

New Jersey Commissioner of Education**Final Decision**

L.R., on behalf of minor child, J.R.,

Petitioner,

v.

New Jersey Department of Education, Office of
Special Education,

Respondent.

Synopsis

Petitioner alleged that the respondent, New Jersey Department of Education, Office of Special Education (OSEP), violated her rights under the New Jersey Pupil Public Records Act (NJPPRA) for sending electronic correspondence regarding J.R.'s file to a person not involved in this matter. Petitioner demanded an order requiring respondent to: recover or destroy the disclosed records at issue; institute a system-wide investigation into the handling of student records; and review and correct respondent's policy on the dissemination of student records. OSEP filed a motion to dismiss.

The ALJ found, *inter alia*, that: the issue for determination here is whether petitioner is entitled to relief from OSEP under the NJPPRA for wrongful dissemination of student records, or whether respondent should be granted summary decision; petitioner claimed that the NJPPRA, and specifically *N.J.S.A.* 18A:36-19, provides him with a cause of action against OSEP due to its inadvertent carbon copying of an unrelated party on an email related to student J.R.; respondent claimed that *N.J.S.A.* 18A:36-19 gives petitioner a cause of action against the school district, but not against OSEP, and therefore its motion to dismiss should be granted; and *N.J.S.A.* 18A:36-19 does not provide a private cause of action against the State or OSEP, *State v. J.S.G.*, 456 N.J. Super. 87, 105 (App. Div. 2018). The ALJ concluded that petitioner has failed to state a claim upon which relief can be granted. Accordingly, the ALJ granted respondent's motion to dismiss.

Upon review, the Commissioner concurred with the ALJ's findings and conclusion. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the matter 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.

April 22, 2019

OAL Dkt. No. EDU 05087-18
Agency Dkt. No. 39-2/18

New Jersey Commissioner of Education

Final Decision

L.R., on behalf of minor child, J.R.,

Petitioner,

v.

New Jersey Department of Education, Office of
Special Education,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon such review, the Commissioner agrees with the Administrative Law Judge (ALJ) that the petition fails to state a cause of action upon which relief can be granted against respondent because the New Jersey Pupil Records Act, *N.J.S.A.* 18A:36-19, does not provide a private right of action. *State v. J.S.G.*, 456 N.J. Super. 87, 105 (App. Div. 2018), *certif. denied*, ___ N.J. ___ (2019).¹ Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter – for the reasons expressed therein – and the petition is hereby dismissed.

IT IS SO ORDERED.²

COMMISSIONER OF EDUCATION

Date of Decision: April 22, 2019
Date of Mailing: April 22, 2019

¹ This decision denying certification was filed on March 9, 2019, and is therefore not yet published in the New Jersey Supreme Court Reporter.

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

GRANTING RESPONDENT'S
MOTION TO DISMISS

OAL DKT. NO. EDU 05087-18

AGENCY DKT. NO. 39-2/18

L.R. ON BEHALF OF MINOR CHILD, J.R.,

Petitioner,

v.

**DEPARTMENT OF EDUCATION,
OFFICE OF SPECIAL EDUCATION,**

Respondent.

Jamie Epstein, Esq., for petitioner

Caroline Jones, Deputy Attorney General, for respondent Department of Education (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record closed: January 25, 2019

Decided: March 5, 2019

BEFORE **JEFFREY N. RABIN,** ALJ:

STATEMENT OF THE CASE

Petitioner, L.R. on behalf of minor child, J.R., has alleged that respondent, the New Jersey Department of Education, Office of Special Education (OSEP), violated her rights under the New Jersey Pupil Records Act (NJPR) for sending electronic

correspondence regarding J.R.'s file to a person not involved in this matter. Petitioner has requested an order requiring respondent to: recover or destroy the wrongfully disclosed records; institute a system-wide investigation into the handling of student records; and review and correct its policy on the dissemination of student records.

PROCEDURAL HISTORY

On or about December 6, 2017, petitioner filed a petition with OSEP's Bureau of Controversies and Disputes (BCD), claiming OSEP had wrongfully disseminated electronic correspondence concerning student J.R. On or about February 8, 2018, OSEP requested additional time to investigate petitioner's claim, and petitioner responded by filing a motion with BCD, on or about March 1, 2018, seeking a default judgement for OSEP's failure to respond to his petition. On March 27, 2018, OSEP filed a motion to dismiss with BCD. On April 6, 2018, this matter was transmitted to the Office of Administrative Law (OAL), where it was filed on April 20, 2018, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. A telephone prehearing was held on June 6, 2018.

Oral argument on the parties' motions was held at OAL on October 24, 2018. Additional information was required and OSEP filed a supplemental letter brief on November 30, 2018. Petitioner did not submit a supplemental brief.³ A second oral argument was heard at OAL on January 25, 2019, and the record closed on that date.

FACTUAL DISCUSSION AND FINDINGS OF FACT

Based upon the petitioner's filing, respondent's briefs, and the two oral arguments, and for the purpose of deciding the motion for summary decision, I **FIND** the following:

³ Respondent's submission of November 30, 2018, reiterated its motion to dismiss from March 27, 2018, and has been treated as if respondent had filed a motion to dismiss with OAL as of November 30, 2018. Petitioner has not filed any motions or briefs with OAL. On January 26, 2018, counsel for petitioner submitted another verified petition seeking relief, with the Commissioner of the Department of Education and not OAL, which was not accompanied by a legal brief setting out the basis for petitioner's claims.

1. Petitioner, L.R., resides in Camden, NJ, with her minor child, student J.R. J.R. attends school in the Camden School District. J.R. has been classified as autistic.
2. On October 31, 2017, respondent sent an email regarding a special education order concerning J.R., to an attorney in Philadelphia, who responded on November 6, 2017, that the email had been inadvertently sent to him.
3. Respondent OSEP had provided no evidence that it had taken any remedial action to protect, secure or destroy the wrongfully disclosed email.
4. Petitioner had provided no evidence that the email of October 31, 2017, was a protected, confidential student record.⁴

LEGAL ANALYSIS AND CONCLUSION OF LAW

The issue is whether petitioner is entitled to relief from respondent OSEP under the NJPRA for a wrongful dissemination of student records, or whether respondent should be granted a summary decision in its favor.

Petitioner has claimed that the New Jersey Pupil Records Act (NJPRA), and specifically N.J.S.A. 18A:36-19, should provide him with a cause of action against OSEP due to its inadvertent carbon copying of an unrelated party on an email related to student J.R. Respondent has claimed that N.J.S.A. 18A:36-19 gave petitioner a cause of action against the school district but not against OSEP, and that therefore its motion to dismiss should be granted.

Summary decision may be granted when the papers and discovery that have been filed show that there is no genuine issue as to any material fact challenged and

⁴ Petitioner has represented to this tribunal that another case filed on behalf of student J.R., L.R. v. Camden City Public School District, 452 N.J. Super. 56 (App.Div. 2017), had been granted certification by the New Jersey Supreme Court, and would further define what is a protected, confidential school record.

the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). No evidentiary hearing need be held if there are no disputed issues of material fact. Frank v. Ivy Club, 120 N.J. 73, 98, cert. denied, 498 U.S. 1073 (1991). “When the evidence is so one-sided that one party must prevail as a matter of law, the [tribunal] should not hesitate to grant summary [decision].” Della Vella v. Bureau of Homeowner Prot., New Home Warranty Program, CAF 17020-13, Initial Decision (March 31, 2014), adopted, Comm’r (May 12, 2014), <http://njlaw.rutgers.edu/collections/oal/> (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995)).

Further, the non-moving party has the burden “to make an affirmative demonstration . . . that the facts are not as the movant alleges.” Spiotta v. William H. Wilson, Inc., 72 N.J. Super. 572, 581 (App.Div. 1962). This requirement, however, does not relieve the moving party from having to initially establish in its moving papers that there was no genuine issue of fact and that they were entitled to prevail as a matter of law. It is the “movant’s burden to exclude any reasonable doubt as to the existence of any genuine issue of fact.” Conti v. Board of Education, 286 N.J. Super. 106 (App. Div. 1995) (quoting Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954)).

Respondent is considered the moving party in its motion to dismiss. It has asserted that it is entitled to prevail as a matter of law because there is no cause of action under the NJPRA allowing a student to seek relief from the State of New Jersey through OSEP for the wrongful dissemination of records. Petitioner has not provided a legal brief for its position, but in its second petition to the Commissioner of Education, petitioner relied on the NJPRA, N.J.S.A. 18A:36-19. (Petitioner’s Verified Petition dated January 26, 2019.)

However, N.J.S.A. 18A:36-19 does not provide a private cause of action against the State or OSEP. Respondent correctly cited to State v. J.S.G., 456 N.J. Super. 87, 105 (App.Div. 2018) for the holding that the NJPRA does not provide a private right of action. (“Like FERPA⁵, the NJPRA and its governing regulations merely provide

⁵ The Family Educational Rights and Privacy Act, 20 U.S.C. section 1232g.

administrative remedies for a violation and do not provide for a private right of action or suppression.”) See also L.S. v. Mount Olive Bd. Of Education, 765 F.Supp. 2d 648 (D.NJ. 2011)(holding that “NJPRA, FERPA . . . do not provide for a private right of action.) Rather, the NJPRA permits parents to challenge the content and handling of student records by a school district, allowing them to seek to expunge inaccurate or irrelevant information from or insert additional correct information into student records, or request a stay of disclosure by a school district.

The limited administrative remedies available to petitioner under NJPRA are only available against school districts, because school districts are responsible for creating and maintaining student records under NJPRA. See N.J.A.C. 6A:32-7.1, 7.3 and 7.4. In the within matter, the email in question was created by OSEP, not the Camden City School District. Petitioner has not sought to avail itself of any remedies against the school district in this matter.

Further, petitioner has not provided any evidence that the email in question met any existing definition of a protected, confidential student record under NJPRA, nor that the email had any statutory or regulatory protections.

Accordingly, I **FIND** that petitioner has failed to state a claim upon which relief can be granted, because there is no cause of action against OSEP under NJPRA. This is sufficient to hold that respondent’s motion to dismiss must be granted.

It must be noted that petitioner’s counsel, in his oral arguments on October 24, 2018, and January 25, 2019, claimed that there were validity problems with how the pertinent statute and regulations regarding student records were written. Petitioner claimed that NJPRA and its associated regulations were in fact written by OSEP, which is why no cause of action was created against OSEP. Petitioner argued for this tribunal to apply a standard of fairness to this issue. Petitioner asked for a finding that, despite the black letter language of NJPRA and the holding of the various courts, respondent be ordered to locate and destroy the email in question, and that OSEP conduct a system-wide investigation into how student records are handled and implement remedial measures to address the problem.

OAL is not the proper forum for a litigant to challenge the validity of a statute or regulation. “The Appellate Division, and not the OAL, is the proper forum in which to challenge the facial validity of an administrative regulation specifically where the matter as here, is purely a question of law.” Wendling v. New Jersey Racing Comm’n, 279 N.J. Super 477, 484; [quoting Christian Bros. Inst. v. No. N.J. Interschol. League, 86 N.J. 409, 416, (1981)]. Further, “normally in administrative proceedings, petitioners can attack the constitutionality of rules as applied, but may not mount facial attacks.” 37 New Jersey Practice, Admin. Law & Practice, § 3.8 (Steven L. Lefelt, Anthony Miragliotta & Patricia Prunty) (2d ed. 2000).

Petitioner has, in essence, made a facial attack on the constitutionality of both the statute and implementing regulations. These are purely questions of law which should be addressed by the Appellate Division pursuant to the court in Wendling. I therefore **CONCLUDE** that the OAL is not the proper forum for the consideration of those issues. For the within matter, it must be accepted that NJPRA and the related regulations do not provide petitioner with a cause of action against OSEP.

Accordingly, as petitioner has set forth no cause of action against respondent, this matter is ripe for summary decision.

ORDER

I hereby **ORDER** that respondent’s motion to dismiss is **GRANTED**, and this matter is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.


This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless

such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 5, 2019

DATE



JEFFREY N. RABIN, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

JNR/dw

APPENDIX

EXHIBITS

For petitioner:

1. Petitioner's Verified Petition, dated January 26, 2019

For respondent:

1. Motion for Summary Decision and brief, dated March 27, 2018
2. Brief, dated November 30, 2018