

THE CENTER FOR EDUCATION, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

STATE OF NEW JERSEY, : DECISION

DEPARTMENT OF EDUCATION, :

RESPONDENT. :

SYNOPSIS

Petitioner – the Center for Education (Center) – alleged that the respondent New Jersey Department of Education (NJDOE) acted in a biased and arbitrary, capricious and unreasonable manner when the Office of Special Education Programs (OSEP) denied the petitioner’s 2014 application to become an Approved Private School for Students with Disabilities (APSSD). Petitioner further contended that the NJDOE conducted an improper investigation in connection with the Center’s application for approval. Respondent asserted that the denial of the Center’s application was pursuant to regulatory requirements and proper under the circumstances. Respondent further contended that the matter became moot when the Center’s application was advanced from Phase II to Phase III in March 2015; the Center received preliminary approval in May 2015.

The ALJ found, *inter alia*, that: the matter was not moot because the issue was capable of repetition and of substantial importance to the public; and the OSEP’s investigation was a sham, and its conclusion was contrary to the facts before it. The ALJ concluded that while the NJDOE’s conduct did not demonstrate bias, NJDOE did act in an arbitrary, capricious and unreasonable manner when it improperly denied the Center’s 2014 application “based on information it knew was incorrect.” The ALJ ordered that the matter be concluded “in accordance with the findings set forth” in the Initial Decision.

Upon a comprehensive review, the Commissioner rejected the Initial Decision, finding that the matter became moot when the Center’s application was advanced in March 2015, and then granted preliminary approval in May 2015. In so deciding, the Commissioner found that the ALJ either failed to understand or disregarded the governing regulations with respect to the facts in the matter and the standard for mootness.

<p>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.</p>
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DEPARTMENT OF EDUCATION, :  
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\_\_\_\_\_ :

The record of this matter and the Initial Decision of the Office of Administrative Law (“OAL”) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C. 1:1-18.4* by the respondent, and the petitioner’s reply thereto. In this matter, petitioner alleges that the New Jersey Department of Education (“NJDOE”) acted in an arbitrary, capricious and unreasonable manner when the Office of Special Education Programs (“OSEP”) denied the Center for Education’s (“Center”) application to establish itself as an Approved Private School for Students with Disabilities (“APSSD”) on the basis that the Center did not demonstrate a need for the school.<sup>1</sup> Petitioner further contends that the NJDOE acted in a biased manner, and conducted an improper investigation in connection with the Center’s application for approval. Respondent argues that the NJDOE did not act in an arbitrary, capricious, unreasonable, or

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<sup>1</sup> For clarity and accuracy, this decision will only refer to the Center for Education as “Center,” and the Special Children’s Center will be referred to as “SCC.” A review of the record reveals that the Initial Decision and several submissions by petitioner use “Special Children’s Center” and “Center for Education” interchangeably. The Center and SCC cannot be considered the same entity with regard to the subject matter of this litigation: SCC is described as a non-profit organization located in Lakewood, New Jersey and Brooklyn, New York, providing various services to children and adults with disabilities; it is not an APSSD, nor is SCC seeking such status in this litigation. Notably, the Lakewood School District (“Lakewood” or “District”) has an ongoing relationship with SCC that is separate from the Center, which includes a services agreement entered into in August 2012, to provide services to the District’s children with special needs at SCC’s “Day Care Center.” The Center for Education, which is not the “Day Care Center” and is referred to as a *division* of SCC in various documents submitted by petitioner, is a for-profit school for young children with disabilities, and is the only entity in this litigation seeking to establish itself as an APSSD. Therefore, referring to the two entities as the same is incorrect.

biased manner because the denial of the application was pursuant to the regulatory requirements, and proper under the circumstances. Respondent further contends that the matter became moot when the Center's application was advanced to Phase III in March 2015, after the NJDOE received documentation demonstrating sufficient need, which rendered the Center eligible for APSSD status.<sup>2</sup>

The ALJ found that the matter was not moot because the issue was capable of repetition and of substantial importance to the public. The ALJ explained:

The approval given in the matter was a preliminary approval only good for two years and the petitioner will have to continue substantiating a daily enrollment of at least twenty-four students. During this process they may well be faced with again dealing with the issue of being denied continued approval based on unknown or known incorrect information relied upon by the DOE and is therefore subject to repetition. In addition, this issue is of substantial important because of the waste of judicial resources, the expense in filing and prosecuting this appeal, and the substantial expenditure of resources in defending the indefensible on the part of the DOE after it knew it had relied on incorrect information. Furthermore this matter I find to be of substantial importance also for the reason that it hopefully will affect public policy by henceforth having applications under OSEP's review be treated fairly, openly, honestly and efficiently in the application process. (Initial Decision at 5)

The ALJ further found that OSEP's "investigation was a sham, and its conclusion was contrary to the facts before it." The ALJ concluded that while the NJDOE's conduct did not demonstrate bias, the NJDOE did act in an arbitrary, capricious and unreasonable manner when it denied the Center's application. (*Id.* at 6)

Respondent takes exception to the ALJ's finding that the matter is not moot and that the NJDOE acted in an arbitrary, capricious and unreasonable manner. Respondent argues that: the ALJ erred when he determined that this matter was not moot after the Center was

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<sup>2</sup> The needs assessment survey submitted by Lakewood in March 2015, in support of the Center's application for APSSD, reflected that more than twenty-four students from the District would likely be placed at the Center.

advanced from Phase II to Phase III and received preliminary approval; the ALJ erred when he conducted a hearing in this matter and denied the NJDOE's motion to dismiss the matter as moot – filed in March 2015 – during the May 8, 2015 hearing; the ALJ erred when he found that the NJDOE acted in an arbitrary, capricious and unreasonable manner in denying the Center's application at Phase II; and the ALJ erred in entering summary decision in favor of the Center.<sup>3</sup> Respondent maintains the matter is moot because there is no existing controversy, and the issue involved is not a matter of substantial importance to the public that is capable of repetition yet evading review. Respondent further contends that the NJDOE's denial of the Center's application in Phase II was appropriate and reasonable because information provided to OSEP by way of the needs assessment survey did not satisfy the regulatory requirement of "sufficient need."<sup>4</sup> Respondent submits that OSEP's investigation of the matter and reliance on the local school district were also appropriate and reasonable.<sup>5</sup>

Petitioner has filed a reply to respondent's exceptions, arguing that the ALJ correctly determined that the matter was not moot and that OSEP's investigation was a sham. Petitioner repeats the following arguments in its submission: 1) NJDOE employees were "well aware" that there were more than twenty-four students from Lakewood who would be enrolled at the Center based on information available to the NJDOE from the Center, documents that the NJDOE had access to from other offices and employees within the Department, and informal

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<sup>3</sup> Although the Initial Decision does not explicitly dispose of the motion and cross-motion filed by the petitioner and respondent, respectively, *after* the hearing in this matter, the pleadings are referenced in the Initial Decision and it can be inferred that determination of the pending motions were incorporated into the ALJ's recommendation to the Commissioner.

<sup>4</sup> "The applicant shall . . . document the need for a minimum of 24 public school placement students in order to be approved by the Commissioner." *See N.J.A.C. 6A:23A-18.3(b)(1)*.

<sup>5</sup> *N.J.A.C. 6A:14-7.2(a)(2)* provides in relevant part: "A survey of need indicating the number, age range, types of students with disabilities to be served by the proposed programs/services and the reasons these students cannot be served in the resident district, supported by documentation from local public school districts. Documentation of local school districts surveyed shall be included."

exchanges between OSEP and other NJDOE employees. The NJDOE “chose to ignore” all the “independent” information and engaged in “deviant behaviors”; 2) OSEP conducted a “sham investigation” as it relied on information from Lakewood employees, even though OSEP employees were “warned” of a Lakewood employee’s alleged bias against the Center.<sup>6</sup> OSEP improperly interviewed the Superintendent of Schools and the Director of Special Services when it should have contacted the Center or the Lakewood employee who executed the needs assessment survey; 3) The matter is not moot because it is capable of repetition yet evading review, since the law cannot “sanction such ‘sham’ investigations of the facts,” and because in this matter the NJDOE “deviated from its normal procedures and the Code, albeit, *failing* to allow truthful and accurate correction, not to mention inquiring of individuals who had known ‘agendas’ and/or no knowledge and/or information.” (Petitioner’s Exceptions at 10-11, emphasis in original) Additionally, petitioner asserts that the NJDOE has already repeated this conduct, citing a case wherein OSEP employees “direct[ed]” Lakewood to remove students from SCC and “wreaked havoc with tons of classified public school children’s lives.”<sup>7</sup> (*Id.* at 12) Finally,

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<sup>6</sup> Petitioner inappropriately introduces a tenure matter relating to one of the Lakewood employees, interviewed by OSEP during its investigation process, to establish that the Lakewood employee was not credible and had “her own agenda towards the Application,” and that the NJDOE was aware of this “fact.” Petitioner’s assertions are unsubstantiated because there is neither any proof nor has there been a finding of “agenda” or “bias” against the Center and its application from the Lakewood employee with regard to this matter. Moreover, the Lakewood employee is not a party to this matter, and the facts in this matter are unrelated to the tenure charges.

<sup>7</sup> Petitioner, again, introduces a case where the facts and issues are unrelated and does not support its argument that the issue in this matter is capable of repetition. Petitioner refers to *J.N. and F.N. o/b/o E.N., et al., v. Lakewood Twp. Bd. of Educ.*, OAL Dkt. No. EDS 13659-14, (August 24, 2016), to suggest that the issue in that litigation – revision of children’s IEPs to change their placement from SCC to another school – is the same as the NJDOE’s initial denial of the Center’s application for failure to establish sufficient need. It is undeniable that the placement considerations raised in *J.N.*, and the parents’ objections to removal of their children from SCC had nothing to do with the Center’s application to become an APSSD. Based on the evidence in the record, it also bears noting that the Lakewood students enrolled in SCC have no effect on the Center’s student enrollment because the SCC students do not automatically transition from SCC to the Center’s program – placement is based on the students’ Individualized Education Program as determined by the Lakewood Child Study Team.

petitioner reiterates its position that this matter should be independently reviewed by another entity other than the Commissioner because the NJDOE is a party to this matter.<sup>8</sup> (*Id.* at 13)

Upon a comprehensive review of the record, the Commissioner rejects the ALJ's decision. Specifically, the Commissioner finds that the matter became moot when the Center's application was advanced from Phase II to Phase III in March 2015, and there was no remaining dispute or controversy once the Center was granted preliminary approval in May 2015. It appears that in deciding the mootness issue, the ALJ either failed to understand, or disregarded, the governing regulations with respect to the facts in this matter and the standard for mootness.

It is well-settled that a matter is moot when it no longer presents a justiciable controversy, and the determination sought, when rendered, cannot have a practical effect on the existing controversy. *See Oxfeld v. New Jersey State Board of Education*, 68 N.J. 301 (1975). Moot cases may, nevertheless, be adjudicated when the issues raised are of substantial importance to the public and are capable of repetition yet evade review. *See In re J.I.S. Industrial Service Co. Landfill*, 110 N.J. 101 (1988). The ALJ found that the issue at hand is capable of repetition because the Center's approval was "a preliminary approval only good for two years and petitioner will have to continue to substantiate a daily enrollment of at least twenty-four students."<sup>9</sup> Essentially, the ALJ suggests that the issue at hand – NJDOE's denial of preliminary approval – is capable of repetition two years from now because the Center (just like

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<sup>8</sup> N.J.S.A. 18A:9-1 provides in relevant part, "[t]he commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the State board or of the commissioner." The State Legislature has provided the Commissioner with jurisdiction to hear and determine *all* controversies and disputes relating to the school laws of the State except in limited circumstances. The subject matter of this litigation does not fall within one of the narrow exceptions enumerated in the statute. Additionally, the Legislature has not made an exception for situations where the NJDOE is a party to the case.

<sup>9</sup> N.J.A.C. 6A:23A-18.3(c)(1)-(i) provides: The school shall receive preliminary approval to operate for a two year period, after which the school shall provide documentation that the school has a minimum ADE of 24 public school placement students by the end of the second school year . . . . A school meeting the minimum ADE of 24 public school placement students by the end of the second school year shall receive new school approval.

all other preliminarily approved schools in its position) has to provide evidence of compliance with the regulatory requirements in order to attain approval as a “new school” and maintain its APSSD status.

First, the preliminary approval stage and the new school approval stage are two separate phases of the approval process. Preliminary approval requires corroboration from the local school district: a needs assessment survey is to be conducted at the local school district level to substantiate “sufficient need.” Once the applicant has received preliminary approval, the local school district is no longer involved.<sup>10</sup> Second, at the end of the two years, the applicant school needs to meet the minimum *average daily enrollment* (ADE) of twenty-four public school placement students so that it may receive approval as a “new school.”<sup>11</sup> In other words, the Center (just like other APSSDs in its position) needs to satisfy the minimal requirements of the regulation and the onus remains exclusively on the Center to provide proper information and data *from its records* to the NJ DOE to prove that it continues to qualify as an APSSD. Additionally, if a dispute arises regarding the Center’s approval, there is a mechanism through which the Center may appeal the determination. As such, the issue raised in this litigation relating to the NJDOE’s denial of the Center’s preliminary approval is not capable of repetition yet evading review.

Similarly, this matter does not meet the criteria of substantial importance to the public. The ALJ’s finding – that the issue is of substantial importance because of “the waste of

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<sup>10</sup> This should also resolve the ALJ’s concern that “[d]uring this process they [the Center] may well be faced with again dealing with the issue of being denied continued approval based on *unknown or known incorrect information* relied upon by the DOE. . . .” (emphasis added), because any information provided to the NJDOE would be coming directly from the Center.

<sup>11</sup> *N.J.A.C. 6A:23A-18.1* defines “average daily enrollment” as follows: the sum of the days present and absent of *all school students enrolled in the register(s) of the school* divided by the number of days the approved private school for students with disabilities was actually in session for the entire school year rounded to the nearest four decimal places, except in no event shall the divisor be less than 180 days (emphasis added).

judicial resources, the expense in filing and prosecuting this appeal, and the substantial expenditure of resources in defending the indefensible on the part of the DOE. . . .”, and because it “hopefully will affect public policy by henceforth having applicants under OSEP’s review be treated fairly, openly, honestly and efficiently in the application process” – is unsubstantiated and unpersuasive. Matters of substantial importance are issues that relate to the welfare of the general public or issues that could arise in the public context where the general public may be a collective stakeholder. An individual’s or entity’s personal interests cannot be substituted for matters that are of substantial importance to the public. Furthermore, the “waste of judicial resources” and “substantial expenditure of resources” were certainly not a result of the nature of this issue (denial of preliminary approval pursuant to State regulations); thus, such bases cannot be utilized to justify a finding of “substantial importance.”<sup>12</sup> The Commissioner, therefore, finds that this matter became moot in March 2015, when the Center received preliminary approval from the NJDOE, and no justiciable controversy exists that is of substantial importance and capable of repetition yet evading review.

The Commissioner also finds that the ALJ’s determination that the NJDOE acted in an arbitrary, capricious and unreasonable manner when OSEP conducted an investigation and denied the Center’s application, was incorrect. Specifically, the Commissioner finds that the ALJ inappropriately applied the requirements of the governing regulations when he determined that the NJDOE’s actions were arbitrary, capricious and unreasonable. The ALJ’s finding that the NJDOE was arbitrary, capricious and unreasonable does not require significant discussion, as the matter has been rendered moot. Notwithstanding, the Commissioner has considered the

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<sup>12</sup> The ALJ’s decision to proceed to hearing when the matter was moot – despite having the opportunity to dispose of the case prior to the hearing – was improper, extraneous, and the true waste of judicial resources. There is also no evidence in the record that either the Center or any other applicant has been treated unfairly, dishonestly or inefficiently by the NJDOE with regard to the approval process.

merits and finds that OSEP followed the mandate of the regulation when it denied the Center's application for failure to demonstrate "sufficient need."<sup>13</sup> Once documentation was submitted establishing sufficient need, OSEP approved the application within the regulatory timeframe.<sup>14</sup> Since OSEP's investigative efforts in this matter exceeded the scope of the governing regulations, the Commissioner will not address the merits of the investigation in detail either. The Commissioner finds, however, that OSEP appropriately relied on representations made by Lakewood and information provided by its employees because "sufficient need" *must* be supported by documentation from the local school district, not the applicant or any other independent source. *See N.J.A.C. 6A:14-7.2; N.J.A.C. 6A:23A-18.3.* Seeking alternative confirmation of "sufficient need" – as petitioner and the ALJ have proposed – when the regulations are unambiguous, would constitute a deviation from the regulations. In this regard, OSEP undertook an unnecessary yet considerate project when it conducted its investigation, as the plain language of the regulations *do not* require such efforts. OSEP could have simply denied the application without engaging in an investigation, solely based on the contents of the needs assessment survey, because it did not reflect sufficient need as defined under *N.J.A.C. 6A:23A-18.3.* Instead of denying the application outright, OSEP appears to have provided the Center a second chance by investigating the matter and seeking to reconcile any discrepancy between the Center's representations in its application and the information on Lakewood's needs assessment survey in support of the Center's application.

The regulations are clear: it is the applicant's responsibility to ensure submission of all required information pursuant to the provisions of *N.J.A.C. 6A:14-7.2* and

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<sup>13</sup> The needs assessment survey submitted by Lakewood listed *less* than twenty-four students, which is the minimum requirement. *See N.J.A.C. 6A:23A-18.3(b)(1).*

<sup>14</sup> *See N.J.A.C. 6A:14-7.2(a)(2).*

*N.J.A.C. 6A:23A-18.3*; the applicant must provide evidence of sufficient need (corroboration from the local school district); if the applicant follows the procedures and meets the requirements, it advances through the application process; if the applicant does not ensure provision of proper evidence and information, the applicant does not obtain approval. Following the regulations and acting in accordance with its provisions is the antithesis of arbitrary, capricious and unreasonable. Remarkably, the suggestions made by the ALJ in the Initial Decision and by the petitioner in its exceptions would result in OSEP circumventing the regulatory process, which could be deemed arbitrary, capricious and unreasonable.<sup>15</sup> Accordingly, the recommended decision of the ALJ is rejected, and the petition is hereby dismissed as moot.

IT IS SO ORDERED.<sup>16</sup>

ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 3, 2017

Date of Mailing: April 3, 2017

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<sup>15</sup> The ALJ and petitioner have suggested that in reviewing the Center's application, OSEP should have: looked to other sources not outlined in the regulations; relied on informal information shared and discussed among colleagues; made inappropriate inferences regarding the sources of information and parties involved in the process; determined the credibility of information received based on tenuous allegation, and engaged in activities not required by the regulation.

<sup>16</sup> Pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*, Commissioner decisions are appealable to the Superior Court, Appellate Division.



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. EDU 14525-14

AGENCY DKT. NO. 280-9/14

**THE CENTER FOR EDUCATION,**

Petitioner,

v.

**STATE OF NEW JERSEY,**

**DEPARTMENT OF EDUCATION,**

Respondent.

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**Michael I. Inzelbuch**, Esq., for petitioner

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

**Eric L. Harrison**, Esq., and **Steven K. Parness**, Esq., for intervenor (Methfessel & Werbel, attorneys)

Record Closed: October 11, 2016

Decided: November 17, 2016

BEFORE **JOHN SCHUSTER III**, ALJ:

In this matter petitioner, the Center for Education t/a Special Children's Center (SCC), brings a Notice of Motion, filed September 20, 2016 requesting the relief by way of a finding that respondent, State of New Jersey, Department of Education (DOE) acted in a biased and arbitrary manner in not granting petitioner's 2014 application to become an approved private school for students with disabilities. DOE filed a Cross Motion on October 11, 2016 seeking an order dismissing the petition as moot or in the alternative moving for summary decision as no material facts are in dispute.

### **FINDINGS OF FACT AND PROCEDURAL HISTORY**

The DOE is authorized to approve institutions of learning to provide programs for students with disabilities upon proof that certain criteria are met. N.J.A.C. 6A:14-7.1 et als. Among the criteria is the demonstration of need from local public school districts. Need is met upon a showing that a minimum of twenty-one public school students attend the school. N.J.A.C. 6A:23A-18.3. Petitioner filed an application seeking approval in April 2014. Phase I of the application process was met by May 6, 2014 leaving only a sufficient determination of need. On or about June 30, 2014 the Lakewood School District submitted Attachment C, Local School Districts' Assessment Survey Response Form (P-1) to the DOE as part of petitioner's application process. The document was signed by Laura Winters, the Superintendent of Schools and Eli Freund, the District's Supervisor of Child Study Teams and listed by initials twenty-one students who were currently at petitioner's facility and would continue in the 2014-2015 school year. This contradicted petitioner's application which informed DOE "The Special Children's Center Preschool (Center) currently educates thirty-eight preschool children with disabilities from the Lakewood Public Schools (Lakewood)." Presumably to resolve this disparity the DOE Commissioner's Office dispatched John Worthington, the Manager of Policy and Planning, to investigate this issue.

Instead of checking with the DOE's county office which is supposed to have a record of all out-of-district placements, a meeting was arranged with the Lakewood District. Mr. Worthington directed Dr. Dolores Walther, the Acting Coordinator of Dispute Resolutions and Coordinator of Complaint Investigations, to accompany him to

that meeting. Her purpose was to listen, take notes, and ask follow-up questions if relevant. Lakewood District was represented at that meeting by Superintendent of Schools, Laura Winters and Helen Tobia, the Director of Special Services. Ms. Winters signed the assessment along with Eli Freund, the Supervisor of Child Study Teams. Ms. Tobia was not a signatory. Mr. Worthington asked at that meeting if any names were missing or were the twenty-one individuals listed accurate, and whether there was any reason to reconsider the document. Ms. Winters stated she did not prepare the list of twenty-one students on attachment C (P-1) as that was done by the District's attorney Mr. Zitomer and given to her for signature. She stated she did not know anything about the particular students at petitioner's facility and signed it assuming its accuracy. Ms. Tobia however believed that the twenty-one students were an inaccurate number as five or six of them were no longer attending the Special Children's Center. That brought the number from twenty-one down to fifteen or sixteen students. Either Mr. Worthington or Dr. Walther asked to see the IEPs for the children at SCC but only ten IEPs could be produced. The IEPs revealed that some of the students were in an inclusion class with supports or in a preschool disabled class. As a result of that meeting the discrepancy of what the District reported as opposed to what the petitioner reported increased instead of what was expected that being that additional students at SCC would be identified. Mr. Worthington's investigation seemed to end at that point. A reasonable effort could have been made to contact Mr. Freund who signed the document and inquire as to him how many students he could verify were at SCC and were going to continue in the 2014–2015 school year or SCC could have been contacted directly and/or visited to physically see the students in attendance and/or review their records to determine the accuracy of the thirty-eight or thirty-nine students that they claimed to be in attendance. This did not happen. And one must question the gross inefficiency in which this investigation took place. In addition, in the early part of August 2014 Dr. Walther informed Mr. Worthington that she was aware at that time that there were at least thirty-one preschool disabled students attending SCC. Mr. Worthington acknowledged receiving that information. In spite of the DOE having that information a denial letter was sent to SCC on August 25, 2014 by Susan Martz the Assistant Commissioner denying the 2014 application for approval based on the needs assessment surveys submitted to OSEP did not reflect the minimum of twenty-four

potential student placements at SCC. DOE has not explained why they did not review their own county office's records, did not question Mr. Freund, did not physically count the number of children from Lakewood at SCC or did not examine the student records and IEP's in SCC's files as the later would have given Mr. Worthington an accurate number upon which the DOE could make a supportable determination of need. While one could argue an incomplete investigation is simply inefficient and/or negligent work one must conclude capriciousness in the denial of August 25, 2014 when the DOE knew directly from Dr. Walther that there were at least thirty-one students attending the Special Children's Center.

As a result of that denial a petition was filed by SCC on September 24, 2014 seeking further review of the needs assessment, to complete the review of SCC's application based on the needs assessment review and for a finding that DOE acted in a biased and arbitrary fashion. The answer was filed by DOE on November 4, 2014. The Lakewood BOE was permitted to intervene on February 10, 2015. In furtherance of a motion, on or about February 9, 2015, Mr. Eli Freund submitted an affidavit as the Supervisor of Special Services for the Lakewood Board of Education indicating that SCC educates thirty-eight Lakewood students, thirty-four of which are preschool disabled. In spite of now learning from the signatory on the original needs assessment that there were thirty-four preschool disabled students at SCC the litigation continued and testimony of Dr. Walther and Mr. Worthington was taken on May 5, 2015. The litigation terminated on May 28, 2015 when DOE advised petitioner that they were preliminarily approved for the 2015–2016 and 2016–2017 school years for four classes for preschool disabled students and one class for multiply disabled students. That notice also provided that this preliminary approval could be revoked if SCC did not provide documentation of a minimum average daily enrollment of twenty-four public school students.

Ms. Walter testified during the hearing of May 8, 2015 that all the children on P-1 were confirmed to have IEPs at SCC in the preschool disabled self-contained program in the 2014–2015 school year. She was also shown during that hearing eighteen

additional IEPs for children at SCC which brought the number at that time to thirty-nine students attending the preschool disabled program.

### **LEGAL ARGUMENT**

Respondent argues that because preliminary approval to operate was granted to petitioner effective July 1, 2015 this matter should be dismissed as moot. "An action is considered moot when it no longer presents a justiciable controversy because the issues involved have become academic. A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." Victoria v. Board of Educ. of Woodbridge, 1982 S.L.D. 1, 5. However courts will hear moot cases nevertheless when the issues they raise are of substantial importance and are capable of repetition yet evade review. In re J.I.S. Indus. Serv. Co. Landfill, 110 N.J. 101 (1988); See also Handabaka v. Div. of Consumer Affairs, 167 N.J. Super. 12, 14 (App. Div. 1979). In this matter SCC's license to operate is always subject to the scrutiny of the DOE. The approval given in this matter was a preliminary approval only good for two years and the petitioner will have to continue substantiating a daily enrollment of at least twenty-four students. During this process they may well be faced with again dealing with the issue of being denied continued approval based on unknown or known incorrect information relied upon by the DOE and is therefore subject to repetition. In addition this issue is of substantial importance because of the waste of judicial resources, the expense in filing and prosecuting this appeal, and the substantial expenditure of resources in defending the indefensible on the part of the DOE after it knew it had relied on incorrect information. Furthermore this matter I find to be of substantial importance also for the reason that it hopefully will affect public policy by henceforth having applicants under OSEP's review be treated fairly, openly, honestly and efficiently in the application process. For those reasons I **CONCLUDE** that this matter is not moot but the issues raised are of substantial importance and are capable of repetition.

As to petitioner's demand for a finding that DOE operated in a biased and arbitrary fashion I do not find that any bias has been demonstrated on the part of

respondent. I cannot find however that it did not act arbitrarily, capriciously, or unreasonably. In fact I find it operated in all three of those manners. Its investigation was a sham, and its conclusion was contrary to the facts before it. While I cannot find any fault with Assistant Commissioner Martz because there have been no facts submitted that she was aware of the knowledge and actions of Mr. Worthington, that does not excuse the conduct of the DOE.

### **CONCLUSION**

For the reasons set forth above I **CONCLUDE** that the DOE acted in an arbitrary fashion when it incorrectly decided the issue of Phase II based on information it knew was incorrect. And I hereby **ORDER** that this matter be concluded in accordance with the findings set forth herein.

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.

November 17, 2016

DATE



JOHN SCHUSTER III, ALJ

Date Received at Agency:

November 17, 2016

Date Mailed to Parties:

November 17, 2016

/cb

**APPENDIX**

**WITNESSES**

**For petitioner:**

Dolores Walther  
John Worthington

**For respondent:**

None

**For intervenor:**

None

**EXHIBITS**

**For petitioner:**

P-1 Attachment C, dated June 30, 2014  
P-2 Attachment C, dated March 13, 2015  
P-3 Letter from Chaya Bender to Dr. Walther

**For respondent:**

None

**For intervenor:**

None