

BOARD OF EDUCATION OF THE :
BOROUGH OF LINCOLN PARK, :
MORRIS COUNTY, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN OF : DECISION
BOONTON, MORRIS COUNTY AND :
NEW JERSEY STATE DEPARTMENT OF :
EDUCATION :

RESPONDENTS. :

SYNOPSIS

Petitioning Board alleged that respondent Board, with whom petitioner is involved in a sending/receiving relationship, improperly included litigation costs in its calculation of the tuition rate to be charged petitioner. The County Superintendent stated it was her belief that respondent acted within its legal rights. Respondent contended the petition was untimely filed.

The ALJ concluded that petitioner was entitled to summary decision on the issue of attorney’s fees and that the petition was not filed untimely. The ALJ determined that respondent was not permitted to include in the tuition rate that it charges petitioner any legal fees, costs or expenses associated with litigation between the parties or their agents. Although the governing regulation that addresses the method for determining tuition rates, *N.J.A.C. 6A:23-3.1*, does not list legal expenses as an exclusion, the ALJ noted that it is well-settled, under the “American Rule,” in the United States and in New Jersey that each party will bear the cost of its own litigation fees. Moreover, in considering the argument of the State that the County Superintendent’s decision regarding the propriety of legal fees should not be disturbed because the decision was not arbitrary or capricious, the ALJ found that the Commissioner and the ALJ are not required to defer to a determination of the County Superintendent or apply an arbitrary and capricious standard.

The Commissioner concurred with the determination of the ALJ with clarification. Initially, the Commissioner found, and noted that the parties herein did not dispute, that because legal costs and fees are not specifically enumerated in *N.J.A.C. 6A:23-3.1(b)(1)* as an exclusion from the calculation of actual cost per student figure for tuition purposes, such costs and fees associated with litigation, against or brought by third parties concerning high school matters, are appropriately included in the tuition calculation. The Commissioner, however, concluded, as did the ALJ, that with respect to legal costs and fees directly attributable to litigation between the parties, inclusion of such costs and fees was prohibited by the “American Rule.”

<p>This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.</p>

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Boonton’s exceptions and those of the Department, along with Lincoln Park’s reply thereto were filed in accordance with the requirements of *N.J.A.C.* 1:1-18.4.¹

Upon his full and independent review, the Commissioner concurs with the determination of the ALJ herein that the Boonton Board is not permitted to include any legal fees, costs or expenses associated with litigation between the parties or their agents in the tuition rate which it charges to Lincoln Park. However, after consideration of the parties’ submissions in this matter, the Commissioner is compelled to clarify the parameters of this determination in order to eliminate any potential confusion.

¹ The parties’ exceptions essentially recast and reiterate their arguments advanced before the Administrative Law Judge (ALJ) below. In that the Commissioner finds that the ALJ reviewed and considered such arguments in her Initial Decision, they will not be revisited herein.

As recognized by the ALJ, *N.J.A.C.* 6A:23-3.1 governs the setting of tuition for public schools in sending/receiving relationships, and requires the calculation of the “actual cost per student.” This regulation directs that *all expenditures*, other than Federal and State special revenue fund expenditures, with certain enumerated exceptions, be included in the calculation of actual cost per student. *N.J.A.C.* 6A:23-3.1(b)(1). Attorney costs and fees are not included as an exception. The Commissioner finds, and the parties here do not dispute, that because legal costs and fees are not specifically enumerated in this regulation as an exclusion from the computation of the actual cost per student figure for tuition purposes, such costs and fees associated with litigation, against or brought by third parties, concerning high school matters, are appropriately included in the tuition rate calculation. However, with respect to legal costs and fees directly attributable to litigation *between the parties*, the Commissioner concludes, as did the ALJ, that a long recognized “overarching” policy consideration must be superimposed.

As found by the ALJ:

It is well settled, under the “American Rule,” in the United States and in New Jersey, that each party will bear the cost of its own litigation fees. *In re Estate of Lash*, 169 *N.J.* 20, 30-31 (2001).

Since 1948, New Jersey has consistently adhered to the general principle that ‘legal expenses, whether for the compensation of attorneys or otherwise, are not recoverable *absent express authorization by statute, court rule or contract.*’ [*Balsley*] *v. North Hunterdon Regional School Bd. of Ed.*, 225 *N.J. Super.* 221, 226 (App. Div. 1988), reversed on other grounds, 117 *N.J.* 568 (1990) (quoting *State Dept. of Environmental Protection v. Ventron Corp.*, 94 *N.J.* 473, 504 (1983)). (emphasis supplied) (Initial Decision at 11)

As *N.J.A.C.* 6A:23-3.1 provides computation authorization implicitly as opposed to explicitly, the express clear and unequivocal authorization requirement contemplated by the “American Rule” for the shifting of legal fees as between parties is not satisfied. As noted by the ALJ, the

parties' sending/receiving contract, similarly, fails to provide the requisite "express" authorization for this particular category of expenses. Consequently, it is hereby held that absent express legal authorization, a receiving district in a sending/receiving relationship is not permitted to charge the sending district for its legal costs in either pursuing or defending litigation against the sending district.

Accordingly, the Initial Decision of the OAL, as clarified herein, is adopted.

IT IS SO ORDERED.²

COMMISSIONER OF EDUCATION

Date of Decision: May 15, 2003

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² This decision 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.*