



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON

CROSS MOTIONS

OAL DKT. NO. EDU 06551-21

AGENCY DKT. NO. 104-7/21

**PATRICIA MONTANA, DAVID M. GRANDE,
THOMAS PERRI, AGNIESZKA NORMAN,
LISA CASSILLI, AND JANET DESIANO,**

Petitioners,

v.

**ANTHONY GROSSO, SUPERINTENDENT,
AND BOARD OF EDUCATION OF THE
TOWNSHIP OF CEDAR GROVE, ESSEX
COUNTY,**

Respondents.

Patricia Montana, petitioner pro se on behalf of all petitioners.

Jeffrey R. Merlino, Esq., on behalf of respondents Anthony Grosso and Cedar Grove Township Board of Education (Sciarrillo Cornell Merlino McKeever & Osborne, attorneys)

Record Closed: October 12, 2021

Decided: November 15, 2021

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE

Petitioners are several parents whose children attend Township of Cedar Grove (“Cedar Grove”) schools. They have brought this action in order to obtain certain relief from a survey presented to students on June 9, 2021, by the Cedar Grove Board of Education (“District”).¹ Petitioners allege that the survey was conducted in such a manner as to violate a requirement that a district obtain “prior written informed consent from a student’s parent or legal guardian and provide[] for a copy of the document to be available for viewing at convenient locations and time periods” before administering any “survey, assessment, analysis or evaluation which reveals information concerning” eight personal and sensitive categories. N.J.S.A. 18A:36-34(a); 20 U.S.C. § 1232h(b), Protection of Pupil Rights Act (“PPRA”). See also District Policy 2415.05.

Petitioners seek to have the surveys and all results removed from any student records and discarded, identification of any other agency or entity that received the results, identification of the members of the District’s Equity and Diversity Advisory Council (“EDAC”) that designed the survey, a public apology, affirmative action on assuring future compliance, and an award of fees and monetary penalties.

PROCEDURAL HISTORY

The Petition of Appeal was filed with the New Jersey Department of Education, Office of Controversies and Disputes (“Department”) on July 6, 2021. The District filed its Answer to the Petition on July 29, 2021. The Department transmitted the petitioners’ complaint to the Office of Administrative Law (“OAL”) where it was filed on August 4, 2021, for adjudication as a contested matter pursuant to N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52:14F-1 to 13.

On August 6, 2021, the matter was assigned to the undersigned. On August 30, 2021, a telephonic case management conference was convened at which time pretrial

¹ While petitioners have also named the District Superintendent individually as a respondent, I shall refer to the respondents in the singular and as the “District.”

issues and motions were discussed. A briefing schedule was established as both parties were of the opinion that the case could be disposed of without evidentiary hearings. The papers have all been filed and the cross-motions are now ripe for determination.

MOTIONS PRESENTED

Respondent has filed a Motion to Dismiss the Complaint on several grounds. The District denies that the subject survey required prior parental consent because it disputes that it touched upon any of the statutory categories. It also disputes that the OAL has jurisdiction over any alleged PPRA violations, which it asserts must be brought in the federal administrative process before the United States Department of Education. The District also asserts as a defense to any consideration of the merits of the PPRA, in the event that I reach such, that the surveys were voluntary and thus, not “required,” a condition it states is necessary to trigger the PPRA’s strictures. Further, the District argues that the EDAC does not receive any federal funds and thus its Policy 2415.05 is not applicable.

Petitioners have filed a Motion for Summary Decision on their Complaint asserting that they are entitled to judgment in their favor as a matter of law and undisputed facts because the surveys touched upon gender identity and for the older students, religious affiliation. They also assert that the surveys were not genuinely “voluntary,” especially for the younger grades who were given the survey in class by the teacher as an anonymous but required assignment to be done right then and there.

LEGAL STANDARDS ON THE MOTIONS

Here, both parties have moved for a determination that the application of the law entitles each to a favorable decision. Respondent moved, however, for a dismissal as a matter of law. For the purposes of a motion to dismiss –

[A] trial court should grant a dismissal “in only the rarest of instances.” Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 772, 563 A.2d 31 (1989). A court’s review of a complaint is to be “undertaken with a generous and hospitable

approach,” *id.* at 746, 563 A.2d 31, and the court should assume that the nonmovant’s allegations are true and give that party the benefit of all reasonable inferences, Smith v. SBC Communications Inc., 178 N.J. 265, 282, 839 A.2d 850 (2004). If “the fundament of a cause of action may be gleaned even from an obscure statement of claim,” then the complaint should survive this preliminary stage. Craig v. Suburban Cablevision, Inc., 140 N.J. 623, 626, 660 A.2d 505 (1995) (citation omitted).

[NCP Litig. Tr. v. KPMG LLP, 187 N.J. 353, 365 (2006).]

Petitioners have moved for summary decision in their favor. On such a motion, it is well established that if there is no genuine issue as to any material fact, a moving party may be entitled to prevail as a matter of law without an evidentiary hearing. Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public and private litigation resources.

STATEMENT OF FACTS ON THE MOTIONS

Applying those legal standards to the pleadings and any factual matters presented outside the pleadings, I **FIND** the following as facts that form the predicate to these cross-motions.

First, the “Community Needs Assessment” surveys at issue herein included the following questions at each of these school levels:

Elementary School:

1. Race/Ethnicity
2. Gender Identity
3. “Do you feel school is a safe place?”
4. “Do you feel school is a safe place for people who look like you?”
5. “Do you feel school is a safe place for people who don’t look like you?”
6. “Do you feel the adults in your school are fair in dealing with people who look like you?”
7. “Do you feel the adults in your school are fair in dealing with people who don’t look like you?”
8. “If you felt unsafe at school, would you feel comfortable going to your teacher or principal?”

9. "What activities in school do you enjoy the most?"
10. "What change would you like to see happen at your school?"

Middle School:

1. Race/Ethnicity
2. Gender Identity
3. "Do you feel Memorial Middle School is a safe space for your particular racial/ethnic group?"
4. "Do you feel the adults in your school are fair in dealing with people who look like you?"
5. "Do you feel the adults in your school are fair in dealing with people who don't look like you?"
6. "If you felt unsafe at school, would you feel comfortable going to your teachers or principal?"
7. "What activities in school do you feel are most enjoyable?"
8. "Can you provide any examples of racial or gender-based discrimination you have experienced in the Cedar Grove Public Schools?"
9. "What change would you like to see happen at your school?"

High School:

1. Race/Ethnicity
2. Gender Identity
3. Religious Affiliation
4. Family Demographic
5. "Do you value diverse perspectives presented in the curriculum?"
6. "Prior to the shift to virtual learning, do you feel supported in Cedar Grove Public Schools?"
7. "Do you feel the school is a safe space for your particular racial/ethnic group?"
8. "Can you provide any examples of racial, gender based or religious discrimination you have experienced in the Cedar Grove Public Schools?"
9. "Do you feel Cedar Grove Public School leadership is supportive of Diversity, Equity and Inclusion efforts?"
10. "How comfortable are you speaking about racial or religious diversity?"
11. "What activities in school do you feel are most enjoyable?"
12. "What changes would you like to see happen at your school?"
13. "If there is an issue of discrimination, do you feel comfortable going to leadership?"
14. "Please use this space to communicate other information based on this survey."

[Certification of Jeffrey R. Merlino, Esq. ("Merlino Cert.") Exhibits A, B, and C.]

Prior announcements about a survey being prepared by EDAC for students, staff, and the community were made during Board meetings but did not provide sufficient detailed information to allow parents or members of the public to determine whether the questions would be touching upon subject matters for which special consideration and permissions might be required. [Certification of Anthony Grosso (“Grosso Cert.”) ¶ 12.]

The surveys were provided to the children by email link or in the classroom (elementary grades) on June 9, 2021. [Grosso Cert. ¶¶ 14-15.]

Only on that same date, June 9, did parents receive an email invitation and link in order to complete the community version of the survey. It did not include any opt-in or opt-out language for parents to object to the student versions of the survey. [Grosso Cert. ¶ 13.] It also did not provide any location or time when parents could review and inspect the surveys in advance. [Petition of Appeal ¶¶ 4, 7.]

The surveys completed by third and fourth grade students were distributed, completed and collected by the classroom teachers during a classroom session. While the students were told that the surveys were anonymous, they were not told that they were voluntary and that they could decline to complete it or that they could discuss it with their parents prior to completing it. Any clarifying questions would have been asked in person of the teacher, negating to some extent the anonymity of the survey. [Petition of Appeal ¶ 6.]

In fact, the email instructions to those teachers stated:

We would very much appreciate that you have the kids take the survey in class tomorrow, Wednesday June 9. It is only about 8 questions and shouldn't take a great deal of time. To introduce the survey, tell the kids that no name is needed. Their answers are private, and no one will know how they answered. Tell them it is to help us plan for the future at [South End/North End] to help make it a better school. Keep it simple.

[Certification of David M. Grande (“Grande Cert.”) ¶¶ 3-4, Exhibits C & D).]

At a June 15, 2021, Board meeting, the Superintendent presented a PowerPoint on the surveys' results, inclusive of "student responses, taken out of context, without consent." Upon questions and concerns expressed by parents at the meeting, he would not identify members of EDAC², commit to discarding the surveys and results, acknowledge that it had been unlawfully conducted, or that the District would comply with the laws in the future. [Petition of Appeal ¶¶ 8-9.]

The District does receive federal education funding; it is irrelevant that the EDAC itself specifically does not.

The surveys completed by students were anonymous and yet the District refused to produce them in response to an OPRA request from petitioners stating that they constitute "student records." [Certification of Patricia Montana ("Montana Cert.") ¶ 3.]

Yet, the summary of the surveys was posted on the District website. And that summary included language which showed the focus of the surveys:

The purpose of this needs assessment was to explore diversity and inclusion in the Cedar Grove Public Schools and seeks to eliminate bias and enhance diversity in all schools. Diversity is considered race/ethnicity, gender identity, LGBTQ+ status and disability status. This needs assessment seeks to explore previous and present bias to provide tangible solutions for all stakeholders. The survey participation yielded 567 participants (64 Faculty/Staff, 158 Families/Caregivers, 132 Elementary Students, 64 Middle School Students, 149 High School Students. . . .

When exploring responses of biased or discriminatory acts against individuals, the experiences varied. These experiences also varied from race, gender identity, religious affiliation and family demographics. It was clear that Cedar Grove Public Schools has had biased acts that have faced all subgroups who participated in this needs assessment.

[\[https://sites.google.com/cgschools.org/edac/2021-needs-assessment\]](https://sites.google.com/cgschools.org/edac/2021-needs-assessment) (emphasis added).]

² The District website now sets forth the names for the next school year. <https://sites.google.com/cgschools.org/edac/members>

LEGAL ANALYSIS AND CONCLUSIONS

All parties acknowledge the importance of diversity in the schools and the requirements that boards develop comprehensive equity plans to ensure that all students, regardless of their race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, gender, religion, disability, or socioeconomic status are not subject to discrimination and that any barriers to achieving equity are removed. N.J.A.C. 6A:7-1.4(c). The question here, however, is whether the survey provided to students in June of this year and which might have been geared toward assisting the District in developing an equity plan, were undertaken in a manner inconsistent with the laws governing the rights of parents and students.

N.J.S.A. 18A:36-34 (“School surveys, certain, parental consent required before administration”)³ provides –

a. Unless a school district receives prior written informed consent from a student’s parent or legal guardian and provides for a copy of the document to be available for viewing at convenient locations and time periods, the school district shall not administer to a student any academic or nonacademic survey, assessment, analysis or evaluation which reveals information concerning:

(1) political affiliations;

(2) mental and psychological problems potentially embarrassing to the student or the student’s family;

(3) sexual behavior and attitudes;

(4) illegal, anti-social, self-incriminating and demeaning behavior;

(5) critical appraisals of other individuals with whom a respondent has a close family relationship;

³ I note that there is a new provision, N.J.S.A. 18A:36-34.1, but same is not in effect until December 29, 2021.

(6) legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers;

(7) income, other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under a program; or

(8) social security number.

b. The school district shall request prior written informed consent at least two weeks prior to the administration of the survey, assessment, analysis or evaluation.

c. A student shall not participate in any survey, assessment, analysis or evaluation that concerns the issues listed in subsection a. of this section unless the school district has obtained prior written informed consent from that student's parent or guardian.

d. A school district that violates the provisions of this act shall be subject to such monetary penalties as determined by the commissioner.

District Policy 2415.05 provides:

PPRA requires written consent from parents of unemancipated minor students and students who are eighteen years old or emancipated minor students before such students are required to participate in a survey, analysis, or evaluation funded in whole or in part by a program of the United States Department of Education that concerns one or more of the following areas referred to as "protected information surveys":

1. Political affiliations or beliefs of the student or student's parent;
2. Mental or psychological problems of the student or student's family;
3. Sex behavior or attitudes;
4. Illegal, anti-social, self-incriminating or demeaning behavior;
5. Critical appraisals of others with whom respondents have close family relationships;

6. Legally recognized privileged or analogous relationships, such as with lawyers, physicians, and ministers;
7. Religious practices, affiliations, or beliefs of the student or parents;
8. Income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program); or
9. Social security number.

This consent requirement also applies to the collection, disclosure or use of student information for marketing purposes, referred to as “marketing surveys”, and for certain physical examinations and screenings.”

The District intended to and did actually seek answers from students, who were not told it was voluntary but only anonymous, with elementary students being given it as an assignment in class, on the subjects of gender identity, gender discrimination, and for the older students, religion and religious discrimination, and family demographics. It matters not that there were only a few questions, *cf.* Green v. Bd. of Ed. of Ocean, Monmouth Cty, OAL Dkt. No. EDU 4867-15, Initial Decision (September 8, 2016), adopted with modif. Comm’r Final Decision (October 24, 2016), <http://www.njlaw.rutgers.edu/collections/oal>, but whether the subject of the questions triggered the legal requirement to provide advance opt-in notice to parents.

While respondent argues that no questions were asked which touched on prohibited subjects, except for the high school students on religion which is enforceable only under the PPRA, I concur with petitioners that –

Children confuse gender identity and sexual identity/orientation also. Often, young people “direct anti-lesbian, gay, or bisexual (LGB) language; negative attitudes; and hostility toward others not because of others’ actual or perceived sexual orientation but because they do not adhere to conventional gender or other prescriptive norms about appropriate or acceptable behavior.” Stacey S. Horn, *Sexual Orientation and Gender Identity-Based Prejudice*, 13 Child Dev. Persps. 21, 21 (2009) (citations omitted). This is especially frequent as “young people try to figure out their own

sexual orientations and gender identities.” *Id.* These concerns lead students to ponder their sexual behaviors and attitudes, including behaviors they might consider anti-social or demeaning, when assessing their gender identity.

[Petitioners’ Brief at 18.]

Similarly, the surveys asked some students about family demographics which could easily elicit highly personal, and oft publicly shamed, information, such as same-sex unions. Furthermore, for the elementary students to whom the survey was distributed in class, I agree with petitioners that such violated the law also prohibits public schools from requiring students to “supply information regarding [their] race, ethnicity, migrant status or economically disadvantaged status on any materials distributed in class.” N.J.S.A. 18A:36-36(a) (emphasis added).

I **CONCLUDE** on the basis of the undisputed facts and the law cited above that the legal requirement of the state education law, N.J.S.A. 18A:36-34, was triggered and this survey was not voluntary. I also **CONCLUDE** that the appropriate remedy is to discard the surveys and all results derived therefrom from the District’s website, student records, the EDAC, and to similarly extend and advise any other entity with whom the surveys or results were shared of this requirement, which entities must be disclosed. I do not consider it necessary for there to be a mandated public apology as the respondent is now the subject of this adverse ruling. Nor do I think monetary damages are called for; and fees are not warranted as the petitioners are representing themselves. Similarly, this Initial Decision, assuming adoption or only minor modification, also serves as guidance and stricture to the District with respect to future surveys conducted on diversity and related issues in the community and the schools.

ORDER

Based upon the foregoing, it is **ORDERED** that the petitioners’ Motion for Summary Decision on their Petition of Appeal shall be **GRANTED**. It is further **ORDERED** that the respondent’s Motion to Dismiss the Petition of Appeal shall be **DENIED**.

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.

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. of any exceptions must be sent to the judge and to the other parties.



November 15, 2021 _____

DATE

GAIL M. COOKSON, ALJ

Date Received at Agency:

11/15/21 _____

Date Mailed to Parties:

11/15/21 _____

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