#103-05 (http://lawlibrary.rutgers.edu/oal/word/initial/edu03066-03_1.doc)

BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,	:	
RESPONDENT.	:	
	:	

SYNOPSIS

The Board of Education of the Borough of Lincoln Park filed a petition challenging the Board of Education of the Town of Boonton's classification of work performed at the respondent's high school parking lot as a "repair" rather than a "capital expenditure," and subsequent attempt to include a *pro rata* share of this expenditure in the tuition costs charged to Lincoln Park under the parties' Sending-Receiving Agreement.

Based on review and consideration of the evidence and testimony submitted in this matter, the ALJ found that the facts support the position of the petitioning Board that the parking lot work constituted a capital improvement. Moreover, the ALJ found that the Sending-Receiving Agreement between the parties reflects clear intent that Lincoln Park not be required to bear financial responsibility for "major capital undertakings" at Boonton High School. Accordingly, the ALJ found that the respondent's effort to include a *pro rata* portion of the related expenditure in Lincoln Park's tuition rate is improper.

The Commissioner concurs with the ALJ in finding that the scope of work undertaken by Boonton constitutes a capital improvement, and expands upon the ALJ's opinion by citing the rubric for "extensive improvement" found within the Department of Education's school facilities systems maintenance chart. The Commissioner emphasizes that the negotiated tuition agreement between the parties specifically protects Lincoln Park against payment for capital improvements to structures owned exclusively by Boonton without express written consent, and that this specific contractual provision controls over the standard "boilerplate" language included in the contract. Moreover, the underlying statute and the rules for the setting of sending-receiving tuition rates clearly provide for tuition to be charged not in excess of the calculated "actual cost per student". Accordingly, the Commissioner concurs that the disputed expenditure was improperly included in the tuition rate charged to Lincoln Park, and the ALJ's Initial Decision is adopted as the final decision in this matter.

OAL DKT. NO. EDU 3066-03
AGENCY DKT. NO. 93-3/03

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Pursuant to *N.J.A.C.* 1:1-18.4, the respondent Board of Education (Boonton) filed exceptions to the OAL decision, to which the petitioning Board of Education (Lincoln Park) duly replied.

In its exceptions, Boonton substantially reiterates arguments made in its post-hearing submissions and contends that the Administrative Law Judge (ALJ) misunderstood the central issue in this matter. In Boonton's view, the ALJ focused on inapplicable law in a misguided attempt to differentiate "capital expenditure" from "current expense," a distinction which has no meaning in the current context, where the real issue is the effect of the parties' contract on a properly budgeted and allocated facility maintenance expenditure. Boonton opines that the ALJ should have found in its favor because: 1) the disputed expenditure was correctly budgeted and allocated under school law; 2) the work it represents falls squarely within the "required maintenance"

category of the Department of Education's school facilities systems maintenance chart (P-9); and 3) the parties' contract expressly states that where regulations differ from contractual provisions, the regulations will control. (Boonton's Exceptions at 1-10)

In reply, Lincoln Park urges adoption of the Initial Decision, contending that the ALJ did, indeed, understand the central issue, which was whether the expense in question constituted required maintenance or a capital expenditure, and that, having correctly concluded it was the latter, he properly applied the contractual provision exempting it from the tuition calculation. Lincoln Park proffers that the ALJ did not ignore the Department's chart of categories, but rather recognized its lack of precision and made an (accurate) assessment of whether the work in question more appropriately belonged in the "maintenance" or the "capital" category. The district also counters that Boonton's argument to the effect that contractual exclusion of an expense from the calculation of tuition is automatically void if regulation permits its inclusion, ignores the reality that parties to a contract are free to agree to whatever terms they wish so long as such terms do not violate the law. In this instance, according to Lincoln Park, because its students constitute approximately 50% of Boonton's high school enrollment, it sought and secured protection, in § (H) of the negotiated tuition agreement, against payment for capital improvements to structures owned exclusively by Boonton. Thus, Lincoln Park concludes, the ALJ correctly found that this specific contractual provision controls over the general "boilerplate" language of § (P), which is intended to do nothing more than preclude violations of law within the terms of the contract. (Lincoln Park's Reply Exceptions at 1-8)

Upon consideration, the Commissioner finds that, regardless of how this matter is characterized, Boonton cannot prevail in its defense to Lincoln Park's claim, either by arguing that the expenditure at issue was a properly allocated capital expenditure for required maintenance[1] or by contending that exclusion of the expenditure from tuition charged to Lincoln Park constitutes a "discrepancy" with rule such that § (P) of the contract mandates its payment.

With respect to the "required maintenance" argument, review of Department of Education's school facilities systems maintenance chart (P-9), upon which Boonton places heavy reliance, reveals that the line of demarcation between the "required maintenance" and "capital" categories for Item 36, Site Improvements, is fluid, with the difference in regard to parking lots being more of degree than kind: While "required maintenance" includes "repair or replacement of uneven or cracked parking areas," "new parking areas *or extensive improvements to same*" (emphasis supplied) is included within "capital," in addition to the provision emphasized by Boonton, that of "replacement of an entire driveway and [associated parking areas] due to end of useful life." In this instance, the Commissioner finds that the scope of the work undertaken by Boonton falls well within the rubric of "extensive improvement" as opposed to "area repair/replacement," so that it is accurate even under the standard advocated by Boonton to characterize it as a "capital" project for purposes of § (H) of the parties' contract.

Moreover, even if Boonton is correct that the disputed expenditure was properly budgeted and allocated under applicable school law,[2] that fact does not mandate

[1] See Note 2 below.

[2] In its exceptions, Boonton states that it has never disputed that the amount at issue was a "capital expenditure" in these terms. (Boonton's Exceptions at 3, *inter alia*)

its inclusion in the tuition rate negotiated between the parties. The underlying statute and the rules for the setting of sending-receiving tuition rates, both at the time of the contract and currently, clearly provide for tuition to be charged *not in excess* of the calculated "actual cost per student" (*N.J.S.A.* 18A:38-19; *N.J.A.C.* 6:20-3.1, now 6A:23-3.1), so that the exclusion provided by § (H) of the contract presents no "discrepancy" with the law, let alone any violation, that would cause it to be superseded by § (P).

Accordingly, the Commissioner concurs that the disputed expenditure was improperly included in the tuition rate charged by Boonton to Lincoln Park. The Initial Decision of the Office of Administrative Law, as clarified above, is adopted as the final decision in this matter.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: March 23, 2005
Date of Mailing: March 23, 2005

[3] 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.*