

#235-06

OAL DKT. NO. EDU 8827-05 (http://lawlibrary.rutgers.edu/oal/html/initial/edu08827-05_1.html)

AGENCY DKT. NO. 274-10/05

R.O., on behalf of minor child, R.O., II, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
WEST WINDSOR-PLAINSBORO :
SCHOOL DISTRICT, MERCER :
COUNTY, :
RESPONDENT. :
_____ :

The record, Initial Decision and exceptions thereto have been reviewed.

This decision is the disposition of a second petition brought by the same party, appealing the same action by respondent. Petitioner challenges respondent's action in imposing a ten-day suspension on petitioner's minor child, R.O. II, for possession of a knife on school premises. The first petition was filed on February 7, 2005 and assigned Agency Docket Number 33-2/05, and OAL Docket Number EDU 2010-05. Petitioner claimed, in that petition, that a hearing should have preceded his child's suspension, the suspension was inappropriate, and any reference to the suspension should be removed from his child's record. Petitioner also asked for the names and identities of students who might have had knowledge of the facts related to R.O. II's possession of the knife.

Several months after the case was transmitted to the OAL, the ALJ denied an application by petitioner for leave to amend his petition, and the Acting Commissioner of

Education denied petitioner's motion for interlocutory review of the ALJ's determination. Petitioner then filed the petition in the present matter – on October 11, 2005.

The second petition, assigned Agency Docket Number 274-10/05, and OAL Docket Number EDU 8827-05, contained three counts. In the first count petitioner alleged violations of R.O. II's due process rights, reciting once again that no hearing was held by school authorities before or after the ten-day suspension, no incident report was prepared contemporaneous with the suspension, and the identities of student witnesses were not provided to petitioner. Petitioner also claimed that Assistant Principal Donna Gibbs-Nini informed a prosecutor's investigator that R.O. II "possessed the knife for the purpose to use it against the person or property of another."¹ Petitioner's second count alleged violations of the New Jersey Law Against Discrimination (NJLAD), and his third count alleged that R.O. II's civil rights had been violated. The latter claim rested on the absence of a hearing at the time of the suspension, non-disclosure of names of possible student witnesses, alleged provision of false information by Gibbs-Nini to the prosecutor's office and the OAL, and alleged concealment of information related to a possible student witness, U.D.

Petitioner's demands for relief were listed at the end of the three counts but did not specify which count was relied upon for each demand. Petitioner demanded 1) the names and identities of "student witness," 2) a formal hearing with evidence and argument, 3) removal from R.O. II's record of any reference to the suspension, and "any and all remedies" under the LAD and other applicable State and federal civil rights laws.

¹ The Commissioner sees no support in the record for this contention. The quoted language appears to be the wording of a charge entered on the bottom of a complaint signed by the prosecutor's investigator who interviewed Gibbs-Nini after the police were made aware of the incident concerning R.O. II and the knife. See Attachment 8 to petitioner's March 27, 2006 "sur-reply" to respondent's motion for summary judgment.

On November 4, 2005, the Acting Commissioner of Education dismissed the second count for lack of jurisdiction. Respondent then moved, on December 9, 2005, to dismiss the remaining counts, alleging that the second petition was untimely filed, and asserting that disposition of the second petition was subject to *res judicata* since, on February 3, 2005, in a Superior Court proceeding flowing from the same incident, R.O. II had been adjudicated delinquent for possessing a dangerous knife while on the grounds of an educational institution without written authorization from the governing officer of the institution, in violation of *N.J.S.A. 2C:39-5(e)(2)*.

On March 17, 2006, the Acting Commissioner of Education adopted the OAL's Initial Decision in EDU 2010-05, granting summary judgment to respondent and dismissing R.O.'s first petition. On April 3, 2006, the ALJ issued an Initial Decision in the present matter granting respondent's motion to dismiss R.O.'s second petition, EDU 8827-05.

In analyzing the relief demanded by petitioner, the ALJ found that petitioner was "essentially making a claim under *N.J.A.C. 6:3-6.7* [now *N.J.A.C. 6A:32-7.7*], that provides for the ability to 'expunge inaccurate, irrelevant or otherwise improper information' from the pupil's records." Initial Decision at 3-4. He further found that the claim was fully and finally adjudicated in the disposition of petitioner's first petition, wherein it was determined that the preclusive effect of the above-mentioned Superior Court judgment of delinquency barred further litigation of the matter, and provided a legitimate basis for both R.O. II's suspension and the reference to the suspension in R.O. II's school record. Initial Decision at 4.

In addition to the foregoing holding, the ALJ discussed, in dictum, some evidential issues and issues related to discovery. *Ibid.* He stated that the discovery requests in the second petition were identical to those adjudicated in the first petition, except for petitioner's

January 14, 2006 motion to compel answers to interrogatories concerning petitioner's civil rights claim. *Ibid.* He thus concluded that, even if petitioner's second petition were not untimely, and even if petitioner's claims had not already been adjudicated, the discovery requests duplicative of those in the first petition could not be relitigated, and the January 14, 2006 motion for answers to interrogatories should also not be granted, as it pertained to a claim that had been dismissed. *Ibid.*

The ALJ also discussed a certification by R.O. II that was submitted to the OAL on March 27, 2006, as a reply to respondent's reply brief for respondent's motion for summary disposition. In the certification, R.O. II stated that when he encountered Assistant Principal Gibbs-Nini on March 3, 2004, he was not in a class, but rather in a school hallway, on his way to turn in the knife he had found on the bus that morning. The ALJ noted that after two years of copious filings in three litigations, this certification was the first evidentiary document challenging respondent's evidence concerning the facts of the incident at the heart of both the two petitions before the Commissioner of Education and the charge against R.O. II in Superior Court. Initial Decision at 5. He concluded that it was "simply too late for petitioner to now argue that his son was innocently on his way to the principal's office to turn in the weapon, as opposed to being pulled out of class by a member of the school administration and then compelled to turn over the knife." *Ibid.*

Finally, with respect to petitioner's claims in the first and third counts of the second petition, the ALJ found them to be time-barred.

As to respondent's motion for sanctions against petitioner for abuse of discovery, the ALJ found that petitioner filed both duplicative pleadings and duplicative discovery requests, some of which had already been the subject of stipulations. Initial Decision at 6. Although the

ALJ was “not completely persuaded” that petitioner’s discovery practices were intentionally harassing, he cautioned that “petitioner’s discovery juggernaut certainly appeared poised to go over the precipice into overzealous, burdensome and harassing conduct.” *Ibid.* However, the ALJ ultimately found that there was “no unreasonable failure to comply with an order of this tribunal sufficient to order sanctions under *N.J.A.C. 1:1-14.14(a)(4).*” *Ibid.* And he was “unable to conclude that petitioner has engaged in any misconduct which obstructed or tended to obstruct the conduct of the instant contested case under *N.J.A.C. 1:1-14.14(b).*” *Ibid.*

The Commissioner adopts the ALJ’s determinations for the reasons expressed in the Initial Decision. Petitioner’s second petition is time-barred, and the counts that were not dismissed on November 4, 2005, raise issues that have been adjudicated in prior proceedings. Further, the undisputed facts conceded by petitioner and his son, *i.e.* that R.O.II found a knife on the bus on his way to school and, despite the presence of numerous teachers and other staff persons to whom R.O. II could have relinquished the knife, still had it in his possession hours later, when the assistant principal sought him out, establish sufficient grounds for the suspension that was imposed upon R.O. II. There was no indication in any submission over the past two years that student witnesses, if any, would contradict those crucial facts. Even assuming *arguendo* that R.O. II’s certification that he was on his way to return the knife when the assistant principal found him was true, the Commissioner still could not find that respondent’s imposition of a ten-day suspension for R.O. II’s possession of the knife in school was arbitrary or capricious. Moreover, as found in the adjudication of the first petition, R.O. II was given the process due him under the applicable authority.

Finally, the Commissioner adopts the ALJ’s determination that, although petitioner has not been careful to propound reasonable discovery requests, the facts do not

support bad faith or intentional harassment, and there was no failure to comply with an order of [the OAL] severe enough to order sanctions under *N.J.A.C.* 1:1-14.14(a) or (b). The Commissioner, however, concurs with the ALJ's caution to petitioner that his discovery practices came very close to constituting "overzealous, burdensome and harassing conduct." *Ibid.*

In summary, the Initial Decision is adopted as supplemented herein, and the petition is dismissed.

IT IS SO ORDERED.²

ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 28, 2006

Date of Mailing: July 10, 2006

² This decision may be appealed to the State Board of Education, pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*