

PHILLIPSBURG EDUCATION ASSOCIATION, :
APPELLANT, : STATE BOARD OF EDUCATION
V. : DECISION
BOARD OF EDUCATION OF PHILLIPSBURG, :
WARREN COUNTY, AND VITO A. GAGLIARDI, :
SR., ACTING COMMISSIONER OF THE NEW :
JERSEY DEPARTMENT OF EDUCATION, :
RESPONDENTS. :
_____ :

Equivalency granted by the Commissioner of Education, February 1, 2001

For the Appellant, Zazzali, Fagella & Nowak (Richard A. Friedman, Esq., of Counsel)

For the Respondent Phillipsburg Board of Education, Schenck, Price, Smith & King, LLP (Richard H. Bauch, Esq., of Counsel)

For the Respondent Vito A. Gagliardi, Sr., Commissioner of Education, Allison Colsey Eck, Deputy Attorney General (John J. Farmer, Jr., Attorney General of New Jersey)

This is an appeal from the grant of an equivalency by the Commissioner of Education to the Phillipsburg Board of Education pursuant to N.J.A.C. 6A:5-1 et seq. The equivalency at issue permits “a certified school psychologist to assist in providing comprehensive support services to students in the district’s alternative school program,” notwithstanding the requirements of N.J.A.C. 6:11-3.1. N.J.A.C. 6:11-3.1 requires in pertinent part that:

[p]ursuant to N.J.S.A. 18A:26-2, the requirement of certification applies to any person who is employed by a district board of education to perform duties that are regulated through certification rules pursuant to this chapter. Such duties shall be performed by the holder of the required certificate or under his or her direct and continuous personal supervision.

Absent the equivalency, N.J.A.C. 6:11-11.11 of the certification regulations would require that an individual possess an educational services certificate with a student personnel services endorsement in order to be authorized to perform the duties attending the position which the Board planned to establish.

The Commissioner granted the equivalency by letter of February 2, 2001, and on March 1, 2001 the Phillipsburg Education Association filed a notice of appeal to the State Board of Education. The Association contends that the grant of the equivalency in this case was improper because such grant was contrary to the State Board's decisions in Guttenberg Education Association v. Leo Klagholz and the Board of Education of the Borough of Guttenberg, decided by the State Board of Education, March 3, 1999, and In the Matter of the Waiver Granted to the Board of Education of the Township of Middletown, decided by the State Board of Education, May 3, 2000. The Association further argues that the equivalency is in violation of N.J.A.C. 6A:5-1.3(a)(1)(i), which was adopted by the State Board effective July 3, 2000, and which provides that "[c]ertification requirements of N.J.S.A. 18A:26-2 shall not be violated."

On June 1, 2001, the Board filed a motion with the State Board seeking dismissal of the appeal on the grounds that the State Board lacks the jurisdiction to decide it. The Board argues that a challenge such as the one involved here must first be made to the Commissioner. In support of its position, the Board points to the equivalency and

waiver regulations, which include the provision that “[a] school district may appeal a decision for an equivalency and waiver decision in accordance with the provisions in N.J.A.C. 6A:3.” The Board also argues that requiring a party to appeal first to the Commissioner is consistent with the State Board’s decision in Linda Peters v. Board of Education of the Pinelands Regional School District and Leo F. Klagholz, Commissioner, decided by the State Board of Education, April 1, 1998.

With respect to the substantive issues raised by this appeal, the Board argues that the equivalency should be sustained because the Board sought “to address program needs as opposed to individual needs.” Board’s brief, at 12. The Board further contends that the equivalency is valid because, although comprehensive support services are ordinarily provided by individuals possessing student personnel certification, a school psychologist is required to complete similar and more rigorous courses than a guidance counselor.

In her brief on behalf of the Commissioner, the Deputy Attorney General argues that the equivalency should be sustained because it was not sought as a waiver of certification requirements for a specific position, but rather to permit the Board to substitute “one type of certificated position to perform the duties of another to better carry out the objectives of the District’s alternate school program.” Brief on behalf of the Commissioner, at 11.

Initially, we deny the Board’s motion to dismiss. As the final decision of the Commissioner of Education with respect to the equivalency or waiver, an appeal from a determination by the Commissioner to grant or deny such equivalency or waiver is properly made to the State Board of Education. This is consistent with both the

statutory and regulatory schemes governing appeals to the State Board, N.J.S.A. 18A:6-27 and N.J.S.A. 18A:6-28; N.J.A.C. 6A:4-1.1(a), and with our decisions in Guttenberg, supra, and Middletown, supra. In this respect, we stress that Peters, supra, which was properly initiated as a controverted case before the Commissioner, involved a challenge by a tenured teaching staff member to the action of a district board to reduce her employment on the grounds that the district board's action was in violation of her tenure and seniority rights. In contrast, the instant appeal is a facial challenge to the grant of a waiver or equivalency by the Commissioner, as were the appeals in Guttenberg and Middletown. While we recognize that an inadvertent change in citation occurred when we readopted the equivalency and waiver regulations effective July 3, 2000, and that such change has caused some confusion, the change was made in error and it was not our intention to alter either the appeals process or our jurisdiction over appeals from determinations made by the Commissioner.¹

We now turn to the substance of the appeal. As set forth above, the equivalency in this case permits the Board to employ an individual possessing certification as a school psychologist to provide comprehensive support services ordinarily provided by a guidance counselor. However, N.J.A.C. 6:11-11.11 of the certification rules requires that an individual possess student personnel services certification in order to be authorized to provide such services. That being the case, the equivalency involved here permits the Board to employ an individual to serve in a position for which he is not

¹ The change in citation was from N.J.A.C. 6:2 (now recodified as N.J.A.C. 6A:4) (appeals to the State Board) to N.J.A.C. 6A:3 (Controversies and disputes). The change occurred subsequent to publication of the proposed rules for equivalencies and waivers and was made as a technical change upon adoption. See 32 N.J.R. 1328 and 32 N.J.R. 2470. We are currently proposing an amendment to the rules to correct the error.

appropriately certified. There is no other way to view this but as a waiver of the certification rules.

In this respect, we reject the distinction that the Board and the Deputy Attorney General representing the Commissioner attempt to make between “individual needs” and “program needs.” While the Board may have been motivated by a desire to implement a specific program design for its alternate school when it applied for the equivalency, rather than by a desire to employ a particular individual who does not possess appropriate certification to provide the services at issue, the effect is the same. Regardless of the Board’s reason for seeking this equivalency, its grant by the Commissioner operates to waive the certification rules in contravention of N.J.A.C. 6A:5-1.3(a)(1)(i) and our decisions in Guttenberg and Middletown.

Nor can such waiver be justified by the fact that more graduate work is required in order to obtain certification as a school psychologist than is required to obtain certification as a guidance counselor. Further, it is of no moment in this context that the preparation for serving as a school psychologist is rigorous. The fact of the matter is that the services provided by a school psychologist are not the same as those provided by a guidance counselor. This is reflected both by the fact that separate and distinct endorsements are required for service in these capacities and, most significantly, that the preparation required in order to obtain these endorsements is quite different. Compare N.J.A.C. 6:11-11.11 with N.J.A.C. 6:11-11.12.

We again repeat that:

Certification requirements establish the threshold qualifications for teaching staff members employed in the public school system throughout the state. N.J.S.A. 18A:1-1; N.J.S.A. 18A:26-2. As such, and under the current statutory

framework embodied in Title 18A, the certification process is critical to assuring the provision of a thorough and efficient education. [Hence], an equivalency or waiver cannot properly be granted under N.J.A.C. 6:3A-1.1 et seq. when the provision of a thorough and efficient education might be compromised. Commissioner's Brief, at 4. Since certification requirements are at the core of the current structure governing the delivery of all education programs under our jurisdiction, setting aside the standards embodied in our certification rules necessarily risks such a compromise.

It was not our intention to create such a risk when we adopted N.J.A.C. 6:3A-1.1 et seq.

Middletown, supra, slip op. at 4, quoting Guttenberg, supra, slip op. at 7.

This is no less true for positions involving the provision of educational support services than for instructional positions. Not only is the character of positions that involve the provision of educational services such that appropriate certification is required in order to be qualified to provide these services, N.J.S.A. 18A:1-1, but such services are essential to the success of the education programs provided by our public schools. See Abbott v. Burke, 119 N.J. 287 (1990) (subsequent history omitted).

Therefore, for the reasons stated, we invalidate the equivalency that was granted by the Commissioner in this case.

August 1, 2001

Date of mailing _____