

BOARD OF TRUSTEES OF THE	:	
PASSAIC COUNTY ELKS CEREBRAL	:	
PALSY CENTER,	:	COMMISSIONER OF EDUCATION
	:	
PETITIONER,	:	DECISION
	:	
V.	:	
	:	
NEW JERSEY DEPARTMENT OF	:	
EDUCATION, OFFICE OF FISCAL	:	
ACCOUNTABILITY AND COMPLIANCE,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Passaic County Elks Cerebral Palsy Center (CP Center) challenged the Department’s determination that petitioner – a private school for students with disabilities (PSSD), which is authorized to receive special education students from public school districts on a tuition basis – may not include in its tuition charges for the 2009-2010 school year the cost of two four day/three night out-of-state field trips (Spring Trips) to Baltimore, Maryland and Hershey, Pennsylvania. The Department’s Office of Fiscal Accountability and Compliance (OFAC) contended that the expenses associated with the Spring Trips were non-allowable costs under *N.J.A.C.* 6A:23-18.5(a)(68) because they were excessive and patently unreasonable. Petitioner asserted that these costs should be allowed in the calculation of its actual cost per pupil for the year in question.

The ALJ found, *inter alia*, that: the IDEA mandates that a free appropriate public education be tailored to meet the unique needs of the handicapped child, supported by services necessary to permit the child to benefit from instruction; this mandate is implemented through a separate Individualized Education Program (IEP) for each classified student; by the time a child turns 16, the IEP must include a statement with appropriate measurable post-secondary goals based upon age-appropriate transition related to training education, employment, and independent living, and the transition services needed to assist the child in reaching those goals; careful analysis of the specifics of the Spring Trips at issue here – based on undisputed facts – leads to the clear conclusion that these trips were relevant and necessary educational and transitional opportunities, consistent with the students’ IEPs; the cost of these trips was carefully calculated, was far less than the alternative format proposed by OFAC’s expert, and was reasonable. The ALJ concluded that OFAC’s determination that the costs of the Spring Trips are non-allowable is arbitrary, capricious and unreasonable. Accordingly, he reversed the determination of OFAC and ordered the tuition rates for 2009-2010 to be recalculated to reflect that the Spring Trips were allowable costs pursuant to *N.J.A.C.* 6A:23A-18.2(a)(1).

Upon a thorough review of the record and consideration of the exceptions of the parties, the Commissioner concurred with the ALJ’s determination – for the reasons outlined in the Initial Decision – that the expenses for the Spring Trips are allowable costs under *N.J.A.C.* 6A:23A-18.2(a)(1). Accordingly, the Commissioner ordered that these costs be included in the tuition rate for the 2009-2010 school year.

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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August 14, 2014

OAL DKT. NO. EDU 16074-12
AGENCY DKT. NO. 327-11/12

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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 the exceptions filed pursuant to *N.J.A.C. 1:1-18.4* by the Department of Education, Office of Fiscal Accountability and Compliance (OFAC), and the Board of Trustees of the Passaic County Elks Cerebral Palsy Center's (CP Center) reply thereto.

In this matter, petitioner CP Center, an approved private school for students with disabilities (PSSD), challenges OFAC's determination that the costs of two four-day/three night out-of-state field trips (Spring Trips) to Baltimore Maryland and Hershey, Pennsylvania cannot be included in the school's calculation of the tuition rate for the 2009-2010 school year. OFAC conducted a fiscal audit of the business services and tuition charges of the CP Center covering the period between July 1, 2009 and June 30, 2010. During that audit, OFAC determined that the expenses associated with the Spring Trips were non-allowable costs under *N.J.A.C. 6A:23-18.5(a)(68)* because they were excessive and patently unreasonable. The Administrative Law Judge (ALJ) found that the OFAC's decision was arbitrary, capricious and unreasonable. The ALJ determined that the costs of the Spring Trips should be included in the tuition costs for the

2009-2010 school year because the costs were reasonable in that they were ordinary and necessary and not in excess of the cost which would be incurred by an ordinary prudent person in the administration of public funds.

In its exceptions, OFAC stresses that a finding by OFAC that certain costs are non-allowable in the calculation of the tuition rate cannot be overturned unless it can be characterized as arbitrary, capricious or unreasonable. OFAC maintains that despite the ALJ's assertion to the contrary, prior decisions of the Commissioner set forth the requirement that the CP Center bears the burden of establishing that the OFAC's determination was arbitrary, capricious or unreasonable. Therefore, OFAC states that the Initial Decision should be modified to set forth the appropriate standard of review to be applied to appeals of OFAC non-allowable cost determinations.

Additionally, OFAC contends that the ALJ erroneously found that the expenses for the Spring Trips were not patently unreasonable. OFAC points out that, given the Legislature's expressed concern for not only the quality of education for handicapped pupils, but the overall cost to the public of such education, tuition rates that PSSDs may charge to sending public school districts are strictly regulated. OFAC's decision to disallow the costs of the Spring Trips was reasonable because the Spring Trips were not required by the IEPs of the students who participated in the trips as none of their IEPs required that the transition plans or goals and objectives be accomplished within the context of a four-day field trip. Further, OFAC asserts that the Spring Trips were not necessary to implement the students' IEPs and that the CP Center – who has the burden of proof – failed to identify an educational benefit or IEP goal that could only be accomplished through a four-night, out-of-state trip. OFAC argues that every one of the educational benefits and IEP goals identified by the CP Center could have been achieved through

any number of different types of trips, social events, or in-school activities. Moreover, it is irrelevant whether or not each expense was the least expensive alternative in the context of the particular trip because the trips as a whole were unnecessary and excessive. Therefore, the OFAC requests that the Initial Decision be rejected.

In reply, the CP Center reaffirmed its position presented at the OAL, arguing that the ALJ properly determined that the costs of the Spring Trips were reasonable and should be included in the tuition cost for the 2009-2010 school year. With respect to OFAC's argument concerning the applicable standard of review, the CP Center maintains that the ALJ properly noted that the correct legal standard for an appeal of an OFAC determination is the traditional preponderance of the evidence standard that applies to administrative agency matters. Since OFAC is a subordinate office of the Department of Education (Department), the agency head is not legally required to give any deference to the staff of the agency, but instead may decide the matter as the agency head deems legally appropriate.

The CP Center argues that in its exceptions, OFAC recast and restated its arguments below to wrongfully compare a field trip to a Broadway play for a music class or a trip to Spain for a Spanish class to the Spring Trips in this case. See, *The Forum School v. New Jersey Dept. of Educ., Office of Compliance Investigation*, EDU 3879-05, Initial Decision (March 31, 2006), aff'd., Comm'r (May 4, 2006); *Bergen Center for Child Development, Inc. v. New Jersey Dept. of Educ., Office of Compliance Investigation*, EDU 1807-05, Initial Decision (Aug. 31, 2005), aff'd., Comm'r (Oct. 17, 2005). The CP Center stresses that after a review of the joint stipulation of facts, CP Center's undisputed facts, and the testimony of all the witnesses, the ALJ found that those cases were distinguishable from the case herein, and that the instant field trip expenses were reasonable. Notably, the CP Center's Executive Director credibly

testified that the Spring Trips were less expensive than the OFAC expert's recommendations for implementing the students' IEPs. Although there may have been alternative ways to achieve the goals addressed by the Spring Trips, the trips actually afforded the CP Center the opportunity to address numerous objectives for 17 different students in a less costly manner than espoused by OFAC's expert. Therefore, the CP Center requests that the Initial Decision be adopted as the final decision in this matter.

As a threshold matter, the Commissioner agrees with the ALJ that, when there is a challenge to a finding by OFAC, the Commissioner is not legally mandated to give deference to his staff but instead determines whether the finding was legally appropriate.¹ A decision by OFAC is not akin to appellate review of a final agency decision that is entitled to an arbitrary, capricious or unreasonable standard of review. As the ALJ pointed out, where the Department of Education has limited the scope of review of a subordinate office or division, it has done so by regulation, i.e. appeals from decisions of the State Board of Examiners, School Ethics Commission and the New Jersey State Interscholastic Athletic Association.

The Commissioner is also in accord with the ALJ's determination – for the reasons outlined in the Initial Decision – that the expenses for the Spring Trips are allowable costs under *N.J.A.C.* 6A:23A-18.2(a)(1). As a PSSD, the CP Center is required to set its tuition rate annually in accordance with the Department's regulations. Pursuant to *N.J.S.A.* 18A:46-21, the tuition rate may not exceed the actual cost per pupil, as determined in accordance with *N.J.A.C.* 6A:23A-18.1 *et seq.* Those regulations specify that certain enumerated costs are not

¹ Prior decisions of the Commissioner have utilized the arbitrary, capricious or unreasonable terminology to indicate that a finding of a subordinate office was appropriate; but those decisions did not establish that the Commissioner was legally required to give deference to staff decisions that are the subject of contested cases before the agency head.

allowable in the calculation of the tuition rate, including “costs found to be patently unreasonable by the Commissioner or his or her representative(s).” *N.J.A.C. 6A:23-18.5(a)(68)*.

When determining the actual allowable costs for the program, the board of directors shall ensure that such costs are:

- i. Based on all costs required for student instruction from July 1 through June 30;
- ii. Consistent with the students’ individualized education program (IEP);
- iii. Inclusive of all costs required to implement all students’ IEPs and related services;
- iv. Reasonable, that is, ordinary and necessary and not in excess of the cost which would be incurred by an ordinarily prudent person in the administration of public funds; and
- v. Based on goods actually received and placed in service in the fiscal year they are expended. [*N.J.A.C. 6A:23A-18.2(a)(1)(i)-(v)*].

In this case, the parties stipulated that the Spring Trips were consistent with the students’ IEPs as mandated by *N.J.A.C. 6A:23-4.2(a)(1)(ii)*, and it is also undisputed that the CP Center complied with *N.J.A.C. 6A:23-4.2(a)(1)(i)(ii)* and (v). Therefore, the only relevant inquiry is whether the cost of the Spring Trips were “ordinary and necessary and not in excess of the cost which would be incurred by an ordinarily prudent person in the administration of public funds.” *N.J.A.C. 6A:23-4.2(a)(1)(iv)*.

Many of the students who attend the CP Center are multiply disabled and require wheelchair accessible transportation and 24 hour nursing care. The students who participated in the Spring Trips are all part of a life skills program with IEPs that included goals and objectives that address independent daily living skills through community experiences. The Spring Trips were designed to meet the transitional goals of students who are learning how to accomplish daily living skills, including interacting in the community, ordering and paying for food at a

restaurant and maneuvering their wheel chairs in different terrain. The testimony revealed that the CP Center students have the types of medical conditions that make it more challenging to take day trips, and that there is a real benefit to being able to get to a destination and then move from place to place within that community to practice certain life skills. As a result, the medical conditions of the CP Center students and the goals and objectives of their IEPs in this matter are completely different from those in *The Forum School, supra*, where it was determined that the costs for a class to attend a Broadway production of a musical performance in New York were non-allowable because they were patently unreasonable. In *The Forum School, supra*, the school arranged the field trip in order to satisfy the core curriculum standards for Visual and Performing Arts, which undoubtedly could have been achieved in a more cost effective manner by simply attending a local theatrical production or movie.

At the hearing in this matter, OFAC's expert – Robert Haugh – opined that the goals of the students' IEPs could be better achieved by repetitive one-on-one exposure in each student's respective community. (T1 at 121-131, 148). Mr. Haugh, however, further testified that he was not aware of the cost of the Spring Trips, and he was not able to estimate how much it would cost for the CP Center to implement the IEPs through the alternative that he recommended. (T1 at 148). The fact that there are various ways to meet the goals and objectives of an IEP does not automatically make one alternative patently unreasonable from a cost perspective.

It is undisputed that these students, in particular, need to be out in the community and exposed to certain experiences in order to meet their transitional needs. As the ALJ thoroughly outlined in the Initial Decision, the CP Center established that each aspect of the Spring Trips was carefully calculated and accomplished in a cost efficient manner. Moreover,

there is no evidence in the record that another alternative to attaining the life skill goals and objectives that were accomplished through the Spring Trips would have been more cost effective.² Therefore, the Commissioner finds that expenses associated with the Spring Trips were not patently unreasonable.³

Accordingly, the expenses associated with the Spring Trips are allowable costs under *N.J.A.C.* 6A:23A-18.2(a)(1) and *N.J.A.C.* 6A:23-18.5(a)(68), and the costs shall be included in the tuition rate for the 2009-2010 school year.

IT IS SO ORDERED.⁴

ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 14, 2014

Date of Mailing: August 15, 2014

² Dr. Weiss, the Director of the CP Center, testified that it was his opinion that the cost of having individual repetitive exposure to each student's community would far exceed the costs of the Spring Trips. (T1 at 166-168).

³ Further, the Spring Trips were not isolated excursions but rather the students did fundraising to raise money as part of the whole experience. To that end, the admission fees for the educational and recreational venues visited during the trips (i.e. the Whitaker Science Center, the National Aquarium, the Maryland Science Center and tickets to a baseball game) were covered by money raised for that purpose, and by donations -- not tuition.

⁴ 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).