287-00

BOARD OF EDUCATION OF THE WEST WINDSOR-PLAINSBORO REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:
PETITIONER,	:
V.	:
BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY,	:
RESPONDENT.	: COMMISSIONER OF EDUCATION
AND	: DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF NUTLEY, ESSEX COUNTY,	:
PETITIONER,	:
V.	:
BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY,	:
RESPONDENT.	:

<u>SYNOPSIS</u>

In consolidated matter, Petitioning Boards, West Windsor-Plainsboro and Nutley, sought to compel Respondent Board Delran to pay transportation costs for two children classified as autistic, K.H. and S.M., who were placed by the Division of Youth and Family Services (DYFS) and the Division of Developmental Disabilities (DDD), respectively, in a group home in respondent's District. (DYFS was responsible for placing K.H. in a group home in 1987, but in 1990, DDD assumed responsibility for these students.)

The ALJ concluded that, under the general legislative and regulatory scheme for the payment of costs of education of special education pupils, it is the district where the child's legal guardian is domiciled/resides which is responsible for the cost of a free appropriate education, including related services, one of which is transportation. (Chapter 207 of the Laws of 1979; *N.J.S.A.* 30:4C-26; *N.J.S.A.* 18A:7b-12) Furthermore, the ALJ noted that for special education students who are residing in the district in which they are domiciled, the costs of transportation are part of

the educational services required to be funded by the local district which in turn receives State aid for such transportation pursuant to *N.J.S.A.* 18A:7F-25 and 18A:46-23. The ALJ noted that there was no logical explanation for placing the financial burden of transportation costs upon a district where a group home happens to be located, except to rely on the 1984 Attorney General's Opinion that advised the Commissioner of Education that the word "tuition" in Chapter 207 of the Laws of 1979 did not include transportation costs. Petitions were dismissed and petitioners were directed to continue funding transportation costs for the students in question as long as such students remain domiciled in their districts and eligible for special education services.

Having considered the Initial Decision, the parties' arguments, and the legal opinions provided by the Attorney General's Office, the Commissioner rejected the ALJ's conclusions of law. The Commissioner determined that *N.J.S.A*. 30:4C-26, which authorizes group home placements by the State and delineates the obligations of school districts, was the statute central to the resolution of who is responsible for transportation costs for these students. Commissioner noted that the child's district of residence is responsible for paying tuition to the school where the child is placed. However, given the absence of any reference to transportation in the provisions of Chapter 207 of the Laws of 1979, the Commissioner concluded that the term "tuition" does not encompass transportation. Further, the Commissioner found that the express language of *N.J.S.A*. 30:4C-26c, stating that children placed in group homes are to be accorded all of the "educational benefits" of the school district in which the group home sits, includes pupil transportation. The Commissioner also found that the school district where the group home is located is responsible for providing child study team services (paid for by the resident district) to children placed in group homes within its borders for reasons expressed in the 1984 Attorney General's Opinion. Therefore, the group home school district determines the child's educational program and placement, which, in turn, dictates the child's transportation needs and the district's transportation costs. The Commissioner granted petitioners' motions for summary judgment and directed that respondent reimburse petitioners for the cost of transportation for the students in question. Since K.H. aged out of West Windsor-Plainsboro, the Board sought reimbursement solely for past expenditures. Moreover, the Commissioner directed respondent to continue the funding of transportation costs for S.M., as long as the student remains in the group home and is eligible for special education services.

OAL DKT. NOS. EDU 665-99 AND EDU 3130-99 (CONSOLIDATED)
AGENCY DKT. NOS. 458-10/98 AND 446-10/98

BOARD OF EDUCATION OF THE WEST WINDSOR-PLAINSBORO REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY,	:	
RESPONDENT.	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF NUTLEY, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

The record in this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioners' exceptions and respondent's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4[1] and were duly considered by the Commissioner in reaching his determination herein.[2]

[1] Petitioner Nutley timely requested and was granted a four-day extension for submission of its exceptions.

[2] Petitioner West Windsor-Plainsboro filed a response to respondent's reply on April 25, 2000. Since *N.J.S.A.* 1:1-18.4 does not provide for submission of a response to reply exceptions, West Windsor-Plainsboro's additional submission was not considered.

In its exceptions, Petitioner West Windsor-Plainsboro (WWP) urges the Commissioner to reject the analysis of the Administrative Law Judge (ALJ). WWP avers that the ALJ's conclusion that the term "tuition" in *N.J.S.A.* 30:4C-26c includes transportation contradicts the plain language of the statute as previously interpreted by the Office of the New Jersey Attorney General[3] and enforced by both the Department of Education and the Department of Human Services. (WWP Exceptions at 10)

WWP further argues that the ALJ's opinion was based on an analysis of *N.J.S.A.* 18A:7B-12 and *N.J.S.A.* 18A:46-18.1, despite the ALJ's acknowledgment that those statutes are not directly relevant. The ALJ's reasoning in support of her reading of *N.J.S.A.* 30:4C-26c, WWP concludes, appears to be that, since a district of residence generally must provide transportation for classified students, it can be inferred, based on the Legislature's silence in Chapter 207 of the Laws of 1979 as to transportation costs, that the Legislature's intent was that the district of residence was to be responsible for such costs. WWP avers that this analysis is in error because, although it is true that the transportation of classified students would normally be provided by the district of residence, *N.J.S.A.* 30:4C-26c transfers that responsibility to the district where the group home is located by providing that a child so placed shall be entitled to the educational benefits of such district. (*Id.* at 4-5)

WWP further contends that the prime indicator of legislative intent is the plain language of the statute, *State v. Sutton*, 132 *N.J.* 471, 479 (1993). Therefore, since the Legislature carefully distinguished between tuition which is to be paid by the district of residence and all other educational benefits in *N.J.S.A.* 30:4C-26c, the reading of transportation costs into the obligation to pay tuition is tantamount to legislating by the ALJ. (*Id.* at 6)

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[3] WWP notes that the March 13, 1984 Attorney General's Opinion was authored by then Deputy Attorney General LaVecchia, who is now Supreme Court Justice LaVecchia.

Citing *State v. Wallach*, 296 *N.J. Super*. 93, 98 (Law Div. 1996) and *Peper v. Princeton University Board of Trustees*, 77 *N.J.* 55 (1978), WWP maintains that the informal opinion of the Attorney General and the interpretation given a statute by the agency charged with its enforcement based on that opinion should be accorded deference. Further, it is argued that the ALJ's inference that the Attorney General's Opinion (Opinion) would have been given more deference if it was a formal opinion is flawed since the opinions relied upon in *Wallach, supra*, were informal. (*Id.* at 6-8)

In its exceptions, Petitioner Nutley (Nutley) agrees with WWP that although Chapter 207 of the Laws of 1979 may have been silent on the issue of who pays transportation costs of individuals placed in group homes, two separate administrative agencies and the Attorney General's Office were not silent, and the ALJ failed to appropriately defer to the Opinion and the subsequent agency decisions relying on that Opinion. (Petitioner Nutley's Exceptions at 5)

Nutley also argues that the ALJ's determination that the Legislature's silence in Chapter 207 of the Laws of 1979 demonstrates that there was no intention to shift transportation costs from the district of residence is flawed, because it is clear from prior decisions on this issue that the Legislature left a vacuum which was subsequently filled by administrative interpretations of the Department of Education and the Department of Human Services. Nutley avers that there can be no shifting of costs that were never designated, and that it is appropriate to rely on the interpretation by the agencies responsible for providing for the delivery of services because those agencies are best able to apply the Legislature's intent to maximize services to children. (*Id.* at 9)

Nutley also maintains that the ALJ improperly relied upon an erroneous equitable determination in reaching her conclusion that it is responsible for transportation and, therefore, the ALJ's ultimate conclusion of law is flawed. Arguing that it was the Department of Human Services which made both the group home placement and the educational placement, and not petitioner as inferred by the ALJ, Nutley concludes that both Nutley and respondent are victims of circumstances created by the State. Contrary to the ALJ's finding, Nutley argues, since neither district played a role in incurring the expenses, neither district is more unfairly treated in being assessed those expenses. (*Id.* at 12, 13) Therefore, Nutley urges the Commissioner to reverse the ALJ, find respondent responsible for the transportation costs of the student in question, and order that respondent reimburse Nutley for the costs of transportation it has assumed since July 1, 1998.

In its reply exceptions, respondent argues with respect to WWP's exceptions that the Opinion of March 13, 1984 is no longer relevant to the question of which district has responsibility for the payment of transportation costs for the times at issue herein. Respondent notes that in her analysis, the Deputy Attorney General relied on *N.J.S.A.* 18A:46-18.1, which was repealed by *P.L.* 1992, *c*. 129, § 2, effective July 1, 1993, and thus has no relevance to this matter, which arose in 1998. (Respondent's Reply Exceptions at 2) Respondent further avers that when the Opinion was issued, the Deputy Attorney General could find no special authorization for a charge back of transportation costs to the school district of residence, and thus, she concluded that those costs must be born by the district in which the group home was located. Respondent argues that this is no longer an accurate conclusion based on current statutes and rules. (*Id*. at 3) Respondent claims that the relevant statutes and rules for determination of responsibility for transportation services are the following:

[1. N.J.S.A. 18A:46-23. Transportation of pupils; handicapped children; state aid.]

The board of education shall furnish transportation to all children found under this chapter to be handicapped who shall qualify therefor pursuant to law and it shall furnish the transportation for a lesser distance also to a handicapped child, if it finds upon the advice of the examiner, the handicap to be as to make transportation necessary or advisable.

The board of education shall furnish transportation to all children being sent by local boards of education to an approved 12-month program pursuant to N.J.S. 18A:46-14 [, or any other program approved pursuant to *N.J.S.* 18A:46-14] and who qualify therefor pursuant to law, during the entire time the child is attending the program. The board shall furnish transportation for a lesser distance also to a handicapped child if it finds upon the advice of the examiner, [his] handicap to be [such] as to make transportation necessary or advisable.

The school district shall be entitled to State aid for the transportation pursuant to section 25 of P.L. 1996, c.138 (C.*18A:7F-25*) when the necessity for the transportation and the cost and method thereof have been approved by the county superintendent of the county in which the district paying the cost of the transportation is situated. (emphasis in text) (*Id.* at 3-4)

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[2. *N.J.S.A.* 18A:7B-12. Determination of residence for funding purposes.]

For school funding purposes the [C]ommissioner of education shall determine district of residence as follows:

> ***
>
> *b. The district of residence for children who are in residential State facilities, or who have been placed by State agencies in group homes, skill development homes, private schools or out-of-State facilities, shall be the present district of residence of the parent…* (emphasis in text) (*Id.* at 4)

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[3. *N.J.A.C.*. 6A:14-1.3 Definitions]

"*Related services" means transportation…*services as are required to assist a student with a disability to benefit from special education as specified in the student's IEP…

-and-

"*District board of education" means the school district of residence…* (emphasis in text) (*Id.* at 5)
***
[4. *N.J.A.C.*. 6A:14-3.9 Related services]

(a) *Related services*…shall be provided to a student with a disability when required for the student to benefit from the educational program.
***
7. *Transportation shall be provided as follows:*
  i. *The district board of education shall provide transportation as required in the IEP.* …
  ii. When out-of-district placement for educational reasons is made by the district board of education, transportation shall be provided consistent with the school calendar of the receiving school. (emphasis in text) (*Ibid.*)

[5. *N.J.A.C.*. 6A:14-4.1 General requirements]***

(a) *Each district board of education shall provide* educational programs and *related services for students* with disabilities required by the individualized educational programs of those *students for whom the district board of education is responsible.* (emphasis in text) (*Id.* at 6)
***
[6. *N.J.S.A.*. 18A:7F-3. Definitions.]***

"Resident [e]nrollment" means the number of pupils … who, on the last school day prior to October 16 of the current school year, are residents of the district and are enrolled in:…(2)…a…private school to which the district of residence pays tuition… . …In addition *resident enrollment shall include the number of pupils who,* on the last school day prior to October 16 of the prebudget year, *are residents of the district and are in a state facility in which they were placed by the state.* … (emphasis in text) (*Ibid.)*

[7. *N.J.S.A.* 18A:7F-25. Calculation of State aid for transportation.]***

P2 is the total number of special education pupils eligible for transportation pursuant to *N.J.S.A.* 18A:46-23 with special transportation requirements *who are resident in the district* as of the last school day prior to October 16 of the prebudget year. (emphasis in text) (*Id.* at 7)

Respondent further argues that the Commissioner should not focus exclusively upon *N.J.S.A.* 30:4C-26c, and should consider principles of statutory construction in making his determination. Respondent avers that the entire statute, including *N.J.S.A.* 30:4C-26(b), should be read *in pari materia* with other relevant statutes in determining responsibility for the transportation costs of these special education students. (*Id*. at 7-8) Respondent concludes that *N.J.S.A.*18A:7F-25 specifically provides for transportation costs for special education students who are resident in the district pursuant to *N.J.S.* 18A:46-23. (*Id*. at 10) Further, respondent submits that the transportation costs in dispute are included in tuition liability pursuant to *N.J.A.C.* 6:20-3.1 and *N.J.A.C* . 6:30-3.1(d)4.vii. (*sic*) "'[c]ontracted transportation…which are part of the instructional program' is expressly included in that sum, while in §5.i '[t}ransportation to and from school [***] is paid by the resident district'***." Respondent, therefore, concludes that these provisions clearly impose liability on WWP for the cost of transportation either as a component of tuition or as a stand alone cost. (*Id*. at 10)

Finally, with respect to WWP's exceptions, respondent avers that WWP's reliance on recent administrative decisions which determined that transportation costs to a county vocational school are the responsibility of the local school district is misplaced since respondent has no "sending" responsibility to the students at issue. (*Id.* at 10-12)

In its reply exceptions with respect to Nutley, respondent states that Nutley's exceptions essentially mirror WWP's exceptions, noting that Nutley's assertion that Nutley is no more responsible for the incursion of the transportation costs at issue than is respondent completely misses the issues involved herein. (*Id*. at 14)

In the course of the review of the above-titled matter, the Director of the Bureau of Controversies and Disputes, on behalf of the Commissioner, sought guidance from the

Attorney General's Office as to the continued validity of the 1984 Opinion concerning school district liability for transportation for students in group homes. By letter of June 21, 2000, the Deputy Attorney General advised the Commissioner that the analysis and conclusions in the 1984 Opinion remain valid.

The parties were noticed of the above communication from the Attorney General's Office, and provided an opportunity to respond.

In its response, respondent argues, *inter alia*, that the Deputy Attorney General's reliance on *N.J.S.A.* 30:4C-26 is misplaced and erroneous because that statute has no relevancy whatsoever to Division of Developmental Disabilities (DDD) group home placements. The express terms of *N.J.S.A.* 30:4C-26, respondent avers, are specifically applicable to placements made by DYFS, and by its plain language, cannot be expanded to include placements by State entities other than DYFS. (Respondent's Memorandum of Law, July 8, 2000 at 2) Respondent further argues that both "[t]he Attorney General *and the ALJ* erred in believing that an expansion of the coverage of *N.J.S.A.* 30:4C-26 to placements by the DDD was warranted." (emphasis added) (*Id.* at 3) Respondent submits that prior to 1985, the Division of Mental Retardation (DMR) was the agency having jurisdiction over those who are autistic, such as the children at issue herein. When DDD came into being in 1985, respondent states that the functions of DMR were transferred to the new entity. (*Id.* at 4) Respondent asserts that before and at the time of the creation of DDD in 1985, the State divided responsibility for certain populations between DYFS and DMR. With respect to the DMR/DDD population, respondent argues, *N.J.S.A.* 30:6D-3a(5) expressly defines those included in the service population as persons with "'severe disabilities attributable to'…'autism.'" (*Id.* at 6) Accordingly, respondents aver, separate statutory jurisdictions are established for DYFS (*N.J.S.A.* 30:4C) and DMR/DDD

(*N.J.S.A.* 30:6D), such that the distinct population for which DMR/DDD is responsible is not somehow transferred to DYFS by a group home setting. (*Id.* at 6-7)

Additionally, respondent repeats its arguments advanced below and in its exceptions to the Initial Decision, urging the Commissioner to adopt the conclusions of the ALJ, dismissing the Petitions of Appeal and determining that the contested transportation costs are the responsibility of petitioners.[4]

In their responses, Petitioners WWP and Nutley essentially reiterate arguments advanced in their exceptions, urging the Commissioner to accept the legal opinions provided by the Attorney General's Office, and to reject the ALJ's analysis which determined that petitioners are responsible for the transportation costs for the students at issue.[5]

Upon consideration of the Initial Decision, the arguments advanced by the parties, the March 13, 1984 Attorney General's Opinion and the June 20, 2000 advice from the Attorney General's Office, the Commissioner determines to reject the ALJ's conclusions of law for the reasons set forth below.

Initially, the Commissioner agrees that the statute central to the resolution of the question as to who is responsible for the cost of transportation services for students placed in group homes is *N.J.S.A.* 30:4C-26, which authorizes group home placements by the State and delineates the obligations of school districts involved in such placements. Further, the statute explicitly states that, for all purposes except school funding, the placed child is to be deemed a resident of the municipality and county where the group home is situated and, as such, is entitled

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[4] Although respondent objects to the Commissioner's consideration of the Deputy Attorney General's letter of June 20, 2000, arguing that it serves to supplant the Commissioner's authority to make a decision with respect to this matter, the Commissioner notes the appropriateness of his consideration of advice of counsel upon taking judicial notice of such advice.

[5] The parties were provided with an opportunity to concurrently submit a letter brief or memorandum of law *in response to the communication by Deputy Attorney General Thomas Russo*. To the extent that both WWP and Nutley included reply arguments *to respondent's submission* in their briefs, these arguments were not considered.

to the use of all health, recreational, vocational and other facilities of said municipality and county. Section "c" goes on to specify that the child is also entitled to the education benefits of that district with the exception that the child's "district of residence," as determined by the Commissioner of Education pursuant to law, shall be responsible for paying "tuition" to the district in which the child is placed.

Although this statute specifically refers to placements made by DYFS, the Commissioner agrees with the ALJ that it should be construed as also covering placements made by DDD. Both DYFS and DDD are divisions within the Department of Human Services which have been entrusted by the Legislature with the responsibility of delivering services to children with disabilities which will enable them to lead as normal and productive lives, as possible. *See N.J.S.A.* 30:6D *et seq.* and *N.J.S.A.* 30:4C *et seq.* Although *N.J.S.A.* 30:4C-26c makes no reference to placements by DDD, it is clear from the June 15, 1998 letter from Human Services Deputy Director, Debra Coniglio, informing Delran that "[b]oth the West Windsor School District for (K.H.) and the Nutley School District for (S.M.) have been reminded of their responsibility to assume educational expenses for their respective pupils, beginning July 1, 1998," that DHS, *the Department overseeing these two divisions, has read N.J.S.A. 30:4C-26c as applying to residential placements by DDD.*

Additionally, except for the matter of tuition, *N.J.S.A.* 30:4C-26 fixes liability for the cost and provision of all governmental services available to children placed in group homes. As stated above, the child's district of residence is responsible for paying tuition to the school where the child is placed. Pursuant to *N.J.S.A.* 18A:7B-12b the "district of residence" is "the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency." In the pending

matters, it is undisputed that the respective districts of residence, which are responsible for paying the cost of tuition, are, therefore, West Windsor-Plainsboro and Nutley.

Given the absence of any reference to transportation in the provisions of *P.L.* 1979, *c.* 207, the Commissioner concludes that the term "tuition" does not encompass transportation. At the time of the enactment of *P.L.* 1979, *c.* 207, the Legislature was aware of the matter of pupil transportation as evidenced by a separate provision dealing with "day training," in which it specifically allocated this cost to the State of New Jersey. *N.J.S.A.* 18A:46-18.1 (repealed *see now N.J.S.A.* 18A:46-13). The existence of this provision shows that if it had desired to impose transportation costs upon the "district of residence," in the case of a group home placement, the Legislature could have easily drafted *N.J.S.A.* 30:4C-26c in such a way that included this cost.[6]

The Commissioner further finds that the express language of *N.J.S.A.* 30:4C-26c, stating that children placed in group homes are to be accorded all of the "educational benefits" of the school district in which the group home sits, includes pupil transportation. In this regard, the ALJ properly noted that a special education pupil may qualify for transportation as a "related service" within the meaning of the special education laws. It must be noted, however, that nothing in those laws alters the Commissioner's conclusion regarding cost allocation. Since *N.J.A.C.* 6A:14-3.9 only references the "district board of education" as bearing these costs and there is no specific provision for group home placements, the regulation must, therefore, be viewed in light of, and subject to, the cost allocation set forth in *N.J.S.A.* 30:4C-26c.

The Commissioner also finds that the school district where the group home is located is responsible for providing child study team services (paid for by the resident district) to

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[6] To the extent that the parties seek further clarification of this statute, the Commissioner notes that the appropriate remedy is legislative.

children placed in group homes within its borders for reasons expressed in the 1984 Opinion. Therefore, the current scheme provides that the group home school district will determine the child's educational program and placement, which, in turn, will dictate the child's transportation needs and the district's transportation costs. [7]

Accordingly, for the reasons set forth above, the Commissioner grants petitioners' motions for summary judgment and directs that respondent reimburse Petitioners WWP and Nutley for the cost of transportation for the students in question. Respondent is further directed to continue the funding of transportation costs for S.M., as long as the student remains in the group home and is eligible for special education services. [8]

IT IS SO ORDERED.[9]

COMMISSIONER OF EDUCATION

Date of Decision: September 5, 2000

Date of Mailing: September 5, 2000

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[7] It is noted that, pursuant to the Comprehensive Educational Improvement and Financing Act, transportation aid is provided to school districts. *N.J.S.A.* 18A:7F-25.

[8] K.H. has aged out of WWP, so that the only relief sought by WWP is the reimbursement for past expenditures.

[9] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.,* within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.