

V.W. on behalf of minor child E.B., :  
PETITIONER, :  
V. : COMMISSIONER OF EDUCATION  
STATE-OPERATED SCHOOL : DECISION  
DISTRICT OF THE CITY OF  
NEWARK, ESSEX COUNTY, :  
RESPONDENT. :

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#### SYNOPSIS

Petitioner, E.B.'s mother, seeks an order granting E.B. a new hearing on disciplinary charges or reinstatement to his original elementary school placement, arguing that E.B. was unfairly disciplined in retaliation for petitioner's activities as a former PTO officer at her son's elementary school. Respondent Board contends that E.B.'s transfer to an alternate educational placement was appropriate given his defiant and disruptive behavior, and poor academic performance.

The ALJ concluded, *inter alia*, that the transfer of E.B. to a different academic program was not deprivation of a property or liberty interest and consequently did not require a due process analysis and, in any event, the petitioner failed to show that E.B. was denied due process in the district disciplinary hearing. The ALJ also concluded that there was ample evidence to sustain charges of open defiance of teacher authority and continued disruptive behavior throughout the school year, that E.B.'s academic performance was failing, and that the transfer of E.B. to the Renaissance Program curriculum was appropriate and not punitive in nature. The ALJ ordered that the petition be dismissed.

The Commissioner, relying upon the credibility findings of the ALJ, determined that the respondent's decision to transfer E.B. to the Renaissance program was not arbitrary, capricious or unreasonable, but rather warranted by E.B.'s disruptive behavior and poor academic performance. The Commissioner also determined that E.B. received the process that was due him, adopted the Initial Decision of the OAL as the final decision in this matter, and dismissed the instant petition.

<p>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.</p>
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September 7, 2006

OAL DKT. NO. EDU 5509-06  
AGENCY DKT. NO. 166-5/06

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The record and Initial Decision in this matter have been reviewed. No exceptions have been filed. For the reasons that follow, the Commissioner adopts the Initial Decision of the Office of Administrative Law (OAL).

The Administrative Law Judge (ALJ) who heard this matter made detailed findings of fact and credibility determinations. Neither party challenged any of the findings by way of exceptions, nor were transcripts of the hearing provided to the Commissioner. Additionally, the Commissioner finds nothing in the hearing exhibits that contradicts the ALJ's findings. Accordingly, the Commissioner relies upon the credibility findings of the ALJ, and adopts the factual findings in the Initial Decision. *See, e.g., In the Matter of Raymond Morrison, 216 N.J. Super.143, 159 (App. Div. 1987).*

The instant controversy arose when, after a disciplinary hearing, petitioner's son was transferred from the school he had been attending – E. Alma Flagg Elementary School (Flagg) – to a curriculum called the “Renaissance Program” at the Gladys Hillman Jones School (Jones). Petitioner asks that the Commissioner either 1) order that her son be returned to Flagg

and a “conference” be provided to assess her son and identify appropriate services, or 2) order that her son be given a second, *de novo* disciplinary hearing.

More specifically, as set forth in the Initial Decision, a hearing was held by the designee of the Superintendent of respondent’s district on April 13, 2006, to find facts concerning the behavior of petitioner’s son, E.B., and to make determinations about discipline, if any, and E.B.’s educational needs.<sup>1</sup> The hearing was precipitated by an incident on March 7, 2006, in which E.B. had grabbed and pushed the heads of two other students while in computer class.<sup>2</sup> As the evidence at the hearing showed, however, the March 7 incident had been preceded by several episodes of defiant and disruptive behavior over the course of the school year, and by tests and reports that indicated that E.B.’s academic performance was poor.

Petitioner and E.B. attended the district hearing, but they chose not to testify. A family friend cross-examined respondent’s witnesses. While the hearing officer had denied petitioner’s request for a two-week adjournment of the hearing so that her attorney could formulate a defense, he did accept a submission from petitioner’s counsel on the day of the hearing and, according to respondent in its brief in opposition to petitioner’s motion for emergent relief, he did leave the record open for further submissions from petitioner’s counsel. None, however, were filed.

The hearing officer’s Report and Recommendation, which was adopted by the District Superintendent, sustained three charges: 1) lewd and inappropriate conduct/gender

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<sup>1</sup> The ALJ found that notice of the hearing had been hand delivered to petitioner on April 6, 2006.

<sup>2</sup> The ALJ found that the Vice-Principal of Flagg had left petitioner a voicemail message one day after the March 7, 2006, incident describing what had been reported to him and asking her to meet with him to discuss it, and that petitioner had not responded.

harassment/violation of the District's harassment, intimidation and bullying policy; 2) open defiance of teacher authority; and 3) continued disruptive behavior. His determination was that E.B. should be transferred from Flagg to the Renaissance Program at Jones. The Renaissance Program would offer E.B. a fresh start in a new academic environment, with different teachers and with students who would be unaware of E.B.'s history. He would be in smaller classes, allowing him to receive more personal attention. The program would provide tutoring and counseling. The transfer was ordered effective May 1, 2006.

At the OAL hearing, respondent presented multiple witnesses who offered testimony about E.B.'s episodes of disrespectful, defiant and disruptive behavior. That behavior, as well as E.B.'s poor academic performance, was also memorialized in exhibits that were entered into evidence at the OAL hearing. Respondent also presented Dr. Vincent Mays, Respondent's Director of Alternative Education, whose testimony verified that the Renaissance Program, which had been designed by and was monitored by the New Jersey Department of Education, does provide classes of only five to eight students, who receive much individualized attention and monitoring. E.B. chose not to testify, leaving most of the evidence submitted by respondent unrebutted.

In sum, the facts found by the ALJ supported his conclusion that petitioner failed to show that respondent's decision to transfer E.B. to the Renaissance program was arbitrary, capricious or unreasonable. To the contrary, the facts supported that E.B.'s behavior and academic performance warranted the transfer. And for the reasons set forth in the ALJ's legal analysis, the Commissioner agrees that the foregoing standard is the correct one for this controversy.

The Commissioner further agrees with the ALJ, based on the legal authority cited in the Initial Decision, that transfer to a different educational program, as opposed to expulsion, did not deprive E.B. of property or liberty interests, and that consequently no constitutional issues were implicated by respondent's actions. The notice provided by respondent for the District's hearing, and the hearing itself – which was attended by petitioner and E.B., and in which live testimony and documentary evidence were presented – were adequate. Moreover, petitioner's son received a second, *de novo* hearing in the OAL.

Because none of the witnesses regarded E.B.'s behavior on March 7, 2006, as having sexual connotations, the ALJ determined that the district hearing officer's finding on the charge of "lewd and inappropriate conduct/gender harassment/violation of the District's harassment, intimidation and bullying policy" was not sustainable. The Commissioner agrees. However, the remaining district charges stand,<sup>3</sup> and the transfer of E.B. to the Renaissance Program is, as the ALJ concluded, "a measured response to E.B.'s overall behavior as well as academic deficiencies." (Initial Decision at 14)

Respondent's action is upheld and the petition in this matter is dismissed.

IT IS SO ORDERED.<sup>4</sup>

ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 7, 2006

Date of Mailing: September 7, 2006

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<sup>3</sup> For the reasons articulated by the ALJ, the Commissioner concurs that the facts do not support petitioner's claim that discipline accorded E.B. was retaliation for his mother's activities as a PTO officer.

<sup>4</sup> 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.*