#470-08 (OAL Decision: Not yet available online)

OAL DKT. NOS. EDU 6956-00, EDU 8646-00, EDU 4834-01, EDU 4607-03, EDU 4608-03, and EDU 427-06
AGENCY DKT. NOS. 271-7/00, 381-10/00, 227-8/99, 392-12/02, 216-5/03, and 57-2/06

(CONSOLIDATED)

ARCHWAY PROGRAMS, INC. PETITIONER, V. NEW JERSEY STATE DEPARTMENT OF EDUCATION, RESPONDENT. and BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY PETITIONER, V. ARCHWAY PROGRAMS, INC., RESPONDENT. and ARCHWAY PROGRAMS, INC. PETITIONER, V. BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

The petitioner, Archway Programs (Archway) is a non-profit corporation which operates a private school for the handicapped (PSH) authorized to educate handicapped public school students pursuant to *N.J.S.A.* 18A:46-14(g), and receives tuition from sending districts commensurate with its actual cost per pupil as determined by a certified audit. Pursuant to governing regulations, certain specified

items may not be included in the computation of a tuition rate chargeable to the sending districts. The controversy herein involves the audits conducted by the respondent Department on Archway's accounts for the school years from 1994-95 through 1998-99, in which the Department disallowed approximately $9 million in non-allowable costs and expenses and ordered these tuition overcharges returned to the sending districts. Archway appealed this conclusion.

The ALJ found, *inter alia*, that: the Department, pursuant to the doctrine of substantial compliance, should not have disallowed teacher salaries for individuals who worked for a period of time without certification, and the Department should not have disallowed maximum salary caps; however, in all other areas of dispute, Archway did not meet its burden of proving that the Department's disallowances were arbitrary, capricious, or unreasonable. The ALJ further determined that the calculation of all of the disallowances, as well as the final decision as to the amounts to be returned by Archway to the sending districts, should be done by the Commissioner as part of the final agency decision.

Upon a thorough and independent review of the record, the Commissioner adopted the Initial Decision as the final decision, with the exception of its conclusion that the Commissioner should calculate – without benefit of OAL recommendations after the parties have been heard – all schedules based on the determinations herein and establish a recommended final amount that Archway is obligated to return to its sending districts. The Commissioner, finding such a conclusion violative of *N.J.S.A.* 52:14B-10(c) and concepts of fundamental fairness, remanded the matter to the OAL for such further proceedings as are necessary to allow the ALJ to conclude these consolidated cases by making the requisite calculations and recommended determination of monies due and owing.

December 4, 2008

OAL DKT. NOS. EDU 6956-00, EDU 8646-00, EDU 4834-01, EDU 4607-03, EDU 4608-03, and EDU 427-06
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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Archway Programs, Inc. (hereinafter "Archway") and the New Jersey Department of Education (hereinafter "Department") jointly sought extensions of time

within which to file exceptions and reply exceptions to the Initial Decision. These submissions – filed in accordance with the extended timelines – were fully considered by the Commissioner in reaching her determinations herein.[1]

Briefly stated, the essence of the instant controversy is as follows: The petitioner in this matter, Archway, is a non-profit corporation which provides educational and human service programs for individuals with special needs. This matter, however, is solely concerned with its programs at its private school for the handicapped (PSH), which is authorized – pursuant to *N.J.S.A.* 18A:46-14(g) – to educate handicapped public school students. Archway is allowed to charge the public school districts in which the handicapped students reside (sending districts) tuition commensurate with its actual cost per pupil pursuant to a certified audit. There are, however, certain specified items which – pursuant to the governing regulations – may not be included in the computation of a tuition rate chargeable to the sending districts (codified during the time period at issue here at *N.J.A.C.* 6:20-4.4). As a consequence of audits conducted by the Department on Archway's accounts for the 1994-95, 1995-96, 1996-97, 1997-98 and 1998-99 school years, the Department concluded that approximately $9 million included in Archway's calculated tuition rate represented non-allowable costs and expenses and ordered that these tuition overcharges be returned to the sending districts. Archway is appealing this conclusion.

The parties' exception submissions essentially recast and reiterate arguments contained in their post-hearing submissions and various motions made during the course of the hearing – which are comprehensively summarized by the Administrative Law Judge (ALJ) in her

[1] It is noted that on August 13, 2007 the Administrative Law Judge (ALJ) executed two separate Orders Granting Partial Summary Decision wherein she accepted settlement agreements between Archway and the Board of Education of Ewing Township (Initial Decision, Attachment V) and Archway and the Pemberton Township Board of Education (Initial Decision, Attachment VI). Upon review, the Commissioner approves the parties' settlements and adopts the ALJ's Orders as the final decision as to these portions of this consolidated matter. Accordingly, EDU 427-06, Agency Dkt. No. 57-2/06 and EDU 4608-03, Agency Dkt. No. 216-5/03 are hereby dismissed, subject to the parties' compliance with the terms of their settlements.

Initial Decision As such, these will be presented only to the extent necessary to convey the essence of their positions on the controverted issues.

Archway's Exceptions and Department's Reply

1) The ALJ incorrectly refused to dismiss the Department's 1997-98 and 1998-99 fiscal year audits on the basis of equitable estoppel. Archway argues that the 1994-95 audit took more than three years to complete; during this period the auditors refused to disclose to Archway any of the miscalculations it had discovered despite numerous requests; as a consequence Archway was prevented from making any counteractive changes for these subsequent two audit years. "Fairness and justice estop the DOE from pursuing the disallowances for the 1997-1998 and 1998-1999 fiscal years, which were fully correctible but for the DOE's delay and silence on the 1994-1995 audit." (Archway's Exceptions at 1-17, quote at 12)

In reply, the Department points out that this identical argument was previously raised by way of two motions to dismiss below and denied both times by the ALJ. (Interlocutory Order dated September 21, 2006 and Letter Order dated November 21, 2006) The Department avers that no new evidence which might operate to change the outcome of these previous motions has been presented here. As pointed out by the ALJ below – it argues – in order to prevail on a motion to dismiss based on equitable estoppel "Archway had to establish that the Department made a voluntary and intentional misrepresentation through its conduct, and that Archway reasonably relied upon that misrepresentation." It charges that Archway has not satisfied this burden. (Department's Reply Exceptions at 2)

2) In light of the Department's clear admission that its 1994-95 audit was improperly calculated, recognizing that rolling calculations will have a carryover effect from year to year, and based on the fact that the Department has failed to present its own revised monetary

calculations for the ALJ's consideration, the entire matter here should be dismissed. Archway takes the position that as part of her decision the ALJ had the responsibility to determine the precise amount of money, if any, that Archway is obligated to return to the districts. It advances – "Archway did not institute this litigation seeking a declaratory judgment merely settling legal issues concerning methodologies and allowable costs. Rather, it sought to invalidate the DOE's determination that it had to refund $9 million to the sending districts." (Archway's Exceptions at 18-22)

The Department asserts that it was under no obligation to present alternate figures for the ALJ's consideration. It maintains that the ALJ correctly determined that the Commissioner's decision should compute and present the final mathematical calculations as to all disallowances subsequent to her resolution of the numerous disputed issues in this matter. (Department's Reply Exceptions at 7-9)

3) In the alternative to outright dismissal of this matter, Archway urges that the ALJ had only one other alternative – to accept the revised calculations presented in its expert's report (Rosenfarb Report). Therein, Archway's expert recalculated the relevant schedules in the 1994-95 audit – using what the Department now concedes was the correct methodology – and adjusted the remaining calculations of that audit and the four succeeding audits accordingly, resulting in a revised total disallowance figure of $5.7 million, significantly less than the $9 million it asserts the Department had previously erroneously determined. Given that the Department's monetary determinations have been removed from consideration by virtue of the conceded invalidity of its audits, the only figures remaining in the record were those introduced by Archway's expert. Archway reemphasizes its position that the ALJ here was responsible to decide the *entire* case, which includes calculation of the monetary consequences. Her inexplicable abdication of this

responsibility by allowing the Commissioner to make the final decision as to the calculations of all of the disallowances is wholly arbitrary, capricious and unreasonable as it gives the Department another bite at the apple through a new round of audits. Moreover, in light of the fact that Archway is entitled to challenge the Department's new numbers, the ALJ's bifurcation of this matter only serves to unnecessarily prolong the litigation of this already extenuated case as the parties are placed right back where they started. (Archway' Exceptions at 22-24)

Responding, the Department presents the following argument:

> [At] this stage in the proceedings, the purpose of this exercise is to determine whether the Department properly applied the governing tuition regulations in determining which costs Archway could include in its tuition rates for the years in dispute. In this respect the sweeping "winner-take-all" approach that Archway advocates is defective. It ignores the fact that the specific refund amount is a secondary and mathematical result, that will be dictated by the law and the facts adduced during the hearing. The ALJ's role in these proceedings was to determine whether the overcharges that the Department identified in its audits were proper, and not, as Archway contends, perform mathematical computations. Archway's depiction of this proceeding as a contest in which one set of calculations must prevail over another simply distorts the purpose of these proceedings. As stated, the propriety of the Department's audits is a determination that turns o[n] issue[s] of law and facts. Thus, the ALJ's finding that her role was limited to that of rendering recommendations in resolving disputed issues of law and facts was proper, and should be upheld. (Department's Reply Exceptions at 9-10)

4) The ALJ's rulings in favor of the Department should be rejected because all of these are conclusory and unsupported by sufficient factual findings or legal analysis. (Archway's Exceptions at 24-27)

The Department submits that any brevity which might be found in the ALJ's analysis and findings in these categories is wholly attributable not to her failure to consider the evidence before her, but, rather, to Archway's failure to present evidence sufficient to satisfy its burden of proof. (Department's Reply Exceptions at 10)

5) The ALJ erred in upholding disallowances of salaries of individuals misclassified in Archway's records as holding positions for which they were not properly certified. Archway claims the disallowed salaries in this category were merely "bookkeeping errors" and – in all other respects – were allowable expenses. It charges that that the ALJ improperly disregarded the unrefuted credible testimony of its witness, Mr. Otto, which Archway claims established "that many of those disallowed educational staff members were actually serving in positions for which they either (1) were properly certified or (2) did not require certification." Archway charges that the ALJ had no factual or legal support for her expressed disbelief that the miscalculations were bookkeeping errors and "[h]er oblique statement that she was 'not…persuaded by Archway's presentation." (Archway's Exceptions at 27-33, quotes at 30 and 32, respectively)

In response, the Department contends that Archway has again failed to recognize that it bears the burden of proof in this matter, which it has failed to satisfy. With regard to the ALJ's failure to credit the testimony of Mr. Otto, upon which Archway relied exclusively to support its allegations that the disallowed salaries were no more than clerical errors, the Department points out that rejection or modification of the ALJ's findings of fact or conclusions of law with respect to the credibility of witness testimony are significantly circumscribed by the New Jersey Administrative Procedure Act, *N.J.S.A.* 52:14B-10(c). Moreover, it avers, on cross examination Mr. Otto conceded that he neither had first hand knowledge of the duties performed by any of the individuals whose salary was in dispute here nor was he even employed by Archway prior to June 1998. (Department's Reply Exceptions at 10-12)

6) Archway proposes that the ALJ's affirmance of disallowances of various non-salary expenses (travel allowances, entertainment, marketing expenses and interest paid on three loans to Archway), on Schedule C of the five audits – in the amount of $113,744 – was

conclusory and not supported by the record. It argues that its expert's report concluded – based on discussions with Archway and a review of documents concerning the nature and purpose of the expenditures – that the Department's disallowances in these areas should be reduced to $34,000. (Archway's Exceptions at 33-35)

In retort, the Department advances that any perceived brevity of the ALJ's analysis of the Schedule C expenses was occasioned by Archway's failure to advance any legally competent evidence at hearing in support of its assertions that such expenses were allowable pursuant to the requirements of the applicable regulations. (Department's Reply Exceptions at 12-15)

7) The ALJ erred in not accepting Archway's expert's calculation of $406,000 for fringe benefit costs – which are a function of allowable salaries – based on the Department's stipulation that certain teachers salaries were improperly disallowed in Schedules F (1994-95) and K (1995-99). Absent a revised set of calculations from the Department, it argues, the only ones in the record are those of Archway's expert and these should have been accepted by the ALJ. (Archway's Exceptions at 35-36)

Responding, the Department concedes that the amount of money disallowed in this category will need to be recalculated. Logic dictates, it avers, that such calculation be made in the Commissioner's decision subsequent to resolution of the myriad of methodology issues. (Department's Reply Exceptions at 15-17)

8) Finally, merely recasting and reiterating arguments advanced below, Archway objects to the ALJ's summary affirmance of the disallowances in the Organizational Overhead category. (Archway's Exceptions at 36-40)

In reply, the Department again emphasizes that Archway has failed to meet its burden of proof in connection with its claims regarding these charges; rather, it offers no more than

self-reinforced statements in support of its assertions that the expenses in this category should have been allowed, and the report of its expert – who has no direct knowledge regarding these expenses – accepted. (Department's Reply Exceptions at 17)

Department's Exceptions and Archway's Reply

1) The Department contests the ALJ's conclusion that it should not have disallowed salary payments – in Schedule A of the five challenged audits – to personnel who worked for a period of time without an emergency certification or full certification. The Department claims that the ALJ made this determination based solely on the equitable doctrine of substantial compliance as articulated by the Appellate Division in *Berstein v. Board of Trustees*, 151 *N.J. Super*. 71 (App. Div. 1977) and the Commissioner's decision in *Search Day Program, Inc. v. New Jersey Department of Education* (Search Day II), decided by the Commissioner June 2, 2006. The Department claims that reliance on these authorities was misplaced as application of the doctrine of substantial compliance in this instance "fails to accord proper weight to the monetary prejudice to the sending districts," and fails to recognize that the unique set of facts which supported the outcome in *Search Day* is not present in this matter. In contrast to the factual pattern in *Search Day*, it asserts, Archway failed to establish: 1) that any delay in processing the applications of these individuals is attributable to the Department; and 2) that all of the individuals had submitted their properly completed applications along with all of the requisite fees and supporting documents in a timely manner. Additionally, the Department avers that the scope of *Search Day* was limited to emergency certifications. It contends that a number of the individuals whose salary was deemed allowable by the ALJ were employees who did not have their standard certification for a period of time. The Department maintains that "[t]he ALJ's interpretation of the Commissioner's decision in

Search Day as providing a blanket allowance of salaries in cases where the Petitioning PS[H] alleges a certification delay is inappropriate, and must be rejected." (Department's Exceptions at 2-7)

Responding, Archway contends that the ALJ's allowance of these individuals' salaries – pursuant to the equitable doctrine of substantial compliance and under the circumstances existing here – was entirely appropriate. Citing *Bernstein, supra.* it avers that this doctrine is applicable where there is "(1) a lack of prejudice to the defending party; (2) a series of steps were taken to comply with the regulation; (3) general compliance with the purpose of the statute or regulation exists; (4) reasonable notice of petitioner's claim; and (5) a reasonable expectation why there was not a strict compliance with the statute." *Bernstein* at 76-77. (Archway Reply Exceptions at 6) Archway contends that it "presented comprehensive, uncontradicted testimony and documentary evidence that the individuals disallowed in the 'delay' category: (1) submitted timely, complete applications for certification or renewal prior to the start of their employment; (2) that these individuals ultimately received the proper certification or renewal after lengthy processing delays, sometimes several months long, by DOE; (3) that but for DOE's processing delays, these individuals would have received their certifications on time and their salaries would have been allowable; (4) that Archway was forced to allow these individuals to teach while their certifications were pending approval in order to comply with the students' IEPs; and (5) that the sending school districts suffered no prejudice, because the students received the education for which they were paying tuition." (*Id.* at 11) As a consequence, Archway posits, the ALJ's conclusion that it substantially complied with certification requirements and, therefore, the salaries in this category are allowable costs, is entirely appropriate.

2) The Department objects to the ALJ's allowances of expenses on Schedule I (1994-95 audit) and Schedule E (subsequent year audits), *i.e.*, travel allowances and maximum salaries. With respect to travel allowances, the Department advances that these were disallowed because Archway could not provide documentary proof of such charges – in contravention of *N.J.A.C.* 6:20-4.3(a)(20) – which provides that a PSH "shall maintain all pertinent financial record(s) for seven years." (Department's Exceptions at 7). As to the second category of expenses identified on these schedules – maximum salaries – the Department advances that Archway is a multi-purpose organization with locations in a number of counties throughout the state. It is undisputed that the services provided by the two employees involved here benefited all of Archway's programs. The issue to be resolved is the determination of the allowable portion of salaries paid to these two individuals in light of the maximum salary requirements contained in *N.J.A.C.* 6:20-4.1(1). Although conceding that applicable regulations did not provide a mechanism or formula for calculating maximum salaries when an individual works in more than one county, the Department proposes that given that the ultimate purpose of the tuition regulations is to ensure that sending districts pay no more than the actual cost per student and to ensure that those costs are reasonable – the Department's auditor determined that proration of the salaries of these individuals based on the revenue generated by the specific PSH program was appropriate. It maintains that such a determination was reasonable and is also consistent with tuition rate procedures which allocate costs in other areas, specifically indirect costs, on the basis of revenue. (Department's Exceptions at 8-9)

Responding, Archway maintains that the ALJ properly reversed these salary disallowances as they "were based on an allocation methodology contrived by DOE's auditor and neither supported nor authorized by the regulations." (Archways Reply Exceptions at 12) Archway

explains that the two individuals whose salaries are at issue here are based at Archway's main campus in Atco, Camden County, but oversaw maintenance and program services duties throughout Archway's multi-county operation. In both cases, Archway's allocation to the PSH program for the services of these individuals was less than the Department approved maximums for their positions. However,

> because Archway had facilities located in both Camden and Gloucester Counties, and because the employees identified in these schedules had responsibilities in both, [the Department's auditor] decided that their maximum salaries should be prorated between the counties, rather than based on the approved maximum salary for Camden County. The regulations, however, neither require such a proration nor provide a method for doing so. See *N.J.A.C.* 6:20-4.4(a)7; *N.J.A.C.* 6:20-4.1(L).
>
> …[The auditor], by his own admission, made one up. Simply stated, [the auditor's] methodology took the approved maximum salaries for Camden and Gloucester Counties, reduced them by the percentage of Archway's revenue attributable to both counties, and added the result to come up with his new maximum salary that was less than half of the DOE-approved maximum salary for either county.
> (*Ibid.*) (citations to Exhibits and transcripts omitted)

To the extent the Department attempts to provide some justification for the use of this unauthorized allocation methodology by virtue of the second sentence of *N.J.A.C.* 6:20-4(a)(7), which provides that "[p]art-time or split time positions shall be prorated," Archway claims that it clearly misreads this provision:

> By its terms, *N.J.A.C.* 6:20-4.4(a)(7) refers not to a proration based on *geography*, but a proration based on an employee's *status*. It requires that the salaries of employees who work less than full-time for a PSH program (part-time), or whose duties include both PSH and non-PSH activities (split-time) be prorated based on the amount of time they spend working for the PSH program. Once that allocation is performed, the amount to be charged to the PSH program gets compared to the approved maximum for their positions. If the amount charged exceeds the approved maximum, the excess is a non-allowable cost. (Archway's Reply Exceptions at 14-15)

Archway further contends that it performed the allocation prescribed by this regulatory provision for each of the audit years at issue herein, allocating to the PSH program the percentage of the employee's base salary which reflected his PSH work, resulting in a salary allocation which was less than the approved maximum for each of their positions. As such, it argues, the ALJ correctly determined that these salaries were allowable costs. (*Id.* at 15)

3) The Department charges that – in her May 2, 2007 interim decision – the ALJ incorrectly determined to reverse the Department's disallowance of the mid-year salary increase that Archway gave its employees during the 1999-2000 school year, which the Department alleges is contrary to prior case law and contravenes public policy. In support of this contention, the Department advances: 1) although a 3% payment for staff members was proposed at Archway's May 25, 1999 board meeting, letters of employment given to staff at the start of the 1999-2000 school year made no mention of the proposed salary increase; 2) staff did not receive payments until nearly nine months later (February, 2000) after confirmation of a budget surplus; 3) in reaching her determination, the ALJ failed to properly apply relevant case law, *i.e., Y.A.L.E. School, Inc. v. State of New Jersey, Department of Education, 92 N.J.A.R.* 2d (EDU) 571 and *Search Day Program, Inc. v. New Jersey State Department of Education*, decided by the Commissioner November 12, 2003 (Search Day I). Rather, it argues, the ALJ found that Archway's salary payments "were paid from 'anticipated revenue' which she differentiated from surplus income," without providing an explanation of how these terms differ or the practical relevance of any difference between them in the regulations. The Department claims the ALJ's distinction between these two terms is illusory, and her decision essentially allows Archway to circumvent the applicable regulations based only on semantics. It claims that acceptance of the ALJ's decision in this regard "would allow a PS[H] to use its mere consideration of a salary increase as a basis for

issuing mid-year bonuses upon confirmation of the existence of surplus income," leading to an unfair result for sending districts and their taxpayers. (Department's Exceptions at 1-14, citations at 11 and 13, respectively)

Responding, Archway maintains the ALJ's reversal of the Department's disallowance of a salary increase paid to its employees in fiscal year 1999-2000 was entirely proper. This raise, it proffers, was a budgeted item – payable out of designated rather than surplus revenues – and, therefore, not prohibited by the applicable governing regulations. Additionally, since it was not a pretext intended to exhaust surplus funds, the case law and regulations governing merit-based and contingent pay increases were not applicable. Archway charges that the "DOE disallowed the pay increase, not because of *how* it was paid, but because of *when* it was paid." Archway proposes the delay in payment of these moneys to its employees was solely attributable to the fact that at the beginning of the 1999-2000 school year it was facing severe financial and operational uncertainties. The board delayed payment of the increases until mid-year when it became clear that it had generated sufficient revenue to support the cost. Citing to the testimony of the Department's witness, Mr. Verner, Archway points out that had it acted in a fiscally imprudent manner and paid the salary increase at the beginning of the year, the increase would not have been denied. (Archway's Reply Exceptions at 15-30, quote at 16)

The Commissioner has conducted an independent and exhaustive review of the voluminous record in this matter, including transcripts of the hearing conducted at the OAL,[2] bearing in mind that the burden of proof rests exclusively with the petitioner – Archway – which must establish, by the preponderance of the relevant, credible evidence, that the determinations

[2] Hearing dates were July 14, August 1, August 4, August 7, August 11, August 14, September 6, October 18, November 3 and November 13, 2006.

arrived at by the Department were improper. Additionally, the Commissioner is cognizant of the deference to be accorded the ALJ's credibility assessments and resultant fact finding.[3]

With these parameters firmly in mind, the Commissioner first turns to review of the as yet unaddressed remaining interim orders of the ALJ issued in this matter. Initially, the Commissioner adopts the ALJ's two decisions denying Archway's motions to dismiss the Department's 1997-98 and 1998-99 audits on the basis of equitable estoppel (September 21, 2006 (Initial Decision, Attachment I) and November 21, 2006 (Initial Decision, Attachment III), as she concurs that Archway has failed to establish the essential elements of this doctrine, *i.e.*, "a knowing and intentional misrepresentation by the party sought to be estopped under circumstances in which the misrepresentation would probably induce reliance, and reliance by the party seeking estoppel to his or her detriment." (*O'Malley v. Dep't of Energy*, 109 *N.J.* 309, 317 (1987)) Notwithstanding, application of this doctrine is also contraindicated as it would result in harm to the districts which sent students to Archway during these school years and were required to pay an increased tuition rate based on Archway's inclusion of non-allowable expenses in its tuition rate for this period, as they would be deprived of any ability to recoup the overcharges.

The Commissioner next adopts the ALJ's dismissal of Archway's appeal of the non-allowable costs set forth in the Department's fiscal monitor's report for the 1998-99 school year (Thomas Report). (Initial Decision, Attachment II). The Department acknowledged that the 1998-99 formal audit superseded this report in its entirety and therefore, it did not intend to pursue the findings of this report; as such, Archway withdrew its appeal in this regard. Accordingly, EDU 8646-00, Agency Dkt. #381-10/00 is hereby dismissed with prejudice.

[3] The applicable standard of review in this regard is clear and unequivocal – the Commissioner "may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent and credible evidence in the record." (*N.J.S.A.* 52:14B-10(c))

Upon consideration of the last remaining interim order, the Commissioner determines to adopt the ALJ's May 2, 2007 Order Granting Partial Summary Decision to Archway on the issue of the salary increase it gave to staff during the 1999-2000 school year (Initial Decision, Attachment IV) for the reasons presented in her decision, which the Commissioner finds well-grounded in the record. Most notably: 1) the 3% salary increase for all staff members was included in Archway's 1999-2000 school year budget, which was adopted May 25, 1999; 2) as Archway's income is largely based on tuition receipts, in light of fiscal problems and adverse publicity as a consequence of the actions of its former CEO, Archway maintains it was uncertain whether there might be a drastic reduction in enrollment – thereby preventing it from generating enough tuition revenue to support payment of the increases – and, therefore, it determined to delay the increases until it could be assured of its financial situation; 3) the Department's Supervising Auditor testified that Archway's intent as to the salary increases would not have been an issue had it begun paying the increase at the beginning of the school year; 4) the facts of this matter are clearly distinguishable from the Commissioner's decisions in *Y.A.L.E. School, Inc.* and *Search Day I, supra*, as the increases were not bonuses but, rather, were paid to all staff members and these individuals were not required to do anything to get them; and they were not paid from surplus but, rather, from revenue which was anticipated provided that there was no substantial reduction in the number of students sent to Archway's PSH program.

Turning now to the ALJ's determinations on the various disputed non-allowable costs at issue for the five audit years under consideration here – again remaining fully aware of the applicable burden of proof in this matter and exercising the requisite deference to the ALJ's credibility assessments and resultant fact finding – the Commissioner finds as follows:

Schedule A – Teacher Salary Disallowances (Initial Decision at pp. 33-80). The Commissioner concurs with the ALJ's determination – for the reasons summarized on pp. 74-77 of her decision as well as those additionally presented in Archway's exception arguments – that, pursuant to the doctrine of substantial compliance, the Department should not have disallowed charges for salary payments to individuals who worked for a period of time without certification.[4] As to the second category of individuals covered in this schedule – those who were listed in Archway's records as holding positions requiring certification but who did not have such certification (Initial Decision at pp. 77-78), the Commissioner agrees with the ALJ that Archway has failed to sustain its burden of establishing that the Department's disallowances for this category of individuals was arbitrary, capricious or unreasonable and, therefore, the disallowances must be sustained. The Commissioner further agrees that the disallowances with respect to the three ledger items (1995-96 school year) – four employees in 1997-98, seven employees in 1998-99 and the 1996-97 salary of Sharon Block – must similarly be sustained as a result of Archway's failure to present any argument in opposition to their disallowance. As a consequence of these determinations, the Commissioner agrees that: for the 1994-95 School Year, of the total salaries of $123,353 remaining in dispute, $94,217 should not have been disallowed; for the 1995-96 School Year, of the $388,494 remaining in dispute (salaries and three ledger items), $69,124 should have not been disallowed; for the 1996-97 School Year, of the total salaries of $211,416 remaining in dispute, $65,451 should not have been disallowed; for the 1997-98 School Year, of the total salaries of $305,501 remaining in dispute, $43,417 should not have been disallowed; and for the 1998-99

[4] In this regard, the Commissioner specifically rejects the Department's exception contention that, in making her determination on this issue, the ALJ relied on *Search Day II, supra* which had a wholly distinguishable fact pattern. The Commissioner finds and determines that rather than placing decision-making reliance on this case, the ALJ presented it as illustrative of the precept that there are instances where the concept of equity dictates that strict adherence to regulatory dictates is counterindicated. The Commissioner finds that such is the case here.

School Year, of the total salaries of $192,859 remaining in dispute, $51,812 should not have been disallowed.

Schedule C – Non Salary Expenses Charged to PSH Schools (Initial Decision at 81-83) For the reasons presented by the ALJ in her decision, the Commissioner agrees that Archway has not met its burden of proof with regard to the items covered in this schedule and, therefore, the Department's disallowances totaling $289,634 must be sustained.

Schedules D,E,F,G,H for the 1994-95 audit and Schedule D for the other audits – Maintenance/Transportation/Depreciation (Initial Decision at 83-86) It is noted that the parties are in agreement that the Department's auditor applied improper calculation methodologies in computing allowable/non-allowable costs on this schedule, and that these must be recalculated – along with the dependent rolling calculations which have a carry over effect from year to year – using the now agreed upon methodology. Although the Commissioner concurs that the ALJ properly rejected utilizing the calculations submitted by Archway's expert in this regard, she specifically disagrees with the ALJ's determination that the Commissioner's final decision here is the appropriate vehicle for the calculation of these and other necessary recalculations necessitated in this matter, along with the presentation of the specific amounts of money that Archway is required to return to its sending districts. Rather, the Commissioner finds that – given the nature of Archway's petitions of appeal in this matter, and the dictates of the Administrative Procedure Act which require that a recommended decision shall be filed "in such form that it may be adopted as the decision in the case" (*N.J.S.A.* 52:14B-10(c)) – the decision of the OAL in this regard should result in recommendations which resolve the entire contested case, *i.e.*, the adjudication of the involved rights, entitlements *and obligations* of Archway. Furthermore, the Commissioner finds and concludes that the ultimate equitable resolution of this matter and the interests of the parties and

the sending districts are optimally furthered by the Commissioner's ability to review calculations recommended by the ALJ subsequent to the parties' ability to be heard at the OAL and on exception with respect to application of the Commissioner's substantive findings here.

Schedule I for the 1994-95 audit and Schedule E for the other audits – Maximum Salary Caps (Initial Decision at 86-89). The Commissioner concurs with the ALJ – for the reasons presented in her decision and those contained in Archway's exception submission – that the Department's disallowances on this schedule be reversed.

Schedule K for 1994-95 audit and Schedule F for the other audits – Fringe Benefit Costs (Initial Decision at 90-91) The Commissioner agrees that the findings of allowed salaries in this decision will necessitate a recalculation of this schedule. However, as previously stated, the Commissioner disagrees that such recalculations should be accomplished here but, rather should be computed at the OAL consistent with *N.J.S.A.* 52:14B-10(c).

Schedules M,O,P,Q, and R for the 1994-95 audit and Schedules G,H,I,J for the other audits – Organizational Overhead (Initial Decision at 91-94) The Commissioner concurs with the ALJ that the Department's disallowances totaling $2.1 million in these schedules must be upheld as Archway has failed to sustain its burden of establishing that such disallowances were arbitrary, capricious or otherwise improper.

Schedule T for the 1994-95 audit and Schedule L for the other audits – Working Capital (Initial Decision at 95) As the calculations in this category are a function of actual allowable costs in each of the disputed categories for each of the audit years, the numbers currently contained in this schedule are incorrect and will have to be recalculated at the OAL on remand.

In summary, with respect to each of the Schedules at issue for the included audit years, the Commissioner adopts the findings and conclusions of the ALJ reflecting the following:

Schedule A
(Teacher Salaries)

1994-95 The amount of disallowances remaining in dispute, $123,352, is reduced to $29,136.

1995-96 The amount of disallowances remaining in dispute, $388,494, is reduced to $319, 370.

1996-97 The amount of disallowances remaining in dispute, $211,416, is reduced to $145,965.

1997-98 The amount of disallowances remaining in dispute, $305,501, is reduced to $262,084.

1998-99 The amount of disallowances remaining in dispute, $192,859, is reduced to $141,047.

Schedule B
(Non-Teacher Salary Disallowance)

1994-95 Non-disputed disallowances are $386,436.

1995-96 Non-disputed disallowances are $261,191

1996-97 Non-disputed disallowances are $176,479.

1997-98 Non-disputed disallowances are $ 3,923.

1998-99 Non-disputed disallowances are $ 34,058.

Schedule C (including C1 and C2 for the 1994-95 audit)
(Non-Salary Expenses Charged to PSH Schools)

1994-95 Department's disallowances of $110,812 are affirmed.

1995-96 Department's disallowances of $ 67,264 are affirmed.

1996-97 Department's disallowances of $ 81,809 are affirmed.

1997-97 Department's disallowances of $ 10,425 are affirmed.

1998-99 Department's disallowances of $ 19,324 are affirmed.

Schedules D,E,F,G,H for the 1994-95 audit and Schedule D for the other audits
(Maintenance/Transportation/Depreciation)

Calculation of allowable expenses to be based on the revenue-based allocation and the disallowances to be calculated at the OAL on remand.

Schedule I for the 1994-95 audit and Schedule E for the other audits
(Maximum Salary Caps)

1994-95 Archway's allowances of $37,470 are affirmed.

1995-96 Archway's allowances of $43,945 are affirmed.

1996-97 Archway's allowances of $54,415 are affirmed.

1997-98 Archway's allowances of $74,900 are affirmed.

1998-99 Archway's allowances of $55,819 are affirmed.

Schedule J
(Food/Entertainment Expenses)

1994-95 Non-disputed disallowances $2,072

Schedule K for the 1994-95 audit and Schedule F for the other audits
(Fringe Benefit Costs)

Amount of disallowances to be calculated at the OAL on remand.

Schedule L
(Food Services Costs)

1994-95 Non-disputed disallowances $84,293.

Schedules M,O,P,Q,and R for 1994-95 audits and Schedules G,H,I,J for the other audits
(Organizational Overhead)

The Department's disallowances with respect to these schedules, in the amount of $2.1 million, are affirmed.

Schedule T for the 1994-95 audit and Schedule L for the other audits
(Working Capital)

Amounts to be calculated at the OAL on remand.

Schedule N for the 1994-95 audit and Schedule S for the other audits
(Tuition Waivers)

Non-disputed disallowances totaling $87,076.

Accordingly, for the reasons expressed therein and above, the recommended decision of the OAL is adopted as the final decision in this matter, with the exception of its conclusion that the Commissioner should calculate – without benefit of OAL recommendations after the parties have been heard – all schedules based on the determinations herein and establish a recommended final amount that Archway is obligated to return to its sending districts. Consequently, this matter is remanded to the OAL for such further proceedings as are necessary to allow the ALJ to conclude these consolidated cases by making the requisite calculations and recommended determination of monies due and owing.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: December 4, 2008
Date of Mailing: December 5, 2008

[5] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.