

#385-15 (OAL Decision: Not yet available online)

T.H., on behalf of minor child, K.H., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
UPPER FREEHOLD REGIONAL SCHOOL
DISTRICT, MONMOUTH COUNTY, :
RESPONDENT. :

SYNOPSIS

Petitioner challenged the discipline imposed upon K.H. – a student athlete – by the respondent Board based on conduct that occurred away from school grounds. Specifically, K.H. posted two pictures on Instagram that appeared to show K.H. and another student – who was wearing an Allentown High School sweatshirt – drinking alcohol. K.H. was, *inter alia*, suspended for thirty days from the basketball team and barred from participating in athletic events or practices for thirty days; the discipline was not, however, recorded in K.H.’s permanent file. Petitioner also contested a one-day detention that K.H. served on February 19, 2014 for an unrelated social media infraction. The Board filed a motion for summary decision, asserting that K.H. violated school policy when she publicized drinking behavior through a post on Instagram. The Board further asserted that petitioner’s claim regarding the one-day detention was filed beyond the 90-day window for the filing of appeals. The petitioner filed a cross-motion for summary decision.

The ALJ found, *inter alia*, that: the facts in this matter are substantially undisputed; pursuant to *N.J.A.C. 6A:16-7.5*, in order for a school district to assert control over student behavior away from school, there must be a clear nexus between the behavior and student health or safety, and the district must then establish that the behavior materially and substantially interferes with the orderly operation of the school; underage drinking is a potential problem and if the within behavior had occurred on school grounds or at a school related function, there would be no question as to the Board’s jurisdiction, *N.J.S.A. 18A:37-2*; the facts of the within case – unlike *G.D.M. v. Board of Education of the Ramapo Indian Hills School District*, 426 *N.J. Super* 246 – are not aggravated by further inappropriate behavior that could be considered substantial interference; and K.H.’s one-day detention was issued on February 19, 2014, but the within appeal was not filed until May 27, 2014, which date is beyond the 90-day period for the filing of appeals. The ALJ concluded that petitioner is entitled to have any record of the event eliminated or marked as having been reversed. Accordingly, the Board’s motion for summary decision as to the drinking incident was denied; the Board’s motion as to the one-day suspension was granted; the petitioner’s motion seeking reversal of the Board’s decision regarding the drinking incident was granted, and was denied as to the one-day suspension. The petition was dismissed.

Upon review, the Commissioner concurred with the ALJ’s findings and conclusions. Accordingly the Initial Decision was adopted as the final decision in this matter.

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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November 19, 2015

OAL DKT. NO. EDU 8021-14
AGENCY DKT. NO. 134-5/14

T.H., on behalf of minor child, K.H., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
UPPER FREEHOLD REGIONAL SCHOOL :
DISTRICT, MONMOUTH COUNTY, :
RESPONDENT. :

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 Upper Freehold Regional Board of Education (Board). In this case the petitioner is challenging the Board’s decision imposing a 30-day suspension from participation in extracurricular activities on K.H. based on conduct that occurred away from school grounds. K.H. posted two pictures on Instagram that appear to show K.H. and another student – who was wearing an Allentown High School sweatshirt – drinking alcohol.¹ Petitioner also contests a one day detention that K.H. received for an unrelated social media infraction. The Administrative Law Judge (ALJ) found that the challenge to the Board’s decision regarding the unrelated social media infraction was barred by the 90-day rule in accordance with *N.J.A.C.* 6A:3-1.3. The ALJ also found that the Board overstepped its authority under *N.J.A.C.* 6A:16-7.5² when it gave K.H. a 30-day suspension from extracurricular activities for the conduct that occurred off-school grounds.

¹ K.H. neither admitted nor denied that she was drinking alcohol. The student in the picture with K.H. admitted to school officials that the two were drinking alcohol.

² *N.J.A.C.* 6A:16-7.5 was re-codified from *N.J.A.C.* 6A:16-7.6 effective March 17, 2014.

The Board takes exception to the ALJ's determination that it overstepped in disciplining K.H. for her inappropriate conduct. The Board argues that the facts in this case are different from the circumstances in *G.D.M and T.A.M., on behalf of minor child, B.M.M. v. Board of Education of the Ramapo Indian Hills Regional High School District*, 427 N.J. Super. 246 (App. Div. 2012) because in that case the Ramapo Indian Hill's Board sought to penalize any off campus conduct without the requisite nexus to the school. Here the Board maintains that the nexus between K.H. and the school was supplied through the use of an Allentown High School sweatshirt worn by the student posing with K.H. and the "sophomore sensation" hashtag utilized on Instagram. The Board stresses that the "requirement of appropriate discipline" in the school was implicated by the use of school athletic apparel and the social media hashtags that inexorably link the school to inappropriate and illegal conduct. Therefore, the Board contends that it reacted appropriately and responsibly to K.H.'s conduct, and the 30-day suspension from extracurricular activities should be upheld.

After consideration and review, the Commissioner is in accord with the ALJ's determination that the Board's decision to suspend K.H. from extracurricular activities for 30 days was arbitrary capricious and unreasonable because the off-school conduct did not materially and substantially interfere with the orderly operation of the school required by *N.J.A.C. 6A:16-7.5(a)2*. The Commissioner also agrees with the ALJ's determination – for the reasons stated in the Initial Decision – that K.H.'s challenge to the Board's decision to give her a detention because of the unrelated social media infraction was barred by the 90-day rule.

There is no doubt that under *N.J.A.C. 6A:16-7.5*, a board of education has the authority to "impose a consequence on a student for conduct away from school grounds ... that is consistent with the district board of education's code of student conduct." The board of education, however, can only exercise that authority when:

1. “it is reasonably necessary for the student’s physical or emotional safety, security and well-being or for reasons relating to the safety, security and well-being of other students, staff or school grounds pursuant to N.J.S.A. 18A:25-2 and 18A:37-2” [*N.J.A.C.* 6A:16-7.5(a)1] and
2. “the conduct that is the subject of the proposed consequence materially and substantially interferes with the requirements of appropriate discipline in the operation of the school.” [*N.J.A.C.* 6A:16-7.5(a)2.]

As a threshold matter the Commissioner finds that Board Policy 5600, “Pupil Discipline”, complies with the requirements outlined in *N.J.A.C.* 6A:16-7.1 and *N.J.A.C.* 6A:16-7.5 relating to the Board’s authority to discipline students for conduct that occurs away from school grounds.³

In order to evaluate whether the Board acted in an arbitrary, capricious or unreasonable manner in suspending K.H. from participating in extracurricular activities, it must be determined whether the discipline for K.H.’s off-school conduct was reasonably necessary for K.H.’s safety, security and well-being – or for the safety, security and well-being of other students – and whether the conduct materially and substantially interfered with the orderly operation of the school. Although the student athletes at Allentown High School are required to sign the Athletic Participation/Permission Form and expressly agree to adhere to the student code of conduct, the crux of the analysis here involves what the regulations permit as a consequence⁴ for a violation of the code of conduct that occurs away from school grounds. When *N.J.A.C.* 6A:16-7.5(a) was adopted, it clearly created an express distinction between a board of education’s authority to impose any

³ Although participation in extracurricular activities is a privilege, and not a right, it does not negate the fact that a board’s decision to revoke a student’s ability to participate in extracurricular activities amounts to a form of discipline. Therefore, student conduct policies must comply with the requirements relating to discipline for conduct away from school grounds that is outlined in *N.J.A.C.* 6A:16-7.6. *G.D.M., supra*, 427 *N.J. Super* at 261, 262 ; *M.W., on behalf of minor child, C.W. v. Board of Education of the Borough of Haddonfield, Camden County*. Commissioner Decision No. 386-12, decided September 24, 2012.

⁴ “Giving the terms used in *N.J.A.C.* 6A:16-7.6 their ‘common meaning,’ a consequence is any result that follows from a student’s violation of the code of conduct.” *G.D.M., supra*, 427 *N.J. Super* at 261.

consequences for conduct that occurs off-school grounds as opposed to conduct that occurs on school grounds or at school functions. *M.W., supra*, Commissioner Decision No. 386-12 at 4-5.

With respect to the first prong of the dual requirements enumerated in *N.J.A.C. 6A:16-7.5(a)*, the Commissioner finds that it was reasonable for the Board to determine that imposing discipline on a student for posting pictures on Instagram which potentially glorify underage alcohol consumption by student athletes is necessary for the student's well-being and the well-being of other students. The underlying purpose of the student conduct code is to promote proper behavior, including the deterrence of underage drug and alcohol use. The Board's concern that published evidence of apparent alcohol consumption by a prominent student athlete could influence other students to engage in such behavior is reasonable and consistent with *N.J.A.C. 6A:16-7.5(a)1*.

Although the discipline imposed on K.H. satisfied the first prong of the analysis outlined in *N.J.A.C. 6A:16-7.5(a)1*, the off-school conduct did not materially and substantially interfere with the discipline of the school as required by *N.J.A.C. 6A:16-7.5(a)2*. It is without question that K.H. exercised very poor judgment by posting pictures on Instagram that appear to depict alcohol consumption by minors, but as the ALJ explained in the Initial Decision, the off-school conduct "was not aggravated by further misdeeds or circumstances that might draw the matter across the substantial interference threshold." (Initial Decision at 3) There is no evidence indicating that the Instagram post caused any disruption to the school environment or impacted the orderly administration of the school. In order to meet the material and substantial impact requirement under *N.J.A.C. 6A:16-7.5(a)2* there must be evidence of more than merely a risk or fear of an impact on the school environment. In *G.D.M., supra*, the Appellate Division emphasized that a board of education may only exercise its authority to discipline a student for off-campus conduct when the conduct *materially and substantially* interferes with the orderly operation of the school. *G.D.M., supra*, 427 *N.J. Super.* at 259. The Commissioner is not persuaded by the Board's argument that – because the student in the picture with K.H. was wearing an Allentown High School sweatshirt and the

“sophomore sensation” hashtags were used – the necessary nexus to the school was established. Simply because there was a connection to the school via the sweatshirt and the presence of two student athletes, the conduct did not rise to the level of materially and substantially interfering with the discipline of the school. Therefore, the Board’s decision to impose a 30 day suspension on K.H. for the off-campus conduct was arbitrary, capricious and unreasonable. However, as the ALJ pointed out in the Initial Decision, there is no relief available to the petitioner since the 30 day suspension was already served by K.H. in March 2014, and the Board never put anything involving the suspension into K.H.’s record.

Accordingly, the recommended decision of the ALJ is adopted as the final decision in this matter.

IT IS SO ORDERED.⁵

COMMISSIONER OF EDUCATION

Date of Decision: November 19, 2015

Date of Mailing: November 19, 2015

⁵ This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36*.