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AGENCY DKT. NO. 546-12/98 (<http://www.state.nj.us/njded/legal/commissioner/2001/feb/58-01.pdf>)  
STATE BOARD NO. 12-01 (<http://www.state.nj.us/njded/legal/sboe/2001/aug/sb12-01.pdf>)

BOARD OF EDUCATION OF THE :  
TOWNSHIP OF MINE HILL, MORRIS :  
COUNTY, :  
  
PETITIONER, :  
  
V. : COMMISSIONER OF EDUCATION  
  
BOARD OF EDUCATION OF THE : DECISION ON REMAND  
TOWN OF DOVER, MORRIS :  
COUNTY, :  
  
RESPONDENT :

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For the Petitioner: Paul H. Green, Esq., (Schwartz Simon Edelstein Celso & Kessler)

For Respondent: Lester Aron, Esq., (Sills Cummis Radin Tischman Epstein & Gross)

This matter is considered on remand from the State Board of Education for the purpose of identifying the criteria which should apply to applications for withdrawal from sending/receiving relationships at the elementary school level formed pursuant to *N.J.S.A.* 18A:38-8. That statute provides:

The board of education of any school district having the necessary accommodations may receive, or may be required to receive by order of the state board, pupils from another district not having sufficient accommodations, at rates of tuition fixed as in this article provided.

Noting that, in contrast to those high school level relationships formed under *N.J.S.A.* 18A:38-11, the Legislature has not established any statutory criteria for withdrawal from

elementary sending/receiving relationships formed pursuant to *N.J.S.A.* 18A:38-8, the State Board reversed the Commissioner's determination that the criteria set forth in *N.J.S.A.* 18A:38-13<sup>1</sup> were applicable to sending/receiving relationships at the elementary level and remanded the within matter for articulation of applicable criteria and for review under the appropriate standard.

Following the issuance of the State Board's decision, the parties were afforded an opportunity to propose the components of the applicable standard. Both filed briefs proposing standards upon remand on February 26, 2003. Each then replied to the other's submission. When the Appellate Division issued its opinion on May 15, 2003, in *In the Matter of the Petition for Authorization to Conduct a Referendum on the Withdrawal of North Haledon Sch. Dist. from the Passaic County Manchester Reg'l High Sch. Dist.*, 363 *N.J.Super.* 130 (App. Div. 2003), the parties were offered an opportunity to submit additional commentary. Respondent Board of Education of the Town of Dover (Dover) filed a supplemental letter memorandum, dated June 16, 2003. Thereafter, the parties were advised that the Department of Education had filed a memorandum with the Supreme Court supporting North Haledon's petition for certification and that the within matter would be held in abeyance pending a determination from the Supreme Court. After the Court issued its decision in *North Haledon* on August 11, 2004 (*In re Petition for Authorization*, 181 *N.J.* 161 (2004)), each party filed a supplemental memorandum in September 2004.

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<sup>1</sup> *N.J.S.A.* 18A:38-13, the statute which governs applications to the Commissioner for change of designation or allocation and apportionment of pupils to high schools, provides in pertinent part, ". . . [t]he commissioner shall make equitable determinations based upon consideration of all the circumstances, including the educational and financial implications for the affected districts, the impact on the quality of education received by pupils, and the effect on the racial composition of the pupil population of the

In its brief proposing standards upon remand, Dover urges the adoption of the same criteria as those set forth in *N.J.S.A.* 18A:38-13, not because they are statutorily required, but because they reflect the public policy of this State:

Here, the State Board has made it clear that the standards contained in *N.J.S.A.* 18A:38-13 do not apply as a matter of law. That is understandable in light of the precise statutory language. Nonetheless, there is nothing which prevents the Commissioner from creating as his own the same standards to apply to an elementary sending/receiving relationship if he believes that they are appropriate, even though not obligatory.

The New Jersey Supreme Court has recognized the logic of such an approach where a Court is looking to apply public policy in circumstances where there are statutes which parallel but don't directly govern a factual matter. In its decision of *Carr v. Carr*, 120 *N.J.* 336 (1990), the Court held that

[i]n the exercise of their common-law jurisdiction, courts should seek to effectuate sound public policy and mold the law to embody the societal values that are exemplified by such public policy. In this process, courts should be responsive to legislation as expressive of public policy, which can serve to shape and add content to the common law, even though such legislative expressions may not be directly applicable or binding in the given matter. \* \* \*

*Carr*, 120 *N.J.* at 350 (emphasis added) (internal citations omitted). (Dover brief at 7)

Dover points to the statement of the Supreme Court in *Booker v. Board of Education of the City of Plainfield*, 45 *N.J.* 161 (1965) as further evidence that it is both the public policy and the law of this State to treat younger children with no less care than older children when it comes to the issue of integration.

In a society such as ours, it is not enough that the 3 R's are being taught properly for there are other vital considerations. The children must learn to respect and live with one another in multiracial and multi-cultural communities and the earlier they do so the better. It is during the formative school years that firm

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districts. The commissioner shall grant the requested change in designation or allocation if no substantial negative impact will result therefrom.”

foundations may be laid for good citizenship and broad participation in the mainstream of affairs. Recognizing this, leading educators stressed democratic and educational advantages of heterogeneous student populations and point to the disadvantages of homogeneous student populations, particularly when they are composed of a racial minority whose separation generates feelings of inferiority. *Booker*, 45 *N.J.* at 170-71 (emphasis added).

Dover then concludes that the articulated standards compel the conclusion that permitting Mine Hill to withdraw would, as previously determined by the ALJ and the Commissioner, result in a substantial negative impact on the racial balance in both districts. Even without considering that thirty-two percent of the students graduating from Mine Hill's elementary school do not go on to Dover Middle School, in every year projected by Dover's experts, who were credited by the ALJ, the effect of the actual withdrawal would be a 7-8 percent reduction annually in white students at Dover Middle School. Dover also suggests that the substantial percentage of students who do not attend Dover Middle School after elementary school in Mine Hill, together with the fact that, at the time the within petition was filed, three of the seven Board members in Mine Hill sent their students to private school after they completed elementary school, is evidence that the petitioner is racially motivated.

Petitioner, the Board of Education of the Borough of Mine Hill (Mine Hill), in its brief on remand, argues that there are significant differences between elementary and secondary pupils and programs, such that an identical standard is not necessary. It urges adoption of "an equitable balancing test weighing the financial and educational implications of the proposed withdrawal, giving due weight to the sending district's right to educate its own pupils." (Mine Hill brief at 3.) In support of this standard,

Mine Hill cites, as did the State Board, *Board of Education of the Township of Haddon v. Board of Education of the Borough of Collingswood*, 1966 *S.L.D.* 207, wherein the hearing officer pointed out that the statute is silent as to the continuance of such relationships at the elementary school level, in contrast to the provisions which the Legislature has established for such relationships at the high school level. The Commissioner permitted the withdrawal, finding no financial hardship would result and the withdrawal would not be contrary to the educational interests of the pupils involved. In advocating for a balancing test, Mine Hill recognizes that such an approach could not be applied under *N.J.S.A.* 18A:38-13:

In fact, even under *N.J.S.A.* 18A:38-13, the State Board had applied a balancing test prior to the Appellate Division's decision in *Englewood Cliffs Bd. of Educ. v. Englewood Bd. of Educ.*, 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, 114 *S. Ct.* 547 (1993). The State Board held that under the statute:

. . . the Commissioner must make equitable determinations based upon consideration of all the circumstances, including those which the statute requires to be addressed in the feasibility study. While requiring that termination be granted where there will be no substantial negative impact, the terms of the statute do not mandate that the negative impact, even a substantial negative impact, will result. Thus, termination may be granted where negative impact will result in some area but such impact is outweighed by the benefits that will result from the change sought. (emphasis in text)

*Board of Education of the Borough of Merchantville, Camden County v. Board of Education of the Borough of Haddonfield, Camden County*, State Bd. of Educ., #78-89 (Sept. 7, 1990) at page 4 of slip opinion.

The Appellate Division, in its decision in *Englewood Cliffs v. Englewood*, *supra*, 257 *N.J. Super.* at 462, held to the contrary; since the Commissioner is required to review an application with respect to a high school sending-receiving relationship in accordance with the requirements of *N.J.S.A.* 18A:38-13, that ruling is binding on the Commissioner and the State Board of Education. But, as the State Board has implicitly recognized, there is no basis for applying the high school standard to analysis of an elementary level severance request. In his prior decision, the Commissioner held that

. . . 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. (Commissioner's decision at 74).

Had the State Board been in agreement with this position, it could have simply affirmed the Commissioner's decision. The State Board of Education's decision rejected such an approach, requiring instead a careful individualized consideration of those circumstances in which elementary level severance should be permitted. Mine Hill's brief at 6-7.<sup>2</sup>

In balancing the equities, Mine Hill concludes that any impact on pupil ethnic/racial diversity resulting from withdrawing Mine Hill's seventh and eighth grade students from Dover Middle School is insufficient to outweigh Mine Hill's right to educate its own elementary pupils. Mine Hill asserts that analysis under such a balancing test would not prohibit severance since, although Mine Hill is less diverse than Dover, its student population is by no means homogeneous. It distinguishes the within matter from the facts in *Englewood Cliffs, supra*, by denying that there is any indication of racial motivation herein, noting that its high school students attend Dover high school and will continue to do so.

In the letter memoranda submitted by Dover following issuance of the opinions by the Appellate Division and the Supreme Court in the *North Haledon* case, Dover notes that in the absence of a specific articulation of racial impact as a standard in *N.J.S.A.* 18A:13-56, the statute governing withdrawal from a regional school district, the court concluded: 1) maintenance of a diverse student population is a critical element in the delivery of a thorough and efficient

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<sup>2</sup> Although Mine Hill initially suggested that the record should be supplemented with up-dated information, it later reconsidered and advised that supplementation was not necessary.

education; 2) the present racial and ethnic composition of the student body, as well as trends in the student population are valid factors to be considered by a board of review in considering the effect of the proposed withdrawal and the granting or withholding of permission to present the issues to the voters; and, 3) the immediate 9% diminution of the white population and the projected racial and ethnic imbalance in the near future cannot be characterized as insubstantial or negligible. Indeed, the court found, the 9% loss in the white population is a substantial negative impact. Dover continues:

In the *Mine Hill v. Dover* dispute there are no statutory standards available upon which the Commissioner can rely. In the *Manchester Regional* there are specific statutory standards, none of which include the issue of racial balance. One could argue, that where there are stated criteria and racial balance is not one of them, then that standard is specifically not applicable because the legislature could have included it if it had so intended. Arguably, therefore, the consideration of race in the context of this effort to withdraw from a limited purpose regional school district would be even less likely to be subject to the consideration of race than (*sic*) would be a withdrawal from an elementary sending/receiving relationship where there are no specified standards in the statutes.

Nonetheless, the Appellate Division had no problem identifying the State's public policy strongly supporting the concept of racial balance in our schools as a critical component to the maintenance of a thorough and efficient education. In fact, it specifically directs the educational policy makers to consider the issue of racial balance when it makes decisions involving the separation of school districts. In overturning the Board of Review's conclusion that a nine percent drop in the white population was not significant, the Appellate Division stated: "This finding is out of step with the recognized public policy of this state which seeks to promote equal educational opportunity and to avoid the adverse effect of racial and ethnic imbalance in schools, and which requires educational policy makers to anticipate imbalance and to take action to blunt perceived demographic trends which will lead to racial or ethnic imbalance."(Dover's letter memorandum, June 16, 2003, at 3-4)

Following *North Haledon*, Dover argues, it is settled that race must be considered in any petition to withdraw regardless of the grade level, and accordingly, race must be incorporated into the standard adopted by the Commissioner attendant to Mine Hill's request to withdraw. The Court, it notes, did not rely on any specific statute in reaching its conclusion in *North Haledon*, and rather, recognized that there is an "abhorrence of discrimination and segregation in the public schools [in New Jersey]" and that there are countless benefits to be derived from interacting with diverse populations. Dover urges that this reasoning cannot be, and was not, limited to any specific grade level, and, in fact, race should be emphasized even more in the younger grades where students have a greater opportunity to benefit from interaction with diverse populations for the remainder of their lives. If this standard did not apply to elementary withdrawals, it would continue the tradition of "[paying] lip service to the idea of diversity in our schools" criticized by the Court. *North Haledon*, 181 *N.J.* at 179. As such, Dover concludes, whatever standard the Commissioner adopts in connection with the State Board's remand, it must include the racial impact of withdrawal as a primary consideration. (Dover's letter memorandum, September 14, 2004, at 5-6)

Mine Hill takes the position that the *North Haledon* decision, which it describes as being of very limited application, does not prevent the severance it seeks herein. Recognizing that racial imbalance is a factor which must be taken into account, it argues that, under the circumstances of this case, the impact of severance is not sufficient to override Mine Hill's right to educate its own seventh and eighth graders. Mine Hill describes the impact as "modest" and asserts that it is offset by the fact that the students will commence attendance in Dover at ninth grade, unlike the situation in *North Haledon*



where the students would have been lost to the district for all grades of instruction. This case is also distinguishable from *North Haledon*, it asserts, because in this case the Mine Hill population is not homogeneous; Mine Hill's student population is more diverse, it asserts, and the demographic trend is in the direction of an increase in that diversity.

Having carefully considered the suggestions, positions and arguments of the parties, the Commissioner concludes that the appropriate standards for evaluating requests for withdrawals at the elementary school level are the same standards which are applicable at the high school level. In this regard, the Commissioner again specifically rejects Mine Hill's suggestion that elementary level severance requests should be reviewed on some less restrictive standard than is required for all other severance request matters. Although Mine Hill has argued that there are significant differences between elementary school students and high school students which warrant such a standard, no such differences have been articulated by Mine Hill, nor has any standard been offered other than replacement of the high school statute's "substantial negative impact" with a "weighing" of the statutorily enumerated factors against a "district's right to educate its own children." The Commissioner has previously determined, and Mine Hill does not appear to dispute, that severance could not occur in an elementary relationship if it were found to result in financial hardship or damage to the educational interests of pupils, *Haddon, supra*. The Commissioner finds this standard, which is tantamount to the statutory high school standard of "no substantial negative impact" in these areas, essential for the maintenance of a thorough and efficient system of public education regardless of the grade level of the schools in question.

With respect to racial composition, there can be no question that where a negative impact is shown, severance cannot be granted. As a threshold reference, the remarks of Justice Jacobs in *Booker, supra*, quoted hereinabove, merit repeating:

In a society such as ours, it is not enough that the 3 R's are being taught properly, for there are other vital considerations. The children must learn to respect and live with one another in multiracial and multicultural communities and the earlier they do so, the better. It is during their formative school years that firm foundations may be laid for good citizenship and broad participation in the mainstream of affairs.

While the Legislature specifically recognized the importance of race/ethnicity as a factor in evaluating requests for severance of sending/receiving relationships at the high school level, this factor is perhaps even more significant at the elementary school level when students are most impressionable. As noted by the Appellate Division in *Englewood Cliffs, supra*, 257 N.J. Super. 413, 452-453, "when children of all races learn to live with and respect each other in school at an early age, education is enhanced and the groundwork is laid for future participation of all in the mainstream of human affairs."

The Commissioner can find no reason for analyzing requests for severance of sending/receiving relationships at the elementary level any differently than other such requests involving high school relationships when it comes to matters of race/ethnicity. In so holding, the Commissioner recognizes this conclusion is not required by statute, but rather determines that it is compelled by common sense and the New Jersey Constitution. The same logic which caused the Appellate Division in *North Haledon* to focus on Article VIII, Sect. 4, para. 1<sup>3</sup> of the New Jersey Constitution in conjunction with considering the

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<sup>3</sup> Known as the Education Clause, or the Thorough and Efficient Provision, Article VIII, Section 4, para. 1 states:

effect of the proposed withdrawal upon the educational and financial condition of the withdrawing and remaining districts requires consideration of the impact of withdrawal on racial and ethnic balance in both districts in determining whether to permit severance of any sending/receiving relationship.

In the *North Haledon* case the Court reviewed the decision of a Board of Review to permit a referendum in order to determine whether or not North Haledon should remain part of the limited purpose regional school district. The Board of Review, despite acknowledging the fact that the intended withdrawal would have the adverse effect of reducing the white population in the regional district by nine percent, had determined that the change was not significant enough to prevent the holding of a referendum. The Appellate Division rejected the Board's finding that the nine percent loss would have a negligible impact on the regional high school district, stating:

This finding is out of step with the recognized public policy of the state which seeks to promote equal, educational opportunity and to avoid the adverse effects of racial and ethnic imbalance in schools, and which requires education policy-makers to anticipate imbalance and to take action to blunt perceived demographic trends which will lead to racial or ethnic imbalance. 363 *N.J.Super.* at 139.

Relying upon *Jenkins v. Township of Morris Sch. Dist.*, 58 *N.J.* 483 (1971), *Booker, supra*, and *Englewood Cliffs, supra*, the Appellate Division required the Commissioner and the State Board to exercise their powers to prevent racial imbalance in the schools and to refrain from actions that exacerbate racial imbalance. The Supreme Court, recognizing that "racial balance and education are 'different sides of the same coin,'"

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The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.

rejected *North Haledon's* argument that the principles of *Booker, Jenkins,* and *Englewood* are limited to “white flight” contexts or *de facto* segregation and concluded that, notwithstanding the absence of any racial motivation, North Haledon’s withdrawal would deny the benefits of the educational opportunity offered by a diverse student body to both the students remaining at Manchester Regional and to the students from North Haledon. Likewise, in the present matter, although the Commissioner rejects Dover’s suggestion that Mine Hill’s request for withdrawal is racially motivated as not supported by the evidence, nevertheless the impact of withdrawal on racial and ethnic balance in both Mine Hill and Dover must be a factor in considering the request. *North Haledon,* although not controlling, is instructive for two reasons: 1) It establishes that substantial negative impact on racial balance is an inherent factor in any determination regarding termination of relationships, and 2) it considers a nine percent decrease in the white population “substantial.” Here, as with factors constituting “any other reason” in the context of de-regionalizing, each factor, educational quality, finances and diversity, implicates the State’s constitutional obligation for the maintenance of a thorough and efficient education.

Given the foregoing conclusions, there is no need to revisit or reanalyze the evidence in the record herein, which is discussed extensively in the Commissioner’s 2001 decision. The factual findings of its proposed severance decision preclude acceptance of Mine Hill’s description of the racial/ethnic impact as “modest.” The Commissioner therefore reiterates the conclusion previously reached in 2001 that, although it had not been established that there would be a substantial negative financial impact or a substantial negative impact on educational programming, the substantial negative impact

on the racial balance in both districts and, consequently on the quality of education in both districts, precludes granting the severance request. <sup>4</sup>

Accordingly, for the foregoing reasons and those expressed in the analysis of the facts in the 2001 Commissioner decision, Mine Hill's application for severance of its sending/receiving relationship with respect to its seventh and eighth grade middle school students is hereby denied and this matter is hereby returned to the State Board which has retained jurisdiction.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: December 15, 2004

Date of Mailing: December 15, 2004

\*Note: [Typographical error on page 9 corrected for web publication.](#)

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<sup>4</sup> Even if an equitable balancing test such as that suggested by Mine Hill were to be adopted, the withdrawal requested by Mine Hill could not be approved; *North Haledon* makes clear that if the substantial negative impact is in the racial/ethnic category, it cannot be outweighed.