

LENAPE REGIONAL HIGH SCHOOL :  
DISTRICT BOARD OF EDUCATION,  
BURLINGTON COUNTY, :

PETITIONER, :

V. :

NEW JERSEY STATE DEPARTMENT :  
OF EDUCATION, OFFICE OF SPECIAL  
EDUCATION PROGRAMS, :

RESPONDENT, :

**AND**

LENAPE REGIONAL HIGH SCHOOL :  
DISTRICT BOARD OF EDUCATION,  
BURLINGTON COUNTY, :

COMMISSIONER OF EDUCATION

PETITIONER, :

DECISION

V. :

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WEST WINDSOR-PLAINSBORO :  
REGIONAL SCHOOL DISTRICT, :  
MERCER COUNTY, :

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**AND**

R.K., ON BEHALF OF MINOR CHILD, :  
S.K.-B., AND R.K. ON HER OWN :  
BEHALF, :

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SYNOPSIS

In prior decisions, the Commissioner had remanded appeals of Office of Special Education Programs (OSEP) complaint investigation decisions to the Office of Administrative Law (OAL), requesting consideration – as a threshold matter – of whether the Commissioner of Education had jurisdiction over such appeals. In addition to the remanded appeals, additional appeals of this type were then pending at the OAL.

Although the pending cases were not consolidated, for purposes of addressing their common jurisdictional question, the OAL issued a “global” Initial Decision. The ALJ concluded that the Commissioner did not have jurisdiction over OSEP complaint investigation appeals, finding that OSEP decisions in these matters were final agency decisions and that the pending petitions must therefore be dismissed.

The Commissioner adopted the recommended decision of the ALJ with amplification. The Commissioner held that the OSEP decisions were final agency decisions and opined that, as such, they were appealable to the Appellate Division of the Superior Court. The Commissioner added that dismissal of the pending appeals was without prejudice to the petitioners’ ability to request reconsideration by the OSEP Director within 15 days of the filing date of the Commissioner’s decision, consistent with newly adopted regulations. In the case of R.K. – who as a parent has additional rights under the IDEA – dismissal was further without prejudice to her ability to seek a due process hearing, with any request deemed filed as of the filing date of her petition to the Commissioner.

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.

October 16, 2006

OAL DKT. NOS. EDU 2781-06 (EDU 8853-01 ON REMAND), EDU 2779-06 (EDU 735-03 ON REMAND), EDU 496-06, EDU 2780-06 (EDU 8012-05 ON REMAND) AND EDU 2595-05

AGENCY DKT. NOS. 373-9/01, 27-1/03, 30-1/06, 212-8/05 AND 69-3/05

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The records of these matters as they pertain to the common issue of Commissioner of Education jurisdiction over the subject of the appeals, and the “global” Initial Decision on this issue rendered by the Office of Administrative Law (OAL), have been reviewed. Exceptions to the Initial Decision were filed by the respondent Department of Education (Department), the petitioning boards of education (Lenape and West Windsor, respectively), petitioner R.K., and participant A.M.<sup>1</sup> The Department and West Windsor replied to A.M.’s exceptions, and A.M. replied to the exceptions of the Department, Lenape and R.K.

On exception, the Department, Lenape and West Windsor all urge rejection of the Initial Decision, contending that the Commissioner does, indeed, have jurisdiction over the subject of the appeals. The Department reiterates its concern that, absent a contested case hearing before the Commissioner, there is opportunity for neither resolution of factual disputes nor application of agency expertise – both essential for subsequent appellate proceedings – in the event of an appeal from the results of a complaint investigation. (Department’s Exceptions at 1-2) Lenape reiterates its argument that findings of noncompliance based on complaint investigations are analogous to those based on monitoring notwithstanding that they arise under different sections of rule, so that both should be appealable to the Commissioner pursuant to *N.J.A.C. 6A:14-9.1(h)*; it again urges that this position is consistent both with case law on the right to seek judicial review of administrative actions<sup>2</sup> and with the intent of the State Board of Education as evidenced by

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<sup>1</sup> Although listed as an Intervenor in the caption of the Initial Decision and at various points in the record of the “global” issue, A.M. is, in fact, a *participant* in two of the Lenape matters (EDU 2781-06 on remand, *Lenape I*; and EDU 2779-06 on remand, *Lenape II*) as ordered by the Commissioner in decisions dated March 21, 2006 and April 25, 2006, respectively. See Initial Decision at 4-5.

<sup>2</sup> *Hirth v. City of Hoboken*, 337 *N.J.Super.* 149, 160 (App. Div. 2001).

its originally proposed amendments to *N.J.A.C. 6A:14-9.2*,<sup>3</sup> deleted on final proposal only in deference to this pending matter. (Lenape’s Exceptions at 1-4) West Windsor makes arguments similar to those of the Department and Lenape, additionally stressing that a holding of “no jurisdiction” in these matters would deprive the Commissioner of the “statutory and inherent administrative authority” to review the decisions of subordinate employees and Departmental units in a supervisory capacity; and that the necessary review may occur, as here, through a contested case proceeding, or alternatively, through uncontested case proceedings, either in such a way as to permit legal argument (and stay of corrective action directives) on broad-based issues while still granting specific relief to the individual complainant within 60 days as required by federal law. (West Windsor’s Exceptions at 1-7, quotation at 3)

R.K., while concurring with the Administrative Law Judge (ALJ) that the Commissioner lacks jurisdiction to hear appeals of complaint investigations conducted by the Office of Special Education Programs (OSEP), excepts to the ALJ’s dismissal of the pending individual cases and to the analogizing of her complaint to the others underlying the “global” determination.<sup>4</sup> In the first instance, R.K. objects to the amount of time it took for the Department to “act and appropriately examine the [jurisdictional] issue,” even as it permitted contested cases to proceed at OAL to the point of being substantially or fully litigated; to dismiss these cases now, and leave the parties thereto without remedy, R.K. argues, would be patently unfair. In the second, R.K. contends that there is a significant difference between appealing the results of a duly conducted complaint investigation and seeking to compel OSEP to undertake an investigation and report its results in the first place,

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<sup>3</sup> See Initial Decision at 11, note vi.

<sup>4</sup> See Initial Decision at 17.

where OSEP has “arbitrarily [denied] a legitimate request [submitted pursuant to rule] at its convenience and with no basis in fact or law”; according to R.K., there “must be recourse for parents when OSEP fails or refuses to do its job”.<sup>5</sup> (R.K.’s Exceptions at 1-6, quotations at 4 and 5)

A.M., on the other hand, excepts to the Initial Decision only to the extent that it does not take the additional step of holding that school districts have no right to appeal the outcome of OSEP complaint investigations at all, in contrast to parents who may do so through a due process proceeding consistent with the protective requirements of the Individuals with Disabilities Education Improvement Act (IDEA). A.M. also reiterates her argument in the alternative that, should school districts be allowed to appeal OSEP complaint investigation reports, such appeals must be governed by rules otherwise pertaining to special education matters, so that the ALJ would have the final decision and any appeal would be taken directly to State or federal trial court. (A.M.’s Exceptions at 1-5) The Department replies to this latter contention by: 1) stating that the case law relied upon by A.M. is inapposite, since it pertains to due process hearings which differ from complaint investigations in that they reflect disputes between parent(s) and a board with no involvement of the Department; and 2) objecting to any structure which effectively forces parents to file appeals in court, where the Department’s actions will come under scrutiny without prior opportunity for agency review through the administrative hearing process. (Department’s Reply at 1-3) The same objection is raised by West Windsor, along with the observation that A.M.’s “no appeal” position ignores the federal memorandum<sup>6</sup> indicating

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<sup>5</sup> R.K. also states that, based on her own experience and the results of the underlying cases thus far litigated at the OAL, better “quality control” should be established within the Department with respect to OSEP’s complaint investigation practices. (R.K.’s exceptions at 5-6)

<sup>6</sup> See Initial Decision at 12.

that states may make their own decisions regarding whether to allow reconsideration of complaint reports, since the IDEA neither prohibits nor requires such reconsideration. (West Windsor’s Reply at 1-3)

In her reply submission, A.M. counters that the Department’s position is not tenable due to the federal requirement for resolution in 60 days, which effectively precludes administrative hearing, and that the decisional law arising from due process cases *is* applicable because it stands for the general proposition that judicial review of IDEA cases “proceeds [not] only upon the record compiled before the agency,” but through “creation of a broader record” in trial court – a proposition that applies equally to due process and complaint investigation proceedings. (A.M.’s Reply at 2) She further contends that Lenape ignores the clear distinctions in purpose and history between the Department’s monitoring and investigative processes as set forth in the Initial Decision at 10-12, noting that the section of rule governing complaint investigations establishes no appeal process – as the monitoring section clearly does – and that the Department cannot, without violating the Administrative Procedure Act, adopt a complaint investigation appeal procedure without codifying it in regulation; she counters Lenape’s argument on the right to judicial review by reiterating her position that a “subordinate branch” of a “single State agency” does not have standing to challenge decisions of the superior agency, citing *Essex County Welfare Board v. Department of Institutions and Agencies et al.*, 75 N.J. 232 (1978). (*Id.* at 2-4) Finally, A.M. agrees that R.K. should not be penalized for the agency’s error, and suggests that an appropriate resolution might be to transfer R.K.’s appeal to the OSEP to be heard as a due process matter deemed filed as of the date of R.K.’s petition to the Commissioner. (*Id.* at 4)

Upon careful review and consideration, the Commissioner concurs with the ALJ that the Commissioner of Education lacks jurisdiction over appeals of OSEP complaint investigations.

Initially, the Commissioner finds – for the reasons discussed by the ALJ in the Initial Decision at 11-13 – that the complaint investigation process established in *N.J.A.C. 6A:14-9.2*,



when read in conjunction with the IDEA provisions it implements, clearly contemplates that the OSEP Director's (or designee's) decision on any complaint is the final decision of the agency. This conclusion is not only consonant with the IDEA's intent that the complaint investigation process serve as an alternative to the lengthier, more complex due process proceeding (Initial Decision at 14-15); it is also buttressed by the absence in *N.J.A.C.* 6A:14-9.2 of a provision comparable to that of *N.J.A.C.* 6A:14-9.1(h), where the right of appeal to the Commissioner (and thence, by implication, to the State Board) is expressly specified, and by the court having identified the OSEP Director's decision as the final agency decision in its consideration of the facial validity of the rule in question. *Baer v. Klagholz*, 339 *N.J. Super.* 168, 214-17 (2001).

The Commissioner additionally concurs with the ALJ's differentiation of the monitoring process set forth at *N.J.A.C.* 6A:14-9.1 – the results of which are appealable to the Commissioner – from that of the complaint investigation process prescribed at *N.J.A.C.* 6A:14-9.2 (Initial Decision at 10-12), and is unpersuaded by the argument that the appeal provision of the former must extend by implication to the latter as a matter of legal construction or educational policy. The two sections reflect distinct processes and purposes, as found by the ALJ, and, in the case of the process set forth at *N.J.A.C.* 6A:14-9.2, the State Board of Education has clearly chosen to place responsibility for agency expertise and staff

oversight with the Director of OSEP rather than with the Commissioner or State Board. As the ALJ aptly observed, the Board could have done otherwise had it wished, and the choice it made is entirely consistent with the longstanding general absence of the Commissioner and State Board from adjudication of special education disputes despite the fact that these arise under State statutes and regulations and are “inarguably ‘controversies and disputes arising under the school laws’ ” (*Id.* at 9-10, 16; quotation at 10); indeed, this very absence militates against finding the Commissioner and State Board to have indispensable expertise for purposes of reviewing matters inextricably linked to disputes arising under the IDEA. See *Lenape I*, *Lenape II* and *West Windsor-Plainsboro, supra*. Moreover, while the Commissioner is not unmindful of the benefits of an OAL factual record for purposes of appeal, the Commissioner concurs with the ALJ that the absence of such a record is an inevitable consequence of the IDEA’s mandate for a less complex alternative to due process proceedings, and that any appeal from a decision reached through such alternative would be likely judged by standards that recognize both the limited underlying process and the reasons for it. (Initial Decision at 15-16)<sup>7</sup>

With respect to the question of appeal, A.M. has urged that the Commissioner should find district boards of education to be precluded from appealing agency complaint investigation decisions in *any* forum, or if permitted, then only through the same mechanism as is used for due process hearings. In this regard, the Commissioner recognizes – as likely did the ALJ in not reaching definitive conclusions on this point – that the Commissioner of

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<sup>7</sup> It is here worth noting that there are other circumstances within the Department where final agency decisions are not based on records developed through OAL proceedings, yet may be heard by the court on appeal; this would be true of any State Board decision reviewing a determination of the Commissioner not made in his or her adjudicative capacity, such as granting or revoking a school charter (*N.J.A.C.* 6A:11-2.5) or restoring municipal reductions to a school budget defeated by voters (*N.J.A.C.* 6A:23-8.10(f)). Additionally, the uncontested case hearing process is not a viable option in this context, since – even assuming, *arguendo*, that it is otherwise appropriate – acceptance of agency head requests for such hearings is at the sole discretion of the Director of the OAL (*N.J.S.A.* 52:14F-5(o); *N.J.A.C.* 1:1-21.1).

Education has no authority to limit the courts with respect to determination of their own jurisdiction. However, the Commissioner does believe it prudent to express her opinion for the record, in anticipation of further consideration of this question by the State Board of Education and the courts.

Accordingly, the Commissioner here opines that while federal law no longer provides for review of final agency complaint investigation decisions by the Secretary of the U.S. Department of Education (Initial Decision at 9), the current law's silence on this point cannot be read to prohibit such appeals as may be available at the State level, nor to extend IDEA requirements expressly linked to due process appeals (20 U.S.C. §1415(i)2(C)) to appeals of complaint investigations so as to remove the latter from the normal State agency decision appeal structure. Initially, the Commissioner views the right to judicial review of final agency decisions as axiomatic provided the requesting party has standing; in this regard, the Commissioner specifically rejects A.M.'s contention – based on *Essex County Welfare Board, supra* – that local district boards of education lack such standing with respect to agency complaint investigation findings. Rather, the Commissioner opines that, while local boards may be subordinate branches of the State agency (SEA) for purposes of administering the IDEA – as county welfare boards are (or were at the time of the *Essex* decision) for administering the federal Aid to Families with Dependent Children (AFDC) law – the two are not otherwise analogous; unlike county welfare boards (*N.J.S.A. 44:1-10 et seq.*), local boards of education are governing bodies of autonomous political subdivisions of the State, with independent authority to tax in support of educational expenditures including those associated with programs and services under the IDEA – thus giving them the same right to judicial review of adverse State agency decisions on behalf of constituents

and taxpayers as was accorded by the *Essex* Court to county governing bodies in the case of AFDC appeals. The Commissioner further notes that IDEA complaint investigation provisions – unlike those for due process proceedings – impose no specific requirement for *de novo* hearing or application of a preponderance of evidence standard on appeal so as to compel proceedings in a trial court; thus, the Commissioner concurs with the ALJ’s suggestion that the proper venue for appeal of OSEP complaint investigation decisions would appear to be the Appellate Division of Superior Court. (*Id.* at 13-14) <sup>8 9</sup>

However, as recognized by the ALJ, “appeal” and “reconsideration” are not synonymous, and the IDEA has been interpreted to leave to each State the decision as to whether – and through what process – *reconsideration* of complaint investigation decisions should be allowed. (Initial Decision at 13-15) Subsequent to issuance of the Initial Decision in this matter, the State Board effectively answered this question for New Jersey by adoption of a rule expressly providing for reconsideration by the OSEP Director of a final complaint investigation decision when “a party believes that [it] includes an error that is material to the determination in the decision” and informs the OSEP and the other party of the asserted error in writing, within 15 days of the date of the report; the steps to be taken to consider the claim of error will be determined by the OSEP. *N.J.A.C.* 6A:14-9.2(c)1;

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<sup>8</sup> In so opining, the Commissioner is not unmindful of the potential for different elements of a single complaint investigation to be on appeal in different forums: in the Law Division for elements pursued through due process, and in the Appellate Division for elements either not eligible for due process or not pursued by a complainant through that mechanism; however, as with the absence of an OAL record discussed above, such anomaly is a direct consequence of the IDEA’s requirement for provision of a simpler alternative to due process hearings without foreclosing full rights to such hearings for parents who wish them. Additionally, since the Appellate Division has adjudicative expertise in special education matters by virtue of hearing appeals from Law Division decisions, the consequences are less problematic than having the Commissioner hear complaint investigation appeals notwithstanding the Commissioner’s prohibition from hearing due process matters involving the same types of issues.

<sup>9</sup> Similarly, to the extent the ability to choose between trial and appellate courts creates an opportunity for “forum shopping” by parents, that consequence, too, flows directly from the IDEA.

38 *N.J.R.* 3530(b), 3567. Thus, there can be no doubt as to the State Board's intent to absent the Commissioner and State Board from the reconsideration process, no less than from the underlying decision on which it is based.

Notwithstanding the Commissioner's concurrence with the ALJ that the Commissioner of Education lacks jurisdiction over the pending individual matters underlying the "global" issue addressed herein, the Commissioner also concurs with R.K. that no petitioner in these matters should be left without remedy as a result of proceeding before the Commissioner in good faith. While dismissal of the pending appeals without further agency action was the only option available to the ALJ in the absence of a regulatory provision for reconsideration, such a provision now exists and should be made available to the petitioners notwithstanding any "reconsideration" that may have been given by the OSEP in response to a petitioner's prior informal request(s). The Commissioner, therefore, finds that the appropriate disposition of these matters is dismissal of the contested cases as recommended by the ALJ, but without prejudice to the petitioners' ability to request reconsideration by the OSEP Director within 15 days of the filing date of the Commissioner's decision, and – in the case of R.K., where the petitioner is a parent rather than a school district and consequently has additional rights under the IDEA<sup>10</sup> – further without prejudice to her concomitant right to pursue eligible issues through a due process hearing deemed requested as of the filing date (March 10, 2005) of her petition to the Commissioner. Additionally, the record of a petitioner's OAL proceeding up to this point

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<sup>10</sup> The Commissioner concurs with the ALJ that, for purposes of reconsideration or appeal, there is no reason to treat R.K.'s contentions of OSEP error any differently from those of school districts contesting OSEP's finding(s) of noncompliance. See Initial Decision at 17.

will be made available for OSEP review as part of any reconsideration or due process proceeding thus requested.

Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed therein, as amplified above. The respective appeals filed by the Lenape Board of Education, West Windsor-Plainsboro Board of Education, and R.K. are hereby dismissed as contested cases before the Commissioner of Education, without prejudice to each petitioner's ability to request – within 15 days of the filing date of this decision –reconsideration by the OSEP Director pursuant to *N.J.A.C.* 6A:14-9.2(c)1; in R.K.'s case, such dismissal is further without prejudice to her ability to request a due process hearing on any eligible issues, with such request deemed filed on March 10, 2005. Additionally, so that A.M. may hereafter have all the rights and obligations of a party as to the “global” issue addressed by the within decision (*N.J.A.C.* 1:1-16.1(b)), the Commissioner hereby elevates her status from participant to intervenor for this limited purpose.

IT IS SO ORDERED.<sup>11 12</sup>

ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 16, 2006

Date of Mailing: October 16, 2006

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<sup>11</sup> Upon filing of the within decision, the Commissioner will request that the matter entitled *Board of Education of Millburn Township v. New Jersey State Department of Education, Office of Special Education Programs* – presently pending at the OAL as Dkt. No. EDU 07130-06 (Agency Dkt. No. 185-5/06) – be returned to the agency pursuant to *N.J.A.C.* 1:1-3.3, with notice to the petitioning board as to its right to request reconsideration in the same manner as the petitioners herein.

<sup>12</sup> This decision 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.*