

M.J.K.D. AND A.W.D., on behalf of minor	:	
child, A.K.D.,	:	
	:	
PETITIONERS,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF PISCATAWAY,	:	
MIDDLESEX COUNTY,	:	
	:	
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning parents challenged the Board’s decision, in accordance with its revised policy, to deny subscription busing to their daughter, A.K.D., who attended a nonpublic school. Petitioners sought subscription busing and a safe and reasonable bus stop. Board’s revised policy limited subscription busing to its public school students.

ALJ found that the Board amended its subscription busing policy by resolution and that this action was within the sound discretion of the Board. *N.J.S.A. 18A:39-1.3* gives boards of education the *option* of offering courtesy busing to nonpublic pupils. Thus, the Board opted to drop the subscription busing for nonpublic school pupils. Petitioners were not treated differently from other parents of nonpublic pupils; therefore, the Board did not misapply the statute. ALJ found no violation of Article I, Section 1 of the New Jersey Constitution, of the First Amendment of the U.S. Constitution, of the New Jersey Law Against Discrimination, of the Equal Protection Clause, of the school laws or any failure to provide safe and adequate transportation. ALJ granted Board’s motion for summary judgment. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

SEPTEMBER 29, 1999

OAL DKT. NO. EDU 661-99
AGENCY DKT. NO. 6-1/99

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The record and initial decision issued by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon independent and careful review of the record, the Commissioner agrees with and adopts the recommendation of the Administrative Law Judge (ALJ) to deny petitioners' motion for summary decision and dismiss the Petition of Appeal. Initially, the Commissioner emphasizes that the ALJ is correct in determining at page 15 of the Initial Decision that while administrative agencies may base their decisions on constitutional considerations, they have only the power to pass upon certain constitutional questions. Of this, the ALJ states:

According to the New Jersey Supreme Court in *Abbott v. Burke*, above, "facial constitutional challenges to statutes should be judicially resolved, even where an as-applied challenge to a statute may strongly suggest initial agency jurisdiction." 100 *N.J.* at 299. However, it is appropriate for an administrative tribunal to review a constitutional issue "to develop a fully informed factual record and maximize the soundness of determinations through the agency's expertise." *Ibid.****

Secondly, the Commissioner is in full agreement with the ALJ that resolution of the instant matter essentially rests upon the clear wording of the statute which permits subscription busing of pupils who are not remote from school. The portion of *N.J.S.A. 18A:39-1.3* relevant to the controversy herein unequivocally states that a board of education ‘*may* also enter into a contract for the transportation of ***pupils who live less than two and a half miles from any not for profit nonpublic school***and *may* require that ***[the individual] having legal custody of the child shall pay all or a part of the costs of that transportation***.’” (emphasis supplied) As recognized by the ALJ,

[t]he words *may* and *shall* are, perhaps, the two most important words in statutory construction. It is well settled that *may* is permissive and *shall* is mandatory. *N.J.S.A. 18A:39-1.3* invests in local boards of education the discretion to provide subscription busing to non-public school pupils, or not. If a local board of education decides not to offer such busing, it is not offered and will not be offered until and unless the board acts by appropriate resolution to initiate it. What a board has done, a board may undo. The same board could, at a later date, decide to discontinue such busing. (Initial Decision at p. 17)

Review of this matter persuades the Commissioner that the ALJ carefully balanced the arguments of the parties and that his findings and conclusions are supported by the record. Further, the Commissioner believes that the holding in this matter is consistent with the decisions of the State Board of Education and the New Jersey Superior Court in *Parents for Student Safety, Inc. v. Board of Education of Morris School District, Morris County*, decided by the Commissioner August 24, 1984, *rev'd* State Board, February 5, 1986, *aff'd* Appellate Division, unreported opinion Docket No. A-3257-T7, decided February 17, 1987, *cert. denied* 108 N.J. 180 (1987), a case which challenged the action of the Morris Board of Education to provide courtesy busing only to public school students. Like the statute being challenged herein, the statute authorizing courtesy busing of students who do not live remote from school,

N.J.S.A. 18A:39-1.1, is permissive. The State Board and court holdings in *Parents for Student Safety, supra*, determined that *N.J.S.A.* 18A:39-1.1 permits, but does not require, a board of education to provide courtesy busing to private school students *even when* it provides such transportation to public school students. The same conclusion, the Commissioner believes, results from examination of the record and legal arguments of the parties in this matter.

Accordingly for the reasons well expressed in the initial decision, the Petition of Appeal is hereby dismissed.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 29, 1999

* This decision, as the Commissioner's final determination in the instant matter, 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.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.