

SILVER FOX LEARNING CENTER, INC., ET AL.,	:	
PETITIONERS,	:	
V.	:	
STATE-OPERATED SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
THE CITY OF PATERSON, PASSAIC COUNTY;	:	
DR. ANNA DE MOLLI, ASSISTANT	:	DECISION
SUPERINTENDENT OF THE PATERSON	:	
PUBLIC SCHOOL DISTRICT; NEW JERSEY	:	
STATE DEPARTMENT OF HUMAN SERVICES;	:	
WILLIAM LIBRERA, NEW JERSEY	:	
COMMISSIONER OF EDUCATION; THE CITY	:	
OF PATERSON; AND FELIX ESPOSITO, IN HIS	:	
CAPACITY AS PATERSON CODE	:	
ENFORCEMENT OFFICIAL,	:	
RESPONDENTS.	:	<u>SYNOPSIS</u>
	:	

Petitioning early childhood education center sought funding for *Abbott* services it allegedly provided to the District from September 4, 2001 through January 31, 2002. The District contended the center was not functioning or contracted as an approved *Abbott* provider during the period in question.

The ALJ found that, even though the issues in this matter involve a contract dispute, since the resolution of these issues was grounded in the regulations governing the establishment of *Abbott* preschools, they are proper issues to be determined by the Commissioner. In light of the testimony of the witnesses and the record in evidence, the ALJ found that the center failed to sustain the burden of proving that it was in compliance with the regulatory requirements for an approved “*Abbott*” preschool from September 2001 through January 2002, notwithstanding the absence of a contract. Petition was dismissed.

The Commissioner concurred with the ALJ that petitioners had failed to demonstrate by a preponderance of the evidence that the center was providing authorized and verifiable subcontractor *Abbott* preschool services during the time in question. The Commissioner agreed that the center was not functioning as a *de facto Abbott* preschool prior to its execution of a contract with the District. Moreover, the Commissioner found that petitioners failed in their burden of proof to establish the accuracy of their claims that they were compliant with *Abbott* guidelines. The petition was dismissed.

<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>
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STATE DEPARTMENT OF HUMAN SERVICES; :  
WILLIAM LIBRERA, NEW JERSEY :  
COMMISSIONER OF EDUCATION;<sup>2</sup> THE CITY :  
OF PATERSON; AND FELIX ESPOSITO, IN HIS :  
CAPACITY AS PATERSON CODE :  
ENFORCEMENT OFFICIAL,<sup>3</sup> :  
RESPONDENTS. :  
\_\_\_\_\_ :

The record of this matter, including hearing transcripts, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners’ exceptions and the District’s reply thereto were filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4, and were fully considered by the Commissioner in reaching his determination herein.

Initially, petitioners except to the Administrative Law Judge’s (ALJ) finding that the Commissioner has jurisdiction to decide this matter, asserting that, in directing the parties to

<sup>1</sup> On November 22, 2002, the parties submitted a Stipulation of Dismissal, without costs against either party and without prejudice, with respect to Dr. Anna DeMolli as a respondent.

<sup>2</sup> A Consent Order of Settlement between petitioners and State respondents, the New Jersey State Department of Human Services and the Commissioner of Education, was entered on June 4, 2003, providing that, if Silver Fox Learning Center, Inc., is found to have a valid “*Abbott*” contract with the Paterson School District for the period at issue, the Department of Human Services will fund the services for which it is responsible.

<sup>3</sup> Prior to the Superior Court’s transmittal of this matter to the Commissioner, the City of Paterson and Felix Esposito were dismissed by the Court as respondents in this matter, without prejudice, as the result of a settlement agreement.

submit briefs as to whether the Trial Court/Commissioner has jurisdiction to decide this case, the “Trial Court” rightly perceived this matter as a breach of contract action that alleged other common law causes of action. (Petitioners’ Exceptions at 4) Pointing to *Archway Programs, Inc. v. Pemberton Township Board of Education*, 352 N.J. Super. 420, 432, 426 (App. Div. 2002), petitioners acknowledge that the Appellate Division held that the Commissioner had primary jurisdiction in addressing the claims of the parties in the *Archway* matter, including petitioner’s breach of contract and other asserted claims of unjust enrichment or quantum merit in that matter, but petitioners herein assert that the Appellate Division also found that, absent a specific grant of legislative authority, the Commissioner, even in the context of his plenary authority to decide controversies and disputes arising under the school laws, is not empowered to decide questions of law, such as those arising in contract disputes. (*Id.* at 4-5) Thus, petitioners submit, they are entitled to have their “strong common law claims,” which were not addressed or disposed of by the ALJ’s decision, decided by the Superior Court. (*Id.* at 5)

Petitioners also argue, *inter alia*, that the ALJ’s findings that: 1) Silver Fox Learning Center, Inc. (Silver Fox) was open from the start of the school year; 2) Silver Fox was formed to provide *Abbott*<sup>4</sup> educational services; 3) the lack of funding from September 4, 2001 through January 31, 2002 caused Silver Fox many problems; and 4) a contract was entered into between the Board and Silver Fox, do not support the ALJ’s ultimate conclusion that Silver Fox should not be funded for the period in question because it was not compliant with the *Abbott* guidelines. (*Id.* at 6) These “material inconsistencies,” petitioners’ proclaim, call for the rejection of the Initial Decision. (*Ibid.*) Petitioners further assert that the ALJ’s conclusion that

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<sup>4</sup> On May 21, 1998, the Supreme Court of the State of New Jersey issued its decision in *Abbott v. Burke*, 153 N.J. 480 (1998) (*Abbott V*) containing, among its mandates, the requirement that the Commissioner of Education “exercise his power under N.J.S.A. 18A:7F-6b and -16 to require all *Abbott* districts to provide half-day pre-school for three-and four-year olds.” (at 508) The Court further clarified the requirements of *Abbott V* as to early childhood education and required Department of Human Services (DHS) licensed child care providers to meet enhanced standards in its decision in *Abbott v. Burke*, 163 N.J. 95 (2000) (*Abbott VI*). In response, the State Board adopted regulations requiring local boards of education, in cooperation with DHS licensed child care providers, to provide full-day, full-year early childhood education programs by the 2001-2002 school year. See N.J.A.C. 6A:24-3.3(a).

Silver Fox should not be funded for the period in question is also directly at odds with the objective facts and evidence in the record, *i.e.*, Silver Fox's possession of a sign that is given only to schools that are part of the District's collaborative, and the content of the Philosophy Statement appearing in the parent handbook stating Silver Fox's goals to meet or exceed the educational and professional guidelines required of it. (*Id.* at 7-8) Citing to the transcripts, petitioners posit that Silver Fox was compliant with the other *Abbott* guidelines in all other relevant respects in that:

1. Silver Fox had a license from the Division of Youth and Family Services;
2. Silver Fox had certified teachers with experience in other *Abbott* schools;
3. Silver Fox had classrooms of 15 students with a teacher and a teacher's aide;
4. Silver Fox had separate contracts with its teachers and teacher's aides;
5. Silver Fox had performed background checks on its staff;
6. Dr. Harry Powers, President of the Board of Directors of Silver Fox, testified that a curriculum was developed that was exemplary;
7. Silver Fox had professional development procedures in place for its teachers;
8. Silver Fox had a certified School Board Administrator working on its budget between September 2001 and January 2002. (*Id.* at 9-10)

Additionally, petitioners aver that the District did not rebut the testimony of petitioners' witnesses, Dr. Powers and John Ambrosio, who testified that no one from the Paterson School District challenged Silver Fox's compliance with the *Abbott* guidelines at any time during the period from September 1, 2001 to January 30, 2002. (*Id.* at 10)

Moreover, petitioners claim that the ALJ failed to consider any of the three causes of action raised in the petition, *i.e.*, breach of contract, unjust enrichment and equitable estoppel. (*Id.* at 11) With respect to the allegations of breach of contract, petitioners aver that the express language of the contract requires Silver Fox to be open from September 1, 2001 through June 30, 2002, and that District's Database Management Specialist Corey Fronte's explanation

that her failure to change the mandated opening date in the contract was an oversight is “simply not believable in light of Ms. Fronte’s expressed ability to make changes to the form [of the] Contract and the fact that she changed several critical dates in the Contract.” (*Id.* at 12) *Citing In re Miller’s Estate*, 90 N.J. 210 (1982) and *Kearney & Trecker Corp. v. Master Engraving Co., Inc.*, 234 N.J. Super. 466 (Law Div. 1988), petitioners claim that any ambiguity in the contract is to be construed against the District as the party who drafted it. (*Ibid.*) Additionally, pointing to *Dontzin v. Myer*, 301 N.J. Super. 501, 507 (App. Div. 1997) and *Burley v. Prudential Ins. Co. of America*, 251 N.J. Super 493, 500 (App. Div. 1991), *inter alia*, petitioners posit that Section I of the contract is specific, while Section III of the contract is general<sup>5</sup> and that it is well-settled that specific terms of a contract have control over general terms. (*Id.* at 12-13)

With respect to petitioners’ claim of unjust enrichment, petitioner avers that the District was well aware of Silver Fox’s status as an *Abbott* school, that Assistant Superintendent DeMolli had first-hand knowledge that Silver Fox was open as of September 4, 2001, and that the District benefited from the provision of *Abbott* services by Silver Fox during the period at issue. (*Id.* at 13) In that the *Abbott* services provided by Silver Fox fulfilled the mandate imposed on the District by the Commissioner to provide full-day, full-year early childhood education services, petitioners assert that the District has been unjustly enriched at Silver Fox’s expense. (*Id.* at 14)

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<sup>5</sup> In pertinent part, Section I of the contract states:

The Provider shall provide a full-day, full-year early childhood educational program to children residing in the Paterson Public Schools District commencing September 1, 2001 and ending June 30, 2002\*\*\*. (Exhibit P-14 at 2)

Section III(A) of the contract states:

The Term of this Agreement shall be from February 1, 2002 to August 31, 2002. (Exhibit P-14 at 4)

Turning to petitioners' argument that the District should be precluded from denying payment based on the doctrine of equitable estoppel, petitioners claim that: 1) Silver Fox notified the District that it was opening an *Abbott* school; 2) the Assistant Superintendent attended the Silver Fox opening ceremonies in September 2001; 3) Silver Fox was given a sign by the District that represented to the citizens of Paterson that it was a "Participating" *Abbott* school; and Carlotta Blakely, an aide to Assistant Superintendent DeMolli, testified that she expressly told Dr. DeMolli that Silver Fox was enrolling students as an *Abbott* school. (*Id.* at 15) If Silver Fox was not considered an *Abbott* school as the District claims, petitioners submit, with the District's knowledge that Silver Fox was operating as an *Abbott* school, "it is both appalling and astonishing" that Dr. DeMolli, who oversees the District's *Abbott* schools, did not feel an obligation to advise the parents of Silver Fox's students that Silver Fox was not an *Abbott* school, nor did she ask Silver Fox to shut down as an *Abbott* school. (*Id.* at 14-17) Since the District allowed Silver Fox to open as an *Abbott* school, never notified Silver Fox that it was not considered to be an *Abbott* school, never notified Silver Fox that it was not compliant with the *Abbott* or District requirements and never notified Silver Fox that it would not be funded for the Fall of 2001-2002, petitioners assert that the District should be equitably estopped from denying payment for the period from September 1, 2001 through January 31, 2002. (*Id.* at 17-18)

In reply, the District claims that, although Silver Fox did operate prior to February 1, 2002, when it became authorized by written contract with the District to provide *Abbott* pre-school services to Paterson children, it did so without authorization by the District. (Respondent's Reply Exceptions at 2) The District avers that, since it did not authorize Silver Fox to operate as an *Abbott* preschool prior to February 1, 2002, it did not monitor the center nor budget for payment to Silver Fox. (*Ibid.*) The reason Silver Fox did not become part of the Paterson collaborative until February 2002, the District asserts, is that it was not properly managed. (*Ibid.*) The District further proffers that when the District became aware of Silver

Fox's situation in the Fall of 2001 during budget planning for the 2002-2003 school year, it worked with Silver Fox to develop a budget that would allow the District to contract with Silver Fox mid-year for 2001-2002. (*Ibid.*) That contract, the District argues, was within the District's budget for that year and specified the period of time of the contract and also specified the dollar amount. (*Ibid.*) Additionally, the District submits that there are no funds set aside or available for an *Abbott* preschool to operate on its own without approval from the District or the State. (*Ibid.*)

The District explains that when the Silver Fox contract was prepared to reflect mid-year commencement of services the standard Department of Education form was used and all of the dates were adjusted to reflect the mid-year commencement, except for the provision that delineates the responsibility for DHS wrap around and supplemental day services, which was not changed due to an oversight. (*Id.* at 3) The District claims that the incorrect date makes no sense in the context of the entire agreement and was properly explained as a clerical error. (*Ibid.*)

With respect to petitioners' claim that it had a Paterson *Abbott* Preschool banner, the District avers that it does not know how Silver Fox acquired the banner because Silver Fox was not authorized to provide contracted services until February 1, 2002, and that a banner is no substitute for a contract. (*Ibid.*) The District expresses its agreement with the ALJ's finding that "there was no clear and convincing evidence that Silver Fox was providing authorized and verifiable subcontractor *Abbott* preschool services." (*Ibid.*) The District also submits that the only testimony offered by Silver Fox was that of a developer of the project, who is also a member of the Board, and a consultant who serves as Board President, and that neither of these two individuals possessed first-hand knowledge of the day-to-day operations of Silver Fox. (*Id.* at 4)

With respect to the Commissioner's jurisdiction to hear this matter, the District relies on *Archway, supra*, and argues: 1) that it is both permissible and appropriate for the Commissioner to decide if an educational provider may claim reimbursement for a period in which there is no contract, and 2) that the within matter is under the primary jurisdiction of the Commissioner to decide whether "the services purportedly provided, but never proven to be provided, are subject to comprehensive early childhood guidelines." (*Ibid.*)

Turning to the question of whether Silver Fox was an approved *Abbott* preschool during the period in question, the District points out that the only two individuals who provided testimony on behalf of Silver Fox executed "Resolutions" stating that they had absolutely no participation in the affairs of Silver Fox prior to November 9, 2001. (*Id.* at 5) Thus, the District claims, Silver Fox relied upon witnesses who could not supply the necessary proofs and that petitioners could not prove, after the fact, that all the necessary requirements, *i.e.*, teacher qualifications, class sizes, attendance and the like had been met. (*Ibid.*)

Moreover, the District argues that, although Silver Fox may have been formed in 2001 and may have opened in September 2001, it was not an *Abbott* preschool until the District agreed to contract for services with it, commencing February 1, 2002. (*Id.* at 6) Although petitioners claim to have common law claims, the District avers that, as in *Archway, supra*, petitioners have failed to meet the initial hurdles regarding entitlement for these claims to be considered in that such claims can proceed to a court only if petitioners can meet their burden of proving that Silver Fox met the regulatory requirements for the period in question. (*Ibid.*) The District concludes that there is no need for further proceedings in that primary jurisdiction rests with the Commissioner. The District, therefore, concludes that Silver Fox is not entitled to funding for September 2001 through January 2002 because Silver Fox did not meet all of the regulatory requirements and because it did not have a contract. (*Ibid.*)

Upon a thorough and independent review of the record, the Initial Decision, the transcripts, the exceptions and the reply thereto filed in this matter, the Commissioner concurs with the ALJ that petitioners have failed to sustain their burden of proving that Silver Fox Learning Center, Inc., was in compliance with the regulatory requirements to be considered an approved *Abbott* preschool during the period from September 1, 2001 through January 31, 2002.

With respect to the Commissioner's jurisdiction to determine whether Silver Fox is entitled to receive funds for its early childhood education program prior to the execution of a contract with the District, the Commissioner points out that it is well-settled that jurisdiction to hear and determine all controversies and disputes arising under the school laws rests with the Commissioner of Education. *See N.J.S.A. 18A:6-9; Balsley, supra; and Hinfey, supra.* As noted by the ALJ, generally, contractual disputes are not within the Commissioner's jurisdiction. However, there are circumstances where the jurisdiction to hear a matter is split between the Commissioner and the courts and where a contractual dispute requires an interpretation of the underlying school law. *See Archway, supra; New Jersey Educ. Ass'n, supra; and Kohn, supra.* In the instant matter, a determination is required as to whether Silver Fox was operating an approved *Abbott* preschool as of September 1, 2001, and, if not, whether Silver Fox was operating in compliance with regulations so as to be considered as operating a *de facto Abbott* preschool, notwithstanding the fact that a contract for preschool services was not executed with the District until February 4, 2002.

The Supreme Court in *Abbott V, supra*, directed the Commissioner to require that all *Abbott* school districts provide preschool education for three- and four-year-olds. The resolution of whether Silver Fox was operating an approved *Abbott* preschool or, if not, was operating a *de facto Abbott* preschool during the period in question is grounded in the implementing regulations governing the establishment of *Abbott* preschools. As such, the Commissioner has jurisdiction to make this determination. Moreover, the Court in *Abbott V*

recognized the possibility of disputes arising with the implementation of its directed preschool requirement and addressed this issue, as follows:

We recognize that disputes will occur in the administration of public education in the era ushered in by these reforms. Those disputes will involve issues arising from the implementation, extension, or modification of existing programs, the need for additional supplemental programs, the allocation of budgeted funds, the need for additional funding, and the implementation of the standards and plans for the provision of capital improvements and related educational facilities. Such disputes shall be considered “controversies” arising under the School Laws. *N.J.S.A. 18A:7A-1 to 7F-34. Abbott V* at 526.

For the reasons expressed above, therefore, the Commissioner concludes that the issues herein are proper issues to be decided by the Commissioner. In so concluding, the Commissioner points out that, notwithstanding petitioners’ stated objections in their exceptions to the ALJ’s conclusion that the Commissioner has jurisdiction in this matter, petitioners refer to the above quotation from *Abbott V* at 526 in response to the ALJ’s request that the parties brief the issue of jurisdiction, and state that “[p]etitioner submits that the source of this Court’s jurisdiction comes from *Abbott* itself.” (Petitioners’ Post-Trial Brief at 7) *Citing Archway, supra*, in support of its claim that the Court (OAL)<sup>6</sup> has jurisdiction to decide the matter, and arguing that the “City”<sup>7</sup> should not be permitted to argue that the Commissioner does not have jurisdiction over this matter, petitioners further state:

Petitioner submits that it would be in bad faith now to allow the City to argue that this Court does not have jurisdiction.

This case has been tried to a conclusion. The Petitioner has spent its time and has incurred legal fees to try this case. In the event that it is now forced to re-try the case in the Trial Court, it asks this

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<sup>6</sup> Although petitioners repeatedly refer to OAL as a “Court,” in fact, the OAL is a quasi-judicial forum established to provide hearings and proposed findings to New Jersey’s administrative agency heads who are charged with final decision-making authority.

<sup>7</sup> Although petitioners refer to arguments anticipated by the “City,” the sole remaining respondent in this matter at the time petitioners’ post-hearing brief was submitted was the Paterson School District. A Settlement Agreement was executed between petitioners and the City of Paterson at Superior Court prior to this matter’s transmittal to the Commissioner by that Court. *See* footnote 3.

Court to award its attorney's fees and costs associated with the prosecution of this matter before the Commissioner and in this Court. (*Id.* at 9)

Next, the Commissioner turns to the question of whether petitioners have met their burden of proving that, during the period of September 1, 2001 through January 31, 2002, Silver Fox was an approved *Abbott* preschool or was operating in compliance with *Abbott* early childhood regulations so as to be considered a *de facto Abbott* preschool, and if so, whether funding is permissible. It is undisputed that it was the *intent* of the founders of Silver Fox to establish an *Abbott* preschool, that Silver Fox held its grand opening on September 6, 2001, that classes began on September 10, 2001, and that there was not an executed contract between the District and Silver Fox at the time of opening, nor until some five months later. Notwithstanding the founders' intent that Silver Fox would be an *Abbott* preschool upon opening in September, however, upon a thorough review of the record, the Commissioner concludes that Silver Fox was not operating as an *Abbott* preschool nor operating in compliance with *Abbott* early childhood regulations so as to be considered a *de facto Abbott* preschool during the period in question, but, rather, during the period from September 1, 2001 through January 31, 2002, Silver Fox can best be described as a work in progress towards becoming an *Abbott* preschool.

In this regard, the Commissioner points out that, since its opening in September 2001, Silver Fox has been operating under a series of Temporary Certificates of Occupancy (CO) issued for a period of 30 days, and, at the time of the hearing at OAL, Silver Fox was still operating on temporary CO's. (Tr. 6/2/2003 at 43) Moreover, with respect to the license to operate a Child Care Center, the Board President, Dr. Powers, testified at hearing that:

Q And do you know at the time of opening or shortly thereafter whether or not Silver Fox obtained a license from the State?

A We were in the process. The thing that we understood from Doctor DeMali's (sic) office, from the State Department of Education, from Human Services, the reason that we

couldn't get a full license was because of the CO, and we anticipated getting the CO on a weekly basis.\*\*\*

Q Well, when you say you didn't have a license, did you have a temporary license?

A Yes, we had a temporary license.

Q Was that, the temporary license continues through today?

A Correct.  
(Tr. 6/2/03 at 75-76)

Thus, Silver Fox was experiencing difficulty in getting all the approvals in place necessary to keep the school open as a Child Care Center, a threshold prerequisite for becoming an *Abbott* preschool as such approvals, were, and apparently still are, being issued on a month-to-month basis.<sup>8</sup>

Notwithstanding the claim by Silver Fox that its financial problems were a result of not being compensated as an *Abbott* preschool, the Commissioner finds that the failure to meet all of the criteria for establishing an *Abbott* preschool can be attributed squarely to its founders. By undated letter, Silver Fox advised the Paterson School District of its intent to participate in the Paterson Early Childhood Education Collaborative. (Exhibit P-6, in evidence) However, there is nothing in the record, absent third-party hearsay, to substantiate that there was any attempt by Silver Fox, prior to the school's opening in September 2001, to contract with the Paterson School District so as to establish the required relationship with the District to become an *Abbott* preschool. Under the auspices of founder Carol Ann Gauthier, Silver Fox began experiencing financial difficulties shortly after opening. The Charter Foundation of New Jersey, Inc., was responsible, under an August 14, 2001 Letter of Agreement between the Charter Foundation of New Jersey, Inc. and the Silver Fox Learning Center, for the fiscal management of the school and for performance of certain fiscal services. (Exhibit R-2, in evidence) As Board

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<sup>8</sup> The record contains a copy of the initial Approval to Operate a Child Care Center for serving children ages 2 1/2-6 years of age from the Department of Human Services, issued September 19, 2001. The Approval indicates that it expires 30 days from the issuance date. (Exhibit P-5, in evidence)

member Ambrosio testified, Carol Ann Gauthier, a founder of Silver Fox and also a trustee for the Charter Foundation of New Jersey, Inc., initially managed the financial affairs of Silver Fox, but when she began to write checks with insufficient funds:

We--one of the other things we did after we--we got the CPA to give us an audit, opened up the new account, told the bank not to honor any checks from the old Silver Fox account, which was Ms. Gothie's (sic) signature, and then, we proceeded to fire Ms. Gothie (sic)—not have her resign. She was fired for cause.” (Tr. 6/2/03 at 32)

So, I think that she got swept up in the problem of not knowing how to handle the situation, and therefore, got indicted by the prosecutor because of -- not our school, because we didn't file charges against her, but Hovey filed charges against her with his school, and it had to do with checks that were cashed she claimed were owed her, and she was a signature on a check. So, that was simultaneous to this all happening when we fired her for cause. And the cause that we fired her for was mismanagement of the school--school funds, not the school. (Tr. 6/2/03 at 33)

Prior to November 9, 2001, Silver Fox was still operating under the auspices of the Charter Foundation of New Jersey, Inc. The Record does not reflect when Carol Ann Gauthier was removed for “mismanagement of school funds.” It is noted, however, that, when the Board of Directors of Silver Fox was formed on November 9, 2001, Ms. Gauthier was still affiliated with Silver Fox as a nonvoting Board member. (Exhibit R-2, in evidence) The minutes of that meeting, as amended on November 16, 2001, state that:

The stated purpose of the meeting was to constitute an official Board for the Silver Fox Learning Center, isolate the activities of Silver Fox Learning Center from all other entities and to clarify the relationship between the Silver Fox Learning Center, New Jersey Charter School Foundation, 236 Ellison Street LLC and Silver Fox LLC. (Minutes of Meeting, November 9, 2001, R-2, in evidence)

Additionally, as late as December 17, 2001, in a letter to Paterson Assistant Superintendent DeMolli, Silver Fox's Director, Laverne Davis, acknowledges that Ms. Gauthier was responsible for the financial problems at Silver Fox, stating “Dr. DeMolli, at present, we are operating

without any funds of any kind due to poor planning by Ms. Carolann Gautier (sic) \*\*\*.”  
(Exhibit R-3, in evidence)

Moreover, during its first five months in existence, in addition to experiencing initial mismanagement of its funds, operating without a signed contract with the Paterson School District, operating under temporary CO's and temporary approvals from DHS, Silver Fox was still in the process of forming its Board of Director's<sup>9</sup> and obtaining appropriate insurance. In this regard, the Commissioner observes that the standard Department of Education contract form utilized for contracting for the provision of *Abbott* preschool services requires the contracted Child Care Center to carry General Liability Insurance of \$3 million and Comprehensive Automobile Liability Insurance of \$2 million. If the required insurance is not in effect, the District may refuse to make payment of any further monies until such times as the provider reinstates the insurance. (Paterson Public Schools Abbott Preschool Educational Program Contract 2001-2002 School Year, Exhibit P-14, in evidence) When queried as to when Silver Fox obtained insurance compliant with the terms of an *Abbott* preschool contract, Board Member Ambrosio testified that: “Silver Fox had no money to purchase insurance at all for the first half of the year” (Tr. 6/3/03 at 41) and, subsequently, testified that he didn't know for sure when Silver Fox became insured, that “you'd have to find out from Bolinger [the insurer].” (Tr. 6/3/03 at 41-42) The minutes of the Silver Fox Learning Center's Board meeting of January 9, 2002 indicate that some four months after opening, Silver Fox was attempting to secure insurance and provide the required certification documentation. The minutes reflect, *inter alia*, that: 1) “[r]elevant documentation pertaining to certification is being submitted as required;” 2) “T. Ambrosio is following through to obtain liability insurance;” and 3) “L. Davis will check

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<sup>9</sup> The January 9, 2001 Board minutes contain a “Resolution” (R-2) stating that, prior to November 9, 2001 there was no formal Board of Directors of Silver Fox.

companies for health benefit quotations\*\*\*.”<sup>10</sup> (Exhibit R-2, in evidence) Thus, during the first five months of its operation, Silver Fox was operating without a signed contract for the provision of *Abbott* preschool services, was operating under temporary CO’s and temporary approvals from the Department of Human Services to operate a Child Care Center, experienced initial mismanagement of its funds, did not establish a Board of Directors for the school until November 9, 2001, and in January 2002 was still attempting to resolve its insurance issues so as to fulfill the contract provisions required as a provider of *Abbott* preschool services for the Paterson School District.

Moreover, notwithstanding petitioners’ claim that Silver Fox was compliant with *Abbott* guidelines in other respects during the period in question, *i.e.*, that Silver Fox used certified teachers with experience in other *Abbott* schools; that Silver Fox had classes of 15 students with a teacher and a teacher’s aide; that Silver Fox had a curriculum that was exemplary; that Silver Fox had professional development procedures in place for its teachers; that Silver Fox offered health services as the year progressed (Tr. 6/2/03 at 111); and that Silver Fox had a certified School Board Administrator working on its budget between September 2001 and January 2002 (Petitioners’ Exceptions at 9-10), the Commissioner finds that petitioners have failed in their burden of proof to establish the accuracy of these claims. Silver Fox provided no witnesses with first-hand knowledge of the day-to-day operations of the school and did not provide adequate documentation to support its claims that its teachers were properly certified and that classes were comprised of Paterson residents and had the appropriate teacher-pupil ratio. With respect to whether Silver Fox’s curriculum was consistent with that required to be considered an *Abbott* preschool, it is notable that petitioners did not submit any documentation of the curriculum content and whether it was consistent with requirements, but offered only the

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<sup>10</sup> Silver Fox acknowledges that it did not provide its employees with health benefits from September 2001 through January 2002 due to financial difficulties.

unsupported testimony of Board President Powers that “[w]e developed a curriculum, an instructional modality that was exemplary.” (Tr. 6/02/03 at 75)

Finally, the Commissioner finds that petitioners have failed to establish that Silver Fox had the required relationship with the Paterson School District during the period September 1, 2001 through January 31, 2002 so as to become an *Abbott* preschool. As stated above, Silver Fox did not execute a contract with the Paterson School District until February 1, 2002. Petitioners claim that a relationship existed between Silver Fox and the Paterson School District prior to that time and offer as proofs of that relationship an undated letter of Silver Fox’s intent to participate in the Paterson Early Childhood Education Cooperative, the possession of a banner given only to *Abbott* preschools, the attendance at Silver Fox’s grand opening of Paterson School District staff assigned to monitor *Abbott* preschools, and a site visit by one of the staff members assigned to monitor *Abbott* preschools.

With respect to petitioners’ claim that the banner was given only to *Abbott* preschools, and that possession of the banner alone proves that the Paterson School District considered Silver Fox to be an *Abbott* preschool, the Commissioner disagrees, pointing out that, although the District cannot explain how Silver Fox came into the possession of the banner, the banner itself is not specific as to Silver Fox and there are a number of possible explanations as to how Silver Fox obtained the banner, a recruitment tool to encourage parents to enroll their children in a Participating Preschool Center in the Paterson School District, as follows:

ATTENTION PATERSON PARENTS  
Free Full Day Preschool Program  
For 3 and 4 Year Old Children  
REGISTER NOW!  
Visit a Participating Preschool Center  
973-321-0544  
Dr. Edwin Duroy  
State District Superintendent  
(Exhibit P-2, in evidence)

Moreover, the Commissioner finds that petitioners have failed to adequately document how Silver Fox came into possession of the banner, claiming that the banner was given to Ms. Gauthier, who did not testify at hearing, by some unnamed staff member of the Paterson School District at some unknown time.

Turning to the Grand Opening invitation, the Commissioner also observes that there is nothing in the invitation itself that indicates that Silver Fox is an *Abbott* preschool or that Silver Fox is affiliated in any manner with the Paterson School District. The invitation simply states:

You're Invited  
Thursday, September 6<sup>th</sup>, 2001  
at 12 Noon  
To the dedication of  
Silver Fox Learning Center  
By the  
Charter Foundation of New Jersey, Inc.  
R.S.V.P. – September 4<sup>th</sup> at 973-278-8428  
(Exhibit P-1, in evidence)

Thus, attendance at the grand opening by Paterson School District staff does not lead to a conclusion that the District considered Silver Fox to be an *Abbott* preschool. Nor can the Commissioner conclude from the proofs presented that a site visit to Silver Fox by a District staff member constitutes the monitoring and reporting required of an *Abbott* preschool.

Accordingly, for the reasons set forth above, the Commissioner concludes that the preponderance of the evidence does not establish that Silver Fox was providing authorized and verifiable subcontractor *Abbott* preschool services during the period September 1, 2001 through January 31, 2002 so as to entitle it to *Abbott* preschool funding during that period. It was presumptuous for Silver Fox to have assumed that, without an executed contract with the Paterson School District, simply by notifying the District of its intent to join the Paterson Early Childhood Education Collaborative and then proceeding to open a child care center under the auspices of the Department of Human Services that Silver Fox was automatically an *Abbott*

preschool. To the extent that petitioners made such assumption, they did so at their own peril. Given the Commissioner's ultimate conclusion that Silver Fox Learning Center, Inc., was not functioning as a *de facto Abbott* preschool prior to its execution of a contract with the Paterson School District, it is unnecessary to reach to the issue of whether funding is permissible for a *de facto Abbott* preschool program operating without an executed contract with an *Abbott* district, or to reach to petitioners' claims of unjust enrichment and equitable estoppel. To the extent petitioners' assert other contractual claims, the Commissioner notes that he lacks jurisdiction to consider these claims. Moreover, the court which transferred this matter to the Commissioner did not retain jurisdiction<sup>11</sup> and, therefore, there is no mechanism for the Commissioner to return this matter to the court.

Accordingly, the Initial Decision of the OAL is adopted for the reasons articulated herein and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.<sup>12</sup>

COMMISSIONER OF EDUCATION

Date of Decision: November 6, 2003

Date of Mailing: November 6, 2003

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<sup>11</sup> See *Archway, supra*, at 432.

<sup>12</sup>This decision 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.*