

#386-12 (OAL Decision: Not yet available online)

M.W., on behalf of minor child, C.W., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
BOROUGH OF HADDONFIELD,
CAMDEN COUNTY, :
RESPONDENT. :

SYNOPSIS

Petitioner sought an order barring the respondent Board from enforcing – and directing respondent to revise – its Policy 5132, governing off-campus alcohol and drug use. Commonly known as “24/7”, the policy contains a provision that enables the Board to deny participation in extracurricular activities based on a student’s use of drugs or alcohol away from school grounds. Petitioner contended that Policy 5132 is illegal and unenforceable as it is *ultra vires* – it exceeds the authority given school districts to impose consequences for behavior away from school grounds pursuant to *N.J.A.C.* 6A:16-7.1 and *N.J.A.C.* 6A:16-7.6. The Board argued that these regulations do not apply to Policy 5132 because it is not part of a code of conduct, and that suspending or limiting a student’s ability to participate in extracurricular activities does not equate to a disciplinary action because such participation is a privilege, not a right.

The ALJ found, *inter alia*, that: Policy 5132 is a code of conduct policy within the contemplation of *N.J.A.C.* 6A:16-7.1; exclusion from extracurricular activities – whether imposed as a consequence for conduct occurring on or off of school grounds – is a form of discipline; *N.J.A.C.* 6A:16-7.6 applies to the imposition of discipline for behavior occurring away from school grounds in the context of Policy 5132; and, despite limiting the proscribed conduct to that involving drugs and/or alcohol, Policy 5132 – by refusing to measure the conduct against the requirements of *N.J.A.C.* 6A:16-7.6 – fails to ensure that the required nexus between the student’s conduct and the orderly administration of the school is present before the policy is triggered. The ALJ concluded that Policy 5132 is *ultra vires* because it does not adequately ensure that the dictates of *N.J.A.C.* 6A:16-7.6(a) will be met in addressing off-campus conduct. Accordingly, the ALJ ordered that respondent revise Policy 5132 to meet the requirements of *N.J.A.C.* 6A:16-7.6.

Upon consideration and review, the Assistant Commissioner – to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34 - concurred with the ALJ’s findings and conclusions in determining that Policy 5132 gives the Board authority beyond the scope of the governing regulatory provisions, and is therefore *ultra vires* and unlawful. Accordingly, the Assistant Commissioner adopted the Initial Decision of the OAL as the final decision in this matter, and directed the Board to revise its policy to bring it into compliance with the requirements of *N.J.A.C.* 6A:16-7.6.

<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>

September 24, 2012

OAL DKT. NO. EDU 0594-11
AGENCY DKT. NO. 710-12/10

M.W., on behalf of minor child, C.W., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
BOROUGH OF HADDONFIELD,
CAMDEN COUNTY, :
RESPONDENT. :

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner and the Board of Education. This case involves the interpretation of Board Policy 5132, which contains a provision that enables the Board to deny participation in extracurricular activities based on a student's use of drugs and alcohol away from school grounds.

The petitioner did not take exception to the Administrative Law Judge's (ALJ) Initial Decision, but instead urged the Commissioner to issue a final decision adopting the Initial Decision for the reasons expressed therein.

The Board takes exception to the ALJ's determination that Policy 5132 is *ultra vires* and violates the applicable regulatory provisions. The Board does not argue that Policy 5132 incorporates the requirements contained in *N.J.A.C.* 6A:16-7.6, but instead maintains that the ALJ erred in finding that Policy 5132 is a discipline code of conduct policy, which must comply with *N.J.A.C.* 6A:16-7.6. The Board asserts that the revocation of a student's ability to participate in extracurricular activities is not discipline because such participation is a privilege, not a right, and thus *N.J.A.C.* 6A:16-7.6 does not apply to Policy 5132. The Board argues that

the stringent dual nexus test of *N.J.A.C. 6A:16-7.6(a)* dealing with off campus activity is only applicable to the denial of the right to attend school and receive core educational services.

The Board also argues that the Initial Decision and the ALJ's reliance on *G.D.M. and T.A.M., on behalf of minor child, B.M.M. v. Board of Education of the Ramapo Indian Hills Regional High School District*, 2012 *N.J. Super.* LEXIS 127 (App. Div. July 24, 2012), where the court found that the suspension from extracurricular activities is a form of discipline, conflicts with the holding in *R.R. v. Shore Regional High School District*, 109 *N.J. Super.* 337 (Ch. Div. 1970). The court in *R.R., supra*, created the language that would eventually become *N.J.A.C. 6A:16-7.6(a)(1)* and (2). The Board contends that the holding in *R.R., supra*, and the nexus requirements in *N.J.A.C. 6A:16-7.6(a)* only pertain to a school's right to impose discipline on a student for conduct away from school, i.e. the expulsion or suspension from school, and does not apply to a school's authority to suspend participation in extracurricular activities. In its exceptions, the Board noted that the Appellate Division acknowledged in *Ramapo, supra*, that the language of *N.J.A.C. 6A:16-7.6* was derived from *R.R., supra*, but then completely disregarded the essence of the holding.

The Board further maintains that the Initial Decision and its reliance on *Ramapo, supra*, conflicts with *Joye v. Hunterdon Central Regional High School Board of Education*, 176 *N.J.* 568 (2003). The Board argues that in *Joye, supra*, the Court upheld a drug policy that conditioned participation in extracurricular activities and student parking based on the results of random drug testing conducted by the Board. The Board argues that the policy in that case was not subjected to the dual nexus requirement of *N.J.A.C. 6A:16-7.6*, and as such Policy 5132 should not have to incorporate the dual nexus requirement of *N.J.A.C. 6A:16-7.6*.

Additionally, the Board argues that the Initial Decision and its reliance on *Ramapo, supra*, conflict with the strong legislative policies that put local public school districts on the front lines in battling student substance abuse. The Board cites to various statutory provisions and case law to support its assertion that combating substance abuse among students is a paramount concern for local boards of education. Finally, the Board states that the Commissioner is not bound by the decision in *G.D.M. and T.A.M., on behalf of minor child, B.M.M. v. Board of Education of the Ramapo Indian Hills Regional High School District*, Commissioner Decision No. 383-10, decided September 13, 2010, because an administrative agency is not bound to its own precedents.

After consideration and review, the Assistant Commissioner – to whom this matter has been delegated pursuant to *N.J.S.A. 18A:4-34* - is in accord with the ALJ's determination – for the reasons thoroughly expressed in the Initial Decision – that Policy 5132 is *ultra vires* and unlawful because it gives the Board the authority to suspend a student from extracurricular activities for conduct that occurs away from school grounds without requiring the Board to conduct the two-prong analysis mandated by *N.J.A.C. 6A:16-7.6*. The Assistant Commissioner also agrees with the ALJ's determination that the exclusion from extracurricular activities is a form of discipline.

In its exceptions, the Board suggests that the revocation of a student's ability to participate in extracurricular activities is not a form of discipline because such participation is a privilege, not a right, and thus *N.J.A.C. 6A:16-7.6* does not apply to Policy 5132. The Board's argument, however, is not supported by any case law or applicable statutory or regulatory provisions, and is simply an attempt to circumvent the limitations on the authority of the Board imposed by *N.J.A.C. 6A:16-7.6*. In *Ramapo, supra*, the Appellate Division addressed a similar

argument advanced by the Ramapo Board of Education in connection with its policy that enabled it to suspend students from extracurricular activities for off-school-grounds conduct without conducting the requirements contained in *N.J.A.C. 6A:16-7.6(a)*. The court found that, “[t]he Board’s attempt to mask this outcome by characterizing participation in extracurricular activities as a ‘privilege’ is unavailing.” *Ramapo, supra*, LEXIS 127 at 23. The Appellate Division went on to say that it was evident that the Board attempted to “use the control it has over students’ participation in extracurricular activities as a form of discipline to enforce its code of conduct.” *Id.* at 24. The Board’s suggestion in its exceptions that the *Ramapo, supra*, decision has effectively reversed years of precedent by ruling that participation in extracurricular activities is now a right is completely inconsistent with the express language of the decision, and it is clear that the court did not overturn the long-standing principle that participation in extracurricular activities is a privilege, and not a right. Rather, the court affirmed the Commissioner’s decision which concluded that although participation in extracurricular activities is a privilege, and not a right, it does not negate the fact that a board’s decision to revoke a student’s ability to participate amounts to a form of discipline. See, *G.D.M. and T.A.M., on behalf of minor child, B.M.M. v. Board of Education of the Ramapo Indian Hills Regional High School District*, Commissioner Decision No. 383-10, decided September 13, 2010.

The arguments advanced by the Board in its exceptions also overlook the fact that Policy 5132 imposes consequences for off-school-grounds conduct, and that the regulatory provisions expressly treat off-school-grounds conduct differently than conduct that occurs on school grounds. Moreover, the cases the Board uses to advance its arguments are distinguishable from the case at bar. In *Joy, supra*, the Court upheld a suspension from extracurricular activities based on a positive result from a random drug test conducted at the school. That case did not

involve discipline for conduct that took place off-school grounds, and there is also no provision in Policy 5132 that incorporates random drug testing. Additionally, the decision in *R.R.*, *supra*, did not limit discipline to the expulsion or suspension of a student as the Board contends. Notably, when *N.J.A.C.* 6A:16-7.6(a)2 was adopted it clearly created an express distinction between a board of education's authority to impose any consequences for conduct that occurs off-school grounds as opposed to conduct that occurs on school grounds or at school functions.¹ Therefore, the Assistant Commissioner finds that Policy 5132 must comply with the requirements relating to discipline for conduct away from school grounds that is outlined in *N.J.A.C.* 6A:16-7.6.

Accordingly, the recommended decision of the ALJ is adopted for the reasons expressed therein. The Board is directed to revise its policy to bring it into compliance with the requirements of *N.J.A.C.* 6A:16-7.6.

IT IS SO ORDERED.²

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: September 24, 2012

Date of Mailing: September 25, 2012

¹ In comparing *R.R.*, *supra*, to the policy in *Ramapo*, *supra*, the Appellate Division stated,

[a]lthough the court in *R.R.* did not discuss the school district's authority to suspend a student's participation in extracurricular activities, we presume that the scope of the disciplinary sanction would include a suspension from extracurricular activities. Regardless of the scope of the holding in *R.R.*, the State Board of Education was free to adopt the *R.R.* court's two-pronged test to determine the validity of any consequences imposed for non-school-related conduct occurring away from school grounds. *Ramapo*, *supra*, LEXIS 127 at 27-28.

² This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36.