#390-09 (OAL Decision: Not yet available online)

A.M.M., ON BEHALF OF MINOR CHILD, G.M.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF PARK RIDGE, BERGEN COUNTY, ET AL.,	:	
RESPONDENTS.	:	

SYNOPSIS

Petitioner, parent of a third grader registered in the Park Ridge schools but not in attendance thus far this school year, filed an application for emergent relief contending, *inter alia*, that the restrictions placed on her access to school property are unlawful and make it impossible for her to send her child to school, since she cannot be assured of his safety and freedom from retaliation for her actions advocating on his behalf. The Board counterclaimed for interim judgment requiring petitioner to cause G.M. to attend school or otherwise comply with compulsory education laws (*N.J.S.A.* 18A:38-25 *et seq*.), and additionally sought attorneys' fees.

The ALJ found that petitioner withdrew her appeal in response to the Board's demand for attorneys' fees. Following an emergent hearing on the Board's counterclaim – at which petitioner failed to appear – the ALJ found that the Board had not met the necessary standard for grant of emergent relief and – noting that enforcement of *N.J.S.A.* 18A:38-25 *et seq*. is under the jurisdiction of the municipal court – dismissed the counterclaim in its entirety.

Observing that the Commissioner's lack of authority to award attorneys' fees is well established and taking into consideration the unique history and circumstances of this matter, the Commissioner directed reinstatement of petitioner's appeal and remanded it to the OAL for hearing solely on its school law claims. The Commissioner further found no evident basis for petitioner's ongoing refusal to send G.M. to school and directed that – within the first school week following the filing date of the Commissioner's decision – petitioner either cause G.M. to attend the Park Ridge public schools or make provision for his education at a private school or elsewhere than at a school, with the understanding that, if she does not, the Board is directed to initiate truancy proceedings against her forthwith.

November 30, 2009

OAL DKT. NO. EDU 11357-09
AGENCY DKT. NO. 253-9/09

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions submitted by each party pursuant to *N.J.A.C.* 1:1-18.4.[1]

In its exceptions, the Park Ridge Board of Education (Board) contends that the Administrative Law Judge (ALJ) erred both in denying its application for emergent relief and in dismissing its counterclaim without further proceedings. With respect to its emergent application, the Board asserts that the ALJ's conclusion that G.M. is not being irreparably harmed makes no sense in light her factual finding – which petitioner did not contest by any answer, affidavit or opposition at hearing – that G.M. has not attended school since the beginning of the school year and is not receiving equivalent instruction at home or elsewhere; moreover, according to the Board, not only is such conclusion contrary to established case law,[2] it is also

[1] Petitioner's exceptions are co-signed by J.F., but are deemed to be solely from petitioner since Mr. F. is not presently a party to this matter. (See notes 3 and 7 below.)

[2] The Board reiterates its reliance on *Union County Educational Services Commission v. Board of Education of the Town of Westfield, Union County*, Commissioner Decision No. 324-06, decided September 18, 2006, and

contrary to the ALJ's own statements at hearing.[3] (Board's Exceptions at 3-4) The Board further asserts that the ALJ erred in requiring additional documentary evidence of irreparable harm, since it is well established that once a board has proven that a child is not attending school, the burden shifts to the parent to show that the child is receiving education elsewhere (*State v. Massa* 95 *N.J. Super*. 382 (1967)); moreover, the Board notes, it did, in fact, provide through its pleadings, brief and certifications – consistent with a hearing on motion for emergent relief as opposed to a plenary hearing – ample evidence of petitioner's "obdurate refusal to send G.M. to school or otherwise educate him." (*Id*. at 4) Finally, the Board objects to the ALJ's *sua sponte* dismissal of its entire claim, effectuated, it contends, without analysis or support in the record; the Board opines that such dismissal is inexplicable, given that no plenary hearing was conducted, no motion to dismiss was made by petitioner, and the parties remain in disagreement – thus ensuring continuance of the (unacceptable) status quo with regard to G.M.'s education. (*Id*. at 5) According to the Board, petitioner has no legitimate reason to withhold G.M. from school attendance, but is doing so based solely on her personal disagreement with the principal of G.M.'s school (Sheldon Silver) over her exclusion from school property. The Board urges that the Commissioner "cannot allow this matter to continue unabated, nor can she permit parents to unilaterally withhold education from their children based on their own whims;" rather, she must "bring this stalemate to an end and return G.M. to his classroom." (*Id*. at 1, 5; quotation at 5)

Petitioner, on the other hand, fully endorses the Initial Decision's dismissal of the Board's counterclaim and request for emergent relief, but takes exception to the ALJ's failure to

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additionally notes the "hundreds if not thousands of Special Education decisions that recognize that interruption or termination of a student's educational program constitutes irreparable harm." (Board's Exceptions at 3-4)

[3] Because this matter was returned to the Commissioner as an Initial Decision, the record did not include an audio recording of proceedings on emergent relief.

reinstate her own petition following its withdrawal on October 6, 2009. According to petitioner, her decision to withdraw the petition was due entirely to the Board's filing of a claim for attorneys' fees – which she feared being held responsible for paying – and she specifically asked the ALJ to reinstate her petition when she learned – subsequent to the October 8, 2009 OAL phone conference, in which she did not participate due to withdrawal of the petition – that the Board had, in fact, withdrawn its claim for attorneys' fees a few days earlier. Petitioner further contends that she did not answer the Board's counterclaim by the designated due date because she did not receive notification of this date until the day before the answer would have been due. Finally, petitioner states that she did not attend the hearing on October 22, 2009 because no one was available to stay with G.M. – whom she did not wish to "expose" to OAL proceedings – and that the ALJ and OAL Director, although advised of the problem well in advance, "refused to make accommodations or compromise." (Petitioner's Exceptions at 1)

On the substantive aspect of her appeal, petitioner again asserts that the Board has no basis – other than harassment and retaliation for "advocating loudly" for G.M. – for the restrictions it has placed on her and J.F.,[4] who are "simply protecting the rights, mental health and education of an eight-year old boy [as is their] legal right;" petitioner reiterates that, in her view, it is the Board and its agents – particularly Mr. Silver – who are responsible for G.M.'s failure to attend school. According to petitioner, although G.M. – an A/B student – has been completing his schoolwork at home[5] and petitioner wants him to return to school, she will not

[4] Petitioner identifies J.F. as her husband and G.M.'s stepfather and legal guardian; the Board, however, questions Mr. F.'s official status vis-à-vis petitioner and G.M.

[5] Petitioner states that, subsequent to issuance of the Initial Decision, the Board notified her that it will no longer provide G.M.'s schoolwork by mail, since it is not obliged to do so and G.M. is required by law either to attend school or to receive equivalent instruction elsewhere. Petitioner characterizes this action as "just another ploy to shift the blame off them that they have a principal that retaliates against children whose parents speak up and advocates (*sic*)" and asks that the Commissioner order G.M.'s schoolwork to be provided to him by mail as before. (Petitioner's Exceptions at 2)

subject him to the "lies, "retaliation," and "harassment" of Mr. Silver, who instills fear in the boy and is irreparably harming him mentally and emotionally. Petitioner asks the Commissioner to consider her claims and "make Mr. Silver and the Park Ridge School District accountable for their negligence in protecting G.M. from mental and emotional harm." (Petitioner's Exceptions at 2)

Upon review, the Commissioner determines to reject the Initial Decision and remand this matter to the OAL for further proceedings.

Initially, the record leaves no doubt that petitioner's proffered reason for withdrawing her appeal was concern that she might have to pay the Board attorneys' fees, which the Board had sought in its counterclaim[6] and petitioner stated she could not afford; the record is likewise clear, however, that petitioner asked for reinstatement of her petition once she learned that the Board had withdrawn its demand for attorneys' fees in light of the withdrawal of the underlying petition.[7] The difficulty this poses for the Commissioner in reviewing the Initial Decision is twofold: First, it is by now settled law that, due to the lack of express statutory authority, the Commissioner cannot award counsel fees in determining controversies and disputes under the school laws; thus, petitioner could not in any event – even if her claim before the Commissioner had been fully litigated and found to be without merit – have been required to pay attorneys' fees as demanded by the Board. *Balsley v. North Hunterdon Bd. of Educ.*, 117 *N.J.* 434, 442-443 (1990) Moreover, there is no indication in either the Initial Decision or the underlying record that the ALJ considered petitioner's request to reinstate

[6] Actually filed as a cross-petition, notwithstanding that OAL rules make no provision for third-party practice.

[7] See petitioner's October 17, 2009 letter to the ALJ, also attached to her October 19, 2009 letter to the OAL Director.

her petition, or, if she did, on what basis she rejected it.[8] Under the circumstances – particularly given petitioner's *pro se* status and the lengthy, tortured and contentious history of the parties' ongoing dispute – the Commissioner finds that the interests of justice would best be served in this matter by reinstating petitioner's appeal and remanding it to the OAL so that it may be heard on the same terms and conditions – including a prompt hearing on petitioner's application for emergent relief – as would have applied had petitioner not withdrawn it in response to the Board's counterclaim for attorneys' fees.

In so finding, however, the Commissioner must stress that petitioner – whose voluminous papers incorporate a host of complaints and allegations against numerous individuals and evince more than a little confusion and resistance with respect to the established rules of administrative procedure – is obliged in all further proceedings to abide by OAL regulations and may litigate only those matters constituting justiciable disputes within the scope of the Commissioner's authority to hear and decide pursuant to *N.J.S.A.* 18A:6-9 – that is, the exclusion of petitioner and Mr. F. from school property and the restrictions on her communications with district staff, the continuation of previously established limitations into the 2009-10 school year, the denial of her request to transfer G.M. to another school, and the refusal to amend G.M.'s student records to "expunge" all absences from June 1, 2009 to the present. The Commissioner further stresses that in no way should her remand of this matter be construed as implying any position on the merits of petitioner's allegations, nor is it intended to limit any procedural or substantive defenses the Board may wish to raise in response to them.[9] Finally, because those

[8] It appears from statements in petitioner's October 17, 2009 letter to the ALJ that she may have been told she could refile and reserve her petition, but declined to do so. Although petitioner states on exception that both the ALJ and the OAL Director rejected her request, the sole communication on record from the OAL Director, a letter dated October 21, 2009, does not address this issue.

[9] Petitioner may again move, if she so chooses, for amendment of her petition to include J.F., who, it is noted, is excluded from school property along with petitioner; however, petitioner is reminded – as correctly stated by the

allegations that variously implicate the named respondents other than the Park Ridge Board of Education, Park Ridge Superintendent Patricia Johnson and East Brook Elementary School Principal Sheldon Silver – including, *inter alia*, attempts to surreptitiously provide G.M. with special education services; harassment, retaliation, intimidation and threats due to petitioner's refusal to consent to special education services for G.M.; violations of confidentiality with respect to G.M.'s student information and child study team records; and the making of intentionally false and inaccurate statements to and about G.M., petitioner and Mr. F. in a variety of contexts – either do not materially pertain to petitioner's justiciable school law disputes or are matters of the type properly pursued through the complaint investigation process set forth at *N.J.A.C.* 6A:14-9.2[10] and hence beyond the Commissioner's jurisdiction, the Commissioner hereby dismisses all such respondents from the present matter.[11]

Moreover, the Commissioner must additionally stress – in the most emphatic terms – that her directive for continued proceedings in this matter, so as to afford petitioner an opportunity for a hearing on her school law disputes, is in no way an endorsement of – and certainly not a grant of permission for – petitioner's continued refusal to either return G.M. to public or private school or provide for his education through home schooling as permitted by law.[12] To the contrary, petitioner's parental obligation in this regard is clear, both under the

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OAL Director in her October 21, 2009 letter – that the ALJ is required to ensure that Mr. F. has standing to pursue any claim(s) on behalf of G.M.

[10] There is no indication in the record, nor is the Department's Office of Special Education Programs aware, of any such investigation initiated by petitioner, notwithstanding allusions throughout petitioner's papers to assorted "investigations" and "official complaints" arising from her differences with the district.

[11] With respect to the remaining Park Ridge staff members, petitioner is additionally reminded that the Commissioner has no authority to "officially reprimand" employees of public school districts, as requested in her petition.

[12] Petitioner has been overseeing G.M.'s completion of assigned classwork sent home from school, but this does not constitute "home schooling" within the meaning of *N.J.S.A.* 18A:38-25, since petitioner has not withdrawn G.M. from the public school system so as to provide for his education elsewhere than at a school; indeed, she has refused to permit such withdrawal and adamantly denies that G.M. is being home schooled. (See Petition of Appeal at 3,

compulsory education statutes, *N.J.S.A.* 18A:38-25 *et seq*., and under child protection laws deeming "willfully failing to provide regular school education as required by law" to constitute "neglect" pursuant to *N.J.S.A.* 9:6-1.

While the Commissioner is not unmindful of petitioner's contention that G.M.'s medical condition requires her and Mr. F. to have "100% access" to G.M. throughout the school day, petitioner has offered no basis to establish, even facially, any nexus between her restricted access to school grounds and events and G.M.'s present ability to attend school. Indeed, the doctor's note (dated June 26, 2009) provided to the school following G.M.'s May 30, 2009 diagnosis with tachycardia reads in its entirety, "Please allow [G.M.'s] parents access to him while wearing cardiac monitor 5/30 – 6/19/09," and, although she contend's G.M.'s medical condition is ongoing, petitioner nowhere claims – notwithstanding her allusions in various papers to "accommodation" and "civil rights" – to have actually requested any accommodation of the district pursuant to Section 504 of the Rehabilitation Act of 1973 and then, upon the district's refusal, to have prevailed on appeal either to the Office of Special Education Programs pursuant to *N.J.A.C.* 6A:14-2.7(w) or to the Office of Civil Rights in the U.S. Department of Education. Nor does anything in the record suggest that G.M.'s health condition renders him unable to attend school so as to be eligible for home instruction pursuant to *N.J.A.C.* 6A:16-10.1, or that such instruction was requested and its denial duly appealed.[13]

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petitioner's June 15, 2009 letter to Superintendent Patricia Johnson, her October 6, 2009 letter to the ALJ, and her October 20, 2009 letter to the OAL Director. Petitioner's June 15, 2009 letter, and all subsequently referenced documents generated prior to commencement of the instant proceeding, were brought to the record by petitioner as attachments to the Petition of Appeal.)

[13] Similarly, petitioner's claims of harm to G.M. due to being retaliated against, harassed and put in fear by Principal Silver are at this point nothing more than bare assertions more appropriately raised as defenses in the context of truancy proceedings. (See below.)

Simply stated, petitioner is not entitled – as she appears to believe,[14] and as the Initial Decision effectively presumes – to keep G.M. out of school, with herself and Mr. F providing instruction and supervision based on class assignments voluntarily sent home by the district in the hope of ultimately resolving petitioner's objections to G.M.'s continued attendance,[15] until such time as either the Board proves G.M. is suffering irreparable harm thereby or petitioner is satisfied that her various conditions for G.M.'s attendance at school have been met. Rather, what the law requires is that petitioner provide for G.M,'s education through one of the methods specified, with the understanding that – if she chooses to educate G.M. in a

[14] By way of example, petitioner's June 15, 2009 letter to Superintendent Johnson states:

> As per our several notifications to your office, I will not allow [G.M.] to return to school with his medical condition, until I have 100% access to my child during school hours. These restrictions on me as a parent, concocted by Mr. Silver and yourself, have not been implemented by any law enforcement agency legally. You and your school district are the ones keeping [G.M.] from going to school and getting an education. You and Mr. Silver are the ones that created this entire situation. This is on record with DYFS regarding your lies and the closed case with them.
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> There are no "several options." I am entitled as a parent to protect my child. There will be no "action plan." I am [G.M.]'s mother, and as I have stated before, I will have 100% access to my child. Go ahead with your such (*sic*) actions in court. This will guarantee your attendance. This will allow me to prove my case against you and the Park Ridge School District. This will allow [G.M.] to get an (*sic*) proper education free from harassment, mental, and emotional abuse from you and your district. I welcome the opportunity to meet with Mr. Silver and yourself in whatever court Mr. Silver is referring to in his letter, as (*sic*) to prove my case. Meanwhile, [G.M.] is completing all his assigned classwork and homework each and every day, as per your Board of Education policy. There will be no plan fro (*sic*) me to meet with the nurse unless I have 100% access to the school. I am his mother and I will meet with my son anytime I want.

In her September 18, 2009 email to the Board attorney (copied to Superintendent Johnson), petitioner adds:

> I will not do anything immediately. This is all in the hands of Commissioner Davy at this point. I will await an emergent relief decision from her before [G.M.] returns to school. I expect since [G.M.] has been home because of the inexcusable and unacceptable actions and lies of Mr. Silver, all of [G.M.]'s assignments have been fully completed, and will continue to be fully completed until this is resolved. This is my notice that [G.M.] will not return to school until a decision is made by Commissioner Davy or yourself. I will not continue to call the attendance mailbox daily.

[15] The Board is entirely correct that it was – and is – under no obligation to send G.M.'s schoolwork home based on petitioner's refusal to send him to school, and the Commissioner herein declines to order that it continue to do so.

public school – she may avail herself, as she deems necessary, of the various mechanisms provided by law to obtain accommodations and appeal actions of the Board and its agents.[16]

In so holding, the Commissioner recognizes – as correctly found by the ALJ – that enforcement of the compulsory education laws lies with the municipal court and not with the Commissioner of Education;[17] although not explicitly stated, this appears to be the reason for the ALJ's dismissal of the Board's counterclaim, which could be construed – particularly since there is no indication on record that the Board has proceeded against petitioner in municipal court – as an attempt to litigate G.M.'s truancy in the wrong forum.[18] However, while such counterclaim does not relieve the Board of the obligation placed upon it by *N.J.S.A.* 18A:38-25 *et seq.* and the Board's attempt to address G.M.'s failure to attend school through the present proceeding cannot substitute for the initiation of truancy proceedings in accordance with statute, there is no question that the Commissioner may order, in the context of a contested case proceeding, a child's return to school by a date certain, with the board of education concomitantly ordered to commence truancy proceedings if the child's parent does not comply.[19] *M.G. on behalf of her minor son, C.G., v. Board of Education of the Borough of Riverton, Burlington County*, 97 *N.J.A.R.*2d (EDU) 67, citing *Rockaway Township Board of Education, Morris County, v. Robert Oostdyk et al.*, 1981 S.L.D. 272, 275 In the present instance, the

[16] Petitioner also states that she has been keeping G.M. home "as per DYFS," indicating that that agency has approved, or at least not objected to, her not sending G.M. to school under the circumstances. (See petitioner's June 15, 2009 letter to Superintendent Johnson, her October 19, 2009 email to the Board attorney and her October 20, 2009 letter to the OAL Director.) However, even assuming petitioner's representation is true, the fact that DYFS may at some point have found that petitioner's actions thus far did not rise to the level of violating child neglect statutes does not relieve petitioner of her obligation to comply with compulsory education laws.

[17] Similarly, enforcement of child neglect laws lies with the Department of Children and Families, Division of Youth and Family Services.

[18] Additionally, even if municipal court proceedings are pending, the entire controversy doctrine would preclude litigation of petitioner's truancy herein. See *M.G. v. Riverton Bd. of Ed., infra.*

[19] The Board is correct that in any such proceeding, once it is shown that a child is not attending school, the burden shifts to the parent(s) to demonstrate compliance with *N.J.S.A.* 18A:38-25. See *State v. Massa, supra.*

Commissioner's review of the record amply persuades her that she would be remiss in her own duty if she did not so order; as petitioner states repeatedly – and the Commissioner sees very clearly – the education of an eight-year-old boy is at stake.

Accordingly, for the reasons expressed herein, the Initial Decision of the OAL is rejected and this matter is remanded for hearing on petitioner's school law disputes consistent with the parameters set forth above; additionally, the petition is dismissed with respect to respondents Dahlia Weinzoff, Wendy Kamarr, Dee Ledgerwood, Dana Catanese and William J. Belluzi. Petitioner is directed to cause G.M. to attend the Park Ridge public schools, or to make provision for his education at a private school or elsewhere than at a school, within the first school week following the filing date of this decision; if she does not, the Board is directed – if it has not done so already – to initiate truancy proceedings against her forthwith.[20]

IT IS SO ORDERED.[21]

COMMISSIONER OF EDUCATION

Date of Decision: November 30, 2009
Date of Mailing: December 1, 2009

[20] Should petitioner choose to educate G.M. in the public schools, both she and the Board and its agents (as well as J.F.) are reminded of their respective obligations to abide by Board policies and procedures. Also, while the current restrictions against petitioner remain in effect, to any extent that G.M. cannot be safely dropped off, as claimed by petitioner, without her exiting her vehicle and entering school property (see Emergent Relief Application at 2 and petitioner's October 6, 2009 letter to the ALJ), the Board is directed to take such steps as are reasonable and necessary to ensure G.M.'s safe passage from the designated drop-off point to the school building

[21] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Appellate Division of the Superior Court.