SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5351-14T3

CAROL GRAVES, LEAH ZALANNA OWENS, DEBORAH SMITH-GREGORY, JOSE LEONARDO, KRISTIN TOWKANIUK, RAMON MELENDEZ, JR., HECTOR MALDONADO, CHANTELL MONCUR, LINDA KELLY GAMBLE, NANCY J. GIANNI, PENNY MATEE, CHRISTINE CUNNINGHAM, JUDY JONES, CYNTHIA WADE, JUDY GAINES-SLOAN, GAIL AUSBY, CHRISTINA IKWUEGBU, FRANCISCA OSUJI, DEIDRE CORLEY, GEORGE TILLMAN, JR., TAMARA MOORE, OMAYRA MOLINA, LOUCIOUS JONES, JENISE REEDUS, and VERONICA BRANCH[1],

Petitioners-Appellants,

v.

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK and CAMI ANDERSON, STATE SUPERINTENDENT OF SCHOOLS,

Respondents-Respondents.

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Argued September 12, 2017 – Decided September 26, 2017

Before Judges Yannotti, Carroll and Mawla.

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[1] We note that Veronica Branch was not listed in the caption, but she was identified as a party in the petition. Therefore, we have added her to the list of petitioners.

On appeal from the Commissioner of Education, Docket No. 225-8/14.

Robert T. Pickett argued the cause for appellants (Pickett & Craig, attorneys; Mr. Pickett, of counsel and on the briefs; Lauren M. Craig, on the briefs).

Daniel Schlein argued the cause for respondents (Adams Gutierrez & Lattiboudere, LLC, attorneys; Perry L. Lattiboudere, of counsel and on the brief; Mr. Schlein, on the brief).

Christopher S. Porrino, Attorney General, attorney for respondent Commissioner of Education (Jennifer Hoff, Deputy Attorney General, on the statement in lieu of brief).

PER CURIAM

On August 18, 2014, petitioners filed an administrative complaint challenging the implementation of the "One Newark Plan" by the State Operated School District for the City of Newark (SOSD).[2] They also alleged that the Newark public schools are unconstitutionally segregated on the basis of race, color, ancestry, and national origin. Petitioners appeal from a final decision of the New Jersey Commissioner of Education (Commissioner) dismissing the petition. We affirm.

[2] In 1995, the State Board of Education (State Board) authorized the removal of the Newark Board of Education and the creation of the SOSD. Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 113-14 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996). On September 13, 2017, the State Board voted to begin the process for returning the Newark schools to local control.

I.

Petitioners include three individuals who are residents and taxpayers of Newark; four students who were attending Newark public high schools when the petition was filed; twelve individuals who were employed as teachers in Newark's school district at that time; and six parents with children who were then attending the Newark public schools. Petitioners named the SOSD and Cami Anderson, who was then superintendent of the SOSD, as respondents.

In their administrative action, petitioners challenged the implementation of the "One Newark Plan," which petitioners claimed had been developed behind closed doors and involved the district-wide restructuring of Newark's public schools. Among other things, the plan provided for the closure of certain neighborhood schools and the leasing of the vacant school facilities to organizations for the operation of charter schools.

In count two, petitioners allege that the plan violates the rights of Newark students to a thorough and efficient education, as guaranteed by the New Jersey Constitution. N.J. Const. art. VIII, § IV, ¶ 1. Petitioners allege that the plan would have a disproportionate impact upon the district's African-American and Hispanic students, as well as severely disadvantaged children in Newark. Petitioners claim that replacing public schools with

charter schools would leave Newark's "neediest" students to languish in schools that are failing or less successful.

In count three, petitioners claim that the "One Newark Plan" violates the Charter School Program Act of 1995 (CSPA), N.J.S.A. 18A:36A-1 to -18. Petitioners allege that under the plan, public schools would be converted to charter schools without compliance with N.J.S.A. 18A:36A-4(b). The statute permits a currently existing public school to become a charter school if at least fifty-one percent of the teaching staff and fifty-one percent of parents or guardians of pupils attending the school sign a petition supporting the conversion. Ibid. Petitioners allege that the SOSD was engaging in the "stealth conversion" of existing public schools by closing the schools and thereafter leasing the closed school buildings to organizations for the operation of charter schools.

In count three, petitioners further allege that the plan violates the CSPA because it allows the SOSD to make final decisions as to the students who will be permitted to enroll in charter schools on the basis of a "sophisticated mathematic equation/algorithm." According to petitioners, such a student-selection process violates N.J.S.A. 18A:36-7 and N.J.S.A. 18A:36-8, which govern the charter-school enrollment process.

In addition, in count four, petitioners allege the plan "falls short of eradicating the corrosive segregated environment that

pervades" the district. Petitioners assert that fifty-one percent of the students enrolled in the Newark public schools are African-American; forty percent are of Hispanic origin; and about eight percent are non-Hispanic whites. Petitioners claim that children who attend racially-segregated schools receive an education that is inferior to the education of children enrolled in predominantly-white suburban school districts in Essex County.

Petitioners assert that the alleged de facto racial segregation of the Newark schools violates the thorough and efficient clause of the State's Constitution, N.J. Const. art. VIII, § 4, ¶ 1, and the provision of the State Constitution that bars segregation of schools on the basis of race, color, ancestry, and national origin, N.J. Const. art. I, § 5.

In their request for relief, petitioners sought: an injunction enjoining the SOSD from further implementation of the "One Newark Plan"; to terminate all contracts with charter-school organizations that assume control of closed public school facilities; a declaration that the concentration of African-American and Hispanic children in the Newark school district is the result of de facto segregation, in violation of the New Jersey Constitution; establishment of a plan to eliminate the alleged unconstitutional de facto segregation of the Newark schools by creating a county-wide or region-wide school district, which would

include the predominantly white Essex County suburban school districts; and other relief.

When they filed their petition, petitioners also filed an application for emergent relief. The Commissioner referred the matter to the Office of Administrative Law for proceedings before an Administrative Law Judge (ALJ). Petitioners later withdrew their request for emergent relief. In September 2014, the ALJ conducted a case management conference and expressed her concern that petitioners had not named certain indispensable parties, including the Commissioner and the State Board.

Thereafter, petitioners filed a motion to amend the petition to add the Commissioner and the State Board as respondents. However, in October 2014, petitioners withdrew that motion and elected to proceed only against the respondents named in the petition. Thereafter, respondents filed a motion to dismiss the petition on various grounds, and petitioners opposed the motion. In January 2015, the ALJ heard oral argument on the motion.

On April 28, 2015, the ALJ filed an initial decision granting the motion and dismissing the petition in its entirety. On June 15, 2015, the Commissioner issued a final decision dismissing the petition for the reasons stated by the ALJ. This appeal followed.

On appeal, petitioners argue: (1) the ALJ and the Commissioner failed to review the motion to dismiss in accordance with the

established standard of review; (2) the ALJ erroneously found that the claims in counts two and three of the petition had not been timely filed; (3) they have standing to assert the claims in the petition; (4) the "One Newark Plan" violates the constitutional right of Newark students to a "thorough and efficient" education; (5) the "One Newark Plan" violates the CSPA; and (6) they were not required to join the Commissioner, State Board, or the predominantly-white Essex County suburban school districts as indispensable parties with regard to the claim of de facto segregation of the Newark public schools.

II.

We first consider petitioners' contention that the ALJ and Commissioner failed to consider respondents' motion to dismiss under the appropriate standard of review. Petitioners argue that the applicable standard is either the standard for a motion for involuntary dismissal of civil actions under Rule 4:37-2(b), or a motion for summary decision in administrative actions under N.J.A.C. 1:1-12.5(b). We disagree.

Here, respondents filed a motion to dismiss under N.J.A.C. 6A:3-1.5(g), which allows a party to file a motion to dismiss a petition in a dispute arising under the school laws in lieu of filing an answer. The motion is comparable to a motion under Rule

4:6-2(e) to dismiss a complaint in a civil action for failure to state a claim upon which relief can be granted.

When reviewing a Rule 4:6-2(e) motion, a court must determine the adequacy of the pleading and decide whether a cause of action is "suggested" by the facts. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (quoting Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)). The court must "search[] the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Ibid. (quoting Di Cristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252 (App. Div. 1957)).

In ruling on the motion, the ALJ correctly applied the standard for dismissal based on the failure to state a claim in determining: (1) whether petitioners had standing to assert the claims in the complaint; (2) whether petitioners filed the claims in counts two and three within the time required; (3) whether petitioners stated a valid claim that the "One Newark Plan" violates N.J.S.A. 18A:36A-4(b); and (4) whether petitioners failed to name indispensable parties with regard to their claim that the plan violated the enrollment mandates for charter schools in the CSPA and the claim of de facto segregation of the Newark schools on the basis of race, color, ancestry, or national origin.

We reject petitioners' contention that the ALJ should have applied the standards set forth in Rule 4:37-2(b) when ruling on respondents' motion to dismiss. The court rule applies at trial in civil actions after the plaintiff has presented its evidence. Ibid. The rule allows the court to dismiss the complaint if, based upon a review of the facts and the law, "the plaintiff has shown no right to relief." Ibid. The standard for granting such a motion does not apply to a motion to dismiss a petition filed with the Commissioner under N.J.A.C. 6A:3-1.5(g).

We also reject petitioners' contention that respondents' motion to dismiss was essentially a motion for summary decision of an administrative action under N.J.A.C. 1:1-12.5(b). Petitioners argue that under that rule, summary decision may not be granted if there are genuine issues of material fact.

The summary decision rule does not, however, apply here. Respondents did not seek summary decision. They sought dismissal of the petition under N.J.A.C. 6A:3-1.5(g). As we have explained, the motion was the administrative equivalent to a motion to dismiss a civil action under Rule 4:6-2(e) for failure to state a claim upon which relief can be granted.

We therefore conclude that the ALJ and Commissioner applied the correct standard in ruling on respondents' motion to dismiss.

III.

We next consider petitioners' argument that the ALJ erred by finding that the claims regarding the "One Newark Plan" in counts two and three of the petition were not filed within the time required by N.J.A.C. 6A:3-1.3(i). The rule provides that a petition of appeal to the Commissioner in a dispute arising under the school laws must be filed "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[.]" Ibid.

In her decision, the ALJ noted that counts two and three of the petition challenged the SOSD's implementation of the "One Newark Plan." The ALJ observed that the SOSD had announced on November 21, 2013, that it would be implementing the plan and the SOSD described the plan in detail. Moreover, on December 18, 2013, the SOSD publicly announced specifics of the plan. In addition, in February 2014, the SOSD issued a pamphlet, which again discussed details of the plan that would be implemented.

The ALJ and the Commissioner determined that at a minimum, petitioners should have filed the claims in counts two and three within ninety days after the SOSD issued the pamphlet about the plan in February 2014. The record supports that determination.

It is well established that the ninety-day-limitation period "provides a measure of repose" and it is "an essential element in

the proper and efficient administration of the school laws." Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 582 (1993). "The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days." Ibid.

We conclude that the ALJ and Commissioner correctly found that petitioners failed to assert their claims regarding implementation of the "One Newark Plan" within the time required by N.J.A.C. 6A:3-1.3(i). Therefore, the dismissal of the claims in counts two and three of the petition was proper.

IV.

Petitioners argue that the ALJ and Commissioner erred by dismissing the claims that the plan violated the CSPA. We disagree.

A. Closing of Schools/Leasing of Space for Charter Schools

Here, petitioners allege that the plan allowed for the "stealth conversion" of public schools without complying with N.J.S.A. 18A:36A-4(b). The statute provides in pertinent part that a district may convert a "currently existing public school" to a charter school if fifty-one percent of the school's teachers and fifty-one percent of the parents or guardians of students attending the school sign petitions approving the change. Ibid.

Petitioners allege that under the "One Newark Plan," the SOSD was closing certain public schools and then leasing the vacant

space in those schools to organizations that would use the space to operate charter schools. Petitioners maintain that this provision of the plan represents an impermissible end-run around the process in the CSPA for converting existing public schools to charter schools.

However, as the ALJ and Commissioner recognized, a school district has the discretion to close a school that the district no longer requires for the education of students. Furthermore, the SOSD also has statutory authority to lease vacant space in school buildings to other persons or organizations. N.J.S.A. 18A:20-8.2. The ALJ and the Commissioner correctly found that because the SOSD was not converting a "currently existing public school" to a charter school, N.J.S.A. 18A:36A-4(b) did not apply.

We will not set aside an administrative decision if it is consistent with the applicable law, supported by sufficient credible evidence in the record, and not arbitrary, capricious, or unreasonable. Saccone v. Bd. of Trs. of Police & Firemen's Ret. Sys., 219 N.J. 369, 380 (2014). The ALJ and the Commissioner's determination that the SOSD was not engaged in the conversion of currently existing public schools to charter schools is consistent with the plain language of the statute and supported by sufficient credible evidence in the record. The decision is not arbitrary, capricious, or unreasonable.

B. Enrollment Plan for Charter Schools

Petitioners also claim that the "One Newark Plan" violated the CSPA because it includes an enrollment process for charter schools that violates the requirements of the CSPA. In support of this argument, petitioners cite N.J.S.A. 18A:36A-7, which states that charter schools shall "be open to all students on a space available basis." They also cite N.J.S.A. 18A:36A-8, which provides that charters must give preference to local students, priority to siblings, and enroll a cross section of the community's school-age population, "including racial and academic factors."

Petitioners argue that they alleged sufficient facts to show that the plan's enrollment process violates the enrollment mandates in the CSPA. The ALJ did not, however, address the merits of this claim. Instead, the ALJ decided that the claim could not be considered because petitioners failed to name indispensable parties.

An indispensable party is one who has "an interest inevitably involved in the subject matter before the court and a judgment cannot justly be made between litigants without either adjudging or necessarily affecting the absentee's interest." Allen B. Du Mont Labs., Inc. v. Marcalus Mfg. Co., 30 N.J. 290, 298 (1959). The ALJ stated that, "Under this standard, it is readily apparent that these affected charter schools have a clear stake in this

litigation, and that the rights that petitioners seek to vindicate, would, in part, require an order directing that the charter schools comply with N.J.S.A. 18A:36A-7 and N.J.S.A. 18A:36A-8."

The ALJ determined that without the participation of the unnamed charter schools, complete relief could not be granted. The Commissioner adopted the ALJ's findings and conclusion on this issue. We conclude that the ALJ and the Commissioner correctly found that the unnamed charter schools whose enrollment processes were at issue were indispensable parties to the dispute.

These organizations clearly have a stake in the resolution of the claims regarding their enrollment plans. Because petitioners had not joined these organizations in the administrative action, the ALJ and the Commissioner correctly found that petitioners' claim regarding the charter school enrollment process in the "One Newark Plan" could not be considered.

We therefore conclude that in addition to correctly dismissing the claims in count three as untimely, the ALJ and the Commissioner correctly determined that the claim regarding the alleged violation of N.J.S.A. 18A:36A-4(b) failed as a matter of law, and the claim regarding the alleged unlawful enrollment plan for charter schools could not be considered because petitioners failed to name indispensable parties.

V.

Petitioners also claim that the "One Newark Plan" was a "feeble attempt to address and ameliorate" what petitioners allege is the de facto segregation of the Newark public schools on the basis of race, color, ancestry, and national origin. Petitioners allege that such de facto segregation violates the New Jersey Constitution.

Among the other relief requested in this action, petitioners sought a remedial plan to address the alleged unconstitutional de facto segregation of the Newark public schools. They sought a mandate requiring the inclusion of predominantly-white Essex County suburban school districts within a county-wide or regional plan "that would effectively desegregate" the Newark public school system.

The ALJ dismissed this claim because petitioners failed to name indispensable parties, specifically, the Commissioner, the State Board, and the Essex County suburban school districts that would be affected by such a remedial order. The Commissioner adopted the ALJ's decision on this issue.

On appeal, petitioners argue that the Commissioner, State Board, and potentially-affected suburban school districts would not be indispensable parties until there has been a finding of unconstitutional de facto segregation of the Newark schools. We

cannot agree. We affirm the dismissal of this claim substantially for the reasons stated by the ALJ in her initial decision, which was adopted by the Commissioner.

As the ALJ noted, the petition does not merely treat the Commissioner as a decision-maker. It asserts a claim against the Commissioner, alleging that the Commissioner has not met his statutory and constitutional obligation to desegregate the Newark public schools. Furthermore, it is well established that only the Commissioner has the power to "cross district lines to avoid 'segregation in fact.'" Jenkins v. Morris Twp. Sch. Dist., 58 N.J. 483, 501 (1971) (quoting Booker v. Bd. of Educ., 45 N.J. 161, 168 (1965)). Thus, the Commissioner is an indispensable party to any claim in which a party seeks a multi-district, remedial order addressing alleged de facto segregation of a district's schools.

We reject as entirely without merit any suggestion that the Commissioner's interest would only involve the remedy for the alleged de facto segregation of the Newark schools. Clearly, the Commissioner would have an interest in any findings of the relevant facts, as well as determining whether a remedy is required.

Moreover, the potentially-affected Essex County suburban school districts also are indispensable parties to the claim of de facto segregation of the Newark schools. As we have explained, petitioners are seeking to create a regional, county-wide school

system that would include the suburban school districts in Essex County. As the ALJ stated in her decision:

> Regionalization county-wide would implicate the delivery of educational services to each and every public school student in Essex County. A failure to join each Essex County school district would plainly impede the ability of these districts to protect their interests. See R. 4[:]28-1(a). Moreover, any order directing such desegregation would call upon the neighboring districts to take the steps needed to effectuate such a broad ranging and monumental change in the delivery of educational services; to include a potential consolidation of staff, school buildings, equipment, and administrative services. Without the participation of these districts, "complete relief could not be accorded among those already parties." Ibid.

We therefore conclude that the ALJ and the Commissioner correctly decided to dismiss the claim of de facto segregation because petitioners failed to name the Commissioner and the affected suburban school districts as indispensable parties. For essentially the same reasons, the State Board should also have been named as a party.

We note that in her decision, the ALJ found that only three petitioners had standing to raise claims that the "One Newark Plan" violated the right to a thorough and efficient education under the New Jersey Constitution. These petitioners were the parents of three students who had attended public schools that were closed under the "One Newark Plan."

The ALJ nevertheless found that these petitioners had not alleged specific facts to show that the education of the three students had been disrupted or otherwise impaired by their assignments to other schools. The ALJ therefore concluded that the claims relating to these three students were not justiciable because they would essentially require the Commissioner to render an advisory ruling.

In view of our decision affirming the dismissal of petitioners' claims on other grounds, we need not determine whether the other petitioners had standing to assert claims that the "One Newark Plan" violates the students' rights to a thorough and efficient education, or whether the claims of the three parents found to have standing are justiciable.

Affirmed.