

LONG BEACH ISLAND EDUCATION :
ASSOCIATION AND JOHN PULJER,
RESIDENT AND TAXPAYER, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION
LONG BEACH ISLAND
CONSOLIDATED SCHOOL DISTRICT :
AND DAWN M. WATSON, :

RESPONDENTS. :
_____ :

SYNOPSIS

Petitioners challenged the respondent Board’s use of a private contractor rather than a school employee to provide speech language services to a classified minor child, contending that the action is in violation of *N.J.A.C. 6A:14-4.3(b)(9)*, *N.J.A.C. 6A:14-4.3(d)*, *N.J.A.C. 6A:14-5.1(a)* and *N.J.A.C. 6A:14-5.1(c)(1)(iv-v)*. The matter was transmitted to the OAL with a request that the Commissioner’s jurisdiction in this matter be determined as a threshold issue.

The ALJ found that: the core issue in this case is whether the Commissioner has jurisdiction over a complaint that alleges a public education agency violated the requirements of State regulations governing the provision of special education and related services; pursuant to *N.J.A.C. 6A:14-9.2*, the State Director of the Office of Special Education Programs (OSEP) determines whether a local education agency has violated the requirements of state and federal laws regarding the provision of special education and related services; in past cases decided by the Commissioner that involved special education regulations, the underlying claims involved violations of tenure, seniority, or other rights arising out of the school laws over which the Commissioner clearly has jurisdiction; in the instant case, there is no allegation of any violation of tenure, seniority rights, or any other school law rights. Accordingly, the ALJ concluded that this matter should be dismissed for lack of jurisdiction.

The Commissioner concurred with the ALJ, and adopted the Initial Decision as the final decision in this matter.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 10501-07
AGENCY DKT. NO. 351-11/07

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Petitioners challenge the respondent board of education’s decision to enter into a contract with respondent Dawn Watson to provide services to H.L., a classified minor child resident of Long Beach Island. It is petitioners’ contention that the services can be adequately provided by a regular employee of the district, and that by hiring the respondent private contractor, the Board is in violation of *N.J.A.C.* 6A:14-4.3(b)(9), 6A:14-4.3(d), 6A:14-5.1(a) and 6A:14-5.1(c)(1)(iv-v). After review of the record, the Initial Decision, petitioners’ exceptions and respondents’ replies thereto, the Commissioner concludes that she lacks jurisdiction to adjudicate the matter.

First, the issue of speech therapy for H.L. arose in the context of a complaint filed by the parents with the Office of Special Education Programs (OSEP) of the Department of Education. That Office is charged with “reviewing, investigating and taking action on any signed written complaint regarding the provision of special education and related services

covered under this chapter.” *N.J.A.C. 6A:14-9.2(a)*. It is undisputed that speech therapy is one of the services included under *N.J.A.C. 6A:14-9.2(a)*.

Second, a proper determination about the appropriateness of the Board’s engagement of speech pathologist Watson must necessarily rest upon an assessment of whether she was and is in a better position than the district speech correctionist to provide the remedial assistance that the minor child, H.L., needs. It is the OSEP – not the Commissioner – that possesses the authority and expertise to make such an assessment.

More specifically, an affidavit submitted by the child’s mother – as an exhibit annexed to the respondent Board’s motion to dismiss the petition – alleges that H.L. has been diagnosed as having moderate to severe oral and verbal apraxia, a condition that seriously hinders an individual’s ability to communicate, and that he consequently needs a speech pathologist with experience and training in the treatment of apraxia. After H.L.’s parents filed their due process petition with OSEP and participated in negotiations with the respondent Board, the Board agreed to – and did – hire such a certified speech pathologist, and the parents withdrew their due process petition.¹

Any resolution of petitioners’ challenge to the Board’s decision requires, at a minimum, an understanding of such issues as the difference, if any, between a speech correctionist and a speech pathologist, and an evaluation of the respective training and experience of the two professionals in light of the particular needs of H.L. Without a determination about this threshold issue, which determination is within the OSEP’s exclusive

¹ The parties have stipulated that no express judgment one way or the other has yet been made by the respondent Board about the ability of the district’s speech correctionist to provide the services that H.L. needs.

province² – not the Commissioner’s – no decision can be made about petitioners’ claims that the Board’s contract with Watson was improper.

Finally, it is undisputed that the speech correctionist employed by the district as a staff member suffered no reduction in pay or benefits as a result of the engagement of Watson for the limited purpose of working with H.L. Consequently there is no tenure or seniority dispute for the Commissioner to adjudicate. In that regard the Commissioner agrees with the ALJ’s legal analysis, on pages 8-11 of the Initial Decision. In that analysis the ALJ noted that the past cases, in which the Commissioner exercised jurisdiction despite the involvement of special education regulations, are distinguishable from the present case because they – unlike the instant matter – contained underlying claims of infringement of tenure and seniority rights or other rights and responsibilities under the school laws.

In consideration of the foregoing, the Commissioner adopts the recommendation in the Initial Decision that the petition be dismissed for lack of jurisdiction.

IT IS SO ORDERED.³

COMMISSIONER OF EDUCATION

Date of Decision: October 13, 2009

Date of Mailing: October 13, 2009

² The State Director of the Office of Special Education Programs (OSEP) determines whether a local education agency has violated the requirements of state and federal laws regarding the provision of special education and related services. *N.J.A.C. 6A:14-9.2*. The final decision reached by OSEP under the procedures set forth in *N.J.A.C. 6A:14-9.2* cannot be appealed to the Commissioner. *Bd. of Educ. of the Lenape Reg’l High Sch. Dist. v. New Jersey Dep’t of Educ., Office of Special Educ. Programs*, 399 *N.J. Super.* 595, 606 (App. Div. 2008). The finality of the decisions respectively reached by OSEP and OAL are “entirely consistent with the longstanding general absence of the Commissioner and State Board [of Education] from adjudication of special education disputes despite the fact that these arise under State statutes and regulations and are inarguably controversies and disputes arising under the school laws.” *Lenape Reg’l High Sch. Dist. Bd. of Educ. v. State of New Jersey, Dep’t of Educ., Office of Special Educ. Programs*, EDU 2781-06, Initial Decision (June 27, 2006).

³ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (*N.J.S.A. 18A:6-9.1*)