#146-10 (OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu8132-09_1.html)

A LITTLE CLASS, INC. AND KIM NOTTE,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY, AND THE NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF EARLY CHILDHOOD EDUCATION,	:	
RESPONDENTS.	:	

SYNOPSIS

Petitioners challenged the respondent Board's decision not to renew a preschool program contract with A Little Class, Inc., as well as the Department's approval of the Board's non-renewal decision. The Board moved for summary decision, asserting that it had facilities to educate the thirty Neptune preschool children previously attending A Little Class's program and that it could do so in a more fiscally and administratively efficient manner.

The ALJ found that: there were no genuine issues of material fact, and the matter was ripe for summary decision; the Board's decision to non-renew petitioners' contract was based upon legitimate financial and administrative considerations and complied with the mandates of the School Funding Reform Act (SFRA) and its implementing regulations; there is substantial evidence to support the findings on which the non-renewal decision was based; accordingly, the respondent's decision was not arbitrary, capricious or unreasonable; and the Department appropriately based its approval on the Board's demonstrated ability to serve all of its preschool children in district facilities and the resulting savings in preschool education aid. The ALJ granted the Board's motion for summary decision and dismissed the petition.

The Commissioner concurred with the ALJ, finding no cause to disturb either the Board's determination not to renew the contract at issue or the Department's approval thereof, and adopted the Initial Decision of the OAL as the final decision in the matter.

May 2, 2010

OAL DKT. NO. EDU 8132-09
AGENCY DKT. NO. 135-6/09

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have petitioners' exceptions and the replies of the Neptune Township Board of Education (Board) and Department of Education (Department), each duly filed in accordance with *N.J.A.C.* 1:1-18.4.

In their exceptions, petitioners urge the Commissioner to reject the decision of the Administrative Law Judge (ALJ) on grounds that it: 1) upholds, without explanation, a Department determination based on palpably erroneous factual conclusions as to cost efficiency; 2) reduces the quality and diversity of preschool education in Neptune in violation of applicable law; 3) improperly relies on evidence beyond the scope of the permissible record; and 4) creates a "cost to absorb" test that is neither justified by regulation nor relevant to the Department determination under review. (Petitioners' Exceptions at 1-2)

Specifically, petitioners contend that the decision to terminate their contract cannot be found to be supported by sufficient credible evidence in the record so as to satisfy

the standard (correctly) set forth by the ALJ, reiterating their consistent stance that the Department's decision affirming the Board's action was fatally flawed because it relied on "information unrelated to reality" – that is, on a comparison of the respective State aid subsidies payable for in-district versus private providers, which it "mistook" for the per pupil costs of Neptune's program versus that of petitioners – rather than on actual or budgeted costs. (Petitioners' Exceptions at 2-5) They further renew their contention that the only reasonable conclusion to be drawn from the sole actual cost figure on record for the Board's program – the 2007-08 per pupil cost of $16,701.00 as stated in the Department's School Report Card – is that petitioners can educate Neptune's preschoolers more economically and efficiently than can the Board. (*Id*. at 5-6)

Petitioners additionally reiterate that termination of their contract is contrary to the spirit of regulations emphasizing high quality education through competition and use of a mixed delivery system, and that it will, in fact, reduce the quality of education available to Neptune preschool students. Asserting that the Board, the Department and the ALJ "have all taken the position that elimination of a great education is acceptable because the district can provide an education that, while inferior, is good enough," petitioners proffer that the Department's decision does not even reference quality of education – notwithstanding that their program undisputedly scored higher (6.4 out of a possible 7.0) than the Board's (5.67 out of 7.0) on the 2008-09 Early Childhood Environment Rating Scale (ECERS-R) evaluation representing the average of 43 items indicative of the quality of education – and they urge wholesale rejection of any implication that "a preschool education only needs to meet a certain [arbitrarily selected] standard of quality above which differences in quality can be ignored." (Petitioners' Exceptions at 6-7)

Petitioners also object, as they did before the ALJ, to any consideration being accorded to either the Department's statements in the present proceeding regarding program quality or the Board's late-coming representation – which was not before the Department when it rendered its decision – that the only additional costs associated with Board absorption of the students previously attending petitioners' program would be the salaries and benefits of two teachers and two paraprofessionals, estimated at $200,000 or $6,666.67 per pupil. According to petitioners, the Board's figure ignores the costs of transportation, meals, supplies and additional facility burdens, and is "nothing more than an arbitrary number" found nowhere in the record and created by the Board "as a last ditch effort to support the unsupportable." Petitioners contend that the Department's decision approving the Board's action rested solely on a comparison of State aid figures and must be reviewed as such, and that the Initial Decision should not have "improperly expanded the record, created its own rationale and rubber stamped the arbitrary, capricious and unreasonable termination of [petitioners'] contract." (Petitioners' Exceptions at 7-9)

Finally, petitioners assert that the "cost to absorb" standard embodied in the Initial Decision is nowhere to be found in applicable law, and that acceptance of it would also be counterproductive as a matter of policy. Petitioners explain that adding a small group of students to a large, high-cost facility may, indeed, have a minimal impact on the facility's overall costs; however, if "cost to absorb" is the measure by which such changes are judged, smaller facilities can one by one be consumed by a larger facility even if comparison of their actual budgets reveals that the smaller schools are more efficient and that greater savings would result from elimination of the larger school. Ignoring actual costs per pupil in favor of comparisons based on the cost to a large in-district school of consuming a private provider or

smaller school, petitioners opine, will increase the ultimate cost of preschool education while simultaneously eliminating school choice. (Petitioners' Exceptions at 9-10)

In reply, the Board counters that the rules governing nonrenewal of preschool program contracts at *N.J.A.C.* 6A:13A-9.3 provide solely for the Board's written notice of nonrenewal and the provider's written notice of dispute therewith – with additional information to be submitted only if requested by the Department – and make no provision for establishment of a record through discovery, production of documents, hearings or other like procedures – clearly contemplating that such a record, if necessary, will be developed on appeal to the Commissioner. The Board further asserts that the record thus developed supports its determination to terminate petitioners' contract on grounds of costs savings, and is devoid of any papers, discovery or affidavits supporting petitioners' position that the referenced difference in ECERS-R scores evidences a reduction in the quality of education; in this latter regard, the Board additionally notes that no affidavits or other competent evidential materials were offered to challenge the affidavit of Director of Early Childhood Education Ellen Wolock attesting that both petitioners and the Board provided quality programs and that the Board's fiscal practices and classroom quality were sound. Finally, the Board contends that petitioners do not identify the regulation(s) the ALJ purportedly failed to apply in accepting the Board's "cost to absorb" argument, nor do they cite the authorities on which they rely for their own position as required by *N.J.A.C.* 1:1-18.4(b)(3) when taking exception to an ALJ's conclusions of law. (Board's Reply at 1-4)

The Department, in turn, reiterates that its determination to affirm the Board's decision not to renew petitioners' contract cannot be held arbitrary and capricious, since the record on which it was based – itemized in full in the Certification of Ellen Wolock

(Exhibit R-3) – provided no justification for denial of the Board's request and demonstrated to the Department's satisfaction that: 1) petitioners' and the Board's programs were both of sound quality, 2) there was ample in-district classroom space within which to serve the 30 students at issue, and 3) the Board could serve these students more efficiently based on statutory Preschool Education Aid (PEA) amounts. [1] (Department's Reply at 2-4) In this latter regard, the Department reiterates that petitioners persist in misunderstanding the School Funding Reform Act of 2008 (SFRA), *P.L.* 2008, *c.* 260, which prescribes that a board is entitled to PEA in an amount determined by multiplying standardized per pupil amounts derived from actual budgets submitted by in-district programs and private providers – in this instance, $12,092 in 2009-10 for all Monmouth County in-district programs and $13,593 for all Monmouth County private providers – by the projected general education preschool enrollment, and provides no mechanism for recoupment based on individualized costs other than adjustment in the subsequent budget year to reflect actual enrollment as of October 15 of the year for which aid is given; thus, if the Board educated petitioners' 30 students in-district, the State would save approximately $45,030. (*Id.* at 4-6)

Upon review, the Commissioner is unpersuaded by petitioners' exceptions and adopts the Initial Decision as set forth below.

Initially, the Commissioner rejects petitioners' contention that the ALJ decided this matter on an improperly expanded record. Petitioners assert that their burden lies solely in refuting the reasons for approval specifically stated in the Department's written letter to the Board, so that the Department and Board cannot be permitted to build a record on appeal in an

[1]The Department also asserts that it did not present an after-the-fact supplement to its reasoning upon review of the Board's application, but rather a fuller explanation thereof. The Department further adds that it does not, when reviewing nonrenewal requests, engage in a balancing test of which provider has the better program, but whether a request is appropriate in light of all the existing circumstances. (Department's Reply at 6-7)

attempt to fabricate *post facto* justifications for their actions. The Commissioner finds, however, that no such attempt has occurred in this instance; to the contrary, the Department has done nothing more than identify the documents and information it took into consideration when reviewing the Board's request and provide a detailed explanation of the process and rationale by which it arrived at its stated conclusions,[2] while the additional cost information provided by the Board was offered not as retroactive justification for its decision to nonrenew petitioners' contract, but specifically in response to petitioners' central claims – made before both the Department and the OAL and properly considered by the ALJ based on the record developed pursuant to *N.J.A.C.* 1:1-12.5 – that comparison of actual costs, rather than PEA amounts, is the correct measure of efficiency to be applied in this matter, and that the Board's actual costs are significantly higher than their own. (See Brief and Appendix in Support of Motion for Summary Decision at 20-21; also Exhibits J-1 at 3, P-1 at 8, P-4 at 3.)

The Commissioner further rejects petitioners' contention that it was improper or unreasonable for respondents to rely on PEA amounts to conclude that nonrenewal of petitioners' contract would result in cost savings. As respondents correctly observe, the Board is required to provide universal preschool and as such is entitled under the SFRA – independent of its actual program costs – to a fixed amount of State aid to support preschool programs, with any difference between petitioners' actual tuition charge and the private provider aid amount returnable to the district without recoupment by the Department; moreover, the documents considered by the Department (notably Exhibit R-7) support the Board's representation that its 2009-2010 preschool program budget did not exceed the

[2] In this regard, see also *Board of Education of the City of Elizabeth, Union County v. New Jersey State Department of Education, Office of Early Childhood Education*, Commissioner Decision No. 180-08, decided April 21, 2008, affirmed App. Div. April 29, 2008, #A-4063-07T2.

amount of such aid. Consequently, in this instance, PEA amounts and the per pupil cost of a budgeted in-district program are effectively the same, so that the Board was neither mistaken nor unreasonable in contending – and the Department neither mistaken nor unreasonable in concluding – that a substantial sum would be saved by allowing the Board to serve students in-district so that its aid would be based on the in-district amount of $12,092 per pupil rather than the private provider amount of $13,593.

With respect to petitioners' objection to the ALJ's purported adoption of an unfounded and unacceptable "cost to absorb" standard, the Commissioner finds that the Initial Decision neither creates any such standard nor turns on this factor as suggested by petitioners, instead merely summarizing (at 4) the Board's calculation – introduced, as noted above, not as justification for the decisions on appeal, but in response to petitioners' continued press for "actual" versus "unreal" numbers – as part of its background discussion and basing its conclusions (at 5-7) on the justifications actually provided by the Board and Department. However, notwithstanding that neither the Board nor the Department relied on "cost to absorb" in the decisions herein on appeal, its introduction into this proceeding as a result of petitioners' claims compels the Commissioner to observe that: 1) petitioners' contention that consideration of this factor will increase program costs in the long run is purely speculative – unsupported by anything in the evidential record[3] and belied by the fact that the Department considers the totality of circumstances in reviewing each individual request for nonrenewal of a provider contract; and 2) the circumstances reviewed in this matter – including the existence of State-built and funded facilities having unused space and

[3] The Commissioner concurs with respondents that petitioners' reliance on the per pupil cost set forth in the School Report Card is misplaced, since that amount reflects comprehensive pre-K through 12 program costs district-wide, and additionally predates enactment of the SFRA and its related accounting practices.

an established program already successfully serving the vast majority of the district's preschool population within a sound administrative and operational framework – support the reasonableness of any conclusion that it would be more efficient to integrate petitioners' students into the existing district program than to continue paying the sum of 30 individual tuitions to a private provider and being responsible for the substantial administrative oversight required of districts utilizing such providers to deliver public preschool services.

Finally, the Commissioner cannot agree with petitioners' assertion that the Board's nonrenewal of their contract must be overturned because it reduces the quality and diversity of preschool education in the district. The Board did not base its request to nonrenew on the quality of petitioners' program – which, as has been stated repeatedly throughout this proceeding, is not in question – and the record is clear that the Department was well acquainted with both petitioners' and the Board's programs and judged both to be of sound quality based on experience and a variety of measures; petitioners offer no support whatsoever for their contention that, in itself alone, a difference in 2008-09 ECERS-R scores made it unreasonable or unlawful for the Department not to have weighed relative program quality in assessing the Board's request – particularly where the scores at issue (5.67 and 6.4, respectively) both fall within the "very good" range between 5 (good) and 7 (excellent). Additionally, since the promulgation in June 2008 of regulations implementing the SFRA and eliminating the former prohibition against the Board's duplication of programs or services otherwise available in the community, lack of delivery through a mix of private and public providers could no longer serve, as it did in the past, as a basis on which the Department could properly deny the Board's request to nonrenew petitioners' contract.

Consequently, like the ALJ, the Commissioner finds no cause to disturb either the Board's determination not to renew its contract with petitioners or the Department's approval thereof, both decisions having been established in this proceeding as in all respects reasonable, lawful and supported by competent evidence.

Accordingly, for the reasons stated 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.[4]

COMMISSIONER OF EDUCATION

Date of Decision: May 20, 2010
Date of Mailing: May 20, 2010

[4] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Appellate Division of the Superior Court.