

RAMSEY TEACHERS ASSOCIATION, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE BOROUGH : DECISION
 OF RAMSEY, BERGEN COUNTY, :
 :
 RESPONDENT. :
 _____ :

SYNOPSIS

Petitioning Education Association challenged the respondent Board's use of noncertified school nurses serving as school health aides in school facilities when certified school nurses were not present. The Board denied that it was improperly utilizing noncertified school nurses.

At the OAL, petitioner moved for summary decision and the Board cross-moved to dismiss the petition. The ALJ denied petitioner's motion and granted the Board's motion to dismiss the petition. The ALJ concluded that the use of a noncertified nurse from 12:15 p.m. to 3:00 p.m., while the certified school nurse assigned to a school facility was not present, did not contravene the applicable statute, as the noncertified nurse was supplementing the services of the certified school nurse assigned to the facility from 8:45 a.m. to 12:15 p.m., which is specifically authorized by *N.J.S.A.* 18A:40-3.3.

The Commissioner affirmed the decision of the ALJ, concluding that the Board's division of duties between a certified school nurse and a noncertified school nurse serving as a school health aide (who is a nurse) does not contravene the applicable statutes.

June 7, 2001

OAL DKT. NO. EDU 3080-00
 AGENCY DKT. NO. 12-1/00

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The record in this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner’s exceptions and the Board’s reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4, and were duly considered by the Commissioner in reaching his determination.

In its exceptions, petitioner argues that the Administrative Law Judge’s (ALJ) interpretation of *N.J.S.A.* 18A:40-3.3, adopted July 1, 1999, renders that statute superfluous because her reading means that the new law adds nothing, simply maintaining the status quo existing prior to its adoption. (Petitioner’s Exceptions at 1) Petitioner points out that *N.J.S.A.* 18A:40-3.3 mandates that “nursing services” are to be provided by certified staff only and that the statute “does not say ‘certified nursing services’ or ‘nursing services which require certification’ when it describes what ‘shall only’ be performed by a certified nurse.” (emphasis in text) (*Id.* at 2)

Although admitting that there is an exception provision in the statute for non-nursing employees, petitioner submits that, contrary to the ALJ’s analysis, this provision does

not refer to noncertified nurses, but rather to individuals who are not nurses, such as lifeguards, emergency medical technicians, etc. (*Ibid.*) Pointing to the Summary of Bill in the Governor's conditional veto, petitioner contends that the purpose of the bill was not to introduce flexibility in the system as the ALJ states, but rather to provide that "*a school district shall only utilize or employ for the provision of nursing services in the public schools of the district, persons holding an educational services certificate with an endorsement as a school nurse issued by the State Board of Examiners.*" (emphasis in text) (*Id.* at 3, quoting Summary of Bill, Exhibit A, page 2, attached to the Jacobs Certification) Petitioner further maintains that the governor supported the bill's purpose, but that her concerns were "related to specialized care for individuals with special needs *** and that supplementation of certified nurses be allowed *if* a certified nurse is assigned to the same building or complex." (emphasis in text) (*Ibid.*, quoting Exhibit A, page 3)

Pointing to *Old Bridge Twp. Ed. Assoc. v. Bd. of Ed. of the Tp. Of Old Bridge*, decided by the Commissioner November 26, 1997, *aff'd* State Board April 1, 1988, petitioner asserts that the system which existed prior to the enactment of *P.L. 1999, c. 153* was the most flexible because the preexisting system permitted the use of noncertified nurses without regard to certified nurse building assignments, and that respondent's use of a certified nurse for half a day and a noncertified nurse for the other half day is merely a subterfuge to pay cheaper salaries, provide fewer benefits and to avoid the accrual of tenure. (*Id.* at 4) Moreover, petitioner argues that the intent of the legislation was to permit a noncertified nurse to assist in covering a school or school complex, and that there is nothing in *N.J.S.A. 18A:40-3.3* which justifies the ALJ's interpretation that "assigned to" means that a certified school nurse's presence is only required for that part of a day when the non-certified nurse is not present. (*Ibid.*)

Acknowledging that the statute permits a noncertified school nurse to act as a temporary substitute when a certified school nurse is temporarily absent, *see N.J.A.C. 18A:40-3.5*, petitioner argues that that is not the situation in the instant matter because the certified and noncertified nurse are never in the building at the same time, except for a fifteen minute overlap in their work schedules. (*Id.* at 5) Moreover, petitioner posits that, since the Board admits that it authorizes its school health aides to assist in tasks, responsibilities and duties reserved for certified school nurses, the noncertified nurse is either only assisting the certified school nurse for fifteen minutes each day or is performing these responsibilities after the school nurse leaves.

Finally, arguing that the purpose of *N.J.S.A. 18A:40-3.2 et seq.* is to promote the use of certified school nurses, petitioner asserts that the Commissioner should reverse the Initial Decision and find that a certified school nurse is required in the Tisdale school each day for the full day and that hereafter a full time certified nurse must be hired whenever the Board hires new employees for its nursing positions in any of its buildings. (*Ibid.*)

In its reply, the Board asserts that the ALJ's interpretation of *N.J.S.A. 18A:40-3.3* is the only reasonable interpretation, and that there is no evidence that the school health aide in question is independently performing any tasks specifically reserved for the certified school nurse. (Board's Reply at 2) The Board further submits that the ALJ correctly concluded that there is no requirement that a school district must have a full-time, certified school nurse present in each building. (*Ibid.*)

Moreover, the Board argues that petitioner's contention that non-nursing personnel refers solely to individuals who are not nurses is a strained interpretation of the statute because it must be construed to permit, for instance, a lifeguard to perform health-related services without the presence of a certified school nurse, but would not permit a registered nurse

within the job description of school health aide to perform services without a certified school nurse present. (*Id.* at 4) The more reasonable interpretation, the Board posits, is that the phrase non-nursing personnel refers to individuals not holding an Educational Services Certificate and, thus, non-nursing personnel would include noncertified registered nurses serving as school health aides. (*Ibid.*)

Arguing that its practices are in accordance with the intent and language of *N.J.S.A.* 18A:40-3.3, the Board objects to the inference that it is perpetrating a subterfuge of the legislative intent. (*Id.* at 4-5) The Board further asserts that the certified school nurse in the Tisdale School provides those services which are required to be performed by an individual holding an educational services certificate, and that the school health aide is limited to assisting the certified school nurse when both individuals are present in the building. (*Id.* at 5) At all other times, the Board avers, the school health aide is expressly limited to performing those tasks which are not required to be performed by the certified school nurse. (*Ibid.*) Therefore, the Board urges the Commissioner to adopt the Initial Decision as the final decision in this matter. (*Ibid.*)

Upon careful and independent review of the record, the Initial Decision, the exceptions and the reply thereto, the Commissioner is in agreement with the ALJ that *N.J.S.A.* 18A:40-3.3 does not expressly require that a certified school nurse be physically present whenever a non-certified nurse performs duties supplementing the services provided by the certified school nurse (*see N.J.S.A.* 18A:40-3.5), and that there is no evidence that the registered nurse serving as a school health aide at Tilsdale School is functioning in a manner not in compliance with the applicable regulation, *N.J.A.C.* 6A:16-2.1(e) and (f). Therefore, the

Board's current division of duties between the certified school nurse and the school health aide does not violate the statute at issue.

Moreover, the Commissioner finds unpersuasive petitioner's argument that the ALJ's holding simply maintains the status quo prior to the adoption of P.L. 1999, c. 153, and thus renders the new law a nullity. To the contrary, prior to the adoption of P.L. 1999, c. 153, there was no requirement that noncertified nurses be assigned to a school building or school complex where a certified school nurse is assigned.

Accordingly, the Commissioner determines to deny petitioner's motion for summary judgment and to grant the Board's cross motion to dismiss the petition for the reasons expressed in the Initial Decision.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: June 7, 2001

Date of Mailing: June 7, 2001

* 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.