#17-08 (OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu03041-07_1.html)

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| TODDLERTOWN CHILD CARE CENTER, | : | |
| PETITIONER, | : | |
| V. | : | |
| BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY, | : | COMMISSIONER OF EDUCATION |
| RESPONDENT, | : | DECISION |
| **AND** | : | |
| TODDLERTOWN CHILD CARE CENTER, | : | |
| PETITIONER, | : | |
| V. | : | |
| BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY, AND NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF EARLY CHILDHOOD EDUCATION, | : | |
| RESPONDENTS. | : | |

SYNOPSIS

Petitioning preschool contends that respondent Board did not provide proper notification of intent not to renew its Abbott provider contract for the 2007-08 school year, and appeals both the Board's decision and the NJDOE Division of Early Childhood Education's affirmation of it.

The ALJ found, *inter alia*, that: the Board failed to adhere to the procedural requirements of *N.J.A.C.* 6A:10A-2.3(b) in notifying the petitioner of its intent to nonrenew; petitioner's efforts to address tasks as agreed to in a 2005-06 corrective action plan (CAP) support petitioner's contention that it is able and willing to provide required preschool services; and respondents failed to prove that petitioner is not able and willing to continue as an Abbott preschool provider. The ALJ ordered that the decision of the Division of Early Childhood Education, affirming the Board's action, be reversed; the ALJ further recommended that the Board enter into a contract for the 2007-08 school year with petitioner, and provide appropriate notice of same to parents of preschool-eligible students in the district.

Upon careful and independent review, the Commissioner rejected the Initial Decision of the OAL. The Commissioner found that, under the particular circumstances of this matter, the Board's technical violation of *N.J.A.C.* 6A:10A-2.3(b) did not prevent petitioner from receiving adequate notice, that CAP and budget approval are not, in themselves, sufficient to demonstrate ability and willingness to meet Abbott standards, and that the Board and Department demonstrated a sufficient basis for their conclusion that nonrenewal of petitioner's contract was appropriate and consistent with law.



January 14, 2008

OAL DKT. NOS. EDU 3041-07 and EDU 5430-07 (CONSOLIDATED)
AGENCY DKT. NOS. 58-2/07 and 129-5/07

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| TODDLERTOWN CHILD CARE CENTER,[1] | : | |
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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have exceptions from the Irvington Board of Education (Board) and the Department of Education (Department) – both filed in accordance with *N.J.A.C.* 1:1-18.4 and 1:1-18.8 – and the petitioner's reply to same.

Substantially reiterating arguments raised at the OAL, the Board's exceptions urge rejection of the Initial Decision in its entirety. The Board again asserts

[1] The petitioner in this matter is variously identified – throughout the papers and by all parties including the petitioner itself – as either "Toddlertown" or "Toddler Town." Although the latter appears on the school's official letterhead, the former is retained in the present decision because the parties' dispute was pleaded, and has proceeded from the outset, under this appellation.

that it met the necessary procedural requirements for nonrenewal of its contract with the petitioner by providing: 1) notice of such nonrenewal on or before March 1 as stipulated by the contract – which does not require a statement of reasons; and 2) reasons for its dissatisfaction in documented communications throughout the course of the preceding year, and again during the review process at the Department as required by *N.J.A.C.* 6A:10A:2.3(b) – which does not set a date or prescribe limitations of time for such provision. The finding of the Administrative Law Judge (ALJ) to the contrary, according to the Board, places form over substance and ignores that the petitioner had – at the very least – ample constructive notice of the matters of concern to the Board, so that it was fully able to defend its own position before both the Department and, later, the OAL. (Board's Exceptions at 2, 5-9)

The Board further reasserts that the petitioner is *not* "able and willing" to comply with standards for provision of Abbott preschool programs, as evidenced by the significant financial, operational and facility issues identified by the Office of Compliance Investigation (OCI) report – several of which remain outstanding – and the judgment of the Department liaison to the Board (Jessica Peters), who testified at length as to her observations of, and experience with, the petitioner's operations and facility. To the contrary, the Board contends, the record evinces a "long and documented history of, among other concerns, excessive lease payments; questionable payroll, food and other expenditures; inferior classroom sizes; inadequate security; and various other financial irregularities and educational program-related deficiencies…the existence of which was not denied and the remediation of which was woefully incomplete." (Board's Exceptions at 1, 3, 9-12; quotation at 1 and 3)

The Department's exceptions, likewise reiterating prior OAL argument, also urge rejection of the Initial Decision. The Department first takes exception – for reasons similar to those of the Board – to the ALJ's findings on the petitioner's ability and willingness to meet Abbott standards (Department's Exceptions at 1-3). It further asserts that it did not act arbitrarily or unreasonably in affirming the Board's decision not to renew petitioner's contract, since in reviewing this decision, it had before it ample evidence of both the petitioner's noncompliance with Abbott standards and the Board's history of written communications with the petitioner – the latter ensuring that the petitioner would (and, in fact, did) have sufficient opportunity to refute the Board's decision consistent with the intent and purpose of *N.J.A.C.* 6A:10A:2-3(b). (*Id*. at 3-6)

The petitioner, on the other hand, urges adoption of the Initial Decision in its entirety, addressing the Board's and the Department's (respondents) respective exceptions in a single reply that, like respondents' exceptions, substantially renews arguments raised at the OAL. The petitioner first contends the ALJ correctly found it "able and willing" to meet Abbott standards, since the OCI report so heavily relied upon by the respondents is not current and petitioner is in "substantial compliance" with the ensuing corrective action plan (CAP); further, according to the petitioner, any claims of breach of contract are belied by the fact that the Board never once invoked the process set forth in rule (*N.J.A.C.* 6A:10A-2.3(d)) for addressing such claims. The petitioner also asserts that the ALJ rightly rejected the respondents' contentions with respect to classroom size, attendance at training sessions, use of preschool premises as a law office, and lack of security, since the respondents have engaged in a "disingenuous pattern" of misrepresentation to "portray a lopsided and incomplete version of events" through

"overblown assertions" having little or no basis in fact. In sum, according to the petitioner, the respondents were "unable to effectively demonstrate [either] a single breach of the Abbott preschool contract, [or] a single instance of noncompliance with the Code by Petitioner." (Petitioner's Reply at 1-5, 20; quotations at 1-5 *passim* and 20)

On the question of the Board's compliance with applicable nonrenewal procedure, the petitioner reiterates its argument that *N.J.A.C.* 6A:10A:2-3(b) requires reasons for a nonrenewal decision to be given along with the decision, asserting that the interpretation espoused by the respondents would leave a provider to guess at a board's reasons for nonrenewal, thus precluding it from mounting a prompt and thorough refutation within the very short time frame allowed by the rule and causing all manner of procedural confusion and delay. According to the petitioner, there can be no doubt that the Board violated *N.J.A.C.* 6A:10A:2-3(b) or that the Department acted arbitrarily and unreasonably in upholding the Board's decision despite such violation, since the Board's "evidence" of its purported notice is nothing more than a series of "cherry-picked" communications that are erroneous, disputed, unclear, or devoid of mention of nonrenewal as a consequence – while the Department had no authority to ignore a duly promulgated administrative rule, nor to interpret it in a manner contrary to its obvious purpose and intent. (Petitioner's Reply at 5-10, 10-20, 20-22)

Upon careful review and consideration, for the reasons that follow, the Commissioner rejects the Initial Decision and dismisses the petition of appeal.

Initially, the Commissioner fully concurs with the petitioner and the ALJ that *N.J.A.C.* 6A:10A:2.3(b) does, in fact, contemplate that a statement of reasons will be given to a provider contemporaneous with notice of a board's decision not to renew its

contract, and that the Board herein failed to take this specific action. However, she also concurs with the Department that – under the particular circumstances here present – the Board's violation was effectively technical and does not act to preclude substantive review of the Board's underlying reasons, either by the Department or by the Commissioner on appeal.

There is no question that the Board in this matter did not articulate its reasons for nonrenewal within the body of – or in any addendum to – the letter notifying the petitioner of its intent not to renew the petitioner's contract for the 2007-08 school year, notwithstanding that the letter itself was provided within the time frame specified by the parties' contract.[2] However, given the documented history of escalating communications between the parties regarding ongoing problems perceived by Board officials – many of them validated by on-site observations of Department staff and Department assessment of CAP implementation issues arising from an OCI report which, it is noted, the petitioner did not appeal – the petitioner cannot creditably claim that it was taken by surprise on receiving notice, as the contractual deadline approached, of a Board decision not to renew – notwithstanding the absence of prior specific mention by the Board of nonrenewal as a consequence for its concerns; nor can it persuasively contend that it could not sufficiently fathom the reasons for such decision so as to undertake preparation of a meaningful rebuttal. Indeed, as the Department notes, the petitioner was, in fact, able to present a very substantial response to the Board's reasons during the course of its review – and again at the OAL hearing – so that the purpose of

[2] That preschool provider contracts are required to utilize a standard Department form with any alteration requiring Department approval (*N.J.A.C.* 6A:10A-2.2(c)-(d)) is yet another indication that the contract and nonrenewal rules are intended to work in tandem.

*N.J.A.C.* 6A:10A:2.3(b) was satisfied both at the Department level and on appeal, and the petitioner's claims of prejudice and denial of due process cannot reasonably stand.[3]

Consequently, in the Commissioner's view, while the Board should have articulated its reasons along with giving notice of intent as contemplated by rule, the omission of such articulation in this instance does not negate the past history of communications between the parties, nor does it render the Department's approval – which the record shows to have been based both on its own direct knowledge and the parties' extensive submissions on review – inherently arbitrary and unreasonable as found by the ALJ. Rather, it is clear that Department staff (appropriately) looked beyond the letter of the procedural rule to its intent in light of the underlying situation and – recognizing that the petitioner was well aware of the Board's (and the Department's) ongoing concerns with various aspects of the petitioner's operations and that the petitioner was being afforded the due process to which it was entitled – reviewed the matter on the merits and determined – both on an independent, individual basis and as a team – that the Board's decision to end its relationship with the petitioner had sufficient substantive basis, made appropriate provision for educating the petitioner's students elsewhere, and did not place the Board in violation of Abbott law requiring utilization of

[3] The petitioner cautions that the Department's lax interpretation of the rule's requirement for reasons will lead to situations where a provider could be totally surprised by, or have to "dig" for reasons that might explain, a Board decision not to renew its contract. The Commissioner does not disagree that boards cannot be permitted to have *carte blanche* with respect to how and when they notify a provider that its contract will not be renewed. However, there is no question here of the rule's intended meaning, only of the Department's application of it under specific factual circumstances where it knew the provider to be well aware of the board's concerns. That the petitioner herein was able to prepare for Department review as it did was not, as the petitioner contends, due solely to the competence and dedication of its legal counsel and staff. (Petitioner's Reply at 16-17)

community providers. (Testimony of David Joye, T4 at 46-128; testimony of Jessica Peters, T3 at 120-22, 134-54[4])

Thus, under these circumstances, the Commissioner finds that the Board may be deemed to have substantially complied with the notice requirements of *N.J.A.C.* 6A:10A:2.3(b), notwithstanding its technical violation, and that the Department did not err in so concluding. The question remains, however, as to whether the Board's decision to nonrenew and the Department's affirmation of it are arbitrary and unreasonable so as to warrant reversal by the Commissioner. On this point, the Commissioner, again, cannot concur with the Initial Decision, finding – as it did with the question of sufficiency of the Board's notice – that the decision effectively places form over substance, ignoring evidence demonstrating legitimate concerns on the part of the Board and minimizing the import of these concerns in terms of the provider's willingness and ability to meet Abbott standards.

In his recommended decision, the ALJ concludes that the petitioner was "able and willing" to continue as an Abbott preschool provider, as evidenced by its entry into a Board and Department-approved CAP which addressed budgetary and staffing issues, often without specific time frames for implementation, and by Department approval of the petitioner's 2005-06 and 2006-07 budgets – as well as by the respondents' failure to substantiate with sufficient evidence their claims as to classroom size, "no show" jobs, and failure to attend training sessions for the Curiosity Corner curriculum. (Initial Decision at 5-6)

[4] These and all subsequent similar citations refer to the transcripts of OAL hearings held on June 21, 2007 (T1), June 22, 2007 (T2), July 10, 2007 (T3) and August 10, 2007 (T4).

However, with respect to the Board's contentions regarding 1) a law practice and other businesses utilizing the school building while the Abbott program was being charged for the entire rent, 2) the security guard paid with Abbott funds not working in the budgeted position and found absent or not visible during site visits, and 3) questionable and disallowable expenditures, the undisputed fact that the petitioner has made material progress in meeting various elements of the CAP, and had its budgets approved for the period at issue, does not alter the equally obvious fact that the question of full Abbott usage of the petitioner's facility has still not been resolved to the Board's (or the Department's) satisfaction;[5] nor does it excuse inappropriate usage of budgeted staff positions[6] or dilatoriness in compliance with CAP directives and related Department or district requests, notwithstanding the absence of a fixed deadline.[7] Similarly, the fact that other providers still used by the Board may also have budget and accounting issues identified through OCI reports does not preclude the Board or Department from citing such issues as a basis for a decision not to renew a particular provider's contract. The Department's budget approval and OCI-CAP processes are separate and distinct from the process for review of nonrenewal decisions, and – although the results of one may have relevance to findings in another – budget and CAP approval cannot, in and of themselves,

[5] Testimony of George Henry (T3), Audrey Lassiter (T3 and T4), Jessica Peters (T3) and David Joye (T4), *passim*. The Commissioner does concur with the ALJ – as did the Department – that no evidence was presented to support the allegation that the petitioner's director also held another position as cruise director.

[6] With respect to the activities of the security guard, see T3 at 35, 47-49, 103-105, and 178-79.

[7] By way of example, law firm signage on a glass door was not removed until shortly before the June 22, 2007 hearing, notwithstanding it having been brought specifically to the petitioner's attention on October 27, 2006. (T2 at 85-88; T3 at 108-09)

be taken as sanctioning of actions or omissions later raised as concerns in a nonrewal proceeding so as to insulate these from Department (or Commissioner) review.[8]

With respect to the Board's remaining "unsubstantiated" reasons, the ALJ has effectively held the Board to proving its allegations precisely as they are stated in its February 21, 2007 and March 1, 2007 letters, while ignoring the fact that underlying the Board's inartful articulation were legitimate concerns which were more than adequately validated by the record, and of which all parties to this matter were clearly aware. In finding the Department's witness "unable to specify which 'no show' jobs [he found] troubling" (Initial Decision at 5), the ALJ has ignored the witness's explanation that he understood "no show" jobs to encompass questions of staff supported by Abbott funds performing non-Abbott work during the course of the school day. (T4 at 102) With respect to the Board's allegations of "substandard" classroom sizes despite "a significant amount of the building [being] used for office space," the record is clear that what Board and Department officials understood by "substandard" was not that the petitioner's classrooms were in violation of the regulatory minimum applicable to them as "grandfathered" spaces, but rather that usage of the petitioner's facility – in the interest of improving the students' educational environment – could have been, but was not, adjusted to decrease administrative space and increase classroom size to something closer to the current standard for "non-grandfathered" facilities. (T3 at 238-40, 137-40, 158-65, 175-76, 181; T4 at 11-26, 103-05) With respect to the Board's contention that the petitioner failed to attend Curiosity Corner training, the ALJ did not find in favor of the

[8] The Commissioner notes that, in any event – and as implicitly recognized in the ALJ's conclusions (Initial Decision at 10) – the approved budget did *not* include the rent increase sought by the petitioner based on its claim of full Abbott facility usage. (T4 at 99)

petitioner, as the petitioner suggests, but rather declined to make any finding at all because he judged the proofs to be in equipoise.

Compounding the problem is the Board's repeated use of the terms "breach" and "violation," which sound in termination for cause and permit the petitioner to counter (correctly) that 1) the Board cannot claim breach of contract where it never availed itself of contractual (*N.J.A.C.* 6A:10A-2.2(f)) and regulatory processes (*N.J.A.C.* 6A:10A-2.3(d)) specifically established to address such claims, and 2) the Board did not prove violation of any specified rule or statute. This matter, however, involves the nonrenewal – not the termination – of a preschool provider contract, so that it is not subject to the more stringent standards governing the latter; nor can it be overlooked that no provider is *entitled* to renewal of its annual contract, and a board is not *obliged* to give any particular provider a new contract so long as its decision to nonrenew can withstand Department scrutiny.

Under this circumstance, all the Department – and the Commissioner on appeal – need determine is that a board's decision has a reasonable basis, that alternative means exist to educate the provider's students, and that the board is not violating the prohibition against duplication of community provider services where available providers are able and willing to meet Abbott standards and use of their services is practical. In the Commissioner's view, adoption of the narrow, technical approach espoused in the Initial Decision sets a standard that would tie boards' hands in seeking optimal implementation of their preschool programs, effectively requiring providers to be noncompliant to the point of warranting mid-contract termination due to major deficiencies or egregious violation of law before a board can be allowed to cease offering

them annual contracts based on the reasonable belief that continued use of their services is not practical as a result of ongoing issues in the application of Abbott standards. This is particularly so where, as here, legitimate board and Department concerns are met with insistent denial, trivialization, misunderstanding or misrepresentation, and where compliance with the full range of stringent fiscal and accounting requirements associated with status as an Abbott provider is grudging at best and often open to question.[9]

In so holding, the Commissioner fully recognizes that the Board and its agents are not without fault in their handling of the nonrenewal of the petitioner's contract; indeed, many of the difficulties presented by this matter are due to the Board's lack of attention to proper procedure[10] and its imprecise articulation of the reasons for its underlying decision. However, under the circumstances here present, the appropriate

[9] Examples abound in the record of this matter. For instance: The petitioner's witness (executive director) is adamant that no external legal work is being done at the petitioner's facility during Abbott hours, and plainly annoyed that the Board and Department continue to press this point (T1 and T2, *passim*); yet she states that the petitioner's in-house counsel (her daughter) – who she claims is a full-time, on-site Abbott employee – keeps an office in East Orange because she does not want to meet with law clients at the preschool facility during the business day. (T2 at 176-77) She is equally adamant that there is no issue with the security guard performing appropriate duties; yet when he was not at his station during an on-site visit by Board and Department staff, who were accompanied by the witness and her son, she stated in response to staff questioning that the guard had gone to get paper towels, then later advised them that she was mistaken because her son was the security guard and had been with them the whole time. (T3 at 35, 47-49, 102-106, 178-79) She insists that the OCI did not single out the petitioner for audit, and that the audit referenced in this matter was random, routine and performed on all providers in the district; yet the record is unequivocally clear that it was initiated by a referral from the Department liaison based on conversations with the district. (T1 at 85-90, 102-03; T4 at 65-66; Exhibit P-24) She denies receiving communications claimed to have been sent to her by Board staff, contending that they are after-the-fact "fakes" fabricated to bolster the Board's case. (T2 at 178-79) Throughout her testimony, she alternately claims that the Board's action is 1) in retaliation for the petitioner's exercise of its rights in challenging the Board, first in its (incorrect and unsuccessful) characterization of a teacher as unqualified and then in its claim that the petitioner's classrooms were "substandard" when they, in fact, met applicable space requirements, and/or 2) an attempt to fill its own new preschool with the petitioner's students; yet there is no evidence to support either of these contentions, which are at the very least countered by credible testimony from Board and Department witnesses. (T1 and T2, *passim*; T3 at 104, 132-148, 194-203)

[10] The Commissioner notes a Board witness's testimony as to use of a standard "form" letter notifying providers of nonrenewal, which was sent to the petitioner in this matter and has in the past been sent to other providers who have not appealed. (T2 at 218-20) In this regard, the Commissioner cautions the Board and its staff regarding the need to provide adequate notice to providers as required by *N.J.A.C.* 6A:10A:2.3(b).

remedy for the errors made by the Board is not to compel it to continue contracting with a provider with whom it has had ongoing, State-validated concerns – particularly where alternatives are now available and the petitioner's ability and willingness to freely meet the full range of Abbott standards is belied by the resistance it has shown on this record to requirements it considers unreasonable or trivial. While the ALJ is correct in observing that procedural rules are "not to be ignored" (Initial Decision at 9), in a matter of this type – in order to fulfill her obligation to ensure that Abbott programs are delivered, and Abbott monies spent in accordance with their intended purpose – the Commissioner cannot allow the letter of the law to prevail over its spirit and intent when the latter dictate a contrary result.

Accordingly, the Initial Decision of the OAL is rejected for the reasons expressed herein, and the petition of appeal is dismissed.[11]

IT IS SO ORDERED.[12]

COMMISSIONER OF EDUCATION

Date of Decision: January 14, 2008
Date of Mailing: January 15, 2008

[11] Based on statements in the petitioner's exceptions (at 23) and, more particularly, in papers filed before the State Board of Education in conjunction with the petitioner's motion for emergent relief seeking issuance of a final Commissioner decision by December 21, 2007 notwithstanding the provisions of the Administrative Procedure Act, the Commissioner is aware that a number of Board students continue to attend the petitioner's school, apparently without payment of tuition in whole or part. While the Commissioner clarifies that she intends nothing in this decision to compel parents to transfer their children mid-year to an Abbott facility within the district, she concomitantly clarifies that the Board is not responsible for the payment of tuition for any time these students have thus far attended, or continue to attend for the balance of the 2007-08 school year. The Commissioner further reminds the parties that emergent relief was denied in this matter, and that the ALJ's initial decision in the petitioner's favor was a recommendation having no force and effect unless and until adopted by the Commissioner; thus, any action the petitioner may now deem to be to its detriment was taken at its own peril.

[12] 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.*