

THE BANYAN SCHOOL, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

NEW JERSEY STATE DEPARTMENT OF : DECISION
 EDUCATION, OFFICE OF SCHOOL FINANCE, :

RESPONDENT. :

SYNOPSIS

Petitioner – the Banyan School (Banyan), a private school for children with disabilities – appealed the determination of the respondent Office of School Finance (OSF) to classify certain employee payments in the 2012-2013 school year as “non-allowable bonuses”. Banyan additionally sought to alter its tentative tuition rates to address the budgetary shortfall created by these disallowed 2012-2013 payments. Banyan filed its appeal with the Department of Education on April 23, 2015. The Department contended that the appeal must be dismissed for failure to file within the 90-day timeframe required by *N.J.A.C. 6A:3-1.3(i)*. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this matter, and the case is ripe for summary decision; OSF issued its final decision regarding the disallowance at issue here in a letter to petitioner dated June 30, 2014; petitioner’s contention that this letter invited Banyan to pursue further discussions on the matter – and that no other communication was received prior to a March 18, 2015 letter that could be construed as notice of a final determination or Banyan’s right to appeal – is without merit; no compelling circumstances exist in this case to relax the 90-day rule; additionally, petitioner failed to state a claim upon which relief may be granted. Accordingly, the ALJ concluded that the petition must be dismissed with prejudice.

Upon review, the Commissioner concurred with the ALJ that the petition is appropriately dismissed for failure to adhere to the 90-day limitation period set forth in *N.J.A.C. 6A:3-1.3(i)*. In so deciding, the Commissioner found that the petitioner was required to file its appeal no later than 90 days from the date of receipt of respondent’s final determination, which in this case was communicated to Banyan in a letter from OSF dated June 30, 2014. Banyan did not file its petition until April 23, 2015. Accordingly, the appeal was dismissed.

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.

OAL DKT. NO. EDU 08696-15
AGENCY DKT. NO. 89-4/15

THE BANYAN SCHOOL, :
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The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed, along with petitioner The Banyan School’s (Banyan) exceptions – filed pursuant to *N.J.A.C.* 1:1-18.4 – and respondent New Jersey State Department of Education, Office of School Finance’s (OSF) reply thereto.

In its exceptions, Banyan argues that the Administrative Law Judge (ALJ) erred in failing to address the merits of its claims – i.e., the correctness of respondent’s determination regarding allowable costs. Banyan reasons that the ALJ’s failure to address the merits of Banyan’s case is reversible error because the employee’s payments were improperly treated as bonuses when they were instead made pursuant to the employee’s contracts. Further, Banyan contends that that the 90-day limitations period should be relaxed in accordance with *N.J.A.C.* 6A:3-1.16, because strict adherence would result in injustice as OSF failed to respond to Banyan’s inquiries. Banyan argues that the ALJ’s reliance on *Polaha v. Buena Regional School District*, 212 *N.J. Super.* 628 (App. Div. 1986) – for the proposition that when parties are engaged in ongoing conversations, the limitations period may be tolled – was misguided, as the case law does not specify the number of contacts parties must have, but rather the nature of the

communications. Here, Banyan maintains that it reasonably expected OSF to respond to its communications and understood that the parties were engaged in ongoing discussions, which should have warranted the relaxation of the 90-day limitations period.

In reply, OSF argues that the ALJ correctly found that OSF's June 30, 2014 letter was a "clear-cut refusal" to revise its determination, and therefore Banyan's petition was time-barred. (Initial Decision at 7) OSF contends that the ALJ properly found that the circumstances did not warrant a relaxation of the limitations period as Banyan and OSF were not engaged in ongoing discussions. OSF disputes Banyan's argument that it understood the parties to be engaged in ongoing discussions, pointing out that Banyan made no attempt to discuss the matter with OSF for seven months, nor did OSF's June 30, 2014 letter invite any further discussion on the matter. Additionally, OSF argues that the ALJ correctly did not address the legal merits of Banyan's claims because the matter was filed out of time and failed to state a claim. OSF also maintains that the ALJ correctly refused to relax the limitations period because Banyan does not have a right to appeal the 2014-2015 tuition rate, as the regulations only permit such an appeal where the tentative tuition rate would cause undue financial hardship on the school. Accordingly, OSF argues that the Initial Decision should be adopted.

Upon review, the Commissioner concurs with the ALJ that the instant petition is appropriately dismissed because it was filed outside the 90-day limitation period set forth in *N.J.A.C. 6A:3-1.3(i)*. The Commissioner agrees with the ALJ that OSF's June 30, 2014 letter was a definitive refusal to revise its published 2014-2015 tentative tuition rate. The Commissioner is also in accord with the ALJ that there is no compelling reason to relax the 90-day limitations period. As such, according to *N.J.A.C. 6A:23A-18.10* and *N.J.A.C. 6A:3-1.3(i)*,

Banyan had 90 days from June 30, 2014 to file a petition of appeal and failed to do so until April 23, 2015.

Accordingly, the Initial Decision – to the extent that it dismisses the petition as untimely – is adopted as the final decision in this matter, for the reasons stated therein. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 18, 2017

Date of Mailing: April 18, 2017

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 08696-15

AGENCY DKT. NO. 89-4/15

THE BANYAN SCHOOL,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF

EDUCATION, OFFICE OF SCHOOL FINANCE,

Respondent.

Vito A. Gagliardi, Jr., Esq., and Janelle Edwards-Stewart, Esq., for petitioner (Porzio, Bromberg, and Newman)

Caroline Jones, Deputy Attorney General, for respondent (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: July 19, 2016

Decided: January 18, 2017

BEFORE **ELIA A. PELIOS** ALJ:

STATEMENT OF THE CASE

Petitioner, The Banyan School (Banyan), a private school for children with disabilities, appeals a determination by respondent the Office of School Finance (OSF) within the Department of Education, to classify payments made to one employee in the 2012-2013 school year as a non-

allowable bonus. Additionally, if the Department's determination is not affirmed, Banyan seeks to alter its tentative tuition rates to address the budgetary shortfall then created.

The Department contends that petitioner failed to file the appeal within the ninety-day timeframe required by N.J.A.C. 6A:3-1.3(i), and that as there is no mechanism for granting the relief that petitioner seeks, the appeal also should be dismissed for failure to state a claim upon which relief can be granted.

PROCEDURAL HISTORY

Petitioner's appeal was received at the Department of Education on April 23, 2015. The Department determined to treat the matter as a contested case, and was transmitted to the Office of Administrative Law (OAL), where it was filed on June 15, 2015. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The matter was assigned to Administrative Law Judge John F. Russo, Jr. The parties filed cross-motions for summary decision, which had not been addressed at the time that ALJ Russo left the OAL for the Superior Court in late December 2015. On January 4, 2016, the matter was transferred to the undersigned. Oral argument, which was adjourned from April 21, 2016, at the parties' request, occurred on July 18, 2016. The record then closed.

FACTUAL DISCUSSION

The parties disagree on which of the communications from the OSF counts as a final ruling. They also differ on the correctness of the OSF determination regarding allowable costs, and the related question of tuition treatment of those costs.

With regard to the "final ruling," the parties agree on the following facts. In general, as an approved private school for students with disabilities, petitioner charges tuition fees to public school districts that send students with learning disabilities to Banyan's lower school (for children in kindergarten through eighth grade) and its high school. The regulatory scheme set forth in N.J.A.C. 6A:23A-18.2 provides for recovery of actual costs incurred by approved schools during the school year.

The regulations provide a projected cost, known as a “tentative tuition rate,” because an approved school cannot know its actual costs before the year begins. Thus, for each school year, the OSF sets the maximum tentative tuition rate for each approved school. These rates typically are established in January of the preceding school year, based upon the audited financial statements of the prior year. For example, the school year 2013-2014 rate would be established in January 2013, based on the audit of school year 2011-2012. The tentative rate is calculated by inflating the prior year’s audit information by twice the spending-growth limitation of 2.5 percent. However, if the OSF is challenging any portion of the prior year’s audit, the rate for that particular school is not released in January. Instead, the OSF issues a letter to the school, outlining its issues and requesting revisions. On receiving the revisions, the OSF provides a certified rate letter.

By letter dated April 30, 2014, the OSF issued a letter to petitioner stating that payment made to one employee during the 2012-2013 school year constituted a non-allowable bonus. Banyan was directed to file a revised audit report within thirty-five days, or have the OSF place it on conditional approval and preclude it from accepting new students. By letters dated May 8, 2014, and May 27, 2014, petitioner’s accountant, Ronald Zuckerman, responded with a justification of the costs, asking the OSF to reverse its determination and to adjust the tentative 2014-2015 tuition rates accordingly. In a letter dated June 30, 2014, the OSF stated:

As of April 30, 2014, the Department of Education published the 2014-2015 maximum tentative tuition rate for Banyan’s Lower School (“Lower School”).

It went on to note:

. . . The information presented by Mr. Zuckerman does not change the determination of those non-allowable costs. . . . Absent compelling information, the Office of School Finance does not ‘revise’ its published 2014-2015 tentative tuition rate.

Additionally, as you are aware a tentative rate is an interim rate, and may increase upon year end calculation of the certified actual cost per student. If the tentative tuition rate is less than the final tuition rate charged, the Lower School’s management may charge each sending district board of education all or part of the difference; thereby allowing

the recovery of the difference between the tentative and final tuition rates charged.

[Gagliardi Certif., Exh. B.]

The letter says nothing about a right of appeal.

Later, in response to a letter of March 11, 2015, from Vito A. Gargliardi, Jr., Esq., counsel to the petitioner, the OSF stated that it received his letter:

. . . regarding the 2014-2015 tentative tuition rate for Banyan School (Lower) and seeking information on a formal appeal. In response to your May 27, 2014, inquiry on this matter, I issued a letter on June 30, 2014, on behalf of former Assistant Commissioner Corso, which detailed the Office of School Finance's position. The provisions regarding a formal appeal of this decision are contained in applicable code and specifically, N.J.A.C. 6A:23A-18.10.

[Id., Exh. C.]

As regards the substance of Banyan's appeal—whether the employee payments constituted unreimbursable bonuses—the respondent has not offered any information to rebut the certification of Ronald Zuckerman, the Board's accountant, regarding the circumstances surrounding the payments. (Zuckerman Certif., Exh. C.) Therefore, all of the following constitutes undisputed **FACT**.

The employee whose compensation was challenged by the OSF was given notice that her employment would be terminated at the close of the 2012-2013 school year. In response, the employee indicated to school personnel that she would begin to exhaust all her available leave time, which amounted to nine personal days and forty-three vacation days, which together had a value of \$22,389.12. (Id., ¶¶ 11, 12, and 14.) Had she done so, Banyan would have been forced to hire a substitute administrator for the remainder of the year. As recorded in the minutes of the Banyan Board of Trustees, the employee was paid for her leave “as a concession for . . . remaining at the school through June 30, 2013.” (Zuckerman Certif., Exh. A.) Her contract stated that either party could terminate without cause, upon sixty days' written notice of intention to terminate. The Banyan minutes also noted that if termination is not for cause, the employee “shall be entitled to either the

notice required hereunder or the applicable pro rata compensation and benefits for the notice period at Banyan's option." (*Id.*, Exh. C.) Banyan's employee handbook stated that staff members could bank up to fifteen days of personal leave, and depending on their status, would receive between eight and twelve days of personal leave annually. It allowed the banking of "unlimited vacation time," but also stated that "vacation time will only be reimbursed upon retirement or for medical reasons." (Zuckerman Certif., Exh. B.)

In its initial letter of April 30, 2014, the OSF noted that the employee received the \$22,389.12, in addition to her regular salary, and that the handbook stated that vacation time was reimbursed upon retirement or for medical reasons. Since neither of the conditions for vacation reimbursement was met, the OSF took the position that payment of those funds constituted a bonus. (Console Certif., Exh. A.)

Additionally, the OSF said the per-diem payment amount was in error—it was \$430.56, when it should have been \$360.92. Thus, "the amount of \$19,140.81 has been considered non-allowable costs when calculating the 2014-2015 tentative tuition rate." (*Id.*, Exh. B.) In his letter of May 8, 2014, to the OSF, Zuckerman took issue with the per-diem payment, noting that the Essex County per diem, which was appropriate to use, was \$612.27, well above the \$430.56 the school had used. (Zuckerman Certif., Exh. AA). The OSF appears never to have addressed this particular argument.

According to Zuckerman, although the OSF letter made no mention of a second faculty member, who was paid \$16,393.50, in the 2012-2013 year, and \$21,858.00, in the 2013-2014 year, in connection with a retirement related to medical reasons, "it appears that its mislabeling of her payout has not been fully resolved, as no notice, corrected report, or monies have been properly forwarded." (Zuckerman Certif., ¶19.) Altogether, this meant that "Banyan's unrestricted funds must necessarily be reduced by \$36,248.00 in order to cover the [unapproved] expenses for year ended June 30, 2013, and \$22,795.00 for year ended June 30, 2014," or a total of \$59,043.00. (*Id.*, ¶21.) Additionally, "Banyan will be required to refund \$19,228.00 to schools for year end June 30, 2013, and \$41,775.00 for year end June 30, 2014," or a total of \$61,003.00. (*Id.*, ¶22.) With regard to Zuckerman's concerns about the second employee, the OSF appears never to have responded in writing to this

concern—it neither verified the existence of a disagreement, nor stated that it had not disapproved that payment.

LEGAL ANALYSIS

Summary decision may be granted when “the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” [N.J.A.C. 1:1-12.5\(b\)](#). The rule further provides that an adverse party must respond by affidavit setting forth specific facts showing that there is a genuine issue which can only be determined at an evidentiary hearing. *Ibid.* The OAL rule is modeled on New Jersey Court Rule 4:46-2. The New Jersey Supreme Court has explained that when deciding a motion for summary judgment under [R. 4:46-2](#),

. . . a determination whether there exists a ‘genuine issue’ of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.

[\[Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 \(1995\).\]](#)

Here, the parties have agreed on all the facts, although they dispute their legal significance. Therefore, I **CONCLUDE** that the matter is appropriate for summary decision.

The OSF argues that Banyan failed to appeal timely, and therefore its petition must be dismissed. [N.J.A.C. 6A:23A-18.10\(a\)](#), which address appeals of decisions regarding the calculation and approval of the tentative tuition rate, and conditional approval status pursuant to [N.J.A.C. 6A:23A-18.9\(i\)](#), states that these determinations may be appealed in accordance with [N.J.A.C. 6A:3](#).

[N.J.A.C. 6A:3-1.3\(i\)](#) states that to initiate a contested case for the Commissioner’s determination of a controversy or dispute arising under the school laws,

[t]he petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or

other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. This rule shall not apply in instances where a specific statute, regulation or court order provides for a period of limitation shorter than 90 days for the filing of a particular type of appeal.

The OSF issued its decision to petitioner on or about June 30, 2014. Therefore, the OSF argues, Banyan was required to file a petition of appeal on or before September 29, 2014, to meet the time requirements.

Banyan contends that the OSF letter of June 30, 2014, “invites Banyan to pursue further discussions and specifically indicates that these discussions should be had within its forum.” It further contends that no communication prior to the March 18, 2015, letter gave notice of either final determination or Banyan’s right to appeal. Therefore, the operative date for final decision was March 18, 2015, and Banyan filed within the ninety-day time frame.

Additionally, Banyan argues that the Commissioner should use his authority under N.J.A.C. 6A:3-1.16 to relax or dispense with procedural rules “in any case where strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice.”

With regard to the adequacy of notice, in Kaprow v. Board of Education of Berkeley Township, 131 N.J. 572 (1993), the Supreme Court held that an unofficial and informal note stating that two positions had been created and filled was sufficient to trigger the start of the ninety-day period in which Kaprow could assert his tenure rights. The Court explained that “adequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate.” Kaprow, supra, 131 N.J. at 587. Here, the June 2015 letter from the OSF said that the information presented by Mr. Zuckerman did not change its determination on non-allowable costs, and that the lower school rate was posted in April. It also said that “[a]bsent compelling information the Office of School Finance does not ‘revise’ its published 2014-2015 tentative tuition rate.” I **CONCLUDE** that this was a clear-cut refusal, fulfilling the notice requirement.

In relation to relaxing the ninety-day rule, the case law makes clear that this occurs only under exceptional circumstances or if there is a compelling reason to do so. Id. at 590. In Polaha v. Buena Regional School District, 212 N.J. Super. 628, 635 (App. Div. 1986), the Appellate Division relaxed the ninety-day rule where evidence demonstrated that the petitioner and the respondent engaged in ongoing discussion in an attempt to “agree on an acceptable position.”

Here, Banyan offered no evidence of numerous phone calls or communications between June 30, 2014, and February 2015. There is only the letter of February 2015, which mentioned the appeal information in a routine letter, answering a question from the District, that included a question on appeal rights. Thus, I **CONCLUDE** that because petitioner waited six months to make further inquiry, and nearly seven months, until April 23, 2015, to file its appeal, the petition must be dismissed as out of time.

Although dismissal for lack of timeliness is sufficient to decide the dispute, for completeness' sake, the issue with the mechanism for relief is addressed below.

The regulatory structure for determining tuition rates has two distinct pieces. The first, which is prospective, is the tentative tuition rate. The second is retrospective, occurring at the conclusion of the school year on June 30, when actual costs are known. The appeal language for tentative tuition rates in N.J.A.C. 6A:23A-18.10 states:

- (a) The decision of the Assistant Commissioner, Division of Finance regarding the calculation of the tentative tuition rate pursuant to N.J.A.C. 6A:23A-18.2(j), regarding the approval of a tentative tuition rate pursuant to N.J.A.C. 6A:23A-18.3 and regarding conditional approval status pursuant to N.J.A.C. 6A:23A-18.9(i), may be appealed in accordance with N.J.A.C. 6A:3.
- (b) The decision of the Assistant Commissioner, Division of Finance in regard to certification may be appealed in accordance with N.J.A.C. 6A:3.

The OSF contends that the language “calculation of the tentative tuition rate” only allows for complaints that the school faces undue financial hardship because “calculation” is limited by “pursuant to N.J.A.C. 6A:23A-18.2(j),” which states, “The Commissioner may approve a higher

tentative tuition rate for any year in which the approved private school for students with disabilities can prove to the satisfaction of the Commissioner that the maximum tentative tuition rate for the year is not adequate and would cause an undue financial hardship on the private school.” The section goes on to require such claims to be made by “no later than January 31 preceding the beginning of the ensuing school year.” N.J.A.C. 6A:23A-18.2(j)(1). It also states:

1. In the event of such hardship claim, the approved private school for students with disabilities shall submit its request for a higher tentative tuition rate for the entire school year to the Assistant Commissioner, Division of Finance no later than January 31 preceding the beginning of the ensuing school year. The approved private school for students with disabilities shall submit such request with appropriate documentation, which shall include, but may not be limited to, the following information:
 - i. A budget reflecting projected costs, working capital fund or surcharge, estimated enrollment and the requested tuition rate based on this information;
 - ii. A detailed explanation of the need for increases in excess of those already provided in the tentative tuition rate calculation; and
 - iii. A financial report which is properly completed and in the format prescribed by the Commissioner for the six months of operations ending December 31 immediately preceding the school year. This report format is available at the Division of Finance, PO Box 500, Trenton, New Jersey 08625-0500.

[Ibid.]

Banyan argues that even if it failed to demonstrate a hardship by January 31, that does not mean it has no remedy for the disputed amount. Petitioner points to the OSF’s own explanation of the retrospective part of the process. At the close of the school year, which is June 30, approved schools have until November to provide audited financial statements that “reflect the certified actual cost(s) per students.” N.J.A.C. 6A:23A-18.9(c).

Once the year-end audit is complete, [the] OSF reviews the financial statements provided by the [approved schools] to ensure compliance

with applicable regulations. If the [school's] financial statements are compliant [the] OSF issues . . . 'a Certified Rate Letter' identifying the CACPS [certified actual cost per student] rate for the prior year. N.J.A.C. 6A:23-18.2(k). The [school] can either bill the sending school districts for the difference between the CACPS rate and the tentative rate, or if the CACPS is lower than the tentative rate already paid, the [school] issues refunds to the sending districts. N.J.A.C. 6A:23A-18.2(a); N.J.A.C. 6A:23A-18.2(m).

[Resp. Br. at 2-4.]

This language, however, refers to N.J.A.C. 6A:23A-18.10(b), which is an appeal of the certified rate letter, which is not the subject of this particular appeal. Therefore, I **CONCLUDE** that the petition must be dismissed for failure to state a claim upon which relief may be granted, as there is no appeal of tentative rates outside of the hardship provision, the school's two May submissions do not use the word "hardship," and the submissions do not include all of the information necessary to make a hardship claim. Moreover, a hardship application was due no later than January 31, 2016, and must have included a financial report for the six months of operations ending December 31, immediately preceding the school year.

ORDER

For both of the reasons cited above—failure to comply with the ninety-day rule for appeals, and failure to state a claim upon which relief may be granted—the petition is hereby **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 18, 2017 _____

DATE



ELIA A. PELIOS, ALJ

Date Received at Agency:

Date Mailed to Parties:

nd