

SB # 82-95

IN THE MATTER OF THE APPLICATION :  
TO ESTABLISH A NORTH JERSEY :  
JOINTURE COMMISSION BY THE :  
SCHOOL DISTRICTS OF BOGOTA, STATE BOARD OF EDUCATION :  
CLIFFSIDE PARK, EDGEWATER, :  
ENGLEWOOD CLIFFS, FAIRVIEW, DECISION :  
LITTLE FERRY, PALISADES PARK AND :  
RIDGEFIELD PARK, BERGEN COUNTY. :  
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Decided by the Commissioner of Education, May 19, 1995

Decision by the State Board of Education, February 7, 1996

Decision on remand by the Commissioner of Education, May 21, 1996

Decision on motion by the State Board of Education, August 7, 1996

For the Petitioners-Appellants, Martin R. Pachman, P.C. (Robin T. McMahon, Esq., of Counsel)

For the Respondent-Respondent, Arlene G. Lutz, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

This matter is before us for consideration of the substance of an appeal by eight school districts (hereinafter "petitioning districts") from a determination of the Commissioner of Education to reject their application to establish a jointure commission pursuant to N.J.S.A. 18A:46-24 through N.J.S.A. 18A:46-27.

The petitioning districts filed their application with the Bergen County Superintendent on November 7, 1994. They had been obtaining services through an informal consortium of school districts, but, as stated in their application, were led to seek the creation of a formal consortium because of the demand for more efficient services and greater responsiveness.

By letter of May 19, 1995, the Commissioner informed the petitioning districts that he supported their intent to provide consolidation of services in the area of special education in order to provide more effective and efficient programs. However, as expressed in his letter, the Commissioner found that:

I cannot approve the request to establish another governance structure in order to bring about the establishment of effective and cost-efficient programs. This decision is based upon the existence of the South Bergen Jointure Commission, which I believe can be expanded without adding an additional governance structure and duplicating central office administrative positions....

I trust you fully understand why the request to form the North Jersey Jointure Commission cannot be approved until these other options are explored fully.

In his letter, the Commissioner also advised the districts that he was requesting the coordinating county superintendent and the county superintendent to meet with their representatives and representatives of the South Bergen Jointure Commission to determine if an expansion of that jointure commission would be advisable. The Commissioner's final determination was embodied in a letter on July 6, 1995, from Assistant Commissioner Peter B. Contini stating that "the decision made by Commissioner Klagholz in his letter of May 19, 1995, regarding the establishment of the North Jersey Jointure Commission, has not changed."

All eight districts appealed the Commissioner's determination, requesting that the State Board set aside the Commissioner's decision and approve the formation of the North Jersey Jointure Commission.

As set forth in our decision of February 7, 1996, when we initially reviewed the appeal, we found that the Assistant Commissioner's letter of July 6, 1995 did not

express a rationale for the Commissioner's determination. We, however, concluded that the Commissioner's letter of May 19, 1995 indicated that his denial of the application was grounded in the feasibility of expanding the South Bergen Jointure Commission to include the petitioning districts. In that the Commissioner had not provided us with any documentation relating to the efforts of the county superintendent and the coordinating county superintendent to explore expansion of the South Bergen Jointure Commission or any conclusions they may have reached, we were unable to evaluate the substance of the appeal. Therefore, although we retained jurisdiction, we remanded the matter to the Commissioner so that he could provide us with the basis for his final determination and the record upon which it had been based.

The Commissioner responded to our remand with a memorandum transmitted to the State Board on May 21, 1996. In that memorandum, the Commissioner stated that his determination to deny the application to form a new jointure commission was based entirely on the application submitted to him and rested solely on his conclusion that he could not approve the establishment of another governance structure.

In the interim, the petitioning districts filed a motion with the State Board to compel the Commissioner to comply with the terms of our remand. In deciding that motion, we found that the Commissioner's memorandum of May 21, 1996 settled that his determination to deny the application by the petitioning districts to form a jointure commission had been based solely on the application which they had submitted and that his decision was based on the belief that it was not necessary to create another governance structure in order for them to achieve their goal. That being the case, we denied the motion and directed briefing on the merits of the appeal.

The petitioning districts argue that the Commissioner's decision to deny their application is arbitrary given the facts set forth in the application. They contend that these facts show that it would be more efficient and economical to provide special education and related services through the proposed jointure commission. They further argue that enactment of N.J.S.A. 18A:7E-7 through -9 has increased the need for such a commission because penalties may be imposed on them for administrative costs if they continue their informal arrangement. They maintain that their proposal to establish a jointure commission satisfies the requirements of Chapter 46 of Title 18A and that the statutory scheme therefore requires the Commissioner to approve the proposal.

The petitioning districts also maintain that the Commissioner's belief that governance structures currently exist to enable the petitioning districts to comply with Chapter 46 is implicit in his decision. They claim that the Commissioner therefore abused his discretion in failing to approve their application after Department of Education officials had determined that expansion of the South Bergen Jointure Commission was not feasible.

In addition, the petitioning districts filed a motion to supplement the record with three documents prepared by Dr. Anthony Scalzo, the former Bergen County Superintendent, and Dr. Sharon Clover, the Coordinating County Superintendent. The petitioning districts argue that these documents confirm that Dr. Scalzo and Dr. Clover had recommended that the Commissioner approve their application to form a jointure commission and that under the relevant case law, consideration of such documents is required.

In response, the Commissioner urges that these documents are not relevant to the issues before the State Board. However, he does not oppose the motion. Nor does he dispute that there is a great need throughout the state for the consolidation of services. Rather, the Commissioner maintains that given the extraordinarily high number of school governance structures already in existence in New Jersey, he could not approve the establishment of a new structure with its attendant administrative costs. The Commissioner supports this view by pointing to the fact that the districts' proposal indicates their intention to hire a superintendent and board secretary.

Initially, we grant the motion to supplement the record in this matter with the documents prepared by Dr. Scalzo and Dr. Clover. As set forth in their motion, those documents include: 1) A memo to Dr. Peter Contini from Dr. Sharon Clover of January 17, 1995, 2) A fax message to Dr. Peter Contini from Dr. Sharon Clover of June 1, 1995, and 3) A letter to Dr. Sharon Clover from Dr. Anthony Scalzo of June 1, 1995.

However, after carefully reviewing all of the materials that have been submitted in the course these proceedings, we conclude that we must once again remand this matter to the Commissioner.

N.J.S.A. 18A:46-14 mandates that programs required by N.J.S.A. 18A:46-1 et seq. (Classes and Facilities for Handicapped Children) must be provided through one of the mechanisms listed in that statute. One such mechanism is a jointure commission program. N.J.S.A. 18A:46-25, in turn, provides that:

When two or more boards of education determine to carry out jointly by agreement the duties imposed upon them in regard to the education and training of handicapped pupils the said boards may, in accordance with the rules and regulations of the state board, and with the approval of the commissioner by the adoption of similar resolution establish

a jointure commission for the purpose of providing such services.

Our rules relating to the provision of special education programs are codified at N.J.A.C. 6:28-1.1 et seq. While the provisions of that chapter do not specify criteria for approval of the establishment of a jointure commission, N.J.A.C. 6:28-7.1 and -7.2 delineate requirements for programs provided by such entities and specify the approval procedures required for establishing such programs. The purpose of these regulatory provisions is to ensure that all pupils with educational disabilities have an appropriate free public education available to them in accordance with the standards of the Individuals with Disabilities Education Act, 20 U.S.C. 1400 et seq., as well as to ensure the evaluation of the effectiveness of the education of these pupils and to assist public and private agencies providing educational services to the pupils. N.J.A.C. 6:28-1.1.

Viewed from this perspective, the Commissioner's conclusory determinations fail to reflect that he properly considered the application of the petitioning districts to provide special education programs and services through a jointure commission. Rather, the Commissioner's determinations convey only that he does not favor the creation of "an additional governance structure" with the "attendant administrative costs." Nowhere does the Commissioner make a factually-supported, reasoned statement reflecting consideration of the districts' current obligations to provide special education services and the costs attending those obligations.

Nor may the Commissioner disregard the recommendations made by his staff during the application process. Those recommendations were prepared at his direction. His failure to consider them highlights how critical it is that the Commissioner provide some explanation of the reasoning by which he reached his conclusion to deny

the application and the factual basis for such conclusion. In re Valley Hospital, 240 N.J. Super. 301 (App. Div. 1990), certif. denied, 126 N.J. 318 (1991).

In sum, we remand this matter for reconsideration by the Commissioner. Such reconsideration should include all relevant information, including the recommendations of the County Superintendent and Coordinating County Superintendent.<sup>1</sup> The Commissioner should then reconsider this matter in the context of our agency's policy favoring the regionalization of educational programs and services as it applies to the districts involved and to the various options available to accomplish their objectives. Finally, the Commissioner's final determination should provide the assurance that our State will continue to fulfill its obligations with respect to the provision of an appropriate free public education to the disabled students in the petitioning districts. Upon receipt of the Commissioner's findings and conclusions, we will determine whether any further proceedings are necessary. We retain jurisdiction.

February 5, 1997

Date of mailing \_\_\_\_\_

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<sup>1</sup> We note that in their supplemental certification in support of their motion to supplement the record, the petitioning districts requested inclusion of an affidavit executed by Dr. Peter Contini and production of a memorandum prepared by Dr. Contini. In that these requests were outside the scope of the motion before us, we did not consider them.

Additionally, by letter of February 3, 1997, counsel for the petitioning districts advised us that the petitioning districts obtained an order from Superior Court on January 30 directing the Commissioner to release Dr. Contini's memorandum by February 18, 1997. This does not, however, alter the scope of the motion which is before us. Furthermore, in view of our determination today, as well as the Superior Court's decision, it is more appropriate at this point that the Commissioner consider such requests.