

#248-15 (OAL Decision: Not yet available online)

SUSAN J. HERMAN,	:	
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PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
NEW JERSEY STATE DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT,	:	DECISION
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – a school bus driver – appealed the respondent Department’s determination to suspend her school bus endorsement pursuant to *N.J.S.A. 18A:39-29(a)* of the School Bus Safety Act (“Act”) after an incident in which O.S. – a kindergarten student at the Drew School – remained on the school bus as petitioner drove toward the bus depot without realizing the child was still on board. Petitioner contended that she did not violate *N.J.S.A. 18A:39-28* as she remained within the vicinity of the bus at all times, and that the customary understanding of the meaning of “the end of the route” is the return of the bus to the bus depot. The respondent filed a motion for summary decision, which was denied, and the matter was heard at the OAL on May 29, 2015.

The ALJ found, *inter alia*, that: the rules by which petitioner’s conduct must be judged are ambiguous, as the statutes use various terms such as “the end of transportation route,” “the end of the route,” and “vicinity of the bus,” which are not defined; petitioner credibly testified that the union custom requires a visual inspection at the bus depot before securing the bus, and that this is the industry’s standard implementation of *N.J.S.A. 18A:39-28*; student transportation regulations provide that “[a] student is considered to have been left unattended on the school bus at the end of the route when the driver has left the vicinity of the bus.” *N.J.A.C. 6A:27-12.3(a)(1)*; respondent’s argument that the law requires the visual inspection at “the end of the route” to be interpreted to mean “after each drop-off point” is inapplicable in the instant case, as petitioner herein never left the vicinity of the school bus; therefore, petitioner did not leave a student unattended on the school bus. The ALJ concluded that petitioner’s actions did not violate *N.J.S.A. 18A:39-28* and, accordingly, reversed respondent’s decision to suspend petitioner’s school bus endorsement.

Upon review, the Commissioner rejected the Initial Decision, concluding instead that petitioner did violate the Act by admittedly failing to visually inspect the school bus before leaving her final student drop-off point, which was the end of her transportation route. In so deciding, the Commissioner found, *inter alia*, that: the interpretation of specifically when the Act requires a school bus driver to visually inspect the bus has been addressed in *Klein v. New Jersey State Department of Education, Criminal History Review Unit*, Commissioner Decision No. 68-12, decided February 21, 2012, and – more recently – in *Vickery v. New Jersey State Department of Education, Criminal History Review Unit*, Commissioner Decision No. 234-15, decided July 9, 2015; and the ALJ improperly relied on *N.J.A.C. 6A:27-12.3(a)(1)* in excusing petitioner’s failure to visually inspect the bus at the end of her route at the Drew School. Accordingly, respondent’s decision to suspend petitioner’s school bus endorsement for six months was affirmed, and the petition was dismissed. Respondent was directed to notify the Motor Vehicle Commission of the suspension of petitioner’s school bus endorsement pursuant to *N.J.S.A. 18A:39-28 et seq.*, and to notify petitioner’s employer that she is ineligible for the period of suspension for continued employment as a school bus driver.

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 30, 2015

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This matter concerns interpretation of the School Bus Safety Act (the Act), *N.J.S.A. 18A:39-26 et seq.*, and specifically when the Act requires a school bus driver to visually inspect the school bus to determine that no pupils remain on the bus. Having previously addressed this issue in *Klein v. New Jersey State Department of Education, Criminal History Review Unit*, Commissioner Decision No. 68-12, decided February 21, 2012, and more recently in *Vickery v. New Jersey State Department of Education, Criminal History Review Unit*, Commissioner Decision No. 234-15, decided July 9, 2015<sup>1</sup>, the Commissioner rejects the recommended Initial Decision of the Office of Administrative Law and instead concludes that petitioner violated the Act by failing to visually inspect the school bus before leaving the Drew School – at the end of her transportation route – and prior to arrival at the bus depot.

The Act requires that a school bus driver “visually inspect the school bus to which he is assigned at the end of the transportation route to determine that no pupil has been left on the bus.” *N.J.S.A. 18A:39-28*. In accordance with *N.J.S.A. 18A:39-29*, if “after notice and opportunity to be heard, a school bus driver is found to have left a pupil on the school bus at the

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<sup>1</sup> The issuance of the Initial Decision in this matter preceded the Commissioner’s final determination in *Vickery*.

end of his route, his school bus endorsement shall be: a) suspended for six months, for a first offense; or b) permanently revoked, for a second offense.”

At the heart of this controversy are the parties’ differing interpretations of the phrase “end of the transportation route” – which is not defined in the statute or the regulations. While petitioner maintains that the “end of the transportation route” is signified by arrival at the bus depot or bus yard, respondent cites the Commissioner’s decision in *Klein* to support its contention that the “end of the transportation route” is “the point where all of the children in that group leave the bus to enter their school and the bus is empty of riders, and before the driver moves on to her next route. At that point, the driver shall inspect the bus for any remaining students.” *Klein, supra*, at 2.

The facts are not in dispute. Petitioner is a school bus driver for the East Windsor School District, which operates a half-day kindergarten program at the Drew School. (Initial Decision at 2) Petitioner’s mid-day bus route initially involves transporting the “AM” Kindergarten students from Drew School to their respective bus stops at the conclusion of the “AM” session. Next, petitioner transports the “PM” Kindergarten students from their respective bus stops to Drew School for the “PM” session. (Stipulation of Facts, ¶ 1)

On March 21, 2014, when petitioner arrived at O.S.’s bus stop following the “AM” session, no adult was present to meet him. (Stipulation of Facts, ¶ 2) As a result, petitioner contacted her dispatch and was advised to return O.S. to Drew School with the “PM” Kindergarten students. (Stipulation of Facts, ¶ 3) When petitioner returned to Drew School, the “PM” Kindergarten students departed the bus; evidently, O.S. remained on the bus. (Stipulation of Facts, ¶ 5) Next, without having visually inspected the bus to ensure that all students had departed, petitioner exited the bus to deliver a student’s misplaced backpack to a teacher, and

returned to the bus shortly thereafter. (Initial Decision at 2) Petitioner admits that she did not visually inspect the bus while at the Drew school; instead, she subsequently drove toward the bus depot without realizing that O.S. was still on the bus. (Stipulation of Facts, ¶ 4) Once petitioner received a call from her dispatch inquiring about O.S., she then called out his name to confirm his presence on the bus and drove him back to the Drew School. (Stipulation of Facts, ¶ 5)

Respondent, the Department's Criminal History Review Unit ("CHRU"), issued a decision dated March 24, 2014 finding that a child was left on petitioner's school bus, "notwithstanding [petitioner's] obligation pursuant to *N.J.S.A. 18A:39-28 et seq.* to conduct a visual inspection at the end of your transportation route to assure that no pupil has been left on the bus." Because this incident was petitioner's first offense, CHRU's decision indicated that petitioner's "S" endorsement on her driver's license (which allows her to operate a school bus) was to be suspended for six months pursuant to the Act. Petitioner appealed CHRU's determination.

Following a hearing at the Office of Administrative Law on May 29, 2015<sup>2</sup>, the Administrative Law Judge concluded that: 1) petitioner, at all times, remained in the vicinity of the school bus and therefore did not leave a pupil unattended on the bus; 2) "the custom of the industry" requires compliance with *N.J.S.A. 18A:39-28* by a visual inspection at the bus depot when the bus driver leaves the vicinity of the school bus; 3) respondent's argument that the law requires "the end of the route" to be interpreted as after each dropoff is inapplicable to the current factual determination since petitioner did not leave the vicinity of the school bus; and 4) petitioner's actions did not violate *N.J.S.A. 18A:39-28*. (Initial Decision at 9)

Respondent filed exceptions with the Commissioner claiming that the ALJ misapplied the relevant statutes and case law to the factual record. In particular, respondent

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<sup>2</sup> The hearing transcripts are not contained within the record, nor were they supplied to the Commissioner.

argues that whether petitioner remained within the vicinity of O.S. after having left him on the school bus at the end of the route is irrelevant because the Act does not require such an inquiry to be made. (Respondent’s Exceptions at 6) Rather, the only relevant inquiry is whether “a school bus driver is found to have left a pupil on the school bus at the end of his route.” *N.J.S.A.* 18A:39-29. In support of its contention, respondent cites to *Klein*, wherein the Commissioner defined “end of the transportation route” as “the point where all of the children in that group leave the bus to enter their school and the bus is empty of riders, and before the driver moves on to her next route. At that point, the driver shall inspect the bus for any remaining students.” *Klein, supra*, at 2. As to the ALJ’s reliance upon “the custom of the industry”, respondent asserts that industry custom is irrelevant to a proper application of the Act and emphasizes that “a prevailing union custom or district policy for its bus drivers cannot supersede New Jersey statutes.” (Respondent’s Exceptions at 7)

In response, petitioner contends that the factual circumstances here are completely different than those described in *Klein* – where a child left unattended on the bus became distressed when the driver exited to visit the restroom – and that, therefore, the ALJ appropriately distinguished *Klein*. (Petitioner’s Reply Exceptions at 1) Additionally, petitioner asserts that respondent’s “rigid” interpretation of the Act would unfairly result in assessment of the same penalty to petitioner as that assessed in *Klein*, and other more egregious cases “when the child’s interests and welfare were at significant risk.” (*Id.* at 2) For these reasons, petitioner seeks to disregard *Klein* and its holding while maintaining that the “end of the transportation route” occurs when the bus is parked at the bus depot. Under this interpretation of the Act, petitioner argues that she was under no obligation to visually inspect the bus while at the Drew School, or at any time prior to arrival at the bus depot.

Upon review of the record, the Initial Decision, and the parties' submissions, the Commissioner concurs with the respondent and rejects the ALJ's recommended conclusions. Instead, the Commissioner concludes that petitioner violated the School Bus Safety Act when she admittedly failed to visually inspect the school bus at the end of her route – *i.e.*, following the departure of the “PM” Kindergarten students from the bus, and before returning to the depot. As a result of petitioner's failure to perform the required visual inspection, O.S. was left on the bus as petitioner departed the Drew School and traveled to the bus depot. Therefore, petitioner is subject to a mandatory six month suspension of her school bus (“S”) endorsement, as per *N.J.S.A. 18A:39-29*.

The ALJ's analysis is flawed for a number of reasons. Initially, the ALJ improperly excused petitioner's failure to visually inspect the bus at the end of her route at the Drew School by finding that she remained in the “vicinity” of the bus at all times and, therefore, never left O.S. unattended. In excusing petitioner's failure to visually inspect the bus before leaving the Drew School, the ALJ cited *N.J.A.C. 6A:27-12.3(a)1* which provides that “a student is considered to have been left unattended on the school bus at the end of the route when the driver has left the vicinity of the bus.” Even if petitioner remained in the vicinity of the bus when she delivered the misplaced backpack to a teacher, that fact does not exempt petitioner from completing the required visual inspection before her departure to the bus depot. Notably, the Act itself does not require a finding that a student was left *unattended* on the bus in order to impose a penalty; rather, the stringent provisions of the Act and its mandatory penalties seek to prevent students from being left unattended and placed at risk of harm. *N.J.A.C. 6A:27-12.3*, which sets forth reporting requirements, should not be viewed as limiting the scope of the Act's plain language – especially when the stated purpose for the rules governing student

transportation “is to ensure the **safe and efficient** transportation of students to and from school and school-related activities.” (emphasis added) *N.J.A.C. 6A:27-1.2*.

The Commissioner’s recent decision in *Vickery* reinforces the Act’s requirement that the visual inspection of the school bus should have occurred before departing the Drew School at the end of the transportation route – when all of the other children had exited the bus – and makes clear that the remaining pupil need not be left unattended by the driver in order for violation of the Act to occur. In *Vickery*, a sixteen-year-old foreign exchange student, who was returning home from school, fell asleep on the school bus and therefore failed to exit at his designated stop. Following his arrival at the last bus stop on the route, and after all of the other children had exited, Vickery failed to complete the required visual inspection. As a result, the sleeping student – who was never left unattended – remained on the bus as Vickery proceeded to the bus yard.

Vickery asserted – as does our petitioner – that he complied with the statute because he did not leave the student alone on the bus and he conducted a visual inspection at the bus yard. Nevertheless, the ALJ concluded that Vickery’s failure to inspect the bus before returning to the bus yard and immediately following his last stop on the route violated *N.J.S.A. 18A:39-28*. As a result, the ALJ appropriately recognized that *N.J.S.A. 18A:39-29* mandated a six-month suspension of Vickery’s “S” endorsement.<sup>3</sup> *Vickery v. New Jersey State Department of Education, Criminal History Review Unit*, OAL Dkt. No EDU 83-15, Agency Dkt. No. 338-11/14, Initial Decision at 7, adopted, Commissioner Decision No. 234-15, decided

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<sup>3</sup> “[U]nder the terms set by the Legislature, where the violation has been established, no consideration of the circumstances of the event or of the driver may be considered in determining the penalty. The mandatory nature of the sanction may fairly be read as an indication of the Legislature’s strong reaction to any such act on the part of someone entrusted with the care and safety of students, who in many instances are of tender years.” *Garner v. New Jersey State Department of Education, Criminal History Review Unit*, OAL Dkt. No. EDU 6655-08, Initial Decision at 3, adopted, Commissioner Decision No. 132-09, decided May 1, 2009.

July 9, 2015. In so doing, the ALJ aptly noted that *N.J.S.A. 18A:39-29* “does not permit me to consider mitigating circumstances, or to consider the fact that, gratefully, this student was unharmed. The statute speaks in the imperative.” (*Vickery, supra*, Initial Decision at 8) The Commissioner concurred with the ALJ in *Vickery* and upheld the six-month suspension.

Furthermore, the ALJ’s erroneous reliance upon *N.J.A.C. 6A:27-12.3(a)1*, coupled with irrelevant testimony concerning industry custom, was an inadequate basis upon which to adopt petitioner’s definition of “end of the transportation route” and cast aside the well-reasoned definition provided by the Commissioner in *Klein*. It is the Commissioner, and not the school bus industry, who is tasked with the oversight of school bus transportation for hundreds of thousands of students. Any supposed industry custom in this context is neither controlling nor persuasive and simply cannot supersede New Jersey law.

Finally, the ALJ’s rejection of the Commissioner’s holding in *Klein* undermines the purpose and intent of the School Bus Safety Act. As the Commissioner stated in *Klein*, “Accepting petitioner’s argument that the inspection did not have to take place until the bus returned to the depot at the end of the day defies reason and eviscerates the fundamental purpose of the statute – to protect our children and ensure their safety.” *Klein, supra*, at 2. To hold otherwise would excuse – if not promote – inefficiency (by endorsing needless rides to the bus depot for our students) and place children at unnecessary risk of harm. It is nonsensical to delay visual inspection of the school bus until arrival at the bus depot when, in fact, any heightened safety risk to the children can be avoided altogether if they are discovered on the bus while still present on school grounds or prior to leaving the route. While it may be true that O.S. was never left unattended, and it is not known from the present record whether he suffered any harm or distress, the visual inspection required by *N.J.S.A. 18A:39-28* should have occurred prior to

departing the Drew School at the end of the transportation route – when all of the other children had exited the bus.

Accordingly, the decision of the Criminal History Review Unit is hereby affirmed, and the petition is dismissed. Respondent is directed to notify the Motor Vehicle Commission of its obligation, pursuant to *N.J.S.A. 18A:39-28 et seq.*, to suspend petitioner’s school bus “S” endorsement on her driver’s license for six months and to notify petitioner’s employer that she is ineligible – for the period of suspension – to continue employment as a school bus driver.

IT IS SO ORDERED.<sup>4</sup>

COMMISSIONER OF EDUCATION

Date of Decision: July 30, 2015

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<sup>4</sup> 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*).