

VICTORY SCHOOL, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT : DECISION
OF EDUCATION, DIVISION OF
FINANCE, :
RESPONDENT. :

SYNOPSIS

Petitioner filed a petition of appeal seeking “complete, unlimited waiver” of *N.J.A.C.* 6A:23-4.3(c)iii, which sets forth the average daily enrollment (ADE) requirement of private schools for the disabled, following notification from the New Jersey Department of Education that the petitioner was in jeopardy of having its preliminary approval status as a private school rescinded unless it attained the minimum ADE of 16 students for the 2004-05 school year. Subsequent to filing the petition of appeal, the Victory School submitted an application for a waiver of these regulations through the equivalency and waiver process set forth at *N.J.A.C.* 6A:5-1 *et seq.*, and requested that the matter be placed in abeyance pending decision on the waiver application.

The Commissioner considered the petitioner’s request for a waiver of the ADE requirements set forth at *N.J.A.C.* 6A:23-4.3(c)iii under the regulations established for application for a waiver and issued a determination on that request on December 7, 2004 denying Victory School’s waiver request. Subsequently, petitioner requested that its appeal be reinstated.

Having previously rendered a determination on petitioner’s request for a waiver of the ADE requirements set forth at *N.J.A.C.* 6A:23-4.3(c)iii in the appropriate forum, *i.e.*, under the regulation governing requests for a waiver, *N.J.A.C.* 6A:5-1.1 *et seq.*, the Commissioner found that the relief requested within the instant petition is moot. Accordingly, respondent’s motion was granted and the petition of appeal was dismissed, with prejudice.

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.
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March 4, 2005

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OF EDUCATION, DIVISION OF :
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For Petitioner, Stephen F. Hehl, Esq. (Hehl & Hehl)¹

For Respondent, Carolyn Grace Labin, DAG (Peter C. Harvey, Attorney General)

This matter was opened by way of a Petition of Appeal filed on May 24, 2004, wherein petitioner seeks a “complete, unlimited waiver” of *N.J.A.C.* 6A:23-4.3(c)iii.² (Petition of Appeal at 3) *N.J.A.C.* 6A:23-4.3(c)iii sets forth the requirement that any previously-approved private school for the disabled, whose enrollment falls below the minimum Average Daily Enrollment (ADE) of 16 full-time students in a school year, shall have its status rescinded and shall be considered preliminarily approved. Further, if it should fail to attain the minimum average daily attendance of 16 full-time students by the end of the third year after the year in question, its approval shall be rescinded and it shall no longer be considered an approved private school for the disabled. The impetus for this appeal arises from a January 20, 2004 notification from the Department’s Division of Finance, advising petitioner that it must attain an ADE of 16 students for the 2004-05 school year or its preliminary approval status as a private school would be rescinded. (*Id.* at 1)

¹ It is noted that the within petition was filed by Mark Lasky, President/Chief Executive Officer of the Victory School, upon his notice of appearance/application to represent petitioner, a close corporation, pursuant to *N.J.A.C.* 1:1-5.4(a)5 and *N.J.A.C.* 1:1-5.5(g). Mr. Hehl entered his appearance by way of the filing of an answer to respondent’s motion to dismiss on behalf of petitioner on February 8, 2005, followed by a Substitution of Attorney on February 25, 2005.

² Although the petition specifically asks for a waiver of *N.J.A.C.* 6A:23-4.1, the regulation petitioner seeks to waive is actually *N.J.A.C.* 6A:23-4.3(c)iii, as clarified in the arguments expressed on pages one and two of the petition and petitioner’s reply to respondent’s motion.

Petitioner states that it “is appealing based on (6:3A-1.3) 6A:5-1.3”³ and argues, *inter alia*, that it has been an effective, approved private secondary school since the 1986-87 school year, and that it is the only private school in Union County with a unique academic/vocational environment that assists students in completing their education, and making a smooth transition to work or the adult service continuum. Additionally, petitioner states that the spirit and intent of the applicable Federal and State laws and regulations are served by granting its request for a waiver. (*Id.* at 1-2)

By letter of July 13, 2004, petitioner requested that this matter be placed in abeyance pending a decision on its application for a waiver of *N.J.A.C.* 6A:23-4.3(c)iii, submitted to the county superintendent through the Equivalency and Waiver Process set forth at *N.J.A.C.* 6A:5-1.1 *et seq.* Subsequently, by letter of December 30, 2004, petitioner requested that its appeal be reinstated in light of the Commissioner’s rejection of its request for a waiver and the “judgment” by the Division of Finance to rescind its longstanding license to operate as a private school for the disabled as of July 2005. Petitioner attached the Commissioner’s determination of December 7, 2004, denying its request for a waiver of *N.J.A.C.* 6A:23-4.3(c)iii to continue the operation of a private school for the disabled that falls below the minimum ADE of 16 by the end of the third school year. (Attachment to Petitioner’s Letter of December 30, 2004) Petitioner also attached a letter, dated November 23, 2004, from Richard Rosenberg, Assistant Commissioner, Division of Finance, noting that petitioner’s ADE was 4.4, 4.1 and 4.95 in the 2001-02, 2002-03 and 2003-04 school years and stating that petitioner must attain an ADE of 16 for the 2004-05 school year or the school’s approval will be rescinded, effective July 1, 2005. (*Ibid.*)

On January 25, 2005, respondent filed a motion to Dismiss in Lieu of Answer, claiming that the issues raised in the within petition are moot in that the Commissioner issued a decision on December 7, 2004 regarding the relief requested through his denial of petitioner’s application for a waiver of *N.J.A.C.* 6A:23-4(c)iii, pursuant to *N.J.A.C.* 6A:5-1.5(a)iii, and noting

³ In that regulation *N.J.A.C.* 6:3A-1.3 does not exist, presumably, petitioner is referring to *N.J.A.C.* 6A:3-1.3 which sets forth the procedures to be followed to initiate the contested case process for the Commissioner’s determination of a

that petitioner has appealed the denial of its waiver request to the State Board. (Motion to Dismiss at 5)

In reply, petitioner claims that a grant of respondent's motion to dismiss this matter would deny petitioner its absolute right to appeal the Commissioner's decision of December 7, 2004, "which is contrary to *N.J.A.C.* 6A:4-1.1." (Petitioner's Reply to Motion to Dismiss at 3) Moreover, petitioner asserts that its request for an appeal and/or waiver of *N.J.A.C.* 6A:23-4(c)iii is not moot in that it has not been provided the opportunity to present any evidence or witnesses in support of its contention that a waiver is appropriate in that: 1) it provides an essential service to students with disabilities ages 15 to 21 that cannot be duplicated by the sending districts and 2) the sending districts of Union County and Union County Education Services would lose an important alternate educational option for students who require a modified setting that includes vocational development and academic services with individualized support. (*Id.* at 4) Petitioner, therefore, concludes that "[t]o leave the Commissioner's decision would clearly deny the Claimant its right to proceed on Appeal." (*Ibid.*)

Respondent points out in its response that nowhere in the petition does petitioner assert that it is appealing the regulatory language of *N.J.A.C.* 6A:23-4.3(c)iii, but, instead, specifically states in its petition that it is seeking a waiver of the regulatory provision set forth in *N.J.A.C.* 6A:23-4.3(c)iii and, even now, in its response to the motion to dismiss, requests that it be heard on its application for a waiver. (Respondent's Response at 3) Respondent contends that the term waiver, as set forth in *N.J.A.C.* 6A:5-1.2, has the specific meaning of "approval to avoid compliance either with the specific procedures or the substantive requirements of a specific rule for reasons that are judged educationally, organizationally and fiscally sound" and that, pursuant to *N.J.A.C.* 6A:5-1.5(a), a school district must submit an application to the Commissioner demonstrating why the waiver of a specific regulatory provision is warranted. (*Id.* at 3-4) Upon the Commissioner's review of the application and determination, respondent submits, a school district

controversy or dispute arising under the school laws. *N.J.A.C.* 6A:5-1.3 describes the criteria that must be met for the

may appeal the Commissioner's decision to the State Board, if it is not satisfied with the Commissioner's determination. (*Ibid.*) With respect to petitioner's contention that it has not been provided the opportunity to present any evidence or witnesses in support of its waiver request, respondent avers that there is no language in the applicable code that states that a school district shall have the opportunity to present evidence and testimony regarding its waiver application. (*Id.* at 4) In conclusion, respondent submits that the relief requested within its petition is moot in that petitioner has had its opportunity to be heard before the Commissioner and that an appeal of the Commissioner's denial of its request for a waiver is now pending before the State Board. (*Ibid.*)

Upon a thorough review of the parties' submissions, the Commissioner has determined to grant respondent's motion to dismiss the within petition. In so concluding, it is emphasized that the Commissioner fully considered petitioner's request for a waiver of the ADE requirements set forth at *N.J.A.C.* 6A:23-4.3(c)iii and issued a determination on that request on December 7, 2004, pursuant to the procedures for consideration of equivalency and waiver requests found at *N.J.A.C.* 6A:5-1.1 *et seq.* In the instant matter, petitioner requests the same relief denied in the Commissioner's December 7, 2004 decision and provides no basis for additional consideration of this matter under *N.J.A.C.* 6A:3, which sets forth the procedures to initiate a contested case where there is an allegation that an action by a school district is in violation of the school laws or where the action being challenged may involve the implementation of a waiver or equivalency granted by the Commissioner. *See, also, N.J.A.C.* 6A:5-1.7. Having previously rendered a determination on petitioner's request for a waiver of the ADE requirements set forth at *N.J.A.C.* 6A:23-4.3(c)iii in the appropriate forum, *i.e.*, under the regulation governing requests for a waiver, *N.J.A.C.* 6A:5-1.1 *et seq.*, therefore, the Commissioner finds that the relief requested within the instant petition is moot.

With respect to petitioner's claim that a finding that its claim is moot under the contested case process set forth at *N.J.A.C.* 6A:3 would deny petitioner its absolute right to appeal

the Commissioner's decision of December 7, 2004, "which is contrary to *N.J.A.C. 6A:4-1.1*," the Commissioner points out that *N.J.A.C. 6A:4-1.1 governs appeals to the State Board, not the Commissioner*, and that petitioner has preserved its right to appeal the Commissioner's decision by filing an appeal with respect to the issue herein to the State Board. Moreover, although the Commissioner finds that petitioner was provided the opportunity to which it was entitled under the regulations to present its arguments in support of its request for a waiver of the ADE requirement set forth at *N.J.A.C. 6A:23-4.3(c)iii*, in that an appeal of the Commissioner's decision is currently pending before the State Board, any argument that petitioner wishes to present in support of its allegation that it was not provided an adequate opportunity to present its arguments in support of its contention that a waiver was appropriate should be made to the State Board.

Accordingly, for the reasons set forth above, respondent's motion is granted and the within petition is dismissed, with prejudice.

IT IS SO ORDERED.⁴

COMMISSIONER OF EDUCATION

Date of Decision: March 4, 2005

Date of Mailing: March 4, 2005

⁴ 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.*