

EDU # 47-03
C #219-04
SB # 30-04

BOARD OF EDUCATION OF THE :
TOWNSHIP OF EAST BRUNSWICK, :
MIDDLESEX COUNTY, :
PETITIONER-APPELLANT, : STATE BOARD OF EDUCATION
V. : DECISION
NEW JERSEY STATE DEPARTMENT OF :
EDUCATION, COMMISSIONER OF :
EDUCATION, :
RESPONDENTS-RESPONDENTS. :

Decided by the Commissioner of Education, May 21, 2004

Decision on motion by the State Board of Education, September 1, 2004

Decision on motion by the State Board of Education, February 1, 2006

For the Petitioner-Appellant, Scarinci & Hollenbeck, L.L.C. (Robin T. McMahon, Esq., of Counsel)

For the Respondents-Respondents, Allison Eck, Deputy Attorney General (Zulima V. Farber, Attorney General of New Jersey)

The Board of Education of the Township of East Brunswick (hereinafter "Board" or "East Brunswick Board") requested extraordinary special education aid in the amount of \$992,182 from the Department of Education for the 2001-02 school year in accordance with the Comprehensive Educational Improvement and Financing Act,

N.J.S.A. 18A:7F-1 et seq. (“CEIFA”)¹ Pursuant to a formula established in a memorandum dated July 31, 2002 from the Assistant Commissioner, Division of Finance, to County Superintendents and County School Business Administrators, the Department reduced the amount requested by the Board by 50% since its actual surplus was greater than its projected surplus. The memorandum indicated that any

¹ N.J.S.A. 18A:7F-19(b) as then in effect provided in pertinent part:

In those instances in which the cost of providing education for an individual classified pupil exceeds \$40,000, after an assessment by the review panel of placements and placement costs for the applicable school year;...the district may apply to the commissioner for additional aid. A panel established by the commissioner for this purpose shall review the district's application and determine whether to grant the district's request based on factors including, but not limited to: an assessment of whether the district is spending appropriate amounts of regular and special education funds on special education pupils; the facts of the particular case or cases at issue; the district's level of compliance with regulatory requirements; and the impact of the extraordinary costs on the district's budget....

The statute was amended effective January 6, 2002 so as to provide:

In those instances in which the cost of providing education for an individual classified pupil exceeds \$40,000:

(1) For costs in excess of \$40,000 incurred in the 2002-2003 through 2004-2005 school years, the district of residence shall, in addition to any special education State aid to which the district is entitled on behalf of the pupil pursuant to subsection a. of this section, receive additional special education State aid as follows: (a) with respect to the amount of any costs in excess of \$40,000 but less than or equal to \$60,000, the additional State aid for the classified pupil shall equal 60% of that amount; (b) with respect to the amount of any costs in excess of \$60,000 but less than or equal to \$80,000, the additional State aid for the classified pupil shall equal 70% of that amount; and (c) with respect to the amount of any costs in excess of \$80,000, the additional State aid for the classified pupil shall equal 80% of that amount; provided that in the case of an individual classified pupil for whom additional special education State aid was awarded to a district for the 2001-2002 school year, the amount of such aid awarded annually to the district for that pupil for the 2002-2003, 2003-2004 or 2004-2005 school year shall not be less than the amount for the 2001-2002 school year, except that if the district's actual special education costs incurred for the pupil in the 2002-2003, 2003-2004 or 2004-2005 school year are reduced below the amount of such costs for the pupil in the 2001-2002 school year, the amount of aid shall be decreased by the amount of that reduction....

L. 2001, c.356, § 1.

district with a projected budget surplus greater than its actual surplus would receive 100% of the amount requested for extraordinary special education aid, but that any district with an actual surplus greater than its projected surplus would receive only 50% of the aid requested.² The Department reduced the aid requested by the Board by an additional 42.72% pursuant to language in the FY2002 Appropriations Act.³ These reductions resulted in a total of \$211,947 in eligible extraordinary costs being awarded to the District.

The Board filed a petition with the Commissioner alleging that the 50% reduction should be set aside as a result of the Department's failure to comply with the rulemaking requirements of the Administrative Procedure Act, 52 N.J.S.A. 14B-1 et seq. ("APA"). The Board also contended that the 50% reduction was arbitrary and capricious. The Department countered that it did not engage in rulemaking, but rather had acted under the authority of CEIFA and the Appropriations Act. The Department also denied that it had acted in an arbitrary and capricious manner. The parties filed cross-motions for summary decision.

On April 6, 2004, an administrative law judge ("ALJ") concluded that the 50% reduction based on the July 31, 2002 memorandum was a violation of the APA, and he recommended that the Board be provided with the additional aid that it would have received but for that reduction. As identified by the ALJ, the issue was:

² The memorandum specifically stated that:

...the reimbursable eligible amount [of extraordinary aid] was either 100% or 50% according to the following rule:

| | | |
|---|----------------------------------------------|------|
| A | If Projected Surplus > Actual Surplus | 100% |
| B | If Actual Surplus > Projected Surplus & < 6% | 50% |
| C | If Actual Surplus > Projected Surplus & > 6% | 50% |

³ We note that the Board did not challenge the 42.72% reduction.

whether the Department engaged in improper rulemaking in violation of the APA when determining the method by which it would disburse extraordinary special education aid. More specifically, the issue is whether the formula in the July 31, 2002, memorandum regarding budget surplus is a rule as defined by the APA. If the formula for budget surplus is a rule then the Department violated the APA by not adhering to specific rulemaking procedures.

Initial Decision, slip op. at 4.

Applying the New Jersey Supreme Court's decision in Metromedia Inc. v. Director, Division of Taxation, 97 N.J. 313 (1984) – in which the Court delineated six factors to be considered in determining whether agency action is the equivalent of administrative rulemaking under the APA – the ALJ found that it was “overwhelmingly clear that the surplus budget formula [set forth in the July 31, 2002 memorandum] constitutes a de facto rule under Metromedia.” Initial Decision, slip op. at 4. The ALJ observed that the Court in Metromedia had indicated that:

[t]he six factors “can, either singly or in combination, determine whether agency action must be executed through rule-making or adjudication.” Id. at 332. Not all six factors need be present for the action to be considered rulemaking, and the factors should be weighed. Matter of Request for Solid Waste Utility Customer Lists, 106 N.J. 508, 518 (1987).

Id.

The ALJ found that the surplus budget formula in the July 31, 2002 memorandum was “an ‘agency statement of general applicability and continuing effect that implements or interprets law or policy....’ N.J.S.A. 52:14B-2(e)....[A]pplying the Metromedia factors to the surplus budget formula leads to the inescapable conclusion that the Department violated the APA.” Id. Accordingly, the ALJ recommended granting the Board's motion for summary decision and directing the Department to “provide the District with

additional State aid for its 2001-02 extraordinary special education costs without regard to any comparison of projected and actual budget surplus.” Id. at 5. The ALJ did not consider the Board’s argument that the 50% reduction was arbitrary and capricious since his determination regarding the APA was dispositive of the matter.

On May 21, 2004, the Commissioner rejected the ALJ’s recommendation. Applying the Metromedia factors to the Department’s decision to reduce aid in accordance with actual surplus figures, the Commissioner found that, even assuming arguendo that the number of districts meeting the statutory threshold to apply for extraordinary aid constituted a large segment of the regulated or general public, and notwithstanding the fact that the approach taken by the Department was applied uniformly, this action, along with the memorandum of July 31, 2002, was not intended to have a continuing effect. Rather, the action challenged was designed to be effective solely for the 2001-02 school year. Further, the Commissioner found that the Department’s method for reimbursing districts for extraordinary special education costs in the 2001-02 school year did not prescribe a legal standard or directive, as contemplated by Metromedia. Notwithstanding that some of the Metromedia factors were present, the Commissioner, upon weighing those factors, concluded that the Department’s action did not bear the characteristics of administrative rulemaking.

Since the ALJ did not reach the Board’s contention that the Department’s use of a surplus comparison formula was arbitrary and capricious, the Commissioner remanded the matter to the Office of Administrative Law for further proceedings in order to resolve that claim.

The East Brunswick Board filed the instant appeal to the State Board, reiterating its argument that the Department's action constituted improper rulemaking.

On November 16, 2005, our Legal Committee issued a report in this appeal, in which it recommended that the State Board dismiss the matter as moot. The East Brunswick Board filed exceptions to that report, in which it argued that the matter was not moot. The Board pointed out, inter alia, that N.J.S.A. 18A:7F-19(b):

uses the amount of aid a district received in the 2001-02 school year as a minimum threshold for determining the amount of aid a district will receive for the 2002-03 through the 2004-05 school years. Therefore, the Department's improper reduction of the Board's aid for the 2001-02 school year would continue to impact the Board whenever the proviso applies.²

² To the extent that the determination in 2001-02 did have a recurring, adverse impact on the Board, the State Board should order the Department to award the School District the additional aid it would have received in those later years but for the budget surplus formula and its use in the 2001-02 school year.

After considering the East Brunswick Board's exceptions, the State Board, in a decision issued on February 1, 2006, directed that the Board "supplement the record on appeal with any documents detailing the amount of extraordinary special education aid received by the district pursuant to N.J.S.A. 18A:7F-19(b) for the 2002-03, 2003-04 and 2004-05 school years and any other documentation bearing upon the effect in subsequent years of the amount of extraordinary special education aid received in 2001-02." State Board's decision of February 1, 2006, slip op. at 1-2.

On March 6, 2006, counsel for the East Brunswick Board submitted three pages from the Department of Education's Division of Finance showing the amount of extraordinary special education aid received by the district for the 2002-03, 2003-04 and

2004-05 school years. Counsel added: "Inasmuch as these documents originate from the Department of Education, perhaps it would be more appropriate to refer to the Department, rather than the District, any questions that the State Board might have about the calculations."

Upon review of the documents filed by the Board, the Legal Committee, observing that the Board had not submitted any documentation to show any effect of the amount of the extraordinary special education aid received in 2001-02 on the aid received by the district in subsequent years, informed counsel for the East Brunswick Board in a letter dated March 28, 2006 that it had determined to provide the Board with the opportunity to clarify its submission with documentation showing the effect on subsequent years of the extraordinary special education aid received by the district for the 2001-02 school year.

In response, counsel for the Board related in a letter dated April 12, 2006:

Presumably, the State Board is looking for some sort of concession from the District with respect to that part of the District's exceptions, where it points out that N.J.S.A. 18A:7F-19(b), as amended, continued to use the amount of aid a district received in the 2001-02 school year as a minimum threshold for determining the amount of aid a district would receive in each of the two subsequent school years....[W]ith respect to East Brunswick, it is unclear from the Department of Education's form in awarding aid whether or not the threshold amount had a continuing effect.

After a thorough review of the record, including the Board's supplemental submissions, we conclude that, regardless of whether rulemaking was required in this instance, the Board's claim to relief is moot. The Board's appeal was limited to whether the Department of Education was required to comply with the APA in fashioning the budget surplus formula at issue in the 2001-02 school year only. As previously

indicated, N.J.S.A. 18A:7F-19(b) was amended effective January 6, 2002 so as to establish a specific formula for the calculation of extraordinary special education aid commencing in the 2002-03 school year. Under these circumstances, we find that any claim raised by the Board under the education laws is moot. Oxford v. New Jersey State Board of Education, 68 N.J. 301 (1975). Further, given the circumstances, the challenged action is not capable of repetition yet evading review. See, e.g., Zirger v. General Accident Ins. Co., 144 N.J. 327 (1996). Nor does this matter present an issue of such transcendent public importance as to compel resolution. Id. We stress, in addition, that despite being provided with several opportunities to do so, the East Brunswick Board has not demonstrated that the reduction of its extraordinary special education aid for the 2001-02 school year by virtue of the July 31, 2002 memorandum had a continuing impact on the Board in subsequent years.

Therefore, we dismiss this matter as moot. To the extent that the Board is alleging that the Department violated the Administrative Procedure Act, the Appellate Division is the proper forum for determining such a claim. Cf. New Jersey Educ. Ass'n v. Librera, 366 N.J. Super. 9 (App. Div. 2004).

Attorney exceptions are noted.

May 3, 2006

Date of mailing _____