

BOARD OF EDUCATION OF THE :
TOWNSHIP OF MINE HILL, :
MORRIS COUNTY, :

PETITIONER, : COMMISSIONER OF EDUCATION

V. : DECISION

BOARD OF EDUCATION OF THE :
TOWN OF DOVER, MORRIS :
COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioning Board sought to sever its sending-receiving relationship with respondent Board with respect to its 7th and 8th grade students. Respondent contested severance and, alternatively, requested that regionalization of the two Districts or a regionalization study be ordered in its demand for relief.

Upon completion of the hearing, the ALJ initially determined that the doctrines of laches and waiver barred application of the Commissioner's 1981 Order in this regard. The ALJ determined to deny severance of the sending-receiving relationship, concluding that petitioner failed to meet its burden of proving that severance would not have a substantial negative impact on the education offered by, and finances of, the affected Districts, the quality of education or the racial composition of the pupil population of the Districts. Finally, the ALJ concluded that mandated regionalization, or a regionalization study, is not appropriate in this case, as regionalization of these two Districts could not accomplish desegregation of the Dover schools.

The Commissioner affirmed the decision of the ALJ with modification. Initially, the Commissioner agreed that the 1981 Order of the former Commissioner was no longer valid and could not serve as a basis to permit severance. While agreeing that severance of the sending-receiving relationship for the 7th and 8th grade students should be denied because there would be a substantial negative impact on the racial balance and on the quality of education in both Districts, the Commissioner did not agree that it had been established that severance would result in a substantial negative financial impact or a substantial negative impact on the educational programming in either District. Finally, the Commissioner rejected Dover's request for mandated regionalization of the two Districts for grades pre-K through 12, noting that the request was not properly before him because it was not raised in a petition or cross-petition, and that he nonetheless agreed with the ALJ that Dover failed to produce any evidence or proofs demonstrating that regionalization of these two Districts would alleviate segregation and is otherwise legally warranted.

OAL DKT. NO. EDU 1147-99
AGENCY DKT NO. 546-12/98

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Mine Hill's exceptions were filed in accordance with *N.J.A.C.* 1:1-18.4. Extensions of time were granted for Dover's reply and cross-exceptions and Mine Hill's reply to cross-exceptions and both were filed in conformance with such extensions.

PARTIES' EXCEPTIONS

Mine Hill's five exceptions to the Initial Decision, which in large measure are reiterative of its post-hearing submission arguments advanced before the Administrative Law Judge (ALJ), are presented below:

EXCEPTION I

THE INITIAL DECISION INCORRECTLY DETERMINED THAT THE COMMISSIONER'S 1981 ORDER IN THIS CASE IS NO LONGER VALID.

Mine Hill first argues that the ALJ erred in determining that, based on the doctrines of laches and waiver, the Commissioner's 1981 Order is no longer valid. With respect to the doctrine of laches, it posits that, although the ALJ recognized that "laches is an equitable defense that may be asserted where neglect or omission to assert a right over a period of time causes prejudice to an essential party ([Initial Decision at] 18)," she erroneously concluded that the mere passage of time and change in the conditions of the parties were sufficient justification for interposing this particular defense. (Mine Hill's Exceptions at 3) Mine Hill cites *Allstate v. Howard Savings Inst.*, 127 N.J. Super. 479 (Ch. Div. 1974) for the proposition that an additional essential requisite to the application of this defense is a demonstration that the delay at issue resulted in prejudice to the other party. Definitive confirmation of the necessity of this additional element, Mine Hill claims, was provided in *Lavin v. Hackensack Board of Education*, 90 N.J. 145 (1982), wherein "the [Court made a] crucial statement [regarding] the lodestar determination to be made in this context: 'Inequity, more often than not, will turn on whether a party has been misled to his harm by the delay.'" (Mine Hill's Exceptions at 4, citing *Lavin* at 153) Noting that the ALJ, when determining that equitable estoppel was inapplicable in this matter, so found because Dover suffered no prejudice or detrimental change as a result of Mine Hill's conduct, Mine Hill contends that laches is inapplicable for the same reason. (*Ibid.*)

Mine Hill further argues that even assuming, *arguendo*, that a mere change in the parties' positions could serve to justify the invoking of laches, conditions here have not changed to such an extent so as to justify invalidation of the Commissioner's 1981 Order. Even accepting the validity of the conclusion that Dover's minority population would increase by 7.22% in 2003-04 with the withdrawal of Mine Hill's 7th and 8th graders, it asserts "this is precisely the impact which the Commissioner of Education considered and approved in his 1981 decision."

(Mine Hill's Exceptions at 4) Moreover, Mine Hill argues, it must have been clear at the time of the Commissioner's decision that the minority population of Dover was steadily increasing and, presumably, would continue to do so. Upon a careful review, Mine Hill asserts, the Commissioner then determined that an impact on the minority population should not preclude the withdrawal of Mine Hill's middle grades. It speculates that key to the Commissioner's 1981 decision was a recognition of the fact that this severance was atypical from those usually found in sending-receiving cases in that Mine Hill's high school students would continue to attend Dover High School, a consideration which it urges should continue to be recognized today. Consequently, Mine Hill advances, "the circumstances have not changed so dramatically from those considered in 1981 as to constitute a level of prejudice sufficient to justify imposing the equitable defense of laches." (Mine Hill's Exceptions at 5)

Mine Hill additionally takes exception to the ALJ's conclusion that its delay in satisfying the Commissioner's 1981 prerequisites was "inexcusable." (*Id.* at 6) In this regard it again contends, as noted below, that it made ongoing attempts and efforts to "follow up on the steps needed to implement the Commissioner's decision" but a critical precondition to definitive action was passage of a referendum to secure the necessary funds to construct additional facilities. (*Ibid.*) It advances that "[b]efore the District could expect to successfully accomplish this task it had to first pay down a good portion of the bonds issued after the 1986 referendum, and needed to await a favorable political climate for a new referendum." (Mine Hill's Exceptions at 8) Consequently, it asserts, since earlier action by the District was precluded by these constraints, good cause for the delay here has been demonstrated. (*Ibid.*)

Likewise, Mine Hill urges that the Commissioner reject the ALJ's conclusion that it intentionally waived its rights with regard to the exercise of the 1981 Order by continuing to

send its middle school pupils to Dover, entering a sending-receiving agreement, or establishing a committee in 1996 to investigate other options. Citing to *West Jersey Title & Guaranty Co. v. Industrial Trust Co.*, 27 N.J. 144, 152 (1958), Mine Hill maintains that it is well-established that “[w]aiver requires ‘a clear, unequivocal, and decisive act of the party showing such a purpose or acts amounting to an estoppel on his part.’” (Mine Hill's Exceptions at 8) Mine Hill argues that its continuing to send its 7th and 8th graders to Dover in the absence of any viable option, its justifiable inability to fulfill the conditions set forth in the Commissioner’s Order, or establishment of a committee to explore other potential options, mainly as they pertained to the high school student issues, cannot be construed as unequivocal acts manifesting an intent to relinquish its rights under the Order. (Mine Hill’s Exceptions at 8) Rather, Mine Hill proffers, “[o]nly by formally moving to enter into a regional arrangement could Mine Hill be deemed to have waived its rights under the Commissioner’s order.” (*Ibid.*)

In response, Dover advances that the ALJ properly determined that the facts of this case warranted the application of laches. Dover points out that, contrary to the urging of Mine Hill, pursuant to *Lavin v. Hackensack Bd. of Educ.*, 90 N.J. 145 (1982), “laches is ‘the neglect, for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done. More specifically, it is inexcusable delay in asserting a right.’” (Dover’s Reply Exceptions at 1, citing *Lavin*, at 151) Dover urges that, in making a determination as to the applicability of laches, “courts should consider ‘the length of the delay, reasons for the delay, and changing conditions of either or both parties.’” (*Ibid.*, citing *Lavin*, at 152) In that the central issue in such a determination is consideration of “whether it is inequitable to enforce the claim, ‘the change in conditions or relations of the parties coupled with the passage of time becomes the primary determinant.’” (*Ibid.*, citing *Lavin* at 153) Prejudice or

change in position, Dover asserts, are essentially issues in estoppel and neither of these should operate to prevent the application of laches. In support of its position, Dover cites *Lavin*. at 152, specifically “holding that the length of the delay alone or combined with other elements may result in laches.” (Dover’s Reply Exceptions at 2) Here, Dover argues, Mine Hill was given permission to withdraw its 7th and 8th graders from its sending-receiving relationship with Dover upon satisfaction of three conditions. Today, almost 19 years after the Commissioner’s Order in 1981, not only do the three prerequisites to withdrawal remain unsatisfied, but Mine Hill has not made any significant attempt to fulfill them, other than a single failed referendum in 1982, which failure, the ALJ correctly notes, “is attributable to the Board insofar as the actions of a school board and its citizens are intertwined.” (Dover’s Reply Exceptions at 1, citing the Initial Decision at 16-18, 20) Additionally, Dover asserts, conditions of the parties have significantly changed since the Commissioner’s Order was entered in 1981. Specifically, there have been dramatic changes in the size and racial compositions of both districts; state requirements and test results have been modified; Dover has made changes in staffing, budgets, facilities and programs in order to facilitate the accommodation of Mine Hill students; and, finally, severance of the sending relationship is opposed by Dover here, which was not the case in 1981. (Dover’s Reply Exceptions at 1-2)

Neither are Mine Hill’s exception “excuses” for its failure, over a 19-year period, to satisfy the prerequisites specified in the Commissioner’s 1981 Order justification for its “inaction and inability to adhere to the mandates of the order.” (*Id.* at 2) Again, failure of its citizens to pass the 1982 referendum cannot be viewed as a valid excuse. Moreover, failure to successfully pass this one referendum does not explain or excuse Mine Hill’s limitation of its 1986 referendum to the kindergarten through 6th grades or its failure to even attempt another

referendum until 1998. Interestingly, Dover argues, although Mine Hill blames high interest rates and the political climate for its failure to fulfill the prerequisites of the 1981 Order, two of these prerequisites totally unaffected by either interest rates or the political climate, also remain unsatisfied. (*Ibid.*)

In conclusion on this point, Dover advances:

Mine Hill had the right to withdraw its students from Dover pursuant to the 1981 order provided that certain criterion were satisfied. Mine Hill waited seventeen years to assert its rights under this order when it filed this petition in 1998, and, almost 19 years later, the prerequisites set forth in the order still remain unfulfilled. This is exactly the type of inexcusable delay that mandates the application of the doctrine of laches. Mine Hill has been unable to assert one justifiable excuse as to why it failed to fulfill the criterion or to assert its rights. (*Id.* at 2-3)

Consequently, Dover urges the Commissioner to uphold the ALJ's conclusion that enforcement of the 1981 Order is barred by laches, as such order is "outdated and no longer valid." (*Id.* at 3, citing the Initial Decision at 21)

Dover next charges that Mine Hill has failed to advance any "credible arguments" to explain why the ALJ erred in concluding that the 1981 Order is barred by waiver. Clearly, it posits, Mine Hill's entering into a formal contractual sending-receiving relationship 12 years after the 1981 Order and its exploration of regionalization some 14 years subsequent to the entry of this Order amply evidence that it "voluntarily and intentionally relinquished the rights granted in the 1981 order." (Dover's Reply Exceptions at 4)

EXCEPTION II

THE INITIAL DECISION INCORRECTLY DETERMINED THAT N.J.S.A. 18A:38-13 IS DIRECTLY APPLICABLE TO THIS MATTER.

Mine Hill's advancements here are essentially a verbatim recitation of its post-hearing submission arguments presented to the ALJ, again urging that *N.J.S.A.* 18A:38-13 is by

its very terms applicable only to severance of high school sending-receiving relationships. Consequently, it proffers, adjustment of elementary sending-receiving relationships can be accomplished by the Commissioner through the exercise of his inferred and incidental powers which provides him more flexibility in granting the severance, in that he may recognize those factors favoring granting the request “unhindered by any limitations in the statute.” (Mine Hill’s Exceptions at 17)

Mine Hill additionally seeks to discredit the ALJ’s reliance on the perceptions of various Department of Education officials that *N.J.S.A. 18A:38-13* was, indeed, applicable in this instance. Such a determination, it states, can only be based on a reasoned analysis of the law, not on the actions or “perceptions” of these individuals. Mere assumptions as to the applicability of a particular statute do not render it applicable as a matter of law. (*Id.* at 19)

Dover, in response, states that, notwithstanding petitioner’s contention that a less stringent standard should be applied to withdrawals at the elementary level, the ALJ correctly recognized that the Commissioner, State Board and the Appellate Division have made it clear that *N.J.S.A. 18A:38-13* is, in fact, the applicable standard. *See Board of Education of the Township of Maurice River v. Board of Education of the Buena Regional School District*, 1982 *S.L.D.* 1270; *Board of Education of the Borough of Kinnelon v. Board of Education of the Borough of Riverdale*, decided by the State Board April 4, 1984, *aff’d* Docket #A-3857-83T2 (App. Div. February 8, 1985) (Dover’s Reply Exceptions at 6) The rationale for such a conclusion, also recognized by the ALJ, is equally as clear, since the concerns raised by a withdrawal, *i.e.*, impact on educational quality, financial issues, and racial composition in the respective districts, are identical irrespective of the grade level at issue. (*Id.* at 7)

EXCEPTION III

THE INITIAL DECISION INCORRECTLY DETERMINED THAT RETURNING MIDDLE SCHOOL STUDENTS TO MINE HILL WILL HAVE A SUBSTANTIAL NEGATIVE IMPACT ON THE RACIAL COMPOSITION OF THE DISTRICTS.

Mine Hill begins by reiterating its advancement that because this matter is not a "high school" severance as contemplated by *N.J.S.A. 18A:38-13*, the Appellate Division's decision in *Englewood Cliffs, supra*, strictly applied here by the ALJ to find substantial negative racial impact, is inapplicable. Moreover, it theorizes, the instant case is atypical from any withdrawal case previously presented in that the issue involved here is one concerning impact on minority composition, primarily a national origin, Hispanic students, rather than race. Mine Hill argues that, although such minority impact may be relevant under some circumstances, there is no specific statute which requires its consideration here. Because Dover and Mine Hill had essentially identical percentages of black students in 1998-99, 6% and 5.2%, respectively, Mine Hill suggests "there is technically little or no racial impact whatsoever from a withdrawal of Mine Hill students." (Mine Hill's Exceptions, footnote at 20)

Further, even assuming, *arguendo*, that a finding of no substantial negative racial impact is requisite to granting this particular severance and that national origin minority impact is included in this categorization, Mine Hill proposes that the ALJ's conclusions in this regard be rejected by the Commissioner. Mine Hill challenges the ALJ's factual and credibility findings with respect to this issue, charging that these were a result of her discounting the testimony and evidence offered by its experts, while accepting as valid that submitted by Dover's experts without due consideration to the record as a whole and the unique aspects of this matter.¹ As

¹ Mine Hill's exceptions repeatedly attempt to categorize this matter as one unlike any other considered by the Commissioner in that: 1) this is the first elementary severance where racial impact has been raised as an issue; 2) because this is an elementary severance, *N.J.S.A. 18A:38-13* and cases such as *Englewood Cliffs, supra*, are inapplicable; and 3) it is not an actual severance, *per se*, since Mine Hill will simply retain its elementary students

examples, it advances that the ALJ's determination that calculation errors in Dr. Savitt's feasibility study student enrollment projections were so egregious as to render all of his projections unreliable, leading her to dismiss them out of hand, was "an overreaction and is not justified." (Mine Hill's Exceptions at 21) Mine Hill proffers that its financial expert specifically testified that the error occurred at the lower grade levels and had no impact on enrollment figures for grades 6, 7, or 8. (Mine Hill's Exceptions at 20-21) Moreover, Mine Hill argues, the bottom-line differences between Dr. Savitt's calculations of the minority enrollment percentages for 2003-04 compared to 1998-99 and Dover's expert's, when utilizing Dr. Savitt's methodology, are so minimal as to be insignificant. Dr. Savitt found a 1% increase in the minority enrollment in grades 7 and 8 during this period, with the overall resultant minority percentage moving from 67% to 68%. Dover's expert

shows the non-minority population dropping from 33% to 29%, while the minority population increases from 67% to 71%.***

However, whether the impact is 1%, 4% or 7.22%, petitioner submits that, as the Commissioner acknowledged in 1981, under the circumstances of this case the minority impact should not trump Mine Hill's right to educate its own seventh and eighth graders.*** (Mine Hill's Exceptions at 22)

Mine Hill also questions the ALJ's acceptance of the figures provided by Dover's experts, charging that these individuals used a six-year averaging period, rather than the generally accepted five-year period, specifically "to inflate the appearance of the potential minority impact of a severance." (*Id.* at 21) Moreover, it claims that the ALJ's conclusion that errors in Dover's report were merely errors in judgment neglects to recognize that "the record is replete with references to what were characterized as 'typographical errors,' especially in

for two additional years, with its high school students continuing to attend Dover High School. (Mine Hill's Exceptions at 23)

Dr. Iannacone's testimony." (*Ibid.*) Mine Hill further objects to the ALJ's acceptance of Dover's experts' theories that Dover students would feel "left behind" or "rejected" and would suffer from symbolic loss by Mine Hill's removal of its students. The experience of these experts in developing such theories, it proposes, was achieved in relation to high school severance cases and it does not automatically follow that such experience is relative or applicable at the middle school level. Moreover, because Mine Hill's students are not permanently leaving Dover but are, in fact, just going there two years later than they do now, such conclusions are obviated. (Mine Hill's Exceptions at 23-24)

Mine Hill "most strenuously" objects to the ALJ's conclusion that its minority students would experience isolation if severance were to be granted. (*Id.* at 27) It points to Exhibits P- 54, P-55 and P-63 as proof that the District is becoming more diverse, with its minority population currently at 23% and trending upward. (*Ibid.*) Mine Hill argues that the ALJ's conclusion that 7th and 8th grade minority students in its school would range between zero to three is belied by the District's demographic breakdown which indicates that the numbers of minority pupils will exceed this range. (*Id.* at 27-28) Also, when compared to all of Morris County, there would not be extraordinary imbalance in Mine Hill's middle school. It may well be that Mine Hill is less diverse than Dover, but "its student population is by no means homogeneous." (*Id.* at 28) Mine Hill cites *Board of Education of the City of Winfield v. Board of Education of the City of Rahway*, Commissioner's Decision of March 2, 2000, for the proposition that although severance from a diverse district in order to pursue a sending-receiving relationship with a non-diverse one would result in substantial negative impact, such would not be the case with a severance to attend a *less diverse* district. (*Ibid.*) Finally, Mine Hill charges that the ALJ discounted the testimony of its witness, Dr. Palestis, regarding the psychological

advantages of providing students an additional two years in their home district before transitioning them to Dover. (*Id.* at 24)

To the extent that the Initial Decision finds educational impact due to the withdrawal of Mine Hill students from Dover’s most challenging classes or activities, Mine Hill proffers that there was no evidence introduced that any courses would have to be eliminated due to the loss of a modest number of Mine Hill students, arguing:

Similarly, Dover does not explain why it could not have three sections of 22 or 23 students for its Grade 8 Level 1 classes, or three sections of 20 or 21 for Grade 7, nor is there any reason why the Honors Algebra class could not be maintained as two sections. No specifics are provided as to the alleged impact on special services, nor are we told whether the District, as would be likely given the near-capacity enrollment levels at the Middle School, is currently unable to place all of its existing special education population due to space limitations. There is also no explanation of how the loss of Mine Hill pupils would impact a Band program with 73 pupils, an Honor Society with 61 pupils, or the loss of six out of 26 Rogate participants. Clearly, these programs could continue to function. As to impact on sports teams, the only evidence presented pertained to girls’ cross-country, and no other programs were cited. (*Id.* at 25)

As to negative impact in Mine Hill, it argues, “[e]ven assuming *arguendo* that Mine Hill may not be able to provide the range of academic and extracurricular opportunities that Dover does ([Initial Decision at] 40), this is not in itself dispositive.” (*Ibid.*) It again cites *Winfield, supra*, this time for the proposition that “bigger is better” is not the measure of whether a district can offer a meaningful education. Mine Hill concludes its argument in this regard with a presentation of what it terms are numerous advantages of its proposed curriculum testified to by Dr. Palestis, some of which, it posits, were even acknowledged by the ALJ in her decision. (*Id.* at 25-27)

In response, Dover advances that it is well-established that the factual findings and credibility determinations of the ALJ, as the individual who had the opportunity to hear testimony firsthand and observe the demeanor of the witnesses, must be given great weight by the Commissioner. (Dover's Reply Exceptions, citations omitted, at 8) Even aside from this precept, Dover argues that it is obvious that the ALJ's findings and credibility assessments are more than well grounded in the record. In considering racial impact on Mine Hill, the ALJ's decision accorded no weight to the projection figures of Dr. Savitt not only because of significant calculation errors, but additionally because the underlying methodology he used to determine that severance would have no substantial negative impact was improper. Specifically, it avers:

Dr. Savitt used the Cohort Survival Method to determine the overall impact of withdrawal on each individual racial category. ([Initial Decision at] 30) The Cohort Survival Method is an appropriate method to determine the projected *overall* student enrollment. ([Initial Decision at] 30) However, it is not a proper means of determining the potential of withdrawal on each *individual* racial classification. (emphasis in text) (Dover's Reply Exceptions at 8)

Also, Dover asserts, Mine Hill's contention that Dr. Savitt's calculation errors were limited to only the earliest years is not supported in the record. Even assuming, *arguendo*, that such was the case, the calculations of the early years are the foundation from which projections of future years are made and, as such, errors in the early-year calculations taint all subsequent projection figures. (*Id.* at 10) By comparison, Dover's experts painstakingly explained the process by which they arrived at their projection figures which found that the change in racial composition would fall between 7 and 8% in any of the measured years. (*Id.* at 9) Finally, Dover contests Mine Hill's advancement that Dover's experts, when using Dr. Savitt's methodology, calculated only a 4% impact as a consequence of withdrawal. Rather, it submits, Exhibit R-28 evidences

that its expert found a 6% impact when using this particular methodology as opposed to the 1% found by Dr. Savitt. (*Id.* at 10)

With respect to substantial negative educational impact, Dover proposes that the ALJ correctly found that “the established educational offerings at Dover Middle School are ‘comprehensive, diverse and offer a broad spectrum of educational opportunity,’ [while] Mine Hill’s proposed program, on the other hand, is simply a proposal. ([Initial Decision at] 38)” (Dover’s Reply Exceptions at 10) Dover charges that Mine Hill has failed to advance any compelling argument to refute the ALJ’s finding of substantial negative educational impact but, instead, merely attacks her factual determinations in this regard.

EXCEPTION IV

THE ALJ ERRED IN DETERMINING THAT PETITIONER DID NOT PROVE IT WOULD INCUR NO SUBSTANTIAL NEGATIVE FINANCIAL IMPACT.

Although the ALJ correctly decided that severance would have no substantial negative financial impact on Dover, Mine Hill charges that she erroneously concluded that Mine Hill had failed to prove no substantial financial impact on that District because of the difference between the \$600,000 cost of constructing the addition to its school for the 7th and 8th grades and the \$800,000 requested for this purpose in the referendum. (Mine Hill’s Exceptions at 30) It contends that hearing testimony establishes that the cost of construction remains \$600,000. While the additional \$200,000 requested in the referendum was intended for “contingent costs,” this money could also be used to finance furniture or educational equipment. (*Ibid.*) Even if this additional \$200,000 ended up being fully utilized, when amortized over a bond term of 20 years, it asserts that this cost would have an inconsequential effect on the financial calculations presented in the feasibility study. Moreover, Mine Hill claims that even if the eventual cost of the construction project did, under a worst case scenario, end up being \$800,000, pursuant to the

recently enacted Educational Facilities Construction and Financing Act, *P.L. 2000, c.72*, Mine Hill anticipates that it would be eligible for State aid equaling 40 percent of this amount, thereby reducing actual cost to the District to \$480,000, well below the \$600,000 contained in the financial projections here. (*Ibid.*) Consequently, Mine Hill urges the Commissioner to find that no substantial negative financial impact would inure to Mine Hill as a result of severance.

In rejoinder, Dover proposes that the ALJ appropriately concluded that Mine Hill, which had the burden of persuasion to establish that there would be no substantial negative impact on Mine Hill from severance, had failed to meet its burden. In so determining, it argues, the ALJ properly weighed testimony of witnesses and decided that Mine Hill had “failed to adequately explain the disparity between the figure in the referendum and the lower figure in the feasibility study presented at the hearing. ([Initial Decision at] 40-41).” (Dover’s Cross-Exeptions at 15) Dover posits that it is well-established that such credibility determinations are entitled to due deference by the Commissioner. (*Ibid.*) Dover also challenges Mine Hill’s assertion that an increase of \$200,000 to the cost of the renovation project, even when amortized over 20 years, would have a “negligible effect” on the financial impact to the District from severance. Not only is the record devoid of any evidence to support such a contention, it argues, common sense dictates that an increase of 33% to the cost of the project would inevitably produce a dramatic financial impact. (*Ibid.*) Finally, Dover objects to Mine Hill’s advancement that, pursuant to the Educational Facilities Construction and Financing Act, it would receive state aid which would ameliorate any potential negative financial impact. Dover posits that this argument was raised for the first time in Mine Hill’s exceptions and, therefore, because it was not addressed at hearing, is unsupported by evidence in the record, and the ALJ was not

afforded an opportunity to make factual findings as to its validity, it is unpersuasive and must be discounted here. (*Ibid.*)

EXCEPTION V

PETITIONER'S RIGHTS UNDER ARTICLE FOURTEEN OF THE FEDERAL CONSTITUTION HAVE BEEN DENIED BY THE DECISION OF THE ALJ WHICH RELIES UPON ETHNIC PROFILING TO DENY SEVERANCE OF THE MIDDLE SCHOOL SENDING-RECEIVING RELATIONSHIP; THE FACTS OF THIS CASE DO NOT SHOW THE EXISTENCE OF A COMPELLING STATE INTEREST OR A NARROWLY TAILORED REMEDY.

Mine Hill avers that in determining that the granting of severance in this matter would result in substantial negative impact on both Mine Hill and Dover, the ALJ so concluded based on factual findings relating to racial/ethnic factors; specifically, the minority population in Dover Middle School would increase while the white population would be reduced, the middle school population in Mine Hill would be imbalanced, there was risk of isolation of the projected small number of minorities in the proposed Mine Hill 7th and 8th grades, and there would be loss of peer role models. (Mine Hill's Exceptions at 32) In essence, it argues, the ALJ found that if severance were denied, racial/ethnic diversity would be furthered. (*Ibid.*) Mine Hill charges that the ALJ's decision in this regard "denies severance through application of a racial classification which denies the Petitioner and its Middle School students equal treatment under the United States Constitution***," in violation of the equal protection clause of Section 1 of the Fourteenth Amendment to the United States Constitution. (Mine Hill's Exceptions at 32, citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995))

Mine Hill asserts that any racial classification which subjects a person to unequal treatment must be justified under the strictest judicial scrutiny. (*Id.* at 33) This standard, it avers, requires that "a legislative enactment or administrative action must be both justified by a compelling government interest and narrowly tailored to serve that interest in order to stand."

(citations omitted) (*Ibid.*) Although cognizant of the Court's decision in *Englewood Cliffs Bd. of Educ. v. Englewood Bd. of Ed.*, 257 N.J. Super. 413 (App. Div. 1992), *aff'd. substantially on o.b.*, 132 N.J. 327 (1993), *cert. denied*, 510 U.S. 991 (1993), where the Court questioned whether strict scrutiny was the applicable standard, Mine Hill urges that the facts in this matter and the law as it has developed since *Englewood* dictate that the strict scrutiny standard of review is dictated here. (Mine Hill's Exceptions at 33) In support of this argument, Mine Hill cites to a number of recent federal affirmative action cases which involved the use of weighted lotteries for admission to schools or the setting aside of a certain number of seats for admission based on race or ethnicity in order to promote racial balance or diversity. Mine Hill argues that the Courts in these cases determined that such actions must be reviewed under the strict scrutiny standard of review and in application of this test found the policies unconstitutional because they represented mechanisms for racial balance which were not narrowly tailored to serve a compelling state interest. (Mine Hill's Exceptions at 33-38) Here, Mine Hill avers, its 7th and 8th grade students are being prevented from attending school in Mine Hill "because of the ethnic composition of its student body and that of Dover's, in order to promote ethnic balancing." (*Id.* at 38) It contends that there is no compelling state interest which justifies Dover continuing to retain the attendance of Mine Hill's middle school pupils in Dover's schools. As such, Mine Hill posits, failure to grant severance of this sending-receiving relationship deprives Mine Hill's students of their equal protection rights under the Fourteenth Amendment. (*Id.* at 39)

In response, Dover strongly urges that, procedurally, the Commissioner should not consider this argument, as it was neither raised at hearing or in post-hearing submissions nor is there any evidence whatsoever in the record with regard to this issue. (Dover's Reply Exceptions at 11) Assuming, *arguendo*, that Mine Hill's contention here is considered, Dover

contends that, substantively, it is preposterous. It points out that *N.J.S.A.* 18A:38-13, a valid state statute governing the severance of sending-receiving relationships, mandates that race be considered in determining whether withdrawal will be allowed. (*Ibid.*) Case law, Dover asserts, further solidifies that racial composition is an essential factor in determining whether withdrawal should be permitted. (*See Jenkins v. Morris Township School District*, 58 *N.J.* 483 (1971); *Englewood Cliffs*, *supra.*) Dover advances that Mine Hill's assertion that race should not be a consideration in assessing whether withdrawal should be allowed is essentially suggesting that a state statute is unconstitutional and requests that the Commissioner of Education strike it down, an action which is clearly outside the jurisdictional authority of the Commissioner. (Dover's Reply Exceptions at 12)

Dover further contends that Mine Hill's reliance on federal affirmative action cases to support its advancement here is misplaced as these cases are inapposite to this matter. Here, it contends, the ALJ does not classify anyone by race but, rather, follows the dictate of the statute and considers racial composition as one of the factors in determining whether withdrawal is permissible. (*Ibid.*) Moreover, Dover notes that the Appellate Division in *Englewood Cliffs*, *supra*, which was affirmed by the New Jersey Supreme Court, specifically held that "[i]t is only the *per se* use of race as a determinant which creates a classification subject to strict scrutiny under the Fourteenth Amendment...The United States Constitution does not prohibit states from taking race into account in educational decisions." (Dover's Reply Exceptions at 12, citing *Englewood Cliffs* at 468) Rather, Dover argues, the Court in *Englewood Cliffs* found that "if any classification is being created attendant to withdrawal, it is a geographical classification which does not rise to the level of strict scrutiny. *See id at 469***.*" (Dover's Reply Exceptions at 12) Consequently, Dover advances that Mine Hill's argument "that strict scrutiny should apply and

that considering race attendant to withdrawal violates the Equal Protection Clause is unsupported and contrary to the authorities on point.” (*Ibid.*)

Dover further points out that Mine Hill incorrectly asserted that racial considerations were the only factor preventing withdrawal in this matter. In fact, Dover argues the Initial Decision additionally found that such withdrawal was precluded by substantial negative educational impact in both Districts and Mine Hill’s failure to establish no substantial negative financial impact in that District. (Dover’s Reply Exceptions at 12)

Finally, in this regard, even if strict scrutiny were applicable here, Dover maintains that standard would be satisfied in this matter. It cites to *Englewood Cliffs, supra*, wherein it claims that the Court noted that a desire to maintain a racial and ethnic balance in schools is a compelling state interest, and, considering the impact of withdrawal on the racial composition of the Districts, refusing to permit withdrawal is a narrowly tailored means of achieving this goal. (Dover’s Reply Exceptions at 12-13, citing *Englewood Cliffs, 257 N.J. Super.* at 470-71)

Dover submits two cross-exceptions:

CROSS EXCEPTION I

THE ALJ OMITTED FINANCIAL IMPACT AS A REASON TO DENY SEVERANCE AND INCORRECTLY DETERMINED THAT THERE WOULD BE NO SUBSTANTIAL NEGATIVE FINANCIAL IMPACT ON DOVER CAUSED BY WITHDRAWAL

Dover charges that, although recognizing that *N.J.S.A. 18A:38-13* requires that severance be denied if a substantial negative financial impact would inure to either or both Districts, and despite her valid finding that Mine Hill had failed to meet its burden of establishing that withdrawal would not have such a consequence in that District, the ALJ improperly neglected to conclude that severance was precluded for financial impact reasons as

well. (Dover's Cross-Exceptions at 14) Moreover, Dover strongly objects to the ALJ's conclusion that negative financial impact on Dover would not be substantial, arguing:

As stated by Dover's financial expert and as recognized in the Initial Decision, the per capita income in Dover in 1996 was \$15,185, as compared to the average income of \$45,000 in Morris County, and the average gross family income was \$30,000. ([Initial Decision at] 41). When state and federal income taxes, social security, medicare, and unemployment are deducted from these figures, the disposable income available to the average family in Dover is significantly less. Out of this net income, the average family needs to pay property taxes, averaging \$4,451.00; food; mortgage; insurance; transportation; and the other obligations that come with running a family. In essence, simply by looking at the above-referenced figures in the record, the average family in Dover has very little expendable cash. (Dover's Cross-Exceptions at 14)

Notwithstanding that the ALJ's decision failed to resolve whether the annual cost to Dover citizens would be \$74 as argued by Mine Hill or \$152 as advanced by Dover's experts, even accepting, *arguendo*, the lower figure as accurate, this increase represents a significant financial impact for families earning an average gross income of \$30,000 per year. (*Ibid.*) As such, Dover urges that the Commissioner add substantial financial impact to his reasons for denial of severance.

In response, Mine Hill proffers that a specific finding as to whether the impact of severance to the average Dover taxpayer would be \$74 or \$152 annually is inconsequential, as its expert found that the resulting difference equates to only \$6.17 per month. (Mine Hill's Response to Dover's Cross-Exceptions at 2) Given that Dover offered "general conclusions," based on per capita and average family income data which was four years old, with respect to the taxpayers' ability to afford the projected increase, the ALJ rightly concluded that the evidence did not support a determination that the projected increase would pose an "incredibly difficult" financial burden for a significant number of the citizens. (*Ibid.*) More importantly, it argues:

[T]he projections assumed that the full impact of the tuition loss would be passed on to the taxpayers. This need not be the case. Both parties' financial experts testified that it is not uncommon for a district, when faced with a loss of tax revenue such as occurs when a municipality reduces the levy amount following a budget defeat, to trim its expenditures accordingly. An alternative is to apply unappropriated free balance. Dover has been receiving increasing amounts of State financial assistance over the past several years and has consistently been running surpluses in excess of \$1 million, even after expending \$700,000 for various capital projects. While this surplus is within State guidelines, Dover could apply some of it to reduce the tax impact and apparently still have sufficient surplus for future years. (*Id.* at 2-3)

Citing the State Board's decision in *Board of Education of the Township of Cranbury v. Board of Education of the Township of Lawrence*, 1987 S.L.D. 2580 and *Washington Township Board of Education v. Upper Freehold Regional Board of Education et al.*, 1989 S.L.D. 2010, Mine Hill contends that mere negative financial impact is insufficient to preclude severance, and that such impact "on the receiving district must border on the catastrophic" to provide justification for denial on this basis. (*Id.* at 4) It contends that Dover has not established any "definite and tangible impact" other than the loss of tuition, or in any way shown that such loss would have a significant impact on its ability to maintain its educational programs. (*Ibid.*) Mere speculation about the effect of a moderate increase on its citizens cannot supplant this required showing.

CROSS-EXCEPTION II

THE ALJ IMPROPERLY REFUSED TO ORDER REGIONALIZATION, OR, AT THE VERY LEAST, A REGIONALIZATION STUDY

Dover claims the ALJ's decision not to order regionalization or a regionalization study is inconsistent with applicable law and public policy. Specifically, Dover proposes that the ALJ rejected regionalization, as she concluded, "it would not accomplish desegregation of

schools. ([Initial Decision at] 42)” (Dover’s Cross-Exceptions at 16) It argues that, pursuant to *Englewood Cliffs, supra*, desegregation is not the sole justification for regionalization. Rather “regionalization may be permitted to implement the state’s educational policies.” (*Ibid.*) Dover notes that over the years, the Department of Education has encouraged districts to regionalize, even providing economic incentives to certain districts so inclined. Here, it advances, the obvious advantage to regionalization would be the elimination of unnecessary duplicative fiscal and administrative costs attendant to operating separate districts, allowing the savings to go where they are most beneficial – the districts’ students. Dover proffers that it would be “difficult to imagine a better educational policy [within the intendment of the *Englewood Cliffs* Court] than creating additional funds to be used for students.” (*Ibid.*) Consequently, Dover suggests, notwithstanding the ALJ’s conclusion that regionalization would not end segregation, it should, nonetheless, be ordered, as it advances a legitimate educational policy. In the alternative, Dover opines that, at a minimum, a regionalization study, which the ALJ similarly rejected as insufficient to eliminate segregation in the schools, should be ordered to ascertain whether it is a viable option for the Districts and the extent to which it would further educational policy. (*Ibid.*)

In reply, Mine Hill counters that an order to regionalize by the Commissioner is not appropriate here. Prior to the State Board’s decision in *Englewood Cliffs*, 1990 *S.L.D.* 1720, it posits that the Commissioner interpreted the Supreme Court’s decision in *Jenkins, supra*, holding that he had the power to order cross-district regionalization, as confining such authority to instances where regionalization was of districts which were, in effect, a single community. In *Englewood Cliffs*, Mine Hill submits, the State Board ruled “that the ‘one community’ limitation would not prevent it from crossing district lines where it *has been demonstrated* that such a remedy was *necessary* to vindicate state constitutional rights and policies – in that case the

policy against segregation – where to do so was reasonable, feasible and workable. *Id.* at 1747.” (emphasis in text) (Mine Hill’s Reply to Cross-Exceptions at 5) Mine Hill asserts that, upon the State Board’s review in *Englewood Cliffs*, it did not order regionalization, but ultimately upheld the Commissioner’s recommendation that a regionalization study be accomplished. In upholding the Appellate Division’s affirmance of the State Board’s decision in *Englewood Cliffs*, including the directive for the conduct of a regionalization study, Mine Hill notes that the Supreme Court very clearly stressed:

We neither express nor imply any position or opinion on the regionalization issue itself, and specifically emphasize that our affirmance of the authority of the State Board of Education to undertake such a regionalization study must not be taken to express or imply any view of the Court on the administrative or judicial power to require inter-district regionalization. 132 *N.J.* 327, 329 (1993). (Mine Hill’s Reply to Cross-Exceptions at 5-6)

Consequently, Mine Hill argues that if, indeed, power exists to order inter-district regionalization, it is abundantly apparent that such authority could only be acted upon “in order to vindicate constitutional rights and policies.” (*Id.* at 6) Here, it proposes, Dover has not brought any evidence to the record indicating a violation of any policy or right. Neither has it established that regionalization is “feasible or workable,” nor does the record support its assertion that students would serve to benefit from any additional funds. (*Ibid.*) In requesting that the Commissioner order regionalization, Mine Hill submits, Dover had the burden of specifically identifying a constitutional violation and to demonstrate how such violation would be remedied by regionalization, a burden which it has unmistakably failed to satisfy. (*Ibid.*)

As to Dover’s request that a regionalization study be directed, Mine Hill advances that Dover has presented no demonstration of what such a study, involving only these two Districts, could accomplish. Mine Hill claims that it has previously investigated regionalization

and concluded that such an undertaking would have to be on a much broader scale than only with Dover to effectively address outstanding issues. (*Id.* at 7) In that Dover has not made any credible showing sufficient to justify the expense of a regionalization study for the parties and the State, Mine Hill urges the Commissioner to adopt the ALJ's conclusion in this regard.

COMMISSIONER'S DETERMINATION

Upon independent review and consideration of the full record in this matter, which includes transcripts of the ten days of hearing conducted at the OAL,² the Commissioner determines to affirm the ALJ's recommended decision with modification as detailed below.

1981 ORDER

Initially, the Commissioner is in full agreement with the ALJ that enforcement of the May 29, 1981 Order of the then-Commissioner granting Mine Hill's request to withdraw its 7th and 8th grade students from Dover is no longer valid. The Commissioner concurs with the ALJ's cogently presented analysis (Initial Decision at 15-24) leading her to the conclusion that, pursuant to the doctrine of laches (*Lavin, supra*), the lengthy passage of time, in combination with the changing conditions of the parties that occurred in this matter, justifies barring the enforcement of the Commissioner's 1981 Order.^{3 4} The Commissioner similarly agrees that

² Hearing dates were December 7, 8, 15, 16, 21, 22, and 29, 1999, January 11, and 31, 2000 and February 28, 2000.

³ Notwithstanding Mine Hill's exceptions to the contrary, "[i]t is because the central issue [in determining the applicability of laches] is whether it is inequitable to permit the claim to be enforced, that generally the change in conditions or relations of the parties coupled with the passage of time becomes the primary determinant." *Lavin* at 152, 153.

⁴ The Commissioner is compelled to comment on Mine Hill's exception argument here which attempts to place untoward significance on a claim that the projected increase in minority enrollment of 7.2% here is essentially the same as that projected in the matter approved by the Commissioner in 1981, thus, evidencing that conditions have not appreciably changed during this interim period. Such argument not only fails to recognize the circumstantial differences in this matter as opposed to those existing at the time of the 1981 Order, as detailed in the ALJ's decision, but additionally neglects to reflect the impact of the modification of the governing statute and the evolution, clarification and refinement of educational law and policy which has developed through decisions of the Commissioner, State Board and the Courts in this area during this interim period. Consequently, merely equating percentage changes in minority composition present in 1981 to those claimed to exist at this time, absent full review

Mine Hill took affirmative action during this period which expressly, or at the very least inferentially, reasonably demonstrated an intent to relinquish its rights under the 1981 Order.

APPLICABLE STANDARD

The Commissioner next determines that the provisions of *N.J.S.A.* 18A:38-13 are applicable in this matter, but for the reasons detailed below rather than those contained in the Initial Decision. He first recognizes that *N.J.S.A.* 18A:38-13, on its face, indicates that provision's application to those instances involving "changes of designation or allocation and apportionment of pupils to *high schools*," leaving applicability at any other grade level unaddressed. (emphasis supplied) The Commissioner believes that such language, or absence thereof, does not reflect a purposeful intent of the Legislature to omit or exempt elementary level relationships from the statutes's dictates but, rather, is reflective of the fact that sending/receiving relationships at the elementary level are relatively rare in this State and, as such, their existence was most likely never contemplated when the statute was being drafted.

Notwithstanding, it can be argued that, due to the absence of specific applicability language, this particular provision, in and of itself, may not be read to encompass situations involving severance requests of elementary level relationships. Nonetheless, as Mine Hill's exceptions correctly recognize, the Commissioner most assuredly possesses the responsibility and authority, pursuant to his broad inferred and implied powers (*See Jenkins, supra*, 58 *N.J.*

and consideration of all attendant circumstances at both points in time, is a meaningless exercise. As just one example of circumstantial differences, Dover's Post-hearing Brief claims that the district is extraordinarily different from what it was in 1981:

Exhibit R-23 shows the racial breakdown of Dover students in that year. The document reflects that the combined seventh and eighth grade population was fifty-five percent (55%) white and forty-five percent (45%) minority. In comparison, by 1998-99, the student population had shifted to thirty-two and one half percent (32.5%) white and sixty-seven and one half percent (67.5%) minority. This is a change of twenty-two and one half percent (22.5%). Dover went from a slight majority of white students to a significant majority of non-white students. (Dover's Post-hearing Brief at 46)

at 483) to determine whether and under what conditions elementary level sending-receiving severance can be granted. *Board of Education of the Borough of Kinnelon v. Board of Education of the Borough of Riverdale, Morris Co.*, decided by the State Board April 4, 1984, *aff'd* Appellate Division #A-3857-83T2.

In his consideration of a standard under which these particular matters should be examined, the Commissioner specifically rejects Mine Hill's suggestion that elementary level severance requests should be reviewed on some less restrictive standard than that required for all other severance request matters. Sound educational policy militates against such an approach, as the Commissioner firmly believes that, as was aptly recognized by the ALJ, "[t]he concerns raised by the withdrawal of a district from a sending-receiving relationship are the same at all grade levels." (Initial Decision at 27) Consequently, the only rational approach to deciding identical, important educational issues is to impose uniform standards, irrespective of the grade level involved and, therefore, the Commissioner directs that the requirements contained in *N.J.S.A. 18A:38-13* are applicable here. Even absent the Commissioner's adoption of this standard, the record establishes that Mine Hill's own actions confirm that it voluntarily subjected itself to the terms of *N.J.S.A. 18A:38-13* in this matter. The formal written contract which Mine Hill executed with Dover in 1993 in pertinent part specifies:

WHEREAS, Mine Hill desires to send its middle and senior high school pupils, grades 7 through 12, to Dover Middle and High Schools and to designate Dover Middle and High Schools as the schools for attendance of Mine Hill Township pupils pursuant to the provisions of *N.J.S.A. 18A:38-11 et seq.* and in accordance with the terms set forth herein; and

[T]he parties desire to enter into this agreement to create a "sending-receiving" relationship pursuant to the provisions of *N.J.S.A. 18A:38-11 et seq.*
(Initial Decision at 22, quoting from Exhibit P-23 at 1)

Mine Hill's contention with respect to the inapplicability of *N.J.S.A.* 18A:38-13 in the instant case, because this matter deals with elementary rather than high school grades, and its claims that this is not a "true" severance since Mine Hill will just retain its elementary students for two additional years, with its high school students continuing to attend Dover High School, are wholly without merit. Mine Hill entered a sending-receiving agreement which included 7th and 8th grade middle school students pursuant to a statute which, by its terms, also confines its authorization to the "high school" level. By entering the contract pursuant to *N.J.S.A.* 18A:38-11 and adopting it as the operative law for the agreement, Mine Hill implicitly recognized and accepted that *any* alteration of such agreement was subject to the terms of *N.J.S.A.* 18A:38-13.

EQUAL PROTECTION ARGUMENT

As to Mine Hill's exception argument that, in considering race attendant to determining whether to grant withdrawal, the ALJ violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the Commissioner finds that even if this argument were validly before him, *i.e.*, having been briefed and argued below, rather than having been raised for the first time in Mine Hill's exceptions in violation of *N.J.A.C.* 1:1-18.4, he concurs with Dover's reply exceptions here that such an assertion is without merit. As advanced by Dover in this regard, an examination of racial impact is mandated by a valid legislative statutory enactment governing the alteration of sending-receiving relationships, negation or modification of which is outside the jurisdictional purview of the Commissioner of Education. Moreover, as Mine Hill's exceptions here obviously recognize, the Fourteenth Amendment Equal Protection claim, as it pertains to sending-receiving severance matters, was previously addressed and resolved by the Court in *Englewood Cliffs, supra*, wherein it concluded, after an exhaustive review, that such a charge was not viable. Mine Hill has not

introduced any relevant case law, credible facts or evidence which would serve to alter or obviate application of the *Englewood Cliffs* Court's reasoned resolution of this particular issue to the instant matter. Indeed, the Commissioner finds the Court's observation in that matter equally fitting here:

invocation of the Fourteenth Amendment here turns that constitutional provision "on its head." The Fourteenth Amendment and its New Jersey counterpart are meant to shield our citizens against state sanctioned racial discrimination. To suggest that they prohibit a state from applying a statute, specifically addressed to remedying the educationally pernicious evils of white flight, racial imbalance and *de facto* segregation in the schools is, at best, cynical. (*Englewood Cliffs, supra, 257 N.J. Super. at 473*)

SUBSTANTIAL NEGATIVE IMPACT

The Commissioner next turns to the statutorily mandated considerations attendant to determining whether the requested severance can be granted.

In considering Dover's exception request for a finding of significant financial impact in connection with the requested severance, the Commissioner concludes that such a finding is not possible based on the record before him. Dover first justifies its request by virtue of the ALJ's finding, on Page 41 of her Initial Decision, that Mine Hill had not demonstrated that there will be no negative financial impact on that District. The Commissioner observes that the ALJ apparently had two reasons for arriving at such a finding. First, she had previously concluded that Mine Hill's projections of enrollment contained in its Feasibility Study, Exhibit P-2 and Updated Feasibility Study, Exhibit P-3, which it employed to project financial implications attendant to severance, were flawed and unreliable and she, thus, ascribed no weight to them. (Initial Decision at 30-31) A second reason advanced for her finding was that Mine Hill had not adequately explained the discrepancy between its feasibility study assertion that the cost

of making the necessary construction modifications to the Canfield Avenue School to allow accommodation of its 7th and 8th graders was \$600,000, while the monetary amount sought in its referendum for this purpose was \$800,000. (Initial Decision at 40-41) Dover urges that, based on the ALJ's finding, Mine Hill, which had the burden of persuasion in this regard, failed to sustain its burden and, therefore, severance must be denied for financial impact reasons. The Commissioner observes that both the Initial Decision and Dover's arguments reflect confusion as to the proper allocation of the burden of proof in sending-receiving severance request cases. Particularly instructive in this regard is the State Board's clarification of this issue in *Board of Education of the Borough of Merchantville, Camden County v. Board of Education of the Township of Pennsauken, Camden County v. Board of Education of the Borough of Haddonfield, Camden County*, State Board of Education Decision on Motion, decided on September 5, 1990, wherein, in pertinent part, it found:

[A]lthough the ultimate burden of persuasion is on the party seeking termination, that party is not required to prove that no substantial negative impact will result from termination as part of its case in chief.

[W]e find that the initial burden of production on the petitioning party may be met by production of a feasibility study as required by the statute and the submission of appropriate proofs as to where its children are to be educated upon severance of the sending-receiving relationship. *See Absecon Bd. of Ed. v. Pleasantville Bd. of Ed.*, decided by the State Board of Education, October 7, 1988. Obviously, the feasibility study must address, at a minimum, all of the areas specifically set forth in the statute, and petitioner must establish in the proceedings the factual basis underlying the study so as to withstand challenge by the party contesting termination. Once the petitioning board has met its initial burden of production, the burden shifts to the party contesting termination to go forward with evidence that termination will result in a negative impact.***

The allocation of the burden of production delineated above does not shift the ultimate burden of persuading the Commissioner that termination is mandated or warranted. That burden remains on the

petitioning party. However, where a petitioner has met its initial burden of production in proceedings under *N.J.S.A. 18A:[38]-13*, ***the claim by the respondent that termination will have a substantial negative impact is in the nature of an affirmative defense. Thus, it is appropriate that the party asserting that claim bear the burden of showing that a negative impact outweighing any positive benefits of termination will result. (Slip Opinion at 2, 5-6)

Here, the Commissioner's review persuades him that Mine Hill has fulfilled its burden of production, within the intendment of the State Board's directive in this regard, notwithstanding certain technical mathematical miscalculations in its projections of student enrollment contained in its feasibility studies. On the other hand, the record is devoid of competent, credible evidence to substantiate the allegations and apparent speculations of Dover that substantial negative financial impact will ensue in Mine Hill from the granting of severance. Thus, the Commissioner concludes that Dover has failed to meet *its* burden in this regard.

Dover's second reason for requesting a finding of significant negative financial impact here, *i.e.*, that the ALJ incorrectly determined that such a resultant condition was not established for Dover, must, likewise, be rejected for Dover's failure to satisfy its evidentiary burden. Dover's arguments and advanced proofs in this regard are solely confined to the tax increase consequences severance would visit on what it takes great pains to portray as an already economically distressed citizenry. The State Board, however, has made it clear that mere loss of tuition revenue and the impact of such loss on taxes for a district's citizens is simply insufficient, in and of itself, to support a claim of significant financial impact. *See Board of Education of the Township of Cranbury v. Board of Education of the Township of Lawrence*, 1987 S.L.D. 2580. Here, Dover has made no demonstration that loss of Mine Hill tuition revenue would impair the district's ability to provide its students with a thorough and efficient education, frustrate the fulfillment of its educational goals and objectives, or result in any other definite, tangible

negative consequence for the District. (*Cranbury, supra*) As such, Dover has failed to satisfy its requisite burden of proof necessary to compel a finding of significant financial impact.

Turning to examination of racial impact, the Commissioner's thorough review of the record, together with his consideration of all the circumstances of this case, compels him to agree with the ALJ that Mine Hill's request for severance must be denied because of the substantial negative racial and concomitant educational quality impacts that would result if termination were approved.

Preliminarily, the Commissioner is compelled to comment on Mine Hill's exception argument which attempts to "technically" move this matter outside the prescriptions of *N.J.S.A. 18A:38-13* because the issue involved here is "minority" composition, specifically, Hispanic students, rather than "race" as expressly addressed in the statute. Such a distinction is fallacious and finds no support in either the logical intentment of the statute or subsequent decisions of the Commissioner, State Board and the Courts interpreting this statutory provision. It is axiomatic that New Jersey's strong policy advancing equal educational opportunity and decrying discrimination and segregation in its public schools is constitutionally derived. As noted by the Supreme Court in *Booker v. Board of Education of the City of Plainfield*, 45 *N.J.* 161, 174 (1965), "*Article 1, paragraph 5 of the 1947 Constitution* ***provides that '[n]o person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, ***nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin.'" It is fully evident that in developing laws and policies effectuating this constitutional directive, use of the particular nomenclature "racial" by the Legislature, the Courts, the State Board or the Commissioner is a rubric term which must be interpreted consistent with the dictates of the Constitution, as

encompassing *all* protected “minority groups.” To accept Mine Hill’s restrictive interpretation would be tantamount to suggesting that there is a State interest in safeguarding the rights of only one of the constitutionally enumerated groups at the expense of the others.

The Commissioner next finds and determines that he ascertains no cause to question or disturb the ALJ’s factual findings and conclusions in this regard as it is fully evident that these are well grounded in the record. It is likewise evident that the record provides no cause to challenge the weight ascribed to the evidence or credibility assessments made by the ALJ. Moreover, contrary to the protestations of Mine Hill, the Commissioner finds the ALJ’s application of the precepts of the Appellate Division in *Englewood Cliffs* with respect to racial impact and educational quality fully appropriate, since guidance gleaned from that decision is directly relevant to understanding why severance must be denied here.

The Commissioner accepts the legitimacy of the ALJ’s finding on page 32 of the Initial Decision that permitting severance in this matter would result in an actual change in racial composition in Dover’s Middle School of between 7 and 8% in any given year of the study here.^{5 6} (See Exhibits R-8 (page 50), R-25, R-26 and R-27.) Also particularly disconcerting are the projections of the effect severance would have on the student racial composition of both districts. Specifically, the student population of the proposed Mine Hill Middle School is projected to be 84.3 % White, with the remaining 15.7 % distributed as follows: 7.9 %Hispanic, 4.5 % Asian and 3.3 % Black. (Initial Decision at 32) In sharp contrast, the projected student

⁵ It is noted that in two places in the second full paragraph on page 32 of the Initial Decision, at line 1 and line 3, there are typographical errors which refer to a “decrease” in minority pupils which should be corrected to read “increase.”

⁶ As an example, the Commissioner notes that the 1999-2000 enrollment of Mine Hill 7th and 8th grade students in Dover indicates that the total number of Mine Hill students in these grades was 51, of which 40 were white and 11 were minority. (Exhibit R-24) If withdrawal had occurred in that year, the percentage of minority enrollment remaining in Dover would have increased from 73% to 81%. (Exhibit R-25)

population of Dover Middle School would be predominantly minority (more than 72%), broken down as follows: 59.5 % Hispanic, 10.2 % Black, and 2.8 % Asian. (See R-8, page 46; Initial Decision at 32-33.) Although, as recognized by the State Board, “there [is] no fixed balance between racial and national origin groupings that, from an educational perspective, can be considered ideal for all communities,” see *Englewood Cliffs, supra*, at 448, the Commissioner concludes that the changes in minority composition which would inure from severance here cannot be termed insignificant from either a statistical or an educational viewpoint. Rather, it is quite evident that permitting severance here would, at a minimum, serve to exacerbate disparity in the national origin/minority groupings in Dover’s student population. Similarly, the Commissioner adopts as valid the ALJ’s observations at pages 33-34 of her decision with regard to the substantial negative “symbolic loss” impact that removal would have on the quality of education at both Dover and Mine Hill. The Appellate Division in *Englewood Cliffs* recognized that the concepts of racial composition and quality of education are inherently “intertwined,” stating “[t]hese are not isolated factors. They are different sides of the same coin.” (at 464) Further explication of the interrelationship of these factors was provided by the State Board when it clarified that:

[E]ducational considerations are primary in eliminating school segregation. The elimination of racial imbalance is not to be sought as an end in itself but because such imbalance stands as a deterrent and handicap to the improvement of education for all. *Englewood* at 449, quoting from New Jersey State Board of Education, A statement of Educational Policy, November 5, 1969.

Consequently, the Commissioner, as did the ALJ, finds that, “based on the foregoing, particularly the increase in the minority population to over 72 percent with the concomitant reduction in White population at Dover Middle School, the extraordinary imbalance of the resulting middle school population in Mine Hill, the risk of isolation to the small number of each

of the different minorities in the projected Mine Hill Middle School, and the loss of peer role models that the granting of severance will have a substantial negative impact on the racial composition of and educational [quality] available in both districts.” (Initial Decision at 40)

Finally, turning to Mine Hill’s advancement that, notwithstanding that racial balance and diversity are important considerations, nonetheless, these must be balanced against the District’s basic right to educate its own students and, under the circumstances of this case, permit severance for this purpose. This particular argument was specifically rejected by the Appellate Division in *Englewood Cliffs, supra*, wherein it found:

[L]ike parental choice, home rule and local control must yield to the fulfillment of the educational and racial policies in the constitution and statutes of this State. at 477.

Notwithstanding the Commissioner’s concurrence with the ALJ regarding the existence of substantial negative racial and educational quality impacts in this matter, he does not similarly support the ALJ’s conclusion that the record sustains a finding of significant negative impact with respect to educational *programming*. The Commissioner observes that neither *N.J.S.A.* 18A:38-13 nor applicable case law contemplates an examination of the type of education Mine Hill students would receive at the Canfield Avenue School vis-à-vis what they are presently receiving in Dover, with Mine Hill having to establish that it will provide a superior program. In other words, the question here is not a program comparison to decide which one is better for Mine Hill students. Rather, the focus must be on potential negative impact if Mine Hill is allowed to withdraw from its long-term relationship. Bearing in mind the proper allocation of the burden of proof in these matters (see previous discussion under financial impact), the Commissioner finds that Dover has not sustained its burden. As recognized by the ALJ, Mine

Hill's proposed curriculum (see Exhibit P-5) "incorporates, but goes well beyond, the State core curriculum requirements." (Initial Decision at 36)

Specifically:

Each course includes a brief section composed of the title, grade level, minutes of instruction per week, and number of weeks the course is taught per year. These are followed by detailed sections explaining the course description/philosophy; course outline; course objectives (including core curriculum standards and cross-content workplace readiness skills); methods of instruction to be employed; assessment/evaluation of pupil progress; instructional materials used; technology support and infusion; community support, partnerships and resources; parent support and involvement; and support for students with diverse needs. The core courses are followed by electives, which are enrichment or exploratory courses to augment the core curriculum.

With respect to extracurricular activities, Mine Hill anticipates extending and expanding the activities of the elementary school, such as intramural sports, school newspaper and literary magazine, yearbook, talent show, school play and clubs into the middle school.*** (*Id.* at 36-37)

The Commissioner notes that it is not surprising that a proposal for the creation of a new middle school would have some problems or "gaps," but it is expected that these would be eliminated through refinement and improvement as the proposal was implemented. Consequently, his review persuades him that Mine Hill's advancement here satisfies its burden of production on this issue and, therefore, it became incumbent on Dover to affirmatively demonstrate substantial negative educational impact in Mine Hill, a burden which is not satisfied by the mere introduction of speculative observations, *i.e.*, the proposal has gaps and may be overly ambitious or the questioning of Mine Hill's ability to fully deliver what it proposes, its ability to attract and hire experienced teachers, or its ability to achieve co-curricular cooperation with Dover or another district. In considering potential impact in Dover, Mine Hill's proffered

advancements indicate that the removal of the relatively small number of its students involved here could have no consequential effect on Dover's ability to provide its students with a thorough and efficient education. Dover, in this regard, has failed to bring forward any evidentiary demonstration that its educational offerings would be negatively impacted by severance but, rather, offers only conjecture as to the general *possibility* of loss of program opportunity or restrictions of some programs. As such, the Commissioner finds and determines that Mine Hill's requested severance could not be denied on the basis of substantial negative program impacts in either district as none have been established by Dover.

REGIONALIZATION ORDER/STUDY

Finally, the Commissioner agrees with the ALJ that the within record fails to advance a sufficient presentation of facts or evidence to support a conclusion that there is a need for either directed regionalization, or the ordering of a regionalization feasibility study and, Therefore, Dover's requests in this regard must be denied.^{7 8}

CONCLUSION

Accordingly, the recommended decision of the OAL is affirmed, as modified above. Mine Hill's request for severance of its sending-receiving relationship with respect to its

⁷ In addition, the Commissioner notes that Dover's request for regionalization was made in the demand for relief in its answer to the petition. Because this request was not made in a petition or cross-petition, it is not properly before the Commissioner for adjudication even if Dover had presented necessary facts and evidence to support such a request.

⁸ The Commissioner declines to reach Mine Hill's exception advancement with respect to whether or under what conditions the Commissioner, State Board or the courts may order inter-district regionalization as such a discussion, in light of his within determination here, is unnecessary to the resolution of the instant matter.

7th and 8th grade middle school students is hereby denied in that such severance would result in substantial negative racial and educational quality impact.

IT IS SO ORDERED.⁹

COMMISSIONER OF EDUCATION

Date of Decision: February 15, 2001

Date of Mailing: February 15, 2001

⁹ This decision, as the Commissioner's final determination, 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. 6A:4-1.1 et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.