

J.N. ON BEHALF OF MINOR CHILD, :
T.N.,

PETITIONER, : COMMISSIONER OF EDUCATION

V. : DECISION

BOARD OF EDUCATION OF THE :
CITY OF ELIZABETH, UNION :
COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner challenged the Board's decision to expel her son from school following an incident in which T.N. shot a fellow student in the leg with a plastic pellet gun, causing a bruise. Petitioner also sought to compel the district to provide an alternative educational placement in the event that her son's expulsion from school was upheld. Respondent Board maintained that petitioner's appeal was not timely filed, and that expulsion was warranted under the circumstances.

The ALJ determined to consider the timeliness question before considering the expulsion issue. He found the petition to have been filed beyond the 90 day time limit set forth in *N.J.A.C. 6A:3-1.3(d)*. Because petitioner had advanced no argument to support relaxation of the time limit, the ALJ concluded that the petition should be dismissed. The expulsion issue was never reached.

Upon consideration of the facts and law, the Commissioner disagrees with the ALJ's conclusion that the petition in this matter must be dismissed. The Commissioner finds that applicable regulations allow for discretion in decisions regarding *pro se* petitions that do not meet minimal standards for acceptance (*N.J.A.C. 6A:3-1.4(b)* and *N.J.A.C. 6A:3-1.16*.) In matters such as this, involving the right to a free public education, where there are compelling public interests and significant constitutional issues, the 90 day rule for filing petitions may be relaxed. Further, the Commissioner finds: petitioner did not sleep on her rights; dismissal of the petition precludes a disposition on the merits; and respondent demonstrated no prejudice caused by the eleven day delay in service of the petition. Accordingly, the Commissioner denies the respondent Board's motion to dismiss, and remands this matter to the OAL for a hearing on the merits.

<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>

OAL DKT. NO. EDU 9193-04
AGENCY DKT. NO. 224-6/04

J.N. ON BEHALF OF MINOR CHILD, :
T.N.,

PETITIONER, : COMMISSIONER OF EDUCATION

V. : DECISION

BOARD OF EDUCATION OF THE :
CITY OF ELIZABETH, UNION :
COUNTY, :

RESPONDENT. :

_____ :

The record in this matter and the initial decision of the Office of Administrative Law (OAL) have been carefully and independently reviewed. No exceptions have been filed by the parties. After considering the facts and law, however, the Commissioner is constrained to disagree with the ALJ's conclusion that the petition in this matter must be dismissed.

The following facts are undisputed. On March 18, 2004, T.N. appeared at a meeting of the Elizabeth Board of Education for a disciplinary proceeding regarding an incident in which T.N. shot a fellow student in the leg with a plastic pellet gun, which resulted in a bruise. Respondent sent T.N. a letter and resolution memorializing his expulsion from the Elizabeth public schools, which was received by T.N. on March 20, 2004.

Petitioner, T.N.'s mother, filed a petition and request for declaratory ruling with the Bureau of Controversies and Disputes (the Bureau) on June 16, 2004. The

petition was partially handwritten on copies of *N.J.A.C.* 6A:3-11.4(a) (format of petition of appeal) and 6A:3-2.2(a) (format of petition for declaratory ruling). It included the name and address of the petitioner and respondent, and a notarized verification.

Because it did not set forth specific allegations and did not include a proof of service upon respondent, the Bureau returned it on Thursday, June 17, 2004, acknowledging that it contained “some of the elements of a Petition of Appeal,” but explaining that it was incomplete. The Bureau advised that petitioner could refile, using the papers she had already submitted, but adding a statement of specific facts and identifying the relief she sought. Petitioner was also instructed to serve a copy on the Elizabeth Board of Education and submit to the Bureau proof that the Board was served. The Bureau outlined the methods for proving service, provided a copy of the rules for filing petitions, and identified a telephone number for questions.

The following Tuesday, June 22, 2004, petitioner sent to the Bureau a copy of a letter addressed to the Elizabeth Board of Education, in which she asked that her son be returned to school and set forth allegations and supporting facts. At this point, the petition lacked proof that all of petitioners papers had been served on the Elizabeth Board of Education. The Bureau wrote to petitioner on June 23, 2004 to advise her of same, and also instructed her to address her petition to the Commissioner. The Bureau also stated that it would use June 23, 2004 as the petition filing date, even though more documentation was needed “within ten (10) days of receipt of this letter.”

Less than ten days later, on July 2, 2004, the Bureau received from petitioner a modification of her June 22, 2004, letter. It had been addressed to the

Commissioner, and was accompanied by a photocopy of a certified mail ticket indicating receipt of the petition by the Elizabeth Board of Education on June 29, 2004.¹

On July 27, after the due date for respondent's answer had passed, the Bureau sent respondent a second and final notice. Eight days later, on August 4, 2004, the Bureau received respondent's answer. The matter was transmitted to the OAL on August 20, 2004, and a hearing was held on May 16, 2005.

At the hearing, the ALJ decided to initially limit the evidence to facts pertinent to respondent's claim that the petition was time-barred. (Initial decision at 2.) T.N. was respondent's only witness. (Initial decision at 2.) The ALJ found that "1. Petitioner received written notice of the determination to expel T.N. on March 20, 2004. 2. The filing date for the petition was June 23, 2004." (Initial decision at 3.) In the initial decision dated May 31, 2005, he reasoned that June 23, 2004, was beyond the allowed 90-day time limit for filing petitions that is set forth in *N.J.A.C. 6A:3-1.3(d)*. He further asserted that petitioner had not advanced any argument to support relaxation of the rule. (Initial decision at 3). Because the ALJ concluded that the petition was untimely filed, he did not hear evidence on the merits of T.N.'s expulsion. (Initial decision at 2.)

The regulation, *N.J.A.C. 6A:3-1.3(d)*, upon which the ALJ relied for his determination, does require that a petitioner 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." However, there are other regulations that may be applied to this matter.

¹ Although it appears that the Bureau received the documentation it requested on July 2, 2004, it sent out a final notice to petitioner on August 2, 2004, reiterating its June 23, 2004 request. Petitioner complied with the request on August 5, 2004.

N.J.A.C. 6A:3-1.4 (b), which addresses *pro se* petitioners, provides as follows:

A petition submitted by a *pro se* petitioner that substantially includes the requisite information as set forth in (a) above shall be accepted for filing notwithstanding that the petition does not conform to the prescribed technical format, and such petitioner shall be notified of any material deficiencies which shall be remedied before the matter can proceed. However, where a petition does not meet minimal standards regarding parties, allegations or relief sought, it may be returned to the petitioner without being filed. (Emphasis added)

Thus, *N.J.A.C.* 6A:3-1.4 mandates that a *pro se* petition that is substantively compliant shall be accepted, technical deficiencies notwithstanding, but uses permissive language that allows discretionary decisions regarding *pro se* petitions with substantive deficiencies. That is to say, the Commissioner may decide to return the petition, but is not required to.

The petitioner in this matter is *pro se*. There is no question that her initial, timely submission to the Bureau failed to identify the facts and sought-after relief, and lacked a proof of service. On the other hand, it is obvious that petitioner was making a serious attempt to file a proper petition. She obtained sample forms and got her submission notarized. Almost immediately after receiving the Bureau's June 17, 2004, letter, she sent a letter with specific factual allegations and a specific remedy demand to respondent, with a copy to the Bureau. It is safe to assume that she thought that copying the Bureau on the letter to respondent constituted proof of service, notwithstanding the instructions that the Bureau sent her. Immediately after receiving another letter from the Bureau, petitioner addressed her substantive petition to the Commissioner, and forwarded it to him with a copy of a receipt showing that respondent received the petition on

June 29, 2004. Under these circumstances, dismissal of petitioner's petition is not a foregone conclusion.

Another regulation germane to this matter is *N.J.A.C. 6A:3-1.16*, entitled "Relaxing of Rules." It provides:

The rules in this chapter shall be considered general rules of practice to govern, expedite and effectuate the procedure before, and the actions of the Commissioner in connection with, the determination of controversies and disputes under the school laws. Where such rules do not reflect a specific statutory requirement or an underlying rule of the OAL, they may be relaxed or dispensed with by the Commissioner, in the Commissioner's discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice.

T.N.'s expulsion from school is an action with very serious consequences. In *P.H. v. Board of Education of the Borough of Bergenfield, Bergen County*, 2002 *School Law Decisions*, State Board of Education (July 2, 2002), the State Board articulated the importance of educating children:

[W]e [are] mindful both of our responsibility for ensuring that all of New Jersey's children are afforded a thorough and efficient education and of the societal implications if we were to fail in that responsibility.

The State Board further concluded:

that a student must be afforded the opportunity to obtain a public education even when he has been appropriately excluded from the regular education program. To conclude otherwise would not only be shortsighted, but would also be an abrogation of our responsibilities.

Prior cases that address relaxation of the ninety day rule for filing petitions have discussed global considerations, e.g., compelling public interests and substantial constitutional issues. See, e.g., *DeMaio v. New Providence Board of Education*,

96 *N.J.A.R.* 2d (EDU) 449, 453; *Pacio v. Lakeland Regional High School District*, 1989 *S.L.D.* 2060, 2064. The present case implicates both, as exemplified by the language from *P.H.*, quoted above. Under Article VIII, Section IV, paragraph 1 of the New Jersey Constitution, T.N. is entitled to a free public education. Failure to provide him with same poses significant detriment both to him and to society.

Also, in *Boles v. Board of Education of Vocational Schools of County of Bergen*, 92 *N.J.A.R.* 2d (EDU) 554, the Commissioner considered several factors in determining that the 90-day rule should be relaxed in that case. He found that: 1) the petitioner in that case had not slept on his rights; 2) there had been no final disposition of the issues that the petitioner had raised; 3) the petitioner should not have been punished for the narrowness of the pleadings drafted by his lawyer; 4) respondent had demonstrated no prejudice; and 5) the requested relief was prospective. *Ibid.* at 6-7.

Factor three is not relevant to the present case. However, factors one, two and four mitigate in the present petitioner's favor. T.N.'s mother did not sleep on her (T.N.'s) rights. She timely initiated the petition and showed diligence in trying to appeal. Dismissal of her petition precludes a disposition on the merits, and respondent demonstrated no prejudice caused by the eleven day delay in service of the petition. Moreover, the record shows that respondent was late in filing its answer.

Finally, without a disposition on the merits, it cannot be determined whether respondent would be required to provide any retroactive relief, as per *Boles* factor #5.

In Summary, the Commissioner finds that under the circumstances of this case, relaxation of the 90-day rule is warranted. Accordingly, the Commissioner hereby

remands this matter to the OAL. Respondent's motion to dismiss is denied, and the matter shall proceed to hearing on the merits.

IT IS SO ORDERED.²

COMMISSIONER OF EDUCATION

Date of Decision: July 8, 2005

Date of Mailing: July 8, 2005

² This decision 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.*