

ELIZABETH EDUCATION ASSOCIATION, :
ROSE CARRETO AND MARIA DEJESUS DIAS, :
 :
PETITIONERS, :
 :
V. : COMMISSIONER OF EDUCATION
, :
 :
BOARD OF EDUCATION OF THE CITY : DECISION
OF ELIZABETH, UNION COUNTY, :
 :
RESPONDENT. :

SYNOPSIS

Petitioning education association asserted that the respondent Board has maintained class sizes in excess of the limits provided in *N.J.A.C.* 6A:13-3.1, and filed a motion for summary decision. The Board avered that the matter is not ripe for summary decision, and further asserted that the petitioners lack standing to bring their claims.

The ALJ found that: the matter was ripe for summary judgment; Elizabeth is a “high poverty” district within the intent of *N.J.A.C.* 6A:13-3.1, and therefore subject to the class size requirements of the regulation; during the 2008-09 and 2009-10 school years, numerous district class sizes exceeded the regulatory limits, thereby failing to address the mandated needs of the district’s “at risk” students. The ALJ concluded that the Board’s contention that petitioners lack standing is meritless, and ordered that the Board immediately comply with the requirements of *N.J.A.C.* 6A:13-3.1 relative to class size.

The Commissioner concurred with the ALJ that petitioners have standing in this matter and adopted the Initial Decision as the final decision in this matter, finding unpersuasive the Board’s exception arguments regarding extenuating fiscal constraints.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

May 27, 2010

OAL DKT. NO. EDU 1637-09
AGENCY DKT. NO. 380-12/08

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of the Board and petitioners' reply thereto¹ – filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in making his determination herein.

The Board first excepts to the Administrative Law Judge's (ALJ) reliance in her decision upon 2008-09 enrollment data provided by the petitioners. This reliance was improper, it argues, because such data should have been excluded as moot since it deals with a school year which has already passed and the ALJ cannot rule prospectively. More significantly, it maintains, this data should have been excluded because the instant petition was filed on December 24, 2008, well into the start of the 2008-09 school year and, as such, deals with a school year which was in progress and is, therefore, irrelevant in determining whether the Board is currently in violation of class size mandates. (Board's Exceptions at 2)

¹ It is noted that petitioners' 22-page reply exception submission – transmitted to the agency via facsimile – included a copy of the 12-page Initial Decision in this matter. As the Initial Decision of the OAL is **always** a part of the record before the Commissioner, attachment of this document to subsequent submissions of the parties is superfluous and unnecessary.

Next the Board urges that the ALJ erroneously relied on the certification provided by Kathleen Wolfe as this certification was not submitted with petitioners' motion papers but, instead, was included with its reply to the Board's brief. Consequently, the Board did not have an opportunity to review and respond to this certification in its opposition to petitioners' motion papers. (*Ibid.*)

Continuing, the Board disagrees with the ALJ's ruling that this matter was ripe for summary decision because it avers a number of issues of material fact remain as to whether the Board has classes over the regulatory size limit. In this regard it argues:

While the Respondent does not dispute that it provided the Petitioners with documentation showing that some of its class rosters appear to be over the size limit, as the Respondent emphasized in its opposition papers, there is an ever-existing fluctuation of students in and out of the school district at any given time within the school year that make such rosters unreliable for purposes of calculating the number of students in every class within the entire district. In addition, the attendance records the Respondent attached to its opposition papers, records which the Judge failed to consider, demonstrate that a class roster does not provide an accurate assessment of the average class size in a school year, especially with respect to the middle schools and high schools, where classes are taught in "periods" throughout the day, as opposed to one teacher having the same class for an entire day.

Further, the New Jersey Administrative Code 6A:32-8.2 provides that school enrollment should be calculated by the "sum of the days present and absent of all enrolled students when schools were in session during the year, divided by the number of days schools were actually in session," something that was not done in this case. (Board's Exceptions at 4)

Finally, the Board maintains that the ALJ failed to consider the economic ramifications to the District – in this time of significant budget cuts – of compelling immediate compliance with class size limitations. (*Ibid.*)

In response, petitioners propose that the ALJ's reliance on 2008-09 class size data was entirely proper, notwithstanding the passage of time. They charge that the Board conveniently overlooks that the instant appeal was filed during the 2008-09 school year because

of excessively large classes. This class size trend continued in the 2009-10 school year and establishes the Board's clear violation of the regulation over the course of several academic years. (Petitioner's Reply Exceptions at 2)

As to the Board's objection to the certification of Kathleen Wolfe – petitioners offer that this document was submitted in response to respondent's opposition to summary decision which included certifications of Ms. Morgan and Assistant Superintendent Olga Hugelmeyer wherein they admit that class sizes were and are over the class size limit. The purpose of Ms. Wolfe's certification, they posit, was merely to provide a firsthand illustration of how excessive class sizes negatively impact the classroom atmosphere and a teacher's ability to perform his or her duties. (*Id.* at 2-3)

Petitioners dismiss as “preposterous” the Board's contention that this matter was not ripe for summary decision “based on the alleged ‘material fact as to whether the Respondent has class sizes that are actually over the limit.’” To the contrary, it points out:

As reflected in the class size data produced by the Board, it is undisputed that during the 2008-09 and 2009-10 school years, district class sizes have been over the limit allowed pursuant to *N.J.A.C.* 6A:13-3.1(a). Moreover, by its own admission, the Board has acknowledged that classes are too large. The Petitioners need not prove that each and every class size in the District is excessively large in order to establish a violation of the regulation. And there is ample evidence to clearly illustrate that excessive class sizes are rampant in grades kindergarten through twelfth. Even assuming that there is an inherent fluctuation of attendance within the District, it does not, and cannot explain, nor excuse the rampant violations that persist at all grade levels, and at nearly every single school in the District. (Petitioners' Reply Exceptions at 4-5)

Lastly, petitioners argue, “the Board's cry for sympathy and immunity from the class size requirements is likewise without merit.” Maintaining that the ALJ was insensitive to the Board's ability to comply with class size regulations due to fiscal restraints, it seeks that the instant petition be dismissed, claiming that it is not possible for it to comply. Petitioners submit

that class size regulations for high poverty districts like Elizabeth are clear on their face and the Board was and continues to be obligated to adhere to the stated requirements. Petitioners contend that the Board's own data clearly evidences that there have been and continue to be a large number of classes with an excessive number of students. They urge that the Board is responsible for complying with the regulations and neither the Court nor the Commissioner is duty bound to excuse the Board's violation simply because it claims to be under fiscal constraints. (Petitioner's Reply Exceptions at 5)

Upon his comprehensive review, and finding the Board's exception arguments unpersuasive, the Commissioner agrees with the ALJ – for the reasons presented on pages 9-12 of her decision – that petitioners have standing to bring this action. He further concurs with the ALJ that summary decision is appropriately granted to petitioners as the record clearly demonstrates that certain of the Board's class sizes during the 2008-09 and 2009-10 school years exceeded the regulatory limits of *N.J.A.C. 6A:13-3.1*.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter. The Board is hereby directed to immediately comply with the provisions of *N.J.A.C. 6A:13-3.1*.

IT IS SO ORDERED²

COMMISSIONER OF EDUCATION

Date of Decision: May 27, 2010

Date of Mailing: June 1, 2010

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*