

SOUTH AMBOY EDUCATION ASSOCIATION,	:	
	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY OF SOUTH AMBOY, MIDDLESEX COUNTY,	:	DECISION
	:	
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning Education Association alleged that the Board improperly assigned the duties of a learning disabilities teacher consultant (LDTC), who was on a one-year sabbatical, to remaining child study team (CST) members and contracted per diem work to an employee of an Educational Services Commission.

Citing *Lammers*, the ALJ found that the Supreme Court held that no vacancy was created when a teacher departed on a one-year maternity leave and the replacement was a long-term substitute. Thus, the ALJ determined that under similar circumstances, respondent Board was permitted to contract with the Commission during the LDTC's leave. Petition was dismissed.

Commissioner reversed the initial decision, finding that the Board's action to contract out the services of its LDTC to the Educational Services Commission for the 1997-98 school year during the LDTC's sabbatical leave was violative of *N.J.A.C. 6:28-3.1(b)*. Moreover, the Commissioner cited *Elson*, which established that a local board may only contract its CST services to supplement existing local district services, but not to supplant them. Therefore, the Commissioner directed the Board to cease said practice.

OAL DKT. NO. EDU 10058-97
AGENCY DKT. NO. 360-9/97

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The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner’s exceptions were submitted in accordance with *N.J.A.C.* 1:1-18.4.

Petitioner argues in its exceptions that the Administrative Law Judge (ALJ) erred in applying *Lammers, supra*, in the instant matter, as the issue of vacancy is not relevant to the illegality of subcontracting core Child Study Team (CST) services. In this regard, petitioner underscores that the issue in *Lammers* “***was whether a teacher’s tenure rights were violated when she was not reemployed after a RIF [to fill] a one-year position of another teacher who was on maternity leave.” (Petitioner’s Exceptions at p. 2) There, “the Court found ‘that a one-year leave of absence does not create a vacancy or temporary vacancy under *N.J.S.A.* 18:28-12.’” (*Id.*, citing *Lammers* at 267) Petitioner contends that *Lammers* was limited to interpreting *N.J.S.A.* 18A:28-12 and that statute’s effect on an individual’s tenure rights. Unlike the situation in *Lammers*, petitioner maintains there are no tenure issues involved in the instant matter.

Rather than focusing on whether there was a vacancy, petitioner reasons that the ALJ herein should have focused “on what is required by the very specific statute and regulations governing CSTs.” (*Id.*) The issue, according to petitioner, is whether a district may subcontract the *services* of a core CST member for *any* amount of time. (emphasis in text) (*Id.*) Citing *Auerbach v. Board of Education of the Borough of Morris Plains, Morris County*, decided by the Commissioner August 20, 1997, aff’d State Board February 4, 1998, and *Vicenzino, supra*, petitioner argues that the Board may not “split” its team members between or among different employers in that such an arrangement “was a concern because of potential management and supervision difficulties ***.” (*Id.* at p. 3) These legitimate concerns, petitioner observes, are significant herein, where not only are the services of the team member contracted, but the services have been provided by more than one person. (*Id.*) Petitioner asserts that “[p]roviding for specific eligibility conferences and initial learning evaluations, ***does not equate with hiring a ‘long-term substitute.’” (*Id.*) The contracted provider, petitioner concludes, “does not ‘have an identifiable, apportioned commitment to the local school district’” and is not “‘available during the hours pupils are in attendance,’” as required by *N.J.A.C. 6:28-3.1(b)*. (*Id.*) Thus, petitioner concludes that when the Board determined to maintain its own CST with one learning disabilities teacher consultant (LDTC), the replacement of her services for the year should have been accomplished by the Board hiring an employee. Only if the Board were approved for a waiver of the pertinent regulatory requirement could the Board do otherwise. Petitioner notes, however, that the Board did not apply for a waiver. (*Id.*)

Upon careful and independent review of the record in this matter, the Commissioner finds that a reading of the relevant case law compels a conclusion different from that reached by the ALJ in his initial decision. While the question before the Appellate Division

in *Vicenzino* was whether a local board may *eliminate* one of the basic CST positions and establish a contract with an outside agency to provide those services while choosing to maintain the other two basic CST positions, the Court therein affirmed that

***The regulations of the Commissioner and the State Board of Education implementing the statutory authority for a CST expressly provide that “all members of the [CST] shall be employees of a district board of education . . .” *N.J.A.C. 6:28-3.1(b)* Further, approved clinics and agencies may be used by the board of education to supplement existing services in defined areas. *N.J.A.C. 6:28-5.1(c)*. *** (*Vicenzino v. Bedminster Township Board of Education*, 312 *N.J. Super.* 243, 250)

Interpreting the special education requirements *in pari materia* with *N.J.S.A. 18A:28-9*, the statutory provision that authorizes a board to eliminate staff positions for reasons of economy and efficiency, the *Vicenzino* Court held that

“***where a board establishes a CST with employees of the district, the board may not eliminate one of those positions and contract out for those services. To be sure, if the Board were in good faith to eliminate the CST for reasons of economy and instead, “join with one or more boards of education or State agencies [to] provide for basic [CST] services,” under *N.J.S.A. 18A:46-5.1*, that would be an appropriate decision to make. In that event, the board of education would have complied with *N.J.S.A. 18A:46-5.1* and *N.J.S.A. 18A:28-9*.

*However, so long as the board elects to maintain its own CST, consistent with N.J.A.C. 6:28-3.1(b), each basic member, consisting of psychologists, learning disability specialists, and social workers, “shall be employees of a district board of education.”****” (emphasis added) (*Id.* at 250, 251)

Notwithstanding that the ultimate question in *Vicenzino* was different from the one herein, the Commissioner cannot disregard the Court’s interpretation of the pertinent special education mandates. Further, inasmuch as the District’s LDTC was unavailable to render services for the 1997-98 school year, those services provided by the Educational Services Commission cannot be considered supplemental but, rather, must be viewed as supplanting those of the LDTC, albeit on

a temporary basis. (See *Elson v. Hudson County Area Vocational-Technical Schools*, 96 N.J.A.R. 2d (EDU) 229, 236, establishing that a local board may only contract its CST services to supplement existing local district services, but not to supplant them. “***The determination as to whether the utilization of outside contracted services constitutes a supplanting or supplementing of the existing team members ‘involves a review of all the surrounding facts and circumstances.’” *Id.* at 234, citing to *Mullen v. Boonton Board of Education*, 94 N.J.A.R. 2d (EDU) 583, 590.)

Accordingly, the initial decision of the ALJ is reversed for the reasons set forth above. The Commissioner declares that the Board’s action to contract out the services of its LDTC to the Middlesex County Educational Services Commission for the 1997-98 school year during the LDTC’s sabbatical leave was violative of N.J.A.C. 6:28-3.1(b), and hereby directs that the Board cease said practice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 5, 1998