

64-13 (OAL Decision: Not yet available online)

BOARD OF EDUCATION OF THE	:	
TOWNSHIP OF MINE HILL,	:	
MORRIS COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE	:	
TOWN OF DOVER, MORRIS COUNTY,	:	
RESPONDENT.	:	
_____	:	

SYNOPSIS

Petitioning Board sought a determination regarding whether it is financially responsible for the private school placement of a classified student, M.G., whose parents are domiciled in the respondent Board's district, but who was enrolled in the Mine Hill district pursuant to the School Choice Act, *N.J.S.A. 18A:36B-14 et seq.* The respondent Board asserted that this issue had been previously litigated between the parties, and was thus barred by the doctrine of *res judicata*, and sought dismissal of the petition.

The ALJ found, *inter alia*, that: the petition should be dismissed on the basis of *res judicata*, as the identical factual claims were previously litigated and were the subject of a May 2011 order by an Administrative Law Judge (ALJ) that assigned financial responsibility for M.G.'s educational programming to Mine Hill; the ALJ who issued the May 2011 order was required to determine which district – Mine Hill or Dover – was financially responsible for M.G.'s education, and had jurisdiction to so decide; and that the instant petition should be dismissed as barred by the doctrine of *res judicata*. Accordingly, the ALJ ordered the within matter dismissed.

Upon comprehensive review of the record, the Commissioner determined to issue a decision on the substantive merits. The Commissioner found, *inter alia*, that: the Commissioner of Education has jurisdiction to hear controversies falling under school law, and school finance/funding falls squarely under New Jersey's school laws; the doctrine of *res judicata* does not apply to the instant case, as the May 2011 decision was never submitted to the Commissioner for review and therefore was not a final ruling capable of triggering *res judicata*; subsequent to the 2011 order in this matter, *N.J.A.C. 6A:12-9.1(b)* was amended to clarify the financial responsibilities of the choice and sending district in the provision of services to choice students who require a private day or residential school, such that the sending district has fiscal responsibility but the choice district is required to contribute any State aid received for such a student and the sending district is responsible for the balance. Accordingly, the Commissioner denied respondent's motion to dismiss and granted the petition subject to *N.J.A.C. 6A:12-9.1(b)*, as amended.

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.
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February 11, 2013

OAL DKT. NO. EDU 7051-12
AGENCY DKT. NO. 91-4/12

BOARD OF EDUCATION OF THE :
TOWNSHIP OF MINE HILL, :
MORRIS COUNTY, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE :
TOWN OF DOVER, MORRIS COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

The parties to this controversy ask for a determination assigning responsibility for the costs of a private school placement for a child who resides in respondent’s district but has been attending school in petitioner’s district as a “choice student.” Upon review of the record, Initial Decision of the Office of Administrative Law (OAL) dated September 28, 2012, petitioner’s exceptions and respondent’s replies thereto, the Commissioner has determined to issue a decision on the substantive merits.

A brief history of the controversy reveals that the child in question, M.G., lives in Dover (respondent or Dover) but was accepted in 2008 by the Mine Hill School District (petitioner or Mine Hill) to be a “choice student” in the first grade under the Interdistrict Public School Choice Act (School Choice Act).¹ Subsequent to M.G.’s acceptance into petitioner’s district, she was classified as being eligible for special education services. When her parents and Mine Hill could not agree on the appropriate educational plan for M.G., the parents filed a

¹ The School Choice Act allows school districts to accept out-of-district students and allows parents who are dissatisfied with the educational opportunities in their districts to apply to send their children to “choice districts.”

petition against Mine Hill – in November 2010. Because M.G. resided within the Dover School District, Dover successfully applied for intervenor status.

Although the matter was instituted as an application for a due process hearing, the Decision which was issued by the Administrative Law Judge (ALJ) reveals that no order was issued identifying the services that would be appropriate for M.G. Instead, the ALJ's sole determination in the May 2011 Decision was that Dover was not the party responsible for any out-of-district private or residential placement of M.G. that would be agreed upon by Mine Hill and M.G.'s parents.

Subsequent to that determination, Mine Hill and M.G.'s parents agreed upon an in-district educational plan. In January of 2012, Mine Hill and M.G.'s parents supplanted that arrangement with a new agreement placing M.G. out-of-district. Dover was not a participant in either accord. Nonetheless, in April 2012, Mine Hill filed a petition against Dover initiating the instant proceeding.

Petitioner Mine Hill asked once again – by way of a regular petition to the Commissioner – for a ruling that Dover is responsible for the costs of M.G.'s out-of-district special education services. Dover contended, in a motion to dismiss the petition, that the doctrine of *res judicata* barred Mine Hill from prosecuting the instant petition. More specifically, Dover maintained that the Decision issued in May 2011 provided a final determination regarding the financial responsibility for M.G.'s out-of-district education, and that the May 2011 order was binding upon Mine Hill. The ALJ in the present matter concurred with Dover and dismissed Mine Hill's petition.

The Commissioner cannot agree that the doctrine of *res judicata* applies to the instant case. *N.J.S.A. 18A:6-9* states that:

The Commissioner shall have jurisdiction to hear and determine, without cost to the parties, **all** controversies and disputes arising under the school laws.... or under the rules of the state board or of the Commissioner. (Emphasis added)

School finance/funding is without question a subject addressed by New Jersey's school laws and squarely under the Commissioner's jurisdiction, *see, e.g. Roxbury Tp. Bd. of Educ. v. West Milford Bd. of Educ.*, 283 N.J. Super. 505, 521 (App. Div. 1995). Yet the May 2011 Decision was never submitted to the Commissioner for review.

Review by the Commissioner may not have been sought because the controversy was initially characterized as a due process application under the federal Individuals with Disabilities Education Act (IDEA). In cases where the appropriate educational plan for a special needs student is in question, administrative proceedings are conducted pursuant to the guidance in the applicable regulations under the IDEA and, in New Jersey, the administrative proceedings end with the Decision of the OAL.

However, in cases which involve both disputes about the provision of educational services and disputes about financial responsibility for same, the Commissioner reminds the parties of the paradigm articulated in *A.N. v. Clark Bd. of Ed.*, 6 N.J.A.R. 360 (1983) and other cases, *i.e.* that "the administrative law judge should carefully parse the claims and delineate which are final determinations and which are reviewable by the agency head or heads." *Ibid.* at 4.

As mentioned above, the May 2011 Decision was neither a decision exclusively establishing the proper educational services for M.G. nor a decision determining both the appropriate educational services and the financial responsibility for same. Rather it purported only to allocate financial responsibility. As such, it should have been subject to the

Commissioner's review. Since it was not, the Commissioner concludes that it was not a final ruling capable of triggering the doctrine of *res judicata*.

That being said, the Commissioner acknowledges that the May 2011 Decision included a legal analysis of the statutory scheme of the School Choice Act. ALJ Cookson concluded from a review of the legislative history of that act that students accepted into a school choice district were to be treated, for purposes of most categories of State educational aid, as residents of the district. She believed, therefore, that any reading of *N.J.A.C.* 6A:12-9.1(b) which transferred responsibility for the cost of a "choice student's" special education services back to the sending district would be dissonant with the school choice statutory scheme.

However, subsequent to ALJ Cookson's analysis, *N.J.A.C.* 6A:12-9.1(b) was amended in a manner that was meant "to clarify the respective financial responsibilities of both the choice and sending districts for choice students enrolled in or determined to require a private day or residential school." 44 *N.J.R.* 2087. That amendment resulted in the following language for *N.J.A.C.* 6A:12-9.1(b), effective December 17, 2012:

The sending district shall maintain fiscal responsibility for any choice student enrolled in or determined to require a private day or residential school, except that the choice district will be required to contribute any State aid received for such a student and the sending district will be responsible for the balance.

(Amendment underlined)

The foregoing amendment clarifies and renders more explicit the Department's guidance about the intended source(s) of tuition for "choice students" placed in private schools. The responsibility would appear to be allocated to the sending district which, however, must receive the benefit of any State aid attributable to the choice student.²

² Challenges to the validity of a regulation are appropriately in the Appellate Division of Superior Court. *R.* 2:2-3(a)(2).

Accordingly, the respondent's motion to dismiss the petition is denied and the petition – which asks for a declaration that a sending district bears responsibility for the private school education of a choice student – is granted, subject to amended regulation *N.J.A.C. 6A:12-9.1(b)* which requires that the choice district contribute toward the cost of the placement all State aid received for the education of the choice student.

IT IS SO ORDERED.³

COMMISSIONER OF EDUCATION

Date of Decision: February 11, 2013

Date of Mailing: February 12, 2013

³ This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).