219-04 (Link to OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu00047-03_1.html)

BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, COMMISSIONER OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning Board challenged respondent Department's determination regarding additional state aid for special education extraordinary costs.

Pursuant to a formula established in a July 31, 2002 memorandum, the Department reduced the aid by 50% because the District's actual surplus was greater than its projected surplus. The Department made a second reduction of 42.72% pursuant to language in the FY2002 Appropriations Act. The reductions resulted in a total of $211,947 in eligible extraordinary costs. The ALJ concluded that the 50% reduction based on the memorandum was a violation of the Administrative Procedure Act (APA), noting that the memo constituted rulemaking, and ordered the Department to provide the District with additional state aid for its 2001-2002 extraordinary special education costs without regard to any comparison of projected and actual budget surplus.

The Commissioner set aside the Initial Decision. The Commissioner determined that, notwithstanding that some of the *Metromedia* factors that need to be present to characterize agency action as rulemaking were present, the Department's action to reduce school districts' extraordinary special education aid based on projected surplus in relation to actual surplus for the 2001-02 school year simply "does not bear the characteristics" of administrative rulemaking. As to the issue of the surplus comparison formula being arbitrary and *ultra vires*, the Commissioner remanded the matter to OAL for further proceedings and expansion of the record as may be needed to resolve fully petitioner's claims and an appropriate remedy.

May 21, 2004

OAL DKT. NO. EDU 47-03
AGENCY DKT. NO. 355-11/02

BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, COMMISSIONER OF EDUCATION,	:	
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions and petitioner's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4.

Respondent's exceptions contend that: (1) the Administrative Law Judge (ALJ) erroneously held that its July 31, 2002 memorandum constituted rulemaking and, therefore, was violative of the Administrative Procedure Act (APA) and (2) even if such memorandum was considered rulemaking, the prospective relief awarded by the ALJ is inappropriate in this instance, since the 2001-02 school year ended on June 30, 2002 and there is no evidence on this record that the Board was harmed in future years as a result of the 2001-02 calculation. (Respondent's Exceptions at 6, 9)[1]

[1] That is, respondent argues that because petitioner does not claim that its subsequent years' funding was adversely affected by its 2001-2002 award, a retroactive monetary reward would be contrary to the holding in *Sloan v. Klagholtz*, 342 *N.J. Super*. 385, 396 (App. Div. 2001). There, the Appellate Division recognized that, in challenges brought pursuant to school funding statutes, the "courts are reluctant to grant retroactive monetary relief when a

In reply, petitioner counters that respondent's latter argument was not raised below and must be rejected because: (1) there is no record to support respondent's "fiscal stability" claim that "complying with the Initial Decision would require it to 'transfer funds or request an appropriation in order to fund the monetary remedy,'" (Petitioner's Reply at 2, citing Respondent's Exceptions at 9) and (2) there is no legal underpinning for such a position, where "the Department has not established the requisite grounds for departing from the 'traditional rule' that decisions are retrospective in nature." (*Id*. at 3, *citing Rutherford Educ. Assoc. v. Board of Educ.*, 99 *N.J.* 8, 21 (1985)) Moreover, with respect to the *Metromedia* factors, petitioner asserts that the Department addresses only the third factor, *i.e*., whether the Department's statement was designed to operate prospectively. Metromedia, Inc. v. Director, Division of Taxation, 97 *N.J.* 313 (1984). Petitioner argues that respondent's prospective design was evident in its extraordinary aid application and related memoranda and such design cannot be nullified by the "happenstance" of a statutory amendment. (Petitioner's Reply at 9-10) Finally, petitioner raises in its reply alternative grounds for adopting the ALJ's recommended order, contending therein that the Department's use of a comparison surplus formula was arbitrary, capricious and unreasonable.[2]

Upon careful and independent review of the record herein, the Commissioner determines to set aside the Initial Decision of the ALJ for the reasons set forth below.

Initially, the Commissioner notes, as set forth in the Initial Decision, that the operative statute during the year in question authorized the reimbursement of extraordinary

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statute relating to government revenues or appropriations is held to be unconstitutional, because of the potential adverse impact of such relief upon public fiscal stability." (*Id*. at 396)

[2] Relevant rules permit reply arguments to include cross-exceptions or submissions in support of the Initial Decision. *N.J.A.C.* 1:1-18.4(d)

special education costs based on facts including, but not limited to: "an assessment of whether the district is spending appropriate amounts of regular and special education funds on special education pupils; the facts of the particular case or cases at issue; the district's level of compliance with regulatory requirements; and the impact of the extraordinary costs on the district's budget.***" *N.J.S.A.* 18A:7F-19(b). In this connection, respondent issued a memorandum directed to all Chief School Administrators dated December 7, 2001 offering school districts the opportunity to apply for extraordinary aid for the 2001-2002 school year, provided through the Comprehensive Educational Improvement and Financing Act (CEIFA). The memorandum stated, in pertinent part,

> The [application] review is based on analysis of the following factors: the program and placement costs for the 2001-2002 school year; amounts expended from regular and special education funds for eligible students; the facts of the particular case; the level of current compliance with regulations; the impact of the extraordinary costs on the district's budget; and other factors considered relevant to the individual application. A previous denial or approval of an extraordinary aid application is not a consideration in the determination. (Petitioner's Brief in Support of Motion For Summary Decision at Exhibit G)

The memorandum additionally referenced the extraordinary aid application and instructions which were available online. The instructions included the following provision:

> **In determining a district's eligibility for extraordinary aid, the Department will review the district's projected budget surplus and actual budget surplus in relation to the request. Districts will be funded for extraordinary costs as follows:**
>
> 1. Districts having an actual budget surplus less than or equal to their projected budget surplus will receive 100% of their extraordinary costs (costs in excess of $40,000).
>
> 2. Districts having an actual budget surplus greater than their projected budget surplus will receive 50%-100% of their extraordinary costs (costs in excess of $40,000). The percentage will be determined by the actual amount of funding available.

> **Districts having an actual budget surplus greater than their projected budget surplus and an actual budget surplus greater than 6% will receive 50% of their extraordinary costs (costs in excess of $40,000).** (emphasis in text) (*Ibid*.)

A completed application and required documentation were to be submitted to the County Superintendent of Schools no later than January 31, 2002.

Later, a memorandum was issued on July 31, 2002 from Assistant Commissioner Rosenberg to the County Superintendents, which stated, in relevant part:

> Please remember to tell districts that later this week they will receive official notification letters explaining the details of how their reimbursement amounts were derived, including reasons for any denials. In the meantime, please convey to districts that low reimbursement amounts can be attributed to an increase by almost $20 million in the requested amounts, while the appropriation remained at the prior year's level of $15 million. This resulted in a prorated amount of less than 50%. In addition, the reimbursable eligible amount was either 100% or 50% according to the following rule:
>
> A. If Projected Surplus > Actual Surplus 100%
> B. If Actual Surplus > Projected Surplus & < 6% 50%
> C. If Actual Surplus > Projected Surplus & > 6% 50%
> (*Id*. at Exhibit H)

Petitioner maintains that the Department's determination to reduce school districts' extraordinary special education aid based on projected surplus in relation to actual surplus constitutes *de facto* rulemaking and is, therefore, invalid for failure to comply with the APA, which governs rulemaking activities in State agencies.

According to the APA, a "rule,"

> when not otherwise modified, means each agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency. The term includes the amendment or repeal of any rule, but does not include: (1) statements concerning the internal management or discipline of

> any agency; (2) intraagency and interagency statements; [3] and (3) agency decisions and findings in contested cases. *N.J.S.A.* 52:14B-2(e)

As noted in the Initial Decision, the Supreme Court established six factors for determining when agency action is tantamount to rulemaking under the APA. "The *Metromedia* criteria *** essentially provide a test of when rulemaking procedures are necessary in order to validate agency actions or determinations." *Woodland, supra, at* 68. In this regard, one would consider whether the action:

> (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group;
> (2) is intended to be applied generally and uniformly to all similarly situated persons;
> (3) is designed to operate only in future cases, that is prospectively;
> (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization;
> (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and
> (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy. *Metromedia, Inc*. v. *Director, Div. of Taxation*, 97 *N.J*. at 331-332.

Applying these factors to respondent's decision to reduce CEIFA aid in accordance with actual surplus figures, the Commissioner initially finds that, even assuming,

[3] An intraagency statement has been defined as "(1) a communication between agency members that (2) does not have a substantial impact on (3) the rights or legitimate interests of the regulated public." *Woodland Private Study Group v. State*, 109 *N.J*. 62, 75 (1987). Here, assuming that the local boards who actually applied for such extraordinary aid for the 2001-02 school year would constitute "the regulated public," the content of the memorandum issued by the Assistant Commissioner on July 31, 2002 reflected a clear intent to convey specific information to local boards of education which could reasonably concern legitimate economic interests, and, therefore, is unlikely to be considered an intraagency statement, within the intendment of the law.

arguendo, the number of districts meeting the statutory threshold to apply for extraordinary aid constitutes "a large segment of the regulated or general public,"[4] and notwithstanding that the approach taken by respondent was applied uniformly, this action, along with the memorandum of July 31, was clearly not intended to be "continuing effect," as required to meet the APA's definition of a rule. Rather, such action challenged by petitioner was designed to be effective solely for the 2001-02 school year. Indeed, the Assistant Commissioner assured in his July 31 memorandum, which is the statement petitioner challenges herein, "With the new statutory requirements we intend to make the fiscal 2002-03 reimbursement process an easier one for everyone involved." (Petitioner's Brief in Support of Motion For Summary Decision at Exhibit H) As noted by respondent, the statutory amendments, effective January 6, 2002, removed the factors, listed *supra*, for the Department to consider when awarding extraordinary special education aid. (Respondent's Exceptions at 9)

Further, the Commissioner finds that respondent's applied method for reimbursing districts for extraordinary special education costs in the 2001-02 school year does not "prescribe a legal standard or directive," as contemplated by *Metromedia*. That is, the methodology used by respondent neither prescribed nor proscribed specific conduct, did not, as noted above, direct future actions or proceedings to be taken by the agency, did not have the purpose of describing or implementing substantive agency policy,[5] and did not establish a

[4] It is noted, however, that the record does not include data on the number of districts that applied for, and received, reimbursement for extraordinary special education costs in the 2001-02 school year.

[5] Contrast, for example, rules adopted by the State Board of Education at *N.J.A.C.* 6A:24 "pursuant to N.J.S.A. 18A:4-15 and P.L. 1999, c.142 and P.L. 1996, c.138 in order to implement educational programs necessary to provide urban education reform initiatives that ensure that public school children *** from the poorer urban districts receive the educational entitlements guaranteed them by the Constitution and to meet the requirements of the decision of the New Jersey Supreme Court in *Abbott v. Burke*, decided May 21, 1998." *N.J.A.C.* 6A:24-1.1.

detailed set of procedures or eligibility requirements.[6] *Bullet Hole, Inc. v. Dunbar*, 335 *N.J. Super*. 562, 583-584 (App. Div. 2000). As such, the Commissioner finds that respondent's statement, although not formally expressed in "any official and explicit agency determination, adjudication or rule," *Metromedia, supra,* at 331, is more reasonably viewed as a method to calculate reimbursements for the 2001-02 school year, rather than an administrative agency's "interpretation of law or general policy." (*Id*. at 332)

The Commissioner recognizes that "[a]ll six of the *Metromedia* factors need not be present to characterize agency action as rulemaking, and the factors should not be merely tabulated, but *weighed*." (emphasis added) *In re Solid Waste Util. Cust. Lists*, 106 *N.J*. 508, 518 (1987). Thus, notwithstanding that some of the *Metromedia* factors are present, upon weighing those factors, the Commissioner finds that respondent's action to reduce school districts' extraordinary special education aid based on projected surplus in relation to actual surplus for the 2001-02 school year simply "does not bear the characteristics" of administrative rulemaking, See, *Bullet Hole, Inc., supra*, at 586, the hallmark of which is "*the widespread, continuing, and prospective effect of an agency pronouncement****." (emphasis added) (*Metromedia*, *supra,* at 329. In so determining, the Commissioner is mindful that agencies may act informally, and the courts ordinarily defer to the procedure chosen by the agency in discharging its statutory duty. *In re Solid Waste, supra,* at 519.

The inquiry does not end here, however, since petitioner also contends that the Department's use of a surplus comparison formula was arbitrary and *ultra vires*. Because this issue was not considered by the ALJ in his Initial Decision, however, this matter is remanded to the OAL for further proceedings and expansion of the record as may be necessary to resolve

[6] Having so found, it is not necessary to reach the remaining condition that the legal standard or directive be "expressly provided by or clearly and obviously inferable from the enabling statutory authorization***." *Metromedia* at 331.

fully petitioner's claims and, if necessary, consider the appropriateness of a remedy, in accordance with the parties' exception and reply arguments.

Accordingly, the Initial Decision of the ALJ is set aside for the reasons set forth herein and the instant matter is remanded to the OAL for resolution of petitioner's remaining claims.

IT IS SO ORDERED.[7]

COMMISSIONER OF EDUCATION

Date of Decision: May 21, 2004
Date of Mailing: May 21, 2004

[7] This decision 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.*