EDU #5449-00N
C # 8-01
SB # 6-01

L.H. AND L.H., on behalf of minor child, H.R., :

PETITIONERS-APPELLANTS, :

STATE BOARD OF EDUCATION

V. :

DECISION

BOARD OF EDUCATION OF THE :
CITY OF RAHWAY, UNION COUNTY,
COMMISSIONER DAVID C. HESPE :
AND THE STATE BOARD OF EDUCATION,[1]
:

RESPONDENTS-RESPONDENTS.
_____ :

Decided by the Commissioner of Education, January 8, 2001

Remanded by the State Board of Education, June 6, 2001

Decision on remand by the Commissioner of Education, November 18, 2002

For the Petitioners-Appellants, Education Law Center (David R. Giles, Esq., of Counsel)

For the Respondents-Respondents Commissioner David C. Hespe and the State Board of Education, Michael C. Walters, Deputy Attorney General (Peter C. Harvey, Acting Attorney General of New Jersey)

Petitioners in this matter are the parents of a classified special education student, H.R., who was expelled by the Rahway Board of Education (hereinafter "Board" or "Rahway Board") on the basis of an incident that occurred on October 5, 1999, at which

[1] In a Stipulation of Settlement approved by the Commissioner of Education, the appellants agreed to dismiss with prejudice the claims they had raised against the Rahway Board. Thus, the current proceedings involve only the State respondents.

time the student allegedly was in possession of a "weapon" on school property.[2] Following the expulsion of H.R., petitioners challenged the Board's action by filing a petition of appeal with the Commissioner of Education asserting that the Board had violated their son's rights under the New Jersey and United States Constitutions. In their petition, the petitioners also claimed that the Commissioner and the State Board of Education had violated their son's right to a thorough and efficient education under the New Jersey Constitution by failing to set uniform standards to guide school districts in imposing long-term suspensions and expulsions.

Following transmittal of the case to the Office of Administrative Law, the Administrative Law Judge ("ALJ") raised the question of whether the matter should have been filed as a request for a due process hearing pursuant to the Individuals with Disabilities Education Act ("IDEA"), rather than under the Commissioner's jurisdiction pursuant to N.J.S.A. 18A:6-9 (Commissioner has jurisdiction over all controversies and disputes arising under the education laws). Counsel for the petitioners specifically advised the ALJ that, although the petitioners were cognizant of H.R.'s status as a classified special education student, they did not wish to invoke the special provisions of statute and regulation governing the process for disciplining classified students.[3]

On October 6, 2000, counsel for the petitioners submitted to the ALJ a Stipulation of Settlement and Dismissal of Claims Against Rahway Board of Education executed by herself and the counsel for the Rahway Board. Pursuant to the terms of the settlement,

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[2] The "weapon" at issue was an 18 inch miniature baseball bat.

[3] We note that the protections afforded classified special education students subject to disciplinary action are, under both our regulations and the IDEA, greater than those applicable to non-classified students. See N.J.A.C. 6A:14-2.8.

which was dated July 20, 2000,[4] H.R. was to be reinstated to the educational program from which he had been removed, his record was to be expunged, the Board was to investigate the availability of compensatory vocational education services to make up for the vocational program H.R. had missed, and the Rahway Board would withdraw the criminal charges against him. In return, the petitioners agreed to dismiss with prejudice the claims they had raised against the Board and to release it from all other claims they might have arising from the incident and expulsion.

On November 14, 2001, the ALJ issued his initial decision in the matter. On the basis of motions for summary decision, the ALJ dismissed the matter in its entirety, concluding that it was moot. The lynchpin of the ALJ's determination was that the "practical effect of the settlement reached between the petitioners and the [Rahway Board] is that the student is no longer expelled and his record is clear." Initial Decision, slip op. at 5.

The Commissioner adopted the ALJ's determination as his final decision in the matter.

Petitioners appealed to the State Board. Counsel for the petitioners contended that the matter was not moot as to the petitioners' claims against the Commissioner and the State Board. In this respect, counsel argued that the constitutionality of zero tolerance policies and the responsibility of the State respondents to issue uniform guidelines for the discipline of students are of such great public importance that settlement of the petitioners' claims against the Rahway Board should not render the

[4] In her October 6, 2000 cover letter submitting the Stipulation of Settlement to the ALJ, counsel for the petitioners indicated that the parties had settled their dispute in July 2000, at which time she had prepared the Stipulation and sent it to the counsel for the Board, but that she had not received an executed copy from the Board's counsel until October.

claims against the State respondents moot. Counsel for the petitioners also sought to supplement the record in the matter with comments submitted to the Department of Education by the Education Law Center, which is representing the appellants in this case, on discussion level regulations on Programs to Support Student Development and the response of Department staff thereto.

On June 6, 2001, the State Board of Education remanded the matter to the Commissioner since there was no indication in the record that the settlement between petitioners and the Rahway Board had been properly approved in conformity with regulatory requirements. The State Board retained jurisdiction over the appeal, including petitioners' motion to supplement the record, but placed the matter in abeyance pending the Commissioner's decision with respect to the settlement.

By decision of September 18, 2002, the Commissioner approved the settlement terms and, accordingly, dismissed the Rahway Board from the matter. Then, pursuant to our decision of June 6, 2001, the Commissioner returned the matter to the State Board for resolution of the issues remaining between petitioners and State respondents.

Petitioners' remaining claim is simple and straightforward. They claim that the State respondents had a responsibility to issue "uniform guidelines" for the discipline of students and, because they had not done so, H.R.'s constitutional rights to a thorough and efficient education and equal protection of the law were violated by the Rahway Board when it disciplined him pursuant to a "zero tolerance" policy. They argue that even though their claim against the Rahway Board was resolved by the settlement approved by the Commissioner pursuant to our remand, their claim against the State respondents is not moot because the questions of the State respondents' responsibility

to issue "uniform guidelines" for the discipline of students and the constitutionality of "zero tolerance" policies are of great public importance and impact the right to a public education. They further argue that the issues they are raising will escape review if this appeal is dismissed for mootness because the State respondents will not be named as parties in the vast majority of student discipline cases and, even if named, will be dismissed once the underlying dispute between the student and the school district is resolved.

After considering the issue, we find that the appeal in this matter is moot. Generally, questions that have become academic prior to review are not proper subjects for judicial determination. E.g., Oxfeld v. State Board of Education, 68 N.J. 301 (1975). In this instance, H.R. has been reinstated and his record has been expunged pursuant to the settlement between petitioners and the Rahway Board. Hence, there is no longer any dispute regarding H.R.'s ability to attend school in the district. That being the case, there is no relief that can be afforded to H.R. and the questions being raised by petitioners are academic at this point.

Furthermore, while the issues being raised are important, we reject petitioners' contention that they will escape review. In this respect, we reiterate that the proper course to follow in order to obtain the promulgation of regulations is not agency adjudication. P.H. and P.H., on behalf of minor child, M.C. v. Board of Education of the Borough of Bergenfield, decided by the State Board of Education, July 2, 2002. Rather, as provided by the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., the proper course for seeking the adoption of regulations by an administrative agency is to petition the agency to adopt a new rule according to the procedures prescribed by such agency.

N.J.S.A. 52:14B-4(f). See N.J.A.C. 6A:6-4, codifying the procedures to be followed in filing a petition for rulemaking with the Department of Education. In the event that a party is dissatisfied with the disposition of his petition or with regulations adopted as a result of such petition, his recourse is to appeal to the Appellate Division. E.g., In re Adoption of N.J.A.C. 9A:10-7.8(b), 327 N.J. Super. 149 (App. Div. 2000). See In re 1999-2000 Abbott v. Burke Implementing Regulations, 348 N.J. Super. 382 (App. Div. 2002). Review of the issues being raised by petitioners would be assured if they followed this course.[5]

Therefore, for the reasons set forth herein, we deny petitioners' motion to supplement the record and dismiss the appeal in this matter.

April 2, 2003

Date of mailing _____

[5] We note that the Department of Education is currently in the process of developing regulations pertaining to student discipline. A discussion paper was approved by the State Board on December 18, 2002, and the Department is in the process of soliciting comments from the public.