

#165-11 (OAL Decision: Not yet available online)

N.N. on behalf of E.N., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
CITY OF OCEAN CITY, CAPE MAY
COUNTY, and KATHLEEN TAYLOR, :
SUPERINTENDENT. :
_____ :

SYNOPSIS

Petitioner alleged that her eighteen year old daughter, E.N., was not given state required physical education courses in high school, and demanded tutoring for E.N. as well as damages. The petition was not filed until after E.N. had already graduated from high school. The Board filed a motion for summary decision, contending that beginning with her freshman year E.N. had submitted medical documentation calling for the limiting of her participation in physical education. The Board further argued that E.N. and her mother had rejected various attempts to modify E.N.'s physical education program, and had advocated for E.N. to be exempt from the physical education requirement. An exemption was consequently noted as an accommodation in E.N.'s 504 Plan, which was signed by both E.N. and N.N.

The ALJ found, *inter alia*, that: E.N. was excused from physical education classes all four years of high school due to a medical condition; E.N. graduated from high school in 2010, having satisfied the number of credits required for graduation; petitioner previously filed a due process claim, which was settled in 2009 and which settlement memorialized the physical education accommodation in E.N.'s 504 plan; a second due process petition, seeking various evaluations and approval for other special education services, was filed in January 2010 and did not directly challenge the exemption from physical education; the petitioner's current claims are barred by the principle of *res judicata* and the entire controversy doctrine; and the petition was filed well beyond the 90-day limit set forth in *N.J.A.C. 6A:3-1.3* and is therefore untimely. Accordingly, the ALJ granted the Board's motion for summary decision and dismissed the petition.

Upon consideration and review, the Commissioner found that petitioner's claims are barred 1) on multiple jurisdictional grounds, 2) on the basis of the doctrines of *res judicata* and equitable estoppel, and 3) because respondent's actions were not arbitrary, capricious, or unreasonable. Accordingly, 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.

May 3, 2011

OAL DKT. NO EDU 11178-10
AGENCY DKT. NO. 543-9/10

N.N. on behalf of E.N., :
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 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
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After review of the record, the Initial Decision of the Office of Administrative Law (OAL) and petitioner's exceptions, the Commissioner concurs with Administrative Law Judge (ALJ) that the petition must be denied.

At the outset, petitioner has no standing to pursue a petition on behalf of E. N., who has reached the age of eighteen. Second, as ALJ Miller noted, the petition was filed beyond the time allowed in *N.J.A.C. 6A:3-1.3(i)*. Third, on May 24, 2009, petitioner signed off on a 504 plan for E.N. which expressly provided that E.N. might be exempted from Physical Education. She is consequently equitably estopped from challenging the exemption over a year after her consent, and months after the successful completion of her daughter's secondary education. Fourth, on April 9, 2009, a final decision was issued by ALJ Gorman of the OAL approving a settlement between the parties wherein they agreed to implement the above referenced 504 Plan. Thus, as explained in the Initial Decision, the doctrine of *res judicata* bars petitioner from re-litigating the issue.

Finally, under New Jersey school law the requirement that students take physical education classes is not absolute. The relevant statutes, *N.J.S.A.* 18A: 35-5 and 18A:35-7, provide that:

Each board of education shall conduct as a part of the instruction in the public schools courses in health, safety and physical education, which courses shall be adapted to the ages and **capabilities** of the pupils in the several grades and departments

(*N.J.S.A.* 18A:35-5) [Emphasis added.]

Every pupil, except Kindergarten pupils, attending the public schools, insofar as he is **physically fit and capable of doing so**, as determined by the medical inspector [licensed physician], shall take such courses, which shall be a part of the curriculum prescribed for the several grades, . . . , and the standing of the pupil in connection therewith shall form a part of the requirements for promotion or graduation.

(*N.J.S.A.* 18A:35-7) [Emphasis added.]

There is ample evidence in the record that during her high school years, E.N.'s physical capabilities were affected by a medical condition, which would prohibit her from participating in most physical education activities. Specifically, respondent received notes from E.N.'s doctor asking that she not participate in physical activities that involve her hands.

In response to the doctor's requests, respondent offered E.N. a modified physical education class – which petitioner and E.N. rejected. Respondent then offered E.N. the opportunity to remain in her regular physical education class but perform exercises not related to the regular class curriculum. Because petitioner and E.N. rejected this option, respondent agreed to a waiver of physical education for E.N.

The Commissioner cannot conclude that respondent's action in allowing the waiver was arbitrary, capricious or unreasonable. The above-referenced statutes clearly

recognize that not all students will have the capability to perform the physical education curriculum, and respondent explained that waivers are not uncommon where students have limiting medical conditions.

E.N. was allowed to and did graduate from respondent's high school without taking physical education courses. Petitioner offers no basis to support her suggestion that E.N.'s diploma is invalid.

Accordingly, respondent's motion for summary disposition is granted, and the petition is dismissed.

IT IS SO ORDERED.¹

ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 2, 2011

Date of Mailing: May 3, 2011

¹ 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*).