

UNION COUNTY EDUCATIONAL :
SERVICES COMMISSION, :
 :
 PETITIONER, :
 : COMMISSIONER OF EDUCATION
V. :
 : DECISION
 :
 BOARD OF EDUCATION OF THE :
 TOWNSHIP OF WESTFIELD, :
 UNION COUNTY, :
 :
 RESPONDENT. :
 _____ :

SYNOPSIS

Petitioning Educational Services Commission (ESC) sought an emergency order directing the Westfield Board of Education to renew the ESC's lease on Westfield's Lincoln Street School building for the 2006-07 school year. The lease had been annually renewed since 1982, but Westfield gave notice in June 2006 that it would not be renewed for 2006-07 because the Board wished to utilize the building for educational purposes and the ESC had failed to appropriately manage the conduct of its students. (The latter assertion arose from an incident in May where four ESC students were involved in alleged criminal behavior, causing fear and alarm among nearby residents.) The ESC claimed that it could not find an alternative facility by the ordered quit date of October 1, 2006, and that it would therefore be unable to provide necessary educational programs – including a state-mandated Abbott alternative education program – to its contracting districts unless Westfield were compelled to renew the lease.

The ALJ granted emergent relief, finding that the ESC and intervening Abbott district of Elizabeth had demonstrated irreparable harm to the students and districts depending upon the affected ESC programs for the 2006-07 school year; a likelihood of success on the merits of a plenary appeal based upon the facts of the matter; and the greater interest when balanced against the interests of Westfield, which did not need the building for the 2006-07 school year, and the concerned residents granted participant status at the OAL. The ALJ also found that the Commissioner had jurisdiction over the dispute, contrary to Westfield and participants' contention that it was a landlord-tenant matter properly heard in Superior Court.

The Deputy Commissioner, to whom the matter was delegated pursuant to N.J.S.A. 18A:4-33, adopted the ALJ's decision with modification. Holding that the Commissioner did have jurisdiction over the matter, the Deputy Commissioner ordered Westfield to renew the disputed lease for the 2006-07 school year. However, the Deputy Commissioner also directed the County Superintendent of Schools to monitor and facilitate the ESC's efforts to find a new location for 2007-08, and the ESC to adopt and enforce policies to ensure adequate supervision of its students during the remaining term of the 2006-07 lease.

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.

September 18, 2006

OAL DKT. NO. EDU 7522-06
AGENCY DKT. NO. 236-7/06

UNION COUNTY EDUCATIONAL SERVICES COMMISSION,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	
	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF WESTFIELD, UNION COUNTY,	:	
	:	
RESPONDENT,	:	
	:	
AND	:	
	:	
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
	:	
INTERVENOR.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the respective exceptions thereto filed by the respondent Board of Education (Westfield or Board) and participants Lisa Wolf (also known as Lisa Stern) and Susan Hopper (participants), and the reply of the petitioning Educational Services Commission (ESC). No submissions on exception were made by the intervening Elizabeth Board of Education (Elizabeth).

Westfield initially excepts to the Administrative Law Judge's (ALJ) holding that the Commissioner has jurisdiction over this matter, contending that the statute and case law cited by the ALJ are inapposite and that the matter should be decided in Superior Court as the straightforward landlord-tenant dispute it is. (Westfield's Exceptions at 1-5) The Board

then urges that, having erroneously assumed jurisdiction, the ALJ further lacked the requisite factual record to reach the conclusions she did with respect to the ESC's likelihood of success on the merits and balancing of the interests of the parties, since the limited proofs presented fell far below the level necessary to sustain the extraordinary remedy granted – particularly where the possibility of maintaining the *status quo* for anything less than the full academic year was not even considered and the ESC made no showing that it had engaged or was now engaging in sufficient attempts to locate an alternative facility. (*Id.* at 5-9) The Board additionally argues that the ALJ erred in not conditioning grant of emergent relief on reporting/monitoring of ESC efforts to relocate the programs at issue so as to permit expedient vacating of the Lincoln Street School premises, in failing to give appropriate weight to the serious public safety issues raised by participants, and in failing to recognize that the Board's decision not to renew the ESC's lease and its plan to use the Lincoln Street School for a district-wide kindergarten program are lawful discretionary determinations entitled to a presumption of correctness not overcome in this proceeding. (*Id.* at 10-12) Thus, Westfield avers, the Initial Decision must be “reversed in its entirety and vacated” and the ESC's petition dismissed with prejudice. (*Id.* at 13)

Participants first except to the ALJ's decision on grounds that it was based on 1) an incomplete record, as a result of the ALJ's failure to have the telephone conference call of July 27, 2006¹ recorded – as required by OAL rule – and to consider a number of participants' papers as exhibits², as she did for comparable documents from the ESC and Westfield; and 2) mischaracterization of participants' central claim, through treatment of the May 3, 2006 incident as an isolated event rather than the culmination of “years of a course of

¹ See Initial Decision at 2.

² See Initial Decision at 11-12.

criminal and antisocial conduct” at the ESC programs located at the Lincoln Street School. (Participants’ Exceptions at 1-4) They also except, on grounds similar to Westfield’s, to the ALJ’s holding on Commissioner jurisdiction – which, they add, will have a detrimental effect on the willingness of boards of education statewide to lease real property to other school districts based on a fear that educational considerations may trump the normal rules of landlord-tenant relationships in any dispute. (*Id.* at 4-7) Like the Board, participants also contend that the Initial Decision lacks factual support for the remedy ordered and relies on inapposite legal authority (*Id.* at 7-11), and that the ALJ erred in not placing specific conditions on the ESC’s continued occupancy of the Lincoln Street School, as the Commissioner is authorized to do by virtue of the very case law relied upon by the ALJ. (*Id.* at 11-13) In this regard, participants reiterate their request for: 1) stationing of an on-duty police officer “in and about the school premises from the time students begin to arrive at the school until such time as all students have left the school”; 2) submission, to the court and counsel, of a report by the ESC on the 30th day of each month detailing its efforts to locate alternative sites, including dates, locations sought, persons contacted, results of efforts, and reasons for any lack of success; and 3) a directive that the ESC comply with the transportation policy it claims to have adopted in ¶8 of the Petition of Appeal and Exhibit E. (*Id.* at 13-14)

In reply, the ESC counters that the ALJ was entirely correct in holding the Commissioner to have jurisdiction over this matter, noting that – notwithstanding that the circumstances they address are not precisely those presented here – the statute and case law relied upon in the Initial Decision clearly *do* illustrate the general proposition for which they are cited, namely that the Commissioner of Education has jurisdiction over disputes involving school district leases as well as the authority to order districts to enter into a lease agreement.

More importantly, the ESC posits, the Commissioner is lodged with “encompassing responsibility over public education and broad authority to supervise all public schools” (*N.J.S.A.* 18A:4-23 and *Hinfey v. Matawan Regional Board of Educ.*, 77 *N.J.* 514, 525 (1978)) and is charged with ensuring that New Jersey public school districts fulfill their obligation to provide to all students a thorough and efficient system of education (*N.J.S.A.* 18A:7F-2a(6)). (ESC’s Reply at 2-4)

As to the purported lack of factual basis on which to conclude that the relief ordered by the ALJ was warranted, the ESC argues that Westfield knows full well the stringent and lengthy approval process faced by boards of education seeking to acquire property for school use, as well as the impossibility of Elizabeth’s being able to replicate or make other arrangements for the program now provided by the ESC in such a short time frame; it further argues that the ESC counsel’s representations to the ALJ during the July 27, 2006 teleconference – as memorialized by letter dated the following day and listed as an exhibit³ – make it abundantly clear that the ESC has been diligent in its efforts to relocate since learning that Westfield would not renew its lease, and that Westfield’s Answer admitted ¶13 of the ESC’s Petition of Appeal, which states:

[The ESC] began a search for a suitable facility even before [being] officially notified about the nonrenewal of the Lease. One facility had just leased its space and another facility was much too small for [the ESC’s] needs. Aside from the disruption of the education program, on such short notice, [the ESC] cannot, under the best of circumstances, locate a new facility, negotiate a lease and prepare and/or renovate a building by October 1, 2006. [The ESC] has a commitment to provide a thorough and efficient education for the Hillcrest students and cannot accomplish this without a facility.

The ESC additionally discounts any claim that it should have been looking for an alternative facility since 2001, since there was no reason at any time prior to June 2006 to believe that its

³ See Initial Decision at 11.

long-standing lease agreement would not be renewed absent a year's advance notice.
(ESC's Reply at 4-8)

With respect to its adversaries' complaints about the absence of monitoring or reporting of the ESC's efforts to relocate as a condition of its remaining at the Lincoln Street School, the ESC states that it would not object to such monitoring; in fact, it opines, the "direct and immediate involvement of the Commissioner would assist in the orderly processing" of its efforts and that "the Commissioner's intimate knowledge of [the process of obtaining an educationally suitable facility] might require an extension of the use of Westfield facilities greater than the year ordered by [the ALJ]," so as to "assure that all sides exercise their responsibilities and the children most effected (*sic*) by such a relocation are protected."
(ESC's Reply at 8)

Finally, the ESC argues that the ALJ correctly ignored participants' position, which has "no basis in fact, no basis in educational policy and certainly no basis in protecting the constitutionally guaranteed rights to education of all students," but rather consists of "emotional assertions" resulting from "one incident which has prompted this amazing outcry of the neighbors who do not want Elizabeth students in their neighborhood." The ESC opines that participants' "false and misleading allegations/conclusions only impede the [ESC's] ability to find alternative locations" and that their "specific exceptions require no response" and should be ignored by the Commissioner, who cannot allow educational programs to be jeopardized based on "an emotional, unfounded and ignorant perspective."
(ESC's Reply at 8-9)

Upon careful review and consideration of the OAL record⁴ and arguments on exception, the Deputy Commissioner, to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-33, adopts the Initial Decision of the ALJ with modification as set forth below.

Initially, the Deputy Commissioner concurs with the ALJ that this matter is appropriately heard before the Commissioner of Education. As the ALJ, the ESC and Elizabeth correctly recognize, more is at stake here than a dispute between a landlord seeking to enforce the literal terms of a lease and a tenant raising equitable arguments against so doing. Rather, the ESC – an entity created by the Legislature for the express purpose of providing needed services to local district boards of education in accordance with its authorizing statute (*N.J.S.A.* 18A:6-51 *et seq.*) – is contending that Westfield’s action has rendered it unable to provide planned, budgeted and approved educational services for which districts have duly contracted with it pursuant to *N.J.S.A.* 18A:6-63 for the 2006-07 school year, including in the case of Elizabeth an alternative education program mandated by *N.J.A.C.* 16A:16-9.1(b) as part of the constitutionally guaranteed thorough and efficient system of free public education (*Abbott v. Burke*, 153 *N.J.* 480, 526 (1998)). Moreover, the ESC’s claim is fundamentally rooted in the virtual impossibility under applicable school law of quickly obtaining an appropriate alternate facility or of Elizabeth’s being able to make alternate arrangements at this point in the school-year planning and budgeting cycle. See, for example, *N.J.S.A.* 18A:7F-1 *et seq.*, *N.J.S.A.* 18A:7G-1 *et seq.*, *N.J.S.A.* 18A:20-1 *et seq.*, *N.J.S.A.* 18A:22-1 *et seq.*, *N.J.S.A.* 18A:27-10 *et seq.*; *N.J.A.C.* 6A:16-9.2, *N.J.A.C.* 6A:23A-1.1 *et seq.*, *N.J.A.C.* 6A:26-1.1 *et seq.*, *N.J.A.C.* 6A:27-9.1 *et seq.*, *N.J.A.C.* 6A:32 *passim*.

⁴ It is noted that the record included an audiotape of the July 20, 2006 proceeding before the ALJ.

Thus, there can be no doubt that this matter falls within the expertise and jurisdictional purview of the Commissioner of Education.

The Deputy Commissioner further concurs, substantially for the reasons expressed by the ALJ, that the ESC has met the requisite standard for grant of emergent relief, *Crowe v. DeGioia, supra, N.J.A.C. 6A:3-1.6*, and that the appropriate order is to direct renewal of the parties' lease, as sought in the ESC's application, for the entire 2006-07 school year. In so holding, the Deputy Commissioner recognizes – as did the ALJ by forwarding her ruling to the agency as an initial decision rather than a decision on motion – that granting such relief effectively ends the instant dispute without benefit of a plenary hearing. However, the Deputy Commissioner also recognizes – as likely did the ALJ subsequent to her conduct of the initial proceeding on July 20, 2006 – that by the time a hearing were held and rulings made by the ALJ and Commissioner, the 2006-07 school year would be well under way and an order disrupting the Hillcrest program mid-year would not issue even in the extremely unlikely event that the ESC did not prevail on the merits of its claim.

The Deputy Commissioner further recognizes that, even within the limited context of an emergent relief proceeding, certifications from the present and former ESC superintendents would have been preferable to counsel's representations of their statements via letter (letter of July 28, 2006) in conjunction with an unrecorded telephonic conference – shortcomings which gave Westfield and participants a basis to claim infirmity in the record.⁵ However, the Deputy Commissioner finds that the truly material claims in this matter – that the ESC reasonably anticipated use of the Lincoln Street School for 2006-07 based upon a

⁵ The Deputy Commissioner here clarifies that the documents “missing” from the Exhibit list of the Initial Decision (see page 3 above) were, in fact, considered by him as attachments to the brief and certifications participants were permitted to file pursuant to N.J.A.C. 1:1-16.6(c).

long-standing agreement with Westfield, which the ESC had no cause to believe prior to June 2006 would not be renewed as it had many times before, and that the standards and processes for facility approval and budget/program development with which the ESC and Elizabeth are bound by law to comply effectively preclude any realistic prospect of making alternate arrangements for Hillcrest Academy students for the 2006-07 school year – are both compelling and essentially indisputable. Under the circumstances, it would be placing form over substance – as well as an abrogation of the Commissioner’s statutory responsibility for public education – to hold that the ESC’s claim must fail because the ESC did not present sufficient factual evidence to prove its inability to obtain a different facility within the time frame demanded by Westfield.⁶ Moreover, the Deputy Commissioner declines to grant relief for a shorter term than the entire 2006-07 school year, not only because the factual record and applicable processes of school law provide no basis to establish the date certain or point(s) of contingency necessary to do so, but also because the Deputy Commissioner will not issue a directive that would result in mid-year disruption of an established educational program serving a particularly vulnerable student population.

In deciding thus, the Deputy Commissioner is not unmindful of the concerns raised by Westfield and participants, particularly in view of the ESC’s suggestion (Reply Exceptions at 8) that it may be contemplating a demand for renewal of the disputed lease beyond the 2006-07 school year. The Deputy Commissioner initially stresses that no such order will issue on the present record, since the ESC will have had – for 2007-08 – the one-year termination notice it relied upon herein in claiming that Westfield did not honor its prior agreement as expected, and Westfield may well have actual (as opposed to anticipated)

⁶ It is noted that the record includes a certification from the Acting Superintendent of Elizabeth as to that district’s inability to educate the Hillcrest students itself or make other arrangements on such short notice.

need for the Lincoln Street School during 2007-08; thus, while the Deputy Commissioner cannot prospectively foreclose the ESC from later seeking additional relief, any such application must be a new dispute to be pled and decided based upon the facts as they then exist, not upon an expectation as a result of this proceeding that the ESC may lease the Lincoln Street School indefinitely notwithstanding Westfield's desire to terminate if the ESC can show that it tried to arrange for another facility and failed.

Moreover, in order to minimize the possibility of this year's situation repeating itself and provide all parties with timely and certain knowledge of their post-2006-07 status, the Deputy Commissioner additionally directs that the Union County Superintendent of Schools shall: 1) monitor the ESC's efforts to locate a new facility for 2007-08 so as to ensure that such efforts are being undertaken with due promptness and diligence, and 2) provide such assistance as is necessary, including but not limited to guiding the ESC's navigation of Department approval processes, so as to facilitate transition of the ESC programs to a new location and avoid needless delays. The Deputy Commissioner further cautions the ESC – and all boards and agencies providing public educational services – that a party acts at its peril in negotiating a lease based on “a handshake and gentlemen's agreement” rather than clear, written contractual terms, or in agreeing to termination or nonrenewal clauses that do not allow for sufficient notice to relocate affected program(s).

Similarly, the Deputy Commissioner – finding the concerns of participants to be neither unfounded nor irrelevant – directs the ESC to adopt and enforce such measures as are necessary to ensure that its students at the Lincoln Street School do not pose a danger to the property and safety of nearby residents during the remaining term of the 2006-07 lease, such measures to include adequate supervision of students during the school day and when in

the immediate vicinity before and after school, and enforcement of policies (such as the aforementioned transportation policy) designed to prevent recurrence of events such as transpired on May 3, 2006.

Accordingly, the Initial Decision of the OAL is adopted with modification as the final decision in this matter for the reasons expressed therein and above.^{7 8} The ESC and Westfield Board of Education are directed to renew the ESC's lease of the Lincoln Street School for the 2006-07 school year; and the ESC is directed to forthwith undertake duly diligent efforts to relocate affected programs for the 2007-08 school year – such efforts to be monitored and assisted by the Union County Superintendent of Schools – and to adopt and enforce policies to ensure adequate supervision of its students during the remaining term of the 2006-07 lease.

IT IS SO ORDERED.⁹

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: September 18, 2006

Date of Mailing: September 19, 2006

⁷ In the interest of clarity, the Deputy Commissioner notes that the ALJ's reference to "No Child Left Behind" (Initial Decision at 8) is purely rhetorical and that this federal law is in no way relied upon or implicated by the instant ruling.

⁸ Such adoption also includes concomitant adoption of the ALJ's rulings on the intervention of Elizabeth and the participation of Lisa Wolf (Lisa Stern) and Susan Hopper.

⁹ 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.*