New Jersey
Appleseed

July 10, 2023

Via Email

Hon. Jude-Anthony Tiscornia, ALJ
Office of Administrative Law
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Re: Walden v. Bd. of Educ. of Twp. of N. Bergen, et al. Agency Docket No.: 5-1/23
OAL Dkt. No.: EDU 3856-23

Dear Judge Tiscornia:

Please accept this sur-reply letter brief on behalf of Petitioner Robert Walden, a North Bergen taxpayer, who to date has been representing himself *pro se*. I submit this letter in opposition to Respondents' respective Motions to Dismiss, not to supplant Mr. Walden's opposition brief, but to augment his detailed, factually based arguments with case law. In essence, all three versions of Mr. Walden's complaint/petition allege a violation of N.J.A.C. 6A:26-3.13(g). Each, though subsequently amended to include more facts and the last to name the New Jersey Department of Education ("DOE) as a respondent, seeks to compel the DOE to require North Bergen Board of Education ("NBBOE") to immediately lease new trailers and transition the pre-school children out of trailers as soon as the current renovations to classrooms is complete, scheduled for September, 2024. This prospective relief vindicates a "continuing

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violation of a public right" caused by DOE inaction or affirmative renewal on an annual basis and is not barred by the 90-day statute of limitations.

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STATEMENT OF FACTS

Mr. Walden's petition sets forth a plethora of facts that, at minimum, set forth the context of his complaint, and are certainly relevant to any relief your Honor may recommend to the Commissioner. The facts he has alleged have been garnered from documents he has received pursuant to the many Open Public Records Act ("OPRA") he has made, as well as his participation in the Department of Environmental Protection's ("DEP") diversion process that commenced in 2014 (2 ½ years after the after-the-fact diversion was discovered by DEP and acknowledged by North Bergen), and has yet to proceed beyond the pre-application stage.

When deciding a motion to dismiss, an Administrative Law Judge like a "court should assume that the nonmovant's allegations are true and give that party the benefit of all reasonable

inferences." NCP Litig. Tr. v. KPMG LLP, 187 N.J. 353, 365 (2006) See also Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005)(a complaint can only be dismissed for failure to state a cause of action if the allegations, taken as true, fail to set forth a claim which provides a legal basis for relief). Motions to dismiss for failure to state a claim "should be granted in only the rarest of instances." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 772 (1989). Mr. Walden alleges, in brief outline, as follows:

In 2001, NBBOE placed 16, soon to be 17, trailers in Braddock Park to temporarily house its new pre-school program. At that time, it informed the public that it intended to place the program in the Lincoln School Annex (now known as the Early Childhood Center), which was not yet completed. Five years later, in 2006, the Lincoln School Annex was completed, but the pre-school program remained in the trailers. Mr. Walden did not receive any documents that indicate that the DOE approved the placement of the trailers in 2001, affirmatively approved their use on an annual basis from 2001 to 2019 (at which time they did approve their use) nor any documents which have shown NBBOE "demonstrates satisfactory progress toward the provision of permanent facilities." N.J.A.C. 6A:26-3.13(g). The trailers are leased pursuant to contracts that have been entered into, over the past 22 years, for different lengths of time. Currently, NBBOE leases them for approximately $300,000 per year.

Based on an inspection occurring in November 2010, DEP issued a violation to North Bergen and Hudson County on March 17, 2011 since the trailers are located on dedicated parkland and constitute an unlawful diversion and impairment of parkland (under the Environmental Rights Act). One month later, the DEP inspector, Robert Rodriquez wrote his team in an e-mail dated April 11, 2011 the following:

> I met with North Bergen Township and Hudson County officials on 4/5/2011 to discuss how to resolve the illegal diversion of the Township's school trailers on

> County parkland. This meeting was prompted by our Bureau's post inspection letter sent last month to both parties threatening to withhold funding if the illegal diversion is not resolved. . . . At the meeting, the Township stated that the relocation of those trailers would result in their destruction as they are antiquated. The Township believes that they may be able to get the North Bergen Board of Education to remove the trailers from the park and relocate the students to another classroom location that is not parkland by September 2012. It was discovered that no legal agreement between the parties or with the school board exists that allows this use or the trailers on parkland.

The notion that the trailers are "antiquated" was again repeated to DEP directly in 2016 in response to a request by DEP to move the trailers out of Braddock Park to a different location. North Bergen wrote:

> The TCUs have been in service beyond the normal life expectancy for this type of structure. Therefore, relocating them to another site is not feasible. The TCUs were originally located in North Bergen in August 2001 and are currently 15 years old. . . . As the TCUs have aged beyond their useful life, relocation of the units is not advisable.

Mr. Walden has not received any documents indicating that either DEP or DOE directed NBBOE, at any time, to lease new trailers rather than house the pre-school children in "antiquated" ones. (In 2012, two of the trailers had to be replaced after a tree fell on electric wires igniting them at a time that the trailers had no fire exits required per N.J.A.C. 6A:26-8.1.)

In 2018, Mr. Walden himself filed a complaint with DOE that the trailers violated the DOE's educational adequacy standards because they lacked a second means of egress. The complaint was found valid, changes were made, and in 2019, 2021 and 2022, it appears that the DOE conducted its annual inspection, which is required by regulation. *See* N.J.A.C. 6A:26-8.1. Mr. Walden has not received any documents indicating that DOE, in contrast to local fire inspectors, conducted such annual inspections prior to 2019.

Also, in 2018 North Bergen and NBBOE, at the suggestion of DEP, decided to acquire the old Hudson County Technical High School ("Hi-Tech") property to achieve compliance with

certain environmental regulations, *i.e.,* N.J.A.C. 7:36-25.2 (concerning diversion of dedicated parkland). NBBOE devised a Long Range Facilities plan which NJDOE conditionally approved in 2018, subject to a North Bergen bond referendum necessary to support the acquisition. The plan was to reorganize the North Bergen school system by moving 7th and 8th graders out of elementary schools and into Hi-Tech, and moving all the preschoolers out of Braddock Park into District elementary schools. In a 2018 referendum, North Bergen voters approved the expenditure of approximately $65 million to enable North Bergen's Long Range Facilities Plan. (Since that time, the Governor has distributed an additional $10 million to North Bergen to implement the LRFP). Specifically, in a letter sent (in August 2018) by an architect working with North Bergen to DOE entitled "*Overview of Proposed LRFP and Related Projects*," North Bergen stated:

> Should enrollments continue to decrease as projected, the NBBOE will be able to terminate its lease of the Fulton Annex. **Further, based on the proposed LRFP, Bond funding will be sought for site acquisition and designated improvements associated with re-alignment. On realization of re-alignment, Pre-K classes located in TCUs at Hudson County Braddock Park will be returned to District schools.** (emphasis added)

However, it does not appear that DOE, since approving NBBOE's LRFP in 2018, has required NBBOE to demonstrate satisfactory progress toward implementing that Plan.

NBBOE's 22-year old deployment of trailers to house its pre-school program has occurred during a period of time that North Bergen has received state funding for its program, while North Bergen has experienced budget surpluses, and school enrollments (including preschool), have decreased.

PROCEDURAL HISTORY

On November 7, 2022, Mr. Walden filed a complaint with the DOE's Office of Controversies and Disputes. His complaint was filed within 90-days of DOE's August 2022

annual inspection of the temporary trailers. He withdrew his complaint and filed a more detailed petition on December 13, 2022 after he was told by an ALJ that he could not "file a brief" with more factual details in support of that petition; rather, he could withdraw his initial petition, without prejudice and file a new one. Again, understanding that he could not amend his petition, Mr. Walden withdrew his second petition and filed a third one on January 11, 2023 primarily to name DOE as a respondent.

On November 25, 2022, NBBOE filed a Motion to Dismiss; they re-filed the motion on December 31, 2022 in response to Mr. Walden's second petition, and on March 1, 2023 in response to his third petition. Mr. Walden filed his Opposition to NBBOE's Motion on March 3, 2023. On March 31, 2023, the Attorney General also filed a Motion to Dismiss for failure to state a cause of action on behalf of the DOE. Mr. Walden filed his Opposition Brief to those papers on April 3, 2023. The Attorney General filed a Reply Brief on June 30, 2023, and NBBOE requested an extension of time to file its Reply Brief.

At a case management conference held on July 5, 2023, New Jersey Appleseed Public Interest Law Center made an appearance on behalf of Mr. Walden. This sur-Reply Brief in Opposition to Respondents' Motions to Dismiss follows.

LEGAL ARGUMENT

I. THE N.J. DEPT. OF EDUC. HAS VIOLATED THE PLAIN LANGUAGE AND POLICY OF N.J.A.C. 6A:26-3.13(g) BY FAILING TO REQUIRE N. BERGEN BD. OF EDUC. TO CEASE USING TEMPORARY TRAILERS TO HOUSE ITS PRE-SCHOOL PROGRAM THAT COMMENCED IN 2001.

In his petition, Mr. Walden asserts that the DOE has failed to enforce N.J.A.C. 6A:26-3.13(g) against NBBOE either by inaction (*i.e.*, failing to require NBBOE to "demonstrate satisfactory progress toward the provision of permanent facilities.") or affirmative renewal of the

trailers beyond 5-years (*i.e.*, 2 years plus 3 annual renewals). In either case, he has stated a cause of action consistent with the plain language and ostensible policy of the regulation, which is to ensure that all school children are housed in permanent educational facilities that are both safe and educationally adequate as soon as feasible.

It is an established principle of interpretation that a "regulation should be construed in accordance with the plain meaning of its language and in a manner that makes sense when read in the context of the entire regulation ." J.H. v. R & M Tagliareni, LLC, 239 N.J. 198 (2019) (citation omitted). "Whether construing a statute or a regulation, it is not [a judge's] function to 'rewrite a plainly-written enactment,' or to presume that the drafter intended a meaning other than the one 'expressed by way of the plain language.'" U.S. Bank, N.A. v. Hough, 210 N.J. 187, 199 (2019)(quoting Di Prospero v. Penn, 183 N.J. 477, 492 (2005)).

N.J.A.C. 6A:26-3.13(g) provides:

> A temporary facility **may be approved by the Division for a term of two years, with three annual renewals if the school district**, or the Development Authority on behalf of the school district, **demonstrates satisfactory progress toward the provision of permanent facilities.** No such approval shall remain in effect or be eligible for renewal unless the executive county superintendent determines in consultation with the Division and upon inspection of the temporary facility that:
>
> 1. The temporary facility meets the educational-adequacy and temporary-facility standards as specified in this chapter;
> 2. The school district or approved private school for the disabled demonstrates through the LRFP or other plan, in the case of the approved private school for the disabled, that students housed in the temporary facility will be housed in permanent school facilities; and
> 3. The temporary facility meets N.J.A.C. 5:23 requirements for a certificate of occupancy for "E" (educational) group use. (emphasis added)

It is apparent from the first sentence in this regulation that it contemplates the use or deployment of temporary facilities, such as trailers, for no longer than five years. Five years is sufficient time for a school district to plan, modify existing structures or build a new facility to

meet the needs of their program. Contrary to the Attorney General's strained reading of the regulation, the second sentence in the regulation does not extend the five-year term in perpetuity, but rather conditions the initial two year approval, and three annual renewals upon satisfaction of certain to conditions set forth in subsections 1-3.

Furthermore, to fully understand the public policy behind this regulation, the lack of a "good cause" exception to extend the number of renewals beyond three must be noted. If, in fact, the regulation contemplated and sanctioned use of temporary facilities beyond the five years, it would include explicit standards under which the Commissioner could evaluate the appropriateness or necessity of granting such an extension. Silence speaks volumes in this situation. Moreover, in deciding whether to recommend to the Commissioner to decline approving NBBOE's application to renew its use of trailers to house its preschool program unless it sets real, steadfast benchmarks to transition the children into the District's elementary schools, your honor must take notice of the specific 5-year mandate found in N.J.A.C. 6A:13A-7.1(g). This regulation, concerning temporary preschool classrooms, states in full:

> Any district board of education using TCUs or other similar temporary facilities for preschool classrooms as of *August 15, 2022*, shall submit to the Department proof of compliance with N.J.A.C. 6A:26 and a long-range facilities plan for phasing out the use of TCUs or other similar temporary facilities for preschool classrooms by *June 30, 2027*.

When this regulation is read together N.J.A.C. 6A:26-3.13(g), the Attorney General's interpretation of the latter falls apart. It is clear from the definitive dates set in N.J.A.C. 6A:13A-7.1(g) that the Commissioner's own regulatory policy regarding temporary facilities, especially for preschool classrooms, does not contemplate nor authorize NBBOE's 22-year use of temporary trailers to house its preschool program. There is simply no legitimate excuse or justification for authorizing DOE to permit North Bergen to continue to fail its children and local

taxpayers. *Cf.* Summer Cottagers' Ass'n of Cape May v. City of Cape May, 19 N.J. 493, 505 (1955) (municipality cannot construe its own regulation so as to "defeat the very public policy" the Legislature intended to be served). The Commissioner must act now starting with the 2023-2024 school year.

II. THIS PETITION COMPLAINS ABOUT AN ONGOING VIOLATION OF PUBLIC RIGHTS AND IS THUS NOT BARRED BY THE 90-DAY STATUTE OF LIMITATIONS SET FORTH IN N.J.A.C. 6:24-1.2(c).

As stated above, Mr. Walden's petition may be viewed as a complaint against DOE for inaction (*cf.* In re Failure by the Dept. of Banking and Insurance to Transmit a Proposed Dental Fee Schedule to the OAL, 336 N.J. Super. 253, 261-262 (App. Div. 2001)(noting that the term "action" in R. 2:2-3(a)(2) and R. 2:2-4 "includes inaction," and that the court can compel the "exercise of a discretionary function") or for approval of NBBOE's requests to deploy trailers beyond the three annual renewals permitted by the regulation. In either case, Mr. Walden's petition implicates an ongoing violation of a public right and thus the ninety-day period of limitations contained in N.J.A.C. 6:24-1.2(c) does not apply, or should be relaxed in the interests of justice, pursuant to N.J.A.C. 6:24-1.15.

N.J.A.C. 6:24-1.2(c) provides:

> The 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, . . . which is the subject of the requested contested case hearing.

Both Respondents argue that since Mr. Walden's third petition was filed beyond 90 days from the DOE's August 22, 2022 annual inspection, his complaint is out of time. This argument falls apart for several reasons. First, it is unclear why Mr. Walden's cause of action arises from the date of DOE's educational adequacy inspection rather than approval of NBBOE's request to continue to use the temporary trailers (though it is not clear whether NBBOE even makes such

request) —an approval that is conditioned on satisfaction of the adequacy inspection but not tantamount to it. Though such approval should be issued prior to the start of the school year, it is not certain when DOE in fact did so. Nonetheless, the record is clear, Mr. Walden did not "rest on [his] rights" as he filed his first petition within 90-days of either the inspection or the commencement of the school year. *Cf.* Reilly v. Brice, 109 N.J. 555, 559 (1988)(The 45-day statute of limitations is "designed to encourage parties not to rest on their rights").

Moreover, there is a credible argument that the 90-day statute of limitation does not even apply because of the continuing impact of DOE's ongoing failure to implement its own regulation as written. *See, e,g.,* D'Alesandro v. Middleton Twp. Bd. of Educ., CD 262-86 (October 20, 1986), Vol. 4, p. 2511 (90-day limitation does not apply where implementation of regulation created "a situation [that] constitutes a continuing violation permitting a potentially discriminatory practice to continue in perpetuity"); Russo Farms v. Vineland Bd. of Educ., 144 N.J. 84 (1996) (holding when a court finds that a continuing nuisance has been committed, it implicitly holds that the defendant is committing a new tort, including a new breach of duty, each day; that new tort is an "alleged present failure" to remove the nuisance, and "[s]ince this failure occurs each day, the defendants' alleged tortious inaction constitutes a continuous nuisance for which a cause of action accrues anew each day."); North Plainfield Educ. Ass'n. v. Board of Educ. of Borough of North Plainfield, 96 N.J. 587, 594-595 (1984)(noting that if the annual increment petitioners claimed they were owed were a statutory entitlement, then the ninety-day period of limitations contained in N.J.A.C. 6:24-1.2 would not apply; however, because the fact that their salary will always lag one step behind and is not attributable to a new violation each year, their case must be dismissed). *Cf.* Wilson v. Wal-Mart Stores, 158 N.J. 263(1999) (when an

individual is subject to a continual, cumulative pattern of tortious conduct, the statute of limitations does not begin to run until the wrongful action ceases).

It is certain that Mr. Walden, in this case, is seeking to vindicate "an important public interest which requires adjudication or clarification" and, if not addressed at this time, there will be "a continuing violation of [a] public right[]." Borough of Princeton v. Bd. of Chosen Freeholders of Mercer, 169 N.J. 135 (2001). *See* cases cited in L. Pucillo & Sons v. Belleville, 249 N.J. Super. 536, 549-550 (App. Div. 1991) (where court reversed the dismissal of a complaint filed by plaintiffs, competitor and taxpayer, in order to assure the public's protection and remanded to compel defendant contractor to comply with the bid specifications because of the continuing impact of the initial wrong).[1] He is also seeking equitable, prospective relief in addition to review of DOE's wrongful inaction/action thus militating against imposition of the 90-day rule. Thorton v. Village of Ridgewood, 17 N.J. 499, 510 (1955) (holding equitable relief not barred by statute of limitations).

Finally, Mr. Walden has demonstrated that a strict adherence to the 90-day rule arising from the inspection date would be "inappropriate or unnecessary or may result in injustice." N.J.A.C. 6:24-1.5. Not only was his first petition filed on a timely basis (which could have been simply amended rather than withdrawn), but also his primary cause of action -- violation of

[1] Jones v. MacDonald, 33 N.J. 132, 138 (1960) (holding that "each purported exercise of the right of office by one without title to it constitutes a fresh wrong"); Meyers v. Mayor and Council of the Borough of East Paterson, 37 *N.J. Super.* 122, 128 (App. Div. 1955), *aff'd,* 21 N.J. 357 (1956)(successive payments of salary under illegally created position constitute separate remediable acts); Reahl v. Randolph Tp. Mun. Utils. Auth., 163 N.J. Super. 501, 510 (App. Div. 1978) *certif. denied,* 81 N.J. 45 (1979)(holding power of municipal authority to charge standard annual rate for sewer services was a question of public importance having a continuing impact on members of the public)

N.J.A.C. 6A: 26-3.13(g) -- will simply accrue again next month, when DOE is required to conduct an inspection of the so-called temporary, but 22-year old antiquated, trailers and approve or deny NBBOE's application to continue their use.

CONCLUSION

For the foregoing reasons, Mr. Walden's petition to enforce N.J.A.C. 6A:26-3.13(g) should not be dismissed and he should be permitted to proceed with discovery and the prosecution of this matter. Instead of deploying its resources and efforts to defeat Mr. Walden's claim, which he has brought on behalf of the predominantly low-income, minority children of North Bergen and all residents who pay schoolboard taxes, the DOE should compel NBBOE to lease new trailers and to start this Fall to transition some of the preschool children into the District elementary schools where they belong.

Respectfully submitted,

NEW JERSEY APPLESEED
PUBLIC INTEREST LAW CENTER

/s/Renée Steinhagen
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