

EDU #3474-95  
C # 64-96  
SB # 14-96

R.D. AND V.D., on behalf of C.D., a minor, :  
AND M.H. AND M.H., on behalf of M.H.  
and S.H., minors, :

PETITIONERS-APPELLANTS, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION  
TOWNSHIP OF BERNARDS, SOMERSET  
COUNTY, ADRIENNE O'NEILL, SUPERIN-:  
TENDENT OF SCHOOLS AND HARRY  
EVANS, ASSISTANT SUPERINTENDENT :  
OF SCHOOLS, :

RESPONDENTS-RESPONDENTS. :  
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Decided by the Commissioner of Education, February 22, 1996

For the Petitioners-Appellants, Pitney, Hardin, Kipp & Szuch (Dennis T.  
Kearney, Esq. and Loryn Riggiola, Esq., of Counsel)

For the Respondents-Respondents, Hurley & Vasios (Michael R. Speer, Esq.,  
of Counsel)

In March 1994, petitioners, residents of Butternut Lane in Basking Ridge, New Jersey, located within the Bernards Township school district, instituted an action in Superior Court, Law Division, against the Board of Education of the Township of Bernards (hereinafter "Board"), claiming that the Board had violated their rights under N.J.S.A. 18A:39-1 and the state and federal Constitutions by failing to provide a safe bus stop for their children, students at a nonprofit private school, as it had done for

similarly situated public school children.<sup>1</sup> In February 1995, the Court denied the Board's motion for summary judgment, but referred this matter to the Commissioner of Education and placed the case on the inactive list.

Petitioners are the parents of children attending a nonprofit private school approximately four miles from their homes. The Board's former acting superintendent indicated that the Board considered safety as a factor in assigning a bus stop to public school children, including the route the children were required to take in getting to and from the bus stop. Stipulation of Facts, at 5-6; tr. 10/26/95, at 174. He indicated that egress safety concerns were not considered by the Board in assigning a bus stop to petitioners' children. Stipulation of Facts, at 6. He further indicated that several minibuses travel from Hardscrabble Road into the Butternut Lane neighborhood to pick

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<sup>1</sup> N.J.S.A. 18A:39-1 provides in pertinent part:

Whenever in any district there are elementary school pupils who live more than two miles from their public school of attendance or secondary school pupils who live more than 2½ miles from their public school of attendance, the district shall provide transportation to and from school for these pupils.

When any school district provides any transportation for public school pupils to and from school pursuant to this section, transportation shall be supplied to school pupils residing in such school district in going to and from any remote school other than a public school, not operated for profit in whole or in part, located within the State not more than 20 miles from the residence of the pupil...provided the per pupil cost of the lowest bid received does not exceed \$675 for the 1992-93 school year or the amount determined for subsequent years pursuant to section 2 of P.L.1981, c.57 (C.18A:39-1a), and if such bid shall exceed that cost then the parent, guardian or other person having legal custody of the pupil shall be eligible to receive \$675 for the 1992-93 school year or the amount determined pursuant to section 2 of P.L.1981, c.57 (C.18A:39-1a) for subsequent years toward the cost of his transportation to a qualified school other than a public school, regardless of whether such transportation is along established public school routes.

up nonremote public school children.<sup>2</sup> Stipulation of Facts, at 7. He asserted that the minibuses pull into Butternut Lane because of heavy traffic and safety egress concerns on Hardscrabble Road. Stipulation of Facts, at 7, 14-15; tr. 10/26/95, at 153.

Petitioners' children have never been assigned to those minibuses. Instead, they have been assigned several different bus stops since 1992, ranging in distance from approximately one-half mile to one mile from their homes. In each case, petitioners' children would be required to walk down Hardscrabble Road, a heavily traveled road with no sidewalks or shoulders, to get to the bus stop.

The Bernards Township Chief of Police indicated in a letter dated June 15, 1993, exhibit P-4, in evidence, that it was not safe for petitioners' children to walk from their homes to the bus stop established for them by the Board. He stated that:

Hardscrabble Road is narrow, there are no sidewalks, and the shoulders are not hard packed. Children would have to walk along the edge of the roadway and taking into account the commuter traffic that would be present at the time children would be walking to the bus stop, I consider the route unsafe.

He indicated that Hardscrabble Road was also not safe for full-sized school buses due to the road's "twisting and turning." As a consequence, the Board uses minibuses to pick up public school children on Butternut Lane.

Petitioners made repeated requests to the Board to allow their children to be transported on the minibuses which pick up public school children on Butternut Lane. The former acting superintendent indicated that the Board had declined to provide

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<sup>2</sup> We note that the Board provides "subscription" busing for pupils who do not meet the distance requirements for remote transportation under N.J.S.A. 18A:39-1. Under such arrangement, the Township and the parents share the cost for such transportation.

petitioners' children with the same travel accommodations as public school children because of the existence of the \$675 cap in N.J.S.A. 18A:39-1. Stipulation of Facts, at 16-17, 21; tr. 10/26/95, at 135, 149. He testified that if petitioners' children were public school children, he would have put them on one of the minibuses or gotten another minibus, if necessary. Stipulation of Facts, at 21. He claimed that his hands were tied since the estimated cost of transportation for use of the minibuses was approximately \$1,000 per pupil. Id. at 16. Consequently, petitioners' children were assigned to a bus stop utilizing a full size school bus, which, as noted, were not permitted to use Hardscrabble Road due to safety concerns. The former acting superintendent acknowledged that the walk from petitioners' homes to the existing bus stop is unsafe. Tr. 10/26/95, at 154.

On January 11, 1996, an Administrative Law Judge ("ALJ") found that, under the particular circumstances herein, the Board's policy was discriminatory on its face. The ALJ observed that the transportation of public and nonpublic school pupils living remote from school was mandatory. West Amwell Board of Education v. State Board of Education of New Jersey, 5 N.J. Misc. 152 (Sup. Ct. 1927); West Morris Reg. Bd. of Ed. et al. v. Sills, 58 N.J. 464 (1971), cert. den. 404 U.S. 986 (1971). The ALJ stressed that a district must apply its transportation policies evenhandedly and provide nonpublic school pupils residing within the district with transportation similar to that provided to public school students. He found that no public school pupil was forced to walk on an unsafe public highway. Only those pupils living in the Butternut Lane neighborhood and attending nonpublic schools were required to do so.

While acknowledging that unsafe roadway conditions were the municipality's function, the ALJ stressed that "neither may a board turn a blind eye to such situations when establishing school bus stops." Initial Decision, slip op. at 14. The ALJ found that students residing in the Butternut Lane neighborhood could not safely walk to the bus stops established by the Board for petitioners' children. Accordingly, he concluded that the Board was required to provide transportation to qualifying nonpublic school pupils from some point within the Butternut Lane neighborhood or to reimburse the parents of qualifying nonpublic school students in the amount of \$675 per pupil per year or the amount determined pursuant to N.J.S.A. 18A:39-1a.<sup>3</sup>

On February 22, 1996, the Commissioner modified the ALJ's decision and remanded to the Office of Administrative Law ("OAL") for further proceedings. The Commissioner observed that there had been no finding that the Board had failed to meet its statutory obligation to provide nonpublic school students with access to transportation or that the Board's provision of such services violated the intent of the legislation. The Commissioner was "not persuaded that the record supports the conclusion that the assigned bus stops are unsafe. While the record does support the conclusion that the travel to and from the assigned stops may be considered hazardous...the provision for safe conditions of travel to and from the bus stops is a

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<sup>3</sup> N.J.S.A. 18A:39-1a provided, at all times relevant hereto:

Beginning in the 1993-94 school year and in each subsequent year, the maximum amount of nonpublic school transportation costs per pupil provided for in N.J.S. 18A:39-1 shall be increased or decreased in direct proportion to the increase or decrease in the State transportation aid per pupil in the year prior to the prebudget year compared to the amount for the prebudget year. As used in this section, State transportation aid per pupil shall equal the total State aid payments made pursuant to section

municipal function, and not the responsibility of the local Board.” Commissioner’s Decision, slip op. at 22. Consequently, the Commissioner concluded that the Board had acted in compliance with N.J.S.A. 18A:39-1.

However, since he found the record unclear with respect to the scope of the remand ordered by Superior Court, the Commissioner remanded this matter to OAL for resolution of the scope of the issues remanded by the Court and, specifically, for a determination of whether petitioners’ constitutional claim as to differential treatment of nonpublic school students was properly before the ALJ.

Petitioners filed the instant appeal to the State Board.

After a thorough review of the record, including the transcript of the hearing held in the Office of Administrative Law in this matter,<sup>4</sup> we reverse the decision of the Commissioner. We agree with the ALJ that petitioners have demonstrated that the Board’s action in this instance was arbitrary and capricious.

As we stated in Peary v. Board of Education of the Township of Barnegat, 93 N.J.A.R. 2d (EDU) 798:

Although district boards have wide discretion to promulgate pupil transportation policies, including school bus routes and stops, they may not discriminate or act in a manner that is arbitrary, capricious or unreasonable. Our review of the Board’s action herein is not limited to the relative safety of the school bus stop...or the Board’s jurisdiction over safety conditions of sidewalks and roadways within the Township. Rather, the broader issue is whether the Board abused its discretion in denying petitioner’s request to reestablish the former bus stop...in this particular case.

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16 of P.L.1990, c.52 (C.18A:7D-18) divided by the number of pupils eligible for transportation.

<sup>4</sup> We note that the hearing transcript was not provided to the Commissioner.

See also Board of Educ. v. Kraft, 139 N.J. 597 (1995) (the State Supreme Court recognized the relevance of student safety in determining whether a walkway could be included in calculating remoteness from school); Nichols v. Board of Education of the Township of Wayne, Docket #A-3526-93T5 (App. Div. 1995), cert. denied, 142 N.J. 449 (1995) (where the route marked for measurement of remoteness had existing sidewalks and marked crosswalks, then the measurement must be based on the assumption that the children should use them).

Thus, our review herein is not limited to the safety of the existing bus stop or the Board's jurisdiction over safety conditions on the Township's roads. Rather, the standard is whether the Board abused its discretion in refusing petitioners' request to relocate their children's bus stop or, in lieu thereof, to pay them for their transportation costs in accordance with N.J.S.A. 18A:39-1 and 18A:39-1a.

N.J.S.A. 18A:39-1, as previously noted, provides that whenever a school district provides transportation for public school pupils, it must also provide transportation or payment in lieu of transportation to nonpublic pupils in the school district residing remote from their nonprofit private school of attendance. There is no dispute herein that the Board provides transportation for public school pupils. Nor is it disputed that petitioners' children live remote from their nonprofit private school and are therefore also entitled to transportation. Rather, it is the Board's failure to provide those nonpublic students with transportation comparable to that provided to similarly-situated public school students that is at issue.

In the landmark case of Everson v. Board of Education of Ewing Tp., 133 N.J.L. 350 (E. & A. 1945), aff'd, 330 U.S. 1, 18, 67 S. Ct. 504, 91 L. Ed. 711 (1947), the

United States Supreme Court observed that New Jersey's school transportation statute, "as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." "The Legislature chose to extend to the private school student a right to transportation on the same basis upon which transportation would have been available if he attended public school in his district, i.e., remoteness from the school, and in that way to deal evenly with him and the public school student within that district." West Morris Reg. Bd. of Ed., supra, at 479. In Bd. of Ed. Woodbury Hts. v. Gateway Reg. H.S., 104 N.J. Super. 76, 86 (Law Div. 1968), the Court observed that "the Legislature has deemed it to be an essential public purpose to benefit children living remote by guarding them against the hazards attendant upon traveling to school. The Legislature...did not choose to distinguish between whether a child had to travel to a public school or a nonpublic school, for a child is a child and the hazards of travel do not depend upon the school which the child attends."

Under the particular facts in the record before us, we agree with the ALJ that petitioners have demonstrated that the Board's action in this case was arbitrary and capricious. The record reveals that the Bernards Township Board does not allow public school children to enter or exit minibuses on Hardscrabble Road due to safety concerns and yet, citing the \$675 cap in N.J.S.A. 18A:39-1, exposes nonprofit private school students to the dangers of walking on Hardscrabble Road to a bus stop. Given the history and purpose of the statute, the \$675 cap in N.J.S.A. 18A:39-1 cannot reasonably be viewed as permitting district boards to treat nonprofit private school students in a manner which denies them the same basic safety considerations afforded

similarly-situated public school students. In the event the costs of providing such considerations to nonpublic students exceeds \$675 per child, then the parents of such children are entitled to payment in the amount of \$675 per pupil per year or the amount determined pursuant to N.J.S.A. 18A:39-1a.

We therefore reverse the decision of the Commissioner and direct the Board to establish a bus stop for petitioners' children within the Butternut Lane neighborhood or, in the event the cost to do so would exceed \$675 per pupil, to pay petitioners \$675 per pupil per year or the amount determined pursuant to N.J.S.A. 18A:39-1a.

Given our determination herein under N.J.S.A. 18A:39-1, we find no need for the remand directed by the Commissioner regarding petitioners' constitutional claims.

April 2, 1997

Date of mailing \_\_\_\_\_