#411-09 (OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu6053-09_1.html)

A.S. on behalf of minor child P.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PINELANDS REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner initially filed a complaint in Superior Court on behalf of P.P., challenging his five-day suspension – under the "zero tolerance" drug policy of respondent school district – for having an over-the-counter allergy pill in his backpack. The incident occurred in April 2008, and the complaint was filed in March 2009. The first count of the complaint alleged that respondent's "zero tolerance" policy went beyond the parameters of the school law statutes and regulations, making it *ultra vires*. This count was dismissed by the court for untimeliness. The second count alleged that P.P.'s procedural rights under Article 1, Paragraph 1 of the New Jersey Constitution were violated by the Board's actions, and this count was transferred to the Commissioner on the premise that she has primary jurisdiction. The matter was transmitted to the Office of Administrative Law (OAL) for hearing, and the respondent Board moved for dismissal based on untimeliness.

The ALJ found that: though the constitutionality of a board policy may be addressed at any time, there must be some definitive date when the cause of action accrued; the zero tolerance drug policy in the present case is being challenged as applied to Board action taken in April 2008; the ninety-day deadline for filing an appeal of P.P.'s suspension with the Commissioner expired in August 2008, and petitioners did not file their complaint in Superior Court until March 2009; the timeliness of the complaint in Superior Court has no bearing on its timeliness before the Commissioner under *N.J.A.C.* 6A3-1.3(i); and the ability to challenge the constitutionality of the policy in Superior Court survives the dismissal of the case before the Commissioner. The ALJ concluded that respondent's motion to dismiss should be granted, and ordered the case dismissed before the Commissioner of Education.

Upon a full and independent review, the Commissioner found that petitioner's claim – that respondent's zero tolerance drug policy, as applied to P.P., was unconstitutional – was untimely. Thus there was no jurisdictional basis for the Commissioner to adjudicate same. As to petitioner's claim that the zero tolerance policy is facially unconstitutional, the Commissioner concluded that administrative agencies lack jurisdiction to decide such claims and that petitioner could re-file same in Superior Court.

OAL DKT. NO. EDU 6053-09
AGENCY DKT. NO. 112-6/09

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On April 17, 2008, allergy medication was found in the backpack of P.P., petitioner's minor child,[1] by the principal of the junior high school that P.P. attended at the time. Pursuant to respondent's zero-tolerance drug policy,[2] P.P. was subsequently suspended from school for five days and notice of the suspension was provided to A.S. by letter dated April 28, 2008.

Petitioner filed a complaint in New Jersey Superior Court on March 9, 2009, asking for A)"compensatory damages," B) "a declaration that defendant's 'zero tolerance' drug policy, both on its face and as applied to P.P., violates the federal and state constitutions," C) "a permanent injunction against a 'zero tolerance' drug policy" by respondent, D) the expungement from P.P.'s school records of any reference to or information pertaining to the suspension,

[1] In the complaint, P.P. is the named plaintiff but is described as a minor. If P.P. is indeed a minor, A.S. must be the petitioner in this matter.

[2] The Commissioner was unable to find, in the record provided to her, a copy of the policy.

E) "full restoration of P.P. to all school activities from which he may have been excluded as a result of the suspension," and F) attorney's fees and costs, pursuant to *N.J.S.A.* 10:6-2(f).[3]

The causes of action invoked in the complaint were set forth in two counts. The first count was brought as an action in lieu of prerogative writ, alleging that respondent's zero tolerance policy went beyond the parameters of the school law statutes and regulations, making it *ultra vires.* The court dismissed that count for untimeliness. The second count alleged that P.P.'s procedural rights under Article I, Paragraph 1 of the New Jersey Constitution were violated by "[d]efendant's actions." This count was transferred to the Commissioner of Education on the premise that the Commissioner had primary jurisdiction.

The complaint was transferred to the Commissioner without amendment. The Commissioner transmitted it as a petition to the Office of Administrative Law (OAL) for a hearing, and respondent moved for its dismissal for untimeliness pursuant to *N.J.A.C.* 6A:3-1.3(i).

Based upon the apparently undisputed fact that petitioners were advised of the suspension on or about April 28, 2008 but did not challenge it until March 9, 2009 – over ten months later – the Administrative Law Judge (ALJ) found that the appeal of the suspension was indeed untimely under the terms of *N.J.A.C.* 6A:3-1.3(i), which provides that:

> [t]he 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, which is the subject of the requested contested case hearing. This rule shall not apply in instances where a specific statute, regulation or court order provides for a period of limitation shorter than 90 days for the filing of a particular type of appeal.

[3] The latter citation is to a provision of New Jersey's Law Against Discrimination.

Consequently, the ALJ concluded that the Commissioner was without jurisdiction to adjudicate the matter.[4] Further, the ALJ rejected petitioner's argument that the timeliness of the second count of the Superior Court complaint required the Commissioner to accept the petition as timely. The Commissioner concurs with the ALJ's determination that the timeliness of a complaint under the superior court rules, in and of itself, has no bearing upon the timeliness of a petition under the Department of Education's regulations.

The weightier of petitioner's arguments in the OAL and in his exceptions appears to relate to the treatment of constitutional claims. More specifically, petitioner asserts that the 90-day time limitation for appeals to the Commissioner must yield to the principle that a constitutional challenge to a school policy may be brought at any time. Petitioner does appear to implicitly concede in his exceptions that an appeal of the application of respondent's drug policy to P.P. is subject to time limitations. However, he contends that there is no time limit regarding his entitlement to bring to the Commissioner a facial challenge to the policy.

The Commissioner must disagree. Administrative agencies generally lack jurisdiction to decide purely constitutional claims. *See, e.g., Valent v. New Jersey State Board of Education et al.*, 114 *N.J. Super.* 63, 69 (Ch. Div. 1971) ([I]n matters of substantial constitutional dimension the Executive and the Legislature are not the determining or final arbiters of what is and what is not constitutional**.** Since *Marbury v. Madison*, 1 *Cranch* 137, 5 *U.S.* 137, 2 *L. Ed.* 60 (1803), this obligation is imposed upon the judiciary, not the executive or legislative branches.)

See also, M.C., a minor child, by his parent, P. H. v. Bergenfield Board of Education, OAL Dkt. No. EDU 7381-00, Agency Reference No. 222-6/00, Initial Decision, May 25, 2001, p. 57-58, *citing* Lefelt, 37 *New Jersey Practice*, 107, § 3.8 (2000):

[4] The appropriateness of filing petitions expeditiously is underscored by the fact that P.P. has aged out of the school from which he was suspended for five days.

> Pure legal questions are exclusively reserved for the courts. Accordingly, an agency has no power to determine the constitutionality of a statute on its face. Agencies may not strike down statutes as being unconstitutional. Therefore, agencies are thought to be without jurisdiction to consider facial constitutional challenges to rules since these are also pure legal questions. . . [*Id.* at 108 (citation omitted).]
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> When a facial challenge to a statute is begun before an administrative agency, the constitutionality of the statute cannot be decided. The agency may, however, either express its opinion on the constitutionality question or simply note its lack of jurisdiction to determine the matter. When a rule is facially challenged, by analogy the agency would similarly be precluded from declaring the rule unconstitutional. No administrative agency is authorized to decide pure legal questions.
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> [*Id.* at 109.]

Further, "in litigation to resolve purely constitutional claims, . . . although an agency may base its decision on constitutional considerations, such legal determinations do not receive even a presumption of correctness on appellate review. *Abbott v. Burke*, 100 *N.J.* 269, 298-99, (1985) (citations omitted).

The Commissioner can, as the Appellate Division did in *Reed v. Attorney General of the State of New Jersey, et al.*, 195 *N.J. Super*. 172, 176 (App. Div. 1984), understand and empathize with the frustration of a litigant – in an action designed to test the facial constitutionality of a policy – who is sent to a forum where that issue cannot be decided. However, the fact remains that administrative agencies do lack jurisdiction to decide constitutional claims (*see, also, Paterson Redevelopment Agency v. Schulman*, 78 *N.J.* 378, 388 (1979), *cert. den. sub nom. Schulman v. Paterson Redevelopment Agency*, 444 *U.S.* 900 (1979)), and the Commissioner of Education has uniformly held this to be so.

Since Count II of petitioner's original complaint was not dismissed with prejudice, he may re-file a facial constitutional challenge to respondent's zero tolerance drug

policy in Superior Court. However, respondent's motion to dismiss the instant petition in its entirety is granted.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: December 16, 2009

Date of Mailing: December 16, 2009

[5] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36.