

#368-16 (OAL Decision: Not yet available online)

MICHELLE GREEN, JACK GREEN IV,  
DANIELLE SINTIC, LEXA SKOWRENSKI,  
AND CHRISTANA KMECZ.

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP  
OF OCEAN, MONMOUTH COUNTY,

RESPONDENT.

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COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioners sought a finding that the respondent Board violated *N.J.S.A. 18A:36-34* when it administered an “Attitudes and Behaviors Survey” (Survey) to sixth graders in the Ocean Township school district without obtaining written informed parental consent, and by failing to provide parents the opportunity to view the pupil survey at convenient times and locations prior to administering the survey. Petitioners alleged that the Survey posed questions that required students to reveal personal information related to mental or psychological issues, “sexual behavior and attitudes,” and “illegal, anti-social, self-incriminating and demeaning behavior” which was potentially embarrassing to students or their families. Petitioners additionally sought attorneys’ fees and related costs, and filed a motion for summary decision.

The ALJ found, *inter alia*, that: on November 14, 2014, the respondent Board administered the Survey to all District sixth graders whose parents or guardians had not signed and returned an “opt-out” form; petitioners in this matter, except Danielle Sentic, had standing to challenge the Board’s alleged violation of the consent and viewing requirements of *N.J.S.A. 18A:36-34*; the Board violated the “prior written informed consent” requirement of the statute, but did not violate the requirement that parents be provided a chance to view the Survey at “convenient locations and time periods”; petitioners are not entitled to an award of counsel fees; however, a monetary penalty that punishes the Board for its actions and serves as a deterrent to similar behavior by other school boards is justified. The ALJ concluded that the Board must redact the results of the survey from pupil records if any results are contained therein; must identify any outside agencies or persons to whom the results of the surveys were given, and must retrieve all survey information from these outside agencies or persons. Accordingly, the motion for summary decision was granted in part and denied in part, and a penalty of \$1000 was imposed against the Board for its violation of *N.J.S.A. 18A:36-34*.

Upon comprehensive review, the Commissioner concurred with the ALJ’s decision but rejected the ALJ’s assessment of a \$1000 penalty, noting, *inter alia*, that the Board has already taken remedial measures – including revising its policy to reflect proper procedures for administration of future surveys and destroying completed copies of the Survey at issue – to voluntarily comply with the provisions of *N.J.S.A. 18A:36-34* going forward. Accordingly, the Initial Decision of the OAL – as modified herein – was adopted as the final decision in this case.

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.

October 24, 2016

OAL DKT. NO. EDU 4867-15  
AGENCY DKT. NO. 3-1/15

MICHELLE GREEN, JACK GREEN IV, DANIELLE SINTIC <sup>1</sup> , LEXA SKOWRENSKI, AND CHRISTANA KMECZ.	:	
	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	
	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY,	:	
	:	
RESPONDENT.	:	

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The record of this matter and the Initial Decision of the Office of Administrative Law (“OAL”) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioners and the respondent. In this matter, petitioners allege that the Board violated *N.J.S.A.* 18A:36-34 by failing to obtain “prior written informed consent” from parents before administering an “Attitudes and Behaviors Survey” (“Survey”) to the District’s students. Petitioners further allege that the Board also failed to provide the parents an opportunity to view the Survey at convenient times and locations prior to administering it to the students, in violation of *N.J.S.A.* 18A:36-34. Respondent contends that the Board did not violate *N.J.S.A.* 18A:36-34, and that the petitioners do not have standing.

The ALJ concluded that the petitioners – except Danielle Sentic – have standing to challenge the Board’s administration of the Survey, and that the Board violated the “prior written informed consent” requirement of *N.J.S.A.* 18A:36-34. The ALJ also concluded that the Board

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<sup>1</sup> Petitioner Danielle Sentic is no longer a party in this matter following issuance of an order by the Administrative Law Judge (“ALJ”) on October 9, 2015, finding that Ms. Sentic did not have standing to pursue this litigation against the Board, which the Commissioner accepts as proper.

did not violate the requirement that the parents be provided the opportunity to view the Survey at “convenient locations and time periods.” Furthermore, the ALJ found that petitioners are not entitled to an award of counsel fees<sup>2</sup>, but imposed a monetary penalty of \$1000 on the Board for its violation of *N.J.S.A.* 18A:36-34. The ALJ further ordered the Board to redact the results of the Survey from pupil records if any such results are contained therein, identify any outside agencies or persons to whom the results of the Survey were given, and request that such agencies or persons return all Survey information to the Board. Upon a comprehensive review of the record, the Commissioner is in accord with the ALJ’s decision, as modified herein.

Petitioners take exception to the ALJ’s denial of counsel fees and the amount of the monetary penalty imposed on the Board. Petitioners also seek additional remedies not requested below. Respondent takes exception to the ALJ’s determination that the petitioners have standing, that the Board violated *N.J.S.A.* 18A:36-34, and the ALJ’s imposition of the monetary penalty on the Board. While reflecting their obvious disagreements with the findings and conclusions contained within the Initial Decision, the parties’ exceptions pertaining to counsel fees, petitioners’ standing, and the Board’s violation *N.J.S.A.* 18A:36-34, are unpersuasive and, substantially recast and reiterate the arguments made below. The Commissioner finds that the issues were properly raised and adjudicated below, and agrees with the ALJ’s determination with regard to counsel fees, petitioners’ standing, and the Board’s violation of the consent requirement of *N.J.S.A.* 18A:36-34. Furthermore, the Commissioner will not consider the additional remedies that are now being improperly sought by petitioners by way of their exceptions.

With regard to the monetary penalty of \$1000, petitioners argue that a penalty of \$10,000 for each year the Board has administered the Survey is appropriate, the total sum of

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<sup>2</sup> See October 9, 2015 Order on Motion to Dismiss.

which is \$90,000, as the Board has conducted the Survey annually from November 2005 to November 2014. Respondent challenges the ALJ's authority to impose a monetary penalty and argues that only the Commissioner may impose such a penalty. Respondent further argues that a monetary penalty is discretionary, not mandatory. Lastly, respondent submits that any penalty in this case would be punitive in nature and the financial burden of the penalty would be on the taxpayers, such as the petitioners<sup>3</sup>.

A review of the legislative history of *N.J.S.A.* 18A:36-34 indicates that the statute is intended to follow the Protection of Pupil Rights Amendment ("PPRA"), 20 *U.S.C.A.* § 1232h<sup>4</sup>. Therefore, the interpretation and application of *N.J.S.A.* 18A:36-34 must be consistent with the PPRA. The enforcement mechanism under the PPRA provides the following:

The Secretary shall take such action as the Secretary determines appropriate to enforce this section, except that action to terminate assistance provided under an applicable program shall be taken only if the Secretary determines that – (1) there has been a failure to comply with such section; and (2) compliance with such section cannot be secured by voluntary means.

Notably, *N.J.S.A.* 18A:36-34's enforcement provision – "[a] school district that violates the provisions of this act shall be subject to such monetary penalties as determined by the Commissioner" – leaves the determination of a monetary penalty at the Commissioner's sole discretion. In the absence of further guidance or restrictions from the Legislature on the monetary penalty, the Commissioner relies on the plain language of *N.J.S.A.* 18A:36-34 and its Federal counterpart in determining whether any monetary penalties should be assessed.

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<sup>3</sup> The Commissioner recognizes that assessment of penalty on the Board is ultimately borne by the taxpayers, and therefore, the penalty should not be unreasonable or excessive.

<sup>4</sup> The identical Sponsor Statements issued in the State Assembly and Senate during the introduction of the underlying bill notes in relevant part, "[t]his bill is modeled on 20 *U.S.C.A.* § 1232h, commonly referred to as the Protection of Pupil Rights Amendment." L. 2001, c. 364.

The PPRA's termination of assistance is akin to the monetary penalty under *N.J.S.A.* 18A:36-34. As such, before imposing a monetary penalty, the Commissioner will consider whether the Board failed to comply with the statute and whether voluntary compliance cannot be secured. The Commissioner has already determined that the Board failed to comply with the consent provision of *N.J.S.A.* 18A:36-34; however, voluntary compliance from the Board can be secured as the Board has already taken certain remedial measures, including revising its policy to reflect the proper procedures to be followed prior to administration of future surveys and assessments, and destroying copies of the completed Survey<sup>5</sup>. Therefore, the Commissioner will not impose a monetary penalty on the Board and rejects the ALJ's assessment of \$1000 on the Board.

Accordingly, the ALJ's Initial Decision – as modified herein – is adopted as the final decision in this matter.

IT IS SO ORDERED.<sup>6</sup>

ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 24, 2016

Date of Mailing: October 25, 2016

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<sup>5</sup> Respondent's representation that it has destroyed the completed Survey and withheld administration of same to the remaining grades has not been refuted.

<sup>6</sup> Pursuant to *P.L.* 2008, c. 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.