

B.J., ON BEHALF OF MINOR CHILD, L.J., :  
PETITIONER, :  
V. : COMMISSIONER OF EDUCATION  
BOARD OF EDUCATION OF THE BOROUGH : DECISION  
OF CARTERET, MIDDLESEX COUNTY, AND :  
JAMES BEVERE, :  
RESPONDENTS. :

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SYNOPSIS

*Pro-se* petitioner appealed the disciplinary action imposed by the respondent Board against her daughter on March 24, 2016. The petition was originally filed on June 14, 2016, but was found to be deficient. After notice from the Commissioner, the petitioner corrected her filing and the petition was re-filed on July 6, 2016. The matter was transmitted to the OAL on August 10, 2016 as a contested case, and the Board subsequently filed a Motion to Dismiss.

The ALJ found, *inter alia*, that: the petition was filed on July 6, 2016, which was outside of the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i). The ALJ concluded that the matter was not timely filed, and must therefore be dismissed.

Upon review, the Commissioner rejected the Initial Decision of the OAL, finding that a relaxation of the rules in accordance with *N.J.A.C.* 6A:3-1.16 is warranted in this case. The Commissioner therefore considers the petition was filed within 90 days of the March 24, 2016 disciplinary action. Accordingly, the matter was remanded to the OAL for further proceedings.

<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>
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OAL DKT. NO. EDU 12095-16  
AGENCY DKT. NO. 182-7/16

B.J., ON BEHALF OF MINOR CHILD, L.J., :  
PETITIONER, :  
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The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

In this matter, petitioner challenges the disciplinary action imposed by the Board against her daughter on March 24, 2016. The Administrative Law Judge (ALJ) dismissed the petition, finding that it was filed on July 6, 2016, outside the 90-day limitation period set forth in *N.J.A.C. 6A:3-1.3(i)*.

Upon review, the Commissioner notes that the original petition in this matter was filed on June 14, 2016 – within the 90 day period. The Commissioner could not move forward with the matter at that time, as petitioner had not submitted her telephone number, as required by *N.J.A.C. 6A:3-1.4(a)*. Although petitioner submitted proper proof of service upon the Board, petitioner did not submit proof of service on individual respondent James Bevere. The Commissioner informed petitioner that should she wish to proceed against respondent Bevere, proof of service would be required, which petitioner submitted on July 6, 2016. The

Commissioner finds that June 14, 2016 – rather than July 6, 2016 – is the appropriate date by which to evaluate the 90-day filing period in this circumstance. The only aspect missing from the petition against the Board at that time was petitioner’s telephone number. With respect to the petition against respondent Bevere, petitioner corrected her lack of proof of service in a timely manner. As such, a relaxation of the rules in accordance with *N.J.A.C. 6A:3-1.16* is warranted, and the Commissioner considers the petition filed within 90 days of the March 24, 2016 disciplinary action.

Accordingly, the Initial Decision is rejected for the reasons set forth herein and the matter is hereby remanded to the OAL for further proceedings.

IT IS SO ORDERED.\*

COMMISSIONER OF EDUCATION

Date of Decision: September 20, 2018

Date of Mailing: September 21, 2018

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\* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*.



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**MOTION TO DISMISS**

OAL DKT. NO. EDU 12095-16

AGENCY DKT. NO. 182-7/16

**B.J. ON BEHALF OF MINOR CHILD, L.J.,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE BOROUGH**

**OF CARTERET, MIDDLESEX COUNTY,**

**AND JAMES BEVERE,**

Respondent.

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**B.J.**, appearing pro se on behalf of **L.J.**

**Gabrielle Pettineo**, Esq., for Respondent (Kenny, Gross, Kovats, & Parton attorneys)

Record Closed: July 27, 2018

Decided: August 13, 2018

BEFORE **ELISSA MIZZONE TESTA**, ALJ:

**CASE SUMMARY AND PROCEDURAL HISTORY**

On June 7, 2016, Petitioner file a Petition of Appeal with the Department of Education, Bureau of Controversies and Disputes ("BCD"), challenging a disciplinary

action taken by Respondent's against her daughter, L.J. On June 14, 2016, BCD issued a notice to Petitioner advising that the Petition was deficient. On July 6, 2016, Petitioner filed a second Petition of Appeal with BCD which was accepted and on August 8, 2016, Respondents filed an Answer to the Petition. On August 10, 2016, the BCD transmitted the matter to the Office of Administrative Law as a contested case and the matter was assigned to the Honorable Leland McGee, A.L.J. Pre-Hearing Conferences were held on October 5, 2016, November 30, 2016, and December 14, 2016. Hearings were scheduled for May 1, 8, and 10, 2017.

On October 17, 2016, Petitioner filed a Request for Due Process Hearing with the Department of Education, Office of Special Education Programs which was forwarded to the OAL, bearing Docket No. EDS-18509-16. On November 3, 2016, Respondent filed an Answer to the Due Process Petition. A Pre-Hearing Conference was held on December 15, 2016, and a Pre-Hearing Order was issued thereafter. Hearings in this matter were scheduled for September 20, 22, 25, and 27, 2017.

On January 30, 2017, Respondent filed a Motion for Partial Dismissal of the Petition for Due Process. On February 21, 2017, Respondent filed an Amended Motion for Partial Dismissal of the Petition for Due Process. On February 28, 2017, Petitioner filed an Answer to the Motion and on March 16, 2017, Respondent filed a Reply to the Answer.

On February 20, 2017, Petitioner filed a Motion to Consolidate the Petition of Appeal and the Petition for Due Process proceedings. On February 28, 2017, Respondent filed its Answer to the Motion for Consolidation and on March 10, 2017, Petitioner filed a Reply to the Answer. The two matters were never consolidated.

On April 17, 2017, Respondents filed a Motion to Dismiss the Petition of Appeal for docket number EDU 12095-16. On April 21, 2017, and again on April 25, 2017, counsel for Petitioner submitted a letter requesting to be relieved as Counsel. Following a series of telephone calls from both parties' attorneys and Petitioner herself, the undersigned converted the Hearing scheduled for May 1, 2017, to an in-person

conference. The matter was then scheduled for a Hearing on May 8, 2017, which was adjourned.

On May 10, 2017, a hearing was held on the Motion to Dismiss the Petition of Appeal. Since Petitioner's counsel withdrew as counsel; she proceeded pro se at the hearing. The hearing was held solely for the purpose of addressing when Petitioner received notice of the adverse action taken against her daughter, L.J. The parties were given thirty days after receipt of the transcripts to submit post summation briefs.

On April 23, 2018, this matter regarding the Motion to Dismiss the Appeal bearing Docket No. EDU 12095-16, was transferred to the undersigned from Judge McGee, due to his retirement. The matter of the Due Process petition bearing Docket No. EDS 18509-16 was transferred to the Honorable Jude Tiscornia, A.L.J.

A decision on the Motion to Dismiss the Appeal had not yet been decided because the recording of the hearing on May 10, 2017, before Judge McGee, could not be located. On May 1, 2018, the recording of the hearing from May 10, 2017, was located and a telephone conference was held by the undersigned and counsel for Respondent's and the Petitioner, pro se. It was decided that the parties would request a copy of the transcript and post summation briefs would be submitted by July 2, 2018. It was further decided that in the interest of judicial economy, I would review the initial Motion papers and any response to same; listen to the May 10, 2017 hearing; consider the post summation briefs; and render a decision on the Motion to Dismiss the Appeal. There was no objection by the parties. Petitioner did raise the issue of being permitted to obtain counsel. In light of the fact that Petitioner's prior counsel was relieved as counsel on May 10, 2017 and she had not since retained new counsel, petitioner was advised that the proceedings would not be further delayed while she attempts to retain new counsel.

The time to file the post summation briefs was extended to July 27, 2018, due to issues with the parties obtaining the transcript. On July 27, 2018, the last of the post summation papers were received, and the record was closed. It should be noted that the post summation papers submitted by Petitioner on July 27, 2018, included additional

Exhibits which did not address the testimony introduced before Judge McGee on May 10, 2018; nor were the Exhibits presented at the Hearing. Rather, they related to the Due Process Petition which is pending before Judge Tiscornia bearing Docket EDS 18509-16. Thus, Petitioner's papers were not considered.

### **FACTS**

The following facts are undisputed and I therefore **FIND** them to be the **FACTS** of the case:

L.J. is a fourteen-year-old student born on August 23, 2002, and who was initially classified as eligible for Special Education and related services on or about March 14, 2007. Specifically, she was classified under the category of "specific learning disability." On or about December 11, 2015, Petitioner withdrew her consent for Special Education and related services

On March 24, 2016, L.J. was involved in an altercation in the Carteret Middle School cafeteria with another student. Security guards restrained L.J. while the other student was removed from the cafeteria. Respondents determined that it was necessary to summon the local police to diffuse the situation. The officers who arrived determined that L.J. would be placed under arrest and she was removed from the school building.

B.J. attempted to file a Petition of Appeal, on behalf of L.J., against the Respondent on June 7, 2016, based on incidents that occurred on March 24, 2016, and an unspecified date in February 2016. On June 14, 2016, the Department of Education notified B.J. that her Petition was not filed due to procedural deficiencies, namely service of the Petition. On or about July 6, 2016, the deficiencies were corrected, and the Department of Education formally filed the Petition of Appeal.

**TESTIMONY OF WITNESSES FROM MAY 10, 2017**

Wendy Miranda, the Administrative Assistant for the Carteret Middle School, testified on behalf of the Respondents. Miranda testified that on March 24, 2016, she was directed by the Vice Principal, James Bevere, to call L.J.'s parents to inform them that their daughter had gotten into a fight, that she was suspended and could be picked up at the police station. Before the call could be placed, B.J. had called into the school. There is no dispute that B.J. initiated the telephone call to Miranda on March 24, 2016. While L.J. was contained in Miranda's office, L.J. called B.J. This, in turn, triggered B.J. to call into the school and speak with Miranda. She confirmed that it was B.J. on the other end of the call by the caller ID and by B.J. verbally confirming it was her. She further testified that she was directed to send the parents of L.J. the Office Conduct Referral, which is a notice sent to all students regardless of whether they have been in detention or suspended. That notification is sent out to the parents and a copy is given to the child. (R-1 and R-2). Miranda testified that this notification was sent to the parents of L.J. on March 24, 2016. She personally went to the post office in Carteret because it was the day before Spring Break and it had to be sent that day or the parents would not have received it. The address on the envelope was confirmed on the record as being the appropriate address and to Miranda's knowledge, this was Petitioner's address at the time of the incident on March 24, 2016. The notice was sent via regular mail. Miranda stated that the suspension letters were usually sent in this manner.

Mary Spiga, the Principal for the Carteret Middle School, testified on behalf of the Respondents. She personally met with Petitioner on Friday, April 1, 2016, at Petitioner's request on March 24, 2016. The suspension, among other issues, were discussed at said meeting. As far as Spiga was concerned, protocol was followed when noticing L.J.'s parents of her suspension. In particular, L.J. received a copy of the notice of suspension and it was also sent by regular mail to her parents by the end of the business day on March 24, 2016, the same day as the incident and suspension.

D.O., the grandfather of L.J., testified on behalf of the Petitioner. He stated that he and B.J. were aware of the incident on March 24, 2016 because he received a telephone call from B.J. to meet at the police station because L.J. had been arrested. That same day they went to the school and spoke with Miranda and another gentleman. However, he testified that he only knew of the arrest and not the suspension which was not disclosed to them until the meeting on April 1, 2016.

B.J. testified that she did not receive the written notice until after the April 1, 2016 meeting, but it was dated March 24, 2016. When asked by Judge McGee if she was able to produce the envelope, she indicated that she was unable to locate it. She did testify that on March 24, 2016 she assumed that L.J. had been suspended because she had been arrested. Based on the initial Motion papers and response, the audio recording of the May 10, 2017 hearing on the issue of notice and post summation paperwork, I **FIND** that Petitioner had notice of the suspension on March 24, 2016. By Petitioner's own admission she assumed that because her daughter had been arrested she had been suspended. Further, Petitioner, B.J., and D.O. went to the school the same day as the incident and spoke with school staff, including but not limited to Miranda. Petitioner was unable to demonstrate that the suspension notice dated March 24, 2016, was not in fact mailed that same day. In fact, Petitioner never established on what date she received the notice; she merely stated that she did not receive it until after the April 1, 2016 meeting.

### **DISCUSSION AND CONCLUSIONS**

Generally, pursuant to N.J.S.A. 18A:6-9, the Commissioner of Education has the authority to hear and determine "all controversies and disputes arising under school laws." Prior to the Commissioner deciding a contested issue however, a petitioner must create a petition of appeal that meets specific requirements, which are delineated in N.J.A.C. 6A:3-1.4. The petitioner must additionally serve the petition upon each named respondent, as per N.J.A.C. 6A:3-1.3(a). Critically, the petitioner must file the appeal within ninety days "from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing." N.J.A.C. 6A:3-1.3(i). This rule has become

colloquially known as the “90 Day Rule,” the application of which has been asserted in the instant matter.

### **NINETY-DAY RULE**

To initiate a contested case for the Commissioner's determination of a controversy or dispute arising under the school laws, a petitioner shall prepare a petition of appeal conforming to the requirements of N.J.A.C. 6A:3-1.4 and serve such petition upon each respondent, together with any supporting papers the petitioner may include with the petition. The petitioner then shall file proof of service on each respondent, the telephone numbers, fax numbers and e-mail addresses where available for the petitioner and each respondent, and the original petition and supporting materials, if any, with the Commissioner c/o the Director, Bureau of Controversies and Disputes, New Jersey State Department of Education, 100 River View Plaza, PO Box 500, Trenton, New Jersey 08625-0500. N.J.A.C. 6A:3-1.3(a). The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. N.J.A.C. 6A:3-1.3(i)

The New Jersey Supreme Court held that there is a two-pronged public policy approach regarding the ninety-day rule. First, the ninety-day rule is meant to “stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims.” Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 587 (1993) (quoting, Ochs v. Federal Ins. Co., 90 N.J. 108, 112 (1982)). Further, the ninety-day rule is intended “to penalize dilatoriness and serve as a measure of repose by giving security and stability to human affairs.” Kaprow, 131 N.J. at 587 (quoting Farrell v. Votator Div., 62 N.J. 111, 115 (1973)). Not applying the ninety-day rule would violate both of these public policy purposes, since it would allow the litigation of “stale claims” to occur, and it would fail to penalize the petitioner’s “dilatoriness,” in filing petitions.

Generally, the ninety-day-rule clock is set in motion by a “ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.” N.J.A.C. 6A:3-1.3(i). In this matter, the February

2016 claim falls well outside of the 90-day limitation for filing. Although Petitioner does not specify a date in February, even using the most liberal date of February 1, 2016 for when the detention occurred would mean that ninety days would have run as of May 1, 2016. Petitioner's appeal was not filed until July 6, 2016 due to deficiencies, and therefore the February 2016 claim is clearly out of time.

Ms. Miranda, on behalf of the Respondents, testified that on March 24, 2016, the date of the altercation involving L.J., she spoke with L.J.'s mother by phone and advised her of L.J.'s suspension from school; personally handed notification of the suspension to L.J.; and delivered the notice for mailing to the Carteret Post Office to be sent by regular mail that day. Let us assume for arguments sake that Petitioner was not noticed or made aware of L.J.'s suspension until April 1, 2016, the date that Petitioner had a meeting at the school with all relevant parties. It would still put Petitioner beyond the ninety days as required by the rule. It is undisputed that Petitioner attempted to file an appeal on June 7, 2016 and that she received notice on June 14, 2016 that her petition would not be accepted due to procedural deficiencies. Further it is undisputed that Petitioner did not file the corrected Petition with the DOE until July 6, 2016. Therefore, the March 24, 2016 claim is out of time.

I **CONCLUDE** that there is sufficient evidence at this time to grant a Motion to Dismiss for violation of the 90-day rule.

### **ORDER**

I hereby **ORDER** that Respondents' Motion to Dismiss is hereby **GRANTED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless

such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 13, 2018

DATE



ELISSA MIZZONE TESTA, ALJ

Date Received at Agency:

August 13, 2018

Date Mailed to Parties:

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EMT/sej

**APPENDIX**

**WITNESSES**

For Petitioner:

B.J.  
D.O.

For Respondents:

Wendy Miranda  
Mary Spiga

**LIST OF EXHIBITS**

For Petitioner

None.

For Respondents:

R-1 Office Conduct Referral  
R-2 Certification of Wendy Miranda