#111-08 (OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu09009-07_1.html)

S.L. on behalf of minor child, D.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF VERONA, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the discipline imposed upon his son, D.L., following his involvement in an incident that occurred in the parking lot at respondent's high school in July 2007. Specifically, respondent determined that D.L.: drove individuals who were involved in severely beating up a student to and from the parking lot where the attack occurred; was present during the fight; and did nothing to intervene to stop the violence. Respondent Board imposed discipline upon D.L. that limited his participation in team sports and extracurricular activities at the beginning of 2007-08 school year, withheld parking and lunch privileges for the school year, and included a three-day in-school suspension. Some of the penalties imposed were subject to reduction for good behavior. Petitioner's initial request for emergent relief was rejected by the Commissioner.

The ALJ found, *inter alia*, that: petitioner's testimony that he had no prior knowledge that the incident was about to take place when he drove his friends to the high school parking lot is not credible; the testimony of respondent's witness at hearing was credible; the discipline imposed by the respondent Board was – pursuant to *N.J.S.A.* 18A:37-2(c) and (d) – reasonably warranted by D.L.'s behavior, and comports with the rules for behavior of students included in the district's handbook; great deference should be given to administrative agencies in interpreting their own rules; no procedural safeguards apply in this situation, and the requirement for fundamental fairness was adhered to. The ALJ affirmed the respondent's actions in imposing penalties upon the petitioner, and dismissed the appeal.

The Commissioner, finding no arbitrariness or unreasonableness in respondent's discipline of D.L. for his involvement in the incident that occurred on respondent's high school property, adopted the Initial Decision – with supplementation – as the final decision in this matter.

March 7, 2008

OAL DKT. NO. EDU 9009-07
AGENCY DKT. NO. 219-8/07

S.L. on behalf of minor child, D.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF VERONA, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter – including the hearing transcript[1] and exhibits, the Initial Decision of the Office of Administrative Law, and the parties' exceptions – have been reviewed.

The controversy stems from an incident that occurred on Friday evening, July 6, 2007. During the incident a young man was severely beaten in the parking lot of respondent's high school. The following facts concerning D.L.'s association with the incident are undisputed:

1. D.L. was asked by a fellow student, V.C., for a ride.
2. D.L. picked V.C. and N.S. up at the location designated by V.C., which was one or two blocks from V.C.'s home.
3. At V.C.'s request, D.L. drove to the high school parking lot. D.L. admitted at the hearing that he drove above the speed limit.
4. Another student, M.F., was waiting in the parking lot for V.C., N.S. and D.L.

[1] The transcript is defective, in that it fails to include a portion of D.L.'s testimony that was elicited by respondent's counsel on redirect examination.

5. D.L. found a parking space and pulled his car into it.

6. M.F. approached D.L.'s car and V.C. and N.S. exited it.

7. D.L. heard V.C. ask M.F. where P.O. was, saw M.F. point, and observed that the three youths proceeded to the location M.F. had designated – where a group of young people had collected about 30 feet from D.L.'s car.

8. D.L. remained on the scene, parked in the school lot.

Exhibit H to the affidavit by petitioner's counsel (Petitioner's Affidavit), submitted to support petitioner's motion for interim relief, is an undated statement by D.L. concerning the evening of July 6, 2007 (the Statement). In the Statement, which was prepared in consultation with his attorney and read to the respondent Board of Education (respondent Board) at a hearing on August 2, 2007, D.L. related that after V.C., N.S. and M.F. exited his vehicle and walked toward the group of young people, he "could hear arguing, and could see that someone was fighting." He further related that he exited his car "after a couple of minutes," and that he and an individual named Dominick Dellavalle went to where the fight occurred.

The statement also recounts:

> By the time I got to the scene of the fight everyone seemed to be attempting to break up the fight. Dominick Dellavalle was pulling V.C. away from the fight and trying to calm him down. Dominick put V.C. in my car. Dominick told me to get V.C. out of the lot. M.F. and N.S. got in the car and they asked me to drive them home to M.F.'s house.

D.L. testified at the hearing that before he left the school lot he saw P.O. "being put into another car." It is undisputed that D.L. then drove the other students to M.F.'s house.

It appears from the record that within a few days of the incident, respondent requested a meeting with D.L. and his parents to discuss same. (Exhibit A to Petitioner's Affidavit is a copy of a letter dated July 12 from petitioner's counsel to the principal of

Verona High School asking for the deferral of any meeting until the disposition of the juvenile charges that had been brought against D.L.)

On July 19, 2007, respondent gave notice to petitioner, through counsel, that D.L. would not be allowed on school grounds until completion of the investigation into the July 6, 2007, incident. (Exhibit B to Petitioner's Affidavit) A letter with the same date, and the subject heading "D.L. – Expulsion Hearing" was sent by respondent's counsel to petitioner advising that a formal hearing would take place on August 2, 2007, and that it could result in the imposition of disciplinary sanctions. (Exhibit D to Petitioner's Affidavit) At the time of the letter, the charges against D.L. were:

1. Aggravated assault on school property; and
2. Trespassing on school property.

A list of witnesses expected to testify at the hearing was provided in the letter, as well as an indication of the documents upon which respondents planned to rely, and instructions outlining petitioner's rights relative to the hearing. Petitioner was invited to contact respondent's counsel with any questions he might have about the upcoming proceeding. (Exhibit D to Petitioner's Affidavit)

By way of a letter dated July 25, 2007, respondent's counsel provided petitioner's counsel with the three-page police report, dated July 7, 2007, concerning the incident. (Exhibit F to Petitioner's Affidavit) The report indicated that the victim had been seriously injured, including a broken cheekbone and a broken eye socket. The victim had been able to identify his attackers, and had related that the attackers had arrived in a car matching the description of petitioner's car. Both the victim and other witnesses had told police that four males had exited the car and had asked where another individual was. One of the four males went to the victim

and began punching him. After the victim was repeatedly punched and kicked, the four males were said to have returned to the car that they had arrived in and left the scene.

Respondent's counsel advised petitioner's counsel that at that point in time the police report was the only document provided by the police to respondent, and that respondent had not received copies of individual statements provided to the police by witnesses. Subsequently, on or about July 29, 2007, respondent's counsel told petitioner's counsel that he had received sworn statements of the victim and eyewitnesses to the incident. Based upon those statements, he had concluded that D.L. had not incited the attack or struck the victim. He informed petitioner's counsel that the respondent Board of Education (respondent Board) wished to use the upcoming August 2, 2007, hearing to ask D.L. questions. Among the questions would be the extent of D.L.'s foreknowledge, if any, of the July 6, 2007, altercation. (Petitioner's Affidavit at 17)

It is undisputed that on August 2, 2007, D.L., his parents, and their counsel appeared before the respondent Board. The Board advised that they would not take any testimony from eyewitnesses, but might hear from the investigating police officer, whom petitioner's counsel would be allowed to cross examine on a limited basis. (Petitioner's Affidavit at 18 and 19)

Petitioner's counsel alleged that at the time of the August 2, 2007 hearing the information that had been provided to the respondent board consisted of summaries of witness statements – prepared by the assistant principal – which had not been provided to petitioner's counsel, and copies of the "initial" police report. (Petitioner's Affidavit at 21) The respondent Board also reviewed photographs of the victim's injuries. (Petitioner's Affidavit at 27)

At the hearing, D.L. made the above referenced Statement that is attached to Petitioner's Affidavit as Exhibit H, and petitioner submitted D.L.'s cell phone record for the date of the incident. Counsel for the three students whom D.L. drove to and from the high school refused the request of petitioner's counsel to produce the three youths to testify for D.L. at the hearing.

It is undisputed that after questioning D.L., the respondent Board met in private with the district superintendent, after which it deliberated in executive session. There is no transcript of the Board hearing in the record, but the Board resolution represents that after deliberations, the respondent found that D.L. was culpable for complicity in the altercation. The Board heard argument from petitioner's counsel concerning an appropriate penalty, deliberated with counsel and the district superintendent, and advised that the hearing would be continued to August 7, 2007. (Petitioner's Affidavit at 31-33)

Petitioner's counsel made arrangements for Dominick Dellavalle to give a statement to the assistant principal. Dellavalle recounted that he had put V.C. in D.L.'s car and told D.L. to remove him from the scene. (Petitioner's Affidavit at 37)

At the August 7, 2007, hearing continuation, the respondent Board did not have copies of the Delavalle statement, but the district superintendent acknowledged the above reported substance of same. (Petitioner's Affidavit at 39) After deliberations, the respondent Board concluded the following, as reflected in its resolution dated August 7, 2007:

> A. It is uncontroverted that D.L. did not physically touch anyone once arriving at the high school parking lot that evening. It is also uncontroverted that D.L. did not take any actions to incite of [sic] otherwise encourage the participation or continuation of the assault that evening. D.L.'s [sic] also did nothing to try and stop the fight.
>
> B. It is uncontroverted that D.L. drove V.C. and N.S. to the high school parking lot after being asked to do so by V.C. It is also uncontroverted that, after the assault took place, D.L. drove N.S.,

M.F. and V.C. from the high school parking lot to M.F.'s home. (Exhibit K of Petitioner's Affidavit)

In consequence of the foregoing facts, respondent determined that:

D.L. did not commit an aggravated assault against another student. However, it is clear that D.L. was complicit in the actions of others that evening and took limited steps to stop or otherwise deter the students from participating in the assault at the high school parking lot that evening. With regard to the second charge of trespass on school property, the Board finds these charges to be sustained; however, since the victim and other witnesses to this incident were not similarly charged with trespassing, no disciplinary action will be taken concerning this charge. (*Ibid.)*

On the basis of those determinations, respondent imposed the following penalties:

1. D.L. shall be placed on a long-term probationary period for the remainder of his high school term in order to continue his education in the District schools. A violation of these conditions of probation shall result in an expulsion of D.L. after the appropriate procedures and hearings. The conditions of probation are as follows:

    a. D.L. shall not display any acts of violence/disobedience/ defiance/insubordination/offensive language or other flagrant act toward any employee or student of the District.

    b. D.L. shall neither retaliate nor have others act on his behalf against any witnesses or potential witnesses to the July 7, 2007 incidents.

    c. D.L. and parents shall make every effort to attend any counseling programs/services provided by the District.

2. The Board affirms the District Administration's recommendations as to the appropriate penalties for participation in various privileges for the 2007-2008 school year including extracurricular and co-curricular activities. These recommendations are as follows:

    a. D.L. shall be provided a three-day in-school suspension, beginning the second day of school, September 11, 2007.

    b. Loss of captaincy on teams for the 2007-2008 school year.

c. Loss of open lunch for the 2007-2008 school year with the opportunity to appeal for reinstatement at the end of the first semester.

d. Loss of parking privileges for the 2007-2008 school year with the opportunity to appeal for reinstatement at the end of the first semester.

e. A five (5) week exclusion from participation in any co-curricular and extra-curricular activities, beginning the first day of school (September 10, 2007) and ending on October 14, 2007. A two-week reduction to the exclusion shall be granted, pending display of good behavior during the time period which would permit participation on October 1, 2007.

f. Prior to the beginning of the school year, D.L. shall continue to be excluded from participation in any co-curricular or extra-curricular activities. (*Ibid.)*

On August 14, 2007, petitioner filed an appeal with the Commissioner of Education and a motion for emergent relief. The matter was transmitted to the Office of Administrative Law (OAL) and heard by an administrative law judge (ALJ) on August 20, 2007. At the conclusion of argument by counsel for both parties, the ALJ entered a proposed order on the record.

The proposed order, which was memorialized on August 21, 2007, recommended a stay to the portion of respondent's resolution that prohibited D.L. from participating in football practice – pending the hearing on the merits of petitioner's appeal. The ALJ recommended upholding the "balance" of respondent's resolution. The rationale for the ALJ's proposed order – as set forth on the OAL hearing audiotape – was the ALJ's view that barring D.L. from football practice would render moot any favorable outcome that D.L. might ultimately be granted after a hearing on the merits of the case.

The recommended order of the OAL was rejected by the Commissioner. Relying on the undisputed facts and on D.L.'s own statement to the respondent Board – which statement

had been filed with the pleadings by petitioner's counsel – the Commissioner concluded, for purposes of the emergent application, that D.L. was complicit in the July 6, 2007 incident. D.L. had driven V.C. and N.S. to the scene of the attack, had heard them ask M.F. where P.O. was, had known that V.C. harbored animosity toward P.O., had seen the three youths go to P.O., had heard arguing, and had seen that students were fighting. Yet, he did nothing to ameliorate the situation, nor did he call the authorities for help. D.L. had admitted in his Statement that he and Dominick Dellavalle had gone "over to where the fight occurred,"[2] but there was no evidence that D.L. tried to assist in ending the attack.

Further, the Commissioner observed that the facts showed that D.L. knew that V.C. was involved in the altercation, but nonetheless assisted V.C. and others – who had seriously violated school policies and harmed another student – by transporting them away from the scene of the infractions and allowing them to evade the authorities. That assistance constituted a breach of his moral responsibilities and his responsibilities as a student on school property. Lack of understanding of those responsibilities, in the Commissioner's view, could not excuse D.L. from the consequences of his bad judgment.

Thus, the Commissioner found it unlikely that petitioner could establish that the imposition of a three-day suspension and the curtailment of extracurricular activities for a discrete period of time – with the opportunity to shorten the time for good behavior – was an arbitrary or capricious action by respondent. She further found that divesting respondent of its discretion to impose that penalty, under the circumstances of this case, would have visited a more serious harm on respondent and its constituents than the penalty would impose upon D.L.

The plenary hearing in this matter took place in the OAL on August 31, 2007, at which time D.L. and Christopher Carrubba, the Assistant Principal of Verona High School,

[2] In light of that statement it is not unreasonable to conclude that D.L. was aware that someone had been hurt.

testified. The ALJ summarized the testimony and hearing exhibits, which did not differ materially from the facts that had been available at the emergent relief hearing. Additionally, the ALJ made credibility findings. While he found Carrubba to be credible and precise, Initial Decision (ID) at 6, the ALJ did not find credible D.L.'s claim that he had no prior knowledge of the altercation that was to take place when he brought his friends to the high school grounds. (*Id.* at 6-7) As will be addressed in the discussion of petitioner's exceptions, *infra,* the Commissioner finds that the record supports the ALJ's credibility determinations.

The ALJ's conclusions of law were as follows. First, he determined that *Podias v. Mairs*, 394 *N.J. Super.* 338 (App. Div. 2007) does not help petitioner. Second, he concluded that D.L. was complicit in behavior which, under *N.J.S.A.* 18A:37-2(c) and/or (d), could reasonably warrant the discipline he received. Third, he determined that D.L. had received the process that he was due.[3]

Petitioner's Exceptions

Petitioner presented twenty exceptions, which the Commissioner will address *seriatim*. The exceptions will be evaluated in accordance with the legal principle that the ALJ's credibility determinations must receive deference. *In re Taylor*, 158 *N.J.* 644, 659-60 (1999).

Exception 1: Petitioner asserts that since he was excluded from football practice before the 2007-2008 school year commenced, his total exclusion from extra-curricular activities, as ordered by the respondent Board, actually exceeded the five-week period imposed by the respondent Board (which suspension was to commence on the first day of school, and

[3] On page 11 of the Initial Decision, the ALJ stated, and the Commissioner concurs, that respondent's actions did not violate the due process standards for students articulated in *Goss v. Lopez*, 419 *U.S.* 565 (1975). More specifically, D.L.'s property interest in his education was not implicated by his discipline, and he was accorded the procedural safeguards required by *Goss.*

could be reduced to three weeks for good behavior). Petitioner accordingly alleges that the total mandated suspension was actually 87 days, as opposed to the fifteen days suggested in the penalty matrix in respondent's published guidelines for infraction penalties. This, argues petitioner, constituted an arbitrary and capricious departure from respondent's disciplinary guidelines.

The record shows, however, that respondent's investigation of the July 6, 2007, attack, which investigation respondent was required to conduct without input from D.L., continued through August 7, 2007, the second day of the hearing before the respondent Board.[4] On that date, D.L.'s discipline was imposed. No more than seven weeks (35 school days) later, *i.e.*, on or before September 24, 2007, D.L. was allowed to resume extra-curricular activities. Given the seriousness of the incident which precipitated this matter,[5] the Commissioner cannot find that respondent's actions deviated so far from its guidelines as to be characterized as arbitrary and capricious.[6]

Exception 2: The Commissioner finds petitioner's second exception to be irrelevant.

Exception 3: Petitioner contends that there is no evidence to support the ALJ's finding that V.C. was at a party or conveyed his location to D.L. when he phoned D.L. at 11:25 p.m. on July 6, 2007. The Commissioner reminds petitioner that on page 2 of D.L.'s Statement, he related that after V.C.'s call he worried that V.C. might have been drinking.

---

[4] The period of investigation may have been lengthened by petitioner's refusal to meet with the assistant principal.

[5] Carrubba testified that in his 10 years in respondent's district there had never been an altercation that had been so prolonged and one sided, and that had produced such serious injuries. T143-44 He further testified that the penalty went beyond the guidelines concerning suspension of extra curricular activities because the incident was more serious than prior incidents. T191-92

[6] Additionally, there is no evidence in the record as to when football practice started. Thus petitioner has no basis to allege that, by the date in September when D.L. was allowed to return to activities, an excessive period of exclusion had occurred.

He decided that "since [V.C.] was only a couple of blocks away from [his] home," he would pick him up. This statement obviously supports the conclusion that V.C. told D.L. where he was. V.C.'s attendance *vel non* at a party is not material to this case. Nor would the question about D.L.'s knowledge of V.C.'s location be relevant, except that the information on this point in D.L.'s Statement contradicts D.L.'s testimony at the hearing and undermines his credibility.

Exception 4: Petitioner challenges the ALJ's finding that when D.L. exited his vehicle he observed V.C., M.F. and N.S. fighting with P.O., and that D.L.'s account suggested that P.O. was taking a substantial beating. First, the record establishes that D.L. knew that V.C. *et al.* were looking for P.O., and he knew that the fighting began when V.C. and the others went to P.O.'s location. Second, D.L. related in his Statement that even before he exited his car he could hear and "see that someone was fighting." Third, D.L. testified that after two to three minutes he exited his car, saw that a fight was going on, and started walking over." Fourth, D.L.'s Statement (p.4) reveals that the fight was still going on when he "got to the scene," and "everyone seemed to be attempting to break [it] up." D.L. also testified at the OAL hearing that before he left the attack location, he observed that P.O. "being put into another car." That description suggests that P.O. required assistance.

On the basis of those facts, the ALJ was justified in finding, at a minimum, 1) that D.L. knew, at least from the time he parked his car in the school lot, that his friends planned a confrontation with P.O.; 2) that D.L. heard and saw, while in his car, that youths had begun fighting; 3) that D.L. could see the fight as he exited the car and walked the short distance to the scene, 4) that his friends were still beating P.O. at that point, and 5) that D.L. subsequently observed that P.O. was being assisted into a car. The Commissioner consequently finds no merit to petitioner's exception.

Exception 5: Petitioner takes exception to the ALJ's finding that D.L. stated that a Verona graduate, Dominick Dellavalle, did the right thing in breaking up the fight.

While the Commissioner does not place great weight on the finding, it does raise a disturbing issue. The OAL hearing transcript indicates that a defect in the recording system caused a portion of D.L.'s testimony to be lost. Consequently, the fact that petitioner cannot find in the transcript the above referenced statement about Dellavalle, cannot lead the Commissioner to conclude that there was no such testimony.

Exception 6: The problem with the transcript is also implicated in petitioner's sixth exception. The ALJ found that D.L. knew his friends would get into trouble, did not want to abandon them and consequently took them to M.F.'s home. Petitioner says the transcript does not contain such testimony, but respondent says that D.L. did so testify. The Commissioner, under these circumstances, cannot disturb the ALJ's finding which, in the context of all the facts presented in this case, is not dissonant. Applying an objective standard, those present in the high school lot at the time of the incident must reasonably have known, by the end of the attack, that the participants would face negative consequences.

Exception 7: This exception reiterates the issue in petitioner's first exception.

Exception 8: Petitioner challenges the ALJ's finding that Carrubba concluded 1) that a fight had taken place in the high school parking lot on July 6, 2007, 2) that the fight had been short in duration, but 3) that P.O. had nonetheless been seriously injured and taken to the hospital. Petitioner's basis for the challenge is the novel idea that only the testimony at the OAL hearing may serve as evidence. However, the record – including hearing exhibit R-4 which consists of summaries of witness statements – reveals that Carrubba had collected information from at least four eye witnesses to the attack on P.O. In addition, the police report – which

Carrubba had undisputedly seen – described P.O.'s injuries. That report is a part of the record in this case. Moreover, Carrubba testified at the OAL hearing that he knew that P.O.'s injuries had required him to go to the hospital. T130.

Exceptions 9 & 10: Petitioner contends that the ALJ should not have considered Carrubba's testimony that despite D.L.'s protestations to the contrary, he – Carrubba – believed that D.L. knew before driving to the high school that V.C. intended to confront P.O. Because Carrubba testified that he had no "objective" evidence to support his belief, petitioner urges that the ALJ should not have considered same.

Taking the evidence as a whole, the Commissioner cannot agree with petitioner that Carrubba's belief was without support and that the ALJ erred to consider it. First, as mentioned above, D.L., by his own admission, knew where V.C. was located before he decided to pick V.C. up. He further knew that V.C. was only one block from his home. Thus, D.L.'s story that he decided to pick V.C. up at 11:30 p.m. because V.C. may have been drinking rings false. A young man with the wherewithal to call D.L. on the phone does not need a ride to get to a home which is one or two blocks away.

Second, it seems anomalous that, having been asked for a ride to the high school, D.L. would simply drive his friends there without asking why. This is especially so in view of his assertions that he picked V.C. up out of concern that V.C. might have been drinking, and that his expectation was to take V.C. home.

Third, D.L. admitted that he drove to the school at a speed that exceeded the speed limit. T84. This comports with the accounts of two witnesses that said D.L. drove into the school parking lot at a fast speed, and suggests that D.L.'s agenda was to get to the school as

soon as possible. Such haste is not harmonious with D.L.'s allegation that he thought he was just dropping his buddies off to hang out.

Fourth, D.L. testified that his intent was just to drop his friends off at the high school. T41 This does not comport well with D.L.'s professed worries about V.C.'s possible consumption of alcohol. But more significantly, D.L.'s admission that he pulled into a parking space when he arrived at the school lot, T48, is not harmonious with his professed intention to just drop his friends off.

Fifth, D.L. affirmed at the OAL hearing that he and V.C. were good friends. T33-34. The Commissioner does not view as unreasonable Carrubba's or the ALJ's conclusion that it was unlikely that V.C. would ask his good friend for a ride and never mention the reason for same. This is especially so in view of the facts that suggest an intensity to the actions of V.C. and friends. For example, the lookout call from M.F. to V.C. giving the whereabouts of P.O., T43; D.L.'s knowledge of V.C.'s antipathy towards P.O., T42; the haste in which D.L. drove to the high school, the fact that M.F. was waiting for V.C. *et al.*, T42, the immediate progress of V.C., M.F and N.S. to P.O. and D.L.'s choice to pull into a parking spot instead of just dropping his friends off.

In summary, there was enough circumstantial evidence to support an inference that D.L. knew why V.C. wished to go to the high school. The Commissioner cannot find arbitrary the conclusions of Carrubba's and the ALJ which were based both upon that circumstantial evidence and upon the application of common sense.

Exception 11: The Commissioner finds that petitioner's eleventh exception is immaterial to the ultimate issue in this case.

Exception 12: Petitioner's twelfth exception relates to the subject of exceptions 9 and 10, *i.e.,* the question of whether D.L. knew of an impending confrontation before arriving at the high school. In exception 12, petitioner argues that the ALJ's credibility determination - that D.L. did know of the upcoming attack - must be rejected since there was no testimony to directly contradict D.L.'s assertion that he did not know. The Commissioner agrees with respondent that petitioner's position misstates the law. The ALJ is not bound to believe a witness simply because he or she avows the truth of a given fact. "A case may present credibility issues requiring resolution by a trier of fact even though a party's allegations are uncontradicted." *D'Amato by McPherson v. D'Amato*, 305 *N.J. Super*. 109, 115 (App. Div. 1997). Exception 12 is accordingly rejected.[7]

Exception 13: The Commissioner finds that D.L.'s Statement to the respondent Board and portions of D.L.'s testimony discussed, *supra,* support the ALJ's finding that D.L. heard arguing, left his vehicle and saw his friends attacking P.O. Exception 13 is therefore rejected.

Exception 14: Petitioner objects to the ALJ's finding that respondent disciplined the individuals involved in the incident by invoking Student Handbook provisions pertaining to fighting. The basis of this objection is that of the four identified students, only D.L. was disciplined. As D.L.'s three friends quit respondent's district, the Commissioner finds petitioner's contention of unfairness in exception 14 to be meritless.

Exception 15: Petitioner objects to the ALJ's finding that D.L. was a "catalyst" for the July 6, 2007, incident. The Commissioner agrees that the word "catalyst" is misleading. The Commissioner also finds, however, that petitioner's fifteenth exception is a red herring.

[7] The Commissioner may not consider the documents referenced in petitioner's twelfth exception , since one is not a part of the record and the other is a paragraph in an affidavit by petitioner's counsel which references that document.

In considering the ALJ's findings as a whole, it is clear that the gravamen of this finding – which was based upon certain conclusions made by Carrubba about D.L.'s involvement in the July 6, 2007, incident – was that D.L. served as a facilitator (not catalyst) for the attack, by driving his friends to the high school. It is immaterial to the evaluation of D.L.'s voluntary participation in this incident whether V.C. and N.S. might have been able to travel to the school parking lot by some other means. In other words, to find that D.L. bore a share of responsibility for the incident, it is not necessary to prove that D.L.'s. transportation service was the only means by which the others could accomplish their objective. Thus, exception 15 is rejected.

Exception 16: In this exception, petitioner challenges the ALJ's determination that *Podias v. Mairs*, 394 *N.J. Super.* 388 (App. Div.), *certif. denied* 192 N.J. 482 (2007), does not relieve petitioner of responsibility for his involvement in the July 6 incident.

At the outset, the Commissioner notes that the common law standard for duty in negligence cases does not control the instant administrative proceeding in which the Commissioner is evaluating the reasonableness of respondent's application of its disciplinary guidelines.

Second, if anything, *Podias* is unhelpful to D.L. In that case a driver, transporting two other passengers, struck a man on a motorcycle. The man was lying on the road, injured. The driver and both passengers exited the car, viewed the man and made cell phone calls, none of which were to the police or medical services. The driver and passengers subsequently left the injured motorcyclist alone in the road, to be struck and killed by another car. The Appellate Division found that the lower court was incorrect in ruling that the passengers – as opposed to the driver – were, as a matter of law, free of any duty toward the motorcyclist.

In explaining its position, the Appellate Division reviewed decisional law and legal principles set forth in treatises such as *Prosser and Keeton on the Law of Torts,* 5th ed., 1984, and the *Restatement (Second) of Torts* (1965). In addressing the question of the duty the two passengers owed to the motorcyclist the Appellate Division stated, *inter alia*:

> Specifically, "[f]oreseeability of the risk of harm is the foundational element in the determination of whether a duty exists." *J.S. v. R.T.H.*, 155 *N.J.* 330, 337 (1998); *Williamson v. Waldman,* 150 *N.J.* 232, 239 (1997). Foreseeability, in turn, is based on the defendant's knowledge of the risk of injury. *Weinberg v. Dinger*, 106 *N.J.* 469, 484-85, (1987). A corresponding consideration is the practicality of preventing it. *J.S. v. R.T.H., supra,* 155 *N.J.* at 339-40; *Clohesy v. Food Circus Supermarkets, Inc.,* 149 *N.J.* 496, 516-20 (1997); *Hopkins v. Fox & Lazo Realtors*, 132 *N.J.* 426, 447 (1993). "When the defendant's actions are 'relatively easily corrected' and the harm sought to be presented is 'serious,' it is fair to impose a duty." *J.S. v. R.T.H., supra,* 155 *N.J.* at 339-40, (*citing Kelly v. Gwinnell*, 96 *N.J.* 538, 549-50, (1984)).

Even if the facts of this case did not support a finding that D.L. knew of the intended confrontation before arriving at the high school, it is clear from his own Statement that he heard and saw that a fight was occurring while he was sitting in his car, only 30 feet away. And he knew by then that his friends had sought out P.O. He was thus aware of the risk of harm to P.O. and perhaps others, and could easily have called the authorities if he did not wish to physically intervene. He did not, however, so much as make a quick call to 911. Consequently, it would not be unreasonable to find that D.L. breached the type of duty articulated in *Podias* and set forth above.

The Commissioner rejects petitioner's suggestion that D.L. should be excused from such liability because he did not expect much injury to occur. (Petitioner's Exceptions at 10) A finding of duty is based on objective standards, *i.e.*, what the 'reasonable person' would

expect. Under the circumstances established in this matter, it was foreseeable to D.L., if not already known to him, that a fight with P.O. was anticipated and did occur almost immediately after D.L.'s arrival at the high school. It is also clear from the witness accounts that the fight was so one-sided as to be reasonably characterized as an attack.

In summary, to the extent that the tort standards relied upon in *Podias* are even relevant to the instant matter, there is a good argument in this case that D.L. breached a legal duty to P.O. Accordingly, the Commissioner cannot find arbitrary and capricious the ALJ's finding that *Podias* does not help petitioner.

Exception 17: Petitioner now excepts to the ALJ's finding that the Verona Student Handbook's provisions concerning 'fighting' are applicable to the instant controversy. However, petitioner did not interpose any such objections at the beginning of the OAL hearing when respondent advised that the fighting provisions were used by respondent's administrators to evaluate D.L.'s infraction. T 24-25.

In addition, petitioner argues that the fighting provision only pertains to combatants in a fight. The text of the provision is: "Any student involved in fighting will be suspended. Where evidence shows that a student has attempted to defend himself or herself, administrative discretion will be exercised." Carrubba determined that D.L.'s behavior of bringing his friends to the altercation, doing nothing to stop it or call the authorities, and taking the actors away from the scene constituted 'involvement in fighting.' T 142. The ALJ found that determination to be reasonable, Initial Decision at 10, and the Commissioner cannot find that either Carrubba's conclusion or the ALJ's is arbitrary or capricious.

Finally, petitioner repeats the contention that the penalty imposed upon D.L. went beyond the matrix in respondent's Handbook. This argument was addressed in petitioner's first exception and will not be duplicated here.

In summary, it has been clear since July 2007, that respondent holds D.L. responsible for his involvement in the July 6, 2007 incident. The Commissioner will not disturb respondent's reasonable determination that D.L. was involved in the fight by virtue of his assistance to the other actors and his failure to take the simplest of measures to prevent the foreseeable harm that comes from such an attack.[8] Nor does the Commissioner see any justification in this case for interfering with respondent's discretion in interpreting and applying its disciplinary guidelines. Petitioner's seventeenth exception is rejected.

Exception 18: The substance of this exception has been covered almost entirely in the discussion of the previous exceptions. The Commissioner will here address only petitioner's argument that a phone call from D.L. to the authorities would not have helped "when the incident was so brief." Clearly, whenever a call to the authorities is made, there is uncertainty as to whether help will arrive in time. The notion that such a reality might be used as a justification for abdicating responsibility is troubling.

Exception 19: This exception contains petitioner's allegations that D.L. did not receive due process from respondent. This issue was examined in depth in pages 10-12 of the Commissioner's September 7, 2007, decision disposing of petitioner's emergent relief application. No material facts were offered at the OAL hearing that had not already been considered by the Commissioner at the time of the September 7 decision. Consequently, the Commissioner's conclusion that D.L. received the process he was due shall stand.

[8] The Commissioner is also mindful of Carrubba's testimony that D.L., by driving his friends away, hindered the investigation of the incident. T 151-52. As stated in *Podias, supra,* at 352-54, such aiding and abetting can impose upon the 'aider' a duty toward the victim of the main actor's misdeed.

Exception 20: Petitioner contends that the ALJ erred in finding that D.L. had breached his responsibilities as a human being, and that respondent was within its rights to impose a punishment for D.L.'s activities on July 6, 2007. Petitioner maintains that the ALJ invoked the concept of moral duty because no legal duty was violated by D.L.[9]

These issues were addressed in the discussion of petitioner's sixteenth and seventeenth exceptions and need not be reiterated here.

The Commissioner's Decision

The Commissioner finds no arbitrariness or unreasonableness in respondent's discipline of D.L. for his involvement in the incident that occurred on respondent's high school property on July 6, 2007, including actions taken immediately before and after the incident, and actions not taken. Accordingly, she adopts the Initial Decision, as supplemented herein, as the final decision in this matter, and dismisses the petition in its entirety.

IT IS SO ORDERED.[10]

COMMISSIONER OF EDUCATION

Date of Decision: March 7, 2008

Date of Mailing: March 10, 2008

[9] Exception 20 is incorrectly numbered as 21 in petitioner's submission dated February 4, 2008.

[10] 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.*