

DOCKET NO. 048-R10-07-2022

MASHA PERLMAN	§	BEFORE THE
Petitioner,	§	
	§	
v.	§	COMMISSIONER OF EDUCATION
	§	
LUBBOCK INDEPENDENT SCHOOL	§	
DISTRICT	§	
Respondent.	§	THE STATE OF TEXAS

DECISION OF THE COMMISSIONER

STATEMENT OF THE CASE

Petitioner, Masha Perlman, complains about actions and decisions of Respondent, Lubbock Independent School District. Christopher Maska is the Administrative Law Judge appointed by the Commissioner of Education to hear this cause. Petitioner appeared pro se. Respondent is represented by Ann Manning, Attorney at Law, Lubbock, Texas.

The primary issue in this case is jurisdiction. Petitioner contends that Respondent violated the school laws of this state when it allegedly violated the January 7, 2022, Public Health Guidance document and 25 Tex. Admin. Code § 97.7. The Public Health Guidance document is not a school law of this state because it was not adopted under the first two titles of the Texas Education Code. 25 Tex. Admin. Code § 97.7 is a rule, but it is not a school law of this state because it was not adopted under the first two titles of the Texas Education Code. Petitioner was given an opportunity to replead but did not do so.

The Administrative Law Judge issued a Proposal for Decision recommending that Petitioner’s appeal be dismissed. Exceptions and replies were not filed.

FINDINGS OF FACT

After due consideration of the record and matters officially noticed, it is concluded that the following Findings of Fact are supported by the record in this case.

1. On or about July 5, 2022, the Petition for Review was filed which alleges that Respondent violated the Texas Education Agency Health Guidance Document of January 7, 2022 and 25 Tex. Admin. Code § 97.7.

2. On or about August 2, 2022, Respondent's Plea to the Jurisdiction was filed, which asserts the Petition for Review fails to allege a violation of the school laws of this state or a provision of a written employment contract.

3. On August 3, 2022, a prehearing conference was scheduled for August 9, 2022 to consider Respondent's Plea to the Jurisdiction.

4. By Order of January 9, 2022, it was held that the Petition for Review failed to invoke the Commissioner's jurisdiction. Petitioner was directed to replead on or before September 9, 2022 and informed that "**A failure to replead in conformity with this Order could result in this case being dismissed.**" (emphasis in original).

5. Petitioner has not filed an Amended or Supplemental Petition for Review.

DISCUSSION

Petitioner contends that Respondent allows students who have tested positive for COVID to return to school without complying with the Texas Education Agency Health Guidance document of January 7, 2022 and 25 Tex. Admin. Code § 97.7. Respondent denies this and contends that the Commissioner lacks jurisdiction over this claim because the Public Health Guidance document is not a school law of this state and 25 Tex. Admin. Code § 97.7 is not a rule adopted under the first two titles of the Texas Education Code.

School laws of this State

Under Texas Education Code § 7.057(a)(2)(A) the Commissioner has jurisdiction over actions and decisions of school boards that violate the school laws of this state. The "school laws of this state" are defined as the first two titles of the Texas Education Code and the rules adopted under those titles. Tex. Educ. Code § 7.057(f)(2). The questions at issue are whether the Public Health Guidance document is a rule adopted under the first two titles of the Texas Education Code and is 25 Tex. Admin. Code § 97.7 a rule adopted under the first two titles of the Texas Education Code.

Public Health Guidance Document

The Public Health Guidance document was issued on January 7, 2022. It provides:

The guidance in this document is authorized by GA-38, which has the effect of state law under Section 418.012 of the Texas Government Code. Executive Order GA-38 provides TEA with legal authority to publish requirements for the operation of public schools during the COVID-19 pandemic. This document takes effect immediately, replacing all prior guidance. TEA recommends that public school systems consult with their local public health authorities and local legal counsel before making final decisions regarding the implementation of this guidance.

By its own terms, this Public Health Guidance document is authorized by the Governor's Executive Order GA-38 that itself is authorized under the Texas Government Code. If the Public Health Guidance Letter is a rule, it is not a rule adopted under Title 1 or 2 of the Texas Education Code. The Public Health Guidance document is not a school law of this state because it was not adopted under Texas Education Code.

25 Tex. Admin. Code § 97.7

25 Tex. Admin. Code § 97.7 is a rule enacted by the Department of State Health Services under Texas Health and Safety Code § 81.042. As it is not a rule adopted under the first two titles of the Texas Education Code, it is not a school law of this state.

Conclusion

This case should be dismissed for lack of jurisdiction because the Second Amended Petition for Review fails to identify a "school law of this state" that Respondent may have violated.

CONCLUSIONS OF LAW

After due consideration of the record, matters officially noticed, and the foregoing Findings of Fact, in my capacity as Commissioner of Education, I make the following Conclusions of Law:

1. The Commissioner lacks jurisdiction over this case under Texas Education Code § 7.057.

2. Under Texas Education Code § 7.057(a)(2)(A) the Commissioner has jurisdiction over actions and decisions of school boards that violate the school laws of this state. The “school laws of this state” are defined as the first two titles of the Texas Education Code and the rules adopted under those titles. Tex. Educ. Code § 7.057(f)(2).

3. The August 5, 2021, Public Health Guidance document was not issued under the authority of the first two titles of the Texas Education Code. It was issued under the authority of GA-38, which was issued under the authority of Texas Government Code § 418.012.

4. 25 Tex. Admin. Code § 97.7 is a rule enacted by the Department of State Health Services under Texas Health and Safety Code § 81.042. As it is not a rule adopted under the first two titles of the Texas Education Code, it is not a school law of this state.

5. The Petition for Review fails to invoke the jurisdiction of the Commissioner because it fails to identify a potential violation of a school law of this state.

6. This case should be dismissed for lack of jurisdiction.

ORDER

After due consideration of the record, matters officially noticed and the foregoing Findings of Fact and Conclusions of Law, in my capacity as Commissioner of Education, it is hereby ORDERED that the Petitioner’s appeal be, and is hereby, DISMISSED.

SIGNED AND ISSUED this 4th day of > U b i 2021 f. m

Mike Morath

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MIKE MORATH
COMMISSIONER OF EDUCATION

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PROPOSAL FOR DECISION

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Conclusion

This case should be dismissed for lack of jurisdiction because the Second Amended Petition for Review fails to identify a "school law of this state" that Respondent may have violated.

CONCLUSIONS OF LAW

After due consideration of the record, matters officially noticed, and the foregoing Findings of Fact, in my capacity as Administrative Law Judge, I make the following Conclusions of Law:

1. The Commissioner lacks jurisdiction over this case under Texas Education Code § 7.057.

2. Under Texas Education Code § 7.057(a)(2)(A) the Commissioner has jurisdiction over actions and decisions of school boards that violate the school laws of this state. The “school laws of this state” are defined as the first two titles of the Texas Education Code and the rules adopted under those titles. Tex. Educ. Code § 7.057(f)(2).

3. The August 5, 2021, Public Health Guidance document was not issued under the authority of the first two titles of the Texas Education Code. It was issued under the authority of GA-38, which was issued under the authority of Texas Government Code § 418.012.

4. 25 Tex. Admin. Code § 97.7 is a rule enacted by the Department of State Health Services under Texas Health and Safety Code § 81.042. As it is not a rule adopted under the first two titles of the Texas Education Code, it is not a school law of this state.

5. The Petition for Review fails to invoke the jurisdiction of the Commissioner because it fails to identify a potential violation of a school law of this state.

6. This case should be dismissed for lack of jurisdiction.

RECOMMENDATION

After due consideration of the record, matters officially noticed and the foregoing Findings of Fact and Conclusions of Law, in my capacity as Administrative Law Judge, it is hereby RECOMMENDED that the Commissioner of Education adopt the foregoing Findings of Fact and Conclusions of Law and enter an order consistent therewith.

SIGNED AND ISSUED this 20th day of September 2022.

Christopher Maska Digitally signed by Christopher Maska
Date: 2022.09.20 14:27:09 -05'00'

CHRISTOPHER MASKA
DIRECTOR
DIVISION OF HEARINGS AND APPEALS