

D.N. AND J.J., on behalf of minor child, J.J., :
PETITIONERS, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY : DECISION
OF ELIZABETH, UNION COUNTY AND :
KELLY A. WATERS, ESQ., :
RESPONDENTS. :
_____ :

SYNOPSIS

Petitioning parents of student attending Category 1 schools in the 2002-03 school year sought an order citing the Board for violations of the public school choice option of the No Child Left Behind Act (NCLBA) and directing the Board to transfer their son from School #17 to School #19 under the provisions of that Act. The Board alleged petitioners had no right to challenge the law in a private lawsuit.

The Commissioner provided petitioners an extended opportunity to answer respondents' motions to dismiss. Petitioners, however, failed to respond. Accordingly, the Commissioner could have dismissed the appeal solely on petitioners' failure to prosecute their appeal, but the Commissioner determined that it was both in the public interest and a matter of judicial efficiency to address whether appeals of this nature with respect to enforcement of the provisions of NCLBA may be considered by the Commissioner.

Upon review, the Commissioner, citing the 2003 U.S. District Court decision in *Association of Community Organizations for Reform Now et al. v. New York City Department of Education et al.*, concluded that since the NCLBA does not provide for a private right of action, there is no basis on which the Commissioner may consider this matter. The Commissioner granted the Motions to Dismiss and dismissed the Petition of Appeal.

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.

February 11, 2004

D.N. AND J.J., on behalf of minor child, J.J., :
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This matter comes to the Commissioner by way of a Petition of Appeal, filed September 15, 2003, wherein petitioners seek an order citing the Board for violations of the public school choice option of the No Child Left Behind Act (NCLBA), specifically 34 CFR 200.44 and 34 CFR 200.32, and directing the Board to transfer their son from School #17 to School #19 under the provisions of that Act. Petitioners claim that the Elizabeth School District did not provide the required public school choice option to parents of students attending Category 1 schools in the 2002-03 school year and claim that the Board continues to deny parents their rights to choices of eligible schools. (Petition of Appeal at 1) Petitioners aver that such options must be made available to parents prior to the first day of the school year and that, if more than one choice is available within the district, then the district must provide more than one choice to transfer students. (*Ibid.*) Petitioners further aver that the Board did not provide options to parents prior to the first day of the school year and did not provide more than one choice of schools for parents wishing to transfer their children and, thus, the Board violated 34

CFR 200.44 of the 2001 NCLBA by not providing public school choice for the 2002-2003 school year as dictated by 34 CFR 200.32. (*Id.* at 6)

On October 6, 2003, the Board filed its Answer and both the Board and respondent Waters filed Motions to Dismiss. The Board claims that, by the letters sent on August 29, 2003 and on September 12, 2003, it complied with the requirement to offer petitioners an option to transfer their son to another school. (Board's Answer and Motion to Dismiss at 4) Moreover, citing *Association of Community Organizations for Reform Now et al. v. New York City Department of Education et al.*, 269 F. Supp. 2d 338 (SD NY 2003), the Board asserts that "the Court held that parental complaints about failures to provide appropriate notices and to follow other requirements of the law could not be challenged in a private lawsuit." (*Id.* at 2-3) Thus, the Board proffers, petitioners have no right to bring this action and no relief can be granted. (*Id.* at 4) Likewise, pointing to the same case, Respondent Waters claims in her Motion to Dismiss that this matter should be dismissed for failure to state a claim upon which relief can be granted as "the law under which Petitioners are attempting to proceed does not provide for a private right of action." (Respondent Waters' Motion to Dismiss at 1-2) Additionally, Respondent Waters asserts that she is not a proper party to this action in that: 1) "her involvement in this matter consisted of nothing more than counsel to the Board by advising the Board on the dimensions of the NCLBA;" 2) her "interaction with one of the Petitioners on behalf of the Board does not create a cause of action upon which liability can be assessed;" and 3) "[p]roviding advice to the Board, particularly when a new law is involved, does not create liability." (*Id.* at 2) Finally, Respondent Waters argues that, even assuming the viability of petitioners' claim, the case should be dismissed as moot because, notwithstanding petitioners' dissatisfaction with the timing of the notice and of the Board's action, petitioners have now been

provided with more than one option under the parental choice provision of the NCLBA.¹
(*Id.* at 4)

By letter of October 7, 2003, the Director of the Bureau of Controversies and Disputes acknowledged receipt of the Motions to Dismiss and requested that petitioners submit memorandums of law or letter briefs in response to the respective motions setting forth their legal arguments as to why each of the motions should not be granted and why the petition in this matter should not be dismissed. Additionally, petitioners were requested to respond to the Board's and respondent Waters' contentions in their respective motions that the substance of petitioners' complaint had been satisfied. Petitioners were, therefore, provided 20 days from receipt of the letter to respond to the motions or to submit a letter withdrawing their appeal, if their complaint had been satisfied. (Letter from the Director of the Bureau of Controversies and Disputes of October 7, 2003)

When no response was received from petitioners, by letter of November 21, 2003, sent via certified and regular mail, the Director of the Bureau of Controversies and Disputes provided petitioners a final opportunity to respond to the pending Motions to Dismiss and advised petitioners that failure to respond to this request within the 10 days provided "may result in your petition being dismissed for failure to prosecute your appeal." (Letter from the Director of the Bureau of Controversies and Disputes of November 21, 2003) By letter of December 15, 2003, petitioners claimed that they had not received the October 7, 2003 letter until November 29, the same day that they aver the November 21, 2003 letter was received.² Accordingly,

¹ By letter of October 20, 2003, the Board advised the Commissioner that the Elizabeth Board had offered petitioners another choice of school for transfer. (Board's Letter of October 20, 2003)

² The "green" certified mail receipt indicates that petitioners received the November 21, 2003 letter on November 28, 2003.

petitioners requested, and were granted, an extension until January 5, 2004 to file their Answers to the pending motions. Notwithstanding two opportunities to file Answers to the motions and an extension of time within which to do so, petitioners have not submitted any response to the motions nor have they notified the Bureau of Controversies and Disputes that they wish to withdraw their appeal. Accordingly, the Commissioner could dismiss the within appeal solely on petitioners' failure to prosecute their appeal. However, in that there is a possibility of future appeals to the Commissioner requesting enforcement of the provisions of the NCLBA, 20 U.S.C. §6301 *et seq.*, the Commissioner has determined that it is both in the public interest and a matter of judicial efficiency to address whether appeals of this nature with respect to enforcement of the provisions of the NCLBA may be considered by the Commissioner.

Upon a thorough review of this question, the Commissioner agrees with the Board and Respondent Waters that this question was answered in the 2003 U.S. District Court decision in *Association of Community Organizations for Reform Now et al, supra*, wherein plaintiffs, parents of school children residing in New York, claimed that respondent school districts had violated the NCLBA and sought to compel compliance with various provisions of that Act. Relying on the Supreme Court decision in *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), the District Court found that:

[T]he **NCLBA** does not reflect the clear and unambiguous intent of Congress to create individually enforceable rights. The statute lacks the necessary rights creating language, because it is focused on the regulation of states and local educational agencies, and focuses on improving the condition of children collectively, and therefore lacks the individual focus suggestive of Congressional intent to create personal rights. Finally, the enforcement scheme of the statute indicates a Congressional intent to centralize enforcement and thereby to avoid the possibility of individual lawsuits and multiple interpretations of the provisions of the Act. *Association of Community Organizations for Reform Now et al. v.*

New York City Department of Education et al., 269
F. Supp. 2d 338, 347.

In reaching the above conclusion, the District Court specifically pointed out that “[t]he ‘Penalties’ section of the NCLBA outlines the procedures available in the event of noncompliance by States with NCLBA provisions,” but “contains no procedure for parents or students to seek judicial, administrative, or any other remedies for alleged noncompliance with the dictates of the Act.” (*Id.* at 342) The District Court also pointed out that “[t]he NCLBA contains no provision for individuals to enforce the notice, transfer or SES provisions--there are no administrative or judicial procedures for any individual to use. Rather the statute contemplates that any enforcement actions for violations of the statute by states be taken by the Secretary of Education and vests such authority solely in the Secretary.” (*Id.* at 345)

In that the NCLBA does not provide for a private right of action, therefore, the Commissioner concludes that there is no basis on which he may consider this matter. For the foregoing reasons, respondents’ Motions to Dismiss are hereby granted, and the petition is hereby dismissed with prejudice. Given this result, it is unnecessary to address the other bases for respondents’ motions.

IT IS SO ORDERED.³

COMMISSIONER OF EDUCATION

Date of Decision: February 11, 2004

Date of Mailing: February 18, 2004

³ This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*