

147-05

MICHAEL GIANNETTA, SUSETTE GIANNETTA, :
AND MICHAEL GIANNETTA, JR., :

PETITIONERS, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF :
EGG HARBOR, ATLANTIC COUNTY, *ET AL.*, :

DECISION

RESPONDENTS. :

SYNOPSIS

This matter was initiated by a Petition of Appeal, filed on October 6, 2004, wherein Michael Giannetta, Jr., an 18-year-old student at Egg Harbor Township High School, and his parents sought: 1) to compel the Board to award Mr. Giannetta credit for subjects he passed during his junior year, which had been denied due to his 43 days of absence; 2) promotion of Mr. Giannetta to the twelfth grade; and 3) reimbursement for legal fees relating to an “unfair assault charge” the district brought against Mr. Giannetta as the result of a fight with another student. Petitioners further requested that school authorities be held accountable for the following allegations: failure to act in the best interest of a child; failure to enforce school policy in a uniform manner; and failure to respond to matters in a reasonable and timely manner. An Amended Petition addressing deficiencies was filed by petitioners, and respondent Board filed an Answer denying petitioner’s claims, requesting an award of attorney fees and asserting that: 1) the Petition of Appeal was not timely filed, and 2) petitioning parents lack standing to bring these claims on their son’s behalf given that their son is of majority age. Subsequently, the parties were requested to submit memoranda of law or letter briefs setting forth their legal arguments on the two threshold issues of untimeliness and lack of standing.

Upon a thorough review of the matter, the Commissioner concurred with the Board’s position that the Petition of Appeal was untimely filed, and cited *N.J.A.C. 6A:3-1.3(d)* which defines the 90-day period for appeal. The Commissioner addressed the mandatory nature of the 90-day time period, which has been well established by case law, and found no factual circumstances that constitute grounds for relaxation of the 90-day rule. With respect to the Board’s request for legal fees, the Commissioner found no statutory authority to award such fees.

The Commissioner dismissed the petition for failure to timely file in accordance with *N.J.A.C. 6A:3-1.3(d)*; denied the Board’s claim for legal fees; and stated that it was not necessary to reach to the issue of standing given this determination.

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.

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DECISION

RESPONDENTS. :

_____ :

For Petitioners, Michael Giannetta, Susette Giannetta and Michael Giannetta, Jr., *Pro Se*

For Respondent, Emily A. Buonadonna, Esq. (Cooper Levenson, Attorneys at Law)

This matter was initiated by way of a Petition of Appeal, filed on October 6, 2004,¹ wherein Michael Giannetta, Jr., an 18-year-old student at Egg Harbor Township High School, and his parents seek to compel the Egg Harbor Township Board of Education (Board) to award Michael Giannetta, Jr. credit for subjects he passed during his junior year, but for which credit was denied due to his 43 days of absence. (Petition of Appeal at 1) Petitioners also seek the promotion of Mr. Giannetta to the twelfth grade and reimbursement for legal fees for the “unfair assault charge” the school district brought against Mr. Giannetta as the result of a fight with another student.² (*Ibid.*) Additionally, petitioners request that the authorities involved be held accountable for: 1) failure to act

¹ Although the petition was dated August 31, 2004, the postmark reflects that the petition was mailed on October 4 and it was received in the Bureau of Controversies and Disputes on October 6, 2004.

² The Commissioner notes that the 43 days of absence include Michael Giannetta, Jr’s 10-day suspension for fighting. In connection with this incident, Mr. Giannetta was charged with attempting to cause bodily injury to a juvenile by punching him with a closed fist in violation of *N.J.S. 2C:12-1(a)1* and purposely causing or recklessly creating the risk of public inconvenience, annoyance or alarm, by engaging in a fight with another student while attending the Egg Harbor Township High School, in violation of *N.J.S. 2C:33-2(a)*. Petitioners claim that these charges were ultimately dismissed. (Attachment to Petition of Appeal, Complaint-Juvenile Delinquency)

in the best interest of a child; 2) failure to enforce school policy in a uniform manner; and 3) failure to respond to matters in a reasonable and timely manner. (*Ibid.*) By letters of October 12, 2004, October 27, 2004 and November 5, 2004, petitioners were advised that they were required to correct specific deficiencies in the petition before it could move forward. An Amended Petition addressing the identified deficiencies was filed on November 3, 2004. The Board filed its Answer on December 30, 2004, denying petitioners' claims, requesting an award of attorney fees and asserting as separate defenses, *inter alia*, that: 1) the Petition of Appeal was not timely filed and 2) petitioning parents Michael and Susette Giannetta lack standing to bring these claims on their son's behalf given that their son is of majority age. (Answer at 1-3)

By letter of January 3, 2005, the parties were notified that respondent's affirmative defenses of untimeliness and lack of standing were threshold issues requiring a determination before any decision could be made as to what further proceedings, if any, were required in this matter. Consequently, petitioners were requested to submit a memorandum of law or letter brief setting forth their legal arguments as to why the petition should not be dismissed for failure to file the Petition of Appeal in accordance with *N.J.A.C.* 6A:3-1.3(d), and their arguments with respect to the petitioning parents' standing to participate in this appeal. The Board was requested to respond to petitioners' submission within twenty days of receipt of same. When petitioners did not respond, by letter of January 31, 2005, petitioners were given a final opportunity to address the threshold issues and were advised that failure to respond would result in the dismissal of the within petition for failure to prosecute the appeal.

Petitioning parents Michael and Susette Giannetta filed a response on February 10, 2005. Petitioners claim that a lengthy letter to the school board was delivered on March 23, 2004, "concerning the harsh treatment given my son and the lenient treatment given his attacker." (Petitioners' February 10, 2005 Response at 1) Then, "[i]n June 2004, when the issue came up of my son not receiving credit for classes passed his junior year because of too many absences, I

went through the proper levels of appeal, with the last request being before the school board.” (*Ibid.*) Petitioners’ claim that they were never given a hearing, but instead the school board held a private meeting and ruled against their son. (*Ibid.*) Subsequently, petitioners claim, their lawyer at the time sent two letters to the superintendent, Dr. Heery, regarding their son receiving credit for his classes. (*Ibid.*) Petitioners report that a response from Dr. Heery was received by their attorney on August 11 or 12. (*Ibid.*) Petitioners also claim that numerous phone calls were made to the county superintendent from April to August trying to set up a meeting with him, and in August, the county superintendent told them he could not help them and directed them to the Commissioner of Education. (*Ibid.*) Petitioners conclude that they are well within the 90-day limit since the last answer from Dr. Heery was received August 11 or 12 and that “[s]ince the Board has never adequately taken care of these issues, these issues remain open.” (*Ibid.*) Moreover, petitioners assert that they are not only appealing about their son not receiving credit for last year, but also are bringing before the Commissioner the “underhanded” way they have been treated by the school district.

With respect to the parents’ standing to participate in this matter, petitioners claim that they have standing because their son was “under 18 at the time all these issues were happening,” noting that he turned 18 on August 31, 2004. (*Id.* at 2) Additionally, petitioners request that whatever the outcome of these proceedings, that they not be burdened with legal fees, submitting that they cannot even afford to hire their own lawyer and that such fees would “literally take food out of our children’s mouths.” (*Ibid.*) Finally, petitioners state that their son has since dropped out of high school, five months before he should have graduated, and that they hold the school district responsible because of the district’s callous attitude and treatment of their son. (*Ibid.*)

In a response filed on March 2, 2005, the Board explains that Michael Giannetta, Jr. was absent for a total of 44 days or 24 % of the 2003-04 school year, which was too many absences to earn credit for all his courses for the year as set forth in the District’s Attendance Policy. (Board’s March 2, 2005 Submission at 1) Of these absences, 28 were excused and 16 were unexcused. (*Ibid.*)

The Board points out that its Attendance Policy states that, if a high school student accumulates more than 10 unexcused absences, the student will not have completed the prescribed course of study and will be placed on No Credit Status, and that the No Credit Status requires the student to present all doctor's notes to the attendance secretary within 15 days. (*Id.* at 1-2) Moreover, if a student acquires 20 or more unexcused absences, the student will be retained and, if a student acquires a total of 35 excused and unexcused absences, the student will be retained. (*Id.* at 2) The Board asserts that the Attendance Policy is included in the Student Handbook and that petitioners cannot claim that Mr. Giannetta, Jr. did not receive a copy of the Student Handbook. (*Ibid.*)

The Board further contends that petitioners were notified of Mr. Giannetta, Jr.'s academic standing based on his number of absences and that they exercised their rights of appeal to the Attendance Appeals Committee, the superintendent and the Board. (*Ibid.*) Both the Attendance Appeals Committee and the superintendent denied petitioners' appeal and, on June 29, 2004, after reviewing petitioners' appeal and supporting documentation, the Board sustained Mr. Giannetta, Jr.'s attendance record of 44 absences and determined that he would have to repeat the eleventh grade. (*Ibid.*) Petitioners were notified of the Board's decision by letter of June 30, 2004 and subsequently appealed to the Commissioner. (*Ibid.*) The Board claims that it was not served with the original petition and notes that the Amended Petition was filed on November 3, 2004, more than four months or 126 days after petitioners' receipt of the final Board action. (*Ibid.*) The Board points out that *N.J.A.C. 6A:3-1.3(d)* specifies that a petition of appeal must be filed no later than the 90th day from receipt of the notice of a final order, ruling or other action by the district board and notes that the Supreme Court in *Kaprow v. Berkeley Township Board of Education*, 131 N.J. 572, 578 (1993) addressed the public policy reasons behind the rule. (*Id.* at 3) Thus, the Board reasons, petitioners' claims are time barred and should be dismissed. (*Id.* at 4)

With respect to petitioners' standing in this matter, the Board argues that petitioners lack standing to pursue this matter because Mr. Giannetta, Jr. voluntarily withdrew from school, and

the Board further notes that petitioners will suffer no harm if the requested relief is not granted, *e.g.*, awarding credit for Mr. Giannetta's eleventh grade classes and promotion to the twelfth grade, because Mr. Giannetta is no longer in school. (*Ibid.*) Moreover, the Board asserts, since "petitioners cannot establish some measurable amount of detrimental impact on their own son's rights, they also lack standing to seek relief on behalf of other students in the school." (*Ibid.*) Additionally, the Board contends that, upon reaching the age of majority, the right to appeal transferred to Michael Giannetta, Jr, who has been silent throughout the appeal process. (*Id.* at 6) Finally, the Board avers that petitioners' claims are moot since Michael Giannetta, Jr. voluntarily withdrew from the school district and is no longer subject to Board policy and regulations. (*Ibid.*)

Upon a thorough review of this matter, the Commissioner fully concurs with the Board's position that the Petition of Appeal herein was untimely filed. By letter of June 30, 2004, petitioners were notified that the Board had sustained Mr. Giannetta's suspension and his record of 43 days³ of absence, and had thus determined that he would be required to repeat the eleventh grade in accordance with the provisions of Policy #5200. (Attachment to Amended Petition and Board's Exhibit F) Thereafter, petitioners contacted the superintendent and the county superintendent in an effort to alter the Board's decision.

Pursuant to *N.J.A.C.* 6A:3-1.3(d), the 90-day period for appeal to the Commissioner begins when the affected individuals have received adequate notice. In order for the notice to be adequate, the individuals must have been alerted to the existence of facts which give rise to a cause of action. *Kaprow, supra* at 586-587. Here, petitioners were clearly put on notice by letter of June 30, 2004 that their appeal to the Board had been denied. Pursuant to the *Rules Governing the Courts*, R.1:3-3, "[w]hen service of a notice or paper is made by ordinary mail, and a rule or court order allows the party served a period of time after the service thereof within which to take some

³ It is noted that the Board's arguments refer to 44 days of absence. However, it appears that Mr. Giannetta's absences actually totaled 43 in that this letter and the other exhibits provided by the Board reflect this number.

action, 3 days shall be added to the period.” Accordingly, petitioners had 93 days from June 30, or until October 1, 2004, to appeal the Board’s determination to the Commissioner. Petitioners did not file the within appeal until October 6, 2004. Petitioners’ subsequent efforts to negotiate with the superintendent and meet with the county superintendent do not toll the 90-day timeline. Numerous decisions concerning the 90-day time limitation have been litigated and the courts have consistently held that the rule is mandatory and that the 90-day time period begins to run on the date that notice is received of the action taken. *See Nissman v. Bd. of Educ. of the Twp. Of Long Beach Island*, 272 N.J. Super. 373, 380 (App. Div. 1994), *cert. denied* 137 N.J. 315 (1994); *Wynne v. Tillery, Camden County Superintendent of Schools et al.*, 96 N.J.A.R.2d (EDU) 995; and *Portee v. Newark Board of Education*, 94 N.J.A.R.2d (EDU) 381. As stated by the Supreme Court in the *Kaprow* matter, attempts to resolve a claim through negotiation with the local board do not negate the fact of receipt of adequate notice, nor do they toll the running of the time limitations. (*Kaprow, supra*, at 588)

Notwithstanding petitioners’ assertion that they are not limited to the 90-day filing requirement because they are not only appealing the issue of their son not receiving credit for last year, but also are bringing before the Commissioner the “underhanded” way they have been treated by the school district and the failure of the Board to take care of these issues, the Commissioner finds that all the allegations raised by petitioners are related to issues determined by the Board in its June 30, 2004 determination and are, thus, subject to the same 90-day time limitation. Moreover, the Commissioner does not find that the factual circumstances set forth in petitioners’ pleadings constitute grounds for relaxation of the 90-day rule. No constitutional issues are involved in the matter nor does it present issues of significant public interest beyond the parties. On the contrary, the Commissioner herein determines, as did the Commissioner in *LeMee v. Board of Education of the Village of Ridgewood*, 1990 S.L.D. 663, 673, that the greater public interest lies with the enforcement of the 90-day rule and the dismissal of petitioners’ appeal as untimely.

With respect to the Board's request for legal fees, in the absence of express statutory authority to award counsel fees, the Commissioner may not direct such compensation. *See B.B., on behalf of her son, L.C. v. Board of Education of Union County Regional High School District No.1. and Donald Merachnik, Superintendent of Schools*, 1987 S.L.D. 323, 336; *Balsley v. North Hunterdon Bd. of Educ.*, 117 N.J. 434, 441 (1990); and *State, Dept. of Environ. Protect. v. Ventron Corp.*, 94 N.J. 473, 504 (1983).

Accordingly, for the reasons set forth above, the petition in this matter is dismissed for failure to timely file in accordance with *N.J.A.C. 6A:3-1.3(d)*, and the Board's claim for legal fees is denied. Given this determination, it is not necessary to reach to the issues of standing or whether this matter has been rendered moot by Mr. Giannetta, Jr.'s withdrawal from school.

IT IS SO ORDERED.⁴

COMMISSIONER OF EDUCATION

Date of Decision: April 25, 2005

Date of Mailing: April 26, 2005

⁴ 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*