

MONMOUTH-OCEAN EDUCATIONAL SERVICES COMMISSION,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
NEW JERSEY STATE DEPARTMENT OF EDUCATION, MONMOUTH COUNTY SUPERINTENDENT OF SCHOOLS,	:	DECISION
	:	
RESPONDENT.	:	
<hr/>		

SYNOPSIS

Petitioner Monmouth-Ocean Educational Services Commission (ESC) filed a Petition of Appeal alleging that the NJDOE, through the Office of the County Superintendent, has improperly denied reimbursement for administrative costs under *N.J.S.A.* 18A:46-19.1 to 9 (Chapter 193), which provides remedial services for handicapped students in both public and private schools. NJDOE asserts that petitioner could not charge for administrative expenses under Chapter 193 funding. The parties filed cross-motions for summary decision.

The ALJ found, *inter alia*, that: petitioner ESC is contracted to provide educational services on behalf of several school districts in Monmouth and Ocean counties; petitioner included general administrative expenses in their budget between 1979 and 2004; in April 2004, subsequent to periodic monitoring of one of the districts to which the ESC is contracted for services, respondent issued – for the first time – a non-compliance order regarding petitioner’s charge of administrative expenses to Chapter 193 funding; the legislative intent was that administrative expenses could be charged from Chapter 193 funding, but with some limitation; in the absence of any specific legislative limitation on administrative funding, the 6% standard found in *N.J.S.A.* 18A:46A-8 shall apply to Chapter 193 expenses; and the respondent’s rejection of the administrative expenses after twenty-five years represents a new policy or rule that was not properly promulgated according to the New Jersey Administrative Procedure Act. (APA) The ALJ ordered that the respondent’s decision to deny reimbursement or administrative expenses for Chapter 193 services be reversed, and recommended that the respondent formulate new regulations to clarify the limitation and reimbursement issues as to Chapter 193 administrative expenses.

The Commissioner concurs with the findings and conclusions of the ALJ in this matter, emphasizing that – when read in conjunction with the statutory and regulatory provisions found at *N.J.S.A.* 18A:46-19.8 and *N.J.A.C.* 6A:14-6.3(a), which relate directly to Chapter 193 funds – the ALJ’s analysis conclusively establishes that funding for administrative costs must come from Chapter 193 funds; moreover, the Commissioner concurs that the respondent’s denial of reimbursement for administrative expenses for Chapter 193 services constitutes an administrative rule that should have been promulgated pursuant to the APA. Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed therein.

<p>This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.</p>

MONMOUTH-OCEAN EDUCATIONAL :
SERVICES COMMISSION, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 NEW JERSEY STATE DEPARTMENT OF : DECISION
 EDUCATION, MONMOUTH COUNTY :
 SUPERINTENDENT OF SCHOOLS, :
 :
 RESPONDENT. :
 _____ :

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. The exceptions filed by the Department of Education (Department) were submitted in accordance with *N.J.A.C.* 1:1-18.4, and were duly considered by the Commissioner in reaching her determination herein.

In its exceptions, the Department takes issue with the Administrative Law Judge's (ALJ) reliance on *N.J.S.A.* 18A:6-51(e) and (j), claiming that it formed the basis for the ALJ's holding that Chapter 193 funds can be used for administrative costs. (Department's Exceptions at 2-3) The Department avers that *N.J.S.A.* 18A:6-51(e) and (j) expressly allow Educational Service Commissions (ESCs) to charge their client districts for administrative expenses, but that the issue is not whether ESCs may charge their client districts for administrative costs; instead, the issue is whether the specific State aid provided to districts under Chapter 193 may be used in this manner. (*Id.* at 3) Thus, the Department avers, whether administrative costs may be charged

against Chapter 193 funding should be limited to a consideration of the services required by Chapter 193 itself and should not include a discussion of the laws governing the creation and administration of ESC's generally. (*Id.* at 4)

The Department also excepts to the ALJ's reliance on *Airwork, supra*, arguing that, in that matter, the Supreme Court rejected plaintiff's claim that an administrative policy conformed with legislative intent because the Legislature had not objected upon publication of a press release that set forth the administrative agency's policy regarding the statute at issue. (*Id.* at 5) Moreover, the Department contends, unlike the situation in *Airwork*, there is no previously enacted policy or statutory interpretation at issue in the present matter. (*Ibid.*) The Department thus urges that the Legislature's failure to prevent petitioner's practice of using Chapter 193 funds for payment of administrative costs for the last twenty-five years does not constitute Legislative approval of any pre-existing administrative policy. (*Ibid.*) Moreover, the Department claims that it simply had not recognized the need to either develop monitoring procedures or create regulations with respect to the use of Chapter 193 funds for administrative costs until the instant litigation. (*Id.* at 5-6)

Additionally, the Department disagrees that its noncompliance determination underlying this issue satisfies each of the six criteria for an administrative rule as set forth in *Metromedia, supra*, and thus constitutes a new administrative rule made in violation of the Administrative Procedure Act. (*Id.* at 6) In this regard, the Department takes exception to the ALJ's determination that its noncompliance determination meets the third *Metromedia* criterion for constituting an administrative rule, *i.e.*, that it was "designed to operate prospectively." (*Id.* at 7) Although the Department admits that its finding against petitioner is intended to prevent Chapter 193 funds from being used for administrative costs in the future, it also argues

that its noncompliance finding was not intended “to create a new rule ‘designed to operate only in future cases,’” but “was meant only as an application of the Chapter 193 laws as written, in the best judgment of the Department at that time.” (*Ibid.*) Additionally, the Department asserts that its noncompliance determination does not meet the fifth *Metromedia* criterion because its “publication of the Chapter 193 laws in this case was not ‘contrary to twenty-five years of existing policy’ of the Department, but only contrary to petitioner’s own practice” because the Department has not articulated a policy regarding administrative costs under Chapter 193. (*Id.* at 7-8) Finally, the Department states that it welcomes the opportunity to promulgate State Board regulations regarding the use of Chapter 193 funds as urged by the ALJ. (*Id.* at 8)

Upon a careful and independent review of the record, the Initial Decision, and the exception arguments filed in this matter, the Commissioner determines to adopt the ALJ’s findings and conclusions as set forth in the Initial Decision. Notwithstanding the Department’s contention that *N.J.S.A.* 18A:6-51(e) and (j) should not be utilized to form the basis for finding that Chapter 193 funds can be used for administrative costs, the Commissioner disagrees. *N.J.S.A.* 18A:6-51(e) and (j) simply set forth the definitions of “Commission expenses” and “program or service expenses,” respectively, and, thus, are instructive to the assessment of the operation of ESCs. However, the conclusion that Chapter 193 administrative funds are recoverable does not turn on these definitions, but, instead, turns on the conclusion that the statutes governing commissions and the interpretative case law provide for collection of all costs with respect to the provision of remedial and auxiliary services to school districts.

Although Chapter 193 itself is silent on administrative costs, as fully explained by the ALJ, statutes should be read in *pari materia* when the statutes in question were enacted during the same session, went into effect at the same time and/or when the sections are part of

the same act, as in this case. The ALJ reached the conclusion that Chapter 193 funds can be used for administrative costs only after a thorough analysis of *all* the statutes that are inextricably a part of the provision of remedial and auxiliary services to local school districts, *i.e.*: *N.J.S.A.* 18A:6-51 to -70, specifically *N.J.S.A.* 18A:6-51(e) and (j), *N.J.S.A.* 18A:6-52(a) and *N.J.S.A.* 18A:6-63; *N.J.S.A.* 18A:46A-8; *N.J.S.A.* 18A:46-19.1; and a review of interpretative case law.

In this regard, the Commissioner determines that the ALJ correctly analyzed the statutory provisions related to funding sources for ESCs to arrive at the conclusion that the legislative scheme contemplates that the ESC will recover all its costs. The following statutory and regulatory provisions, which relate directly to Chapter 193 funds, further support the ALJ's conclusion:

***In preparing its annual budget, each board of education shall include as a revenue State aid in an amount equal to the estimated costs of providing services to nonpublic school children, pursuant to *P.L.*1977, *c.*193 (C.18A:46-9.1 et al.) *N.J.S.A.* 18A:46-19.8.

Each board of education of the district in which the nonpublic school is located shall provide programs and services under this subchapter at a cost not to exceed the amount of State aid funds. *N.J.A.C.* 6A:14-6.3(a).

When read in conjunction with the above-quoted statutory and regulatory provisions, the ALJ's analysis conclusively establishes that funding for administrative costs must come from Chapter 193 funds; public schools and educational services entities may not subsidize the costs of nonpublic programs by diverting funds for or from other public educational programs.

Moreover, the Commissioner rejects the Department's argument that the ALJ's reliance on *Airwork*, *supra*, is misplaced. While the court in *Airwork* rejected the plaintiff's

claim that an administrative policy conformed with legislative intent because the Legislature had not objected upon publication of a press release that described the administrative agency's policy regarding the statute at issue in that matter, the court in *Airwork* also clarified the circumstances when Legislative intent could or could not be inferred from administrative construction, stating:

We note that courts have acknowledged that the practical administrative construction of a statute over a period of years without interference by the Legislature is evidence of its conformity with the legislative intent and should be given great weight by the courts. (citations omitted) Nevertheless, the court will consider this factor only when it is not satisfied that the Legislature's intent cannot otherwise be determined by a critical examination of the purposes, policies, and language of the enactment. When such circumstances point strongly to the imputation of a particular legislative intent, they may not be outweighed or overcome simply by a countervailing administrative practice. (citations omitted) *Airwork, supra*, at 296.

In the instant matter, there is no clear legislative intent regarding the issue of the payment of administrative costs from Chapter 193 funds. To conclude that the omission of specific language in Chapter 193 prevents the ESCs from calculating administrative expenses in determining the costs of providing remedial services would result in a departure from the legislative scheme as set forth in similar statutes governing the provision of remedial and auxiliary services. Moreover, notwithstanding the Department's contention to the contrary, the Department permitted, whether consciously or by inaction, the payment of administrative expenses out of Chapter 193 funds for approximately twenty-five years. Thus, in the absence of a clear legislative intent within the statute itself and the Department's practice of permitting the use of Chapter 193 funds for administrative expenses without legislative interference over a twenty-five year period, the Commissioner agrees that such inaction can be construed as evidence of conformity with legislative intent pursuant to the parameters established in *Airwork, supra*.

The Commissioner also rejects the Department's claim that its denial of reimbursement for administrative expenses from Chapter 193 funds does not satisfy the third and fifth criteria of *Metromedia* so as to constitute an administrative rule. Whether the Department's noncompliance finding was intended to create a new rule designed to operate only in future cases, or, as argued, was meant only as an application of the Chapter 193 law as written, it was "designed to operate only in future cases" and, thus, satisfies the third criterion. See *Metromedia, supra*, at 331. Likewise, with respect to the fifth criterion of *Metromedia*, the Department's determination to deny reimbursement for administrative expenses from Chapter 193 funds is, in effect, an "administrative policy," whether articulated or not, that was "not previously expressed in any official and explicit agency determination, adjudication or rule or constitutes a material and significant change from a clear, agency position on the identical subject matter." (*Ibid.*) The Commissioner, therefore, concurs that the Department's denial of reimbursement for administrative expenses for Chapter 193 services constitutes an administrative rule that should have been promulgated pursuant to the Administrative Procedures Act.

Accordingly, as explicated above, the Initial Decision is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 21, 2005

Date of Mailing: October 24, 2005

* 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.*