

MONTCLAIR EDUCATION ASSOCIATION, :
on behalf of itself and the member named herein, :
MOIRA PALISITS, :

PETITIONERS, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP :
OF MONTCLAIR, ESSEX COUNTY, :
DEPARTMENT OF HEALTH OF THE :
TOWNSHIP OF MONTCLAIR, AND THE :
TOWNSHIP OF MONTCLAIR, ESSEX COUNTY, :

RESPONDENTS. : COMMISSIONER OF EDUCATION

AND : DECISION

CYNTHIA SAMUEL, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP :
OF MONTCLAIR, ESSEX COUNTY, :
DEPARTMENT OF HEALTH OF THE :
TOWNSHIP OF MONTCLAIR, AND THE :
TOWNSHIP OF MONTCLAIR, ESSEX COUNTY, :

RESPONDENTS. :

SYNOPSIS

In consolidated matter, petitioning Association and two school nurses asserted the Board terminated their employment pursuant to a RIF and retained other nursing professionals who were noncertified and/or nontenured. Petitioners alleged these individuals were hired under unlawful contract arrangements. The Board sought summary decision on the grounds that 1) it performed a lawful RIF to eliminate the school nurse positions held by petitioners, and 2) it entered into a contract with the Department of Health of Montclair (DOH) for the provision of certain nursing services to the school district which was legal pursuant to both *N.J.S.A. 18A:40-3.1* and the Interlocal Services Act (Act), *N.J.S.A. 40:8A-1 et seq.* Petitioners likewise moved for summary decision.

ALJ concluded that petitioners suffered no injury by virtue of the Board’s action and they were entitled to no relief in this matter. The Board could legally abolish their positions as part of a reduction in force and legally contract out those services that are not restricted to certificated nurses to the DOH. Moreover, the

ALJ concluded that the Association is not entitled to compel the Board to provide all health-related services in the school district through the employment of certificated nurses, and that the Board's contract comports with the Interlocal Services Act. Since petitioners only raised the general issue that no school nursing duties could be contracted out and since the contracts in question have already been performed, the ALJ concluded that no relief may be granted to the Association as a result of this appeal. ALJ granted the Board's motion for summary decision and denied petitioners' motion for summary decision. ALJ ordered petitioners' appeals dismissed with prejudice.

Commissioner affirmed finding that, although the DOH contract did not violate school laws or the Interlocal Services Act, the Board's assignment of duties to these contracted nurses, as evidenced by the contract, did not appear to consistently comport with the holdings in *Old Bridge* and *Dover*. To the extent that a contract exists for the current school year, the Commissioner ordered the Board to review such contract to ensure that the duties performed by the contracted nurses do not conflict with the duties specifically reserved for certificated school nurses who must be employed by the District, to make revisions as necessary, and to submit results of the revisions, within 120 days, to the Essex County Superintendent of Schools for review and approval.

September 30, 1999

OAL DKT. NOS. EDU 9511-97 AND 9512-97, CONSOLIDATED
 AGENCY DKT. NOS. 269-7/97 AND 276-7/97

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The record of this consolidated matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners’ exceptions and the Board’s reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in rendering the within decision.

Upon careful and independent review of the record in this matter, the Commissioner determines to affirm in part, and modify in part, the Initial Decision of the Administrative Law Judge

(ALJ). Initially, the Commissioner notes that the parties stipulate that, “[f]or reasons of economy, the Board abolished two school nursing positions [belonging to Petitioners Palisits and Samuel] effective following June 30, 1997.” (Joint Stipulation of Facts at paragraph 14) Thus, while they do not challenge the propriety of the RIF, petitioners do contend that the Board is without the legal authority to provide school health-related services through a contract with the Montclair Township Department of Health (DOH), which it established prior to the RIF, and has maintained since then. (*Id.*) They argue that *N.J.S.A.* 18A:40-3.1 mandates that the Board “employ and manage” its own school nurses, and, therefore, the contract between the Board and the DOH is unlawful. (Petitioners’ Brief in Support of Motion for Summary Decision at p. 5) Petitioners further assert that the Interlocal Services Act, *N.J.S.A.* 40:8A-1 *et seq.*, “does not permit the DOH to provide to the Board services which it is otherwise unauthorized to provide to itself, namely school nursing services.” (*Id.*)

With regard to the first argument, the Commissioner observes that *N.J.S.A.* 18A:40-3.1 does *not* mandate, as petitioners claim, that *all* nurses performing services in the District be *employees* of the Board. That statute provides, in pertinent part, that

[e]very person employed as a school nurse, school nurse supervisor, head school nurse, chief school nurse or school nurse coordinator, or performing any school nursing service, in the public schools of this state shall be appointed by the board of education having charge of the school or schools in which the services are to be rendered and shall be under the direction of said board***. *N.J.S.A.* 18A:40-3.1.

This law has now been read to require each school district to employ at least one school nurse, who must be appropriately certified by the State Board of Examiners and who is considered a teaching staff member for purposes of salary, tenure and evaluation, to perform duties expressly reserved to school nurses, and to oblige a local board to employ a sufficient number of school nurses to ensure the adequate provision of the duties specifically reserved for certified school nurses. *Dover, supra*, at pp. 9, 10.

In *Old Bridge, supra*, the Commissioner held that while “school nursing services” must be provided by certificated school nurses, other nursing services in the school setting may be provided by any qualified person, licensed and supervised, where the duties so require, in accordance with nursing

law. *N.J.S.A.* 45:11-23. In *Dover*, the Commissioner found that although *school nurses* must be employees of the district, there is nothing in the controlling statute that would preclude a board from contracting for the services of *noncertificated* nurses, to perform other health-related services, consistent with the dictates of *Old Bridge, supra*.¹ *Dover, supra*, at p. 10. To the extent the parties weigh the effect of a recently enacted statute, *P.L.* 1999, *c.* 168, on the provision of health services in this matter, the Commissioner notes that this law is explicitly applicable only to persons “who are initially employed to provide nursing services on and *after the effective date of [the] act*,” which was July 1, 1999. (emphasis supplied) Therefore, this statute does not control the outcome of the present matter.

The Board herein has contracted with the DOH, a governmental agency, for nursing services. Each of the nurses identified in the Board’s 1998-99 contract is fully licensed and registered in accordance with the guidelines set forth by the State of New Jersey Board of Nursing. (Joint Stipulation of Facts at paragraph 23) Accordingly, each of those contracted nurses may perform services *other than* “school nursing services.” Additionally, although they may not perform school nursing functions requiring a standard certificate, as long as they are duly licensed professionals who are supervised in accordance with any conditions specified by the terms of that license, these contracted nurses may *assist* certificated school nurses in the performance of duties reserved by law to such nurses. *Dover, supra*, at p. 10; *Old Bridge, supra*, State Board of Education, April 1, 1998.

Further, the Board’s 1998-99 contract with the DOH specifically states that the services to be provided by the contracted nurses will include, but not be limited to, the following: “1. Maintaining student health records. 2. Assisting with medical examination, including dental screening. 3. Conducting hearing screenings. 4. Conducting scoliosis screenings of pupils between the ages of 10 and 18.” (*Id.* at Exhibit J-12) Given the provisions of the Board’s contract with the DOH, as well as other documents on

¹ “[W]here education law is silent on the provision of specific nursing services and support functions related to them, and such services do not otherwise require educational certification, there is nothing to prevent a board of education from duly determining, for reasons of economy or efficiency, that these nursing services will be provided by health professionals who hold the requisite license from, and are supervised in accordance with the requirements of, the Board of Nursing pursuant to *N.J.S.A.* 45:11-23 *et. seq.****” (*Old Bridge, supra*, at p. 14)

record which indicate an overlap in functions between the District's "school nurses" (Exhibit J-1) and the contracted nurses (Exhibit J-6), the strictures of *Old Bridge, supra*, bear repeating:

[t]he duties expressly reserved to "school nurses" are recognized as "school nursing services" pursuant to *N.J.S.A.* 18A:40-3.1, and include lecturing to teachers on recognition and prevention of communicable disease and other health concerns (*N.J.S.A.* 18A:40-3; *N.J.A.C.* 6:29-1.2(b)1vi), maintaining pupil health records and assisting the medical inspector with physical examinations, including vision and hearing exams (*N.J.S.A.* 18A:40-4; *N.J.A.C.* 6:29-1.2(b)1i, 6:29-1.2(b)1iv, 6:29-2.1), examining pupils for the presence of scoliosis (18A:40-4.3; *N.J.A.C.* 6:29-1.2(b)1ii), recommending exclusion from school due to illness or exposure to disease (18A:40-7/8; *N.J.A.C.* 6:29-1.2(b)1v), reporting, receipt of reports and examinations in instances of suspected substance abuse (18A:40A-12, *N.J.A.C.* 6:29-6.5), vision screenings, health appraisals and various consultative functions with respect to evaluation for and provision of special education services (*N.J.A.C.* 6:28-3.2 *et seq.*, 6:28-11.3 *et seq.*), audiometric screening (*N.J.S.A.* 18A:40-4; *N.J.A.C.* 6:29-1.2(b)1iii, 6:29-5.1), maintaining awareness of safe procedures for handling of body fluids (*N.J.A.C.* 6:29-2.5), accessing employee health records when permitted by the employee (*N.J.A.C.* 6:29-7.4), serving as liaison to the local board of health on issues relating to pregnancy and prenatal health (*N.J.A.C.* 8:52-5.3), administration of Snellen vision screenings for special learner's permits for obtaining a driver's license (*N.J.A.C.* 13:21-7.1 *et seq.*), testing for tuberculosis infection (*N.J.A.C.* 6:29-2.3), and completion or approval, as designated thereon, of health forms required to be submitted to the State. Additionally, where so assigned, the school nurse will provide instruction to students within the limitations of the school nurse endorsement (*N.J.S.A.* 18A:26-2; *N.J.A.C.* 6:11-11.7, 6:29-4.2).² *Old Bridge, supra*, at pp. 13, 14, emphasis added.

The within matter differs from the circumstances in *Dover, supra*, insofar as two of the nurses employed by the DOH hold a standard educational services certificate with a school nurse endorsement. (Joint Stipulation of Facts at paragraph 31) However, given the language of *N.J.S.A.* 18A:40-3.1, and the holding in *Dover*, those contracted nurses holding educational services certificates with endorsements as school nurses may *not* perform the above-delineated *school nurse* services. Nor may contract nurses holding county substitute's certificates substitute for certified school nurses; any such substitutes must be employed by the District.

²It is noted that noncertificated nurses may serve as resource persons for family life programs pursuant to *N.J.A.C.* 6:29-4.2(h), but may not actually instruct pupils.

Therefore, because the Board is permitted to contract for nursing services within the limitations set forth by the *Dover* and *Old Bridge* decisions, having an agreement with the DOH is not, in itself, violative of applicable school law. However, the Board *may not* have noncertificated and/or certificated contracted nurses *independently performing functions reserved to the school nurse* and then simply have the school nurse review and approve the results; the role of noncertificated and contract nurses in such functions must be clearly limited to provision of *assistance*. *Old Bridge, supra*, at p. 16; *Dover, supra*, at pp. 10, 11.

With regard to petitioners' second argument, that the Interlocal Services Act permits local government agencies which share like responsibilities to provide joint services, but precludes a local agency which lacks experience and power in a particular field from providing those services to another local unit (Petitioners' Exceptions at p. 4), the Commissioner finds that so long as contract nurses are not providing *school nursing services* as set forth in *Old Bridge, supra*, and *Dover, supra*, there is nothing in the Act that would prevent local entities which are not school districts from providing other types of nursing services to a school district. Therefore, the Commissioner concurs with the ALJ that no violation of the Interlocal Services Act occurs as a result of the respondent Board's contracting with DOH consistent with the parameters of *Old Bridge, supra*, and *Dover, supra*.

Accordingly, the Commissioner affirms the Initial Decision of the ALJ for the reasons expressed therein as amplified above. However, although the Commissioner concurs with the ALJ that petitioners are entitled to no relief based on the within claim, the Commissioner does direct that the Board, to the extent that it may have a contract with DOH in place for the current school year, review such contract and its attendant job descriptions to ensure that the nursing duties performed pursuant to that contract do not conflict with duties specifically reserved for certificated school nurses employed by the District, *supra*; to make such revisions as may be necessary in these documents and in District staffing patterns; and, within 120 days of the date of this decision, to submit the results of its revisions to the Essex County Superintendent of Schools for review and approval. Finally, pursuant to *N.J.A.C. 1:1-14.10(j)*, the Commissioner affirms the ALJ's Interlocutory Order of June 5, 1998, as modified in her

Initial Decision on page two, dismissing with prejudice these consolidated matters with respect to respondents Department of Health of the Township of Montclair, Essex County, and the Township of Montclair.³ A copy of this decision shall be forwarded to the Essex County Superintendent of Schools.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

September 30, 1999

³ 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.