INDEX No. 07-023023

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

P R E S E N T:

Hon. Gary J. Weber
Acting Justice of the Supreme Court

MOTION DATE September 10, 2007
Motion Seq. # 001-MG

In the Matter of the Application of C.E., as Parent of and Natural Guardian of L.E., an infant under the age of 14 years,

Petitioner

for an Order pursuant to Article 78 of the Civil Practice Law and Rules

-against-

DENNIS RYAN, as President of the Board of Education of the Deer Park Union Free School District,

Respondent

WILLIAM A. GOMES, ESQ.
ATTORNEY FOR THE PETITIONER
59 CLINTON AVENUE
ROCKVILLE CENTRE, NY 11570

COOPER, SAPIR & COHEN, PC
BY: ROBERT E. SAPIR, ESQ.
ATTORNEYS FOR RESPONDENT
560 BROADHOLLOW ROAD, SUITE 210
MELVILLE, NY 11747

The Petitioner, by Notice of Petition and Petition dated August 10, 2007, has made application to this Court directing the respondent to rescind and annul the determination suspending the infant petitioner for five days, and directing the respondent to expunge the suspension from the petitioner's records pursuant to CPLR Article 78. The Petitioner has submitted a Memorandum of Law in Support of the Petition received on August 22, 2007. The Respondent has submitted a Verified Answer dated September 11, 2007, and a Memorandum of Law. Petitioner filed a Reply Memorandum of Law with the Court on October 23, 2007.

DECISION

Respondent's Affirmative Defenses

This proceeding was commenced on August 13, 2007 within four months of the final determination made by the Respondent, the proceeding is, therefore, timely, and the second affirmative defense is without merit. The Respondent argues that the Court should not decide this case based upon the application of the doctrine of primary jurisdiction, this is incorrect and the first affirmative defense is without merit. ***See Mandell v. Board of Education, 243 AD2d 479 (2nd Dept. 1997)(Whether or not the petitioner possessed a knife on school premises was not an issue solely within the special competence of the Commissioner of Education, doctrine of primary jurisdiction inapplicable)*** The Respondent contends that Petitioner failed to exhaust her administrative remedies. The respondent contested the matter at the Superintendent's hearing and then appealed to the Board of Education. Her administrative remedies were thus exhausted. The third affirmative defense is, therefore, without merit. The Respondent contends that the Petitioner failed to file a notice of claim and contends it is a condition precedent to this Article 78 proceeding. This is incorrect. The fourth affirmative defense is without merit. ***See Piggone v. Board of Education, 92 AD2d 106 (2nd Dept. 1983).*** The fifth affirmative defense alleges that the Petitioner has failed to state a cause of action upon which relief may be granted. This proceeding has been brought to review an

administrative determination pursuant to CPLR Article 78. This review is authorized by law and the fifth affirmative defense is without merit. ***See Mandell supra.***

On March 12, 2007, L.E., a 5th grade student enrolled in the Deer Park U.F.S.D. was found to be in possession of a pocket knife. The Respondent has not submitted a transcript of the Superintendent's hearing that was recorded, ***See CPLR 7804(e),*** but Respondent does not contest that the subject knife was a miniature Swiss Army knife with tweezers, scissors, a nail file, a toothpick and a blade 1 ½ inches in length. After the Superintendent's hearing the Respondent determined that "While I do not believe it was L.E.'s intention to inflict injury or harm, the school district cannot ignore the fact that a knife was brought to school and created a danger to students."

The Five Day Suspension

L.E. was suspended from school for a period of five days with the suspension to commence on March 13, 2007, the day following the alleged infraction. The due process to be accorded a student prior to the imposition of a five day suspension is provided in ***Education Law § 3214 (3)(b).*** A letter dated March 12, 2007 addressed to L.E.'s parents put them on notice that L.E. "***is*** suspended out of school for five days." ***emphasis added.*** This same letter advised the parents that they could request an informal conference with the principal. ***Education Law § 3214 (3)(b)*** provides that notice and an opportunity for an informal conference must be provided prior to a suspension unless the school makes a determination prior to the imposition of this suspension that the pupil's presence in the school poses a continuing danger to persons or property or an ongoing threat of disruption to the academic process. In this instance no such determination was made. In fact, the ultimate determination of the Superintendent was entirely to the contrary. The parental notice of their right to an informal conference was insufficient because it did not inform the parents that such a conference was to determine if a suspension would be imposed. The letter informed the parents that the suspension was a ***fait accompli.*** The parents had not been informed that such a conference could prevent the imposition of the five day suspension.

Respondent contends that Petitioner cannot challenge the five day suspension because Petitioner did not appeal the five day suspension to the Board of Education as provided by district policy. However, Respondent proceeded with a Superintendent's hearing on March 15, 2007, and this occurred prior to the expiration of the 10 day period of limitations[1] to appeal the five day suspension contained in the Respondent's policy. The Respondent's election to proceed with ongoing administrative fact finding in a Superintendent's hearing reflects that Respondent had not completed its chosen course of action and an appeal to the Board of Education would simply waste everyone's time. Under these circumstances, the determination was not final and the Respondent itself was advancing an administrative process that was to be exhausted, and, ultimately, was exhausted when Petitioner appealed to the Board of Education after the Superintendent's hearing.

Obviously, the fact that the suspension has already occurred moots the question of whether there should be a suspension, but it does not resolve whether the student's permanent record should continue to contain a record of a suspension if, in fact, such a suspension was improper. ***See Swinton v. Safir, 93 NY2d 758.***

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[1]It is doubtful that a ten day period of limitations to perfect an appeal before the Board of Education comports with due process such that this could stand as a bar to judicial review. This is particularly the case when the notice of suspension did not afford notice to the parents of this right to appeal, or inform the parents of this period of limitations. Understandably, an appeal does not stay the imposition of the suspension from school, and consequently any appeal would be directed to protecting the student's reputation as affected by his school records. A requirement that a notice of appeal must be filed within ten days, when a parent is informed of such requirement would be appropriate. There is no justification for the 10 day period of limitations and any attempt to use such a period of limitations to bar administrative review, and, ultimately, judicial review upon exhaustion grounds, must fail.

The Superintendent's Hearing

On March 15, 2007 a Superintendent's hearing was held to determine whether a longer suspension was appropriate under the circumstances as were to have been determined at this hearing. At the hearing L.E., represented by counsel, did not dispute that she possessed the pocket knife, but argued that it was not a prohibited weapon . The Superintendent, after giving consideration to the fact that L.E. did not have any prior incidents of a disciplinary nature, and was regarded as a good student, determined that L.E. had violated district policy, but elected not to continue the suspension beyond the original 5 days. L.E. appealed this determination to the Board of Education which upheld the decision of the Superintendent of Schools on April 16, 2007.

The question of whether the Petitioner's possession of this pocket knife constituted possession of a weapon as defined by the Respondent's policy is determinative of the propriety of the district action both in suspending the Petitioner and in maintaining a record that Petitioner had violated this policy.

The District's Policy

The District's policy states "Weapon" means a gun, pistol, revolver, shotgun, rifle, machine gun, disguised gun, dagger, dirk, razor, stiletto, switchblade knife, gravity knife, metal knuckle knife, box cutters, cane sword, electronic dart gun, Kung Fu star, electronic stun gun, laser pointer, pepper spray or other noxious spray, explosive or incendiary bomb, or other dangerous instrument that can cause physical injury or death.

The Respondent does not now contend that the pocket knife with a blade 1 ½" in length constituted any of the knives specified in its policy, but instead contends it was a "dangerous instrument that can cause physical injury or death." There are numerous cases in this State that demonstrate the broad spectrum of articles that can constitute a "dangerous instrument." ***People v. Vasquez, 88 NY2d 561(a wad of paper towels bound by a rubber band was a dangerous instrument); People v. Galvin, 65 NY2d 761 (sidewalk was a dangerous instrument); People v. Izquierdo, 292 AD2d 247 (car door was a dangerous instrument); People v. Wade, 232 AD2d 290 (the wire handle of a fly swatter was a dangerous instrument); People v. Hansen, 267 AD2d 474 (boots were a dangerous instrument)*** All of these prosecutions were successful and the instrumentality which was considered met the definition because the Penal Law contained the qualification that, to be a dangerous instrument the article must be capable of causing injury by virtue of the manner in which it is used or threatened to be used. Here, no such condition, only mere possession, is alleged. The district's policy, with respect to definition of what constitutes a dangerous instrument as was done here, is unconstitutionally vague as it fails to give notice of the prohibited conduct, and is overly broad as to vest unlimited discretion in school authorities. Based upon the foregoing cases, any student wearing boots would be in possession of a dangerous instrument under the Respondent's policy if someone in authority should arbitrarily decide to make it an issue. The Respondent's policy, as applied here, fails to provide a meaningful definition of "dangerous instrument." ***See People v. Munoz, 9 NY2d 51***

To be certain, the Respondent could have adopted a policy that all knives were prohibited from school grounds, ***see NY Education Law 3214(2-a)(a).*** Instead, it chose to prohibit only a subset of specific types of knives. Both Petitioner and Respondent agree this list did not include the pocket knife at issue.[2] Under these circumstances, there was no evidence that this ten-year-old child violated the Respondent's policy since possession of <u>all</u> knives is not prohibited and no one claims L.E. harbored bad intentions with respect to this tool. Accordingly, the petition is granted as provided more specifically below.

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[2]Respondent would be well advised to revisit its policy in view of the amendment to Education Law 3214 that is due to become effective on June 30, 2008.

ORDER

ORDERED that Petition (Mot. #001) is granted; and it is further

ORDERED that the Respondent is directed to expunge from the Petitioners record all references to Petitioner's alleged violation of the District Policy that is the subject of this proceeding, including but not limited to the five day suspension imposed, the Superintendents Hearing, the Appeal to the Board of Education and this special proceeding. In short, with respect to this incident, the Petitioner's record should appear the same as it did prior to March 12th, 2007 and it is further

ORDERED that the Petitioner is directed to serve a copy of this decision and order together with a notice of entry on the Respondent as soon as is practicable.

This shall constitute the decision and order of the court.

Dated: January 14, 2008

Gary J. Weber, Acting J.S.C.

Non-Final Disposition
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