

O.E. on behalf of minor child, A.E., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
BOROUGH OF WALLINGTON,
BERGEN COUNTY, :
RESPONDENT. :

SYNOPSIS

Petitioner challenged his son's indefinite suspension from regular educational classes after he authored notes and drawings containing threats toward other students whom – he alleged – had harassed and bullied him. A.E. has received home instruction since March of 2007, without benefit of a school library, physical education classes, or school social activities. Respondent Board argued that – pursuant to *N.J.S.A. 18A:37-2* – A.E. posed a threat to others, based on an April 2007 psychiatric evaluation in which the word “minimal” was used in summarizing A.E.’s risk to himself or others.

The ALJ found, *inter alia*, that: A.E. drew depictions of tombstones with students’ names on them for the purpose of alarming said students; there was nothing in the record to indicate that A.E. exhibited the behavior referenced in sections a, b, or d-j of *N.J.S.A. 18A:37-2*, and the herein controversy centers around section c, which prescribes punishment for conduct that “constitutes a continuing danger to the physical well-being of other pupils”; nothing in the record suggests that A.E.’s conduct presents such a danger; and A.E. is remorseful for his actions. The ALJ concluded that continuing the discipline imposed upon A.E. by the respondent into the new school year is arbitrary and capricious, and ordered that A.E. be returned to regular classroom instruction.

Upon full and independent review of the record, the Commissioner adopted the Initial Decision as the final decision in this matter, noting that: A.E. has no history of physical violence or overt aggression; the physician who conducted his psychiatric evaluation recommended weekly personal counseling sessions focusing on coping and problem-solving skills, as well as weekly in-school counseling, rather than medications or higher level psychiatric intervention; and a rational basis for continuing discipline does not exist. The Commissioner further reminded the respondent of its obligations pursuant to *N.J.S.A. 18A:37-15* and *N.J.A.C. 6A:16-7.9* to provide a school environment free from intimidation, harassment and bullying.

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.

OAL DKT. NO. EDU 5790-07
AGENCY DKT. NO. 139-5/07

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Petitioner asks that his son be returned to a regular educational program in respondent's district. The record, including several exhibits submitted by the parties, the Initial Decision and the parties' exceptions have been reviewed. While the Administrative Law Judge (ALJ) reported that a plenary hearing had been held in the Office of Administrative Law (OAL), no transcript of same is before the Commissioner.

It is undisputed that petitioner's son, A.E., is currently 14 years old and receiving educational instruction at the eighth grade level. He was suspended from regular classes on or about March 18, 2007, after he authored notes and drawings containing threats toward other students. Since that date he has been given ten or more hours of academic instruction per week by teachers at one of respondent's facilities. He does not have access to the school library, physical education classes or school social activities.

In support of its position that A.E. should not be returned to regular classes, respondent offered as exhibits copies of several writings and drawings that were conveyed by A.E. to other students, or confiscated by school staff. (Respondent's Exhibit 1) The contents of the writings variously include profanity, insults, religious slurs, and homophobic and racist

remarks. One note articulates a declaration that the author is not afraid of the student to whom the note was addressed. Another writing in R-1 is a list of nine names - entitled "People that bother me!" – that A.E. gave his father, O.E., in preparation for a meeting between O.E. and the school principal. (Respondent's Exhibit 4 [R-4] at 2)

There are also copies of drawings in Respondent's Exhibit 1. Of heightened concern to respondent are sketches of six tombstones, each containing the name of a student and the phrase "R.I.P." Some of the tombstone drawings contain comments, such as "After World War III," "In a few days," "Killed in World War III." Another drawing depicts the stabbing of a female, with the caption "Born to kill A----."

After initial resistance, O.E. agreed to have his son evaluated by a psychiatrist – Mona Ismail, M.D, of Comprehensive Behavioral Healthcare, Inc. Dr. Ismail's report was issued on April 30, 2007. (R-4) Although she was not called to testify at the OAL hearing, both parties referred to the findings in Dr. Ismail's report, and neither party objected to its admission into evidence.

Criminal proceedings were instituted against A.E., resulting in an order dated June 1, 2007, deferring the matter until December 1, 2007, at which time the charges would be dismissed upon good behavior. (Petitioner's Exhibit 1)

At the OAL hearing, A.E. admitted drawing the tombstone pictures and placing them in the students' lockers to upset them, but denied responsibility for some of the other writings in R-1. (Initial Decision at 4) He testified that the students whose names were in the tombstones had been harassing him - calling him "gay" and a "terrorist." (*Ibid*) Frank Cocchiola, respondent's Superintendent of Schools, conceded on cross examination that A.E. had been "bothered" by kids in the past. (*Id.* at 3)

A.E. denied ever hitting or attacking anyone and, according to the ALJ, respondent offered no credible evidence that A.E. had ever engaged in violent acts against any student. Nor was there any evidence that A.E. 1) used profane or offensive language in class, 2) made racial or ethnic comments or 3) frequently disrupted class. (*Id.* at 5)

When asked at the hearing whether he was sorry for transmitting the notes/drawings, A.E. said that he was. (*Id.* at 4-5) The ALJ consequently found A.E. to be remorseful.

The ALJ correctly determined that petitioner has the burden to establish by a preponderance of the credible evidence that respondent's indefinite continuation of A.E.'s suspension is arbitrary, capricious and unreasonable. (*Id.* at 5) Thus, the ALJ assessed the facts adduced at the hearing by measuring them against N.J.S.A. 18A:37-2, upon which respondent relied in suspending A.E. N.J.S.A. 18A:37-2 provides:

Any pupil who is guilty of continued and willful disobedience, or of open defiance of the authority of any teacher or person having authority over him, or of the habitual use of profanity or of obscene language, or who shall cut, deface or otherwise injure any school property, shall be liable to punishment and to suspension or expulsion from school.

Conduct which shall constitute good cause for suspension or expulsion of a pupil guilty of such conduct shall include, but not be limited to, any of the following:

- a. Continued and willful disobedience;
- b. Open defiance of the authority of any teacher or person, having authority over him;
- c. Conduct of such character as to constitute a continuing danger to the physical well-being of other pupils;
- d. Physical assault upon another pupil;
- e. Taking, or attempting to take, personal property or money from another pupil, or from his presence, by means of force or fear;
- f. Willfully causing, or attempting to cause, substantial damage to school property;

- g. Participation in an unauthorized occupancy by any group of pupils or others of any part of any school or other building owned by any school district, and failure to leave such school or other facility promptly after having been directed to do so by the principal or other person then in charge of such building or facility;
- h. Incitement which is intended to and does result in unauthorized occupation by any group of pupils or others of any part of a school or other facility owned by any school district;
- i. Incitement which is intended to and does result in truancy by other pupils; and
- j. Knowing possession or knowing consumption without legal authority of alcoholic beverages or controlled dangerous substances on school premises, or being under the influence of intoxicating liquor or controlled dangerous substances while on school premises.

As stated above, the ALJ determined that there was nothing in the record to indicate that A.E. had exhibited the behavior referenced in sections a, b, or d-j of *N.J.S.A. 18A:37-2*. Nor does respondent argue otherwise. The controversy centers around section c of *N.J.S.A. 18A:37-2*, which prescribes punishment, including suspension and expulsion, for “conduct of such character as to constitute a continuing danger to the physical well-being of other pupils.”

In weighing the totality of the evidence, the ALJ concluded that A.E. does not pose a continuing danger to the physical well-being of other pupils. He stated:

There can be no doubt that Board [sic] could reasonably find the “tombstone” drawings as petitioner’s attempt to place fear or alarm in the mind of each student whose name appeared in the drawing. However, nothing in any of the testimony suggests that petitioner’s conduct amounted to a “continuing danger to the physical well-being of other pupils.”

Initial Decision at 6

Having determined that A.E.’s behavior did not violate *N.J.S.A. 18A:37-2*, the ALJ reasoned that it would be arbitrary and capricious for respondent to continue to bar A.E. from regular classroom instruction.

Respondent's Exceptions to the Initial Decision stress its duty to provide a safe and secure environment for its school children. It contends that A.E.'s actions progressed from racial and ethnic remarks, vulgar notes and disgusting actions, to threats of violence and physical harm, Respondent's Exceptions at 2, and perceives that this 'progression' can be regarded as a continuing danger to the physical well-being of other pupils.

Respondent is not reassured by Dr. Ismail's evaluation because it states in the "Impression" section that "the chance of having overt physical violence or homicidal thoughts, risk to others or self are minimal." (R-4 at 4) Focusing on that sentence, respondent argues that even a minimal chance of physical harm is unacceptable. (Respondent's Exceptions at 2)

After careful review of the facts before her and the content of Dr. Ismail's report, the Commissioner concurs with the ALJ that a solid rational basis to support the further suspension of A.E. from regular attendance at school is lacking. First, it is undisputed that A.E. has no history of physical violence, overt aggression, cruelty to animals, destructive or suicidal behavior, serious risk-taking, psychoses, affect disorders, hospitalization or significant medical problems. Dr. Ismail reported that A.E. presented as cooperative and polite. His speech, affect, perception, concentration, memory , attention span and thought processes were normal.

Second, the record contains evidence that A.E. was harassed from the onset of his enrollment in respondent's high school, and that each of the writings offered as exhibits was an ill-conceived response to an incident of harassment by specific individuals. Both Dr. Ismail and the ALJ noted that A.E. was remorseful for retaliating via the menacing notes and drawings.

Dr. Ismail concluded that A.E.'s appearance and mannerism's may "render him a target to ridicule and criticism." (R-4 at 4) She observed that he "seems to have poor mechanisms and poor responses to stressors such as bullying in school," and he "tends to have

difficulty tolerating the bullying and the harassment behavior and the means of retaliating to him were by passive/aggressive means such as the drawings . . .” (*Ibid.*)

Significantly, Dr. Ismail saw no need for medications or higher level psychiatric interventions. She recommended weekly personal counseling for A.E. to teach coping and problem-solving skills and provide support. She also recommended that A.E. receive weekly in-school counseling to check how he is coping and behaving. Finally, Dr. Ismail wrote: “The patient may follow up as an outpatient at this point since he is not presenting a risk to self or to others.” (*Ibid.*, emphasis added)

In light of the foregoing, the Commissioner adopts the Initial Decision’s order that A.E. be returned to regular classroom instruction without delay. While A.E.’s conduct warranted discipline, the Commissioner concludes that a rational basis for continuing the discipline into the new school year does not exist – provided that A.E. does not repeat the conduct which precipitated his suspensions.

Additionally, the Commissioner reminds respondent of its obligations pursuant to N.J.S.A. 18A:37-15 and N.J.A.C. 6A:16-7.9 to provide a school environment free from intimidation, harassment and bullying.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: December 7, 2007

Date of Mailing: December 10, 2007

* 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.*