EDU #6974-97
C # 509-97E
C # 660-97
SB # 87-97 and #10-98 (consolidated)

K.B., on behalf of minor child, H.B.,

PETITIONER-RESPONDENT,

V.

BOARD OF EDUCATION OF THE RANCOCAS VALLEY REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,

RESPONDENT-APPELLANT,

AND

K.B., on behalf of minor child, H.B.,

PETITIONER-RESPONDENT,

AND

GLOUCESTER COUNTY INSTITUTE OF TECHNOLOGY,

INTERVENOR-RESPONDENT,

V.

BOARD OF EDUCATION OF THE RANCOCAS VALLEY REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decision on motion by the Commissioner of Education, September 25, 1997

Decided by the Commissioner of Education, December 29, 1997

For the Petitioner-Respondent, K.B., pro se

For the Respondent-Appellant, Parker, McCay & Criscuolo (Stephen J. Mushinski, Esq., of Counsel and Frank P. Cavallo, Esq., of Counsel)

For the Intervenor-Respondent, Capehart & Scatchard (Joseph F. Betley, Esq., of Counsel)

K.B. (hereinafter "petitioner"), who resided within the Rancocas Valley Regional High School District in Burlington County, filed a petition of appeal with the Commissioner of Education, along with an application for emergent relief, alleging that the Board of Education of the Rancocas Valley Regional High School District (hereinafter "Board") had improperly refused to provide transportation for her daughter, H.B., who attended the Gloucester County Institute of Technology Academy of Performing Arts ("GCIT" or "Gloucester County Institute"). The Board countered that it had no obligation to provide transportation for H.B., contending that it offered a performing arts program that was comparable to the program provided by the Gloucester County Institute. See N.J.A.C. 6:43-3.11. The Board also questioned whether an academy for the performing arts was a vocational program within the intendment of N.J.S.A. 18A:54-1 et seq. so as to require a school district to provide transportation for a student's attendance.

On September 17, 1997, an administrative law judge ("ALJ") recommended denying the petitioner's application for emergent relief. The ALJ found that although the relative hardship to the parties weighed more heavily on the petitioner, the relief requested was not necessary to prevent irreparable harm since the Gloucester County Institute had agreed to provide transportation during the pendency of this case. In

addition, the ALJ found that there was insufficient information in the record to determine whether the petitioner had a reasonable probability of prevailing on the merits of her claim. The ALJ therefore concluded that a plenary hearing should be scheduled on an expedited basis.

On September 25, 1997, the Commissioner affirmed the ALJ's decision to deny the petitioner's application for emergency relief, agreeing that the relief requested by the petitioner was not necessary to prevent irreparable harm. The Commissioner added:

> Although the record additionally indicates that the Board raises a question as to whether the Performing Arts Program offered by the Gloucester County Institute falls within the scope of vocational education as contemplated by N.J.S.A. 18A:54-1, the Commissioner takes judicial notice of the program's inclusion in the Department of Education's Directory of Verified Occupational Educational Programs (DOE Publication PTM No. 1123.00, Revised 1995), reflecting its status as a DOE approved trade and instructional program. As such, it is clearly within the purview of the cited statutory provisions and, therefore, there is no necessity for resolution of this question at the plenary hearing. Additionally, in reviewing the Directory, the Commissioner notes that the program at issue herein is the only approved vocational program in Dance and Performing Arts in southern New Jersey (Atlantic, Burlington, Camden, Cape May, Cumberland and Gloucester Counties).

Commissioner's Decision, slip op. at 9.

The Commissioner therefore denied petitioner's motion for emergent relief and directed that this matter proceed to a plenary hearing limited to the issue of whether the Rancocas Valley Regional High School District offered a performing arts program comparable to the program offered by the Gloucester County Institute.

The Board filed the instant appeal to the State Board, arguing that nothing in N.J.S.A. 18A:54-1 et seq. or its legislative history suggested that the Legislature had

intended the definition of vocational education to include the type of program at issue herein.

On November 12, 1997, following a hearing, the ALJ concluded that the Board did not offer a program in the performing arts that was comparable to the program offered by the Gloucester County Institute. Consequently, he recommended that the Board be directed to provide transportation for H.B. to the Gloucester County Institute. On December 29, 1997, the Commissioner adopted the findings and conclusions of the ALJ and directed the Board to provide such transportation. The Commissioner added in a footnote:

> Respondent is reminded that, notwithstanding the fact that the within Petition of Appeal only seeks transportation for H.B.'s attendance at GCIT, Academy of the Performing Arts, pursuant to N.J.S.A. 18A:54-20.1c, the District is likewise responsible for payment of H.B.'s tuition and, to the extent permitted by law, any imposed nonresident fee.

Commissioner's Decision, slip op. at 21.

The Board filed an appeal to the State Board from that decision, contending that the Commissioner erred in determining that its performing arts program was not comparable to the program offered by the Gloucester County Institute. In addition, the Board argued that the Commissioner had gone beyond the scope of the petition in determining that the Board was also responsible for H.B.'s tuition.

Since they arise from the same claim, we have consolidated the two appeals filed by the Board.

After a careful review of the record, we reverse the Commissioner's decision and remand this matter for further proceedings in accordance with our determination herein.

We reject the Commissioner's assertion in his decision of September 25, 1997 that inclusion of the GCIT performing arts program in the Department of Education's Directory of Verified Occupational Education Programs ("Directory") conclusively establishes that such program is "clearly within the purview of the cited statutory provisions and, therefore, [that] there is no necessity for resolution of this question at the plenary hearing." Initially in that regard, we find that the Commissioner failed to follow the proper procedure for taking official notice of the Directory. N.J.A.C. 1:1-15.2, which permits an agency to take official notice of "judicially noticeable facts" and "generally recognized technical or scientific facts within the specialized knowledge of the agency," requires that

> (c) Parties must be notified of any material of which the judge intends to take official notice, including preliminary reports, staff memoranda or other noticeable data. The judge shall disclose the basis for taking official notice and give the parties a reasonable opportunity to contest the material so noticed.

In this instance, we can find no indication in the record certified to us by the Commissioner that he notified the parties of his intent to take official notice of the Department's Directory of Verified Occupational Education Programs or provided them with the opportunity to contest such material. Nor is there any indication that he informed the parties that he intended to rely upon a staff memorandum dated September 24, 1997 from the Director of the Department's Office of School-to-Work Initiatives to the Director of the Bureau of Controversies and Disputes to conclude that

the GCIT program was the only approved program in these occupational fields in southern New Jersey.[1]

We stress in this regard that it is well established that the Commissioner cannot consider materials outside the record without divulging their substance and providing the parties with the opportunity to address them. See Edison Township Education Association v. Board of Education of the Township of Edison, decided by the State Board of Education, September 7, 1994, aff'd, Docket #A-895-94T1 (App. Div. 1996). In Elizabeth Federal S. & L. Assn. v. Howell, 24 N.J. 488, 506-507 (1957), the State Supreme Court emphasized that:

> The determination of the Commissioner cannot be made to rest upon information outside the record in the case before him which the parties have not had the opportunity to meet. This principle of exclusiveness of the record was discussed in Mazza v. Cavicchia, 15 N.J. 498 (1954) and was held there to be established law in this state. We said in that case, 15 N.J., at page 514:
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> "In any proceeding that is judicial in nature, whether in a court or in an administrative agency, the process of decision must be governed by the basic principle of the exclusiveness of the record. 'Where a hearing is prescribed by statute, nothing must be taken into account by the administrative tribunal in arriving at its determination that has not been introduced in some manner into the record of the hearing.' Benjamin, Administrative Adjudication in New York, 207 (1942). Unless this principle is observed, the right to a hearing itself becomes meaningless. Of what real worth is the right to present evidence and to argue its significance at a formal hearing, if the one who decides the case may stray at will from the record in reaching his decision? Or

[1] The memorandum was in response to a request for information regarding the performing arts program at the Gloucester County Institute. Along with his memorandum, the Director of School-to-Work Initiatives provided the "pertinent pages" of the Directory of Verified Occupational Education Programs—the title page and page 17, which included the GCIT program at issue. He indicated in his memorandum that "[t]he program at Gloucester County Vocational School is the only approved program in these occupational fields in southern New Jersey (Atlantic, Burlington, Camden, Cape May, Cumberland, and Gloucester Counties)."

> consult another's findings of fact, or conclusions of law, or recommendations, or even hold conferences with him?"
>
> Beyond question the use of expert knowledge gained by the Department is a desirable attribute of the administrative process, but it need not be applied in a manner which is unfair. By taking appropriate official notice of such material and making such facts part of the record and giving the parties fair opportunity to meet, explain or refute it, the Commissioner can satisfy the requirements of fairness and adequately protect the interests of all concerned.

In Edison Township Education Association, supra, slip op. at 7, the State Board observed that:

> "It is a fundamental principle of all adjudication, judicial and administrative alike, that the mind of the decider should not be swayed by materials which are not communicated to both parties and which they are not given an opportunity to controvert." Mazza, supra, at 516….
>
> Moreover, the Administrative Procedure Act, while authorizing the agency to take notice of generally recognized technical facts within the specialized knowledge of the agency, requires that the parties "shall be notified either before or during the hearing or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed." N.J.S.A. 52:14B-10(b).

As previously stated, there is no indication in the record of the instant matter that the Commissioner notified the parties that he intended to rely upon the memorandum from the Director of School-to-Work Initiatives or that he intended to take official notice of the Directory of Verified Occupational Education Programs. Consequently, the parties were not afforded the opportunity to contest those materials.

Moreover, as previously indicated, the record before us contains only two pages from the Directory—the title page and page 17, which includes the GCIT performing arts

program along with a partial list of the approved vocational programs in Gloucester County. The limited information contained on those two pages does not permit the conclusion that the GCIT performing arts program is the only approved program of its type in southern New Jersey. Such an approach does not "satisfy the requirements of fairness and adequately protect the interests of all concerned," Elizabeth Federal S. & L. Assn., supra, at 507, particularly in light of the fact that the parties were not notified of the memorandum submitted to the Commissioner by the Director of School-to-Work Initiatives, which was the sole authority upon which this conclusion rests.

We conclude, in addition, that even if the Commissioner had followed the required procedure for taking official notice of the fact that the GCIT program was listed in the Department's Directory of Verified Occupational Education Programs, it was not proper for him to construe such inclusion as providing conclusive proof that the program satisfied the requirements of N.J.S.A. 18A:54-1 et seq. The record before us is devoid of any information regarding the procedure for inclusion of a program in the Directory during the period relevant to this matter. Nor is there any indication of the basis for the determination to include the GCIT performing arts program or the standard applied in determining to include that program. The title page of the Directory, which is included in the record, indicates only that it was "revised for 1995" and was "[p]repared under the direction of New Jersey Occupational Competencies Project, Northeast Curriculum Coordination Center."

Under these circumstances, in which we are unable to review either the legal or factual basis for the inclusion of the GCIT program in the Directory, we would be abdicating our quasi-judicial responsibilities if we were to affirm the Commissioner's

determination to foreclose review of that program without any factfinding or legal analysis concerning whether the program was vocational within the intendment of the statute. See In re Masiello, 25 N.J. 590, 606 (1958).

Therefore, for the reasons expressed herein, we reverse the Commissioner's decision that the Board was responsible for H.B.'s transportation to the Gloucester County Institute and remand this matter to him with the directive that he transmit it to the Office of Administrative Law for such proceedings as are necessary to determine whether the GCIT performing arts program was vocational within the intendment of N.J.S.A. 18A:54-1 et seq. during the period relevant to this matter and for a resultant determination on the merits of the petitioner's claim for transportation. Since the petitioner did not make a claim against the Board for the payment of H.B.'s tuition and the parties, therefore, did not litigate the Board's obligation to pay tuition, we also set aside the Commissioner's determination in a footnote that the Board was responsible for H.B.'s tuition at the Gloucester County Institute. Hence, the Commissioner's determination on remand, in the absence of proceedings to resolve the tuition issue, must necessarily be limited to the petitioner's request for transportation.

We retain jurisdiction.

Samuel J. Podietz recused himself.

March 1, 2000

Date of mailing _____