

489-10 (OAL Decision: Not yet available online)

D.L.G. and B.B.-G., on behalf of minor child, :
O.G., :

PETITIONERS, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE :
TOWNSHIP OF MILLBURN :
ESSEX COUNTY, :

DECISION

RESPONDENT. :

SYNOPSIS

Petitioners challenged the decision of respondent Board to expel their son in the aftermath of a January 9, 2009 incident at the high school in which a fellow student was allegedly assaulted by O.G. and members of his family. The attack included strikes inflicted upon the student with a baseball bat. Petitioners sought reversal of the expulsion decision, reinstatement of O.G. as a student at Millburn High School, and reimbursement for costs of litigation and attorney fees. The Board sought dismissal of the petition in its entirety.

The ALJ found, *inter alia*, that: the testimony of O.G. was not credible as it differed dramatically from all of the other numerous accounts of the incident, which was consistently described by witnesses as a vicious attack upon a fellow student by O.G. and members of his family, using a baseball bat; the Board was not arbitrary, capricious or unreasonable in finding that O.G. was involved in the altercation, and that he was subject to discipline; O.G. was provided with the requisite due process before the Board imposed discipline stemming from the incident; the action of the Board in imposing an expulsion, however, was contrary to the requirements of *N.J.A.C. 6A:16-7.5(a)(1)* which requires a long-term suspension and a second subsequent infraction warranting suspension or expulsion before educational services may be discontinued. Accordingly, the ALJ concluded that O.G. must be permitted to return to school and his record amended to reflect a long-term suspension, and ordered the Board to permit O.G. to return to Millburn High School.

Upon a full and independent review, the Commissioner concurred with the ALJ's findings, and adopted the Initial Decision with the following modification. *N.J.S.A. 18A:37-5* and *N.J.A.C. 6A:16-7.3(c)* provide the Board the authority, at the completion of a long term suspension, to either reinstate the student or to continue the suspension. Based on the nature and severity of the circumstances surrounding the attack in this case, the Commissioner found that the Board shall determine whether O.G.'s suspension should continue or whether he should return to the general education program, and – if the suspension is determined to continue – to identify and effectuate O.G.'s placement in an appropriate alternative education program pursuant to *N.J.A.C. 6A:16-9*.

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.

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioners and the Millburn Township Board of Education (“Board”). This case involves a student, O.G., who was expelled by the Board based upon an incident on school grounds wherein O.G. and his older brother attacked another student in an altercation which involved the use of a baseball bat. O.G.’s father was also on the scene and involved in the altercation. The Administrative Law Judge (ALJ) found that the Board was not arbitrary, capricious or unreasonable in finding that O.G. was involved in the altercation, and that he should be subject to discipline. The ALJ, however, found that the Board could not expel O.G. as a result of the incident because O.G. has never served a long-term suspension based on a prior incident as required by *N.J.A.C.* 6A:16-7.5(a)(1).

The Board takes exception to the ALJ’s determination that O.G. could not be expelled for his conduct during the altercation. In its exceptions, the Board argues that the ALJ misapplied the Commissioner’s interpretation of *N.J.A.C.* 6A:16-7.5(a)(1) in *M.R. v. Board of*

Trustees of the Hoboken Charter School, Commissioner Decision No. 89-10, decided March 22, 2010. The Board contends that since O.G. was suspended for longer than ten days prior to the Board's decision to expel him, the Board complied with the applicable statutory and regulatory provisions. The Board maintains that the plain meaning of *N.J.A.C. 6A:16-7.5(a)(1)* should be applied, arguing that there is nothing in the regulation that requires a student, prior to being expelled, to have first served a long-term suspension for an earlier infraction.

The petitioners take exception to the ALJ's finding that the Board did not in an act arbitrary and capricious manner, or in violation of O.G.'s due process rights. In their exceptions, the petitioners argue that O.G. and his counsel were deprived of a sufficient opportunity to prepare for and participate in the hearing before the Board. The petitioners contend that the Board violated O.G.'s due process rights by denying his counsel's request for an adjournment of the hearing to allow counsel additional time to prepare, and because at the time O.G. would not testify because of a pending criminal investigation.

Upon a comprehensive review of the entire record in this matter, which included the transcripts of the hearings conducted at the OAL on April 21, June 7 and June 17, 2010, the Commissioner concurs with the ALJ that O.G. was provided with the requisite due process before the Board determined to impose discipline stemming from the altercation. The Commissioner also finds that the Board was not authorized to expel O.G. because he has never served a long-term suspension for a prior incident. *N.J.A.C. 6A:16-7.5(a)(1)*. There is no question that O.G.'s conduct was sufficiently serious to warrant suspension or expulsion, but it is undisputed that O.G. has never served a long term suspension for any other incident.

The Commissioner further agrees with the ALJ that the Board's argument related to *N.J.A.C. 6A:16-7.5(a)(1)* is unpersuasive. O.G.'s suspension for more than ten days for this

incident prior to the action by the Board to expel him simply does not equate to the serving of a prior long-term suspension. In *M.R., supra*, the Commissioner found that, under *N.J.A.C. 6A:16-7.5*, expulsion – i.e., discontinuance of educational services – can only take place after a student has “engaged a second time in conduct warranting possible suspension or expulsion, after having first served a duly imposed long-term suspension for an earlier infraction.”¹

Although expulsion was not the appropriate discipline in the absence of the required suspension for a prior incident, the regulations provide the Board with the authority, at the completion of a long-term suspension, to either reinstate the student or to continue the suspension. *N.J.S.A. 18A:37-5; N.J.A.C. 6A:16-7.3(c)*. Based on the nature and severity of the circumstances surrounding the attack in this case, the Commissioner finds that the Board shall determine whether O.G.’s suspension should continue or whether O.G. should return to the general education program. Pursuant to *N.J.A.C. 6A:16-7.3(c)*, this determination must be made based on the following criteria:

- i. The nature and severity of the offense;
- ii. The district board of education removal decision;
- iii. The results of any relevant testing, assessments or evaluations of the student; and
- iv. The recommendation of the chief school administrator, principal or director of the alternate education program or home or other in-school or out-of-school instruction program in which the student has been placed. [*N.J.A.C. 6A:16-7.3(c)1.i.-iv.*]

Therefore, at the next scheduled Board meeting the Board is directed to evaluate the factors enumerated in *N.J.A.C. 6A:16-7.3(c)1.i.-iv*, and determine whether O.G. should return to the general education program or whether O.G.’s long-term suspension should

¹ See also *N.J.A.C. 6A:16-7.3(a)5.iv.*, which requires written notification to the parents of a suspended student that further engagement by the student in conduct warranting expulsion shall amount to a knowing and voluntary waiver of the student’s right to a free public education.

continue.² If it is determined that O.G.'s long-term suspension should be continued, the Board must identify and effectuate O.G.'s placement in an appropriate alternative education program pursuant to *N.J.A.C.* 6A:16-9. The Board is also reminded that it must also continue to follow the applicable regulatory provisions concerning the process for determining whether the suspension should continue and/or when O.G should return to the general education program, i.e., *N.J.A.C.* 6A:16-7.3(d)-(f).

IT IS SO ORDERED.³

ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 12, 2010
Date of Mailing: November 15, 2010

² If there are currently no Board meetings scheduled within 30 days after the date of this decision, the Board is directed to schedule a special meeting to determine whether O.G.'s suspension should continue.

³ This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).