

S.S. and E.S. on behalf of minor child, E.S., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
TOWNSHIP OF UNION, UNION COUNTY, :
RESPONDENT. :

SYNOPSIS

Petitioners sought the expungement or redaction of E.S.’s Union Township school disciplinary record because the family has permanently moved out of state, and/or because the pertinent document in the child’s record – a letter from the school principal – is allegedly inaccurate. Respondent Board contended that, pursuant to *N.J.S.A. 18A:36-19*, it is obligated to retain the letter in E.S.’s school records. The parties submitted cross motions for summary decision and jointly stipulated to the material facts.

The ALJ found that: the Destruction of Public Records Law, *N.J.S.A. 47:3-15 et seq.*, does not apply in the instant case, as E.S. is no longer a student in New Jersey; the record of E.S. related to his making a threatening gesture seven years ago, while in the first grade, is not educationally relevant and should be expunged by the Board pursuant to *N.J.A.C. 6A:32-7.7(a)1*; the issue of whether a suspension seven years ago was merited is not a subject of review here; and that the principal’s letter in E.S.’s file meets the broad definitions of “student discipline record” and “student record”. The ALJ granted summary decision to petitioners, and ordered that the Board remove the principal’s letter from E.S.’s student record and destroy it.

The Commissioner rejected the OAL’s Initial Decision, finding, *inter alia*, that: petitioners’ argument that the principal’s letter should be expunged because its contents are inaccurate is without merit; *N.J.A.C. 6A:32-7.8(b)* allows student records which are no longer educationally relevant to be destroyed only while the student is still enrolled in a district; disposal of the records of a student who has left the district is governed by the Destruction of Public Records Law (DPRL), which mandates that student disciplinary records be maintained until two years after the student’s graduation or termination from the school system or age 23, whichever is longer; the relevant statutes and regulations do not prohibit the sharing of student disciplinary records across state lines, nor do they suggest that the retention of information in student disciplinary records is no longer of benefit after a student has moved out of state; *N.J.A.C. 6A:16-7.10* and other New Jersey regulations flow from federal regulations, making it reasonable to conclude that the retention and sharing of student disciplinary records was intended to be universal. Accordingly, the Commissioner granted the respondent’s motion for summary judgment and dismissed the 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>

OAL DKT. NO. EDU 5179-07
AGENCY DKT. NO. 112-4/07

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RESPONDENT. :
_____ :

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Commissioner rejects the Initial Decision for the reasons that follow.

As explained by the Administrative Law Judge (ALJ), the parties submitted cross motions for summary decision and jointly stipulated to the material facts. (Initial Decision at 2) Stipulated fact #3 stated that on or about June 7, 2000, E.S., had an argument with another student. (Initial Decision at 2) Stipulated fact #4 stated that “[d]uring the argument E.S. ‘allegedly’ pointed his first finger at the other child and threatened to shoot him.” (*Ibid.*) In a letter to petitioners on the date of the incident, the school principal stated that E.S. “held his hand to the child’s head like a pistol” and said twice “I am going to shoot you in the brain and kill you.” (Letter dated June 7, 2000 from Dr. Edward A. Kliszus, attached as exhibit to respondent’s June 13, 2007 letter brief in support of its motion for summary decision) E.S. was suspended for three days, and the letter from the school principal was placed in his record. (Initial Decision at 2-3)

Subsequent to June 7, 2000, there were no further reports of violence, threats or disruptive behavior by E.S. in the Union school system. (Stipulated fact #8, Initial Decision at 3) In 2005, E.S.' family moved to Pennsylvania, where he was enrolled for the 2005-2006 school year. (Stipulated fact #7, Initial Decision at 3) Petitioners ask the Commissioner to order the removal from E.S.'s school record of the June 7, 2000 letter by the school principal.

At the outset, the Commissioner agrees with the Administrative Law Judge (ALJ) that the argument set forth in Point I of petitioners' summary disposition brief is without merit. In that argument, petitioners invoked *N.J.A.C.* 6A:32-7.7, which allows expungement of inaccurate or irrelevant information in student records. Petitioners appeared to contend that the June 7, 2000 letter by the school principal contains inaccuracies and irrelevancies by virtue of its allusion to the referral of the incident to the Assistant Superintendent of the school district, and recommendation that E.S. receive counseling or a psychiatric evaluation. These items, according to petitioners, made the incident seem more serious than it was, thus generating inaccurate and irrelevant information.

However as the ALJ explained:

[Petitioners] point to no facts in [Dr. Kliszus'] letter which are inaccurate, but rather complain that Dr. Kliszus mischaracterized the incident as serious. The joint stipulation of facts, upon which both parties agreed to rely as a complete recitation of relevant facts, does not suggest that any of the facts in the letter were inaccurate. The issue of whether a suspension seven years ago was merited is not a subject of review here. (Initial Decision at 6)

The Commissioner further agrees with the ALJ that Dr. Kliszus' letter conforms to the broad definitions of "student discipline record" and "student record" as defined by *N.J.A.C.* 6A:32-2.1. (Initial Decision at 6-7)

In Point II of their brief, petitioners maintain that E.S. is in the East Stroudsburg, PA school district permanently; that this renders his records in the Union School District

irrelevant; and that consequently – pursuant to *N.J.A.C.* 6A:32-7.7 – their request for expungement of Dr. Kliszus’ letter should be granted. They make reference to *N.J.A.C.* 6A:32-7.8, but that regulation does not help them.

N.J.A.C. 6A:32-7.8(b) allows student records to be destroyed while the student is still enrolled in a district. After the student has left the district, his records may be disposed of only in accordance with the Destruction of Public Records Law (DPRL), *N.J.S.A.* 47:3-15 *et seq.* Records are classified by the State Records Committee and posted on a Records Retention and Disposition Schedule. As the ALJ explained, student disciplinary records have been assigned the Record Series Number 0012-0001.¹ Records in that classification may not be destroyed until two years after the student’s graduation or termination from the school system or age 23, whichever is longer. Since E.S. has not reached the age of 23, his records are not ripe for disposal.

Petitioners also cite to the Initial Decision in *J.C. on behalf of minor child, J.C. v. Board of Education of the Bergen County Vocational School District*, Agency Dkt. No. 284-8/03, OAL Dkt. No. EDU 9575-03, for the proposition that once a student has transferred, his disciplinary records may be destroyed at the request of his guardian(s). The Initial Decision in *J.C.*, however, was rejected by the Commissioner of Education, and cannot serve as support for petitioners’ position. (Commissioner’s Decision No. 34-04, decided February 5, 2004)

The Commissioner’s decision in *J.C.* reflects the statutory scheme described above:

In the instant matter, J.C. withdrew from the Bergen County Vocational School District to attend school at Bogata High School and, thus, pursuant to *N.J.A.C.* 6:3-6.8(c)2, [6A:32-7.8(c)], the

¹ As mentioned, *supra*, Dr. Kliszus’ letter qualifies as a disciplinary record under *N.J.A.C.* 6A:32-2.1.

destruction of his pupil records are [sic] governed by the Destruction of Public Records Law, *N.J.S.A. 47:3-15 et seq.*, which specifies that the destruction of public records are [sic] to be in accordance with the Records Retention and Disposition Schedules found at <http://www.njarchives.org/links/recman.html>.

With respect to a student's Confidential Disciplinary File, Record Series No. 0012-0001, the Records Retention and Disposition Schedule for school districts specifies that such file is to be [sic] retained for "two years after graduation or termination from school system or age 23, whichever is longer." The Commissioner cannot, therefore, grant petitioner the relief he seeks as the Board is prohibited from removing the documents at issue from J.C.'s disciplinary file and destroying them until such time as two years have passed or until J.C. turns 23, whichever is longer. (*Ibid.* at 2)

The State Board of Education subsequently considered the matter and affirmed the Commissioner's decision. (State Board Decision No. 12-04, decided July 7, 2004) After doing so, the State Board additionally observed that the reason for the discipline – *i.e.*, the threat of student violence – militated against destroying the records about it.^{2 3} The State Board also reasoned that the documents concerning J.C.'s discipline remained educationally relevant until J.C. was no longer a student in the New Jersey school system. (*Ibid.* at 3, emphasis added)

This latter conclusion was interpreted narrowly by the ALJ in the present case.

He found that:

Clearly, the State Board, in interpreting its own regulations, made a very specific distinction in their application to a student transferring from one district to another in the New Jersey public

² New Jersey statutes and regulations reflect a widespread concern about violence in schools and other institutions. *See, e.g. N.J.S.A. 18A:35-27* (Findings and Declarations about the link between violence and vandalism and ethnic intolerance; *N.J.S.A. 18A:35-4.26* (Elementary school instruction about gang violence); *N.J.S.A. 18A:17-46* (Requirement that school employees report student violence; *N.J.A.C. 6A:16-7.1* (code of student conduct); *N.J.A.C. 6A:16-5.3* (Requirement that school employees report incidents of violence, vandalism and alcohol and other drug abuse).

³ Petitioners distinguish the Commissioner's and State Board's decisions by arguing that E.S.'s behavior was much less serious compared to the behavior at issue in J.C. However, petitioners did not challenge the suspension when it was imposed. Thus, the suspension and the documents describing it are properly in E.S.'s student record. By way of contrast to the criminal law statute allowing assignment judges to dismiss prosecutions where they determine that a defendant's behavior was *de minimis*, the Commissioner is aware of no provision in the Destruction of Public Records Law that allows exceptions to the disposition schedule based upon the content of disciplinary records. Nor is there any expert testimony in the record evaluating the significance of E.S.'s behavior.

school system versus an individual who is no longer a student in the New Jersey public school system. . . . E.S. is no longer a student in nor has an attachment to the New Jersey public school system. . . . I conclude accordingly that, consistent with the distinction made by the State Board in *J.C.*, the Destruction of Public Records Law does not apply here. Instead, I further conclude that the record of E.S. related to his making a threatening gesture with his finger seven years ago while in the First Grade, is not educationally relevant for this out of state individual and should be expunged by the Union Township School District pursuant to *N.J.A.C. 6A:32-7.7(a)1*.

The Commissioner cannot agree with the ALJ's interpretation of the State Board's language in *J.C.* and the conclusion that New Jersey's laws and regulations concerning student disciplinary records are nullified by a student's move to a neighboring state. Such an interpretation could create a loophole allowing students to rid themselves of disciplinary records by transferring out of New Jersey, and returning later with a clean file.

The law does not support such a notion. First, there is no provision in the DPRL for destroying New Jersey student disciplinary records earlier than the date set forth in the above described retention and disposition schedule, based solely upon a student's subsequent enrollment in the school district of another state. Second, in *N.J.A.C. 6A:16-7.10* – which requires the transfer of disciplinary records between public school districts, and between public school districts and private schools – there is no provision limiting the receiving schools to schools located in New Jersey.

Third, the provisions of *N.J.A.C. 6A:16-7.10* refer to 20 *U.S.C. 6301, et seq.* – the law popularly known as No Child Left Behind (NCLB) – and 20 *U.S.C. 1232g*, a section of the Family Educational Rights and Privacy Act of 1974 (FERPA). Section 7165(b) of NCLB requires that, “in accordance with the Family Educational Rights and Privacy Act of 1974 (20 *U.S.C. 1232g*,” each state which receives federal funds [under NCLB] “shall provide an

assurance . . . that [it] has a procedure in place to facilitate the transfer of disciplinary records, with respect to a suspension or expulsion, by local educational agencies to any private or public elementary school or secondary school for any student who is enrolled or seeks, intends, or is instructed to enroll, on a full- or part-time basis, in the school.” (Emphasis added)

Section 1232g of FERPA, in turn, contains provisions allowing the disclosure – to teachers and school officials in other schools who have legitimate educational interests in the behavior of the student – of information about disciplinary action taken against students. *See, e.g., 20 U.S.C. 1232g (h).*

In other words, nowhere in the relevant statutes and regulations is there language stating that the sharing of student disciplinary records cannot cross state lines, or that retention of the information in student disciplinary records in New Jersey is no longer of benefit to any institution or agency after a student has moved from New Jersey. By virtue of the fact that *N.J.A.C. 6A:16-7.10* and other New Jersey regulations flow from federal regulations, it is more reasonable to conclude that the retention and sharing of student disciplinary records was intended to be ubiquitous. Consequently, the Commissioner construes the above quoted language in *J.C.* to create a dichotomy between the relevance of records pertaining to a student who is still in an elementary or secondary school system as opposed to a student who has terminated his or her education by graduation or other means, and will no longer be enrolled in any elementary/secondary school.

Accordingly, summary decision is granted in favor of respondent and the petition is dismissed. The Commissioner notes that, pursuant to *N.J.A.C. 6A:32-7.7(d)*, petitioners may place a statement in E.S.’s record commenting on the information therein or setting forth reasons

for their disagreement with the Commissioner's decision. Such a statement must always be disclosed along with the portion of E.S.'s record to which it pertains.

IT IS SO ORDERED.⁴

COMMISSIONER OF EDUCATION

Date of Decision: August 23, 2007

Date of Mailing: August 24, 2007

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.*