503-03

COMMISSIONER OF EDUCATION DECISION SYNOPSIS

George Osborne v. Board of Education of the Township of Lakewood, Ocean County; Meir Grunhut, Board President; Norman Bellinger, Board Vice President; Chet Galdo, Harvey Kranz, Sara Lichtenstein, Irene Miccio, Abraham Ostreicher, Neal Price and Leonard Thomas, Members of the Board; and Dr. Ernest J. Cannava, Superintendent of the Lakewood School District

Petitioning taxpayer sought ruling that the Lakewood Board's busing policy, which provides for courtesy busing services for public and nonpublic school students, was unlawfully discriminatory and designed to segregate students based upon race, religion and gender. Respondents asserted that the Board's busing policy and its implementation was neutral with respect to race, religion and gender.

Initially, the ALJ concluded that petitioner, who was a voting Board member in 1995 when the busing policy was revised, filed his petition more than seven years after he was on notice of the existence of the policy and how it was being implemented. Thus, the petition was untimely filed and the ALJ concluded that the 90-day limitation should not be waived. The ALJ also concluded that laches and estoppel precluded petitioner's claims and that petitioner, who was neither a student nor the parent of a student in the District, did not have standing to challenge the Board's busing policy under the New Jersey Constitution and State Law. Moreover, the ALJ determined that petitioner failed to state a claim upon which relief could be granted; he failed to meet his burden of proving discrimination. The ALJ found that the Board chose to provide transportation to all children within its school district within reasonable limitations as to distance. Petitioner as taxpayer did not have standing to pursue any of his claims under the U.S. Constitution or Federal Laws with the exception that as taxpayer he brought a claim which attacked government expenditures on First Amendment Establishment Clause grounds. Petitioner, however, could not show that the Board's application of its busing policy violated the Establishment Clause of the First Amendment of the U.S. Constitution since the Board offered busing on the same terms to all school children in its District without regard to religion. Respondents' motion for summary decision was granted.

Following careful and independent review of the record, the Initial Decision and the parties' exceptions, the Commissioner modified the findings and determination in the Initial Decision. Initially, the Commissioner declined to apply the filing limitation of the 90-day period set forth at *N.J.A.C.* 6A:3-1.3(d) or to apply laches since respondents did not raise untimely filing or laches as affirmative defenses in this matter and, if the allegations of discrimination and violations of Federal and State laws were true, they would constitute a continuing violation. The Commissioner agreed that petitioner did not establish that he had standing to pursue his claims under the U.S. Constitution or Federal laws except for petitioner's claim that Lakewood's busing policy, as applied, violated the Establishment Clause of the First Amendment of the Constitution. The Commissioner also found that petitioner had standing with respect to his New Jersey Constitutional claims; petitioner presented convincing arguments that, as a resident and taxpayer, he was directly affected by the District's courtesy busing policy. Notwithstanding the finding that petitioner had standing to pursue his claim under the Establishment Clause of the First Amendment to the Constitution and his New Jersey Constitutional claims, the Commissioner found that petitioner did not meet his burden of presenting specific facts to demonstrate that the busing policy was applied in a discriminatory manner nor did he allege that the courtesy busing was not provided to all students residing in the District, without regard to whether they attend public, private or parochial schools. Thus, petitioner failed to demonstrate that Lakewood's Busing Policy No. 3541.31 and its implementation were contrary to law. Summary decision was, therefore, granted to respondents and the petition was dismissed.

August 26, 2003

OAL DKT. NO. EDU 6438-02
AGENCY DKT. NO. 241-8/02

GEORGE OSBORNE, PETITIONER, V. BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY; MEIR GRUNHUT, BOARD PRESIDENT; NORMAN BELLINGER, BOARD VICE PRESIDENT; CHET GALDO, HARVEY KRANZ, SARA LICHTENSTEIN, IRENE MICCIO, ABRAHAM OSTREICHER, NEAL PRICE AND LEONARD THOMAS, MEMBERS OF THE BOARD; AND DR. ERNEST J. CANNAVA, SUPERINTENDENT OF THE LAKEWOOD SCHOOL DISTRICT, RESPONDENTS.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions[1] and respondents' reply exceptions were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in reaching his determination.

[1]Pursuant to *N.J.A.C.* 1:1-18.4, the parties were permitted to file written exceptions with the Commissioner within 13 days from the date the Initial Decision was mailed. In the instant matter, the Initial Decision was mailed to the parties on May 21, 2003. The parties' exceptions in this matter were therefore due on or before June 3, 2003. Petitioner timely filed exceptions on May 28, 2003 and subsequently submitted "Supplemental Exceptions." Although these "Supplemental Exceptions" were dated and mailed on June 2, 2003, they were not received until June 5, 2003. Since exceptions are considered filed upon receipt (*see N.J.A.C.* 6A:3-1.2), petitioner's "Supplemental Exceptions" were untimely filed and were therefore not considered in making this determination.

Initially, petitioner asserts that the Initial Decision must be rejected in its entirety because it does not contain the elements set forth at *N.J.A.C.* 1:1-18.3. (Petitioner's Exceptions at 2) Specifically, petitioner asserts that:

> 1. The written Initial Decision does not contain an appropriate caption as required by law;
> 2. The written Initial Decision does not contain an appearance of the parties and their representatives as required by law;
> 3. The written Initial Decision does not contain a statement of the issue(s) as required by law;
> 4. The written Initial Decision does not contain a factual finding as required by law;
> 5. The written Initial Decision does not contain a conclusion of law as required by law;
> 6. The written Initial Decision does not contain a disposition as required by law;
> 7. The written Initial Decision does not contain a list of exhibits admitted into evidence as required by law.[2] (*Ibid*.)

Petitioner also takes issue with the ALJ's concluding, without the benefit of discovery or the holding of a plenary hearing, that petitioner does not have standing to pursue any of his claims under the U.S. Constitution or Federal Laws, with the exception of his claims under the Establishment Clause of the First Amendment of the U.S. Constitution. (*Id.* at 3) *Citing, inter alia*, *Flast v. Cohen*, 392 *U.S.* 83 (1968), *Crescent Park Tenants Ass'n v. Realty*

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[2]It is unclear as to why petitioner objects to the form of the Initial Decision in that the Initial Decision contains an appropriate caption (Initial Decision at 1), clearly lists the appearance of the parties and their representatives (*ibid*.) and contains a disposition of the matter (*id*. at 23). Moreover, as petitioner himself points out, *N.J.A.C.* 1:1-18.3 states that the necessary elements may be combined and need not be separately discussed. (Petitioner's Exceptions at 2) Such is the case in the Administrative Law Judge's (ALJ) statement of the issues (Initial Decision at 7), factual findings (*ibid.*) and conclusions of law (*id*. at 8-23). With respect to the list of exhibits, the ALJ provides the following explanation:

> Penultimately, it should be noted that I have not set forth an exhibit list. The reason is simple. The numbers of submissions and their disarray makes it practically impossible to determine what was and was not meant to be utilized as part of the motion. I reviewed every document submitted in the case and all of those documents remain in the file for further review by the agency head. I cannot, however, rationally set forth in numerical, chronological order what those exhibits are and whether they are or are not germaine to the issues *sub judice*. (*Id*. at 23)

Equity Corp. of N.Y., 58 *N.J.* 98 (1971) and *Silverman v. Board of Ed., Tp. of Millburn*, 134 *N.J. Super*. 253, 257-258 (Law Div. 1975), *aff'd* o.b. 136 *N.J. Super*. 435 (App. Div. 1975), petitioner argues that he has standing to pursue his constitutional claims because there is no bar to taxpayers challenging allegedly unconstitutional federal taxing and spending programs because taxpayers have a personal stake in the outcome. (*Id*. at 4) Petitioner, therefore, contends that there is no reason why the State's liberal approach to standing should not apply to taxpayer suits challenging quasi-legislative actions of a board of education. (*Ibid.*) Petitioner additionally maintains that, since the ALJ determined that he had standing to pursue his Establishment Clause claims, it was erroneous for the ALJ to dismiss those claims without a hearing on the merits. (*Id*. at 8)

Moreover, petitioner avers that material facts in this matter are in dispute with respect to whether state and federal monies are being spent in violation of constitutional protection against the abuse of legislative power so as to preclude this matter from being decided on a summary basis. (*Ibid*.) Petitioner asserts that:

> Specifically, there exists a "genuine issue of material fact" as to whether federal and state taxpayers' money is being used under Lakewood's "courtesy busing" policies programs to:
>
> 1. foster and promote religion in ways that violate state, federal, and school laws, and discriminate against public school students
>
> 2. foster and promote religion in ways that violate state, federal, and school laws, and [segregate] public school students from private students, and boys and girls in violation of state, federal, and school, and
>
> 3. foster excessive government entanglement[.]
>
> (*Ibid*.)

Providing numerous citations with respect to the standards for the granting of summary judgment, *i.e*., evidential materials must be viewed in the light most favorable to the non-moving party; discovery and a full hearing on the merits of a case should not be prevented simply because the ALJ favors one of several views of evidence; the non-moving party must present enough evidence to demonstrate that a dispute is genuine, *etc.*, petitioner concludes that the grant of summary judgment to respondents "should be reversed" because "there exists a 'genuine issue of material fact'" and respondents are not entitled to summary judgment as a matter of law. (*Id.* at 4-9)

Turning to the issue as to whether the petition in this matter was timely filed, petitioner asserts that he was severely prejudiced by the ALJ's abuse of discretion in concluding that the petition was untimely filed pursuant to *N.J.A.C*. 6A:3-1.3(d). (*Id*. at 9) Petitioner points out that the record is silent on the issue of the timeliness of the filing of the petition and he is now forced to respond to an issue never raised by respondents. (*Id.* at 9 and 12) *Citing Kaprow v. Bd. of Ed. of Berkeley Townsh*ip, 131 *N.J.* 572 (1993), *Borough of Park Ridge v. Salimone*, 21 *N.J*. 28 (1956) and *North Plainfield Ed. Ass'n v. Bd. of Ed. of North Plainfield Borough*, 96 *N.J*. 587 (1984), petitioner contends that he "was obligated to file his claims with the [Department of Education] within 90 days of the date on which he first became aware that he had a 'cause of action' against the board, and not when Local Policy No. 3541.31 was revised on June 12, 1995." (*Id*. at 11)

Moreover, petitioner claims that respondents were put on notice on June 7, 2002 by way of petitioner's signature on a petition calling for the termination of nonpublic school student transportation contacts and a letter of July 17, 2002 to the former Board president. (*Ibid*.) Since petitioner filed his petition on August 2, 2002, petitioner argues, both dates are well

within the 90-day rule specified in *N.J.A.C.* 6A:3-1.3(d). (*Ibid*.) Petitioner further argues that, as stated in *Lopez v. Swyer*, 62 *N.J.* 267, 272 (1973), the discovery rule "shields a plaintiff from the accrual of his cause of action 'until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim'" and that "although an injured party may be aware he suffered an injury, 'the injured party may not know it is attributable to the fault or neglect of another.'" (*Id.* at 12) The ALJ erred, petitioner claims, in dismissing his complaint on the erroneous assumption that petitioner "should have known that a 'facially neutral' local courtesy busing policy was discriminatory" by virtue of his service on the Lakewood School Board. (*Ibid*.) Petitioner therefore concludes that the 90-day rule should be waived and the Initial Decision rejected under the doctrine of fundamental fairness and abuse of discretion. (*Ibid*.)

Petitioner also excepts to the ALJ's raising the defense of laches, an issue which respondents failed to raise themselves, and then erroneously concluding that the petition was barred by laches. (*Id*. at 13) *Citing Dorchester Manor v. New Milford Bor.,* 287 *N.J. Super.* 163, 172 (Law Div. 1994), petitioner argues, *inter alia*, that "[I]n order for laches to apply, the party asserting the doctrine must have 'a justifiable reason to believe that the alleged rights are meritless or have been abandoned.'" (*Id.* at 14) Petitioner asserts that, generally, a factual hearing is required in determining whether the application of laches or estoppel is equitable. *Dorchester* at 173. (*Id*. at 15) Petitioner points to *Enfield v. FWL*, *Inc.*, 256 *N.J. Super*. 502, 520-521 (Ch. Div. 1991) in arguing that "the length of the delay in assertion of a party's rights is determined with reference to 'the date when alleged legal injury occurred'" and that "a party asserting laches must establish that the other party either knew or, with reasonable diligence and vigilance, could have known of such date of occurrence." (*Id*. at 14)

Clearly, petitioner submits, this means that the equitable defense of laches is to be asserted by a party to the action and respondent did not raise the defense of laches in their Answer to the petition or elsewhere in these proceedings. (*Id.* at 17) Therefore, petitioner reasons, in raising the issue of the timeliness of the petition and the defense of laches, the ALJ improperly abandoned his role as impartial judge and assumed the role of attorney for respondents. (*Ibid*.)

Additionally, petitioner argues, the nature of his complaint, which goes to policy considerations which affect the school tax burden on Lakewood property owners, should dictate hesitation by the Commissioner in applying laches or estoppel in the instant matter. (*Ibid*.) Rather, petitioner asserts that, in challenging the Board's spending habits, he has exercised express statutory rights and that the applicability of laches and estoppel should be determined based on policy considerations related to tax appeals where the right of appeal is constitutionally protected, quoting *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 *U.S*. 18, 36, 110 *S. Ct.* 2238, 110 *L.Ed.*2d 17, 35-36 (1990), which states that "[b]ecause exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause." (*Id.* at 16-17)

Respondents' reply exceptions acknowledge that the 90-day requirement for the timely filing of relief from the Commissioner was never specifically raised, but notes that respondents did raise the factual issue that petitioner was a sitting member of the Board when the policy in question was revised. (Respondents' Exceptions at 1-2) In so acknowledging, respondents submit that there is no bar to the raising of this issue by the ALJ, noting that an ALJ in *K.C. and C.C. o/b/m J.C. v. Lakewood Board of Education* (OAL Docket No. EDS 739-03/Agency Reference No. 75-3/03), similarly raised said time bar on his own volition. (*Id.* at 2)

Despite protestation by petitioners in that matter, respondents aver, the Commissioner concurred with the ALJ's determination. (*Ibid*.)

Moreover, respondents argue that the application of the 90-day rule will not result in any legally based injustice. (*Ibid*.) Therefore, respondents assert, the strict application of the rule should be applied in that: 1) petitioner was a voting member of the Board when the policy in question was revised; 2) while petitioner's claims are couched in state and federal constitutional terms, none are novel; and 3) the OAL has no jurisdiction to confer much of the relief sought. (*Id.* at 2-3) With respect to petitioner's Establishment Clause claim, respondents state that they will rely on previously submitted legal memoranda. (*Id.* at 3)

BACKGROUND DISCUSSION

Initially, in reviewing the Petition of Appeal,[3] containing 96 enumerated items variously categorized under the headings of "Authority," "Parties," "Standing," "Statement of Facts," and "Counts" I through IV, it is noted that petitioner sets forth the context from which his claims arise by providing a description, from his perspective, of the alleged influence of the Orthodox Jewish population in Lakewood on policies and actions of the Lakewood Board, particularly in the creation and implementation of the school district's busing policy. In summary, petitioner avers that Lakewood has a population of over 60,000 persons, 50% of which are ultra Orthodox Jews and that the ultra Orthodox Jewish community's bloc voting controls the election process. (Petition of Appeal at 4 and 11) Petitioner also states that "[i]f, the ultra Orthodox Jewish community where [sic] to sneeze, the township committee, and the board of

[3] This petition was originally filed as a Verified Petition for Declaratory Judgment. On September 5, 2002, the Commissioner declined to consider this matter as one for declaratory judgment, pursuant to his authority under *N.J.A.C.* 6A:3-2.1(a), and transferred this matter to the OAL for further proceedings.

education would catch a cold. The board is more than 'excessively' entangled with religion. It is joined at the hip with it." (*Id*. at 11) Thus, petitioner claims, the public school district and the sectarian nonpublic schools are "woven together as one fabric with one common goal, and that is to ensure that members of the ultra Orthodox Jewish community are transported to their 'pervasively' sectarian schools in a segregated and separate manner." (*Id*. at 15) Petitioner also claims that "[w]hat the district calls courtesy busing for nonpublic school students has become a private taxi service for the transportation of Orthodox Jewish children." (*Ibid.*) Additionally, petitioner asserts that the courtesy busing of over 6,000 children[4] via routes that: 1) segregate public and nonpublic school students and 2) segregate Orthodox Jewish students by sex violates the federal and state constitutions, the Civil Rights Act, the Law Against Discrimination, and creates an undue burden on the taxpayers of the district.[5] (*Id*. at 5, 9 and 16-18)

Moreover, the following is a *summary* of specific claims asserted by petitioner in the Petition of Appeal. Petitioner seeks a decision that:

> 1. Remedies the distribution of public monies that are being used by the district to finance unlawful discriminatory segregated busing policies that have the "effect" of advancing religion. These unlawful discriminatory busing policies deny public school students free exercise and enjoyment of the right to travel free of discrimination upon intrastate highways, in violation of the Equal Protection and Due Process Clause of the Fourteenth Amendment of the United States Constitution. (Petition of Appeal at 1)

[4]Respondents contend that the Board transports 4,231 nonpublic school students with non-mandated transportation, and that, of these 4,231 students, 3,805 are Orthodox Jewish students, representing 64% of the total number of students that are transported daily via the school district's courtesy busing services, but that regardless of the numerical discrepancy, "the District's busing policies are neutral in nature and apply equally to all students regardless of race, religion, gender or school of attendance." (Answer at 9 and 11)

[5]Petitioner presents calculations indicating that the Lakewood School District spends in excess of 4 million dollars yearly to transport its students and that over 2 million dollars of these transportation costs are for courtesy busing services. (Petition of Appeal at 5) Although respondents in their Answer state that they leave petitioner to his proofs with respect to these costs, it is noted that respondents' Exhibit F confirms that these costs are accurately represented. (Answer at 8-11 and Exhibit F)

2. Finds that the Lakewood School District has disbursed federal funds under the Elementary and Secondary Education Act of 1965 to finance instruction and the purchase of educational materials for use in religious and "pervasively" sectarian schools, in violation of the Establishment and Free Exercise clause of the First Amendment. (*Ibid.)*

3. Finds that respondents have created unlawful discriminatory segregated routes that are designed solely for the transportation of "pervasively" sectarian Orthodox Jewish parochial school students. (*Id.* at 19)

4. Finds that respondents have adopted, implemented and maintained student transportation policies that discriminate against similarly situated pubic school students and have failed to revise transportation policies to ensure that similarly situated public school students are not discriminated against. (*Ibid*.)

5. Finds that respondents have failed to desegregate and have failed to eliminate segregation in the transportation of all public and nonpublic school students. (*Ibid*.)

6. Finds that respondents have failed to assure that the district transportation policies are in full compliance with the Constitutional, Federal, and State antidiscriminatory provisions and have failed to require plans providing for the transportation of public and nonpublic students in an integrated setting. (*Ibid*.)

7. Finds that respondents have failed to require the development and implementation of concentrated and aggressive outreach and recruitment efforts to improve and maximize integrated travel for all pupils. (*Ibid*.)

Petitioner's constitutional claims are as follows:

1. Respondents have created unlawful discriminatory and segregated routes designed solely for the transportation of Orthodox Jewish parochial school students in violation of the Equal Protection and Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. (*Id*. at 17)

2. Respondents have designed bus routes solely for the purpose of transporting parochial nonpublic school students in a manner that is different from that of public school students, *i.e*., Orthodox Jewish students are transported to their parochial

schools in a segregated manner so as to not come into contact with public school students and Orthodox Jewish boys and girls are transported to their respective schools on separate buses. These acts of respondents violate the Establishment Clause of the First Amendment to the U.S. Constitution. (*Ibid.*)

3. The discriminatory, segregated routes designed solely for the transportation of Orthodox Jewish parochial nonpublic school students violates Section 201(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000a (a) (1964 ed.) and Section 207 (b) of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. 2000a-6 (b) (1964 ed.) The Board is also in violation of Section 601 of Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000d, "prohibits any recipient of federal financial assistance from discriminating on the basis of race color, or national origin in any federally funded program. (*Id*. at 18)

4. The discriminatory, segregated routes designed solely for the transportation of Orthodox Jewish parochial nonpublic school students violates Article I.1 and 5 of the New Jersey Constitution which provides in part: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."[6] (*Ibid*.)

5. The discriminatory, segregated routes designed solely for the transportation of Orthodox Jewish parochial nonpublic school students violates the New Jersey Law Against Discrimination, Title 10:1-5, which provides, in part: "The remedies provided

[6]Notwithstanding petitioner's "quote" from Article I.1 and 5 of the New Jersey Constitution, the Commissioner observes that the language contained in these sections is as follows:

> Article I.1
>
> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.
>
> Article I.5
>
> No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin.

> in this title shall be the exclusive means of enforcing the rights based on this title, but nothing in this title shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this title, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right." (*Ibid*.)

Additionally, referring to his petition, petitioner states in his exceptions that:

> The complaint alleged that Lakewood's "courtesy busing" policies and programs were carried-out in a manner that violates the New Jersey Law Against Discrimination, Title10:1-5; Article I.l and 5 of the New Jersey Constitution; The [Establishment] Clause of the First Amendment to the United States Constitution; The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; Section 601 of Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000d, "prohibits any recipient of federal financial assistance from discriminating on the basis of race, color, or national origin in any federally funded program."[7] (Petitioner's Exceptions at 3)

Additionally, petitioner states that he "seeks to invalidate the Lakewood Board of Education Local Policy 3541.31, and all district state-sponsored, NON-MANDATED, public school 'courtesy busing' transportation policies, practices, and programs***." (Petitioner's February 10, 2003 Memorandum of Law in Opposition to Respondents' Motion for Summary Judgment at 26) Thus, the *primary* focus of petitioner's claims is directed toward the Board's busing policy and its implementation.

Respondents answer petitioner's claims by stating that the transportation service provided to all children residing in Lakewood "is *not* discriminatory, does *not* advance religion in an impermissible manner, nor is same in violation of Federal or State law." (Answer at 1,

[7]It is noted that petitioner makes no mention in his exceptions of his claim that the Lakewood School District has disbursed federal funds under the Elementary and Secondary Education Act of 1965 to finance instruction and the purchase of educational materials for use in religious and sectarian schools.

emphasis in text) Respondents further claim that, with the adoption of Local Policy No. 3542.31 on June 25, 1975, and revised on June 12, 1995 providing all school children transportation between their homes and schools within clearly defined riding limits, the Board has been directly busing children, whether public, nonpublic, religious or nonreligious to their school of attendance for nearly thirty (30) years. (Motion for Summary Judgment at 3) Moreover, respondents claim that children are bused upon public policy concerning the safety of children and other neutral factors, such as school calendars and school schedules. *(Id*. at 3-4) While acknowledging that boys and girls are transported in separate buses to those Orthodox Jewish parochial schools that are same sex schools, respondents point out that "[s]everal parochial schools, including, but not limited to, Holy Family, Calvary Academy, and the Bezalel Yeshiva (an Orthodox Jewish day school), have bus routes wherein boys and girls are transported together***." (*Id*. at 6)

With respect to petitioner's allegation that the Lakewood School District has disbursed federal funds under the Elementary and Secondary Education Act of 1965 to finance instruction and the purchase of educational materials for use in religious and sectarian schools in violation of the Establishment and Free Exercise clause of the First Amendment, respondents deny the allegations "based on a Corrective Action Plan filed by the Lakewood Board of Education and accepted by the State Department of Education." (Answer at 1-2) Additionally, respondents point out that "[t]he Lakewood Board of Education has a responsibility to fulfill 'child find' requirements as delineated in Section 613 (a)(3) of the Individuals with Disabilities Education Act ("*IDEA*") including religious school children, 20 U.S.C. § 1412(a)(10)(A)(ii) and 34 CFR § 300.451; equitable participation under "IDEA" Part B, *N.J.A.C.* 6A:14-6.1; Chapter 192 services such as Child Study Team Examination and Classification Services, the provision of

textbooks, Chapter 226 services such as Nursing and Transportation Services." (Certificate of Counsel in Support of Respondents' Motion for Summary Judgment at 6)

COMMISSIONER'S DECISION

TIMELINESS OF THE FILING OF THE PETITION AND APPLICATION OF LACHES

Initially, the Commissioner finds that consideration of the timeliness of the filing of the petition and the application of laches by the ALJ was inappropriate in this matter as these were not affirmative defenses raised by respondents.[8] In so concluding, it is noted that the Supreme Court in *Zaccardi v. Becker*, 88 *N.J.* 245, 256 (1982), found that:

> At the outset we note that statutes of limitations are not self-executing. Such statutes are based on the goals of achieving security and stability in human affairs and ensuring that cases are not tried on the basis of stale evidence. *Galligan v. Westfield Centre Service*, 82 *N.J.* 188, 191-92 (1980); *Tevis v. Tevis*, 79 *N.J.* 422, 430 (1979); *Kaczmarek v. N.J. Turnpike Authority*, 77 *N.J.* 329, 337-38 (1978). Because they are based on these specific policies, *they must be raised as affirmative defenses*, subject to judicial modification in appropriate circumstances. Mechanistic application of such statutes could unnecessarily sacrifice individual justice in particular circumstances. (emphasis added)

Moreover, assuming, *arguendo,* for purposes of this discussion, that Lakewood's busing policy and its implementation are discriminatory and contrary to Federal and State laws as petitioner claims, each act in designing and implementing the discriminatory and unlawful busing policy would constitute a pattern of discrimination and a continuing violation of law and, thus, the statute of limitations would begin only when the wrongful action ceases. As set forth by the Appellate Court in *Bollinger v. Bell Atlantic,* 330 *N.J. Super*. 300, 306 (App. Div. 2000):

[8] The Commissioner observes that the record is devoid of any claim by respondents that they have suffered prejudice or that they are unable to present a defense because petitioner did not assert his claims in a timely manner.

> For causes of action arising under anti-discrimination laws, however, a judicially created doctrine known as the continuing violation theory has developed as an equitable exception to the statute of limitations. (citations omitted)
>
> New Jersey recognizes the existence of a similar "continuing tort doctrine," which is unrestricted to discrimination claims and provides that when an individual experiences a "continual, cumulative pattern of tortious conduct" the limitations period begins only when the wrongful action ceases. *Wilson v. Wal-Mart Stores* 158 *N.J.* 263, 272, 729 A.2d 1006 (1999).***
>
> Two types of continuing violations are recognized in the federal context: (1) "systemic violations," which originate in a discriminatory policy or practice that continues into the limitations period, and (2) "serial violations," which consist of a various number of discriminatory acts, all emanating from the same discriminatory animus, where each act nonetheless constitutes a separate actionable wrong. *Thomas v. Eastman Kodak Co*., 183 *F*.3d 38, 53 (1st Cir.1999), *cert denied*, ____U.S.___, 120 *S. Ct.* 1174, 145 *L.Ed*.2d 1082 (2000); *accord Bullington v. United Air Lines, Inc., supra,* 186 *F*.3d at 1311.

Additionally, the Supreme Court in *Wilson, supra,* at 273 observed that "***a significant number of courts recognize that the cumulative effect of a series of discriminatory or harassing events represents a single cause of action for tolling purposes and that the statute of limitations period does not commence until the date of the final act of harassment." *See also Terry v. Mercer County Bd. of Chosen Freeholders,* 173 *N.J. Super*. 249 (App. Div. 1980).

Accordingly, in that respondents did not raise untimely filing or laches as affirmative defenses in this matter, and given the probability that petitioner's allegations of discrimination and violations of Federal and State laws, if found to be true, would constitute a continuing violation, the Commissioner declines to apply the filing limitation of the 90-day

period set forth at *N.J.A.C.* 6A:3-1.3(d) or to apply laches in this matter.[9]

SUMMARY DECISION

After an exhaustive review of the papers filed in this matter, the Commissioner has determined that grant of summary decision to respondents is appropriate in this instance. Pursuant to *N.J.A.C.* 1:1-12.5(b) and *Contini v. Bd. of Educ. of Newark*, 286 *N.J. Super*. 106, 121-122 (App. Div. 1995) (*citing Brill v. Guardian Life Ins. Co.*, 142 *N.J*. 520 (1995)), summary decision may be granted in an administrative proceeding if there is no genuine issue of material fact in dispute and the moving party is entitled to prevail as a matter of law. In this regard, notwithstanding petitioner's assertion to the contrary, there are no "material facts" in dispute in this matter. *Black's Law Dictionary, seventh edition,* at 610-611, defines "fact" as "[a]n actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation" and a "material fact" as "[a] fact that is significant or essential to the issue or matter at hand." Thus, all the issues characterized by petitioner as "genuine issues of material fact" set forth in petitioner's exceptions, *i.e.*, whether federal and state taxpayers' money is being used under Lakewood's courtesy busing policy to foster and promote religion, discriminate against public school students, segregate public and private school students and segregate boys and girls in violation of state, federal and school laws are issues calling for a legal conclusion

[9] Notwithstanding this conclusion, the Commissioner cannot ignore that petitioner failed to file a petition with respect to Lakewood's busing policy for seven years following its revision to its present form. The busing policy at issue is neither a new busing policy nor a new burden to petitioner as a taxpayer. The Board's Policy No. 3541.31, which provides courtesy busing services to all children residing in the school district within specified distance limitations, was adopted on June 25, 1975 and revised on June 12, 1995. Petitioner was a voting member of the Board seven years ago when Lakewood's busing policy in its present form was revised and implemented. There is nothing in the record to suggest that petitioner voted against the busing policy when it was revised or that he raised any concerns at the time of the revision. Moreover, there is also nothing in the record to suggest that petitioner raised any concerns with respect to the implementation of Lakewood's busing policy during the two years he served on the Board following the revision. Nor does petitioner assert that anything has changed with respect to the busing policy or its implementation in the five years since his service on the Board. Thus, it is reasonable to conclude that petitioner bears some responsibility for the formation and the implementation of the busing policy which he now claims is contrary to State and Federal laws.

with respect to the effect, consequence or interpretation of the school's busing policy as applied, not disputed "material facts" as presented by petitioner.[10] "It is well-established that where no disputed issues of material fact exist, an administrative agency need not hold an evidential hearing in a contested case." *Frank v. Ivy Club*, 120 *N.J.* 73, 98 (1990), *citing Cunningham v. Dept. of Civil Service*, 69 *N.J.* 13, 24-25 (1975). "Moreover, disputes as to the conclusions to be drawn from the facts, as opposed to the facts themselves, will not defeat a motion for summary judgment." *Contini v. Board of Education of Newark*, 96 *N.J.A.R.* 2d (EDU) 196, 215, *citing Lima & Sons, Inc. v. Borough of Ramsey*, 269 *N.J. Super*. 469, 478 (App. Div. 1994); *In the Matter of the Tenure Hearing of Andrew Phillips, School District of the Borough of Roselle, Union County*, Commissioner's Decision No. 129-97, decided March 20, 1997; and *In the Matter of the Tenure Hearing of Neal A. Ercolano, Board of Education of Branchburg Township, Somerset County*, Commissioner's Decision No. 140-00, decided May 1, 2000. Additionally, the Commissioner agrees that respondents are entitled to prevail as a matter of law for reasons provided in the Initial Decision and explicated below.

DISBURSEMENT OF FEDERAL FUNDS UNDER THE ELEMENTARY AND SECONDARY ACT OF 1965

Initially, the Commissioner notes that petitioner's claim that the Lakewood School District has disbursed federal funds to finance instruction and the purchase of educational materials for use in religious and sectarian schools stems from the ALJ's findings in the matter entitled *C.L. and B.L., on behalf of C.L. v. Lakewood Township Board of Education*, OAL Dkt. No. EDS 878-01, decided August 3, 2001. (Petition of Appeal at 11) As a result of the ALJ's

[10] It is noted that respondents do not dispute that some of its bus routes transport boys and girls separately to same sex Orthodox Jewish parochial schools, but points out that bus service provided to parochial schools also includes the transportation of boys and girls together to parochial schools, including an Orthodox Jewish day school. (Answer at 12)

determination in that matter, the Board filed a "Plan of Compliance" with the Department of Education on March 18, 2002, which was revised on April 11, 2002 and approved by the Department of Education on April 15, 2002. (Certification of Counsel in Support of Respondents' Motion for Summary Judgment, Exhibit A, Answer at 34 and Respondents' Exhibit B Attached to Answer) In that petitioner merely quotes verbatim from the ALJ's decision in that matter (Petition of Appeal at 11, Nos. 46, 47, 48 and Affidavit of George S. Osborne in Opposition to Respondents' Motion for Summary Judgment at 4-7), and does not present any facts or allegations beyond what was resolved in that case, nor does he allege that the Board's "Plan of Compliance" approved by the Department is not being followed, the Commissioner dismisses petitioner's claim with respect to this issue.[11] Accordingly, petitioner's remaining claims all relate to the Lakewood Board's courtesy busing policy and its implementation.

JURISDICTION AND STANDING

Initially, as fully set forth by the ALJ, the Commissioner emphasizes that, to the extent that petitioner is asserting a facial constitutional challenge to Lakewood's busing policy, the Commissioner lacks jurisdiction to consider his claims. (Initial Decision at 14-15) However, jurisdiction does exist to the extent that petitioner is asserting that Lakewood's Policy No. 3541.31 regarding the busing of students has been unconstitutionally applied by the Lakewood Board.[12] (*Ibid*.)

[11] It is noted that the ALJ did not address this issue in the Initial Decision. Neither did petitioner address this claim in his exceptions.

[12] The Commissioner notes that "[a]dministrative agencies have power to pass on constitutional issues only where relevant and necessary to the resolution of a question concededly within their jurisdiction." *Christian Bros. Inst. v. No. N.J. Interschol. League*, 86 *N.J.* 409, 416 (1981), *citing to Hunterdon Cent. High Sch. Bd. of Ed. v. Hunterdon Cent. High Sch. Teachers' Ass'n,* 174 *N.J. Super*. 468, 474-475 (App. Div. 1980), *aff'd* o.b., 86 *N.J.* 43 (1981).

With respect to the question of petitioner's standing to pursue his claims under the U.S. Constitution or Federal Laws, the Commissioner fully agrees that, with the exception of petitioner's claim that Lakewood's busing policy as applied violates the Establishment Clause of the First Amendment, petitioner has not established that he has standing to pursue his claims under the U.S. Constitution or Federal Laws. Notwithstanding petitioner's assertion that there is no bar to taxpayers challenging allegedly unconstitutional federal taxing and spending programs because taxpayers have a personal stake in the outcome (Petitioner's Exceptions at 4), as pointed out by the ALJ, in responding to a motion for summary judgment petitioner bears the burden of establishing specific facts showing that he has suffered an "injury in fact--an invasion of a legally protected interest"; and that, generally, people have no standing as taxpayers to claim that expenditures violate federal law or the U.S. Constitution, except when a taxpayer brings a claim that a policy as applied violates the Establishment Clause of the First Amendment of the Constitution. *Lujan, supra,* and *Flast, supra*. (Initial Decision at 15-16) In the instant matter, petitioner claims that he has standing to pursue his claims under the U.S. Constitution or Federal Laws *solely* on the basis that he is a resident taxpayer. In so doing, petitioner has presented no specific facts, only naked assertions, that he has, in fact, suffered an injury from which he is legally protected under the U.S. Constitution or Federal Laws. The Commissioner, therefore, finds that petitioner has standing only with respect to his claim that Lakewood's busing policy, as applied, violates the Establishment Clause of the First Amendment of the Constitution.

The Commissioner, however, disagrees with the ALJ's conclusion that petitioner does not have standing with respect to his New Jersey Constitutional claims. As noted by the ALJ, the New Jersey Courts and the State administrative system have adopted a very liberal approach to standing in order to provide easy access to the legal system. (Initial Decision at 16)

In *In the Matter of Camden County v. Board of Trustees of the Pub. Employees Retirement System (PERS) and William J. Simon*, 170 *N.J.* 439, 446-447 (2002), the Supreme Court observed that:

> Only "[a] substantial likelihood of some harm visited upon the plaintiff in the event of an unfavorable decision is needed for the purposes of standing." *New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Comm'n*, 82 *N.J.* 57, 67, 411 *A.*2d 168 (1980) (citations omitted). Generally, a person who has suffered any economic detriment as a result of an administrative agency action can gain standing for judicial review of that action without proving any unique financial damages. See *Walker v. Borough of Stanhope*, 23 *N.J.* 657, 662-63, 130 *A.*2d 372 (1957) (noting numerous decisions of courts adopting broad approach to standing where residents and taxpayers sought to set aside wrongful official action).

Thus, while petitioner in this matter is neither a student nor the parent of a student in the school district, petitioner has presented convincing arguments that, as a resident and a taxpayer, he is directly affected by the annual expenditure of 2 million dollars for courtesy busing of students in the Lakewood School District. *See also West Village Civic Club, Inc. and Arthur Silverstein v. Board of Education of the Township of Manchester and Joel P. Oppenheim, Superintendent of Schools, Ocean County*, decided by the State Board, June 5, 1996, where petitioning resident taxpayers were found to have standing to challenge a superintendent's contract which guaranteed an additional annual expense which had not been included in the superintendent's previous contract. Accordingly, the Commissioner concludes that petitioner has demonstrated a sufficient stake in the outcome of the proceedings to confer standing to pursue his New Jersey Constitutional claims.

Notwithstanding this conclusion, however, the Commissioner finds that petitioner has not met his burden of presenting specific facts to demonstrate that Lakewood's busing policy is being applied in a discriminatory manner in violation of Article I.1 and/or 5 of the New Jersey

Constitution, nor does he allege that the courtesy busing services being provided in accordance with Policy No. 3541.31 are not being provided to all students residing in Lakewood without regard to whether they attend public, private or parochial schools. Respondents aver that its bus routes are designed to transport students to their individual schools to account for varying school calendars, schedules and locations and acknowledge that, in some instances, boys and girls are transported separately because the students have chosen to attend boys only or girls only parochial schools. While it is true that this individual school transportation scheme also means that public and private students do not ride together because they attend different schools, petitioner has presented no evidence that Lakewood's busing program transporting students to their individual schools has been designed as a pretext for discrimination.

Turning to petitioner's claims of discrimination on the basis of race, gender and religion under the New Jersey Law Against Discrimination (LAD), even accepting all of petitioner's statements regarding the religious and racial statistics in Lakewood as true and considering the undisputed fact that boys and girls are being transported separately to their individual schools by the Lakewood School District, as well as other information in the record, petitioner has provided no evidence of invidious discrimination. As found in *Kenny, supra,* at 257, "[m]ere inequality or difference in treatment does not suffice to support a charge of unconstitutional discrimination." Moreover, "a classification must be upheld under any reasonable set of facts unless there is a showing of invidious discrimination." (*Ibid*.) Accordingly, the Commissioner concludes that petitioner has failed to establish a claim upon which relief can be granted under the LAD.[13]

[13] The Commissioner notes that petitioner did not except to the recommended dismissal of his claims under the LAD for failure to state a claim upon which relief can be granted as set forth in the Initial Decision.

ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT OF THE U.S. CONSTITUTION

As noted above, in that the U.S. Supreme Court has held that taxpayers have standing to challenge statutes or rules under the Establishment Clause of the First Amendment, the Commissioner finds that petitioner has standing to pursue his Establishment Clause claim.[14] *Flast, supra*.

In evaluating petitioner's Establishment Clause claim, the Commissioner points out that the Courts have consistently held that governments are permitted to use tax dollars to aid religious schools as long as the aid has a secular purpose and does not have the primary effect of advancing or inhibiting religion. *See Lemon, supra; Mitchell, supra,* and *Agostini, supra*; and Initial Decision at 19. With respect to the use of tax dollars to transport students to school, the New Jersey Legislature has made it mandatory that school districts provide transportation to *all* students, including private and parochial school students, to and from their schools within certain specified distance requirements[15] and, additionally, has provided school districts the discretion to provide non-mandated transportation, *i.e.* courtesy busing, to its students. *N.J.S.A.* 18A:39-1 *et seq*. Moreover, as noted by the ALJ in quoting *West Morris Regional Bd. of Ed., supra*, "[t]he New Jersey Supreme Court has held that the Legislature has not violated the Establishment Clause by extending to a private school student, the right to transportation on the same basis on which transportation would have been available if he attended public school in his district because it is 'a measure to aid the student rather than the school he attends; its purpose and primary effect are not to advance religion.'" (Initial Decision at 22)

[14] The Establishment Clause prohibits the making of any law respecting the establishment of any religion.

[15] Payment of aid in lieu thereof is permitted in certain specified circumstances.

In the instant matter, Lakewood's busing policy provides for the transportation of all resident students, including children in public, private and parochial schools, to and from his or her school within certain specified distances that are less than the distances mandated in *N.J.S.A.* 18A:39-1, as follows:

> The Lakewood Board of Education may, in addition to other factors, take into consideration in determining authorized bus routes, the existing unsafe conditions that pupils be subjected to if required to walk.
>
> Students living in the Lakewood school district shall be entitled to transportation between their homes and schools in accordance with the following riding limits as measured portal-to-portal: kindergarten through grade 6, a distance of one mile or more; grades 7 through 8, one and one-half miles or more; and grades 9 through 12, two miles or more.
>
> Students, upon approval of the Superintendent of Schools or his/her designee, with at least ten (10) days prior notice, shall be transported other than between their homes and schools, when on those special occasions the destination changes due to school-related activities, provided that there is no additional cost to the district. (Answer, Exhibit I, Board's Policy No. 3541.31)

Respondents assert that this policy was instituted for student safety and that its policy applies to all students within the school district without regard to race, gender, religion or the type of school the student attends. As noted above, respondents maintain that bus routes are designed to transport students separately to their individual schools to account for varying school calendars, schedules and locations. It is undisputed that, as a result of this scheduling decision, boys and girls are, in some instances, transported separately because the students have chosen to attend boys only or girls only parochial schools. It is also undisputed that all students in the school district, whether public, private, or parochial, are provided transportation services separately to their individual schools in the same manner.

Moreover, petitioner presents no facts to contravene Lakewood's explanation that its decision to provide courtesy busing services to its students is because of safety concerns, nor has petitioner offered facts that would support a conclusion that the implementation of Lakewood's busing policy is a pretext for some non-secular purpose or that the busing policy has the *primary* effect of advancing or inhibiting religion. Petitioner's arguments primarily focus on the expense of providing courtesy busing and the makeup of the population in Lakewood and his perception that the Orthodox Jewish children benefit disproportionately from Lakewood's busing policy due to the large Orthodox Jewish population. While this *may* be true, there is nothing in the record to suggest that Lakewood does not offer the same transportation services to all children in the school district, without regard to religion, so the mere fact that significant numbers of the children in Lakewood attend parochial schools as a result of parental choice does not establish that the busing policy at issue and its implementation has a non-secular purpose. Even construing the facts and the inferences therefrom in the light most favorable to petitioner, therefore, the Commissioner concludes that petitioner has not shown that respondents' application of its busing policy violates the Establishment Clause of the First Amendment of the U.S. Constitution.

Finally, the Commissioner recognizes petitioner's frustration that 4 million dollars (2 million dollars of which is spent for courtesy busing) is spent to bus children to and from school each year and acknowledges that this expenditure has an impact on the taxpayers in Lakewood. However, even if petitioner would prefer to eliminate the 2 million dollar expense to provide courtesy busing services for students or choose to spend this money in a different manner, *N.J.S.A.* 18A:39-1.1 provides boards of education with the authority (but not the obligation) to provide courtesy busing services. Thus, it is the Lakewood Board, as elected

representatives of the community, which is vested with the discretion to make the determination as to whether to provide non-mandated busing services.

Accordingly, in that petitioner has failed to demonstrate that Lakewood's Busing Policy No. 3541.31 and its implementation are contrary to law, respondents' motion for summary decision is granted and the petition in the instant matter is dismissed for the reasons set forth above.

IT IS SO ORDERED. [16]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 26, 2003

Date of Mailing: August 27, 2003

[16] 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.*