

New Jersey Commissioner of Education

Final Decision

Tristin Goode, Doreen Blanchard-Gliebe; D.G., on behalf of minor child N.G.; T.A., on behalf of minor children, C.A., C.A., C.A., G.A., C.A., and T.A. and L.V., on behalf of minor children, E.V., K.V. and D.V.,

Petitioners,

v.

Board of Education of the Watchung Hills Regional School District, Somerset County,

Respondent.

Synopsis

Petitioning parents alleged that the respondent Board violated *N.J.S.A. 18A:33-1*, which requires school districts to provide “courses of study suited to the ages and attainments of all pupils,” by approving a twelfth-grade curriculum that includes as optional reading a book entitled Fun Home: A Family Tragicomic (Fun Home). Petitioners contended that the book contains obscene, age-inappropriate material that is ill-suited for the school curriculum. The Board filed a motion to dismiss the petition in lieu of filing an answer, arguing that the petition is time-barred pursuant to *N.J.A.C. 6A:3-1.3(i)* which requires petitions to be filed no later than 90 days from the date of the relevant Board decision.

The ALJ found, *inter alia*, that: pursuant to *N.J.A.C. 6A:3-1.3(i)*, a petition must be filed no later than the 90th day from the date of receipt of the notice of a final order or action that is the subject of the appeal; the “90 day rule” may only be relaxed in cases where strict adherence to the rule would be inappropriate or result in an injustice, or if there is a substantial constitutional issue involved; in the instant case, petitioners argued that they did not know that they could file an appeal with the Commissioner until they received the Superior Court’s June 10, 2019 order dismissing their complaint which sought to enjoin the Board from violating criminal statute *N.J.S.A. 2C:34-3* by “distributing to minors” the “obscene and pornographic” Fun Home, yet they subsequently failed to file the within petition until nearly six months later, on December 6, 2019; and it is unclear how exactly Fun Home’s placement in a twelfth-grade curriculum as an optional assignment violates the thorough-and-efficient-education clause of the New Jersey constitution and thus rises to the level of a “substantial constitutional issue” that would override the ninety-day rule. Accordingly, the ALJ concluded that petitioners failed to file a timely appeal and consequently declined to address any substantive issues in this matter.

The Commissioner concurred with the ALJ’s determinations herein and adopted the Initial Decision of the OAL as the final decision in this case. The petition was dismissed.

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.

New Jersey Commissioner of Education

Decision

Tristin Goode, Doreen Blanchard-Gliebe; D.G., on behalf of minor child N.G.; T.A., on behalf of minor children, C.A., C.A., C.A., G.A., C.A., and T.A. and L.V., on behalf of minor children, E.V., K.V. and D.V.,

Petitioners,

v.

Board of Education of the Watchung Hills Regional School District, Somerset County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions. Upon such review, the Commissioner concurs with the Administrative Law Judge that the petition should be dismissed because it was filed outside of the 90-day limitation period set forth in *N.J.A.C. 6A:3-1.3(i)*. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons stated therein, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.¹


ANGELINA ALLEN McMILLAN, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 13, 2021
Date of Mailing: December 14, 2021

¹ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A. 18A:6-9.1*. Under *N.J.Ct.R. 2:4-1(b)*, a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING
MOTION FOR SUMMARY
DECISION

OAL DKT. NO. EDU 00592-20

AGENCY DKT. 314-12/19

TRISTIN GOODE;
DOREEN BLANCHARD-GLIEBE;
D.G. ON BEHALF OF MINOR CHILD N.G.;
T.A. ON BEHALF OF MINOR CHILDREN C.A.,
C.A., C.A., G.A., C.A., AND T.A.; AND
L.V. ON BEHALF OF MINOR CHILDREN E.V., K.V., AND D.V.,

Petitioners,

v.

BOARD OF EDUCATION,
WATCHUNG HILLS REGIONAL SCHOOL DISTRICT,
SOMERSET COUNTY,

Respondent.

Demetrios K. Stratis, Esq., appearing for petitioners Tristin Goode; Doreen Blanchard-Gliebe; D.G. on behalf of minor child N.G.; T.A. on behalf of minor children C.A., C.A., C.A., G.A., C.A., and T.A.; and L.V. on behalf of minor children E.V., K.V., and D.V. (Ruta, Soulios & Stratis, attorneys)

Erik Harrison, Esq., appearing for respondent Board of Education, Watchung Hills Regional School District (Methfessel & Werbel, attorneys)

Record Closed: December 7, 2020

Decided: November 5, 2021

BEFORE **SUSAN M. SCAROLA**, ALJ:

STATEMENT OF THE CASE

The petitioners, five individual parents of children who attend or attended school in the Watchung Hills Regional School District,¹ allege that the respondent, the Board of Education of the Watchung Hills Regional School District (Board), violated N.J.S.A. 18A:33-1, which requires school districts to provide “courses of study suited to the ages and attainments of all pupils,” by approving a twelfth-grade curriculum that includes as optional reading Alison Bechdel’s graphic memoir entitled Fun Home: A Family Tragicomic (Fun Home), which includes comic illustrations and in which the author chronicles her early struggles with her sexual identity as a lesbian and her complicated relationship with her gay father. According to petitioners, the book contains obscene, age-inappropriate material that is ill-suited for the curriculum.

In response, the Board has moved to dismiss the petition in lieu of filing an answer on the basis that petitioners failed to file their challenge within ninety days of the relevant Board decision, as required by N.J.A.C. 6A:3-1.3(i).

PROCEDURAL HISTORY

On December 6, 2019, the petition was filed with Commissioner of the Department of Education. The District responded by filing a motion to dismiss in lieu of an answer, contending that because the petitioners had failed to file their petition within the ninety-day limitation required under N.J.A.C. 6A:3-1.3(i), dismissal was required.

The matter was transmitted to the Office of Administrative Law, where it was filed as a contested case on January 13, 2019 [sic, 2020]. N.J.S.A. 52:14B-1 to -15; N.J.S.A.

¹ The petitioners are Tristin Goode and Doreen Blanchard, individually; D.G., on behalf of her child N.G.; T.A. on behalf of her six children; and L.V. on behalf of her three children.

52:14F-1 to -13. On June 19, 2020, the petitioners filed a response to the motion in which they contend that the petition is not time barred, and that even if the time limits had been exceeded, the issue is of such importance that the rule should be relaxed to permit the matter to go forward. Supplemental responses were received from the parties on December 2, December 4, and December 7, 2020, when the record closed.²

STATEMENT OF FACTS³

On November 7, 2017, the Board ostensibly approved a revised curriculum resolution that added Fun Home to the twelfth-grade English curriculum. Board Ex. E. While it may be accurate to say that the Board did, in fact, resolve to add Fun Home to the curriculum at that meeting, the meeting minutes provided by the Board in support of its motion to dismiss simply state “RESOLVED, the Board of Education approves the curriculum for the courses as per the attached list”; however, there is no list attached to the minutes, and the Board has not otherwise submitted a list showing that Fun Home was added to the curriculum at its November 7, 2017, meeting. Ibid.

Nonetheless, it is not disputed that the Board distributed Fun Home to certain students in spring 2018. At the Board’s May 22, 2018, meeting, several parents voiced their concern about sexually explicit material contained in the book. Board Ex. F. One parent asked the Board and the district’s superintendent about the process to remove the book from the curriculum. Ibid. In response, the Board’s president, Peter Fallon, stated, “[w]e don’t have that set out in a particular policy,” but encouraged the parent to come to the next Board meeting, if, after speaking with certain district personnel, the parent’s concerns were not allayed. Petitioners’ Ex. B. The district’s superintendent, Elizabeth Jewett, advised, “if you do not want your child to participate in a certain part of the curriculum, we have a process for that.” Ibid.

At the next Board meeting on June 5, 2018, the Board again allowed for public comment on the inclusion of Fun Home in the curriculum. Board Ex. G. Prior to public

² This decision was delayed in filing by a personal extended medical emergency and the COVID-19 pandemic.

³ The facts are gleaned from the exhibits of both parties.

comment, Mr. Fallon and Ms. Jewett made statements regarding Fun Home. Ibid. Mr. Fallon acknowledged that the Board had recently received many emails and phone calls from parents about the book. Ibid. He explained that Fun Home was added to the curriculum as part of a five-year strategic plan that the Board had implemented in part to “enhance the social and emotional wellness of all students within a compassionate learning community.” Ibid.

He clarified that Fun Home was optional reading, such that if students “are uncomfortable with the content or the images in the book, they can opt out of reading the book and another book will be assigned.” Ibid. He also stated, “approval of the curriculum for the next school year is not on our Meeting Agenda for tonight.” Ibid. He surmised that “[i]t is possible that after listening to your comments tonight some Board members may want to revisit that and discuss whether or not the current curriculum—which does include [Fun Home—should be revised,” but he also advised that absent such revision by the Board, “the next time this will be considered would likely be next January, when the Board typically is asked to approve or disapprove of the entire curriculum.” Ibid.

Mr. Fallon directed “those of you who find the images [in the book] offensive” to Board Policy No. 2240, which pertains to “Controversial Issues.” Ibid. That policy states that “[a]ll complaints about instructional material directed to the [Board] must be in writing,” and advises that the Board has the “ultimate responsibility to decide on the educational materials to be used.” Petitioners’ Ex. E.

Ms. Jewett then gave a statement on the district’s reasoning for including the book in the curriculum. Board Ex. E. She explained that “[w]e chose Fun Home to advance our goals for thoughtful, contextualized literary reading and to expand the LGBTQ voices in our curriculum.” Ibid.

Thereafter, several members of the public made comments, some in favor of the book, but many in opposition to the inclusion of Fun Home in the curriculum. Ibid.

After public comment, Ms. Jewett announced that “the English supervisor will be working with members of the English department this summer to select additional titles to

add to the LGBTQ literature unit of study in addition to . . . Fun Home,” and that “[t]his will allow students to have several options from which to choose one work to read during the LGBTQ literature unit.” Ibid. She stated that she anticipated “the additional titles being shared with the [Board’s] Education Committee in September and subsequently being recommended to the full Board for approval at our September or early October board meeting.” Ibid.

At its September 6, 2018, meeting, the Education Committee ultimately approved the addition of two other books that students could choose if they did not want to read Fun Home. Board Ex. K.

At a September 11, 2018, Board meeting, a parent presented the Board with a petition signed by 650 parents and community members urging the Board to remove Fun Home from the curriculum. Petitioners’ Ex. F.

On September 29, 2018, petitioner Tristin Goode emailed her concerns about Fun Home to the Somerset County executive superintendent, Roger Jinks. Board Ex. L. She asked that Mr. Jinks “address our concerns regarding the apparent criminal offense posed by requiring this book to be read by students under age 18.” Ibid. She stated that “[a]n expedited response is requested, since if this curriculum is approved at the next [Board] meeting on October 2, 2018, the book will be included in the current Class of 2019 curriculum.” Ibid.

In response, Mr. Jinks stated, “[t]he selection of materials to implement the curriculum is in the discretion of the school district,” and “[p]lease continue to share your concerns with the board of education.” Ibid. He also advised Ms. Goode to “address this [criminal] issue with your county prosecutor’s office.” Ibid.

On October 2, 2018, the Board approved the inclusion in the curriculum of Fun Home and the two alternative books recommended by the Education Committee. Board Ex. M.

On May 3, 2019, several of the petitioners in this matter filed a verified complaint against the Board in the New Jersey Superior Court, Chancery Division, seeking to enjoin the Board from violating criminal statute N.J.S.A. 2C:34-3 by “distributing to minors” the “obscene and pornographic” Fun Home. Board Ex. N. On June 10, 2019, the court dismissed the complaint for several reasons, including the complainants’ failure to exhaust their administrative remedies with the Commissioner of Education. Board Ex. O.

According to petitioners, “[i]n July and August 2019, the lawsuit participants, following the order of the Court, worked with the staff of the Commissioner of Education to set a date to meet with the Commissioner to have our dispute heard.” Petition, ¶ 13. Petitioners met with staff on September 23, 2019, and “[t]hey then were made aware of the procedure to follow to have the dispute formally heard by the Commissioner.” Ibid.

On December 6, 2019, petitioners filed with the Commissioner of Education this petition seeking to remove Fun Home from the curriculum. On December 26, 2019, the Board filed a brief in support of its motion to dismiss in lieu of an answer in accordance with N.J.A.C. 6A:3-1.5(g).

According to the Board, the petition should be dismissed as untimely under N.J.A.C. 6A:3-1.3(i), also known as the “ninety-day rule,” which requires a petitioner who seeks to challenge a school board’s action to file a petition with the Commissioner of Education “no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education.” The Board argues that the December 6, 2019, petition should be dismissed because the petitioners failed to file their petition within ninety days of the Board’s initial decision to add Fun Home to the curriculum on November 7, 2017, or within ninety days of the Board’s decision on October 2, 2018, to revise the curriculum to add two other books from which students could choose to read instead of Fun Home.

The Board alternatively argues that good cause does not exist to relax the ninety-day rule, and questions the standing of several of the petitioners.

In opposition to the Board's motion, petitioners contend that the ninety-day rule should be relaxed because this matter implicates significant questions of public interest and constitutionality with respect to whether certain material in Fun Home is obscene and the book should be removed from the curriculum. Petitioners further argue that the ninety-day rule should not apply to this matter because the Board's action in including the book in the curriculum was not limited to certain votes taken in 2018, as the Board votes on the curriculum on a yearly basis, and thus the repeated inclusion of Fun Home in the curriculum "involves an ongoing violation" that should be subject to the Commissioner's review.

Petitioners also submit that the ninety-day rule should not apply here because the Board misled petitioners by advising them of the incorrect policy for seeking removal of the book from the curriculum. Specifically, the Board directed parents who wished to have Fun Home removed from the curriculum to seek redress through Board Policy No. 2240, which pertains to "Controversial Issues"; however, the appropriate policy is No. 9130, "Public Complaints and Grievances," which sets forth the procedure for "complaints about instructional or resource materials" and for the Board's determination of whether "challenged material may be removed from the curriculum." Petitioners' Ex. D.

That policy further provides that, upon receipt of a written complaint, "[t]he Superintendent shall appoint a committee of professional staff members and community representatives to review the challenged material against the standards for the selection of resource materials established by Board policy." Ibid. The committee would then report its findings to the Board and, if the Board ultimately decides not to remove challenged material from the curriculum, "[a] complainant shall be notified that a decision of the Board may be appealed to the Commissioner of Education." Ibid. Petitioners argue that the Board's failure to advise them of this policy caused a delay in the filing of the petition such that the ninety-day rule should be relaxed.

Finally, the parties dispute whether, even if the matter is not dismissed pursuant to the ninety-day rule, the Board's decision to include Fun Home in the curriculum was arbitrary and capricious and in violation of N.J.S.A. 18A:33-1.

LEGAL ANALYSIS AND CONCLUSION

Under the “rules of procedure for the filing of petitions with the Commissioner of Education to hear and decide controversies and disputes arising under school laws,” N.J.A.C. 6A:3-1.1 to -1.17, “[t]he petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education, individual party, or agency, that is the subject of the requested contested case hearing.” N.J.A.C. 6A:3-1.3(i). The rules further provide that a respondent may file a motion to dismiss in lieu of an answer to a petition. N.J.A.C. 6A:3-1.5(g). Such motion may be made “on the grounds that the petitioner has advanced no cause of action even if the petitioner's factual allegations are accepted as true or for lack of jurisdiction, failure to prosecute or other good reason.” N.J.A.C. 6A:3-1.10.

Here, the Board has filed a motion to dismiss in lieu of an answer to the petition on the grounds that the petition is untimely under the ninety-day rule, N.J.A.C. 6A:3-1.3(i). As the Supreme Court has explained, the ninety-day rule serves the dual purposes of (1) “stimulat[ing] litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims” and (2) “penaliz[ing] dilatoriness and serv[ing] as a measure of repose by giving security and stability to human affairs.” Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 587 (1993) (citations and quotations omitted).

The ninety-day rule may be “relaxed or dispensed with . . . in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice,” or if there is “the presence of a substantial constitutional issue or other issue of fundamental public interest beyond that of concern only to the parties themselves.” N.J.A.C. 6A:3-1.16; Balwierczak v. Bd. of Educ. of Berkeley Heights, 1999 N.J. AGEN LEXIS 1367 (Dec. 8, 1999).

The ninety-day rule has been relaxed in several cases. For example, in D’Alessandro v. Board of Education of Middletown, 1986 S.L.D. 2496, although a teacher untimely filed his petition alleging that the school board had adopted a discriminatory affirmative-action policy, the Commissioner relaxed the ninety-day rule “in the interest of

justice” because “if the facts of this case are as petitioner alleges, then, potentially, the situation could constitute a continuing violation . . . in permitting a potentially illegal discriminatory practice to continue in perpetuity,” absent a review by the Commissioner. Id. at 2514, 2515.

In Newark Teachers Union Local 481 v. State-Operated School District of Newark, 2016 N.J. AGEN LEXIS 502 (May 12, 2016), in a case involving the layoff of forty-six attendance officers responsible for monitoring and locating truant students, the Commissioner deemed relaxation of the ninety-day rule appropriate due to “the importance of attendance.”

Lastly, in C.G. & R.G. ex rel. R.M.G. v. Board of Education of Brick, EDU 2375-05 (State Bd. of Educ. July 19, 2006), in which parents sought to challenge the grade their child received in an English class, the State Board of Education relaxed the ninety-day rule because the parents twice sought help from the Department of Education in filing an appeal within the relevant limitations period but were given insufficient guidance.⁴

Here, there are two relevant Board actions for purposes of the ninety-day rule. The first is the Board’s November 7, 2017, vote to add Fun Home to the curriculum; the second is the Board’s October 2, 2018, decision to keep Fun Home in the curriculum, but to make the book optional reading by offering two other books from which twelfth-grade students could choose. Petitioners filed their petition on December 6, 2019, well more than ninety days from either Board decision. However, the papers submitted in support of and in opposition to the Board’s motion reveal that petitioners’ late filing was not entirely without excuse.

First, the minutes from the November 7, 2017, meeting in which the Board added Fun Home to the curriculum state that the Board approved “the curriculum for the courses as per the attached list”; however, there is no list attached to the minutes, and the Board has not otherwise submitted a list showing that the public was then put on notice that Fun Home was added to the curriculum. As the Court stated in Kaprow, “[a]dequate notice”

⁴ This decision is available at <https://www.nj.gov/education/legal/sboe/index.shtml>.

to trigger the ninety-day limitations period “must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate.” Kaprow, 131 N.J. at 587. Because the November 7, 2017, meeting minutes do not reflect that the public, including petitioners, were given adequate notice of the Board’s decision to add Fun Home to the curriculum, the Board’s November 7, 2017, decision cannot be said to have started the ninety-day clock to challenge the Board’s decision and to seek the removal of the book from the curriculum.

Moreover, it appears from the record that the Board misinformed the public at subsequent meetings of the proper procedure to use, and that this misinformation also could have delayed the filing of the instant petition. Specifically, at the Board’s May 22, 2018, meeting, in response to a parent who asked how to pursue the removal of Fun Home from the curriculum, Mr. Fallon, the Board president, stated, “[w]e don’t have that set out in a particular policy,” and Ms. Jewett, the superintendent, advised, “if you do not want your child to participate in a certain part of the curriculum, we have a process for that.” Then, at the June 5, 2018, Board meeting, Mr. Fallon advised parents who objected to Fun Home to seek redress under Board Policy No. 2240, “Controversial Issues,” which states that “[a]ll complaints about instructional material directed to the [Board] must be in writing,” and that the Board has the “ultimate responsibility to decide on the educational materials to be used.”

However, as petitioners point out, it is Board Policy No. 9130, and not Board Policy No. 2240, that sets out the procedure for seeking the removal of material from the curriculum. Board Policy No. 9130, “Public Complaints and Grievances,” includes the procedure for “complaints about instructional or resource materials” and for the Board’s determination of whether “challenged material may be removed from the curriculum.” That policy provides that, upon receipt of a written complaint, “[t]he Superintendent shall appoint a committee of professional staff members and community representatives to review the challenged material against the standards for the selection of resource materials established by Board policy.” The committee would then report its findings to the Board and, if the Board ultimately decided not to remove challenged material from the curriculum, “[a] complainant shall be notified that a decision of the Board may be appealed to the Commissioner of Education.”

Petitioners' argument that the Board caused a delay in the filing of this appeal by directing the public, including petitioners, to Board Policy No. 2240, and not to Board Policy No. 9130, has some merit. It seems clear that Board Policy No. 9130 governs the removal of material from the curriculum, and the policy clearly states that at the end of the process, the Board has an affirmative duty to notify a complainant that he or she may appeal the Board's decision not to remove material from the curriculum to the Commissioner of Education. If Mr. Fallon had properly referred those who objected to Fun Home to Board Policy No. 9130, and not Board Policy No. 2240, petitioners could have filed a written complaint with the Board; the superintendent would have formed a committee that included members of the public; and if the Board thereafter declined to remove Fun Home, the Board would have had to inform any complainants of their appeal rights. That certainly would have triggered the ninety-day limitations period. However, because the Board misinformed the public about the relevance of that policy, the Board is not without fault with respect to petitioners' delayed filing.

The record further shows that one of the petitioners, Tristin Goode, sought redress from the Somerset County executive county superintendent of schools Roger Jinks prior to the Board's October 2, 2018, meeting. The superintendent was asked to "address our concerns regarding the apparent criminal offense posed by requiring this book to be read by students under age 18." In response, Mr. Jinks stated, "[t]he selection of materials to implement the curriculum is in the discretion of the school district," and "[p]lease continue to share your concerns with the board of education." He also advised Mr./Ms. Goode to "address this [criminal] issue with your county prosecutor's office." Whether Mr. Jinks had a duty or not, he did not inform Mr./Ms. Goode of the potential right to seek redress from the Commissioner of Education if, at the October 2, 2018, meeting, the Board had approved a curriculum including Fun Home. As in C.G., this interaction with Mr. Jinks also could have delayed a filing of an appeal with the Commissioner, as Mr. Jinks advised Mr./Ms. Goode to seek redress instead from a county prosecutor.

It appears that this was followed when Tristin Goode and others filed a verified complaint in Superior Court, Chancery Division, on May 3, 2019, seeking to enjoin the Board from violating criminal statute N.J.S.A. 2C:34-3 by "distributing to minors" the "obscene and pornographic" Fun Home. However, on June 10, 2019, the court dismissed

the complaint for several reasons, including the complainants' failure to exhaust their administrative remedies. In dismissing the complaint, the court stated that "the Commissioner [of Education] has special expertise on matters regarding curriculum, and what is or is not appropriate curricular material for 12th grade English students."

However, even if the foregoing could serve as good cause to relax the ninety-day rule, such that petitioners did not receive adequate notice of the Board's initial decision to add Fun Home to the curriculum; that they were misinformed of the proper procedure to seek the removal of Fun Home under Board Policy No. 9130; that they were misinformed by the executive county superintendent of their right to seek redress from the Commissioner; and that they did not know that they could file an appeal with the Commissioner until they received the court order dismissing their complaint on June 10, 2019, no reason has been presented as to why the petitioners waited until December 6, 2019, nearly six months after the court order, to file an appeal with the Commissioner.

Certainly, as a party to that judicial matter, the Board reasonably could have expected petitioners to file an appeal with the Commissioner upon the dismissal of the verified complaint. And if petitioners had done so within ninety days of June 10, 2019, perhaps a stronger argument for relaxation could have been made.⁵ However, petitioners still waited almost six months after the Superior Court order to file their petition. While petitioners state that they first contacted the Commissioner about filing an appeal in July or August 2019, there comes a point at which petitioners can no longer blame others for their dilatoriness and must take required action on their own. To be sure, a simple internet search would have directed petitioners to the Department of Education's website, which clearly sets forth the procedures for filing an appeal.⁶

As such, the ninety-day rule should not be relaxed or dispensed with since, under these circumstances, strict adherence to the rule would not be inappropriate. The fact

⁵ The filing of a Superior Court action does not toll the ninety-day period for filing an appeal with the Commissioner. Semprevivo v. Bd. of Educ. of the Pinelands Reg'l Sch. Dist., EDU 6386-09, Initial Decision (Dec. 8, 2009), adopted, Comm'r (Jan. 15, 2010), available at <https://njlaw.rutgers.edu/collections/oal>. However, given the misinformation received by petitioners from the Board and the executive county superintendent, it may be considered that the petitioners' delayed filing could have otherwise been excused.

⁶ See Controversies and Disputes, <https://www.nj.gov/education/cd/faq>.

that one month *after* the filing of this petition the Board again voted to approve a curriculum that included Fun Home also does not save the petition from dismissal as untimely, nor can the Board's continued approval of the book constitute an ongoing violation. See N. Plainfield Educ. Ass'n v. Bd. of Educ. of N. Plainfield, 96 N.J. 587 (1984) (holding that teachers who untimely filed an appeal regarding salary credit could not claim that "the withholding of [an] increment constitute[d] a continuing violation" because "[s]uch a claim, which is associated with the assertion of discrimination in employment, has no relevance to this case").

The ninety-day rule should also not be relaxed or dispensed with because, contrary to petitioners' arguments, this case does not involve a "substantial constitutional issue" or a "fundamental public interest." First, petitioners have failed to articulate how this matter involves a "substantial constitutional issue." Petitioners generally allege that the inclusion of Fun Home in the curriculum conflicts with the thorough-and-efficient-education clause of the State Constitution, such that "the 90-day rule should not be applied to prevent the Commissioner from reviewing the suitability of this book in the high school classroom as required in the fulfillment of his constitutional mandate."⁷ Petitioners also argue that "the 90-day rule should be dispensed with in cases such as this where a school board has run roughshod over parents' rights to direct the education of their children and to protect them from exposure to obscene and otherwise inappropriate material."

To raise a constitutional claim, a party "must have suffered, or may presently suffer, a direct impairment of his *own* constitutional rights." Trombetta v. Mayor & Comm'rs of Atl. City, 181 N.J. Super. 203, 222 (Law. Div. 1981). Petitioners have not articulated how an optional book directly impairs their children's constitutional right to a thorough and efficient education or their right to make decisions regarding their children's upbringing. Petitioners argue that the inclusion of Fun Home in the curriculum somehow offends the thorough-and-efficient-education clause because the book "is riddled with numerous sexually explicit illustrations and narrative accounts and promotes adult themes and erotic and other age-inappropriate literature throughout." It is unclear how

⁷ Under the New Jersey State Constitution, the "Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." N.J. Const. art. VIII, § 4, ¶ 1.

exactly Fun Home's placement in a twelfth-grade curriculum as an optional assignment violates the thorough-and-efficient clause and thus rises to the level of a "substantial constitutional issue" that would override the ninety-day rule.

And while "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children," there are "certain circumstances [in which] the parental right to control the upbringing of a child must give way to a school's ability to control curriculum and the school environment." Troxel v. Granville, 530 U.S. 57, 66 (2000); C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 182 (3d Cir. 2005).

In Smith v. Ricci, 89 N.J. 514 (1982), the New Jersey Supreme Court upheld a State regulation that required local school boards "to develop and implement a family life education program in the public elementary and secondary curricula." Id. at 516. In that case, a group of parents "contend[ed] that such a program impinges upon the free exercise of their religion and constitutes an establishment of religion in violation of the United States Constitution." Ibid. In particular, the parents argued that through the teaching of family life and human sexuality "children will be exposed to attitudes, goals, and values that are contrary to their own and to those of their parents, and will thereby be inhibited in the practice of their religion." Id. at 520–21. However, because the regulation included an "excusal clause," the Court stated that "[w]hether or not [the parents' argument was] well-reasoned we need not now decide, for we believe that the simple fact that parents can remove their children from any objectionable part of the program is dispositive." Id. at 521. That is, "if the program violates a person's beliefs, that person is not required to participate." Ibid. Thus, "[w]here there is no compulsion to participate in this program, there can be no infringement upon appellants' rights freely to exercise their religion." Ibid.

Here, as in the family life program in Smith, Fun Home is optional. Any twelfth-grade student who finds the book objectionable need not read it. Thus, there is no "substantial constitutional issue" involving the thorough-and-efficient clause or a parent's right to control their children. The unproven fear that "there is no way [to] reasonably prevent Fun Home's obscene images from being viewed by other children in the school

or on the bus or even by young siblings at home,” as petitioners argue, is also an unavailing claim for dispensing with the ninety-day rule.⁸

Finally, petitioners maintain that relaxation is appropriate because of the “[p]ublic interest in protecting children from inappropriate, sexually explicit, illicit and otherwise harmful material.” While it appears that 650 parents and community members signed a petition asking the Board to remove Fun Home from the curriculum, and these numbers reflect a public interest beyond petitioners’ private interest, “the greater public interest in this matter lies with enforcement of the 90-day rule and dismissal of petitioner[s]’ appeal as untimely.” Le Mee v. Bd. of Educ. of Ridgewood, 1990 S.L.D. 671, 673. There is no “fundamental public interest” in the inclusion of an optional reading assignment in a twelfth-grade curriculum as was seen in D’Alessandro or Newark Teachers Union.

N.J.S.A. 18A:33-1 empowers a school board to provide “courses of study suited to the ages and attainments of all pupils,” and further provides that “no course of study shall be adopted or altered except by the recorded roll call majority vote of the full membership of the board of education of the district.” An action by a board of education “is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable.” Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965). If petitioners had wished to challenge the Board’s decision, they should not have waited more than a year to file this appeal in violation of the ninety-day rule, which is designed to “stimulate litigants to pursue

⁸ It should be noted that N.J.S.A. 18A:35-4.35 became effective January 31, 2019, and provides that the history of disabled and LGBT persons be included in the middle- and high-school curriculum. “A board of education shall include instruction on the political, economic, and social contributions of persons with disabilities and lesbian, gay, bisexual, and transgender people, in an appropriate place in the curriculum of middle school and high school students as part of the district’s implementation of the New Jersey Student Learning Standards.”

N.J.S.A. 18A:35-4.36, effective the same date, provides for the policies and procedures pertaining to inclusive instructional materials. “A board of education shall have policies and procedures in place pertaining to the selection of instructional materials to implement the requirements of section 1 [C.18A:35-4.35] of this act. When adopting instructional materials for use in the schools of the district, a board of education shall adopt inclusive instructional materials that portray the cultural and economic diversity of society including the political, economic, and social contributions of persons with disabilities and lesbian, gay, bisexual, and transgender people, where appropriate.”

a right of action within a reasonable time” and “penalize dilatoriness and serve as a measure of repose.”⁹

For these reasons, the Board’s motion to dismiss the petition as untimely shall be granted, and the petition shall be dismissed. As such, it is unnecessary to reach the substantive issue of whether the Board’s decision to include Fun Home in the curriculum was arbitrary or capricious.

ORDER

I hereby **ORDER** that the motion to dismiss filed by the respondent Board of Education of the Watchung Hills Regional School District is **GRANTED**, and the petition is **DISMISSED**.

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

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.

⁹ The Board also questions the standing of several of the petitioners. Given that the Board filed its motion during the 2019–2020 school year, and it is currently the 2021–2022 school year, the status of the various petitioners is unclear. That is, it is not now known with certainty if any of the petitioners have moved out of the school district, what grade or grades their children are in, or if some of the children on whose behalf the petition was filed have graduated and/or are now adults. 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 et seq., 372 N.J. Super. 61, 85 (App. Div. 2004). However, because this matter should be dismissed under the ninety-day rule, any standing issues need not now be addressed.

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, PO 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.

November 5, 2021

DATE



SUSAN M. SCAROLA, ALJ

(Ret., on recall)

Date Received at Agency:

November 5, 2021 (emailed)

Date Mailed to Parties:

APPENDIX

WITNESSES

For petitioners:

None

For respondent:

None

EXHIBITS

For petitioners:

Brief and Certification

Letter Supplement

Response

For respondent:

Brief and Certification

Letter response to Supplement