

L.E.A., on behalf of minor child, N.A., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
TOWNSHIP OF DELRAN, BURLINGTON :
COUNTY, DR. GEORGE F. SHARP, :
SUPERINTENDENT, AND JAMES A. DUDA, :
PRINCIPAL, :
RESPONDENTS. :

SYNOPSIS

Due to his son's unsuccessful tryout for the 2000-01 Delran Middle School basketball team, petitioning parent claimed ethics violations and alleged the Board violated its Pupil Records Policy through inadequate maintenance of his son's file and alleged altering of the file. The Board contended petitioner's claims were time-barred.

The ALJ concluded that the petition was not timely filed pursuant to *N.J.A.C.* 6A:3-1.3(d). In that there were no genuine issues of material fact regarding the 90-day limitation period, the ALJ determined that the matter was amenable to summary decision. The ALJ found that even though pupil record violations were raised by petitioner in letters dated July 26 and September 3, 2002, he did not file with the Commissioner until April 4, 2003, well out of time. The ALJ determined that respondents were entitled to prevail as a matter of law, *N.J.A.C.* 1:1-12.5(b).

The Commissioner adopted the Initial Decision granting summary decision to respondents with modification. In his exceptions, petitioner conceded that violations raised in his letters of July 25 and September 3, 2002 were untimely, but asserted that violations of the Pupil Records Policy newly discovered in January 2003 were timely. Upon examination of the newly discovered documents, the Commissioner determined that these documents were not violations of the Pupil Records Policy. The Commissioner also noted that the record closed on January 12, 2004; thus, petitioner's submissions on February 20, 2004 were outside the record and the Commissioner declined to consider these submissions. Moreover, with respect to petitioner's claim that respondents did not provide his requests for discovery, the Commissioner found that there was nothing in the record to indicate that petitioner exercised his rights under *N.J.A.C.* 1:1-10.4(d) within the timeframe provided to compel discovery when this matter was at the OAL.

<p>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.</p>

April 5, 2004

OAL DKT. NO. EDU 2793-03
AGENCY DKT. NO. 117-4/03

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions were submitted by petitioner in accordance with *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in reaching his determination herein.¹

In his exceptions, petitioner acknowledges that the triggering of the 90-day limitation is valid, but asserts that “each violation of Pupil Records stands as a single [offense] and the 90-day limitation criterion must be applied to each incident***.” (Petitioner’s Exceptions at 1) In this regard, petitioner claims that, in response to his request to the Superintendent in a letter dated July 26, 2002 to review all files (with respect to his son), the Superintendent notified him by letter of February 3, 2003 that he had been permitted access to all

¹Petitioner’s exceptions were filed on March 4, 2004. On March 15, 2004, respondents filed a reply, claiming that petitioner’s exceptions had not been received in the Board’s offices until March 5, 2004. (Respondents’ Reply at 1) Given respondents’ claim that the petitioner’s exceptions were not received until March 5, 2004, pursuant to *N.J.A.C.* 1:1-18.4(d), *N.J.A.C.* 1:1-1.4 and *N.J.A.C.* 6A:3 1.2, respondents’ reply was due on March 12, 2004. In that respondents’ reply was not filed until March 15, 2004, it was not timely filed; thus, it was not considered by the Commissioner.

the files on January 17, 2003.² (*Ibid.*) Petitioner points out that he does not control access to a student's file and the 90-day limitation applied to these circumstances allows respondents to withhold access to the student's file and then claim immunity under the 90-day rule. (*Ibid.*)

Noting that he filed his appeal on April 4, 2003, petitioner avers that pupil record violations he discovered within the files not previously viewed cannot be considered with the violations found in the central file in July 2002. (*Ibid.*) Petitioner claims that a letter he found in the Superintendent's file in January 2003, Exhibit J in the petition, is an example of a newly discovered violation. (*Id.* at 2) That letter, petitioner contends, shows the Board Secretary's receipt of a third-party disclosure which the Board Secretary then disclosed to respondents' attorney and other individuals in violation of the District's Pupil Records Policy. (*Ibid.*) Petitioner further points to a letter sent in conjunction with the transmission of his son's file on October 17, 2001 to the U.S. Department of Education, which he alleges constitutes another violation because "this letter was not submitted." (*Ibid.*)

Petitioner also contends that he is entitled to a copy of the student's file upon request, and *implies* that several discovery requests, including a request for a copy of the student's complete file, made to respondents' attorney from April 4, 2003 through February 19, 2004 were not provided. (*Ibid.*) Petitioner suggests this failure to provide the student's file during discovery could be considered "an obstruction."³ (*Ibid.*) Additionally, petitioner avers that a letter from the U.S. Department of Education to respondent's attorney, dated June 25, 2001, was never placed in the student's file, and, thus is another violation of pupil

² A review of the Superintendent's letter of February 3, 2003 to which petitioner refers (Petition, Exhibit O) indicates that it is a response to *petitioner's letter of January 17, 2003*, and that it confirms that petitioner had reviewed the files in question on January 24, 2003, not on January 17, 2003 as it appears from petitioner's exceptions.

³ Petitioner claims he brought this to the attention of the Administrative Law Judge (ALJ) by letters of November 12, 2003 and December 14, 2003. (Petitioner's Exceptions at 2)

records, asserting that “a violation that occurs during discovery is admissible at the hearing.”
(*Ibid.*)

Finally, petitioner states that he submitted evidence to the ALJ on February 20, 2004, 30 days prior to the scheduled hearing, to prove that respondents violated the District’s Pupil Records Policy, and that such evidence clearly delineates violations which were discovered within 90 days prior to filing his petition. (*Ibid.*) Petitioner notes that he is not asking for relaxation of the 90-day filing requirement, but only that it be applied equitably to the evidence submitted. In conclusion, petitioner concedes that respondents are entitled to a partial summary decision, but contends that respondents are not entitled to a complete summary decision. (*Ibid.*)

Initially, upon a careful and independent review of the record, the Initial Decision and petitioner’s exceptions in this matter, the Commissioner concurs with the conclusion by the ALJ that: 1) the Petition of Appeal in this matter was not timely filed, pursuant to *N.J.A.C.* 6A:3-1.3(d); and 2) respondents are entitled to summary judgment in this matter in that a) there are no general issues of material fact regarding application of the 90-day limitation for the filing of an appeal, and b) respondents are entitled to prevail as a matter of law. *See N.J.A.C.* 1:1-12.5(b).

With respect to petitioner’s exceptions, the Commissioner observes that petitioner does not dispute the ALJ’s conclusion that alleged pupil records violations that appear in his petition, which were previously raised by him in his letters to the Superintendent, dated July 26, 2002 and September 3, 2002, and described in his complaint with the School Ethics Commission on October 11, 2002, are out-of time pursuant to *N.J.A.C.* 6A:3-1.3(d). Instead, petitioner raises an argument in his exceptions that does not appear in his petition or in his brief

in opposition to respondents' motion for summary decision, *i.e.*, that he discovered pupil record violations on January 2003 that were previously unknown to him and that these violations constitute violations such that each stands as a single offense subject to the 90-day limitation.

In support thereof, petitioner points to two letters discovered as the result of his review of District files in January 2003 as examples of documents that were not placed in his son's student file, which he alleges is a violation of the District's Pupil Records Policy. A review of the petition, however, reveals that only one of these letters is mentioned in the petition, a May 15, 2001 memo from the Board Secretary to the Board's counsel, identified as petitioner's Exhibit J. In point of fact, there is no record that petitioner ever asserted that the District violated the District's Pupil Records Policy with respect to its handling of the other document, an October 17, 2001 letter from the District to the Department of Education, accompanying a copy of the student's file being forwarded to that agency,⁴ prior to filing his exceptions. Thus, even accepting, *arguendo*, petitioner's claim that he first discovered the October 17, 2001 letter in January 2003, petitioner was well aware of its existence when he filed his petition on April 4, 2003. The Commissioner, therefore, finds that petitioner is precluded from now asserting a claim with respect to the October 17 letter at issue as the 90-day limitation for asserting a claim concerning that document has passed.

The May 15, 2001 memo from the Board Secretary to the Board's counsel appears in the petition as Item No. 5, wherein petitioner claims that the memo violates school policy because the "business agent" (Board Secretary) "should not be handling matters concerning the welfare of children" and that "[n]o school official should disclose any file information to him, as per school policy." (Petition, Item No. 5) Petitioner further avers that "[t]his information should

⁴ The record does not contain a copy of this letter.

not have been released to Mr. Barbour (the Board attorney) and Mr. Irons.⁵ This is third party disclosure without parental permission.” (*Ibid.*) A review of the May 15, 2001 memo from the Board Secretary to the Board’s attorney reveals that this memo is an internal, confidential communication from the Board Secretary to the Board’s attorney transmitting a copy of petitioner’s complaint filed with U.S. Office of Education and providing background information to the Board’s attorney for his requested response to the complaint on behalf of the Board and its employees named therein.⁶ (Petition, Exhibit J) The other document, a June 25, 2001 letter, which petitioner claims to have noticed during the discovery process, is a letter to respondents’ attorney from the U.S. Department of Education providing information on the District’s responsibilities related to petitioner’s complaint filed with that agency.

N.J.S.A. 18A:36-19, *N.J.S.A.* 6:3-6.1 *et seq.* and the District’s Pupil Records Policy establish that a pupil’s record may include only the specified mandated and permitted records set forth in code and policy as relevant to the *education* of the pupil. Since the May 15 memo⁷ and the June 25 letter at issue do not fall within the mandated and permitted documents to be placed into a student’s file as specified in State code and District policy, and in that these documents deal solely with litigation issues related to the complaint filed by petitioner at the U.S. Office of Education, the Commissioner finds that respondents’ failure to place copies of these documents in petitioner’s son’s student file do not constitute violations of *N.J.S.A.* 18A:36-19, *N.J.S.A.* 6:3-6.1 *et seq.* or the District’s Pupil Records Policy.

⁵ The copy notation at the bottom of the May 15, 2001 memo lists Mr. Irons as T. Irons, Utica Representative. This is the only mention of Mr. Irons in the record and petitioner does not clarify what his role is in the District.

⁶ This letter was copied to the Superintendent and the Principal, who were named in the complaint, as well as T. Irons, identified as Utica Representative.

⁷ Respondents assert that this memo is subject to attorney-client privilege, which has not been waived. (Answer, No. 5 at 2-3)

Turning to petitioner's assertion that respondents' counsel did not provide his requests for discovery, including the request for a copy of his son's complete file, when this matter was before the OAL, the Commissioner finds that petitioner's request for his son's pupil records within the context of discovery is a litigation issue, not a pupil records request under *N.J.S.A.* 18A:36-19, *N.J.S.A.* 6:3-6.1 *et seq.* or the District's Pupil Records Policy. Moreover, notwithstanding petitioner's assertion that he notified the ALJ of his inability to obtain the documents he requested from respondents, there is nothing in the record to indicate that petitioner exercised his rights under *N.J.A.C.* 1:1-10.4(d), within the timeframe provided, to compel discovery when this matter was at the OAL. In this instance, therefore, petitioner asserts a claim that is not within the Commissioner's jurisdiction and for which relief cannot be granted.

Finally, with respect to petitioner's assertion that on February 20, 2004 he submitted all the evidence required to prove that respondents violated the District's Pupil Records Policy and that such evidence clearly delineates violations which were discovered 90 days prior to filing his petition (Petitioner's Exceptions at 2), the Commissioner observes that the record in this matter closed on January 12, 2004, and the Initial Decision was issued on February 19, 2004. In that petitioner's submissions on February 20, 2004, are, therefore, outside the record, the Commissioner declines to consider these submissions in deciding the within matter.⁸

Accordingly, as set forth above, the Commissioner rejects petitioner's argument that the alleged newly discovered and additional violations of the District's Pupil Records Policy delineated in his exceptions undermine respondents' entitlement to summary decision in this

⁸ The Commissioner notes that petitioner did not move to reopen the record.

matter. The Commissioner, therefore, adopts the Initial Decision granting summary decision to respondents for the reasons articulated therein, as modified above.

IT IS SO ORDERED.⁹

COMMISSIONER OF EDUCATION

Date of Decision: April 5, 2004

Date of Mailing: April 7, 2004

⁹ This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*