

MONMOUTH-OCEAN EDUCATIONAL :
SERVICES COMMISSION, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 NEW JERSEY STATE DEPARTMENT : DECISION
 OF EDUCATION, DIVISION OF :
 FINANCE, :
 :
 RESPONDENT. :
 _____ :

The record in this matter and the Initial Decision have been reviewed.¹

The Commissioner adopts the determination of the Office of Administrative Law (OAL) that the petition must be dismissed. The undisputed material facts in this case are set forth in the Initial Decision, and will not be repeated. However, the Commissioner adds the following information to lend context to the Administrative Law Judge (ALJ)'s findings and conclusions, with which the Commissioner concurs.

Petitioner is an Educational Services Commission, *i.e.*, “an agency established . . . in one or more counties for the purpose of carrying on programs of educational research and development and providing to public school districts such educational and administrative services as may be authorized pursuant to rules of the State Board of Education.” *N.J.S.A.* 18A:6-51(a). Such a Commission is created under the following conditions. First, five or more boards of education, and the Commissioner

¹ The Initial Decision was mailed to the parties on July 28, 2006. Pursuant to *N.J.A.C.* 1:1-18.4(a), exceptions were due on July 11, 2006. Petitioner’s exceptions were received by the Commissioner on July 13, 2006 and were consequently untimely.

of Education (Commissioner), must study and investigate, and conclude that the creation of a Commission is advisable. *N.J.S.A.* 18A:6-52(a). The boards may then petition the State Board of Education (State Board) for permission to establish a Commission. *Ibid.* Annexed to the petition must be a report identifying the kinds of educational and administrative services and programs that the boards of education expect the Commission to provide, estimated costs of the provision of those services and programs, and a method of financing the expenditures, “including a detailed budget which projects anticipated costs and identifies anticipated sources of revenue until such can be financed under its first regularly adopted budget” *Ibid.*

If the State Board approves the establishment of a Commission, a “Representative Assembly” is formed, comprised of one representative of each of the boards of education [districts] which petitioned to create the Commission. *N.J.S.A.* 18A:6-53 The Representative Assembly elects a board of fifteen or more directors, including at least one director from each district. *N.J.A.C.* 18A:6-54; *N.J.A.C.* 18A:6-55 This board of directors performs functions similar to a corporate board, in that it has the authority to contract, pay debts, purchase or lease real or personal property and hire a compensated Secretary to execute board decisions and perform various reporting and recording duties. *N.J.S.A.* 18A:6-57; *N.J.S.A.* 18A:6-59; *N.J.S.A.* 18A:6-61. The Commission board can also hire a superintendent or chief administrator to run the Commission. *N.J.S.A.* 18A:6-60

The Commission board is responsible for annually submitting to the Representative Assembly the financial information which the assembly needs to present a budget to the county superintendent of schools. *N.J.S.A.* 18A:6-62 That information

must include the estimated cost of providing each service or program, the fees to be charged for same, and the method by which the commission expenses shall be funded.

Ibid. Commissions may also apply for grants from individuals, agencies and governments for programs approved by the State Board. *N.J.S.A.* 18A:6-67

Commissions may contract with school districts, public agencies and private agencies to provide services, to both public and non-public schools. *N.J.S.A.* 18A:6-63 In the present case, petitioner contracted with two school districts to provide nursing services to a non-public school, Our Lady of Perpetual Help (OLPH), located within their district boundaries, in connection with Chapter 226 of the Laws of 1991, which mandates that public school districts arrange such services with State money that is distributed to the districts for that purpose.² When public schools make such contracts with Commissions to provide nursing services, the nurses are considered “employees of a third-party contractor.” *N.J.A.C.* 6A:16-2.4(b)

Petitioner entered into the two identical contracts (the Contracts) with the Henry Hudson Regional School District and the Highlands School District in 1991.³ Respondent is not a party to either of the Contracts.⁴ Under the contract terms, the respective boards of education agreed “to pay the Commission the full amount of State Aid received in support of Chapter 226” on a fixed schedule. The record indicates that for the 2004-2005 school year, that amount was \$9578.00. Significantly, the Contracts provide that “[n]o other funding is due the Commission in order to operate this program.”

² Any unused Chapter 226 funds must be returned to the State on an annual basis, *N.J.S.A.* 18A:40-31(b), but once the allocated funds are spent, no public school district is obligated to make expenditures in excess of the amount of Chapter 226 aid it received. *N.J.S.A.* 18A:40-31(c).

³ Since OLPH is apparently located within the boundaries of both the Henry Hudson Regional School District and the Highlands Borough School District, both contribute Chapter 266 funds for the nursing services.

⁴ Copies of the contracts are in the record, marked C-1 and C-2, respectively.

The Contracts also provide that “[t]he Commission shall contact the designated non-public schools within the district and determine the services to be provided within the parameters of the law and the limitation of funding.” In connection therewith, the contract requires that the Commission issue an annual addendum to the contract “outlining the individual services provided to each non-public school located within the district.”

Included in the record in multiple locations, including Exhibit P-3A, are copies of the contract addendum relating to OLPH, for the 2004-2005 school year. The addendum, signed by a representative of OLPH and by a representative of petitioner, recited that petitioner was permitted to use \$574.68 of the above referenced \$9578.00 of Chapter 226 funds for administrative expenses, and would provide 10.75 hours of nursing services per week for 33 weeks. The base cost of the nurse per hour was set at \$20.50, for a total base cost of \$7272.38. This amount was multiplied by 1.12 to cover fringe benefits (social security, pension and unemployment insurance), amounting to \$8145.25, and again by 1.1 to cover nursing supervision, amounting to \$8959.78. \$43.75 remained in the 2004-2005 OLPH Contract for supplies and physicals.

As related in the Initial Decision, petitioner did not provide OLPH with the full 354.75 hours of nursing services that had been identified in the contract addendum. The nurse that it assigned to OLPH, like all Commission employees, was entitled to sick leave pursuant to *N.J.S.A. 18A:6-66*, and took 9.5 days during the 2004-2005 school year. The Commission maintained that it had the right to unilaterally reduce the amount of OLPH nursing service hours memorialized in the addendum, in accordance

with the amount of money it had to pay as sick leave benefits to the nurse that had been assigned to OLPH.

In a letter dated June 20, 2005 to John Lally of the New Jersey Department of Education (respondent), who is responsible for the oversight of services provided to non-public schools, Timothy Nogueira, petitioner's superintendent, articulated petitioner's rationale for providing OLPH with less than the promised amount of nursing services. Exhibit R-3E Nogueira contended that since the nurse in question worked only at OLPH, her wages and benefits could only be paid with non-public nursing program funds. Paying her for her sick leave, argued Nogueira, reduced the pool of Chapter 226 funds available for services to OLPH, resulting in the provision to OLPH of less than the contracted for amount of hours of nursing services.

Nogueira stated that other non-public schools to which petitioner provides services "have elected to set aside part of their funding allocation in the eventuality that the nurse[s] assigned to the[ir] school[s] [are] absent for any reason" *Ibid.* The administrator at OLPH elected not to do so. *Ibid.* Nogueira further declared his intention to write to the schools to which petitioner had been providing nursing services, advising them that they could "set aside money within their non-public nursing service agreement to cover these contingencies," and that if they did not, they would be responsible for securing a substitute nurse. *Ibid.*

In response to Nogueira's letter and a similar letter from petitioner's counsel, Yut'se Thomas, Assistant to the Commissioner for Finance, and Susan B. Martz, Director of the Office of Program Support Services, Department of Education, wrote to

petitioner's counsel on October 13, 2005. Exhibit R-3G They advised that petitioner is a service provider like any other:

The salaries and benefits of the employees of any given service provider is [sic] outside the contractual obligations of the public school district. The service provider, when utilized by the district, is a contracted entity providing a purchased professional service, and nothing more. As such, it is inappropriate for non-public schools to be asked to set aside funds to pay for the salaries and benefits of employees of the service provider

Thomas and Martz emphasized that no one at the Department would advise petitioner to dishonor its contractual obligations with its employees, but that petitioner's nurses' salaries and benefits are the responsibility of neither the public school districts nor the non-public schools that receive the services. Corroborative of that position is guidance which respondent issued in October 1994, which states that when agencies use employees to provide services, the employees' benefits "should already be calculated in their hourly rate." Exhibit P-3J and Exhibit R-3H

The petition in this matter demands "entry of a judgment: (a) requiring the [sic] public agency, such as the MOESC, to comply with *N.J.S.A.* 18A:30-1, *et seq.* in the provision of Chapter 226 services, and (b) requiring that the Chapter 226 services are to be solely paid for [sic] funding designated for Chapter 226." The Commissioner sees no reason to enter such an order, since a) by the terms of *N.J.S.A.* 18A:6-66, petitioner must comply with *N.J.S.A.* 18A:30-2 *et seq.*, and b) respondent has issued no directive requiring petitioner to use non-Chapter 226 funding to pay for Chapter 226 services.

The Commissioner concurs with the ALJ that the ultimate issue to be decided in this controversy is whether the petitioner has proven that the respondent was arbitrary, capricious or unreasonable in interpreting the relevant statutes and regulations

to preclude petitioner from passing on its employee costs to OLPH. *Matturi v. Bd. of Trs. of the Judicial Ret. Sys.*, 173 N.J. 368, 381 (2002) (“we defer to '[t]he agency's interpretation . . . provided it is not plainly unreasonable,” citing *In re Pub. Serv. Elec. & Gas Co.'s Rate Unbundling, Stranded Costs & Restructuring Filings*, 167 N.J. 377, 384 (2001), quoting *Merin v. Maglaki*, 126 N.J. 430, 437, (1992)). The Commissioner also agrees with the ALJ’s conclusion that petitioner did not meet that burden.

Respondent’s 1994 guidance, referenced above, and its subsequent advisements have neither barred petitioner from paying its employees sick leave benefits nor required that petitioner use non-Chapter 226 funds to do so. Rather, respondent has counseled that third party providers such as petitioner may factor expected sick leave benefits into the fees charged to the school districts for the services to the non-public schools. It is true that the amount of hours of nursing services provided to non-public schools could decrease as a result. However, petitioner has pointed to nothing in *N.J.S.A. 18A:40-23 et seq.*, the legislation that established public school districts’ responsibility to provide nursing services to non-public schools, that would prohibit such a result. To the contrary, the legislative history and statutory provisions infer such a possibility, *inter alia*, by imposing caps on the funding of the nursing services for non-public schools, and by specifying that “[i]n any year, no district shall be required to make expenditures for the purpose of this act in excess of the amount of State aid received for these purposes. *N.J.S.A. 18A:40-31(c)*

The statutory and regulatory provisions discussed above reveal that petitioner is an entity that, having been created by a group of public school districts, received the authority and responsibility to annually formulate and adopt budgets which

include the estimated costs of providing each of its services and/or programs. Petitioner is required to annually establish the fees to be charged for its services and notify each district in its representative assembly of those fees. The Commissioner reiterates that also among petitioner's powers is the authority to enter into contracts to "receive and administer funds and grants from any individual or agency, including but not limited to, agencies of the federal government . . . , provided that the funds or grants are for programs and services for which the commission has received approval from the State board" *N.J.S.A. 18A:6-67*

In light of petitioner's above described obligations to scrutinize its finances each year, it is not unreasonable to expect that petitioner would have recognized that its employees' sick leave benefits were a cost of doing business that needed to be addressed. There are no strictures in the legislation creating Commissions, or in the Chapter 226 legislation, against factoring the cost of sick leave benefits into the cost of providing a nurse to a non-public school to provide health care services. Thus, factoring such costs into its service fees to the school districts would have been and is an acceptable way of handling them.

Demanding that a non-public school be responsible for a sick leave escrow or a substitute nurse, on the other hand, has no statutory support. There are no provisions in the Chapter 226 legislation requiring non-public schools to contribute in any way to the costs of the nursing services mandated therein. Indeed, under the statutory scheme the State distributes the Chapter 226 funds to public school districts which, in turn, either use them to provide nursing services with school district employees or pay them to other service providers - such as petitioner. The non-public students are essentially third-party

beneficiaries; they receive the services, but neither they nor their schools receive the money.

Nor can petitioner look to the school districts for separate funding of employee benefits. Under *N.J.S.A.* 18A:40-31 and the terms of the contract between petitioner and the two school districts identified above, the districts were not obligated to provide petitioner with any funds over and above the allotment of Chapter 226 money that they received from the State. To the extent that there was a shortfall in petitioner's provision of hours of nursing service to OLPH, it was attributable to petitioner's own planning and management of resources.

In sum, as found by the ALJ, respondent's position with regard to the application of relevant statutory and regulatory authority to the facts of this case was not arbitrary, capricious, unreasonable or unlawful.⁵ The petition is dismissed.

IT IS SO ORDERED.⁶

ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 11, 2006

Date of Mailing: August 11, 2006

⁵ The Commissioner disagrees with the ALJ's suggestion that rulemaking would be appropriate, given the clarity of the existing statutory scheme.

⁶ 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.*