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P.P., a Minor, by His Parent
and Guardian, A.S.,

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
OCEAN COUNTY

Plaintiff,

DOCKET NO. OCN-L-1040-09

v.

Civil Action

BOARD OF EDUCATION OF THE
PINELANDS REGIONAL SCHOOL
DISTRICT,

PLAINTIFF'S BRIEF IN
OPPOSITION TO MOTION TO
DISMISS OR TRANSFER

Defendant.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This action challenges the validity of Pinelands Regional School District's "zero tolerance" drug policy. The plaintiff is P.P., currently a freshman at the Pinelands Regional High

School. The defendant is the school district.¹

Last year, when P.P. was an eighth grader, school officials discovered a single over-the-counter allergy tablet inadvertently left in his backpack. Invoking its "zero tolerance" policy, the school district suspended P.P. for five days, stripped him of his membership in the school honor society and barred him from participating in music activities.

P.P.'s complaint contains two counts. The first, a prerogative writ action, challenges the policy on the ground that it violates the governing state statutes and regulations. Count Two asserts that the policy violates the procedural due process guarantees of the New Jersey Constitution

The school district has asked the Court to 1) dismiss Count I because it was not filed within 45 days of P.P.'s suspension; and 2) transfer Count II to the Commissioner of Education under the doctrine of primary jurisdiction.

P.P. submits this brief in opposition to the district's motion. For two reasons, the Court should deny it.

First, Count I of the complaint raises issues of public and private importance that justify enlarging the 45-day limitation on prerogative writ actions, pursuant to R. 4:69-6(c).

¹ The nominal defendant is the "Board of Education of the Pinelands Regional School District." See N.J.S.A. 18A:13-1 et seq.

Second, Count II of the complaint alleges a procedural due process deprivation that presents no factual issues and requires no agency expertise. It is a straightforward constitutional issue that is uniquely within this Court's province. Transfer pursuant to the doctrine of primary jurisdiction is not appropriate here.

II. STATEMENT OF THE FACTS

As the statement of facts relevant to this motion, P.P. incorporates paragraphs 1 through 13 of his complaint.

Moreover, in this instance the district's answer does not dispute the material facts. Irrespective of its justification, there is no dispute that school officials searched P.P.'s backpack, that they found a single "Alavert" allergy tablet underneath the backpack's cardboard liner, and that as a result they suspended P.P. for five days in accordance with the "zero tolerance" policy.

III. ARGUMENT

Defendant brings its motion under R. 4:6-2(e). In deciding a motion to dismiss, the Court must accept the allegations of the complaint as true, and must provide plaintiff with every favorable inference from the facts alleged. Craig v. Suburban Cablevision, Inc., 140 N.J. 623, 625-26 (1995); see Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989).

When judged by this standard, both portions of defendant's motion fail.

A. Pursuant to 4:69-6(c), The Court Should
Enlarge the Time for the Filing of Count I.

Defendant seeks dismissal of Count I on the ground that it was filed more than 45 days after the cause of action accrued, in violation of R. 4:69-6(a). The claim incorrectly assumes the 45-day limitation on prerogative writ actions is absolute.

R. 4:69-6(c) permits a court to relax the 45-day limit "where it is manifest the interest of justice so requires." Three general categories of cases qualify for this exception: cases involving 1) important and novel constitutional questions; 2) informal or *ex parte* agency determinations; and 3) important public interests that require adjudication or clarification.

Borough of Princeton v. Bd. of Freeholders of Mercer Cty., 169 N.J. 135, 152 (2001). In addition, a court's authority to enlarge the time is not limited to these three categories; it extends to sufficiently important private interests as well. See Gregory v. Borough of Avalon, 391 N.J. Super. 191, 189 (App. Div. 2007).

In determining whether to enlarge the time, a court must weigh the public and private interests that favor enlargement against the policy of repose expressed in the 45-day rule.

Reilly v. Brice, 109 N.J. 555, 559 (1988). In this case, for several reasons, that balance favors P.P..

First, plaintiff's claim raises an issue of public importance that requires judicial review: the propriety and legality of "zero tolerance" drug policies in schools. This case is not merely about P.P.'s suspension; it is also about Pinelands's "absolutist" approach to drug offenses. The school's decision to take this approach, exemplified by its treatment of P.P., raises questions that go well beyond P.P.'s individual discipline, and touch on fundamental tensions between individual freedom and public safety.

Justice LaVecchia made this point in Joye v. Hunterdon Cent. Reg. School Bd. of Educ., 176 N.J. 568 (2003). There, dissenting from a decision upholding a high school's right to conduct random drug searches, she pointed out that "[t]he desire to wage war on drugs should not be permitted to coarsen our sensitivity to constitutional protections." Id. at 619 (LaVecchia, J., dissenting). This case poses the same conflict of important public interests in the context of the public school system.²

² It is worth noting as well that in Joye, Court heard the case even though it was moot, because of the public importance of the issue and its effect on the general rights and interests of students. See 176 N.J. at 582-83.

Beyond that, P.P.'s private interest in ensuring that his school disciplinary record is fair and accurate also justifies enlarging the time for filing. A school disciplinary record is an important piece of an individual's personal history, and has ramifications that go beyond the immediate instance that gives rise to a particular disciplinary action. This sort of situation, and private interest, make exercise of the Court's authority under R. 4:69-6(c) appropriate. Cf. Cohen v. Thoft, 368 N.J. Super. 338, 344-45 (App. Div. 2004) (private interest in appeal of zoning board decision sufficient to trigger three-day enlargement of appeal period).

These interests, public and private, outweigh any interest the school might have in obtaining "repose." First, and most importantly, if the school's policy is illegal or unconstitutional, no mere interest in "repose" can justify maintaining it. And even when considered against P.P.'s individual interest in clearing his name and correcting his school record, the district's interest in "repose" is minimal.

Finally, the district cannot credibly assert it is prejudiced by P.P.'s delay in challenging the suspension. As noted above, the facts are not disputed, and no danger exists that some key witness or piece of evidence will be unavailable.

The burden on the school of correcting the record, if P.P. were to prevail, is slight.

Accordingly, the Court should deny defendant's motion. It should enlarge P.P.'s time to file Count I of the complaint under R. 4:69-6(c) and permit him to proceed with his prerogative writ claim.

B. The Constitutionality of A "Zero Tolerance"
Drug Policy Is Properly a Matter for a Court
to Decide.

Count II of the complaint asserts that defendant's "zero tolerance" drug policy violates the procedural due process guarantee of the state constitution. Defendant says the Commissioner of Education has "primary jurisdiction" over the claim, and asks the Court to transfer it to the commissioner for disposition.³

The Court should reject that request. The issue raised by Count II - the constitutionality of the zero tolerance policy - is not properly subject to the primary jurisdiction of the education commissioner. It is not a primarily fact-based question that requires the particular expertise of an agency.

³ Defendant asserts the claim is brought under the state Civil Rights Act, N.J.S.A. 10:6-2. Actually, as paragraph 3 of the complaint makes clear, the claim is brought both pursuant to the CRA and directly under the state constitution. "It has been recognized that the state Constitution, as a wellspring of rights and individual liberties, may be directly enforceable, its protections not dependent even upon implementing legislation." State v. Schmid, 84 N.J. 535, 558 (1980).

Rather, it is a straightforward due process question - the type of constitutional question commonly and appropriately decided by a court. Indeed, the expertise required to decide this case is expertise not in school administration but rather in constitutional law.

The doctrine of primary jurisdiction permits a court to "defer to the jurisdiction of an administrative agency ... for the resolution of threshold issues, usually of a factual nature, which are placed within the special competence of the administrative body." Unalachtigo Band of the Nanticoke-Lenni Lenape Nation v. State, 375 N.J. Super. 330, 345 (App. Div. 2005). In other words, "the case is properly before the court, but agency expertise is required to resolve the questions presented." Boldt v. Correspondence Mgmt., Inc., 320 N.J. Super. 74, 83 (App. Div. 1999).

The typical application of the doctrine requires the court to reclaim the case once the administrative agency has resolved the particular factual question within its area of expertise.

[W]here the resolution of a contested legal issue properly brought before a Court necessarily turns on factual issues within the special province of an administrative agency, the court should refer the factual issues to that agency. The trial court should accept the factual determinations of the agency and lay them against the legal issues to be resolved and enter its final judgment resolving the mixed questions of

law and fact based upon the agency fact finding.

Boss v. Rockland Elec. Co., 95 N.J. 33, 42 (1983).

Further, deference to an administrative agency "is appropriate only if to deny the agency's power to resolve the issue in question would be inconsistent with the statutory scheme which vested the agency with the authority to regulate the industry or activity it oversees." Muise v. GPU, Inc., 332 N.J. Super. 140, 160 (App. Div. 2000). In making that determination, a court must consider 1) whether the matter is within the conventional experience of judges; 2) whether the matter is peculiarly within the agency's discretion; 3) whether inconsistent rulings might pose the danger of disrupting the statutory scheme; and 4) whether prior application has been made to the agency. Id.

Notwithstanding the school district's claim, here these factors weigh heavily against referral to the commissioner. This is not a case in which there is any relevant factual dispute, much less a factual issue that calls for the exercise of some special administrative expertise. Count II presents a purely legal question: whether the school's zero tolerance drug policy violates the state constitution.

This question falls squarely within this Court's competence. In fact, it is a question which by its nature

warrants a judicial rather than an administrative determination in the first instance. It presents no danger of inconsistent rulings on disputed factual questions, or of a ruling that might disrupt the commissioner's statutory or regulatory control of New Jersey's schools. Nor, given the nature of the question, is it significant that the commissioner has never previously entertained it.

The district's contrary arguments are based on a flawed premise: that cases presenting constitutional questions are "very much akin" to cases involving claims of discrimination, over which the commissioner has statutory jurisdiction. See N.J.S.A. 18A:36-20. But this is simply not so, unless of course the constitutional guarantee involved is equal protection. Alleged violations of other constitutional provisions in the school context - the guarantee of free speech, for example, or the guarantee against illegal searches - are not "akin" to discrimination cases, and are routinely brought before courts without any assertion that doctrine of primary jurisdiction requires transfer to the commissioner. See, e.g., Joye v. Central Hunterdon Regional School District, supra (search and seizure); Dempsey v. Alston, 405 N.J. Super. 499 (App. Div. 2009) (First Amendment claim).

Here P.P. has alleged a deprivation of procedural due process rights. His claim is that the school's "zero tolerance" policy deprived him of a state-protected interest in progressive discipline without the process due him under state law. He does not allege discrimination of any sort.

Indeed, the district has failed even to show that a discrimination claim filed originally with a court must necessarily be subject to the commissioner's primary jurisdiction. The cases on which it relies do not stand for that proposition.

Balsey v. North Hunterdon Reg. School Dist. Bd. of Educ, 117 N.J. 434 (1990), held that counsel fees cannot be awarded when the Commissioner of Education decides a discrimination claim. In the course of that decision, the Court found that the commissioner has jurisdiction to determine "controversies and disputes arising under" the school laws, including claims of discrimination on the grounds of race, color, religion, sex or national origin. Id. at 438, citing N.J.S.A. 18A:6-9 and N.J.S.A. 18A:36-20. But the decision did not hold that the commissioner has exclusive jurisdiction over discrimination claims, or that school discrimination claims cannot be entertained by a court.

Similarly, Hinfey v. Matawan Reg. Bd. of Educ., 77 N.J. 514 (1978), dealt with the concurrent jurisdiction of two agencies - the Division of Civil Rights and the Commissioner of Education, and held that N.J.S.A. 18A:6-9 and N.J.S.A. 18A:36-20 require that, as between those two agencies, the commissioner determine school discrimination claims. Again, however, the case says nothing about a court's ability to hear and decide such claims.

The district has therefore failed to demonstrate that, absent an interagency conflict or a reason to invoke agency expertise, the commissioner has exclusive jurisdiction to hear discrimination claims, even when those claims are initially brought before a court. Much less has it established that such jurisdiction extends to non-discrimination claims, such as this one, founded on the state constitution.

Accordingly, the Court should deny the district's motion to transfer Count II of the complaint. The doctrine of primary jurisdiction does not apply to that claim, and the Court should hear and determine it.

IV. CONCLUSION

The interests of justice, both public and private, require the Court to entertain plaintiff's prerogative writ claim. Moreover, the legal question raised by Count II - the constitutionality of defendant's zero tolerance policy under the

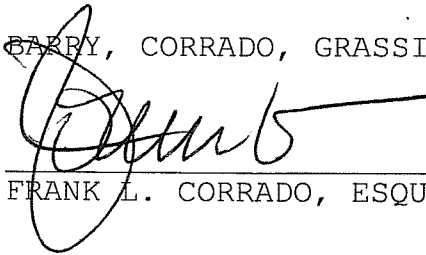
state constitution's due process guarantee - is a matter for
this Court to decide. Accordingly, for the foregoing reasons,
defendant's motion to dismiss and transfer should be denied in
its entirety.

Dated:

8/19/09

Respectfully submitted,

BARRY, CORRADO, GRASSI & GIBSON, PC

A handwritten signature in black ink, appearing to read "Frank L. Corrado", written over a horizontal line.

FRANK L. CORRADO, ESQUIRE