

New Jersey Commissioner of Education

Final Decision

C.B., on behalf of minor child, J.B.,

Petitioner,

v.

Board of Education of the City of Newark,
Essex County,

Respondent.

Synopsis

Pro se petitioner appealed the respondent Board’s decision to retain her son in the seventh grade for the 2017-2018 school year. C.B. was informed that J.B. would be held back during a meeting on September 12, 2017. The class placement determination was made after J.B. was removed from special education classes at the end of the 2016-2017 school year, at the insistence of C.B. and against the advice of school district personnel. The within appeal was filed on February 20, 2019. Petitioner had filed an earlier petition on the same topic, but withdrew it after appearing for an emergent hearing in October 2018. The Board filed a motion for summary decision, contending that the within petition is time-barred under the 90-day rule, *N.J.A.C.* 6A:3-1.2(i) and should be dismissed.

The ALJ found, *inter alia*, that: there are no genuine issue as to any material fact here, and the case is ripe for summary decision; under *N.J.A.C.* 6A:3-1.3(i), a petitioner shall 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 that is the subject of the case; it is uncontested that the petition herein was filed on February 20, 2019, some 17 months after petitioner was informed that her son would be retained in the seventh grade; further, the matter is moot as J.B. is now in the 9th grade for the 2019-2020 school year. The ALJ concluded that the petition should be dismissed in its entirety. Accordingly, the ALJ granted the Board’s motion for summary decision, and dismissed the petition.

Upon careful and independent review of the record and the ALJ’s recommended decision, the Commissioner concurred with the ALJ’s determinations and adopted the Initial Decision of the OAL as the final decision in this case. The petition was dismissed.

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.

February 20, 2020

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Petitioner,

v.

Board of Education of the City of
Newark, Essex County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed and considered.¹

Upon review, the Commissioner concurs with the ALJ that the petition is time-barred pursuant to *N.J.A.C.* 6A:3-1.3(i), which requires petitions to be filed no later than 90 days from the date of receipt of the action that is the subject of the case, and *Giannetta v. Bd. of Educ. of Egg Harbor*, Commissioner Decision 147-05 (April 25, 2005), which holds that negotiations do not toll the time limitation.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed.

IT IS SO ORDERED.²

COMMISSIONER OF EDUCATION

Date of Decision: February 20, 2020
Date of Mailing: February 20, 2020

¹ Exceptions filed by petitioner were not timely pursuant to *N.J.A.C.* 1:1-18.4 and were therefore not considered by the Commissioner. Respondent timely filed a reply, arguing that petitioner's exceptions merely reassert facts already presented below.

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, c. 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 04507-19

AGENCY DKT. NO. 315-12/18

C.B. ON BEHALF OF MINOR CHILD, J.B.,

Petitioner,

v.

**BOARD OF EDUCATION OF THE CITY OF
NEWARK, ESSEX COUNTY,**

Respondent.

C.B. on behalf of J.B, petitioner pro se

Bernard Mercado, Esq. for respondent

Record Closed: December 20, 2019

Decided: January 16, 2020

BEFORE **ERNEST M. BONGIOVANNI,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The appeal was transmitted to the Office of Administrative Law (OAL) by the NJSP, where it was filed on April 1, 2019, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. I held a prehearing conference at the OAL with both parties attending on June 5, 2019, and entered a prehearing order on June 12, 2019. A hearing date was scheduled for September 30, 2019. The parties

attempted to resolve the matter which resulted in the hearing being adjourned to December 20, 2019.

Newark Public Schools submitted a Motion for Summary Decision, Certification and Brief in support of same on December 6, 2019. Petitioner C.B. filed a timely response on December 12, 2019, and argument on the motion was heard on December 20, 2019. Testimony by C.B. and by J.B, which would be permitted to be supplemented at the continued hearing, was also given. The record on the motion was closed that date.

MOTION UNDER CONSIDERATION

The respondent requests that summary decision be granted and that the petition of C.B. on behalf of J.B. be dismissed for the following reasons; the petition which complains that J.B. was wrongfully retained at elementary school 7th grade for the 2017-2018 year is time barred under the 90-day rule, and C.B. contributed to J.B. being retained that year because, in June 2017,³ she removed J.B. from special education which he had been receiving from Newark Public Schools since 2012. The Prehearing Order records that the issues to be resolved at the hearing were: 1) Was J.B., currently 16, wrongfully denied advancement to the 8th grade for the 2017-2018 school year? 2) Was C.B.'s petition on behalf of J.B. timely? 3) What effect did C.B.'s revocation of consent for Special educational services have on J.B.'s ability to advance? 4) Are there any other rights of J.B. that were violated? 5) What has J.B.'s status as an 8th grader in 2018-2019 and if graduated as a 9th grader in 2019-2020 have to the issues complained of?

FACTUAL DISCUSSION

Based on the pleadings of the petitioner and upon facts up of the motion papers as to facts that are not contested, or are incontestable, and argument and testimony of the petitioner on the motion, I rely upon the following relevant facts.

³ Petitioner claims she did so in May 2017, not June 2017.

J.B. was removed from Special education classes provided for at J.B.'s elementary school at C.B.'s insistence in either May or June of 2017. C.B. was informed at a meeting at the school held September 12, 2017 that C.B. was being retained in the seventh grade for the duration of the 2017-2018 school year. C.B. and representatives of the elementary school discussed in the Fall of 2017 the possibility of J.B. advancing to the 8th grade in February of 2018; however, the advancement did not take place.

On or about July 19, 2018, C.B. on behalf of J.B. filed a Petition of Appeal ("first Petition") with the Department of Education, (Respondent's motion, Exhibit A, Notice of Filing), which was referred to the OAL on or about September of 2018. After appearing for an emergent hearing on that petition in October, 2018 C.B. withdrew the petition. She insists she did so without knowing she was doing so, and that she was told by the Administrative Law Judge (ALJ) that her withdrawal would be without prejudice. Further she believes she was "tricked misled manipulated" by the ALJ, along with the attorney for the Newark School Boards, which induced her to withdraw her claims. She claims she was "taken advantage of" because of her "ignorance." When she realized that her withdrawal was with prejudice, C.B. filed another petition ("current petition") with the Commissioner of Education on February 20, 2019 (Respondent's Exhibit B, Notice of Filing) wherein she repeated the allegations of the first petition.

Because the respondent does not argue that this matter has already been litigated, and therefore cannot be heard again, I shall not address that possibility. For the same reason, I shall also not address the possibility that the petitioner does not state a claim upon which proper relief may be granted (except for certain ancillary issues which I shall address) because J.B. is now in the middle of the 9th grade and C.B.'s claim addresses his failure to advance from the seventh grade. Further, because it is not at all clear to what extent C.B.'s decision to withdraw J.B. from special education had on the decision to retain him in 7th grade, and not enough facts have been advanced upon which it could be decided, I shall not address respondent's second theory that C.B. had no right to complain about the decision. Therefore, I shall only address the narrow question of whether the current petition filed in February 2019

is a time bar to C.B.'s complaint that J.B. was wrongfully retained in the seventh grade for the 2017-2018 year.

ANALYSIS AND CONCLUSIONS OF LAW

N.J.A.C. 1:1-12.5(b) provides that summary decision should be rendered “if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” Our regulation mirrors R. 4:46-2(c), which provides that “[t]he judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.”

If there is no genuine issue as to any material fact, a moving party is entitled to prevail on a motion for summary disposition as a matter of law. Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public resources. Under the Brill standard, a fact-finding hearing should be avoided “when the evidence is so one-sided that one party must prevail as a matter of law.” Id. The motion judge must “consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party...are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Brill, 142 N.J. at 523. And even if the non-moving party comes forward with some evidence, the forum must grant summary decision if the evidence is “so one sided that [the moving party] must prevail as a matter of law. Id. at 536 (citation omitted).

Under N.J.A.C. 6A:3-1.3(i), a petitioner shall 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 that is the subject of the case. As case law makes clear, such a time limitation confers due process, is both meaningful

and reasonable, and provides finality in education matters, which negotiations do not toll. Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 583–88 (1983). As such, this time limitation has long withstood challenge. See, e.g., Nissman v. Bd. of Educ. of Long Beach Island, 272 N.J. Super. 373, 381–82 (App. Div. 1994), certif. denied, 137 N.J. 315 (1994) (where the court stated that the time limitation is not inherently arbitrary or capricious, and to rule otherwise would deprive district boards of education the security of the rule). Moreover, negotiations do not toll this time limitation. See, e.g., Giannetta et al. v. Bd. of Educ. of Egg Harbor, No. #147-05, Comm’r Decision (April 25, 2005), <https://www.nj.gov/education/legal/commissioner/> (where the Commissioner of Education explicitly stated, citing Kaprow, 131 N.J. at 588, that attempts to resolve a claim through negotiation with a board of education do not negate receipt of adequate notice or toll the running of the time limitation).

The above-recitation of the uncontested or indisputable essential facts make this matter ripe for summary decision. J.B. was held back in the seventh grade by action taken between the time J.B. was removed from special education in May or June 2017 and September 12, 2017 when C.B. by her own claims she was first informed of that decision. Assuming *arguendo*, that the “first petition” is relevant in its first raising the claim that J.B. was wrongly retained, I **FIND** that C.B. would have had to have filed that claim with the Commissioner of Education on or before December 11, 2017. However, petitioner did no such thing. In fact, her own petition and response to the motion for summary decision indicate she used the time between the original decision to retain J.B. in the 7th grade to attempt to negotiate with the school’s representatives to have J.B. advance to the 8th grade by February 2018. However, as indicated in the above cited case law, negotiations do not toll this time limitation. Thus, even if there was any validity to C.B.’s claim that she was “tricked” into withdrawing that petition it was time barred as it was filed on July 19, 2018, seven months after the 90-day time limitation.

Turning to the current petition, which again repeats the claim that J.B. was wrongfully retained in the seventh grade for the 2017-2018 year, it is uncontroverted that it was filed with the Commissioner of Education on February 20, 2019, 17 months after C.B. was informed on September 12, 2017 that J.B. was being retained in the

seventh grade. Petitioner has no special right or privilege to file a petition 14 months beyond the 90-day limitation simply because she feels she “was taken advantage of” or for whatever reason, didn’t know that she had to act within the governing law on the subject matter. I **FIND** that petitioner’s claim against Newark Public schools for their decision to retain C.B. in the seventh grade for the 2017-2018 year violated J.B.’s rights or was otherwise unlawful, is plainly time barred by N.J.A.C. 6A:3-1.3(i).

Further, this claim should be dismissed because it is moot. It is uncontroverted that J.B. was retained in the seventh grade for the 2017-2018 school year. J.B. is now in the 9th grade of the 2019-2020 school year. A hearing on this matter cannot have any practical effect since it would not be reasonable to promote him to the 10th grade by “skipping” a year without the benefit of the academics that other 9th graders are getting. I also **FIND** this matter is not appropriate for hearing based on the limited and narrow exception to the general doctrine of mootness since promotion and retention issues are challenged with sufficient regularity to reserve judicial review for live controversies where such relief is available.

There remains the ancillary issues which can be gleaned from C.B.’s pleadings. They are at best a jumble of vague ideas and notions, and like the claim of wrongful retention issue, appear, if they are cognizable claims, to be time barred at well. These ancillary claims are best summarized in C.B.’s description of the relief she seeks on page 4 of her written response to the motion for summary decision. As stated therein 1. J.B. “did not receive the aggressive counseling” and J.B.’s school transcripts that he was classified for special education be changed to general education as he was misclassified” 2. All parties should be “held accountable for their actions.” 3. Her petitions took “so long to be heard.” 4. J.B. should “receive the aggressive counseling.” 5. C.B. says “no” to J.B. attending “small group instructions or a reading intervention”.

Claims 2 and 3 both fail to state a claim or cause of action upon which relief may be granted and must therefore any portion of the Petition which restates this claim must be dismissed. The first part of claim 1, and claims 4 and 5 do not relate to anything in the Second Petition, but rather involve issues that were discussed during settlement

negotiations after this matter was referred to the OAL. The second part of claim 1, wherein petitioner seeks to have the special education classification in J.B.'s student records removed is also clearly time barred for the same reasons as stated above as the classification for J.B. concerned actions taken by respondent between 2012, when he first started receiving special education and May or June of 2017, when he was removed from that classification.

Accordingly, I **CONCLUDE** as a matter of undisputed fact and law that the Petition in its entirety should be **DISMISSED**.

ORDER

For the reasons set forth above, the motion for summary decision filed by the respondent Newark Public Schools is and the same be hereby **GRANTED** and the Petition of Appeal **DISMISSED**.

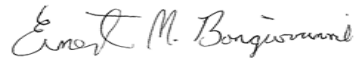
I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Environmental Protection does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 16, 2020

DATE



ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency:

1/16/20

Mailed to Parties:

id

APPENDIX

List of Moving Papers

For Petitioner:

None

For Respondent:

R-1 Notice of Filing July 19, 2018

R-2 Notice of Filing February 26, 2019