

BOARD OF EDUCATION OF THE	:	
BOROUGH OF HIGHLANDS,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF MIDDLETOWN,	:	
MONMOUTH COUNTY AND THE STATE	:	
OF NEW JERSEY, DEPARTMENT OF	:	
EDUCATION, DIVISION OF FINANCE,	:	
	:	
RESPONDENTS.	:	
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SYNOPSIS

Petitioning Highlands Board challenged the Department of Education’s determination that the Board had the financial responsibility for the education, including special education services, during the 1997-98 school year, for M.M.C., a school-aged child classified for special education. The Department claimed that, by operation of law, the Board must be considered M.M.C.’s district of residence because M.M.C. lived with C.S., his mother, prior to placement and because C.S. resided in the Board’s district. *N.J.S.A. 18A:7B-12(b)*. The Board contended that given M.M.C.’s scrambled residential history (foster homes and institutions outside of the district served by the Board) and the absence of any real connection between the Board and M.M.C.’s education, the State must assume responsibility. *N.J.S.A. 18A:7B-12(d)* and *12(e)*. Moreover, the Board argued that because DYFS failed to comply with *6:28-7.4(b)(5)*, it should not be held responsible for M.M.C.’s tuition. (*Prospect Park*) The parties cross-moved for summary decision.

The ALJ found that the district of residence for M.M.C. pursuant to *N.J.S.A. 18A:7B-12b* was the Highlands. Citing *Riggs* (“time-of-decision” rule), the ALJ determined that the failure of DYFS to comply with the repealed *N.J.A.C. 6:28-7.4(b)(5)* did not negate the Board’s responsibility for M.M.C.’s 1997-98 school year education costs. The ALJ ordered the Highlands Board to pay M.M.C.’s 1997-98 school year education.

The Commissioner agreed with and adopted as his own the findings and conclusions of the ALJ that, pursuant to *N.J.S.A. 18A:7B-12(b)*, the Board was properly assigned by the Department as the district of residence for M.M.C. for the 1997-98 school year. That aspect of the petition was dismissed. The Commissioner, however, found that the parties did not present any legal arguments or engage in any legal analysis whatsoever relative to whether the general prospectivity rule or the “time-of-decision” doctrine should be applied, given the repeal of *N.J.A.C. 6:28-7.4(b)(5)* in July 1998, after the 1997-98 school year concluded. Consequently, the Commissioner remanded this matter to the OAL so that the parties have an opportunity to present legal arguments with respect to the impact of the repeal on the Board’s financial responsibility and the ALJ may have full opportunity to consider in the first instance the legal arguments of the parties as to the applicability to the regulation in dispute of the “time-of-decision” doctrine and the prospectivity rule, in light of the facts of this matter and the Commissioner’s decision in *Prospect Park*.

OAL DKT. NO. EDU 425-99  
AGENCY DKT. NO. 347-11/98

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The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Petitioner’s exceptions and Respondent State of New Jersey, Department of Education’s (Department) reply were timely filed pursuant to *N.J.A.C.* 1:1-18.4. No exceptions were filed by Respondent Middletown Township Board of Education.

Highlands Board of Education (Board) vigorously excepts to the Administrative Law Judge’s (ALJ) conclusion that it may not be relieved from financial responsibility for the costs of M.M.C.’s education for the 1997-1998 school year because *N.J.A.C.* 6:28-7.4(b)5ii, the regulation under dispute herein, was repealed in July 1998. The Board argues, *inter alia*, that the ALJ erroneously applied the doctrine of “time-of-decision” articulated in *Riggs v. Long Beach Tp.*, 101 *N.J.* 515 (1986), when concluding that the regulations that govern in this matter are those in effect at the time of trial, *N.J.A.C.* 6A:14-1.1 *et seq.*, not those in effect at the time the Department made the determination that the Board was financially responsible for M.M.C.’s

education, *i.e.*, *N.J.A.C. 6:28-1.1 et seq.* Petitioner's exceptions set forth at length the Board's legal position on the applicability of the general prospectivity rule to the instant matter as opposed to the "time-of-decision" doctrine. These arguments are briefly summarized below.

The Board urges the general rule is that regulations are to be applied prospectively only. *Seashore Ambulatory Surgery Center, Inc. v. N.J. Department of Health*, 288 *N.J. Super.* 87, 97 (App. Div. 1996); *Mitchell v. Cavicchia*, 29 *N.J. Super.* 11, 15 (App. Div. 1953). It further argues that legislation may be applied retroactively only if there is an expression of intent to retroactively apply, when reasonable expectations of those affected by regulation warrant retroactive application, or if the regulation is ameliorative or curative in nature. *Seashore, supra*, at 97. As to this, the Board states:

None of these criteria apply. There is no expression by the Department of any explicit or implicit intention to apply these regulations retroactively. The reasonable expectations of school districts clearly do not point to retroactive application. The change in the special education regulations was not to correct some defect in the original regulations but to "improve special education programs by assuring a balance of flexibility and safeguards...and to comply with the Individuals with Disabilities Education Act., 20 U.S.C. §§ 1400, et seq.\*\*\*" If the special education regulations were to be applied retroactively, school districts would be subject to countless violations of special education requirements, merely because the requirements changed. Surely, that is not what the Department intended. (Board's Exceptions at pp. 2-3)

Moreover, the Board contends that regulations may not be applied retroactively if to do so will result in manifest injustice to the party affected, *Seashore, supra*, at 98, which it believes would occur in the instant matter if it is required to pay for DYFS's unilateral placement of M.M.C. It urges, *inter alia*, manifest injustice is especially true in this matter because Highlands was entirely innocent in its actions and the ALJ's ruling means that without input by Highlands, the Highlands taxpayers must pay for M.M.C.'s education. The Board, therefore,

avers that the Commissioner should not reward DYFS's failure to follow the law. Of this, it states:

The time-of-decision rule is often applied to promote public policy as embodied by the actions of the Legislature. However, condoning a failure to follow applicable regulations contravenes public policy and places financial burden on a small group of local taxpayers whose board of education was deprived of the right to make educational decisions. Thus, applying the time-of-decision rule in this case would not promote public policy. (Board's Exceptions at p. 4)

In addition to its strong objections to the ALJ's application of the "time-of-decision" doctrine in this matter instead of the general prospectivity rule, the Board also objects to the ALJ's conclusion that it is financially responsible for M.M.C.'s education based upon *N.J.S.A. 18A:7B-12(b)*, urging that the ALJ reliance upon that statutory provision is misplaced. As to this, the Board avers that the ALJ essentially ignored the uncontroverted fact that M.C. has not resided with his parent since approximately 1990. As such, placement pursuant to that regulation does not conclusively point to the Board. The Board, therefore, contends that the State must assume financial responsibility for M.M.C.'s education, not the Highlands Board of Education.

The Department urges affirmance of the ALJ's recommended decision, maintaining that the ALJ properly applied the "time-of-decision" rule in assigning financial responsibility to the Board. As to this, the Department emphasizes that the change in the law that occurred in the instant matter involves repeal of an existing regulation and not the enactment of a new one. The Department also contends that it is well-established that the same rules which govern the construction and application of statutes and municipal ordinance also govern the

construction and application of administrative regulations. In summarizing its legal position, the Department states:

the ALJ's application of the "time-of-decision" rule was correct because the repeal of *N.J.A.C. 6:28-7.4(b)5ii* effectively extinguished any cause of action which might have arisen under it. Further, under a traditional retroactive application analysis, it is clear that the repeal of *N.J.A.C. 6:28-7.4(b)5ii* was intended to be retroactive, as it was curative and not contrary to the reasonable expectations of the parties. Moreover, retroactive application of the regulation does not infringe upon a vested interest of the petitioner and does not result in manifest injustice. (Department's Reply Exceptions at p. 11)

The Department also urges affirmance of the ALJ's determination that it properly applied *N.J.S.A. 18A:7B-12(b)* when assigning the Board financial responsibility for M.M.C.'s education for the 1997-1998 school year. The Department avers that the Board would read into the statute a requirement that a child must have resided with his parents *immediately prior* to his most recent placement, or the State assume financial responsibility, an interpretation which the Department contends has never been previously made and for which the Board provides no authority. The Department further contends that the precise wording of the statute dictates that the time M.M.C. resided in foster placement is not counted; hence, the mother's residence is determinative of his district of residence.

Upon a thorough and comprehensive review of the record in this matter, the Commissioner agrees with and adopts as his own the findings and conclusions of the ALJ that, pursuant to the statutory provisions of *N.J.S.A. 18A:7B-12(b)*, the Board was properly assigned by the Department to be the district of residence for M.M.C. for the 1997-1998 school year for the reasons well-expressed by the ALJ in the Initial Decision.

However, the Commissioner also finds upon his independent review of the record that during the period this matter was under consideration by the ALJ, the parties did not present

any legal arguments or engage in any legal analysis whatsoever relative to what has emerged as the second major issue in this matter, namely, whether the general prospectivity rule or the “time-of-decision” doctrine should be applied, given the repeal of *N.J.A.C. 6:28-7.4(b)5ii* in July 1998, after the 1997-1998 school year concluded. Given the determination herein that the Highlands Board was properly assigned as M.M.C.’s district of residence for the 1997-1998 school year, this issue takes on prominence in the present matter in light of the Commissioner’s decision in *Prospect Park, supra*. Therein, the Commissioner waived Prospect Park Board of Education’s financial responsibility for the education of a student assigned to it under the provisions of *N.J.S.A. 18A:7B-12(b)* because DYFS had failed to comply with the requirement set forth in *N.J.A.C. 6:28-7.4(b)5ii*, that it meet with the district of residence prior to placing a student in a residential facility. Careful scrutiny of the record reveals that the ALJ did not have the benefit of the extensive briefing and legal arguments of the parties contained in the exceptions and reply exceptions prior to the issuance of the Initial Decision wherein he determined that the “time-of-decision” doctrine as articulated in *Riggs, supra*, should apply in the present matter.

Consequently, the Commissioner concludes that the matter must be remanded to the OAL so that the parties will have an opportunity to present, and the ALJ will have the opportunity to consider in the first instance, legal arguments with respect to the impact of the July 1998 repeal of *N.J.A.C. 6:28-7.4(b)5ii* on the Board’s financial responsibility for the 1997-1998 school year, which were set forth for the first time in the exceptions, and for consideration of such other submissions relative to this issue as the ALJ may deem fit.

Accordingly, that aspect of the Board’s petition which appealed the action of the Department designating it, pursuant to *N.J.S.A. 18A:7B-12(b)*, as the district of residence for

student M.M.C. is hereby **Dismissed**. However, the question of whether the Board remains responsible for the costs of M.C.C.'s education is remanded to the OAL in order that the ALJ may have full opportunity to consider the legal arguments of the parties as to the applicability to the regulations in dispute of the "time-of-decision" doctrine and the prospectivity rule in light of the facts of this matter and the Commissioner's decision in *Prospect Park, supra*. \*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 23, 1999

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\* This decision, as the Commissioner's determination in the instant matter, 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. 6:2-1.1 et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.