

M.N., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF : DECISION
THE BOROUGH OF DUMONT,
BERGEN COUNTY, :
RESPONDENT. :
_____ :

SYNOPSIS

Petitioner filed a petition inquiring: (1) whether the school is under a duty to notify the parents/guardians or include them in a meeting regarding the questioning of students; (2) whether the school and/or guidance counselor is under a duty to disclose to the parents discussions between the school counselor and the student regarding potentially dangerous situations; and (3) whether a school is allowed to destroy student files without parents' consent.

At the OAL the respondent Board moved for summary decision and dismissal. After concluding that circumstances warranted relaxation of the 90-day rule for filing a petition, the ALJ determined that the decision of the building administrator to question E.N. outside the presence of his parents was not unreasonable or an abuse of his discretion. In addition, the ALJ concluded that the school counselor who met with E.N. had a duty to inform petitioner that E.N. was or may have been contemplating suicide. Finally, the ALJ found that the Board destroyed E.N.'s school records in violation of *N.J.A.C.* 6:3-6.8(c)2.

The Commissioner modified the initial decision as follows. The Commissioner concurred with the ALJ's decision to relax the 90-day filing limitation and conclusion that there is no general requirement in either statute or regulation which obligates a local administrator to notify the parent or guardian of a student prior to questioning that student regarding a disciplinary incident. The Commissioner held that a local board may *not* destroy, without parents' consent, mandated pupil records during the time of the student's enrollment, or any pupil records existing at the time of the student's graduation or permanent departure from the district. He noted, however, that the board *may* destroy, with no prior notice, permitted records during the time of the pupil's enrollment consistent with the requirements of *N.J.A.C.* 6:3-6.2(i). The Commissioner further concluded that the factual record of the instant matter did not permit a determination of whether E.N.'s records were destroyed subsequent to his permanent departure from school or not, but that determination is unnecessary to provide the declaration sought by petitioner. Finally, notwithstanding the ALJ's analysis, the Commissioner determined that he is without the legal authority to render a determination as to a counselor's duty of care.

AUGUST 13, 1999

OAL DKT. NO. EDU 11658-98
AGENCY DKT. NO. 476-10/98

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The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. The Board’s exceptions and petitioner’s reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4.

The Board in its exceptions contends that: (1) the Administrative Law Judge (ALJ) erroneously concluded that relaxation of the 90-day time limit for filing a petition was warranted; (2) the ALJ failed to address the issue of whether the Commissioner has the subject matter jurisdiction to adjudicate petitioner’s claim of negligence; (3) the ALJ improperly ruled on the merits of the issue that the Board failed to disclose to the parents that E.N. was, or may have been, contemplating suicide, since the Board did not admit these facts, did not move for summary decision on this issue, and received no hearing with respect to petitioner’s allegations; and (4) the ALJ erroneously concluded that *N.J.A.C.* 6:3-6.8(c)2 applies to the circumstances of this case.

In reply, petitioner affirms that her petition should not be deemed untimely, since she filed her notice of tort claim within the requisite 90-day period and was also “denied access to the NJ School codes” by the Board, thereby, presumably, thwarting her attempts to determine her rights and duties. (Petitioner’s Reply at p. 2) Moreover, petitioner claims that the Board had the opportunity, contrary to its assertion, to develop an evidentiary record in connection with the issue pertaining to a counselor’s duties. In this regard, petitioner maintains that she knew E.N.’s record contained information about his meetings with his middle school counselor. “I assumed,” petitioner continues, “that the High School counselor would pick up where Mrs. Bowan left off. Even if these informations [sic] were not descriptive of [E.’s] educational situation, they were descriptive of his mental state and should not have been destroyed at any time.” (*Id.* at p. 3)

Upon careful and independent review of the record in this matter, the Commissioner determines to modify the initial decision of the ALJ, for the reasons set forth below. Preliminarily, although the Commissioner concurs with the ALJ that the petition herein is untimely, he determines to relax the 90-day filing limitation because he finds the within circumstances to be sufficiently compelling and extraordinary.¹ *N.J.A.C.* 6:24-1.15.

For the reasons set forth in the initial decision, the Commissioner first affirms there is no general requirement in either statute or regulation which would obligate a local administrator to notify the parent or guardian of a student prior to questioning that student regarding a disciplinary incident.

¹ In so determining, the Commissioner notes that there is no indication on the record before him what contact, if any, petitioner may have had with “state school officials” *prior* to her letter to the Governor. (Initial Decision at p. 9) However, once she communicated with Governor Whitman, petitioner’s (undated) letter was transmitted to the Department of Education for review and response. The Assistant Commissioner of the Division of Executive Services responded to petitioner by letter dated August 5, 1998. Petitioner’s second letter, dated August 26, 1998, was addressed directly to the Assistant Commissioner, which letter was answered by him on September 1, 1998. Finally, petitioner wrote a third time, by letter dated September 15, 1998 addressed to the Commissioner, which letter specifically referenced a dispute with her local board and was, therefore, answered by the Director of the

Next, the Commissioner concurs with the ALJ that, *at the time of a student's graduation or permanent departure from a local district*, a board is obligated to notify, in writing, the student's parents, or the adult pupil, *and* obtain written parental or adult pupil permission *before* pupil records, other than those required to be kept by the district in perpetuity, may be destroyed, *N.J.A.C. 6:3-6.8(c)2*. *However*, as also recognized by the ALJ, this does not prevent a board from destroying pupil records prior to that time in accordance with *N.J.A.C. 6:3-6.2(i)* and *N.J.A.C. 6:3-6.8(b)*. The former provides that mandated records may be destroyed once they are no longer educationally necessary, but only after parental consent has been obtained or reasonably attempted; the latter provides that, without prior notice except in the case of classified students, "the chief school administrator or his designee shall require all permitted pupil records of currently enrolled pupils to be reviewed annually by certified school personnel" and that records deemed no longer relevant shall be destroyed and not recorded elsewhere. The factual record in the instant matter does not enable the Commissioner to conclude, as did the ALJ, that the documents sought by M.N., assuming *arguendo* that they did, in fact, constitute permitted pupil records (clearly, they were not *mandatory* records), were destroyed subsequent to E.N.'s permanent departure from the district, rather than prior to it. *However*, that determination is unnecessary to provide the declaration sought by petitioner, i.e., an answer to the question of whether a district may destroy a student's file without parental consent.

Finally, notwithstanding the ALJ's analysis, the Commissioner finds and declares that petitioner's request for a determination as to whether "the school counselor is allowed to keep from parents a potentially dangerous situation and a minor's state of mind" (Petition of Appeal at p. 2) calls for an analysis of duties in relation to a body of law which is not within his

Bureau of Controversies and Disputes, by letter dated September 22, 1998, with instructions on how to file a Petition of Appeal, to the extent petitioner presented a case which was justiciable before the Commissioner of Education.

jurisdiction, since it is “the Commissioner’s ‘primary responsibility*** to make certain that the terms and policies of the School Laws are being faithfully effectuated ***.’” (*Jenkins, et al. v. Tp. of Morris School Dist. and Bd. of Ed.*, 58 N.J. 483, 494 (1971) (citations omitted). See also *Picogna v. Board of Educ.*, 249 N.J. Super. 332, 335 (App. Div. 1991), citing *Board of Ed., E. Brunswick Tp. v. Township Council, E. Brunswick*, 48 N.J. 94, 102 (1966) for the proposition that “[w]here the controversy does not arise under school laws, it is outside the Commissioner’s jurisdiction even though it may pertain to school personnel.”) The Commissioner so finds, notwithstanding that the Board appears to have adopted a policy contemplating that it may be necessary for a counselor to set aside confidentiality considerations when it is in the best interest of a student.

Accordingly, in summary, the Commissioner declares in response to petitioner’s inquiry that: (1) a school administrator may question minor students without parents’ consent; (2) a local board may *not* destroy, without parents’ consent, mandated pupil records during the time of the student’s enrollment, or any pupil records existing at the time of the student’s graduation or permanent departure from the district, but *may* destroy, with no prior notice, permitted records during the time of the pupil’s enrollment consistent with the requirements of N.J.A.C. 6:3-6.2(i); and (3) the legal authority to render a determination as to a counselor’s duty of care does not rest with the Commissioner of Education.²

ACTING COMMISSIONER OF EDUCATION

AUGUST 13, 1999

² This decision, as the Commissioner’s final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C. 6:2-1.1 et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.