EDU #10697-97S
C# 11-99
SB# 9-99

ARLENE MILLER, :

PETITIONER-APPELLANT, :

V. :

THE BURLINGTON COUNTY SPECIAL SERVICES SCHOOL DISTRICT, BURLINGTON COUNTY, :

RESPONDENT-RESPONDENT. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, January 19, 1999

For the Petitioner-Appellant, Zazzali, Fagella, Nowak, Kleinbaum & Friedman (Richard A. Friedman, Esq. and Kathleen A. Naprstek, Esq., of Counsel)

For the Respondent-Respondent, Parker, McKay & Criscuolo (Frank P. Cavallo, Jr., Esq., of Counsel)

Arlene Miller (hereinafter "petitioner") is a tenured school psychologist who was employed by the Board of Education of the Township of New Hanover (hereinafter "Board" or "New Hanover Board") until June 30, 1996, when her position was abolished and the Board contracted with a private vendor to provide all basic child study team services for 1996-97.[1] Thereafter, in July 1997, the Board determined that it would

[1] In May 2000, the State Board of Education invalidated the waiver upon which the Board had relied in contracting with a private vendor, finding that the clear and unambiguous language of the applicable statutes precluded a district from providing basic child study team services solely by contracting with a private vendor. Arlene Miller v. Leo F. Klagholz, Commissioner, Department of Education, and Board of Education of the Township of New Hanover, decided by the State Board of Education, May 3, 2000.

provide basic child study team services for subsequent years by contracting with the "Burlington County Educational Services Unit" ("ESU").

On November 6, 1997, petitioner filed a petition of appeal with the Commissioner of Education, claiming that the "ESU" had violated her tenure rights under N.J.S.A. 18A:28-16 and N.J.S.A. 18A:6-31.3 by not recognizing her rights to preferred employment when it "succeeded" to the provision of child study team services to the district.

The Administrative Law Judge ("ALJ") concluded that neither statute afforded any protection to petitioner and recommended that the Commissioner grant the "ESU's" motion for summary decision. On the basis of the stipulated record, the ALJ found that "the agreement [between the Board and the 'ESU'] does not appear to have contemplated that the ESU would take over or in any way replace the operation of any program of special education operated by New Hanover, nor that the programs then in operation in New Hanover to provide such education would be abolished." Initial Decision, slip op. at 4. In that the protections afforded by N.J.S.A. 18A:28-16 and N.J.S.A. 18A:6-31.3 are available only when the operation of any "school" previously operated by a school district is undertaken by other specified entities or when a new school district is formed, the ALJ concluded that neither statute afforded any protection to petitioner. In so concluding, the ALJ found that the term "school" as defined by the case law encompasses programs providing direct educational services to students, rather than the evaluative function involved in supplying child study team evaluations, as was the case before him.

The Commissioner adopted the ALJ's recommended decision with clarification and expansion. Finding that the agreement between the Board and the "ESU" had been amended in December 1997 to include the provision of child study team services, rather than just child study team evaluations, the Commissioner stressed that joint contractual agreements for the provision of child study team services are permitted by N.J.S.A. 18A:46-5.1 and that the Board retains the legal responsibility under that statute to provide child study team services, albeit through a joint agreement with another public entity. In the Commissioner's judgment, the agreement involved in this case did not constitute a "takeover" of a school or educational program "even when giving deference to the broader applicability of the statute enunciated by the New Jersey Supreme Court in its 1984 Shelko decision." Commissioner's Decision, slip op. at 11.

Petitioner appealed to the State Board, contending that the "ESU" was obligated to recognize her tenure rights pursuant to N.J.S.A. 18A:28-16 and "other similar statutes." She argued that although tenure earned in one school district cannot generally be transferred to another district, the Legislature has created numerous exceptions to encompass those situations in which schools in a district are discontinued, when the operation of schools or school programs are assumed by other public entities, when new school districts are created, and when regional school districts are established or dissolved. She maintained that the Commissioner's decision in Stuermer v. Bergen County Special Services School District, decided by the Commissioner of Education, 1978 S.L.D. 628, and the New Jersey Supreme Court's decision in Shelko v. Mercer County Special Services School District, 97 N.J. 414 (1984), demonstrate that neither N.J.S.A. 18A:28-16 nor N.J.S.A. 18A:28-6.1 were

intended to be restricted to situations in which entire schools or grades were discontinued, but were intended to apply when a class or program for special education students is eliminated and replaced with one that is operated by the county, even though the balance of the school program continues to be operated by the local district. Since the facts clearly demonstrated that the "ESU" was performing the same services for the same students previously served by the Board, she argued that the situation in this case conformed with the type of takeover envisioned by N.J.S.A. 18A:28-16. Accordingly, petitioner urged the State Board to reverse the Commssioner's decision and to direct the "ESU" to recognize her tenure and seniority rights as a school psychologist.

Respondent countered that petitioner could not claim relief under N.J.S.A. 18A:28-16 because that statute affords protection only when the operation of a school is taken over by a jointure commission or an educational services commission. Since the "ESU" was neither, respondent asserted that the statute did not apply. Respondent further contended that even if the statute did apply, petitioner would be entitled to relief only if the "ESU" assumed control over the entire special education program.

Initial review of this matter by the Legal Committee of the State Board revealed that although the parties had jointly stipulated that the respondent in this action was the "Burlington County Educational Services Unit," nothing in the record established the authority upon which the creation of such entity was based. Further, our review of the education statutes revealed that N.J.S.A. 18A:46-29 et seq. prescribed with specificity the requirements for the establishment, organization, management and control of county special services school districts and their programs. In that the "Burlington

County Educational Services Unit" is a part of the Burlington County Special Services School District, it appeared to us that N.J.S.A. 18A:46-29 et seq. was controlling of the existence and operation of such unit. Because the statutes make no provision for the establishment or operation of such an entity independent of the special services school district, the Legal Committee requested that the parties submit briefs with regard to which specific corporate entity properly should be named as respondent in this case pursuant to the applicable statutes.

In response to our request, petitioner submitted a letter brief indicating that she did not dispute that the "ESU" is controlled by the statutes governing the establishment and operation of county special services school districts. She further stated that she had no objection to the substitution of the Burlington County Special Services School District as the proper corporate entity to be named as respondent in that the Burlington County Special Services School District is the public entity legally responsible for the actions of the Burlington County Educational Services Unit.

In its letter brief, respondent acknowledged that the "ESU" is an "arm" of the Burlington County Special Services School District, but asserted that the identity of the respondent was not a critical factor, nor one that required reversal of the Commissioner's decision.

Based on the foregoing and as set forth above, we conclude that the proper respondent in this matter is the Burlington County Special Services School District. We further conclude that the proper identification of the respondent in this case is not an insignificant matter given the statutory framework that governs the provision of special education services in New Jersey. Specifically, under that framework, there is no

authorization for the establishment by a county special services school district of subsidiary entities to contract with other public school districts for the provision of special education services. That being the case, the only entity with the legal authority to enter into the agreements involved in this case was the Burlington County Special Services School District.

Having disposed of that issue, we turn now to the question of whether under the circumstances presented here, the Burlington County Special Services School District had an obligation under N.J.S.A. 18A:28-16 or N.J.S.A. 18A:6-31.3 to recognize the tenure rights acquired by petitioner by virtue of her service in the New Hanover school district when the Special Services School District undertook to provide the special education services previously provided by the district.

Initially, we find that N.J.S.A. 18A:6-31.3 did not impose any requirement on the Burlington County Special Services School District to recognize petitioner's tenure rights when it undertook the provision of special education services to the New Hanover school district. That statute defines "new school district" for purposes of providing a continuation of specified employment rights, including tenure rights, when a new school district is created. See N.J.S.A. 18A:6-31.4 through N.J.S.A. 18A:6-31.6. N.J.S.A. 18A:6-31.3 provides that:

> As used in this act, "new school district" means a local school district, a regional school district, a county vocational school district, a jointure commission, a county special services school district, or an educational services commission….

N.J.S.A. 18A:6-31.4 through N.J.S.A. 18A:6-31.6 provide for the continuation of employment rights "whenever a new school district is created."

The terms of these statutes are clear: they apply only when a new school district is created. When an existing special services school district contracts with a district board to provide special education services, no new school district is created. Hence, while N.J.S.A. 18A:6-31.3 includes special services school districts for purposes of ensuring the continuation of the employment rights specified in N.J.S.A. 18A:6-31.4 through N.J.S.A. 18A:6-31.6, those statutory provisions do not apply in this case.

Nor did N.J.S.A. 18A:28-16 require the Burlington County Special Services School District to recognize petitioner's tenure rights when it undertook to provide special education services to the New Hanover school district. That statute provides for the continuation of tenure and other specified employment rights:

> [w]henever an Educational Services Commission, a Jointure Commission, the Commissioner of Education, the State Board of Education, the board of trustees of any State college, or any officer, board or commission under his, its or their authority shall undertake the operation of any school previously operated by a school district in this state….

We reject respondent's argument that the statute does not apply to county special services school districts because they are not specifically listed. Clearly, the board of a special services school district is under the authority of the Commissioner and the State Board. See, e.g., N.J.S.A. 18A:46-30 (State Board of Education shall prescribe rules for the organization, management and control of special services school districts); N.J.S.A. 18A:47-32 (programs and courses and any change therein shall be approved by the Commissioner with the advice and consent of the State Board). However, for the reasons that follow, we find that petitioner is not entitled to the protection afforded by this statute.

Under a literal reading of the statute, the result is clear. Because the special education services previously provided by the New Hanover school district were not a "school," N.J.S.A. 18A:28-16 does not apply to this situation. Petitioner, however, argues that the Commissioner's decision in Stuermer, supra, and the New Jersey Supreme Court's decision in Shelko, supra, demonstrate that this statute, as well as N.J.S.A. 18A:28-6.1, "were, in fact, also intended to apply to situations where a class or program for special needs students is eliminated and replaced by one operated by the County, even though the balance of the school program continued to be operated by the local district." Petitioner's brief, at 10. We do not agree.

Stuermer involved the application of N.J.S.A. 18A:28-6.1, which provides for continuation of tenure and other rights when:

> any board of education in any school district in this state shall discontinue any high school, junior high school, elementary school or any one or more of the grades from kindergarten through grade 12 in the district and shall, by agreement with another board of education, send the pupils in such schools or grades to such other district….

In Stuermer, the Hackensack Board of Education operated a program for the deaf to which it admitted students from other districts pursuant to individual agreements with the sending boards based on the need of each classified student to receive an appropriate education. In 1973, the Hackensack Board discontinued this program and the newly created Special Services School District of Bergen County assumed responsibility for it. Petitioner had been a tenured employee of the Hackensack Board who was employed by the Special Services School District after it assumed responsibility for the program for the deaf. When the Special Services School District

terminated her employment, she challenged its action claiming that it was in violation of her tenure rights.

The Commissioner agreed that petitioner was entitled to the protection of N.J.S.A. 18A:28-6.1. In reaching this conclusion, the Commissioner looked to N.J.S.A. 18A:28-16 to determine the meaning of "school." In determining the meaning of "school" under N.J.S.A. 18A:28-16, the Commissioner reasoned that since jointure commissions were created only for the purpose of special education classes, "school" as referenced in N.J.S.A. 18A:28-16 "must mean special education classes." 1978 S.L.D. 631. Then, finding that a harmonious interpretation of the statutes necessitated interpreting "schools or grades" in N.J.S.A. 18A:28-6.1 in the same manner as for N.J.S.A. 18A:28-16 and 18A:28-17, the Commissioner concluded that petitioner's tenure rights had been violated by her termination.

We agree that "school" as referenced in N.J.S.A. 18A:28-16 includes special education classes. However, no special education classes were transferred to the Burlington County Special Services School District. Rather, as embodied in the contract with the New Hanover Board, the Burlington County Special Services School District was to provide child study team services. In contrast, the responsibility undertaken by the Bergen County Special Services School District in Stuermer was for the education of the students who had previously been educated by the school district. Hence, Stuermer does not entitle petitioner to the rights conferred by N.J.S.A. 18A:28-16.

Nor does the New Jersey Supreme Court's decision in Shelko entitle her to such rights. The petitioner in Shelko had been a teacher in a program run by the Ewing Township Board of Education which provided instruction to multiply-handicapped

infants, pre-schoolers and kindergarteners. Ewing had served as the local education agency for the purposes of obtaining the state and federal grants that funded the program, and the program served the needs of the "educationally-handicapped young" on a county-wide basis. 97 N.J. at 416. Upon the creation of the Mercer County Special Services School District, the entire program was transferred from Ewing to the Special Services School District.

The central issue in Shelko was whether a teacher employed by the Mercer County Special Services School District achieved tenure based on her years of employment by the local school district combined with her years of service with the Mercer County Special Services School District. In resolving this issue, the Court considered the argument that petitioner was not entitled to the protection of N.J.S.A. 18A:28-16 because the program in which she taught was not a school within the meaning of the statute. The Court rejected this argument, finding that to accept it "would read all practical meaning out of the statute, because by definition the special services school districts never take over the entire operation of a school but are limited to providing educational services for the disabled." 97 N.J. at 422-23. The Court then quoted the Commissioner's decision in Stuermer, finding that the Commissioner's straightforward analysis was based on the realities of the statute and avoided "engaging in the esoteric quest of defining 'what is a school.'" Id. at 423. The Court, however, observed that there was ample precedent that a program for the disadvantaged would meet the definition of a "school," pointing to the fact that a residential institution for the treatment and education of emotionally disturbed children had been held to be a "school" under a municipal zoning ordinance. Id.

As in Stuermer, the Court in Shelko was confronted with the transfer of an entire education program, including the instructional component, from a district board to a county special services school district. Because the only educational programs that a special services school district is authorized to provide under the statutory framework are educational programs for classified special education students, programs such as those involved in Stuermer and Shelko represent the full extent of any program that can be transferred from a school district to a special services school district. Further, as the Court in Shelko observed, N.J.S.A. 18A:28-16 and similar statutes were enacted in response to changes in the forms of governance resulting from the provisions made by the Legislature for the regional delivery of educational services. Shelko, supra, at 418. Review of N.J.S.A. 18A:28-16 in conjunction with N.J.S.A. 18A:46-29 through 18A:46-46 as originally enacted, L.1971 c. 271, indicates that the Legislature's intent as to county special services school districts when it enacted N.J.S.A. 18A:28-16 was to preserve the rights of teaching staff members affected when the educational programs for handicapped students, including the instructional component, were transferred from local school districts once the creation of county special services school districts was authorized. Id. Quite simply, there is no indication that the Legislature intended to preserve the rights of staff members when a local district determines to provide for child study team services as required by N.J.S.A. 18A:46-5.1 by contracting with a county special services school district as permitted by N.J.S.A. 18A:46-6.1. Given the distinction between "programs" and "services" that is reflected in the statutes, we decline to construe the word "school" in N.J.S.A. 18A:28-16 so as to extend the protection afforded by that statute to staff members affected by a district's determination

to contract for child study team services when it is only the provider of the services that changes.

Therefore, for the reasons set forth herein, we affirm the decision of the Commissioner in this matter.

Attorney exceptions are noted.

November 7, 2001

Date of mailing _____