#21-08 (OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu09700-06_1.html)

BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAINSIDE, UNION COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERKELEY HEIGHTS, UNION COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Mountainside Board of Education, which sends its high school students to the Berkeley Heights school district pursuant to a sending-receiving relationship established in 1997, contends it was overcharged for tuition over the years – during which the two districts calculated payments and credits through an *ad hoc* method rather than as set forth in regulation – and was due a cumulative credit/refund of $673,496. When, in the fall of 2006, Mountainside declined to pay invoiced tuition amounts based on this contention, Berkeley Heights cross-appealed.

Based on the parties' submissions and a limited hearing held for the purpose of taking expert testimony, the ALJ found, *inter alia*, that: the 90-day limitations period does not apply to bar the claims of either party; the proper method of calculating tuition credit is the method outlined in *N.J.A.C.* 6A:23-3.1(f)(6), and school districts are not free to agree to a method of calculating tuition that contradicts the provisions of statute and regulations; the issue of tuition credits for special education students is not encompassed in this matter; and, per the proper formula, Mountainside should pay Berkeley Heights $2,980,313.90 for the 2006-07 school year, additionally receiving a credit of $236,046.10 so as to bring the total estimated tuition for 2006-07 to $3,216,360.

Upon careful review and consideration, the Commissioner adopted the Initial Decision with modification and clarification. The Commissioner concurred with the ALJ that the matter was appropriately decided without plenary hearing, that the provisions of rule rather than any contractual agreement between the parties must govern calculation of tuition credits, and that special education costs are not appropriately considered in deciding the present dispute. The Commissioner further concurred that the 90-day rule did not foreclose consideration of the matter on the merits, although the Commissioner modified the ALJ's analysis on this point. Finally, the Commissioner concurred with the ALJ's methodology for determining how best to rectify the parties' past errors and bring them into compliance with law moving forward. The Commissioner directed Mountainside to remit tuition to Berkeley Heights for the 2006-07 school year in the amount necessary to bring its total payments for the year to $2,980,313.90, reflecting the total estimated tuition of $3,216,360 less $236,046.10 in prior year credit.

January 17, 2008

OAL DKT. NO. EDU 9700-06
AGENCY DKT. NO. 243-7/06

BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAINSIDE, UNION COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF BERKELEY HEIGHTS, UNION COUNTY,	:	
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions and replies filed by the Mountainside Board of Education (Mountainside) and the Berkeley Heights Board of Education (Berkeley Heights) in accordance with *N.J.A.C.* 1:1-18.4 and 1:1-18.8.

On exception, Mountainside notes its agreement with the Initial Decision in most respects, urging the Commissioner to adopt the recommendations of the Administrative Law Judge (ALJ) as to: 1) the timeliness of the petition; 2) the need to resolve this matter by calculating estimated tuition and credit for overpayment for the years at issue in the manner advocated by Mountainside's expert, i.e., in strict accord with applicable rule rather than through the *ad hoc* method previously employed by the parties; and 3) the conclusion that Mountainside had been shortchanged over the years and was due credit by way of adjustment. (Petitioner's Exceptions at 2-7)

Mountainside disagrees, however, with the specific manner in which the ALJ actually implemented her substantive ruling, contending that she "erroneously inputted several data entries that distorted the bottom line result for the 2006-07 and 2007-08 school years, in a manner contrary to the very principles she intended to apply." According to Mountainside, "[while] these errors will net themselves out in the long run, they delay a full application of the formulas provided under the statute until the 2008-09 school year, which is unnecessary because it is possible to fully apply the statutory formulas in the current 2007-08 school year." (Petitioner's Exceptions at 7)

Mountainside explains that the ALJ's Attachment 2, which is intended to show tuition and credits actually paid over the years as corrected for an "overapplication" in 2005-06, errs in commingling actual and recalculated figures, with the result that certain amounts appearing as paid to Mountainside were not, in fact, received as they should have been according to the simulation developed in Attachment 1. Had the ALJ used the correct figures based on undisputed historical data, Mountainside concludes, she would have arrived at $638,431.90 as the amount of credit to be received by Mountainside in 2006-07, representing the sum of the credits due Mountainside from 2002-03 ($297,877.60) and 2003-04 ($354,141.50), adjusted for the difference ($13,587.20) between the credits actually received in 2000-01 through 2005-06 ($1,552,288) and the credits that should have been received for overpayments in 1997-98 through 2001-02 ($1,538,700.80). (Petitioner's Exceptions at 7-12) Mountainside adds that – since the 2006-07 school year has now ended – the $638,431.90 credit should be construed as "credit received" for that year, so that the regulatory formula can be fully

implemented during 2007-08 by crediting Berkeley Heights with the $138,811 underpaid by Mountainside in 2004-05. (*Id*. at 12)[1]

In reply, Berkeley Heights references its own exceptions (see below) and notes its disagreement with Mountainside's contention that the Initial Decision is correct in most respects. It also objects to Mountainside's characterization of the ALJ's methodology, since, according to Berkeley Heights, the ALJ adopted the methodology of *its* expert rather than that of Mountainside's, comparing the amount paid with the amount owed and then applying that reconciliation to the third year following – deviating only in one overapplication of credit in order to achieve balance for the 2006-07 school year and avoid reconciliation problems going forward. (Respondent's Reply at 2-3) Likewise infirm, Berkeley Heights asserts, is Mountainside's proposed modification of the ALJ's calculations, which commingle credits actually given – not always correctly – with credits properly due, thus failing to produce an accurate account of what would be owed and to whom during the 2006-07 school year if the regulatory formula had been properly implemented from the inception of the parties' agreement. (*Id*. at 3-4) Finally, Berkeley Heights contends that there remains an issue of fact as to whether the $402,500 credit received by Mountainside in 2005-06 was intended to satisfy all credits claimed up to that point – an issue which cannot be resolved without remanding the matter for testimony from individuals having personal knowledge of the parties' transactions. (*Id*. at 4)

In its primary exceptions, Berkeley Heights contends that the ALJ misconstrued applicable law and made findings that are arbitrary, capricious and

[1] Mountainside appends to its exceptions a proposed substitute for the ALJ's Attachment 2, reflecting the calculations advocated.

unreasonable – thus rendering the 90-day rule meaningless, omitting issues material to Berkeley Heights' claims and defenses, and reaching beyond both the scope of the parties' summary decision motions and the relief requested in the underlying petition and cross-petition. (Respondent's Exceptions at 1-2)

Following a detailed recitation of the evidence and proceedings before the ALJ from its own perspective (*Id.* at 2-13), Berkeley Heights argues that the ALJ should have dismissed Mountainside's appeal as untimely, since "[the] notion that a party to a sending-receiving agreement can go back in time many years seeking credits or additional tuition monies has no support in law and is anathema to the means by which school districts must behave." (Respondent's Exceptions at 15-16, quotation at 16)

According to Berkeley Heights, the ALJ erred in finding that Mountainside had an absolute statutory right to reimbursement, so as to render the 90-day rule inapplicable. Such finding, Berkeley Heights contends, ignores the fact that *Lavin v. Hackensack Board of Education,* 90 *N.J.* 145 (1982), was intended to create only a narrow exception to regulatory limitations periods, and that open-ended interpretation of *Lavin* in a matter of this type entirely undermines the requirement for reconciliations of tuition disparities to be made three years after the contract year at issue; it also, the Board continues, ignores recent case law applying the 90-day rule to a tuition dispute. (*Bd. of Ed. of the Township of Pemberton v. Bd. Of Ed. of the Burlington County Special Services School District,* Commissioner of Education Decision No. 134-07, decided April 12, 2007) (Respondent's Exceptions at 17-18)

The ALJ further erred, Berkeley Heights asserts, in finding that the parties' engagement in ongoing discussions about tuition credits due (or not due) to

Mountainside resulted in there being no single event that would have triggered the 90-day limitation period; to the contrary, the Board continues, it has consistently been held that attempts to resolve a dispute informally or through negotiation do not negate either the receipt of adequate notice – which Mountainside had at any number of points up to and including the March 16, 2006 meeting at the county office[2] – or the tolling of applicable limitations periods. (Respondent's Exceptions at 18-23, citing to *Kaprow v. Berkeley Township Board of Education*, 255 *N.J. Super.* 76 (App. Div. 1992), *aff'd*, 131 *N.J.* 572 (1993), and *Pemberton, supra*, among others) Berkeley Heights also reasserts that Mountainside's claims with respect to 2001-02 must be foreclosed – even assuming, *arguendo*, that its claims as to later years are not considered time-barred – based on prior decisional law finding the limitation period in a tuition dispute to have begun upon expiration of the period for collecting amounts due based on the reconciliation of estimated and certified tuition rates. (Respondent's Exceptions at 23-24, citing *Lord Sterling Schools, Inc. v. Bd. of Ed. of the Morris School District, Morris County*, Commissioner of Education Decision No. 277-02, decided July 19, 2002)

According to Berkeley Heights, the ALJ additionally erred in finding that relaxation of the 90-day rule was warranted, since 1) the public interest is best served by upholding the State's clear policy in favor of recognizing the need, with respect to exposure to disputes, for stability and repose in the fiscal and administrative affairs of

[2] Berkeley Heights states that "the undisputed facts reveal that [Mountainside] received notice of the certified tuition rates each year. It is also undisputed that [Mountainside] was aware that 'substantial arrearages in reimbursement [were] due' sometime between July and November 2005 and did nothing. Thereafter, [Mountainside] received a credit of $402,500, and did nothing to recoup the rest of the overpayments allegedly owed. [Mountainside] was never led to believe that the entirety of its demand would be satisfied and Berkeley Heights never admitted to owing same. Finally, [Mountainside] was specifically instructed to take action to protect its interests in March 2006, and did nothing." (Respondent's Exceptions at 22-23)

boards of education; and 2) the ALJ's perception of the "interests of justice" is based on the erroneous belief that Berkeley Heights gave no indication of any intent to argue untimeliness until it filed its cross-motion for summary decision, when, in fact, it was pleaded as an affirmative defense in the Board's answer to Mountainside's petition. (*Id*. at 25-26)[3]

Thus, Berkeley Heights asserts, the Commissioner should find that Mountainside's appeal is foreclosed by the 90-day rule; however, if she does not, the ALJ's determinations as to the parties' intent during their dealings and the actual figures at issue must then be rejected. According to Berkeley Heights, the parties' cross-motions for summary decision sought resolution of two questions only: the appropriate *method* to be applied in calculating credits – i.e., whether credit could be claimed based on the difference between the tentative tuition charged and the certified tuition rate without regard to payments actually made – and whether Mountainside's claim was barred by the statute of limitations. Berkeley Heights opines that, once the ALJ declined to grant summary decision on either motion, she should have advanced the matter to plenary hearing instead of holding a narrowly circumscribed hearing and then proceeding to rule on numerous issues of fact and law without benefit of testimony from individuals who had personal knowledge of the parties' interactions during the relevant school years – thereby making findings "predicated on an incomplete and prejudicial record," so as to result in a decision that is inherently arbitrary, capricious and unreasonable. (Respondent's Exceptions at 28-29)

[3] Since the ALJ based her conclusion that Berkeley Heights' cross-petition was timely solely on her prior determination with respect to Mountainside's petition, Berkeley Heights also reiterates its arguments before the ALJ as to why its own cross-petition was not untimely filed, for consideration by the Commissioner in the event that she determines to dismiss Mountainside's petition as untimely.

Specifically, Berkeley Heights contends, an issue of fact remains as to the nature of the $402,500 credit extended to Mountainside during the 2005-06 school year, of which the parties have taken very different views and on which the ALJ should not have reached any conclusion – particularly as to whether it resulted in either party waiving claims or defenses – without taking testimony on the parties' intent and making a concomitant evaluation of witness credibility. (Respondent's Exceptions at 29-31) An issue of fact also remains, Berkeley Heights continues, with respect to the $49,250 payment applied in the 2001-02 school year – which the ALJ accepted "based solely on unsworn representations of counsel, without benefit of witness testimony or supporting affidavits" as a payment toward prior tuition despite its manifest irregularity. (*Id*. at 31-32, quotation at 32) Berkeley Heights further asserts that the ALJ erred in precluding it from bringing evidence and testimony with respect to how the parties handled special education costs during the years in dispute, since the issue was sufficiently implicated in the parties' pleadings and Mountainside cannot fairly claim to have been "overcharged" without taking these costs into account. (*Id*. at 32-34)

Moreover, according to Berkeley Heights, the Commissioner must reject a number of the ALJ's specific determinations as without factual basis in the pleadings and testimony: 1) that Mountainside could reasonably have believed that its tuition claim was open to further negotiations after mediation at the office of the county superintendent; 2) that Berkeley Heights' business administrator retired on "short notice," suggesting that duress or problems relating to the current dispute may have been involved; 3) that the interactions between the parties' two business administrators were exactly as represented in Mountainside's brief and certifications, without testimony from – or cross-examination

of – either of the two men; 4) that Mountainside's "rough transcription" of a voicemail message allegedly left for its business administrator by the Berkeley Heights business administrator can be accepted as true for the matters asserted, likewise without testimony from, or cross-examination of, either of the two men; 5) that the dispute encompassed the 2004-05 school year notwithstanding that the petition did not include the latter; 6) that Berkeley Heights admitted that tuition should be reckoned in accordance with statute and rule and not by contract terms, in a context "sounding in the doctrine of waiver, requiring testimony on the parties' intent;" and 7) that Berkeley Heights' expert admitted that, should the ALJ find regulation applicable, then the amount of credit calculated by Mountainside for the period of 1997-99 was correct. (Respondent's Exceptions at 34-36, quotation at 36)

Finally, Berkeley Heights objects to the ALJ's statement regarding credit due Mountainside for the 2007-08 school year, since: 1) that year is outside the scope of both the petition and the cross-petition; 2) credits owed relating to the 2005-06 school year and beyond cannot be known until the Department of Education releases certified costs for those years; and 3) the parties have already agreed on an appropriate credit for the 2007-08 school year. (Respondent's Exceptions at 37-38)

In reply, Mountainside – after countering Berkeley Heights' factual and procedural recitation with one of its own (at 2-13) – first reiterates its arguments as to why its appeal is not untimely filed. (Petitioner's Reply at 13-30) It reasserts its contention that Mountainside has an absolute statutory entitlement to pay no more in tuition than Berkeley Heights' actual cost per pupil, citing *Lavin, supra*, and *Bd. of Ed. of the Borough of Alpha v. Alpha Educ. Ass'n.*, 188 *N.J.* 595 (2006), and distinguishing the

present matter – which is "simply a matter of inputting data into the regulatory formula" – from others where the 90-day rule was found applicable, noting that the latter involved employment benefits grounded in statute but dependent on discretionary action of a board of education. (*Id*. at 14-15) It further reasserts that review of the underlying facts demonstrates that Berkeley Heights cannot – as it must to invoke untimeliness as an affirmative defense – pinpoint any one objective event constituting a violation of Mountainside's rights so as to trigger running of the 90-day rule; to the contrary, according to Mountainside, to whatever extent such "plausible 'concrete events' " can be identified, its appeal was filed well within 90 days of each of them, and, moreover, each monthly tuition invoice can be deemed a continuing and separate cause of action pursuant to *Alpha*, *supra*. (*Id*. at 16-25, quotation at 25)

Mountainside then reiterates its arguments to the effect that – should the 90-day rule be found applicable and Mountainside determined to have filed beyond the regulatory deadline – relaxation of the rule is warranted. Mountainside again asserts that: 1) important public interests are at stake, since calculation of tuition is a matter of significance to every district sending students to another public school district; and 2) strict application of the rule would result in injustice, since the parties engaged in continuing dialogue with neither side signaling to the other that the point had come for legal action. (Petitioner's Reply at 25-30)

Mountainside further contends that Berkeley Heights cannot now claim that the ALJ erred in not conducting a plenary hearing, since it did not oppose Mountainside's motion for summary decision on grounds that material facts were in dispute, but rather cross-moved for summary decision on its own behalf in the belief that

the ALJ would decide in its favor based on the evidence and certifications submitted, without the need for live testimony. (Petitioner's Reply at 31-36) As to the ALJ's exclusion of claims for reimbursement of special education costs, Mountainside denies that such claims may be inferred from a cross-petition filed "for the sole purpose of recouping from Mountainside the tuition that Berkeley Heights had anticipated receiving in its budget for the 2006-07 school year," and asserts that – to the extent that they are included in Berkeley Heights' cross-motion for summary decision – the Board's moving papers presented no evidence in support of such claims. (*Id*. at 36-37, quotation at 36) With respect to Berkeley Heights' contention that the ALJ made factual findings not supported by the record, Mountainside counters that such findings are entirely grounded in the parties' evidential submissions, which the ALJ appropriately scrutinized for points of concession and instances where rebuttal evidence was either nonexistent or insufficient to raise a genuine issue of material fact. (*Id*. at 37-40)

To the extent that Berkeley Heights objects to the ALJ's acceptance of the testimony of Mountainside's expert over that of Berkeley Heights, Mountainside urges that the methodology proposed by Berkeley Heights errs in failing to recognize that "the calculation of tentative tuition to be billed to the sending district is separate from the calculation of any reimbursement due the sending district in those years, except to the extent that the receiving district chooses to prorate the reimbursement monthly as a credit against the tentative charge otherwise due from the sending district." Only in this way, Mountainside asserts, can the discrepancy between tuition charged and actual cost in any year be "squared up" over the four-year cycle as intended by the statute, whereas the methodology proposed by Berkeley Heights is "the financial equivalent of throwing the

sending district off the back of a moving train." (Petitioner's Reply at 40-44, quotations at 43, 44)

Finally, Mountainside interprets Berkeley Heights' exception to the ALJ's award of relief pertaining to the 2007-08 school year as a claim for entitlement to the 2006-07 portion of the ALJ's award while rejecting the 2007-08 portion as beyond the scope of present proceedings. While reiterating its belief that the ALJ erred in her specific cash-flow instructions and urging adoption of its own calculations as set forth on exception, Mountainside asserts that Berkeley Heights can in no event "cherry pick that portion of the result that is advantageous to it, while escaping the consequences of that portion arguably favoring Mountainside" – since the ALJ's directives were an "integrated whole" not susceptible to bifurcation. (Petitioner's Reply at 44-45, quotation at 45)

Upon careful review and consideration, the Commissioner adopts the Initial Decision with modification and clarification as set forth below.

Preliminarily, the Commissioner concurs with the ALJ that this matter can be fully and fairly decided on the parties' cross-motions for summary decision together with the record developed at the hearing convened for the purpose of taking expert testimony on the question of proper calculation of tuition credits. While the parties obviously impute very different meanings to many of their past actions and calculations and Berkeley Heights objects to what it perceives as certain questionable inferences on the part of the ALJ, the Commissioner finds that the material facts necessary for disposition of this matter are clear on the record and largely undisputed, and that where a material factual dispute does exist – i.e., the nature of the $49,250 and $400 payments

made by Mountainside in the 2000-01 school year – the existing record was sufficient for the ALJ to have made reasonable findings of fact.

Similarly, with respect to the question of timeliness, the Commissioner likewise agrees with the ALJ that this matter should be decided on its merits; however, she does so for reasons other than those stated in the Initial Decision.

Initially, the Commissioner does not agree that this matter falls within the scope of *Lavin, supra*, so as to render the 90-day rule inapplicable. The provision of *N.J.S.A.* 18A:38-19(a) specifying that tuition to be paid by a sending district shall not exceed the actual cost per pupil does not create an "entitlement" in the sense addressed in *Lavin*, which distinguished between benefits to which an employee was absolutely entitled by statute and those dependent on the contract of employment or services rendered; indeed, extending the Court's holding from the narrow circumstance addressed in *Lavin* to *N.J.S.A.* 18A:38-19(a) – and, by implication, to virtually every statute prescribing non-discretionary parameters for the operation of local district boards of education – would, as Berkeley Heights correctly asserts, render meaningless both the 90-day rule and the carefully crafted regulatory mechanism for orderly reconciliation of tuition costs.[4] [5]

Further, the Commissioner does not agree that there is no single point in time that can be identified as constituting appropriate notice of a cause of action on Mountainside's part. Whatever the parties' differences as to details and intentions, there is no dispute that: 1) during the summer and fall of 2005, Mountainside's business

[4] As further noted by Berkeley Heights, the 90-day rule has, in fact, previously been applied in matters involving payment of tuition.

[5] Similarly disingenuous is Mountainside's contention that, in a dispute of the type herein, each monthly tuition bill constitutes a new cause of action.

administrator raised the issue of credits for the 2001-02 and 2002-03 school years (due in 2004-05 and 2005-06, respectively) with the Berkeley Heights business administrator; 2) Mountainside was credited in November 2005 with $402,500 to be paid over the course of the 2005-06 school year; 3) discussions continued between the parties' respective business administrators, who by then were additionally required to consider the question of credits for 2003-04, to be reflected in the 2006-07 budget following the December 2005 certification of 2003-04 actual tuition rates by the Department of Education; and 4) by the spring of 2006, Mountainside had clearly taken the position that it was cumulatively owed $673,496 and Berkeley Heights was equally clear about its disagreement with this position. As required by *N.J.A.C.* 6A:23-3.1(f)5, the districts' dispute was taken to the county superintendent for mediation, and although efforts were made by county office staff, no mutually acceptable agreement could be reached and the parties resolved to continue in their respective postures.[6]

Thus, as of March 16, 2006 – the date of the meeting at the county office – Mountainside was clearly on notice that Berkeley Heights was firm in its stance that Mountainside was not owed the credits claimed, so that Mountainside could have no reasonable basis to expect that Berkeley Heights would either be paying it additional monies attributable to 2002-03 during the remainder of the 2005-06 school year or

[6] The Commissioner here notes that the parties and the ALJ all infer that the County Superintendent "failed" to render a "decision" resolving the parties' dispute once they could not reach agreement, and that, when the County Superintendent did not make a determination in the matter, the Department of Education's Division of Finance could or should have intervened in some way. There is, however, no provision in rule for "decision" or "determination" by either the County Superintendent or the Department – notwithstanding that a county superintendent may on occasion take a position on a tuition matter in dispute between parties to a sending-receiving relationship, as in *Board of Education of the Borough of Lincoln Park v. Board of Education of the Town of Boonton*, Commissioner of Education Decision No. 246-03, decided May 15, 2003, cited by Mountainside before the ALJ and on exception. What *N.J.A.C.* 6A:23-3.1(f)5 expressly provides for is "mediation" by the County Superintendent, so that there should have been no expectation of a dispositive ruling by the County Superintendent once mediation proved unsuccessful. (*Cf.*, for example, *N.J.A.C.* 6A:17-2.8, requiring County Superintendent or Division of Finance "decisions" and "determinations" on disputes involving homeless students.)

crediting it in 2006-07 with the cumulative monies it believed it was due. At this point, in the Commissioner's view, the parties were undeniably at impasse, and Mountainside – as the aggrieved party with no entitlement to subsequent intervention by the County Superintendent or Department – needed no further "trigger" to file a petition with the Commissioner. Berkeley Heights, in contrast, could not assume that Mountainside would withhold actually payment on its 2006-07 tuition invoices solely because it budgeted for the large cumulative credit it believed itself due; in so doing, Mountainside was merely acting – at its own peril – consistent with its previously stated position, which it could and would (presumably) then seek to vindicate through appeal to the Commissioner. Berkeley Heights was not aggrieved, and had no cause of action ripe for adjudication, until Mountainside actually failed to honor its tuition obligation in the absence of a ruling from the Commissioner entitling it to pay less than the invoiced amount.

However, by failing to pay the invoices issued by Berkeley Heights – thereby unilaterally taking for itself the relief it should have obtained from the Commissioner – Mountainside effectively compelled Berkeley Heights to file a cross-appeal, thus ensuring that it would be able to press its claims in the form of a defense in the event they were found untimely in their own right.[7] While the Commissioner ordinarily would not countenance such a tactic, she cannot overlook the unique posture of this matter – which has brought to light a nearly decade-long history of the parties to a still-extant sending-receiving relationship ignoring regulatory mechanisms for calculation and payment of tuition and credits, the cumulative effects of which, if unattended, will be

[7] The Commissioner here notes that Berkeley Heights did, in fact, raise untimely filing as an affirmative defense in answering Mountainside's petition on August 2, 2006 – as the ALJ herself recites in the procedural history (Initial Decision at 2) – so that the ALJ is incorrect in stating (*Id*. at 20) that the first indication of Berkeley Heights' intention to raise untimely filing as a defense was its December 2006 cross-motion for summary decision.

carried over into the future.[8] Neither can she ignore that both parties are equally to blame for the morass created by their mutual failure to abide by the provisions of a regulatory scheme expressly designed to ensure clarity, accuracy and stability in tuition arrangements between public school districts; indeed, this entire matter is an object lesson in the wisdom of the regulation and pitfalls of tampering with its application. Consequently – although she does not agree with the ALJ that interpretation of the applicable tuition rules serves the general public interest, since the rules are clear on their face and there can be no two opinions as to how they should operate – the Commissioner does believe it necessary to decide this matter in the more specific interest of the citizens of Mountainside and Berkeley Heights, who are entitled to have the tuition arrangements between their respective boards of education brought back into alignment with law designed to ensure fairness to both.

Turning, then, to the merits of the matter, the Commissioner first concurs with the ALJ, for the reasons set forth in the Initial Decision, that: 1) the regulatory provisions at *N.J.A.C.* 6A:23-3.1(f) rather than the parties' contractual terms govern the calculation of tuition credits for the 1997-98 and 1998-99 school years, so that Berkeley Heights cannot claim a right to reimbursement of credits for those years paid over and above contractual amounts; 2) special education costs – for which Berkeley Heights did not claim reimbursement at any time prior to the present litigation or expressly plead in its cross-petition – are not appropriately considered in this matter; and 3) Mountainside's $49,250 payment to Berkeley Heights in 2000-01 was for tuition, while its $400 payment was not.

[8] In this respect, the present matter differs from other matters, as cited by Berkeley Heights, where the 90-day rule was applied to foreclose appeal of a disputed tuition calculation.

The Commissioner further concurs that – in order for the parties to be positioned at the conclusion of proceedings so that past errors are rectified to the extent reasonably and fairly possible at this point, and so that the law can be followed moving forward – it is necessary to analyze and recast the payments and credits between the parties from the outset of their relationship in 1997 through the date of closing of the record, notwithstanding that Mountainside's petition expressly addressed only the 2001-02, 2002-03, and 2003-04 school years and that the parties may have already made an agreement between themselves with respect to the 2007-08 school year.

Finally, the Commissioner finds the ALJ's methodology – as set forth and applied in the Initial Decision at 26-34 – to be well-devised for the purpose at hand, reducing the dispute to abstract formulations that clearly reveal the fallacy of each of the parties' positions on appeal, allow for incorporation of the valid aspects of both positions, and provide a clear, consistent mechanism for calculating the adjustments and realignments necessary to conform the parties' past actions to the framework of law. The Commissioner further concurs that Mountainside should remit to Berkeley Heights the difference between what it should have paid and what it actually paid for the 2006-07 school year, rather than crediting that amount as an underpayment to Berkeley Heights in a subsequent budget; as previously stated, Mountainside acted at its own peril in unilaterally taking for itself relief it should have sought to obtain by order of the Commissioner.

Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed therein, as clarified and modified above.[9] The Mountainside Board of

[9] The Commissioner notes that Mountainside's expert – Melvin L. Wyns – although identified correctly in the body of the Initial Decision, is erroneously listed in the Appendix (at 39) as "David" Wyns.

Education is directed to remit to Berkeley Heights tuition for the 2006-07 school year in the amount necessary to bring its total payments for the year to $2,980,313.90, reflecting the total estimated tuition of $3,216,360 less $236,046.10 in prior year credit.

IT IS SO ORDERED.[10]

COMMISSIONER OF EDUCATION

Date of Decision: January 17, 2008
Date of Mailing: January 17, 2008

[10] 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.*