

262-01

CHRISTINE KNIGHT AND THE NEPTUNE
EDUCATION ASSOCIATION,
:
:
PETITIONERS,
:
:

V.

BOARD OF EDUCATION OF THE TOWNSHIP
OF NEPTUNE, MONMOUTH COUNTY,
:
:
RESPONDENT,
:
:

COMMISSIONER OF EDUCATION

AND

DECISION

ERNEST RIZZITELLO AND THE NEPTUNE
EDUCATION ASSOCIATION,
:
:
PETITIONERS,
:
:

V.

BOARD OF EDUCATION OF THE TOWNSHIP
OF NEPTUNE, MONMOUTH COUNTY,
:
:
RESPONDENT.
:
:

SYNOPSIS

Petitioners challenged the Board’s handling of two separate incidents involving threats made by students against teaching staff members pursuant to *N.J.S.A. 18A:37-2*, arguing that a suspension/expulsion hearing should have been held before the Board of Education in each matter. In each case, the school’s administration imposed penalties and did not schedule suspension/expulsion hearings before the Board of Education.

The ALJ permitted petitioners to amend both petitions to assert claims pursuant to *N.J.S.A. 18A:37-2.1*, and concluded that the superintendent was required to place both incidents before the Board for suspension/expulsion hearings because the conduct underlying each incident constituted an assault. The ALJ recommended remanding both matters to the Board for suspension/expulsion hearings.

The Commissioner reversed the decision of the ALJ and dismissed the petitions. The Commissioner determined that the district superintendent’s decisions not to schedule suspension/expulsion hearings before the Board in each case were not arbitrary, capricious or unreasonable. The Commissioner noted that district administrators, at the time the incidents occurred, determined that these matters fell within the purview of *N.J.S.A. 18A:37-2* and, thus, a suspension/expulsion hearing was not required. In addition, petitioners did not allege that the incidents fell within *N.J.S.A. 18A:37-2.1* at the time the incidents occurred, nor did they make written allegations of assault as set forth in *N.J.S.A. 18A:37-2.1(b)*, nor seek a review of the administrators’ determinations within the 30-day time frame for conducting suspension/expulsion hearings before a board set forth in *N.J.S.A. 18A:37-2.1*. As such, the Commissioner determined that the decision to proceed in accordance with *N.J.S.A. 18A:37-2* in each case and the measured and reasoned penalties imposed therein, were not arbitrary and capricious, and did not constitute an abuse of the Board’s discretion and authority.

AUGUST 20, 2001

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.

OAL DKT. NOS. EDU 4005-00 AND EDU 4805-00 (CONSOLIDATED)
AGENCY DKT. NOS. 115-4/00 AND 176-5/00

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COMMISSIONER OF EDUCATION
DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board’s exceptions and petitioners’ reply thereto were timely filed in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in reaching his decision.

In its exceptions, the Board avers that the stipulated facts do not establish that Petitioner Knight was assaulted within the meaning of *N.J.S.A.* 2C:12-1(a)(3) because she was not present when her fourth-grade student stated to another pupil, “I’m going to kill my teacher

with my father's gun – word is bond,” and, moreover, the student was not in possession of a weapon. Noting that *N.J.S.A.* 2C:12-1 states that a person is guilty of simple assault if that person “‘attempts *by physical menace* to put another in fear of imminent serious bodily injury’ [Emphasis added],” the Board asserts that there is no evidence that the student directed physical menace toward Petitioner Knight because she only learned of the student’s statement through the school nurse and there was no showing that the student ever intended that she should learn of the remark. (Board’s Exceptions at 4, 5)

With respect to the incident involving another student and Petitioner Rizzitello, wherein the student engaged in a verbal confrontation, threw a brush to the floor and threatened to punch Rizzitello in the face, the Board notes that there are no allegations that the student made physical contact with Rizzitello or caused him bodily harm (*Id.* at 6) The Board also contends that the threat to punch Rizzitello in the face does not establish that he was placed “in fear of imminent serious bodily injury” as required by the statute. (*Ibid.*) In support of this argument, the Board points to *N.J.S.A.* 2C:11-1(b), which defines serious bodily injury as follows:

“Serious bodily injury” means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ. (*Id.* at 6-7)

In reply, petitioners maintain, *inter alia*, that the Administrative Law Judge’s (ALJ) legal analysis was correct and that both of the students committed simple assault by attempting, by physical menace, to put their teachers in fear of imminent serious bodily injury, thus requiring the initiation of expulsion proceedings against these two students pursuant to *N.J.S.A.* 18A:37-2.1. (Petitioners’ Reply at 3) Petitioners further posit that the Board has cited no case law in support of its contention that there must be actual physical contact to put another in fear of imminent serious bodily injury by physical menace. (*Ibid.*) Citing the definitions for

“physical” and “menace” in Black’s Law Dictionary, petitioners also assert that incidents such as those herein where a student threatened to kill his teacher with his father’s gun and where a student threatened to punch his teacher in the face would cause any reasonable person to fear imminent serious bodily injury. (*Id.* at 3-4)

Moreover, petitioners proffer that the “Legislature has gone out of its way to provide extra protection to school personnel,” noting that *N.J.S.A.* 2C:12-1 was amended in 1979 to provide that a person committing simple assault under *N.J.S.A.* 2C:12-1(a)(1), (2) or (3) is guilty of aggravated assault if committed upon a school board member or any employee of the school board while those individuals are engaged in the performance of their school duties. (*Id.* at 4) Petitioners also argue that, prior to the filing of its exceptions, the Board had not submitted any legal arguments with respect to whether the students committed simple assault and, therefore, should not be permitted to first raise the issue of whether the students’ conduct constituted simple assault under the statutes in its exceptions to the Initial Decision. (*Id.* at 5) Finally, pointing to their Brief in Opposition to Respondent’s Motion for Summary Decision and *N.J.S.A.* 18A:37-2.1, petitioners assert that Petitioners Knight and Rizzitello and the Neptune Township Education Association have standing in the instant matter. (*Id.* at 5)

Upon a careful and independent review of the record, the Commissioner, for the reasons set forth below, cannot accept the recommended decision of the ALJ.

Initially, the Commissioner notes that petitioners filed a challenge to the Board’s actions in two incidents involving students and teachers, alleging that the Board’s refusal to initiate expulsion hearings under *N.J.S.A.* 18A:37-2 in these two consolidated cases was arbitrary, capricious, and unreasonable. Neither petition alleged that the individual teacher had been assaulted so as to trigger proceedings under *N.J.S.A.* 18A:37-2.1. As an Affirmative

Defense, the Board, in its Answer in the Rizzitello matter stated that it was not required to institute suspension or expulsion proceedings because petitioner did not allege that the pupil's actions constituted an assault upon petitioner within the meaning of *N.J.S.A.* 2C:12-1 and *N.J.S.A.* 18A:37-2.1. (Board's Answer in Rizzitello at 3-4) In a footnote in their Brief in Opposition to Respondent's Motion for Summary Decision, filed approximately one year later, petitioners sought to amend each petition to allege a violation of both *N.J.S.A.* 18A:37-2 and *N.J.S.A.* 18A:37-2.1. (Brief in Opposition to Respondent's Motion for Summary Decision at 4, Footnote 1) The ALJ granted the Motion to Amend the Petition by footnote in the Initial Decision. (Initial Decision at 3, Footnote 1)

N.J.S.A. 18A:37-2.1(a) requires that any pupil who commits an assault, as defined in *N.J.S.A.* 2C:12-1, on a teacher, administrator, board member or other board employee, shall be immediately suspended from school consistent with procedural due process pending *suspension or expulsion proceedings* before the board of education. In the instant matters, however, the Board argues that the facts fail to establish that criminal assaults were committed by the two students at issue, and that, therefore, the school administration in each instance, although recognizing the two incidents as serious, proceeded with disciplinary measures pursuant to *N.J.S.A.* 18A:37-2. (Board's Exceptions at 4 and 8) The record supports the Board's contention that the school's administrators, after interviewing the students and teachers involved, did not believe that these students had attempted, by physical menace, to put the respective teachers in fear of imminent serious bodily injury, and, therefore, they did not consider these incidents to be assaults within the intendment of *N.J.S.A.* 2C:12-1.

Of particular note, in the Rizzitello matter, Petitioner Rizzitello was given an assault form to fill out, which might lead one to believe that either Rizzitello had raised the issue

or the principal was giving Rizzitello an opportunity to assert such a claim. However, as of March 6, 2000, the principal notes that petitioner had not filed a complaint and there is nothing in the record to demonstrate that it was ever filed. (Board's Exceptions, Exhibit C, Exhibit 2 attached thereto) The superintendent's letter to Petitioner Rizzitello confirms that the superintendent's review of the incident led to a conclusion that a suspension or expulsion hearing was discretionary, not required, as it would be if determined to be an assault under *N.J.S.A.* 18A:37-2.1(a). (*Id.* at Exhibit 4) The superintendent reported to Petitioner Rizzitello the actions that were being taken in response to the verbal confrontation and responded to the Association's request for an expulsion hearing by stating, in pertinent part:

I have carefully reviewed the conduct of H.B. as well as the actions taken by Principal Lampinen, which included the following:

- Five day suspension and parent conference.
- Removable (sic) of pupil from your math and homeroom.
- Referral to counseling for Anger Management Program.
- Reassignment of pupil or yourself to alternate lunch period site as of 5/1/00.

I view the incident as serious and am requesting the Child Study Team to further investigate and assess the educational and emotional profile of the pupil. We have requested a CST evaluation in this case and issued an administrative letter to the parent insisting upon the need for a CST evaluation, along with my discussion at the Superintendent's level to underscore the seriousness of H.B.'s verbal interaction with you.***

Your Association's request for an expulsion hearing in this case is viewed as not in keeping with the progressive discipline and social service approach that we feel will correct H.B's deportment now and in the future. (*Ibid.*)

The State Board recently adopted *N.J.A.C.* 6A:16-5.7, specifying the procedures to be followed, pursuant to *N.J.S.A.* 18A:37-2.1, when a student commits an assault. Although not controlling in this matter, this regulation is instructive in the implementation of

N.J.S.A. 18A:37-2.1, and, thus, provides guidance for deciding the issues herein. *N.J.A.C.* 6A:16-5.7 requires that any pupil who commits an assault, as defined in *N.J.S.A.* 2C:12-1, on a teacher, administrator, board member or other board employee, shall be immediately suspended from school consistent with procedural due process pending *suspension or expulsion proceedings*, which must take place before the board of education within 30 calendar days. *N.J.A.C.* 6A:16-5.7(c) further identifies the principal or his or her designee as the responsible party to immediately remove the student, report the removal to the chief school administrator and notify the parent of the removal action and the student's due process rights. Therefore, under *N.J.A.C.* 6A:16-5.7(c), it is the principal, or his or her designee, who must make an initial assessment with respect to whether an assault has occurred.

There is nothing in the record indicating that the principals at the two schools where these incidents occurred deemed the pupils' actions to constitute assaults as defined in *N.J.S.A.* 2C:12-1, which would have required that they act in accordance with *N.J.S.A.* 18A:37-2.1(a). Additionally, the superintendent's actions reflect that he, too, did not deem the actions to be assaults as defined in *N.J.S.A.* 2C:12-1 because, upon assessment of the situations, he concluded that suspension or expulsion hearings were *not required*, as would be the case were the incidents determined to be assaults. Moreover, as noted above, the Petitions of Appeal did not allege that petitioners had been assaulted.

Petitioners were put on notice that the District had determined that these incidents were not assaults when: (1) the students were not immediately suspended pending a hearing before the Board; and (2) neither a suspension nor an expulsion hearing was scheduled for the students before the Board within 30 days, as required by *N.J.S.A.* 18A:37-2.1(a) when an assault upon a staff member has occurred. If petitioners believed that they had been assaulted, as they

now claim, nothing precluded petitioners from making written allegations of alleged assaults pursuant to *N.J.S.A.* 18A:37-2.1(b), thereby triggering mandatory reporting by the principal to the superintendent, who must then report allegations of assault to the Board. Petitioners could also have filed Petitions for Emergent Relief at that juncture, naming the alleged assaulters as party respondents, asserting that these incidents constituted assaults so as to trigger the provisions of *N.J.S.A.* 18A:37-2.1(a).

According to the petitions, the Neptune Township Education Association (NTEA) was advised through the superintendent that the Board would not conduct expulsion hearings for the students involved in these incidents. (Knight Petition at 2-3, and Rizzitello Petition at 3) The Commissioner is unable to determine whether the NTEA requested expulsion hearings alleging assaults, as prescribed by *N.J.S.A.* 18A:37-2.1(b), because those communications are not part of the record. However, *assuming arguendo*, that allegations of assaults were reported by NTEA pursuant to *N.J.S.A.* 18A:37-2.1(b), a board is *not required* to hold suspension or expulsion hearings upon receipt of such allegations. *See N.J.S.A.* 18A:37-2.1(b), which reads as follows:

Whenever a teacher, administrator, board member, other employee of a board of education or a labor representative on behalf of an employee *makes a allegation in writing* that the board member or employee has been *assaulted* by a pupil, the principal shall file a written report of the alleged assault with the district's superintendent of schools. The superintendent to whom the alleged assault is reported or, if there is no superintendent in the district, the principal who received the allegation from the board member, employee, or labor representative shall report the alleged assault to the board of education of the district at its next regular meeting; provided that the name of the pupil who allegedly committed the assault, although it may be disclosed to the members of the board of education, shall be kept confidential at the public board of education meeting. (emphasis added)

In the instant matter, the administration conducted an immediate investigation of the two incidents at issue, determined that these incidents fell within the parameters of *N.J.S.A.* 18A:37-2, not *N.J.S.A.* 18A:37-2.1, and proceeded to assess punishment and administer corrective action accordingly. Of particular note, petitioners herein did not allege that these incidents fell within the parameters of *N.J.S.A.* 18A:37-2.1, so as to require expulsion or suspension hearings, until a year after the incidents occurred.¹ Moreover, there is nothing in the record to indicate that petitioners made an allegation in writing that an alleged assault had occurred in accordance with *N.J.S.A.* 18A:37-2.1(b) upon learning that the Board was not going to conduct expulsion or suspension hearings. Neither can the Commissioner conclude, upon a thorough review of the undisputed facts presented in this matter, that the Board's assessment that these incidents fell within the parameters of *N.J.S.A.* 18A:37-2 was arbitrary, capricious or unreasonable. Therefore, petitioners have not met their burden of proving that the Board acted unreasonably in concluding that these incidents did not fall within the prescriptions of *N.J.S.A.* 18A:37-2.1, but rather within *N.J.S.A.* 18A:37-2.²

With respect to petitioners' claim that the Board's failure to initiate expulsion hearings, pursuant to *N.J.S.A.* 18A:37-2, in these two instances was arbitrary, capricious,

¹ The Commissioner notes that the Petitions of Appeal asserted that the Board's refusal to conduct expulsion hearings under *N.J.S.A.* 18A:37-2 was arbitrary, capricious and unreasonable. Petitioners amended their petitions to include a claim that the Board was in violation of *N.J.S.A.* 18A:37-2.1 in response to the Board's contention in its Motion for Summary Judgment that it was not required to hold suspension or expulsion hearings because petitioners did not invoke a claim under *N.J.S.A.* 18A:37-2.1. With the amendment of their petitions, therefore, petitioners asserted claims under both *N.J.S.A.* 18A:37-2 and *N.J.S.A.* 18A:37-2.1. In amending their claims, petitioners did not assert, however, that these incidents fell within the prescriptions of *N.J.S.A.* 18A:37-2.1, rather than *N.J.S.A.* 18A:37-2.

² In *Garrity v. State-operated School District of Paterson*, 96 *N.J.A.R.2d* (EDU) 567, the Commissioner found that the board failed to comply with *N.J.S.A.* 18A:37-2.1 when it did not schedule expulsion proceedings for several students who assaulted their teachers. *Garrity* was decided prior to the effective date of amendments of *N.J.S.A.* 18A:37-2.1(a) in 1995 and 1997, which changed the language requiring expulsion proceedings for students committing assault to that of requiring *suspension or expulsion* proceedings, and changed the requirement for a hearing to be held from to within twenty-one days to within thirty days. *Garrity* also differs from the proceedings herein in that the board in *Garrity* had compelling reasons to believe that assaults had occurred, substantiated by the fact that the students involved subsequently pled guilty to, or were convicted of, assault.

unreasonable and in violation of that statute, the Commissioner notes that *N.J.S.A. 18A:37-2* does not *require* expulsion hearings before the Board. *N.J.S.A. 18A:37-2* states, in pertinent part:

Any pupil who is guilty of continued and willful disobedience, or of open defiance of the authority of any teacher or person having authority over him, or of the habitual use of profanity or of obscene language, or who shall cut, deface or otherwise injure any school property, *shall be liable to punishment and to suspension or expulsion from school.*

Conduct which shall constitute good cause *for suspension or expulsion of a pupil guilty of such conduct shall include, but not be limited to,* any of the following***. (emphasis added)

It is undisputed that, in each instance herein, the administration immediately conducted an investigation of the underlying incident, assessed punishment and administered corrective action. With respect to the incident involving Petitioner Knight, the following steps were taken:

1. Instituted an investigation of the incident;
2. Notified the local police department which also conducted an investigation;
3. Notified the student's parents;
4. Conducted a parent conference;
5. Suspended the student for four days;
6. Principal conducted a conference with the student, his parents, Petitioner Knight and the school nurse;
7. Student was removed from petitioner's fourth grade class and placed in another class for the remainder of the 1999-2000 school year; and
8. Student was referred to a licensed Clinical Psychologist for counseling.

(Answer at 4)

With respect to the incident involving Petitioner Rizzitello, the following steps were taken:

1. Instituted an investigation of the incident;
2. Suspended student for five days;
3. Removed the student from Rizzitello's math and homeroom classes and reassigned lunch period;

4. Conducted a parent conference;
5. Directed that the student receive counseling through the Anger Management Program.

(Answer at 4 and Board's Exceptions, Exhibit C, Exhibit 4 attached thereto)

N.J.S.A. 18A:11-1(d) grants a board of education broad discretionary powers to “[p]erform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district.” Thus, the Board herein had the discretionary authority to determine the appropriate punishment to be imposed in these two instances. Further, it is well-settled law that when a board acts within its discretionary authority, its decision “is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious and unreasonable.” *Thomas v. Bd. of Ed. of Morris Tp.*, 89 *N.J. Super.* 327, 332 (App. Div. 1965), *aff'd* 46 *N.J.* 581 (1966).

The standard of review for determining whether or not a board of education action was arbitrary, capricious or unreasonable is narrow in its scope and, consequently, imposes a heavy burden on those who challenge actions of boards of education. The standard defined by the New Jersey Courts states:

In the law, “arbitrary” and “capricious” means having no rational basis. *** Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached. *** Moreover, the court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling. (citations omitted) *Bayshore Sew. Co. v. Dep't. of Env.*, *N.J.*, 122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *aff'd* 131 *N.J. Super.* 37 (App. Div. 1974).

In applying this standard to the instant matter, the Commissioner finds and determines that the record does not establish that the Board herein took willful or unreasoning action, without consideration and in disregard of the circumstances. On the contrary, it shows that the Board acted quickly to investigate the two incidents at issue and determined to punish the students involved, remove the students from the teachers' classes and require the students to attend counseling to deal with the underlying issues surrounding their behavior.

Accordingly, the Commissioner finds that petitioners have failed to demonstrate that the Board actions were arbitrary, capricious or unreasonable or contrary to law. The petitions are, therefore, dismissed.

IT IS SO ORDERED.³

COMMISSIONER OF EDUCATION

Date of Decision: AUGUST 20, 2001

Date of Mailing: AUGUST 20, 2001

³ This decision, as the Commissioner's final determination, 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.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.