#230-06

OAL DKT. NOS. EDU 6143-05 and EDU 6428-05 (CONSOLIDATED)
OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu06143-05_1.html
AGENCY DKT. NOS. 186-8/05 and 148-6/05

EXECUTIVE COMMITTEE OF THE VINELAND SCHOOL DISTRICT'S PARENT ADVISORY COMMITTEE ON BILINGUAL EDUCATION AND M.N., ON BEHALF OF MINOR CHILD, S.R.,	:	
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	
RESPONDENT,	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
EXECUTIVE COMMITTEE OF THE VINELAND SCHOOL DISTRICT'S PARENT ADVISORY COMMITTEE ON BILINGUAL EDUCATION,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY, AND NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SPECIALIZED POPULATIONS,	:	
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners and the respondent Department of Education (Department) each filed primary exceptions; petitioners

additionally filed a reply to the Department's exceptions. The respondent Board of Education (Board) submitted neither exceptions nor replies.

In its exceptions, the Department objects to the Administrative Law Judge's (ALJ) conclusion that its 2004-05 and 2005-06 waivers of the requirement for full-time bilingual programs in the third and fourth grades at the Board's Mennies School are null and void because the Department lacked legal authority to review and grant such waivers on a school-by-school, grade-by-grade basis. The Department urges the Commissioner to reject the Initial Decision and instead accept the Department's interpretation and application of its own statutes and regulations, which – when reasonable, as here – are entitled to great weight under well-established decisional precedent. (Department's Exceptions at 1-2) Stressing that its actions – consistent with the intent of both the Legislature and the State Board of Education – are guided by the need for local district flexibility in meeting requirements for bilingual education, the Department contends that the ALJ erred in holding the plain language of such law to dictate that waivers may be requested and granted on a district-wide basis only and may not be requested or granted at all if a district has sufficient limited English proficient (LEP) students in any one language to establish two or more bilingual classes in consecutive grades in any one school. (*Id*. at 2-9)[1] The Department additionally urges that, viewed in light of its interpretation of applicable law, its particular decision to grant a waiver in this instance was reasonable and should also be upheld. (*Id*. at 9-10)

[1] Throughout its discussion, the Department presents situations where it believes that the ALJ's interpretation – particularly when applied to languages less widespread than Spanish – would lead to manifestly unreasonable results, such as where districts having one well-defined cluster of eligible students in two consecutive grades would be forced to offer full-scale K-12 programs even though only a handful of eligible students are enrolled at other levels.

In reply, petitioners restate their arguments – substantially adopted by the ALJ – to the effect that the plain language of the law neither permits the interpretation espoused by the Department as to granting waivers by individual school or grade(s) nor encompasses the Department's practice of using the waiver process to provide flexibility in programming for reasons of educational policy without determining that a full-time program is impractical for one or more of the reasons prescribed in statute and rule. Petitioners reiterate that, regardless of what the Department may wish, the law provides that: 1) waivers may be granted solely on a district-wide basis and solely where it is impractical to provide a full-time program meeting statutory and regulatory requirements due to the age range, grade span or geographic location of eligible pupils; and 2) no waiver may be granted under any circumstances where eligible students in two consecutive grades in any one school are sufficient to establish two or more self-contained or subject area classes. (Petitioners' Reply at 1-10)

In their primary exceptions, while endorsing the ALJ's interpretation of operative law, petitioners object to his dismissal of their remaining claims as moot, arguing that their allegations remain live and their requests for relief remain unaddressed with respect to the Mennies Pilot Program not meeting statutory and regulatory requirements for full-time bilingual education, violation of No Child Left Behind Act requirements for provision of information to parents, and violation of State requirements for maximum practicable parent involvement and maintenance of a parent advisory committee on bilingual education. (Petitioners' Exceptions at 3-5) Petitioners also object to the ALJ's failure to list the two witnesses and four documents admitted into

evidence at the December 14, 2005 hearing, before testimony was halted by the ALJ's decision to bifurcate proceedings.[2] (Id. at 1-2, 4)

Upon careful review and consideration, the Commissioner rejects the Initial Decision, as to both its conclusions of law and its determination that petitioners' remaining claims in this matter are moot.

The framework for provision of bilingual education adopted by the New Jersey State Legislature requires that, in any school year where at the beginning of the year there are 20 or more LEP students in the district in any one language classification, a program in that language must be established for all eligible students in the district. *N.J.S.A.* 18A:35-18a. The requirements for such programs are clear and specific:

> "Programs in bilingual education" means a full-time program of instruction (1) in all those courses or subjects which a child is required by law, rule or regulation to receive given in the native language of the children of limited English-speaking ability enrolled in the program and also in English (2) in the aural comprehension, speaking, reading, and writing of the native language of the children of limited English-speaking ability enrolled in the program and in the aural comprehension, speaking, reading and writing of English, and (3) in the history and culture of the country, territory or geographic area which is the native land of the parents of children of limited English-speaking ability enrolled in the program and in the history and culture of the United States.
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> *N.J.S.A.* 18A:35-16

The only exception permitted by the statute is where a board of education is able to demonstrate, through application to the Commissioner for waiver of this requirement, that provision of a program of the type specified above is "impractical" due to the age range, grade span or geographic location of eligible pupils; in such case, the board may provide a "special alternative instructional program" for as long as the conditions exist that justified the waiver. *N.J.S.A.* 18A:35-18b.

[2] See Initial Decision at 3.

In considering the statutory scheme, the ALJ adopted petitioners' position that where a waiver is requested, its application must necessarily be district-wide. The Commissioner does not concur with this conclusion. While operative law clearly and unequivocally fixes responsibility for the provision of a program of bilingual education – including any request for waiver – on the board of education, district-level responsibility and district-wide programmatic integrity neither equate to nor compel district-wide uniformity with respect to the requirements of *N.J.S.A.* 18A:35-16 regardless of need or circumstance. Such a construction would be contrary to both sound educational policy and the intent of the Legislature and State Board of Education in adopting laws expressly intended to provide flexibility to districts. *See* 30 *N.J.R.* 1249, 1250; P.L. 1995, c. 59, including legislative history (Appendix A to Petitioners' Post-Trial Brief). Moreover, contrary to the assertions of petitioners, nothing in statute or rule prohibits a district from requesting – or the Department from granting upon demonstration that a program meeting the requirements of *N.J.S.A.* 18A:35-16 is impractical district-wide – a waiver that "targets" specific schools or grades so as to result in a full-time program in some situations and an alternative program in others, or one that proposes an alternative program where a full-time program had previously been established.

Similarly, in considering the State Board rules promulgated to implement the statute, the Commissioner cannot concur that *N.J.A.C.* 6A:15-1.5(a)4 acts to preclude any possibility whatsoever of any waiver anywhere in the district, where two bilingual classes can be established in any two consecutive grades in any one district school. Even granting that the language of the rule itself might – viewed in isolation – be subject to more than one interpretation, its context and the accompanying summary of provisions

approved by the State Board at the time of proposal (30 *N.J.R.* 1250) make it clear that the rule is not intended to restrict beyond the latitude permitted by statute a board's ability to apply for waiver, but rather to define the threshold below which a finding of impracticality consistent with statutory criteria is inherently precluded. Thus, a district may not even *request* a waiver of the requirement for a full-time bilingual program pursuant to *N.J.A.C.* 6A:15-1.5(a) where the concentration of students to be impacted by the waiver reaches the level specified in 6A:15-1.5(a)4, since under these circumstances, the district *cannot* meet the requisite criteria of impracticality by reason of age range, grade span or geographic location.

Thus, the Commissioner fully concurs with the Department's interpretation and application of the operative statutes and rules with respect to the issues discussed above, so that the inquiry must now turn to its granting of the particular waiver in dispute.

As previously set forth, New Jersey's statutory scheme on its face allows for waiver of the requirement for a program meeting the criteria of *N.J.S.A.* 18A:35-16 *only* in those instances where the board of education can demonstrate to the Commissioner that the age range, grade span or geographic location of eligible pupils makes it impractical to provide the required program. It is equally clear that "eligible pupils" in this context refers to the student population district-wide, that is, to the "20 or more pupils" who have triggered the requirement for a full-time program. Consequently, the Commissioner concurs with petitioners that no waiver may be granted by the Department without regard to the overall age range, grade span or geographic location of the eligible population of a district, and that a small number of eligible students within

any one school cannot alone qualify a district for waiver without consideration of other factors, including whether the students in question could, for example, reasonably be assigned to a different school. While a greater degree of flexibility might well be desirable from educational or administrative standpoints as argued by the Department, the fact remains that the controlling statute *mandates* a full-time program unless the district's eligible students *cannot* reasonably be configured so as to make such a program practicable. Similarly, the Commissioner is compelled to concur with petitioners that the law as written does not allow for waiver based on a district's desire to implement alternative educational approaches, no matter how well motivated or potentially promising.

The record in this matter clearly establishes that the Department's decision to grant waivers in 2004-05 and 2005-06 for the Mennies School Pilot Program did not take into account the overall configuration of the district's LEP population; it further establishes that the Board's desire to implement the program was rooted in educational philosophy rather than the impracticality of providing the traditional full-time program to eligible third- and fourth-graders in the Mennies School, who, it appears, could at the very least have been readily accommodated within the full-time program at the district's Johnstone School. Simply stated, the Commissioner cannot find on the present record that the Board demonstrated – or that the Department required the Board to demonstrate, as required by law – that "due to the age range, grade span or geographic location of the eligible pupils it would be impractical to provide a full-time bilingual education program" to the Mennies students. *N.J.S.A.* 18A:35-18b. Consequently, the Department's action in granting a waiver under these circumstances cannot be upheld.

In determining the relief to be awarded as a result of this finding, however, the Commissioner is mindful that, despite the Board's application for waiver in order to implement the Mennies Pilot Program, the record supports petitioners' contention – which the Board did not dispute through reply exceptions – that the Board considers the Mennies program a full-time program which complies with statutory requirements for bilingual education; the Commissioner is further mindful that parents of Mennies students are being given the option of enrolling their children in the full-time bilingual program at Johnstone, and that all requests for such accommodation have thus far been honored.[3] Under these circumstances, notwithstanding the holding on the waiver issue herein, the Commissioner is loath to order discontinuance of the Mennies program or consider granting remedial relief to students enrolled during the years in question on the basis of the record and argument thus far developed. Additionally, the Commissioner notes that petitioners' pleadings did, in fact, raise allegations of violation susceptible to repetition but left unresolved by the Initial Decision and proceedings thus far conducted at the OAL.

Accordingly, the Commissioner rejects the Initial Decision of the OAL and holds, for the reasons expressed above rather than those set forth by the ALJ, that the Department erred in granting a waiver to the Vineland Board of Education for the Mennies Pilot Program; the Commissioner further rejects the ALJ's conclusion that petitioners' remaining claims are mooted by such holding. The Commissioner directs the Department to reform its practices with respect to review of bilingual education program waiver requests to the extent necessary to implement the holdings of this decision, and

[3] In this regard, the Commissioner notes that parents of students eligible for bilingual education have the option of declining enrollment in bilingual education programs or of removing them once enrolled. *N.J.S.A.* 18A:35-22, 18A:35-22.1.

the instant matter is hereby remanded to the OAL for determination of 1) the compliance of the Mennies Pilot Program with statutory and regulatory requirements for full-time bilingual education and the relief to be granted upon any finding of noncompliance, and 2) petitioners' allegations of violation of State requirements for parent involvement and maintenance of a parent advisory committee on bilingual education.[4] [5] Should the Board so wish, it may continue to implement the Mennies Pilot Program during the pendency of these proceedings, provided that the parent or guardian of each student enrolled in the program is provided with full information about the program and given the option of enrolling the student in an established full-time bilingual program elsewhere in the district.

IT IS SO ORDERED.[6]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 26, 2006
Date of Mailing: June 26, 2006 (Via Fax)

[4] Petitioners' allegations based on the No Child Left Behind Act (NCLBA) are not justiciable by the Commissioner of Education. See *D.N. and J.J., on behalf of minor child, J.J. v. Board of Education of the City of Elizabeth, Union County*, Commissioner of Education Decision, February 11, 2004 (citing the 2003 U.S. District Court decision in *Association of Community Organizations for Reform Now et al. v. New York City Department of Education et al.*, holding that NCLBA does not provide for a private right of action); see also *Fresh Start Academy v. Toledo Board of Education*, 363 *F. Supp. 2d*. 910 (N.D. Ohio 2005).

[5] The Commissioner notes that, as claimed by petitioners, Keith Figgs and Annette Rudd appeared as witnesses for petitioners at the hearing on December 14, 2005, and that P-13, P-14, P-34 and P-44 were admitted into evidence on that date. (See pages 3-4 above.) It is anticipated that this will be duly reflected in the Initial Decision on Remand resulting from the Commissioner's directive herein.

[6] 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.*