#229-08 (OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu01240-07_1.html)

ALL CAN EXCEL (A.C.E.) ACADEMY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION PROGRAMS,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning private school for students with disabilities appealed the Department's December 15, 2006 revocation – based on the lack of a facility meeting applicable health and safety standards – of its approval to operate effective December 31, 2006, contending that the Department failed to follow proper procedures, made unreasonable demands, and denied it due process.

The ALJ recommended reversal of the Department's action, finding that the Department did not give petitioner appropriate notice of deficiencies or reasonable opportunity to address them before revoking petitioner's approval.

The Commissioner rejected the ALJ's decision, finding that the Department's action to revoke petitioner's approval was fully warranted under the circumstances and effectuated in accord with applicable law. The Commissioner noted that petitioner was on notice at least as early as October 4, 2006 that – as a direct result of its unilateral expansion beyond approved capacity – its facility was insufficient for enrollment levels and not in compliance with applicable health and safety rules; moreover, as of December 15, 2006, petitioner still could not represent, in response to the Department's December 6, 2006 request, that its students would – by the end of the year or any date certain immediately thereafter – be assured of a safe, educationally appropriate school site. Opining that the Department would have failed in its own obligations had it not acted as it did, the Commissioner upheld the Department's revocation and dismissed petitioner's appeal.

May 16, 2008

OAL DKT. NO. EDU 1240-07
AGENCY DKT. NO. 1-1/07

ALL CAN EXCEL (A.C.E.) ACADEMY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION PROGRAMS,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have exceptions filed by the Department of Education (Department) pursuant to *N.J.A.C.* 1:1-18.4 and *N.J.A.C.* 1:1-18.8. Petitioner did not reply to the Department's exceptions.

On exception, the Department first asserts that – contrary to the conclusion of the Administrative Law Judge (ALJ) – it was not required to follow the monitoring/investigation procedures set forth in *N.J.A.C.* 6A:14-9.1 *et seq.* (Subchapter 9) before exercising its authority to revoke petitioner's approval pursuant to *N.J.A.C.* 6A:14-7.10(b)3. According to the Department, Subchapter 9 flows from the federal Individuals with Disabilities Education Act (IDEA) and its purpose is to monitor local compliance with the IDEA so as to ensure that eligible students are provided with a free, appropriate public education in the least restrictive environment, whereas *N.J.A.C.* 6A:14-7.10(b)3 flows from the Department's statutory authority to effectuate the school laws of the State and specifically empowers the Department to act

immediately against any private school for students with disabilities where it has been documented that the health, safety or welfare of students is at risk. Thus, the Department contends, compliance with the procedural requirements of Subchapter 9 cannot be viewed as a precondition to action taken under the authority of the complementary but distinct provisions of *N.J.A.C.* 6A:14-7.10(b)3. (Department's Exceptions at 1-5)

The Department further contends that the ALJ erred in concluding that petitioner was not given an opportunity to correct deficiencies and was lulled into a false sense of security before having its approval revoked. To the contrary, the Department asserts, each of the allegedly "surprise" deficiencies cited by the Department in its December 6, 2006 memorandum was either already known to petitioner through prior discussions with Department staff – during which petitioner was clearly apprised of the need to ensure that its facility situation was addressed – or a violation of established regulations with which petitioner had an ongoing, independent obligation to comply. A finding that revocation could not be imposed under these circumstances, according to the Department, would effectively insulate noncompliant private schools from prompt Departmental intervention and remove any incentive for diligence in conforming their practices to rule. (Department's Exceptions at 5-8)

The Department next proffers that the ALJ's conclusions were based – substantially as a result of looking beyond the facts as they existed at the time of the Department's action – on the erroneous assumption that extension of petitioner's lease was a viable option, so as to permit its continued operation at 71 Sanford Street until a new facility was ready. According to the Department, the ALJ's own fact-finding established that, on the date of the Department's determination: 1) 71 Sanford Street

lacked proper approvals as required by *N.J.A.C.* 6A:14-7.4(b), including a Certificate of Occupancy and fire approvals for the second floor notwithstanding that such space had been used for student instruction since at least October 2006; 2) the facility was significantly overcrowded as a result of petitioner – without the Department's prior knowledge or approval – having unilaterally expanded its enrollment beyond the building's lawful capacity, to the point where students were seen to be cramped and endangered during a Department site visit, with no other location authorized as an additional school site; and 3) petitioner's lease was due to expire in approximately 15 days (on December 31, 2006), with petitioner still unable to guarantee that an adequate site would be available for students upon their return from winter break on January 2. Under the totality of these circumstances, the Department avers, it was compelled to act decisively so that the school's student population would not be abruptly displaced and sending districts would have adequate time to make alternative arrangements for their students' education consistent with required procedural safeguards. (Department's Exceptions at 9-14)

Finally, the Department contends this matter is now moot, since the relief sought by petitioner – reversal of the Department's determination to revoke its approval to operate a private school for students with disabilities at 71 Sanford Street – cannot be granted. To the extent that petitioner no longer occupies the site on which the approval in question was based, the Department asserts, reversal would be meaningless because any private school for students with disabilities that seeks to expand by opening an additional location must apply for approval as a new private school. Indeed, the Department observes, on March 15, 2007, it expressly notified petitioner of its

eligibility to apply for approval to operate a private school for students with disabilities at 760 Clinton Avenue, since the necessary site approvals had at that point been acquired; however, no application had been submitted as of the date of the hearing in this matter. (Department's Exceptions at 14-16)

Upon review, the Commissioner is unpersuaded by petitioner's arguments and cannot concur with the ALJ that the December 15, 2006 revocation of petitioner's status as an approved private school for students with disabilities was unfair or unwarranted. On the contrary, the Commissioner finds the Department's action to have been fully justified under the circumstances, as well as undertaken in a manner consistent with applicable law.

Petitioner has attempted to portray itself during this proceeding as an unsuspecting victim of heavy-handed State officials who acted in flagrant disregard of its rights – denying it any semblance of due process, depriving it of any reasonable opportunity to cure "alleged" deficiencies before being foreclosed from continued operation, and perhaps even targeting it for undisclosed reasons. However, the disobliging facts – as found by the ALJ and not materially disputed by petitioner – are as follows: Upon the Department's October 4, 2006 inquiry – precipitated by information that a serious violation was occurring at petitioner's school – petitioner was confirmed to have enrolled students far in excess of the maximum number allowed, and to have addressed the resulting overcrowding in its approved facility by transporting students in private vehicles to a second, unapproved facility. On subsequent site visits conducted on October 5 and November 1-2, 2006 – although students were no longer being transported to the second facility – Department officials found them crammed into undersized

second-floor rooms unapproved for student instruction, observed a number of plainly visible safety hazards, and discovered that petitioner had failed to maintain local fire and building approvals as clearly required by regulation. Moreover, petitioner had indicated that the lease on its sole approved facility – which by that point had itself been rendered inadequate by petitioner's unapproved, unilateral expansion in enrollment – was expiring on December 31, 2006, and petitioner was able neither to identify an acceptable alternative site nor to offer anything more than hopeful speculation – belied by the physical evidence as it then existed, as well as the pace at which work had previously progressed – that the building into which it was planning to move would be ready for student occupation in January 2007.[1] (Initial Decision at 4-16) Thus, regardless of whether petitioner and its landlord might have agreed between themselves to month-by-month extension of petitioner's lease beyond December 31, 2006, petitioner's then-current facility was clearly inadequate for the number of students enrolled – and had been since at least October 4, 2006 – and petitioner could offer no imminent date certain for availability of an approvable alternate location.[2]

The Commissioner similarly rejects petitioner's argument that the Department denied it due process and gave it no reasonable opportunity to correct deficiencies. Initially, the Commissioner fully concurs with the Department that Subchapter 9 and *N.J.A.C.* 6A:14-7.10(b)3 represent two complementary but distinct processes, and that the latter clearly (and appropriately) authorizes the Department to act

[1] The site was not actually deemed compliant until February 21, 2007. (Initial Decision at 16)

[2] The Commissioner expressly rejects the ALJ's suggestion (Initial Decision at 18) that petitioner could have been allowed simply to "cut" 24 of its 120 students to bring itself back into compliance with capacity requirements until its new facility was ready; such "solution" is tantamount to shifting the consequences for violating regulation from the offending private school to the sending districts and their students.

without observing the procedural requirements of the former in situations where student health and safety are at risk. Moreover, petitioner was on notice as early as October 4, 2006 – upon the Department's confirmation that petitioner had enrolled students beyond its approved capacity and was impermissibly transporting "overflow" students to a separate, unapproved site – that it needed a contingency plan in the event it was unable to carry out its planned move to a larger facility by the end of the year;[3] petitioner surely could not have expected that the Department would allow it to continue using its current, now-inadequate facility indefinitely while it proceeded in due course with its long-term plan for a wholesale move to new quarters – the timing of which would be determined not by student needs or compliance with regulation, but by petitioner's desire to avoid having to re-apply for approval as a new school pursuant to *N.J.A.C.* 6A:14-7.3(a), as it would if it opened a second location, rather than simply seek an amendment to its existing approval pursuant to *N.J.A.C.* 6A:14-7.3(a)2, as it could if it merely relocated.[4] Finally, while petitioner might well have been able to address many – or even most – of the "minor" violations identified during the Department's November 2, 2006 site inspection of 71 Sanford Street had it been provided with the ensuing evaluation report (Exhibit J-8), it is beyond comprehension that petitioner would believe it needed a specific directive from the Department before it was required to rectify obvious hazards and inadequacies and ensure that the fire and safety approvals required by rule were, in fact, in its possession; more importantly, the referenced "easy fixes" would still not have resulted in petitioner's current facility being adequate for the

[3] Testimony of Elaine Lerner, T1 at 27-28, 101; testimony of Shakuur Sabuur,. T2 at 135-47. These and all subsequent similar citations refer to transcripts of OAL hearings held on July 16, 2007 (T1), July 18, 2007 (T2) and July 19, 2007 (T3), respectively, followed by applicable page number(s).

[4] Testimony of Shakuur Sabuur, T3 at 28-30; Exhibit J-4.

number of students enrolled, so that the fundamental obstacle to petitioner's continued operation – and the essential basis for the Department's withdrawal of approval for reasons of student health and safety – would have remained.[5] Under these circumstances, the Commissioner finds particularly disingenuous petitioner's insistence that the Department forced closure upon it by making unreasonable and unrealistic demands. To whatever extent petitioner was "backed into a corner" by the purportedly narrow time frame within which it was required to present the Department with an approvable site, that dilemma was entirely of its own making: the direct result of its unilateral expansion of enrollment beyond approved capacity, together with its failure to clearly understand – and consequently to make diligent efforts to comply with – the standards required before using all or part of a facility as instructional space.[6]

Similarly, the Commissioner rejects any notion that petitioner could have been lulled into a sense of false security by the Department's December 6, 2006 communication. The memorandum in question (Exhibit J-3) plainly states that extending the lease on 71 Sanford Street beyond December 31, 2006 was not an option in view of the inadequacy of that facility for the number of students enrolled, and that – unless petitioner could identify an alternative facility by December 15, 2006 – sending districts would be notified of the need to arrange other programming for their students, and petitioner would be placed on conditional approval. Thus, petitioner was unequivocally put on notice that, absent identification of an acceptable location by the stated deadline,

[5] Testimony of John Ferraro, T1 at 127; T2 at 86-88. See also Note 2 above.

[6] Indeed, the record shows petitioner to have acted with alacrity in this regard only upon revocation of its approval, despite being clearly obligated by law to maintain proper certificates. Testimony of Shakuur Sabuur, T2 at 131, 179-81; T3 at 26-27, 39-45, 48-53, 100-18. Testimony of John Ferraro, T2 at 75-77, 88. See also Initial Decision at 4, where the ALJ finds it "noteworthy that Dr. Sabuur's testimony did not reflect a clear understanding as to required approvals." (Initial Decision at 4).

it could accept no new students and its approval to operate in any capacity would end on December 31, 2006 – at which time current students who had been allowed to remain in the interim would be removed and re-placed by their sending districts. Petitioner, then, should not have been surprised when – upon expiration of the deadline without its having identified an approvable facility in which to educate students effective January 1, 2007 – the Department deemed it incapable of operating as a private school for the disabled after December 31, 2006 and revoked its approval as of that date pursuant to *N.J.A.C.* 6A:14-7.19(b)3.[7] That the Department's December 6, 2006 communication did not convey any sense of urgency to petitioner – and, indeed, was actually viewed by it as something of a reprieve[8] – speaks volumes about petitioner's failure to comprehend its own rights and obligations, as well as those of the Department, under laws governing private schools for students with disabilities.

Finally, the Commissioner does not agree with the ALJ that the letter of Lisa Nathari – received by the Department on October 13, 2006 (Exhibit R-1) – effectively initiated, with respect to facility issues, a complaint investigation against petitioner pursuant to *N.J.A.C.* 6A:14-9.2 so as to invoke the procedural requirements of that regulation. (Initial Decision at 21-22). On the contrary, the Commissioner perceives the letter's sole relevance to this matter to be the fact that the phone call preceding it served as the impetus for the Department's unannounced October 4, 2006 site visit to petitioner's premises to ascertain whether students were, as alleged, being transported to an unapproved facility in violation of law – the confirmation of which set into motion the chain of events ultimately leading to the action herein in dispute. Notwithstanding

[7] Testimony of Elaine Lerner, T1 at 52, 114-16.

[8] Testimony of Shakuur Sabuur, T2 at 179-81 and T3 at 112-15.

the further issues identified by Ms. Nathari in her letter, the Commissioner finds, as did the ALJ (Initial Decision at 22-23), that the Department did not revoke its approval of petitioner for reasons other than those stated in its memoranda of December 6, 2006 and December 15, 2006 (Exhibits J-3 and J-5) – reasons which, in the Commissioner's view, clearly permitted it to act as it did.

In conclusion, then, the Commissioner determines that – contrary to the conclusion of the ALJ – the Department has met its burden of demonstrating by a preponderance of evidence that its action to revoke petitioner's approval to operate as a private school for students with disabilities was both justified and lawful, and as such must be sustained. In so holding, the Commissioner stresses that the issue in this matter is not whether petitioner was well-intentioned or whether petitioner can now – or could have at some point after the Department's action – operate a school in compliance with regulation;[9] rather, the question is whether the Department's action was warranted under the circumstances and effectuated in accordance with applicable law. It is of no import that, as events transpired, petitioner made diligent efforts toward compliance once its approval was actually revoked, or that one of the alternate sites it had been developing became approvable a little more than two months after the Department's action; the fact remains that, at least as early as October 4, 2006, petitioner – as a result of its own unapproved expansion in enrollment – knowingly lacked a facility complying with applicable health and safety rules, and as of December 15, 2006, still could not demonstrate that its students would, by the end of the year or any date certain

[9] The record shows that petitioner was eligible to reapply for approval to operate as of February 21, 2007 (Exhibit R-7), but had not done so as of the date of hearing in this matter, despite the Department's March 15, 2007 reminder of such eligibility (Exhibit R-2). The record does not indicate if petitioner applied for approval subsequent to hearing.

immediately thereafter, be assured of the safe, educationally appropriate environment to which they were entitled by law. Faced with this situation, the Department could not have acted other than it did, and, indeed, would have failed in its own obligations had it permitted petitioner to continue operating beyond December 31, 2006.

Accordingly, for the reasons expressed herein, the Initial Decision of the OAL – recommending reversal of the Department's revocation of petitioner's approval as a private school for students with disabilities – is rejected, and the petition of appeal is dismissed.

IT IS SO ORDERED.[10]

COMMISSIONER OF EDUCATION

Date of Decision: May 16, 2008
Date of Mailing: May 16, 2008

[10] 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.*