their claims.

PROCEDURAL HISTORY

Petitioners filed their appeal before the Commissioner of Education (the Commissioner) on December 24, 2008. The Board filed an answer and the contested case was transmitted to the Office of Administrative Law (OAL) on February 6, 2009.

Several hearing dates were adjourned due to discovery concerns, and to afford the parties an opportunity to explore settlement. During the course of several status conferences with me, the drafting of a joint stipulation of facts was discussed, as it appeared that the salient facts were not in dispute. Both parties agreed that it was likely this matter could be decided via cross-motions for summary decision.

As early as July 9, 2009, I confirmed via letter to the parties that they were working cooperatively on a comprehensive stipulation of facts. Ongoing discovery concerns remained, however, and a September 23, 2009, hearing date was adjourned until March 22, 2010.

Via letter dated February 12, 2010, I was advised by counsel for the petitioners that settlement had not been reached, nor had the parties drafted a stipulation of facts. Counsel indicated that she sought leave to file a motion for summary decision. Via letter order dated February 18, 2010, I directed counsel for petitioners to file her motion, which she did on March 2, 2010. The Board filed its opposition to the motion on March 15, 2010. The petitioners replied to the Board's opposition on March 22, 2010, at which time the record closed.

FINDINGS OF FACT

The relevant facts are not in dispute and I **FIND** as follows:

The Elizabeth School District is a "high poverty school district." N.J.A.C. 6A:13-3.1(a).[1] The Association is the collective bargaining representative for professional staff employed by the school district. Petitioners Rose Carreto and Maria DeJesus Dias are taxpayers and residents of Elizabeth. Ms. Dias had a child who attended the Elizabeth Public Schools at the time the petition was filed, but who has since graduated. Ms. Carreto is also the President of the Association and a teacher in the district.

During the fall of 2008, the Association received complaints from its membership regarding large class sizes. In an effort to explore these concerns further, the Association surveyed teachers in grades kindergarten through twelve at the start of the 2008-2009 school year. The results of that survey are contained in Exhibit B to the certification of Association Representative Al Ramey. Mr. Ramey's research confirmed large class sizes at all levels of instruction. By way of example, two kindergarten teachers at School Number 28 reported class sizes of thirty-one students. At the middle school level, Mr. Mascari, a math teacher at School Number 15, reported a class size of thirty-one students. At Jefferson Arts High School, Art Teacher Mary Callahan reported a class size of forty-three students.

The Association brought the results of its research to the attention of district administration, was unable to receive a satisfactory response to its concerns, and this petition followed. Through discovery, the Board supplied the Association with data regarding class sizes during the 2008-2009 and 2009-2010 school years. This data accompanies petitioners' moving papers, and is too voluminous to recite here in its entirety. The following excerpts are representative of the Association's concerns, however:

[1] Elizabeth was previously denoted as an "Abbott District" in accordance with the provisions of N.J.A.C. 6A:10A-1 et seq. and N.J.A.C. 6A:10-1 et seq.

2008-2009 Data

The data supplied to the petitioners by the Board reflects, in part, the following relative to class sizes in November 2008:

1. At George Washington School, (School Number 1), Jasmine Lee's kindergarten class had an enrollment of twenty-three students. (Exhibit 4 to O'Driscoll certification, p. 505.)
2. At George Washington School (School Number 1), Shawneequa Torres's first grade class had an enrollment of twenty-four students. (Exhibit 4 to O'Driscoll certification, p. 505.)
3. At Winfield Scott School (School Number 2), three kindergarten and one first grade class had enrollments of twenty-two students. (Exhibit 4 to O'Driscoll certification, p. 508.)
4. At Joseph Battin School (School Number 4), two fourth grade classes had enrollments of twenty-four students. (Exhibit 4 to O'Driscoll certification, p. 512.)
5. At Benjamin Franklin School (School Number 13), two sixth grade classes had enrollments of twenty-seven students. (Exhibit 4 to O'Driscoll certification, p. 524.)
6. At the High School, over fifty ninth grade classes had enrollments in excess of twenty-four students. (Exhibit 4 to O'Driscoll certification, pp. 564-585.)

The data supplied to the petitioners by the Board reflects, in part, the following relative to class sizes in January 2009:

1. At the High School, over fifty ninth grade classes continued to have enrollments in excess of twenty-four students. (Exhibit 3 to O'Driscoll certification, pp. 299-320.)
2. At the High School, over fifty twelfth grade classes continued to have enrollments in excess of twenty-four students. (Exhibit 3 to O'Driscoll certification, pp. 368-392.)

2009-2010 Data

The data supplied to the petitioners by the Board reflects the following, in part, in regard to class sizes in November 2009 for grades pre-K through 8:

1. At George Washington School, (School Number 1), several classes in grades one through three had more than twenty-one students enrolled. (Exhibit 2 to O'Driscoll certification, p. 279.)
2. At George Washington School, (School Number One), a fifth grade class had twenty-four students enrolled. (Exhibit 2 to O'Driscoll certification, p. 279.)
3. At Mabel G. Holmes School (School Number 5), a fourth grade class had twenty-five students enrolled. (Exhibit 2 to O'Driscoll certification, p. 282.)

Board data confirms that there were numerous classes in grades nine through twelve as of December 2009 that had more that twenty-four students enrolled. The data supplied for the 2009-2010 school year at the High School broke enrollment down by subject matter. (Exhibit 1 to O'Driscoll certification.) Class sizes in excess of twenty-four students were noted in many academic subjects. For example, at the Admiral William F. Halsey, Jr. Leadership Academy, there were two Geometry classes with enrollments of twenty-nine students. (Exhibit 1 to O'Driscoll certification, p. 234.) At Elizabeth High School there were three Latin classes with more than twenty-four students. (Exhibit 1 to O'Driscoll certification, p. 275.)

The Board submitted the certification of counsel, who readily admits that several classes were over "the class size limit." The certification alludes to "discrepancies" in the data the Board supplied to the Association, but it appears that this is a reference only to the fact that not every class size exceeds the regulatory limits. The certification of counsel, and that of Assistant Superintendent of Schools Olga Hugelmeyer, both explain the fiscal constraints which necessitated large classes, and the diligent but unsuccessful efforts by the district to uniformly bring class sizes in compliance with regulatory requirements.

The certification of district teacher, Kathleen Wolfe, outlines the problems that are created by large class sizes. Her certification furthermore confirms that large class sizes continue to date in Elizabeth. Wolfe teaches visual arts at Edison High School and currently teaches a class with twenty-five students, and another with thirty. She states that there are not enough desks for her students nor space in the classroom to accommodate additional desks. Wolfe indicates that it is difficult for her to keep track of the students in her class, and that the large class size results in discipline problems, which force her to turn her focus away from instruction to classroom management. She has no time for individualized instruction or to even provide small-group assistance.

CONCLUSIONS OF LAW

The Board seeks relief pursuant to N.J.A.C. 1:1-12.5, which provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." The regulation mirrors R. 4:46-2(c), which provides that "[t]he judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party . . . offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (quoting Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)).

The "'judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" Brill, supra, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214.

I **CONCLUDE** that this matter is ripe for summary decision. There are no material disputed facts which require a plenary hearing, and the petitioners are entitled to judgment as a matter of law. Petitioners contend that the Board violated the requirements of N.J.A.C. 6A:13-3.1, which provides that class sizes in "high poverty" districts "shall not exceed 21 students in grades kindergarten through three, 23 in grades four and five, and 24 students in grades six through twelve." Exceptions are noted in the regulation for "some" physical education and performing arts classes, "where appropriate." The regulation further provides that if the district chooses to maintain lower class sizes in grades kindergarten through three, class sizes in grades four and five may not exceed twenty-five students. Elizabeth is a "high poverty" district within the intent of the regulation, and was previously "subject to N.J.A.C. 6A:10A and 6A:10" per N.J.A.C. 6A:13-3.1(c). It therefore was subject to the requirements of N.J.A.C. 6A:13-3.1(b) during the 2008-2009 and 2009-2010 school years.

In asserting that the Board maintains class sizes which contravene the express requirements of the regulation, the petitioners primarily rely not on anecdotal data, but rather, data supplied by the Board itself. The Board, in its opposition to the motion, merely offers explanations for its non-compliance. Those explanations reflect the harsh fiscal realities under which the district operates, rather than a willful disregard for the regulation and its requirements. Nonetheless, it is uncontroverted that numerous district class sizes during the 2008-2009 and 2009-2010 school years have exceeded the

regulatory limits.[2] I **CONCLUDE** that class sizes in the Elizabeth School District do not uniformly comply with the requirements of N.J.A.C. 6A:13-3.1.

Petitioners correctly urge that the requirements of N.J.A.C. 6A:13-3.1 are clear and unequivocal, requiring no analysis of the agency's regulatory intent. See Phillips v. Curiale, 128 N.J. 608, 618 (1992). Nonetheless, the intent behind the regulation is noteworthy, and serves to emphasize the seriousness of the Board's disregard of the regulation's express requirements. A "high poverty district" is defined by the regulation as one in which "40 percent or more of the students are 'at risk.'" N.J.S.A. 18A:7F-45 defines "at risk" students as those from households that are at or below the poverty level. In educational terms, the future of these students is "at risk," as is their ability to access an educational program that will free them from the cycle of poverty. The Department of Education has determined that smaller class sizes will create a learning environment in which these "at risk" students can achieve academic success. Accordingly, I **CONCLUDE** that it is appropriate to enter the relief sought by the petitioners and direct that the Board immediately comply with the requirements of N.J.A.C. 6A:13-3.1.

The Board's contention that the petitioners lack standing to assert the claims raised in the petition is unavailing. Standing is a "threshold justiciability determination whether the litigant is entitled to initiate and maintain an action before a court or other tribunal." In re Six-Month Extension of N.J.A.C. 5:91-1, 372 N.J. Super. 61, 85 (App. Div. 2004); Stubaus v. Whitman, 339 N.J. Super. 38, 47 (App. Div. 2001). In order to have standing, a party "must present a sufficient stake in the outcome of the litigation, adverseness with respect to the subject matter and a substantial likelihood that the party will suffer harm in the event of an unfavorable decision." In re Camden County, 170 N.J. 439, 449 (2002). In New Jersey we have a "venerable tradition" of liberally applying the standing criteria. Ridgewood Educ. Ass'n v. Ridgewood Bd. of Educ., 284 N.J. Super. 427, 430 (App. Div. 1995). This approach to standing is even more liberal within the State's administrative system. Reiman and Borough of Carteret v. New

[2] Petitioners correctly note that the subsequent to the filing of its petition, N.J.A.C. 6A:13-3.1 was amended. The petitioners also correctly note, however, that these amendments created no changes to the previously prescribed class size limitations.

Jersey State Dep't of Educ., EDU 8564-04, Initial Decision (August 26, 2005), aff'd, Commissioner (December 27, 2005), <http://lawlibrary.rutgers.edu/oal/search.html>.

Both Carreto and Dias are residents of Elizabeth, and taxpayers. Their status as taxpayers suffices to give these petitioners standing to bring their claims. Our courts have recognized "a broad right in taxpayers and citizens of a municipality to seek review of local legislative action without proof of unique financial detriment to them." Kozesnik v. Montgomery Twp., 24 N.J. 154, 177-78 (1957). The Ridgewood court held that "we see no reason why this State's historic liberal approach to the issue of standing . . . should not apply to taxpayer suits challenging the quasi-legislative actions of local boards of education." Ridgewood, supra, 284 N.J. Super. at 433.

Indeed, in Paterson Eastside High School Parent/Alumni Committee v. State Operated School District of the City of Paterson, EDU 11847-06, Initial Decision (May 30, 2007), adopted, Commissioner (July 13, 2007), <http://lawlibrary.rutgers.edu/oal/search.html>, the Commissioner relied on Ridgewood to uphold the standing of a parent committee and individual parent to challenge the district's appointment of a basketball coach. The status of the petitioners there, "as residents and taxpayers of Paterson who have expressed a strong interest in the workings of the high school," was deemed sufficient to give them standing to challenge the school district's actions. In Silverman v. Millburn Board of Education, 134 N.J. Super. 253 (Law Div. 1975), an analogous conclusion was reached by the court relative to a challenge brought by taxpayers to the closing of a school. The Silverman court noted that the taxpayer plaintiffs "represent their own personal interest and the public interest of the community," and thus were not "strangers to the dispute." Id. at 258.

In like measure, the petitioners here are not interlopers, but rather, have a legitimate interest in the orderly, efficient and legally sound administration of the Elizabeth Public Schools. Ms. Dias's interest could not be more direct, as her child attended the public schools, and did so at the time the petition was filed. I agree with the petitioners that the graduation of Dias's son does serve to limit her standing to bring the claims raised in the petition. Relative to Ms. Carreto, who is a taxpayer but also a district teacher, the Ridgewood court specifically upheld the standing of two individual

petitioning teachers there, citing their "professional status and involvement" in the subject matter of the litigation. Ridgewood, supra, 284 N.J. Super. at 432.

Moreover, the Association has standing to bring this claim on behalf of its membership. The Board's reliance on Bedminster Education Association v. Board of Education of the Township of Bedminster, EDU 6720-05, Initial Decision (March 23, 2006), <http://lawlibrary.rutgers.edu/oal/search.html> is misplaced. The Administrative Law Judge in Bedminster recognized a local teachers association's standing to challenge board action on behalf of district teachers, but dismissed the claims of the petition because the petitioning association could not demonstrate "a substantial likelihood of harm to its members arising from the complained of conduct." Ibid. Here, the Board correctly asserts that there is no statutory or regulatory basis for an award of damages to the petitioners. Nonetheless, the Board's non-compliance with class size requirements harms the members of the Association in very real ways. Teachers are being asked to deliver instruction in overcrowded classrooms, directly impacting their working conditions. Overcrowded classrooms furthermore may negatively impact the teaching performance of Association members, who are evaluated, in part, based on a review of "available indicators of student progress and growth toward program objectives." N.J.A.C. 6A:32-4.4. The certification of District Teacher Kathleen Wolfe emphasizes this point.

Petitioners correctly urge what where, as here, a question of significant public interest is presented even the slightest private interest suffices to establish standing. Loigman v Twp. Comm. of the Twp. of Middletown, 409 N.J. Super. 13, 27 (App. Div. 2009). Our courts have held that a petitioner's interest may be accorded proportionately less significance where it coincides with a strong public interest. N.J. State Chamber of Commerce v. N.J. Election Law Enforcement Comm'n, 82 N.J. 57, 68 (1980). The strong public interest in quality schools is incontrovertible.

Ultimately, the standing of these petitioners can be expressed in quite simple terms, however. If the citizens, parents and teachers of Elizabeth do not have standing to question the manner in which educational services are delivered to the children of Elizabeth, then who does? Petitioners correctly state that the voices of these children

"can only be heard" through their parents, through the concerned citizens and taxpayers of the City of Elizabeth, and through their teachers. I **CONCLUDE** that the Board's contention that petitioners lack standing is meritless.

ORDER

Based on the foregoing, it is **ORDERED** that the Board immediately comply with the requirements of N.J.A.C. 6A:13-3.1 relative to class size.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

OAL DKT. NO. EDU 01637-09

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 12, 2010
DATE

ELLEN S. BASS, ALJ

Date Received at Agency:

4-12-10

Date Mailed to Parties: APR 13 2010

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE