

D.K., on behalf of minor child, M.O’K., :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE : DECISION
 BOROUGH OF BELMAR, MONMOUTH :
 COUNTY, :
 RESPONDENT. :
 _____ :

SYNOPSIS

Petitioning parent challenged the Board’s determination of suspension of her son, M.O’K., from school for three days and his permanent expulsion from the basketball team for alleged sexual harassment (inappropriate exposure of buttocks and remarks) in November 1999. Petitioner sought reversal of discipline and removal from M.O’K.’s school record.

In light of the testimony of witnesses and the record, the ALJ found that petitioner failed to establish by a preponderance of credible evidence that the allegations in the petition were true. Moreover, the ALJ concluded that the Board’s actions were taken based solely on the incidents of November 1999 and were not connected to petitioner’s earlier filing of a notice of tort claim. Petition was dismissed.

The Commissioner agreed with the ALJ’s conclusion that petitioner had not met the burden of establishing that the Board’s actions were arbitrary, capricious and unreasonable. (*J.M. v. Hunterdon Central Regional High School District*) The Commissioner also found that the ALJ properly applied the law with respect to weighing the evidence in this matter, including conflicting testimony and assessment of credibility. The Commissioner agreed with the Board that M.O’K.’s inappropriate behavior fell within the prohibitions of the District’s Student Code of Conduct against sexual harassment and that the sanctions it applied against M.O’K. were consistent with that Code. Commissioner further determined that the Board’s action to exclude M.O’K. from participation on the school’s basketball team must be reviewed in the context of prior decisions which have consistently held that participation in extracurricular activities is not an entitlement but a privilege. (*Domacasse*) The Commissioner adopted findings and determination in Initial Decision as his own.

OAL DKT. NO. EDU 100-00
AGENCY DKT. NOS. 9-1/00 AND 395-12/99

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The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Petitioner’s exceptions and the Board’s reply thereto were timely filed pursuant to *N.J.A.C. 1:1-18.4*.

Petitioner’s exceptions in large part recast her arguments as raised before and considered by the Administrative Law Judge (ALJ), essentially contending that the discipline relating to M.O’K. should be reversed and removed from his school record. Petitioner also urges, *inter alia*, that:

1. The ALJ made findings and conclusions relative to J.S. Yet J.S. did not testify and the ALJ’s findings are contrary to J.S.’s statements in the police report.
2. The ALJ made findings and conclusions that M.O’K. “knowingly” exposed the upper portion of his buttocks and “knowingly” brought his pelvis forward. These “knowingly” determinations are contrary to all the evidence presented.
3. The ALJ ignored that the School’s Code of Conduct would not support a finding of sexual harassment, warranting a three-day suspension and permanent removal of M.O’K. from the school’s basketball team. The School’s Code of Conduct does not support a determination that the actions were sexual harassment.

4. The ALJ's findings that M.O'K. accompanied his contact with K.J.'s backside with guttural sounds is not supported by any of the evidence presented.

5. The ALJ's referring to another student who allegedly received the same discipline is inaccurate, as this incident regarding a member of the wrestling team, involved exposure of frontal nudity. Moreover, the wrestling season was concluding and the basketball season for M.O'K. had just begun.

6. The ALJ ignored the compelling evidence that the superintendent, the principal, and the Board, severely disciplined M.O'K because D.K. had filed a Notice of Tort Claim against them and others related to incidents that occurred in March 1999.

The Board's reply exceptions rebut each point raised in petitioner's six primary exceptions. The legal arguments advanced by the parties with respect to each of petitioner's exceptions have been duly considered by the Commissioner in reaching the final determination herein.

Upon a comprehensive and independent review of the record in this matter, including the parties' exceptions, the Commissioner agrees with and adopts as his own the findings and conclusions of the ALJ that petitioner has not met the burden of establishing that the Board's actions in the instant matter were arbitrary, capricious, or unreasonable. It is well-established "****that actions of local boards of education which lie within the area of their discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives." *J.M. v. Hunterdon Central Regional High School District*, 96 N.J.A.R.2d (EDU), 415, 419, citing *Kopera v. West Orange Bd. of Education*, 60 N.J. Super. 288 (App. Div. 1960).

A major thrust of petitioner's exceptions attack findings and conclusions which are grounded in credibility determinations made by the ALJ. It is noted by the Commissioner that the record before him does not include transcripts or an audiocassette tape recording of the hearing conducted at the OAL. In the absence of transcripts or tapes from the hearing, due

regard should be given to the person who heard the live testimony and assessed the witnesses' behavior at the hearing. *Close v. Kordulak Bros.*, 44 N.J. 589, 599 (1965). Likewise, the Commissioner may not properly reject such findings of fact without reviewing those portions of the transcript(s) or tape recording of the testimony upon which the ALJ's findings were reached. *Rowley v. Board of Education of Manalapan-Englishtown*, 205 N.J. Super. 65, 75 (App. Div. 1985). *In re Morrison*, 216 N.J. Super. 143, 159 (App. Div. 1987).¹

Having thoroughly examined the record before him, the Commissioner finds the ALJ properly applied the law with respect to weighing the evidence in this matter, including conflicting testimony and assessment of credibility. *Lazorick, supra*; *In re Perrone, supra*; *Middletown Tp., supra*; *In re Wolf, supra*; *Jackson, supra*; *State v. Salimone, supra*; and *Congleton, supra*. Moreover, the Commissioner finds no cause to challenge the credibility assessments made by the ALJ or to disturb the ALJ's findings of fact. Further, the Commissioner agrees with the Board's contention that, even though J.S. did not testify and he might have made a contrary statement in the police reports, this does not contradict the findings of fact made by the ALJ. As correctly stated by the Board, "the ALJ's findings relating to J.S.' statements to Lieutenant Van Etten are not misplaced. The ALJ's findings were grounded in what is characterized as the credible testimony of K.J. and the report of Lieutenant Van Etten [Initial Decision at 15]. The thrust of Petitioner's objections appear[s] to hinge upon whether the mooning was full or partial exposure. Neither act need be condoned by the Board of Education." (Reply Exceptions at 4)

The Commissioner is also in full agreement with the Board's position that the inappropriate conduct engaged in by M.O'K. may be deemed to fall within the prohibitions of

¹ As held by the court in *In re Morrison* at 158-159, it is the responsibility of those challenging such determinations to provide the Commissioner with such portions of the transcript, and no obligation arises for the Commissioner to review them before issuing a final decision regarding the findings and recommendations of the ALJ.

the District's Student Code of Conduct against sexual harassment and that the sanctions it applied against M.O'K. were consistent with that Code. As to petitioner's exception with respect to M.O'K.'s discipline being more severe than that applied to the student wrestler, the Commissioner fully concurs with the Board's argument that "[i]nappropriate exposure of a student's private parts is unacceptable behavior. Petitioner attempts to excuse M.O'K.'s actions by trying to differentiate between partial and complete exposure, and whether exposure was frontal or rear nudity. Both violations warranted appropriate disciplinary action by the Board of Education." (*Id.* at 8) The Commissioner further determines that the Board's action herein to exclude M.O'K. from participation on the school's basketball team must be reviewed in the context of prior decisions which have consistently held that participation in extracurricular activities is not an entitlement but a privilege, which can be revoked for infraction of school rules or failure to act in accordance with Board policy. *Martin A. Domacasse v. Board of Education of North Warren Regional School District, Warren County*, State Board of Education decision dated April 17, 1996, citing *Camden City Board of Education v. NJSIAA*, Docket #A2802-91T2 (App. Div. 1992); *Burnside v. NJSIAA*, 1984 *S.L.D.* 1696 (App. Div. 1984), *cert. denied*, 101 *N.J.* 236 (1985). *See also P.K., on behalf of R.K. v. Board of Education of the Morris Hills Regional School District, Morris County et al.*, decided June 17, 1998. The Commissioner's review of the record in this matter fails to demonstrate that the Board's disciplinary actions with respect to M.O'K. were arbitrary, capricious or unreasonable; therefore, his suspension for the entirety of the basketball season may not be disturbed.

Lastly, the Commissioner affirms the ALJ's determination that there is no connection established in the record of this matter between the events of November 1999 and D.K.'s earlier filing of notice of a tort claim against the Board and its agents.

Accordingly, the Initial Decision is, hereby, adopted as the final decision in this matter for the reasons clearly articulated therein, and the Petition of Appeal dismissed.

IT IS SO ORDERED.²

COMMISSIONER OF EDUCATION

Date of Decision: May 5, 2000

Date of Mailing: May 5, 2000

² This decision, as the Commissioner's final determination, 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. 6:2-1.1 et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.