

STRENGTHEN OUR SISTERS, :
ON BEHALF OF ITS RESIDENTS AND :
THEIR SCHOOL-AGE CHILDREN, :

PETITIONER, : COMMISSIONER OF EDUCATION

V. : DECISION

BOARD OF EDUCATION OF THE :
TOWNSHIP OF WEST MILFORD, :
PASSAIC COUNTY, :

RESPONDENT. :
_____ :

SYNOPSIS

Petitioner, Strengthen Our Sisters Domestic Violence Shelter (SOS), a not-for-profit organization that houses the children of its residents and also owns and operates Omni Day School (Omni), which provides before- and after-school care to such children, sought an order compelling the West Milford Board of Education to continue providing transportation – as it had done from approximately 2001 through the 2007-08 school year – between Omni and the Marshall Hill Elementary School (Marshall Hill), which some of SOS’s students attend.

The ALJ recommended dismissal of the petition, finding that the Board’s discontinuance of transportation between Marshall Hill and Omni was the result of its periodic rotation of bus routes, examination of which led to changes in the interest of cost efficiency, logistics and safety. The ALJ concluded that petitioner had not met its burden of proof in demonstrating that the Board’s action was arbitrary and capricious.

The Commissioner adopted the Initial Decision as the final decision in this matter.

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.

July 8, 2009

OAL DKT. NO. EDU 11097-08
AGENCY DKT. NO. 235-8/08

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, together with petitioner’s exceptions and the Board of Education’s reply pursuant to *N.J.A.C. 1:1-18.4*.¹

In its exceptions, petitioner first urges the Commissioner to make several additional findings of fact. (Petitioner’s Exceptions at 1-4, incorporating the recitation of its post-hearing summation at 2-7²) Petitioner then contends that the Administrative Law Judge (ALJ) applied the wrong standard in deciding this matter, basing her decision on the Board’s lack

¹ It is here noted that the record of this matter did not include a transcript of proceedings, and that petitioner submitted, along with its exceptions to the Initial Decision and without objection by the Board, an unofficial copy of the sound recording of the OAL hearing obtained pursuant to *N.J.A.C. 1:1-14.11(b)*; that recording, however, was not considered in rendering the within decision, since an unofficial copy of the sound recording of OAL proceedings may not be substituted for the official hearing transcript, and will not be considered if so submitted. *In the Matter of the Tenure Hearing of Ralph McCullough, School District of the City of Trenton, Mercer County*, State Board Dkt. No. 12-06, decided by the State Board of Education, October 4, 2006 and December 6, 2006.

² Petitioner’s proposed findings are embodied in the post-hearing summation (PHS) as follows: Proposed Finding No. 1 = PHS at 2; Proposed Finding No. 2 = PHS at 4; Proposed Finding No. 3 = PHS at 4; Proposed Finding No. 4 = PHS at 5; Proposed Finding No. 5 = PHS at 6; Proposed Finding No. 6 = PHS at 5-6; Proposed Finding No. 7 = PHS at 1-2; Proposed Finding No. 8 = PHS at 3; Proposed Finding No. 9a = Petitioner’s Exhibit 8 (Initial Decision at 3); Proposed Finding No. 10 = PHS at 6; and Proposed Finding No. 11 (misnumbered as No. 12) = PHS at 7. Proposed finding No. 9b does not appear in the PHS and is attributed, on exception, to the testimony of Steven Cea.

of bad faith rather than on an examination of the rational basis for the Board's actions; according to petitioner, had the ALJ analyzed the facts under the proper standard, she would have found the Board's actions to have been patently arbitrary and unreasonable. (*Id.* at 4-5, incorporating the arguments of petitioner's post-hearing summation at 8) Finally, petitioner argues that the ALJ erred in failing to consider the public policy embodied in federal law governing the provision of educational services to children of homeless parents,³ ignoring the fact that the Board is denying petitioner's children the same accommodation as is extended to others contrary to the law's requirement for equal access and comparable services. (*Id.* at 5-7, incorporating the arguments of petitioner's post-hearing summation at 8-9) Petitioner also renews its request for alternative relief, asking the Commissioner to direct – in the absence of an order directing provision of the requested transportation – that petitioner's children be transferred from Marshall Hill Elementary School (Marshall Hill) to Westbrook Elementary School (Westbrook), from which the Board *does* provide transportation to and from the Omni Day School (Omni). (*Id.* at 7-8, incorporating the request of petitioner's post-hearing summation at 7-8; Petition of Appeal at 4)

In reply, the Board counters that petitioner's proposed additional findings of fact are largely taken out of context and are more in the nature of argument, addressing each in turn with discussions recasting and reiterating the pertinent arguments of its own post-hearing summation. (Board's Reply at 1-6, incorporating post-hearing summation, *passim*) The Board further contends that the ALJ did, in fact, apply the correct standard in deciding this matter – as evidenced by the Initial Decision at 7–9 – and that petitioner is “simply mincing words” in attempting to focus on the ALJ's use of the words “bad faith” in a context where the phrase clearly refers to willful and unreasoning action without regard to circumstances – the very definition of “arbitrary and capricious” suggested by petitioner (*Id.* at 7-8); it additionally

³ Petitioner references the McKinney-Vento Act, 42 U.S.C. §11431 *et seq.*,

reiterates its own prior arguments in support of the conclusions reached by the ALJ. (*Id.* at 8-12, incorporating the arguments of the Board’s post-hearing summation at 13-18) In response to petitioner’s contentions based on federal law governing educational services for children of homeless parents, the Board reiterates that there is no private right of action under that law, and that – even allowing for consideration of its substantive intent – petitioner here is asking for preferential – not comparable – transportation services for the students residing at its facility. (*Id.* at 13-14, incorporating the arguments of the Board’s post-hearing summation at 21-22) Finally, the Board reiterates that – notwithstanding its agreement with the ALJ’s conclusions on the merits – this matter is still subject to dismissal for failure to file within 90 days as required by *N.J.A.C. 6A:3-1.10*. (*Id.* at 14-15, referencing prior proceedings as noted in the Initial Decision at 2, note 1) With respect to petitioner’s request for alternative relief, the Board notes that Steven Cea – who was *petitioner’s* witness – testified that: 1) attendance of petitioner’s resident children at Marshall Hill rather than Westbrook stems from a decision made many years ago;⁴ 2) when in the past the Board proposed that petitioner’s children be reassigned to Westbrook, petitioner’s administrators rejected this suggestion, maintaining that they preferred to have the children remain at Marshall Hill; and 3) the district’s student population has so changed over the ensuing years that it would not now be feasible to reassign petitioner’s students without creating a disparity in the populations of the two schools and requiring re-allocation and transfer of teachers. (*Id.* at 6 and 14, incorporating the arguments of the Board’s post-hearing summation at 16)

Upon review, the Commissioner is unpersuaded by petitioner’s exceptions and concurs with the recommended findings and conclusions of the ALJ.

⁴ The Board’s post-hearing summation (at 16) more specifically indicates, based on Cea’s testimony, that petitioner’s students have attended Marshall Hill since 1993.

Initially, the Commissioner finds that, for the reasons fully set forth in the ALJ's order of November 17, 2008, it would be inappropriate to dismiss this matter solely on the Board's claim of untimely filing. The Commissioner further finds that – contrary to petitioner's contention – the Initial Decision sufficiently incorporates the material facts necessary to decide this matter,⁵ and additionally applies the appropriate standard of review, plainly intending the statement that the Board did not act “in bad faith” to mean that the Board's actions were considered, reasonable and within the bounds of its lawful discretion – not merely that such actions were taken without malice or improper motive.

Having so found, the Commissioner must also concur with the ALJ that the Board's discontinuance of transportation between Marshall Hill and Omni as of the 2008-09 school year cannot be held to have been arbitrary, capricious or violative of any law. To the contrary, the decision to discontinue such transportation plainly arose out of the district's customary five-year bus route rotation, after due consideration of costs, logistics and safety factors. The record is clear that the Board did not single out petitioner for disparate treatment, and that it applied to Omni the same established criteria as were applied to all other day care centers within the district – denying all requests that did not meet these criteria and making exceptions for “out-of-zone” centers only if a scheduled bus passed them on its regular route. Nor did the Board deny transportation to children of homeless families or prevent them from having equal access to district services; all of the students in question are being transported between the shelter and school, and they are being treated like every other student in the district with respect to transportation between school and day care.

⁵ Although it was unnecessary to do so in this instance, the Commissioner could not in any event make additional findings of fact based on testimony for which no official transcript was provided. *In re Morrison*, 216 N.J. Super. 143, 158 (App. Div. 1987) Moreover, the Commissioner notes that petitioner's proposed findings – to the extent that they do not constitute argument and conclusion rather than facts, as correctly observed by the Board – are largely reflected in the ALJ's summations of testimony at 3-6.

Under these circumstances, it is of no moment that petitioner believes the Board could and should have made a different determination, concluding that the cost efficiencies to be achieved by eliminating transportation from Marshall Hill to Omni were relatively insignificant⁶ and that an exception could be made to the Board's policy without substantial difficulty, danger or expense simply by altering one of its regular routes to pass by Omni so as to drop off and pick up its students. Although petitioner does not agree with the Board's decision, the fact remains that such decision was reasoned, in accord with uniformly applied Board policy, and consistent with law; indeed, had the Board made the exception requested by petitioner, it would have exposed itself to allegations of arbitrariness and disparate treatment from the other centers denied transportation under the policy and established a dangerous precedent with respect to any such future requests. Nor can the Commissioner find that the Board was unreasonable in rejecting the alternative relief requested by petitioner during the present proceeding, given the difficulties changing school assignments would pose as related by petitioner's own witness.

Accordingly, for the reasons expressed therein and above, the Initial Decision of the OAL is adopted as the final decision in this matter, and the Petition of Appeal is dismissed.

IT IS SO ORDERED.⁷

COMMISSIONER OF EDUCATION

Date of Decision: July 8, 2009

Date of Mailing: July 9, 2009

⁶ There is no basis for petitioner's contention that the Board could recover even these minimal costs from the districts of residence of petitioner's students.

⁷ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (*N.J.S.A. 18A:6-9.1*)