

E.T. on behalf of minor child, T.T., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
TOWNSHIP OF EGG HARBOR,
ATLANTIC COUNTY, ET AL., :
RESPONDENT. :

SYNOPSIS

Petitioner appealed respondent’s action suspending his minor child, T.T., for eight days after he allegedly made a terrorist threat in class, and sought expungement of the record of this suspension from T.T.’s student file. The respondent Board, contends, *inter alia*, that the petitioner failed to exhaust all administrative remedies regarding expungement of student records, pursuant to *N.J.A.C.* 6A:32-7.7(b), prior to filing his appeal; it further asserts that no appeal to the Commissioner is permitted in this case, as the provisions of *N.J.A.C.* 6A:16-7.2 which address short term suspensions provide no such remedy. The Board filed a motion for summary decision.

The ALJ found that: T.T.’s short term suspension falls under the provisions of *N.J.A.C.* 6A:16-7.2, which does not provide for an appeal to the Commissioner; petitioner failed to file pleadings opposing respondent’s motion for summary decision, and accordingly does not dispute that he failed to comply with *N.J.A.C.* 6A:32-7.7(b); petitioner has not exhausted the administrative remedy afforded him in this regulation. The ALJ granted summary decision to the Board, and ordered the petition dismissed.

Upon thorough and independent review of this matter, the Commissioner rejected the Initial Decision of the OAL, finding that: the Board’s arguments that the petitioner did not exhaust administrative remedies pertaining to record expungement do not resolve the case, as the instant petition is a challenge to the discipline imposed upon T.T., and – as an ancillary matter – to the placement of references to that discipline into his student file; the ALJ decided the case on the papers, without evaluation of whether the discipline imposed upon T.T. was arbitrary, capricious or unreasonable; and there is no bar in *N.J.A.C.* 6A:16-7.2 to appealing short-term suspensions to the Commissioner. Accordingly, this matter was remanded to the OAL for a hearing concerning the sufficiency of the district’s procedures under *N.J.A.C.* 6A:16-7.2 and the merits of petitioner’s challenge to the discipline imposed upon T.T.; petitioner’s request for expungement of T.T.’s record must await resolution of the merits of the district’s imposition of the discipline.

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.

July 7, 2008

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The record of this matter, including respondent's summary disposition motion papers, and the Initial Decision of the Office of Administrative Law (OAL), have been reviewed. For the reasons that follow, the Initial Decision is rejected.

E.T. appeals the discipline imposed upon his minor child, T.T., consequent to an incident which took place in school on September 18, 2007. At the outset, the Commissioner notes that T.T. had been classified as a special education student about a week before the incident. Thus, on September 28, 2007, a manifestation hearing was held, after which it was determined that the behavior for which T.T. received discipline was not a function of his disability. He received a suspension, which he served.

T.T. returned to school on October 1, 2007, and three weeks later E.T. filed a *pro se* petition with the Commissioner's Office of Controversies and Disputes. The required proof of service was submitted subsequently, on December 11, 2007. It appears from examination of the record that papers were also submitted by V.T., T.T.'s other parent, to the

Commissioner's Special Education Office; however that case was withdrawn by V.T. on December 12, 2007.

The Office of Controversies and Disputes transmitted the case to the OAL on December 13, 2007, and it was scheduled for an OAL hearing on June 11, 2008. On April 29, 2008, however, respondent filed a motion for summary disposition, which petitioner apparently did not answer. The Administrative Law Judge (ALJ) decided the case on the papers.

Curiously, in its motion, respondent framed this matter solely as a dispute concerning the expungement of the record of T.T.'s September 19, 2007 suspension. It argued that it was not acting arbitrarily or unreasonably when it recorded T.T.'s discipline, and that petitioner was in any event barred from filing a petition with the Commissioner seeking expungement because he did not first follow the steps set forth in *N.J.A.C. 6A:32-7.7* (b) concerning requests for expungement of records.

Respondent only cursorily referred to the discipline that precipitated the entries into T.T.'s student file. In a footnote on page 9 of its brief it stated "V.T. or E.T. did not file a written objection to T.T.'s suspension for these actions, nor does he [sic] deny T.T. made these statements," and on page ten of the brief it asserted that petitioner was not disagreeing with "the findings of the Board regarding the reports pertaining to T.T."

At the outset, the Commissioner notes that the papers filed by petitioner indicate that he did challenge the facts underlying the discipline imposed upon T.T. Further, there is no requirement that a parent submit a writing to the school administrators that registers his or her disagreement with the discipline imposed upon his or her child before appealing that discipline to

the Commissioner.¹ Thus, the instant petition is a challenge to the discipline imposed upon T.T. and – as an ancillary matter – to the placement into T.T.’s file of references to that discipline. Accordingly, respondent’s arguments that the petition is barred for lack of exhaustion of administrative remedies pertaining to record expungement do not resolve the case.

Rather, the Office of Controversies and Disputes sent the matter to the OAL for a determination as to whether the discipline imposed was arbitrary, capricious or unreasonable. This required an evaluation of the circumstances presented and a determination both as to whether T.T.’s rights were upheld and whether the facts warranted the discipline.

In the Initial Decision, the ALJ correctly noted that under the applicable regulations, T.T.’s suspension was “short-term” and covered by the less formal procedures of *N.J.A.C. 6A:16-7.2*.² Unfortunately, it is unclear from the record before the Commissioner whether, on the day that he was suspended, T.T. was given the full process required by that regulation. More specifically, the record does not reveal whether – pursuant to *N.J.A.C. 6A:16-7.2 (a) (1) and (2)* – T.T. was given notice of the charges, the evidence upon which they were based, and an informal hearing with a school administrator.

The record does confirm that T.T.’s parents were sent a letter identifying the date of the suspension and the charge, as mandated by *N.J.A.C. 6A:16-7.2 (a) (3) (i)*. However, the facts upon which the charge was based, the policy number alleged to have been violated, and articulation of T.T.’s due process rights (*see N.J.A.C. 6A:16-7.2 (a) (3) (ii), (iii) and (iv)*) were not evident in the notice. A letter dated September 21, 2007, from the assistant principal of

¹ Additionally, as the record does not appear to contain any Board findings, the Commissioner cannot place any weight upon respondent’s assertion that petitioner agreed with same.

² The process due recipients of short-term suspensions is less formal than that required for recipients of long-term suspensions – the latter being controlled by *N.J.A.C. 6A:16-7.3*.

T.T.'s school to his parents, does indicate that academic instruction was arranged for T.T. during his suspension and was provided at the school after normal school hours.

The ALJ did not find these factual deficits in the record to be significant because he determined that petitioner had no right to appeal the suspension to the Commissioner. For this conclusion he relied upon *N.J.A.C. 6A:16-7.3* and *N.J.A.C. 6A:16-7.2*:

N.J.A.C. 6A:16-7.3 deals with long term suspensions, which are defined as suspensions of at least ten days duration [sic].³ *N.J.A.C. 6A:16-7.3* specifically provides that a long term suspension may be appealed to the Commissioner. *N.J.A.C. 6A:16-7.2* affords no such protection to the student subjected to a short term suspension.

Initial Decision at 3.

This interpretation, however, constitutes a misreading of the regulations.

N.J.A.C. 6A:16-7.3 (a) (11) directs that after a formal hearing a district must provide a student's parents with a statement setting forth the charges that were brought, a summary of the evidence, its factual findings and determinations, the terms and conditions of the suspension, the educational services to be provided during the suspension and an advisement that the parent may appeal to the Commissioner. This regulatory provision does not bestow the right of appeal – it merely requires the district to advise the parent of that right. Similarly, the absence of that provision from *N.J.A.C. 6A:16-7.2* does not signify the absence of a right to appeal.

Because there is, in fact, no bar in *N.J.A.C. 6A:16-7.2* to appealing short-term suspensions to the Commissioner, this case is remanded to the OAL for a hearing with findings of fact and legal conclusions concerning the sufficiency of the district's procedures under *N.J.A.C. 6A:16-7.2* and the merits of petitioner's challenge to the discipline imposed upon T.T.

³ A short term suspension is ten or less days in duration. *N.J.A.C. 6A:16-7.2* (a). A long term suspension is over ten days in duration. *N.J.A.C. 6A:16-7.3* (a).

Petitioner's request for expungement from T.T.'s file of references to the suspension must await resolution of the merits of the district's imposition of the discipline.⁴

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: July 7, 2008

Date of Mailing: July 7, 2008

⁴ The Commissioner cannot agree with respondent's contention, in its summary disposition motion, that T.T.'s attendance in another school renders the controversy moot. The question of whether the discipline was properly imposed upon T.T. must be adjudicated between the parties named in this action.