

EDU # 1086-86  
 C # 193-88  
 SB # 37-88  
 App. Div. #A-4912-89T5, #A-6384-90T5 and #A-6385-90T5 (consolidated)  
 Sup. Ct. #A-121/2/3/4/5  
 SB # 81-96  
 C # 337-02L  
 App. Div. #A-1870-97T2  
 #A-1091-98T2  
 Sup. Ct. # A-60  
 SB # 16-03 and 19-05 (consolidated)

BOARD OF EDUCATION OF THE BOROUGH	:	
OF ENGLEWOOD CLIFFS, BERGEN	:	
COUNTY,	:	
	:	
RESPONDENT,	:	
	:	
V.	:	STATE BOARD OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY OF	:	DECISION ON MOTIONS
ENGLEWOOD, BERGEN COUNTY,	:	
	:	
APPELLANT,	:	
	:	
V.	:	
	:	
BOARD OF EDUCATION OF THE BOROUGH	:	
OF TENAFLY, BERGEN COUNTY,	:	
	:	
RESPONDENT.	:	

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Decided by the Commissioner of Education, July 11, 1988

Decision on motion by the Commissioner of Education, September 1, 1988

Decision on motion by the State Board of Education, November 1, 1988

Decision on motion by the Commissioner of Education, February 22, 1989

Decision on motion by the State Board of Education, May 3, 1989

Decision on motion by the Commissioner of Education, September 6, 1989

Decision on motion by the State Board of Education, March 7, 1990

Decided by the State Board of Education, April 4, 1990

Resolution adopted by the State Board of Education, July 3, 1991

Decision on motions by the Appellate Division, August 27, 1991

Decided by the Appellate Division, June 15, 1992

Decided by the New Jersey Supreme Court, June 9, 1993

Decision on motions by the State Board of Education, December 4, 1996

Final Report from the Commissioner of Education, submitted on  
February 5, 1997

Decision on motion by the State Board of Education, March 5, 1997

Decided by the State Board of Education, November 5, 1997

Resolution adopted by the State Board of Education, October 7, 1998

Decision on motion by the Commissioner of Education,  
December 20, 1999

Decided by the Appellate Division, July 20, 2000

Decided by the New Jersey Supreme Court, January 24, 2002

Decision on motion by the State Board of Education, December 4, 2002

Report from the Commissioner of Education, submitted on  
December 16, 2002

Decision on motion by the State Board of Education, January 8, 2003

Decision on motion by the State Board of Education, February 19, 2003

Decision on motions by the State Board of Education, April 2, 2003

Decision on motion by the State Board of Education, May 14, 2003

Decided by the State Board of Education, May 5, 2004

For the Board of Education of the Borough of Englewood Cliffs,  
Stephen Fogarty, Esq. and William Bradford Reynolds, Esq., pro  
hac vice

For the Board of Education of the City of Englewood, Weiner Lesniak  
(Mark A. Tabakin, Esq., of Counsel)

For the Board of Education of the Borough of Tenafly, Apruzzese,  
McDermott, Mastro & Murphy (James L. Plosia, Esq., of Counsel)

For the Amicus Curiae Education Law Center and New Jersey State  
Conference of NAACP, Education Law Center (Koren Bell,  
appearing pursuant to R. 1:21-3(b))

In a decision issued on April 4, 1990, the State Board of Education denied a petition filed by the Englewood Cliffs Board seeking to sever its sending-receiving relationship with the City of Englewood. In so doing, the State Board found that the deterioration in the racial balance at Dwight Morrow High School in Englewood was directly related to a tuition program instituted by the Tenafly Board, which that district had initiated to address its own declining enrollment problem. As a result, the State Board concluded that the first step in achieving the kind of balance that would effectuate the State's policy with respect to racial balance in the public schools was to act to forestall any further deterioration in the racial balance at Dwight Morrow by assuring that high school age students from Englewood and Englewood Cliffs would attend their assigned school if they attended public school. The State Board therefore directed that no other public school district could accept high school age students from Englewood or Englewood Cliffs on a tuition basis or otherwise.

On December 4, 2002, the State Board considered the motions filed by Englewood and Englewood Cliffs that sought to vacate the directive. In doing so, the State Board stressed that it could not remove the prohibition on other public school

districts from accepting high school age students from Englewood or Englewood Cliffs unless it was fully confident that such action would not compromise its obligation to ensure that the racial imbalance at Dwight Morrow was addressed. Finding that it was necessary to obtain information from the Commissioner as to the exact status of the magnet school program that was being established, the State Board directed the Commissioner to submit a status report to it by December 16, 2002.

The Commissioner submitted his report on December 16, and, on January 8, 2003, the State Board again considered the motions to vacate its directive of April 4, 1990. In doing so, the State Board rejected the recommendation of the Legal Committee and referred the matter back to the Committee for further review.

Upon further review, the Legal Committee determined that it was necessary to supplement the record with additional information relating to the funding and operation of the Academies@Englewood, the magnet school program being established at Dwight Morrow High School. By decision of February 19, 2003, the State Board directed that the record be supplemented with documentation that provided such information.

On April 2, 2003, the State Board considered the motions to vacate its directive on the basis of the record as supplemented, including revised documentation relating to the racial balance of the overall student population attending the Academies@Englewood. By its decision, the State Board removed the prohibition it had placed on New Jersey's public school districts that precluded them from admitting high school age students from Englewood and Englewood Cliffs on a tuition basis or otherwise. The State Board found that, while there was not sufficient data at that point to draw any conclusions as to the likely effect of the Academies@Englewood program

on the racial and ethnic composition of the student body at Dwight Morrow High School, the statistics were promising, and, although they did not provide a sufficient basis to draw any definitive conclusions as to whether the Academies@Englewood would be successful in ameliorating the racial imbalance at Dwight Morrow, they did demonstrate positive movement in that direction. The State Board observed, in addition, that the Bergen County Board of Chosen Freeholders had appropriated \$1 million as a contribution to the Englewood public schools and the Legislature had agreed to match that funding with another \$2 million for this project, demonstrating a commitment to ensuring that such positive movement would continue.

The State Board, however, retained jurisdiction over the matter, concurring with the concerns that had been expressed by the Deputy Commissioner that removal of the prohibition that the State Board had imposed on April 4, 1990 should be conditioned on the continued progress of the Academies@Englewood in ameliorating the racial imbalance at Dwight Morrow High School. To ensure such progress, the State Board directed the Commissioner to report formally to it on a semi-annual basis, reminding him that his reports must include data as to the progress being made toward achieving racial balance in the composite student body at Dwight Morrow. Additionally, given Englewood Cliffs' obligation to act consistently with its sending-receiving relationship with Englewood, the State Board directed that the Commissioner monitor which school districts accepted high school age students from Englewood and Englewood Cliffs. The State Board also stressed that it was compelled to carefully assess the progress being made over time in ameliorating the racial imbalance at Dwight Morrow and that, in the event it concluded that sufficient progress was not being made, it would be obligated to

consider all available remedies, including re-imposing the directive that it was setting aside by its decision.

On May 7, 2003, the Englewood Board filed a notice of appeal with the State Board from “final funding decisions” of the Commissioner of Education dated March 5 and April 30, 2003. Englewood also filed an application for emergent relief.<sup>1</sup>

In its application for emergent relief, Englewood sought an order directing the Commissioner and the State Board to provide funding to cover a \$5.15 million budgetary shortfall in its Equity and Excellence Program for the 2003-04 school year. In the alternative, Englewood requested an order staying the May 15, 2003 deadline set forth in N.J.S.A. 18A:27-10, which required that notices be sent to non-tenured teaching staff members notifying them that their employment would not be renewed for the 2003-04 school year. In the event that such requests were denied, Englewood sought an order directing compulsory regionalization.

Exercising the discretion afforded by N.J.A.C. 6A:4-3.3,<sup>2</sup> the President of the State Board determined on behalf of the State Board that Englewood had failed to demonstrate that it was entitled to emergent relief under the standard set forth in Crowe v. De Gioia, 90 N.J. 126 (1982), and she therefore denied the Englewood Board’s application for emergent relief. In doing so, she found that the Englewood Board had

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<sup>1</sup> It was assumed solely for purposes of deciding the Englewood Board’s application for emergent relief that the letters from which it was appealing were final determinations of the Commissioner under N.J.S.A. 18A:6-27 so as to be appealable to the State Board as of right pursuant to N.J.S.A. 18A:6-28. See N.J.A.C. 6A:4-1.1.

<sup>2</sup> N.J.A.C. 6A:4-3.3 provides that:

[t]he President of the State Board or, in the President’s absence, the chairperson of the Legal Committee is authorized to decide on behalf of the State Board applications for emergency relief made pursuant to N.J.A.C. 6A:4-2.4 unless the determination would constitute the final decision with respect to the controversy.

failed to demonstrate that it would suffer irreparable harm if it was not afforded the relief it sought since the scenario it presented was highly speculative. In that respect, she concluded that Englewood had not shown that it would be impossible to properly staff its Equity and Excellence Program or the Academies@Englewood if it did not get the funding it was seeking on an emergent basis or that the Academies would fail as a consequence. In addition, she found that the Commissioner's letters demonstrated that he was engaged in ensuring that the programs would continue to operate successfully despite fiscal constraints. In this respect, she stressed that the New Jersey Supreme Court's decision of January 24, 2002 did not entitle the Englewood Board to any specific amount of funding for purposes of implementing the Academies and that it did not require that the State directly finance their operation.

On May 27, 2003, the Englewood Board filed its brief on the merits of its appeal. In addition, supplemental briefs were filed by Englewood and Tenafly on the question of whether the Commissioner's letters of March 5 and April 30, 2003 were final decisions within the meaning of N.J.S.A. 18A:2-27.<sup>3</sup> This question was not decided, however, because the matter was placed in abeyance at Englewood's request on August 26, 2003.

On April 19, 2005, the Englewood Board filed the motion for emergent relief that is now before us, seeking \$6 million in additional funding for the 2005-06 school year. It also filed a motion seeking to take its appeal relating to the 2003-04 school year out of abeyance and to consolidate that appeal with the appeal now pending before the State Board so as to create a single record for disposition.

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<sup>3</sup> N.J.S.A. 18A:6-27 provides that "[a]ny party aggrieved by any determination of the commissioner may appeal from his determination to the state board."

On May 9, 2005, the Education Law Center filed a motion on behalf of itself and the New Jersey State Conference of the NAACP to appear as amicus curiae.

Initially, we grant the Englewood Board's motion to consolidate this appeal with its earlier appeal. However, we find that the earlier appeal is moot as it relates to the 2003-04 school year, and we therefore dismiss that portion of the appeal. When the merits of the appeal now before us are considered, we will also consider that portion of the earlier appeal that relates to the issue of ongoing funding for the Academies@Englewood.

We also grant the motion of the Education Law Center and the New Jersey State Conference of the NAACP to appear as amicus in this matter. However, we find that it is premature to consider the question of compulsory regionalization. In doing so, we stress that the only issues we are deciding today are those that directly relate to Englewood's application for emergent relief. Those issues solely involve whether Englewood is entitled to emergent relief in the form of additional funding for the 2005-06 school year.

The Englewood Board is appealing from a letter from the Commissioner of Education to its Superintendent dated April 6, 2005. That letter was in response to the Englewood Board's formal request on that same date that the Commissioner certify \$6 million in State aid to support its Equity and Excellence Program that was included in the Board's proposed budget for 2005-06 and which the County Superintendent had informed the Board he did not have the authority to certify. In his letter the Commissioner stated:

...Six million dollars in State Aid is not in the Governor's recommended budget and therefore cannot be certified. Should you not understand, let

me make it clear that Dr. Aaron Graham is in this instance, the official representative of the Department of Education. Please direct all future inquiries to him as I am sure he has made clear to you the consequences of proceeding with an unapproved budget.

By its application for emergent relief, the Englewood Board is seeking a directive from the State Board ordering that: 1) the Commissioner certify the \$6 million referenced in the Commissioner's letter, 2) the Commissioner be enjoined from taking any action to reduce the Board's proposed budget until the merits of its appeal are decided, 3) compulsory regionalization be imposed if emergent funding is not provided before July 1, 2005 so as to fund the \$6 million included in the Board's proposed budget, and 4) the rules governing appeals, motions, exhaustion of remedies and length of briefs be relaxed.

In support of its application, the Englewood Board argues that it will suffer irreparable harm if it is not granted the relief it is seeking because all the work of the parties involved with the Equity and Excellence Program will have been for naught and the money that has been expended will have been wasted. It further argues that if the funding it seeks is not provided, the Interlocal Agreement between Englewood and the Bergen County Technical School will be nullified and the management team from Bergen County will be forced to return to that school, thereby leaving the Englewood Board without its top administrators. The Board maintains that it will be unable to fund a budget necessary to provide its students with a thorough and efficient education, 318 Academy students will be dispossessed of their education, and the first graduating class from the Academies will be denied the opportunity to complete their program. It contends that the early successes of the Equity and Excellence Program and the

improved racial diversity that has resulted will be lost, and the Englewood Board will be forced to seek redress in the form of compulsory regionalization.

The Englewood Board argues that there is a likelihood that it will prevail on the merits of its appeal to the State Board because the Commissioner's decision to deny funding to cover the budget shortfall of the Equity and Excellence Program for 2005-06 is in contravention of the Supreme Court's decision in Board of Educ. of Borough of Englewood Cliffs v. Board of Educ. of Borough of Englewood, 170 N.J. 323 (2002). It further asserts that the doctrine of equitable estoppel applies because the Commissioner and the State Board have accepted responsibility for providing funding for Englewood's Equity and Excellence Program and are legally bound by their obligation to achieve racial balance and educational equity at Dwight Morrow High School to continue to provide that program with funds. It also argues that the Commissioner's determination to deny the funding it seeks is arbitrary and capricious and that the equities favor granting it the relief it is seeking.

Initially, as was the case with respect to the application for emergent relief filed by the Englewood Board in 2003, we are assuming solely for the purpose of deciding its current application for emergent relief that the Commissioner's letter of April 6, 2005 is a final determination of the Commissioner that is appealable to the State Board pursuant to N.J.S.A. 18A:6-28.

After careful review of the papers filed,<sup>4</sup> we conclude that Englewood has failed to demonstrate that it is entitled to emergent relief under the standard set forth in Crowe v. De Gioia, *supra*. That standard requires that a party seeking emergent relief show: 1) that it will suffer irreparable harm if the relief it is seeking is not granted, 2) that the legal

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<sup>4</sup> We note that the Commissioner did not participate in this matter.

right underlying its claim is settled, 3) that it has a likelihood of prevailing on its underlying claim, and 4) that when the equities are balanced, it will suffer greater harm if the relief is not granted than the other parties will suffer if the relief is granted.

Careful review of the Englewood Board's application shows that it has failed to demonstrate that it will suffer irreparable harm if it is not afforded the relief it seeks. The scenario presented by the Englewood Board as to the consequences of a failure to obtain \$6 million in additional State aid on an emergent basis is speculative. Despite its dire predictions, nothing presented by the Englewood Board shows that it will in fact be required to dismantle the Academies@Englewood or its Equity and Excellence Program if it does not receive emergent funding. Rather, the documents presented to us show that from the time that it was notified that the \$6 million it is seeking was not being provided by the State, the Englewood Board has taken the position that it was not going to attempt to fund its budget, including the programs at issue here, without receiving \$6 million from the State to fund its Equity and Excellence Program. Despite notification from the County Superintendent that its failure to document a funding source for the \$6 million in its proposed budget meant that he could not approve that budget and that it was required by law to adopt an approvable budget by April 1, 2005, the Englewood Board refused to adopt such a budget. This refusal persisted even in the face of the County Superintendent's directive of March 30 to the Englewood Board that prior to April 1, which was the last date the budget could be presented to the municipal clerk, it was required to:

...set a final proposed general fund budget and supporting tax levy that does not include the \$6 million of non-guaranteed state funds in "Other State Aids" and must be balanced through either an increase in local revenues and/or reduction in appropriations as enumerated below. The

final proposed budget must contain sufficient spending for T&E and to maintain all programs and services to ensure the implementation of the court ordered approved plans and strategies for remedying segregation.

The fact that the Englewood Board asserts in support of its application that it could not increase the local tax levy nor reduce expenditures as directed by the County Superintendent does not change the fact that it did not attempt to implement the directives or follow his recommendations as to other ways to reduce expenditures and increase revenues. Rather than attempting to develop a budget that conformed to legal requirements, the Englewood Board clung to its original budget and submitted it without the approval required by N.J.S.A. 18A:7F-5.<sup>5</sup> Such stridency and deliberate disregard of legal requirements does not lead us to accept the Englewood Board's assertions that it could not develop a budget that would enable it to provide a thorough and efficient education to its students and to continue the Academies@Englewood and its Equity and Excellence Program without the \$6 million it is now seeking. To the contrary, its failure to follow the requirements of law and the directives of the County Superintendent undermines the credibility of Englewood's assertions that the budget it adopted was the only budget that could provide its students with a thorough and efficient education and avoid eliminating the Academies and the Equity and Excellence Program. Under these circumstances, it is disingenuous for the Englewood Board to claim that unless it is

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<sup>5</sup> N.J.S.A. 18A:7F-5(c) provides that:

Annually, on or before March 4, each district board of education shall adopt, and submit to the commissioner for approval, together with such supporting documentation as the commissioner may prescribe, a budget that provides no less than the minimum permissible T&E budget, plus categorical amounts required for a thorough and efficient education as established pursuant to the report, special revenue funds and debt service funds.

In addition, we note that N.J.A.C. 6A:23-8.1, which sets forth the requirements for the development, review, and approval of budgets, mandates that the county superintendent as designated by the Commissioner "shall review and approve each district board of education's proposed budget prior to its advertisement." N.J.A.C. 6A:23-8.1(d).

afforded emergent relief, it will be unable to provide T&E to its students and will have no choice but to immediately discontinue the programs at issue.

Thus, on the basis of the papers submitted, we deny the Englewood Board's application. However, we remain cognizant of our obligations under our own decisions in the ongoing litigation in this matter and the decisions rendered by the Appellate Division and the New Jersey Supreme Court. Under those decisions, our responsibilities are clear.

In our decision of April 4, 1990, we recognized our responsibility for the effectuation of our State's constitutionally derived policy with respect to racial balance in our public schools. Board of Education of the Borough of Englewood Cliffs v. Board of Education of the City of Englewood, decided by the State Board of Education, April 4, 1990 (prior and subsequent history omitted). We further recognized our responsibility to ensure that such measures were taken as were necessary to correct the situation that had been brought before us by virtue of the litigation initiated by Englewood Cliffs' petition to sever its sending-receiving relationship with Englewood. Id.

To fulfill that responsibility, the State Board on October 7, 1998 adopted by resolution the Final Report issued by its Committee on Englewood. In adopting that report, the State Board recognized that satisfactory effectuation of the State's policy would take time and required the long-term commitment of both the Englewood School District and the State. Final Report, at 16. In directing the development of a plan to address the racial imbalance at Dwight Morrow High School, we made it clear that any plan that the State Board would sanction "must ensure that enrollment reflects a reasonable percent ratio indicative of progressive integration over the time period

included in the plan.” Id. at 17. We also made it clear that such a plan “should include provisions for interim assessment of progress so as to permit program adjustment during the term of the plan.” Id.

In reviewing the allocation of responsibilities set forth in the Final Report,<sup>6</sup> the New Jersey Supreme Court confirmed that, based on the history of the litigation and the State Board’s express assumption of responsibility in our April 4, 1990 decision, the Commissioner and the State Board retained the ultimate responsibility for developing and directing implementation of a plan to address the racial imbalance at Dwight Morrow High School. Board of Educ. of Borough of Englewood Cliffs v. Board of Educ of Borough of Englewood, supra. At that point, the Commissioner and the Department of Education had initiated implementation of a partnership between Englewood and the Bergen County Technical Schools based on the voluntary approach adopted by the State Board in its Final Report. Id. Although there was no issue of funding the proposed academy partnership before the Court, in endorsing the efforts to establish the partnership, the Court expressed its confidence that the “parties [would] not permit so promising a resolution of Dwight Morrow’s racial imbalance to fail because of disagreement over a fair allocation of funding responsibility.” Id. at 345.

Under the circumstances with which we have been presented, it would be an abrogation of our responsibility if we were to deny the Englewood Board’s application for emergent relief without ensuring that a budget conforming with all legal requirements

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<sup>6</sup> Subsequent to the State Board’s adoption of the Final Report, Englewood petitioned the New Jersey Supreme Court to consider and resolve “the appropriate allocation of specific responsibilities between the Commissioner of Education and the Englewood School District in relation to the development and implementation of a voluntary plan that is designed to achieve an appropriate racial balance and educational quality at Dwight Morrow High School by means of magnet and specialty schools.” Board of Educ. of Borough of Englewood Cliffs v. Board of Educ of Borough of Englewood, supra at 324. The Court granted direct certification and considered the question.

is established for Englewood and that such a budget includes adequate fiscal support to enable the Englewood Board to continue to provide the programs it is offering with the approval of the Department of Education to correct the racial imbalance at Dwight Morrow High School. We therefore direct that the Commissioner immediately undertake such measures as are required to ensure that such a budget is established.

In addition, given our responsibility to ensure that the racial imbalance is ultimately remedied, we cannot avoid the recognition that the standards established by our Final Report are not being met by the Academies@Englewood as currently implemented. The Commissioner's reports to us clearly show that, while the proportion of white students attending the Academies@Englewood is steadily increasing, the racial imbalance among the composite student body at Dwight Morrow is not improving. In this respect, we stress that under the standards established by our Final Report, the approach taken to reduce the racial imbalance at Dwight Morrow must ultimately achieve a balance in the composite student body at Dwight Morrow that would be acceptable under the Appellate Division's decision in Englewood Cliffs v. Englewood, 257 N.J. Super. 413 (App. Div. 1992), aff'd, 132 N.J. 327 (1993), cert. denied, 510 U.S. 991, 114 S. Ct. 547, 126 L.Ed.2d 449 (1993).<sup>7</sup>

Further, we can no longer ignore the fact that, contrary to our directive, it appears that benchmarks for measuring progress toward achieving a racial balance that would be acceptable under the Appellate Division's decision were never established. Final Report, at 18. Without such benchmarks, the progress being made toward achieving that balance cannot be assessed and necessary program adjustments cannot be made.

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<sup>7</sup> While the Court did not specify the exact racial balance that would be acceptable, it found that a racial balance that reflected a combined minority population of 84% would not be acceptable.

We therefore direct that the Commissioner develop benchmarks to measure the progress being made toward achieving a racial balance in the composite student body at Dwight Morrow High School that will be acceptable under the Appellate Division's decision and that he include in his August 2005 report to the State Board, as well as in all subsequent reports made to the State Board pursuant to our decision of April 2, 2003, his assessment of the progress being made toward achieving such benchmarks and his recommendations as to adjustments that should be made to the approach that we have taken thus far to achieve racial balance at Dwight Morrow.

In sum, by our decision today we have granted the Englewood Board's motion to consolidate the appeal in this matter with the appeal it filed in 2003. We, however, have dismissed that portion of the appeal that relates to funding for the 2003-04 school year because it is moot. We have granted the motion filed on behalf of the Education Law Center and the New Jersey State Conference of the NAACP to appear as amicus curiae, but find that it is premature to consider those issues that relate to compulsory regionalization in determining whether the Englewood Board is entitled to emergent relief. We have denied the Englewood Board's application for emergent relief, but we have directed that the Commissioner immediately take such measures as are necessary to establish a budget for the Englewood Board for the 2005-06 school year that conforms with all legal requirements and provides adequate fiscal support to enable the Board to continue to provide the programs approved by the Department of Education that are aimed at correcting the racial imbalance at Dwight Morrow. We also have directed the Commissioner to develop benchmarks to measure the progress being made toward achieving a racial balance in the composite student body at Dwight

Morrow that conforms to the Appellate Division's decision, to assess that progress in his August 2005 report to the State Board, as well as in all subsequent reports made to the State Board pursuant to our decision of April 2, 2003, and to provide the State Board with his recommendations for adjustments in the approach being taken.

June 1, 2005

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