

New Jersey Commissioner of Education

Final Decision

A.O., on behalf of minor child, V.M.,

Petitioner,

v.

Board of Education of the Town of Kearny,
Hudson County,

Respondent.

Synopsis

This case involves a dispute over whether V.M.'s math grades for the first and second marking periods of the 2017-2018 school year should be changed based on his scores on tests and quizzes that he was allowed to retake later in the year, at his mother's request. V.M., a sixth grader in the respondent Board's school district during the period in question, had received failing grades for the first two marking periods, and was allowed to retake the assessments starting in late February 2018 after his mother expressed concern that V.M. might not be academically prepared for seventh grade. Petitioner contended that there had been an agreement with school officials that V.M.'s first and second marking period grades would be changed based upon his retake scores. The Board asserted that no such agreement had been made, and that its actions in denying petitioner's request to change V.M.'s grades were lawful and in keeping with district policy.

The ALJ found, *inter alia*, that: in addition to petitioner's demand that V.M.'s grades be changed based upon his scores on tests and quizzes that he was allowed to retake at A.O.'s request, petitioner also asked that the New Jersey Department of Education "...investigate the internal administration of the Kearny Board of Education interactions with the internal administration of Garfield Middle School;" as the record offers no evidence of the need for such an investigation, the grading dispute is the only issue to be resolved here; pursuant to *N.J.S.A.* 18A:11-1(c), local boards of education make, amend and repeal rules for the government and management of public schools, consistent with state law; allowing a student to repeat entire marking periods months later to earn better grades would compromise the integrity of the grading process and set bad precedent; the testimony of the Board's witnesses that there was no agreement to change V.M.'s first and second marking period grades based on the test retakes was credible, while the testimony of the petitioner was not. The ALJ concluded that there was no evidence that the Board violated any law, and the petitioner failed to demonstrate that the Board's refusal to change V.M.'s grades was arbitrary, capricious, unreasonable or in bad faith. Accordingly, the ALJ ordered that the petition be dismissed with prejudice.

Upon careful and independent review of the record and the ALJ's recommended decision, the Commissioner adopted the Initial Decision of the OAL as the final decision in this case. The petition was dismissed with prejudice.

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.

February 14, 2019

OAL Dkt. No. EDU 12379-18
Agency Dkt. No. 162-7/18

New Jersey Commissioner of Education

Final Decision

A.O., on behalf of minor child, V.M.,

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v.

Board of Education of the Town of Kearny,
Hudson County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.¹ The parties did not file exceptions.

Upon such review, the Commissioner agrees with the Administrative Law Judge – for the reasons thoroughly set forth in the Initial Decision – that the Board did not act in an arbitrary, capricious, or unreasonable manner in refusing to change V.M’s grades.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed.

IT IS SO ORDERED.²

COMMISSIONER OF EDUCATION

Date of Decision: February 14, 2019
Date of Mailing: February 14, 2019

¹ The Commissioner was not provided with a transcript of the November 19, 2018 hearing at the OAL.

² 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

OAL DKT. NO. EDU 12379-18

AGENCY DKT. NO. 162-7/18

A.O., ON BEHALF OF MINOR CHILD, V.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN

OF KEARNY, HUDSON COUNTY,

Respondent.

A.O., petitioner, pro se

Kenneth J. Lindenfelser, Esq., for respondent

Record Closed: November 19, 2018

Decided: January 3, 2019

BEFORE **KELLY J. KIRK**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner A.O. challenges her son's math grades for the first and second marking periods of the 2017-2018 school year.

By letter dated March 29, 2018, petitioner was notified by the Kearny Superintendent of Schools that her appeal was denied and that V.M.'s grades for the

first and second marking periods would not be changed. Petitioner thereafter appealed to the Kearny Board of Education. The full Kearny Board of Education voted to deny petitioner's appeal and V.M.'s grades remained unchanged. On July 12, 2018, petitioner filed a Petition of Appeal with the Department of Education. The Petition of Appeal did not include a proof of service, and the Department sent petitioner a Deficiency Notice on August 2, 2018. Mail receipts were submitted to the Department by A.O. on August 3, 2018. The Board filed an answer on August 20, 2018. Thereafter, on August 27, 2018, the Department transmitted the case to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the office, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, and the rules of procedure established by the Department of Education to hear and decide controversies and disputes arising under school laws, N.J.A.C. 6A:3-1.1 to -1.17. Jurisdiction is conferred under N.J.S.A. 18A:6-9. The hearing was held on November 19, 2018, on which date the record closed.

FACTUAL DISCUSSION AND FINDINGS

Petitioner testified on her own behalf. Lyndsay Vitale and Curtis Brack testified on behalf of the respondent.

Preliminary Facts

After due consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following preliminary facts:

V.M. is the son of A.O. V.M. was in sixth grade during the 2017-2018 school year. His math teacher was Lyndsay Vitale. V.M. had not previously had Vitale as a teacher. Vitale has been employed by the Kearny Board of Education as a math teacher for eleven years. Curtis Brack has been employed by the Kearny Board of Education for eighteen years, with this year being his fifth year as principal of V.M.'s school. Patricia Blood was the Superintendent of Schools.

Vitale gave tests and quizzes during the first and second marking periods. V.M.'s June 21, 2018, report card for the 2017-2018 school year reflects his grades in Math 6 as follows: first marking period - 61; second marking period - 60; third marking period - 80; and fourth marking period - 95. The report card comments for Math 6 are "Quality of work shows improvement." (P-1.)

V.M.'s Progress Report for the first marking period reflects an "F" for failing in math and the comments: [i]nteracts well with peers; [h]as a positive attitude; [i]s talkative in class; and [l]ow test scores. (R-1.) V.M.'s Progress Report for the second marking period again reflects an "F" for failing in math and the comments: [a]ccepts teacher guidance; [h]as a positive attitude; [n]eeds to study and prepare better for tests; and [b]ehavior needs improvement. (R-2.)

In late December 2017 or early January 2018, A.O., V.M., Brack, and Vitale had a meeting about V.M.'s first and second marking period grades.

On February 23, 2018, Vitale emailed A.O. and Brack that V.M. would be taking his tests and quizzes on Mondays and Thursdays in Brack's office. (P-6.) Vitale was referring to the first and second and marking period tests and quizzes.

The first marking period was comprised of the following: Quiz 1.1-1.3; Take Home Quiz; Chapter 1 Test; Quiz 2.3; Chapter 2 Test; and Quiz 3.2. The second marking period was comprised of the following: Quiz – Chapter 3; Test – Chapter 3; Quiz 4.1-4.2; Quiz – Equations; Midchapter Test; and Test Chapter 4.³ V.M.'s grades on the first marking period retakes were 84, 80, 80, 85, and 84.⁴ V.M.'s grades on the second marking-period retakes were 50, 91, 90, 100, and 83.⁵ Other tests were submitted with Exhibit P-3 not listed by Vitale as part of the second marking period retakes as follows: Chapter 5 Quiz (76); Chapter 5 Test (77/73); Chapter 6 Test (78); and Chapter 7 Mid Chapter Test (60).

³ Vitale's list for the second marking period also reflects the following: "Area of Polygons Test cannot be retaken. It was based on completion of entire unit in ST Math."

⁴ Quiz 3.2 was not submitted with Exhibit P-2.

⁵ Midchapter Test (Chapter 4) was not submitted with Exhibit P-3.

On February 28, 2018, A.O. emailed Blood regarding points on a test. Blood responded that the issue had been addressed by Brack. (P-4.) Later that day, A.O. emailed Blood, stating that she had been trying to resolve a school issue with V.M. since November, and that she had reached out to the Board of Education, but the Board failed to assist her, and that she was now requesting that Blood assist her. (P-4.)

On February 28, 2018, A.O. filed a harassment, intimidation and bullying (HIB) report. (P-7.) By letter dated March 2, 2018, Brack notified A.O. that the allegations would be investigated within ten days. (P-7.)

On March 5, 2018, A.O. emailed Blood, Brack, and Vitale as follows:

[Garfield School] offered test retake for 1,2 marking period. Today eventually I received a phone call from [Brack] said [V.M.] grade will be the same. But a few days ago he told me after all the test will taking and grade, [V.] grade will be changed. Today Patricia Blood and [Brack] told me if I like I can transfer [V.] to another school. I said [V.] will continue his 4 months left of school year in [Garfield School] I just like to these issue yo be resolved shortly.

[P-5.]

By letter dated March 29, 2018, Blood notified A.O. that after review of V.M.'s records and Vitale's gradebook, she found no reason to make any alterations to V.M.'s grades for the first and second marking periods. Blood's letter further notified A.O. that her appeal was denied, and she could appeal Blood's decision to the Board of Education. (P-8.) A.O. appealed to the Board of Education. By letter dated May 17, 2018, the attorney for the Board of Education notified A.O. that the Board of Education agreed to hear her appeal on May 21, 2018. (P-8.) A committee of the Board of Education heard A.O.'s appeal on March 21, 2018. By letter dated June 19, 2018, the attorney for the Board of Education notified A.O. that the Board voted to deny her appeal at its June 18, 2018, meeting. A.O. thereafter appealed to the Department of Education. (P-8.)

Testimony

A.O.

A.O. first learned of V.M.'s poor performance in math in November 2017 when he came home crying and told her Vitale had been talking about him to another student. He said he did not want to be in school, and that Vitale had said she did not like him and he was a terrible student. He was not comfortable going to school. He had never previously complained about Vitale to her. Maybe he did not say anything prior because he was holding it all in. He did not mention his grades. She checked the parent portal. She was enrolled in school at that time and she had not been checking V.M.'s grades. Maybe it was her fault she did not check the first and second marking period grades from the beginning, but she was able to address it when she found out.

She read the progress reports that were sent home. She had a meeting with Brack and Vitale about V.M.'s grades in December after she received a progress report. Vitale did not have the tests and quizzes. Vitale has her gradebook, but it does not mean anything. As a parent, she has a right to see the tests and quizzes. V.M. never brought any math tests home and she never saw the original tests. She does not know if the grades were good or bad. Vitale should have a folder for the parents to see the grades. If V.M. threw the tests away or did not give them to her he should be able to retake them. Vitale had no way to show her the grades, so she told Vitale to allow him to retake the tests.

On March 5, 2018, she emailed the relevant District employees confirming that V.M.'s grade was supposed to be changed based upon the retakes. She believed the retakes would be substituted for his prior grades because the District did not have the original tests to show her.

V.M. had three points taken off a test for behavior in class, but the points were restored after she questioned it. Points cannot be removed for behavior. It was very difficult for V.M. to be in the class and learn the correct way. After V.M.'s homeroom was changed, everything changed, although Vitale remained his math teacher.

As evidence that V.M.'s grades on the original tests were good, A.O. relies upon the retake grades and that his grades in the third and fourth marking periods were good. If V.M. did not know the first and second marking period material, he would not have been able to do well in the third and fourth marking periods.

The first and second marking period math grades for 2017-2018 should be changed because A.O. does not have any way to see how V.M. did on those tests; his grades for the third and fourth marking periods were good; and his grades on the retakes were also good. If he did not know the material before, he would not know it later. V.M. earned the retake grades because he was able to retake the tests and the teacher cannot show her the original tests.

Lyndsay Vitale

A week to a week and a half prior to a test or quiz, she wrote the date of the test or quiz on the homework board. Thereafter, she daily reminded the students to study. Two days prior she would conduct a review and the students would work either in pairs or individually to try problems in advance and she would help. The following day she would go over every question and answer and ask if the students had any questions. The next day she would give the test or quiz, which would be very similar to the review.

Students had the full period to complete the test. If additional time was needed, it was given to the students. She graded tests either the same day or the following day at the latest so that she was able to put the grades on the parent portal. Parents could call or email her if there were any issues. She returns the tests the day after she enters the grades, if no students were absent. If a student was absent on the day of the test, she waited a day or two, until after the absent student took the test.

At the start of the school year, she instructed the students to get a folder or binder in which they would keep their tests and quizzes. She advised the students that because they were in sixth grade, she would return their tests and quizzes to them to keep so they would learn responsibility and accountability before going to junior high

school the following year. She used to keep copies of all tests and quizzes and have the parents sign them, but she discontinued doing so when she began teaching sixth grade. She accurately recorded all the grades in the parent portal prior to returning the tests and quizzes to the students. Parents are able to immediately see the grades.

She noticed that V.M.'s grades were not good. He would get 30's on tests and she would ask him what happened, but he would shrug his shoulders. V.M. fooled around a lot during tests and distracted the other students. Progress reports were generated half-way through each marking period. The progress reports were sent home and parents had to sign them. A.O. never contacted Vitale about V.M.'s progress reports.

The first contact Vitale had with A.O. was in November 2017, when she received an email from A.O. A.O. was upset about certain alleged behavior that Vitale felt was not true, so Vitale spoke to Brack about it. Some time went by and A.O. later advised that she was unhappy with V.M.'s grades. A meeting was set up to discuss it. A.O., V.M., Brack, and Vitale attended the meeting. A.O. was upset that she did not have copies of the tests and quizzes. V.M.'s behavior toward Vitale in a specific class was also discussed. A.O. wanted Vitale to produce the tests and quizzes, but she does not retain a copy of them.

The first and second marking period grades on V.M.'s report card are correct. V.M.'s report card grades were higher than V.M.'s actual grades, because V.M. had 30's on tests and quizzes, but the lowest average grade a student can receive in the computer is 60. Vitale attributed V.M.'s poor performance to not paying attention in class. He started to get better grades after his mother was on top of it, and he started paying attention and his behavior improved. Vitale never made him scared to come to class, and she thought they had a great relationship. He was always smiling, happy, and laughing.

A.O. was very upset that she did not have a copy of the tests and was concerned that V.M. would not be prepared for seventh grade with such low test scores. Brack advised Vitale that V.M. would be allowed to retake the tests and quizzes to allow his

mother to see how well he could do, but that it would not change his grades. Vitale spoke to V.M. the following day and explained that he would be allowed to retake the tests and quizzes, but that it would not change his grades. V.M. advised that he knew it would not change his grades, but his mother just wanted him to retake them. Vitale was very clear that his grades would not be changed.

It was agreed upon that the tests would be taken after school hours in Brack's office. Vitale wanted the math coach to correct them. The math coach graded all but one. The grades were much better on the retakes. Based on the retakes, V.M. was prepared for seventh grade math. Vitale never told anyone V.M.'s prior grades would be changed.

The first marking period ends in November, the second marking period ends in January, the third marking period ends in April. The progress reports go out in the middle of a marking period so that a student has time to improve a grade. Progress reports are returned to Vitale. A.O. signed the progress reports for the first and second marking periods. A.O. did not address with Vitale the comments on the progress reports.

Curtis Brack

A.O. approached Brack with an issue about V.M.'s first and second marking period grades. She was concerned based upon V.M.'s grades and wanted to be sure that V.M. would be academically prepared for seventh grade. Brack was aware Vitale did not retain hard copies of the tests and quizzes, so to reassure A.O. that V.M. would be prepared for seventh grade, Brack would allow V.M. to retake the quizzes and his tests in his office. A.O. did not ask Brack to change V.M.'s grades. Changing grades was never a topic of discussion.

V.M. began retaking the tests after school in Brack's office, a neutral location. Another District math employee graded the tests and the tests were given to A.O. Brack became aware that A.O. wanted V.M.'s grades changed around the time that A.O. filed a HIB report. There had been emails about how V.M. was progressing, but

there had been no discussion prior about changing grades. Changing a student's grades in this manner would undermine the teacher's professionalism, compromise the integrity of the grading process, and set a bad precedent for the other students. Brack has never changed a student's grades in this manner and he denied A.O.'s request to change V.M.'s grades. At no point did Brack ever indicate to A.O. that the retakes would change V.M.'s first or second marking period grades. He was under the impression that everyone was on the same page about the retakes.

A.O. did not want Vitale to continue as V.M.'s math teacher, but the school has only one sixth-grade math teacher. Several options were considered, including putting V.M. with the fifth-grade math teacher, but Brack did not think was appropriate because the curriculum is different, or having a resource teacher teach him sixth-grade math, but Brack did not think that was appropriate either. The last resort option he discussed with the superintendent was to allow V.M. to switch schools if A.O. really did not want Vitale to be his teacher.

Additional Findings of Fact

A credibility determination requires an "over-all evaluation of the testimony in light of its rationality or internal consistency and the manner in which it hangs together with other evidence." Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). For "testimony to be believed, it must not only proceed from the mouth of a credible witness, but must be credible in itself." Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954). It must be "such as the common experience and observation of mankind can approve as probable in the circumstances." Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961). "The interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.) (citation omitted), certif. denied, 10 N.J. 316 (1952).

Petitioner presented no written documentation of an agreement that V.M.'s grades would be changed based upon the retakes. There is an email from Vitale on February 23, 2018 confirming that V.M. would be taking the tests and quizzes in Brack's

office after school. However, there was no response to that email from A.O. confirming that grades would be changed based upon the retakes. Vitale and Brack both credibly testified that there was no agreement that V.M.'s grades would be changed based upon the test retakes. Brack explained why he would not have agreed to change V.M.'s grades, and further explained that the retakes were to address A.O.'s concerns about V.M. knowing the material to be prepared for seventh grade. A.O. did not send an email about changing grades until March 5, 2018, which was after she would have been aware that V.M.'s grades on the retakes were significantly higher than his grades on the original tests. Accordingly, I credit the testimony of the Board's witnesses and **FIND** that there was no agreement that V.M.'s first and second marking period grades would be changed based upon the retakes.

LEGAL ANALYSIS AND CONCLUSION

Pursuant to N.J.S.A. 18A:6-9, the commissioner of the Department of Education has jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws. N.J.A.C. 6A:3-1.1 et seq. sets forth the rules of procedure for the filing of petitions with the Commissioner of Education to hear and decide controversies and disputes arising under school laws in accordance with N.J.S.A. 18A:6-9. N.J.A.C. 6A:3-1.1(a).

The Petition requests that the Department "intervene in the grade change for [V.M.] as well as investigate the internal administration of the Kearny Board of Education interactions with the internal administration of Garfield Middle School." However, the record is devoid of evidence of the need for an investigation, and petitioner failed to cite to any legal authority to order such investigation. Thus, the sole remaining issue is the grading dispute.

Local boards of education make, amend and repeal rules, consistent with law and the rules of the state board, for the government and management of the public schools. N.J.S.A. 18A:11-1(c).

Petitioner disputes V.M.'s grades primarily because she was not provided with the original graded tests and quizzes. However, she did not request to view the tests or quizzes at any point until late November or December 2017, despite that the grades were available on the parent portal within a day or two of when the test or quiz was taken, and despite that she already had received a report card and progress reports reflecting that V.M. was failing. Vitale testified that it was the student's responsibility to maintain the copies of the tests and quizzes, but V.M. failed to do so. Although there was testimony from A.O. about harassment, intimidation and bullying, there is no evidence of the same in this record. Likewise, there is no evidence in this record that the grades earned by V.M. on the original tests and quizzes were not accurately recorded by Vitale. V.M.'s performance on the retakes, months later and after his mother became involved, does not establish that those were the grades he earned on the original tests and quizzes. I concur with Brack that allowing a student to repeat entire marking periods months later to earn better grades would compromise the integrity of the grading process and set a bad precedent. "School Law vests the management of the public schools in each district in the local boards of education, and unless they violate the law or act in bad faith, the exercise of their discretion in the performance of the duties imposed upon them is not subject to interference or reversal." Kenney v. Bd. of Educ. of the Town of Montclair, Essex County, 938 S.L.D. 647, 653 (1934), aff'd, State Board of Education, 938 S.L.D. 649 (1935). There is no evidence that the Board of Education violated any law, and I **CONCLUDE** that petitioner has failed to demonstrate that the Board's refusal to change V.M.'s grades was arbitrary, capricious, unreasonable or in bad faith.

ORDER

It is **ORDERED** that that V.M.'s math grades for the first and second marking periods remain unchanged and that petitioner's Petition be **DISMISSED** with prejudice.

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, P.O. 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.

January 3, 2019 _____
DATE



KELLY J. KIRK, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

APPENDIX

Witnesses

For Petitioner:

A.O.

For Respondent:

Lyndsay Vitale

Curtis Brack

Exhibits

For Petitioner:

- P-1 Report Card 2017-2018
- P-2 Tests/Quizzes for Marking Period 1
- P-3 Tests/Quizzes for Marking Period 2
- P-4 Email, dated February 28, 2018
- P-5 Email, dated March 5, 2018
- P-6 Email, dated March 6, 2018/February 23, 2018
- P-7 HIB Letter, dated March 2, 2018
- P-8 Superintendent Letter, dated March 29, 2018; Board Attorney Letters, dated May 17, 2018, and June 19, 2018

For Respondent:

- R-1 Progress Report, Marking Period 1
- R-2 Progress Report, Marking Period 2