295-00

BOARD OF EDUCATION OF THE BOROUGH OF HIGHLANDS, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY AND THE STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION ON REMAND
RESPONDENTS.	:	

SYNOPSIS

Petitioning school district challenged the determination of the Division of Finance that it was responsible for payment of tuition for the 1997-1998 school year for a student placed by DYFS. Petitioner alleged that a now repealed regulation, *N.J.A.C.* 6:28-7.4(b)(5), divested it of responsibility for payment of the student's tuition. The Commissioner remanded this matter to the OAL so that the parties would have an opportunity to present legal arguments with respect to the impact of the repeal on the Board's financial responsibility and the ALJ might have full opportunity to consider in the first instance the legal arguments of the parties as to the applicability to the regulation in dispute of the "time-of-decision" doctrine and the prospectivity rule, in light of the facts of this matter and the Commissioner's decision in *Prospect Park*.

The ALJ determined that the regulation, because it is no longer in effect, was inapplicable in this case and that, as the district of residence, petitioner is statutorily responsible for payment of tuition.

The Commissioner affirmed the conclusion of the ALJ. However, unlike the ALJ, the Commissioner concluded that petitioner is responsible for the student's educational costs under both the repealed regulation and the current regulation, *N.J.A.C.* 6A:14-7.5(a)(4) and, therefore, he declined to undertake an analysis of the applicability of the "time of decision" rule and "prospectivity doctrine." The Commissioner interpreted *N.J.A.C.* 6:28-7.4(b)(5), the repealed regulation, as placing responsibility for payment of tuition on the local school district, and requiring participation in the placement decision, not as a condition precedent to invoking the tuition responsibility, but in order to ensure that the district addresses the student's IEP needs.

September 11, 2000

BOARD OF EDUCATION OF THE BOROUGH OF HIGHLANDS, MONMOUTH COUNTY,	:	
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V.	:	COMMISSIONER OF EDUCATION
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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and Respondent, State of New Jersey, Department of Education's ("State") reply thereto were timely submitted and considered by the Commissioner.[1]

In its exceptions, the Board disputes the ALJ's finding at page 7 of the Initial Decision that "during the 1997-98 school year, the [Board] had notice of M.M.C.'s placement and did not file a due process request or otherwise challenge the appropriateness of the placement." (Initial Decision at 7) The Board contends that filing a due process petition, pursuant to regulation, would not have been the correct course of action; moreover, it *did* take appropriate action by immediately advising the State that it would not assume responsibility for

[1] By letter dated August 16, 2000, counsel for the State informed the ALJ that she had not yet received a copy of the Initial Decision, and that, upon receipt of same, an extension of time to submit exceptions and/or reply arguments would be required. Thereafter, counsel for the State was granted an extension of time to submit such arguments.

M.M.C. (Board's Exceptions at 2) Following a series of communications with the Department of Education, the Board filed a Petition of Appeal.

Instead, the Board argues, it was DYFS which failed to take the appropriate action, pursuant to its responsibility under the former regulations. Noting that the operative decisions herein were rendered well before July 1998, the date the new regulations went into effect, the Board reasons that the Initial Decision would force "the Highlands taxpayers [to] bear the consequences of a decision to amend a regulation which conferred an affirmative obligation on another arm of the State, an obligation which was ignored." (*Id.* at 3) Moreover, the Board asserts that the ALJ's strict reliance upon *Parsippany Hills, supra*, is wholly improper. Unlike the regulation herein, in *Parsippany Hills*, the disputed ordinance had expired and the Township did not enact a replacement.

Finally, the Board maintains its position that "[i]f the special education regulations were to be applied retroactively, across the board, school districts would be subject to countless claims of violations of special education requirements, merely because the requirements changed." (*Id.* at 4) "Surely", the Board reasons, "that would not be consistent with the State and federal mandate to protect the rights of disabled students." (*Id.* at 5) In this instance, the Board underscores that it was not notified of its responsibility for the educational costs of M.M.C. until January 1998, more than halfway through the 1997-98 school year. Therefore, even if the new regulations were to be applied herein, the Board questions how it could have met its obligation to conduct an IEP meeting under these circumstances, thereby concluding that it "was denied its right to participate in any meaningful decision-making regarding M.C.'s placement." (*Id.* at 7)

In reply, the State contends that the ALJ properly determined that the old rule, *N.J.A.C.* 6:28-7.4(b)(5), is not applicable herein, inasmuch as "petitioner has demonstrated no vested right obtained by way of *N.J.A.C.* 6:28-7.4 that would require application of the repealed rule and thereby [except] it from statutory responsibility as the district of residence." (State's Reply at 2) Further, the State argues that, contrary to the Board's assertions, the ALJ's application of *Parsippany Hills, supra,* to the present matter is entirely proper, since prior case law has established "that the same rules which govern the construction and application of statutes and municipal ordinances also govern the construction and application of administrative regulations." (*Id.* at 3)

Upon careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge's conclusion, for the reasons set forth below, that petitioner, as the "district of residence" for M.M.C. for the 1997-98 school year, is responsible for the costs related thereto.

Subsequent to the Commissioner's remand of this matter, the parties were provided an opportunity to present legal arguments regarding the issue of the applicability of the "time of decision" doctrine and the prospectivity rule vis-à-vis the regulations in dispute, and in light of the facts in this matter. Having the advantage of such legal arguments, the ALJ's recommendation, as well as the parties' responses to the Initial Decision, and given the language of the regulation adopted in 1998 which removes *any* ambiguity regarding a local board's fiscal obligations in those cases where a student with a disability is placed in an approved residential private school by a public agency, the Commissioner now determines that, under *either* a prospectivity analysis[2] *or* a time-of-decision analysis,[3] the Board is responsible for the

[2]The prospectivity doctrine would apply the old rule, *N.J.A.C.* 6:28-7.4(b)5ii, to the instant matter, reserving application of the new rule for those matters arising after July 1998.

educational costs for M.M.C. for the 1997-98 school year. As such, the Commissioner finds it unnecessary to determine which doctrine should be determinative herein.

As the Initial Decision indicates, the Department of Education conducted a review of special education regulations, which, while technically resulting in the repeal of "old" and adoption of "new" regulations in 1998 by the State Board of Education, essentially constituted a comprehensive *revision* to, and recodificaton of, the special education regulations. (See, State's Brief of March 17, 2000, Attachment, Memorandum to State Board of Education from Commissioner Klagholz, August 7, 1996) The newly codified rules, *inter alia*, clarified the responsibilities of district boards of education with respect to student placements. *N.J.A.C.* 6A:14-7.5 *et seq*. Specifically, although the former regulations clearly provided that, where a student with a disability was placed in an approved residential private school by a public agency, "[t]he district board of education *shall* pay the nonresidential special education costs," *N.J.A.C.* 6:28-7.4(b)5 (emphasis supplied), the pertinent rule went on to add:

> The chief school administrator or his or her designee shall participate with the public agency in the placement decision if the district board of education is to be responsible for the special education costs.
>
> *N.J.A.C.* 6:28-7.4(b)5ii

This language could reasonably be construed, and, indeed, was previously construed by the Commissioner, as placing *a condition* upon the local district's fiscal obligations, notwithstanding an otherwise unambiguous directive. The revised regulation, however, while likewise requiring that, where a student with a disability is placed in an approved residential private school by a public agency, "[t]he district board of education *shall* pay the nonresidential special education costs," *N.J.A.C.* 6A:14-7.5(a)4 (emphasis supplied), replaces the prior language with the

[3] The time-of-decision doctrine would apply the more recently-adopted rule, *N.J.A.C.* 6A:14-7.5(a)4, to the instant

directive: "the district board of education shall convene a meeting according to *N.J.A.C.* 6A:14-2.3(i)2 to revise the IEP as necessary."

Consequently, in light of the clarification provided by the amended rule, the Commissioner finds that *N.J.A.C.* 6:28-7.4(b)5ii should not be read to have established a condition precedent to a district's liability for education costs, but, rather, to have mandated that the chief school administrator, or designee, of the district *participate in the placement decision for the purpose of addressing the student's individualized educational program planning needs.* The Commissioner now so interprets *N.J.A.C.* 6:28-7.4(b)5ii, and, finds that, to the extent prior decisions construed the regulations differently, they do not control the outcome in this matter, or in future matters which may invoke *N.J.A.C.* 6:28-7.4(b)5ii.

Accordingly, the Commissioner concurs with the ALJ, for the reasons set forth above, that petitioner is liable for payment of M.M.C.'s educational costs for the 1997-98 school year.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: September 11, 2000

Date of Mailing: September 13, 2000

matter, since it is operative when this matter is decided.

[4] This decision, as the Commissioner's final determination, 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.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.