#356-09R (OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu06798-07_1.html)

BOARD OF EDUCATION OF THE TOWNSHIP OF WATERFORD, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMMONTON, ATLANTIC COUNTY,	:	
RESPONDENT,	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF FOLSOM, ATLANTIC COUNTY,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMMONTON, ATLANTIC COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

The Waterford Board of Education (Waterford) and the Folsom Board of Education (Folsom) – both in a sending-receiving relationship with the Hammonton Board of Education (Hammonton) – appealed Hammonton's retroactive charge for resource room costs for the 2004-05, 2005-06, and 2006-07 school years. Waterford and Folsom contended that tuition contracts were in place for the years in question, and did not contain provisions requiring separate payment for resource room. In a prior decision, the Commissioner had found petitioners' claims to be untimely filed; that determination, however, was reversed on appeal to the Appellate Division of the Superior Court, which remanded the matter to the Commissioner for determination on the merits.

On the merits, the ALJ had previously found, *inter alia*, that: resource room charges are permissive, not mandatory, pursuant to *N.J.S.A.* 18A:38-19 and *N.J.A.C.* 6A:23-3.1; Hammonton chose to exclude such charges in its contracts with the sending school districts; future resource room assessments may be charged to the sending districts, if they are presented in advance for budgetary consideration; Hammonton agreed to waive resource room costs for students from Waterford in its sending/receiving relationship, in consideration for Waterford's assumption of the costs of a Child Study Team; Folsom is exempt from the resource room assessments, as it was without foreknowledge of any additional charges to be applied to its sending/receiving payments for the periods at issue. The ALJ recommended that summary decision be entered on behalf of petitioners.

The Commissioner adopted the ALJ's conclusion that petitioners were not responsible for the payments in question, but modified the Initial Decision to clarify that applicable rules clearly provide for resource room costs to be treated as a separate charge over and above the actual cost per pupil for general tuition purposes, so that they may not be recouped through the tuition adjustment process where no charge for them has been made in the tuition contract for the year in question. The Commissioner also directed the Division of Finance to address the court's suggestion that current regulations be reconsidered and amended to better address the relationship between the time for appeal and the required mediation process where a tuition rate dispute arises between a sending and receiving district.

October 29, 2009

APPELLATE DIVISION DKT. NOS. A-5974-07T2 AND A-6159-07T2 (CONSOLIDATED)
OAL DKT. NOS. EDU 6798-07 AND EDU 8091-07 (CONSOLIDATED)
AGENCY DKT. NOS. 204-7/07 AND 235-8/07

BOARD OF EDUCATION OF THE TOWNSHIP OF WATERFORD, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMMONTON, ATLANTIC COUNTY,	:	COMMISSIONER OF EDUCATION
RESPONDENT,	:	DECISION
AND		
BOARD OF EDUCATION OF THE BOROUGH OF FOLSOM, ATLANTIC COUNTY,	:	
PETITIONER,	:	
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BOARD OF EDUCATION OF THE TOWNSHIP OF HAMMONTON, ATLANTIC COUNTY,	:	
RESPONDENT.	:	

These consolidated matters were remanded to the Commissioner of Education by the Appellate Division of the Superior Court, which – in an August 17, 2009 decision on appeal by the petitioning boards of education pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1) – reversed the Commissioner's March 24, 2008 finding that petitioners' respective claims were

untimely filed and directed that such claims be determined by the Commissioner on the merits.[1] Because these claims had already been fully litigated at the Office of Administrative Law (OAL) and addressed in the Administrative Law Judge's (ALJ) Initial Decision of February 5, 2008 – which the Commissioner had rejected based on its failure to address the Hammonton Township Board of Education's argument, ultimately adopted by the Commissioner, that petitioners' appeals were untimely filed – the consolidated claims on the merits now proceed directly to final decision by the Commissioner consistent with the directive of the court.[2]

As noted in the Commissioner's prior decision, pursuant to *N.J.A.C.* 1:1-18.4, exceptions to the Initial Decision of the OAL were duly filed by the Hammonton Township Board of Education (Hammonton), and a joint reply thereto by petitioners.

In the pertinent portions of its exceptions, Hammonton urged the Commissioner to reject the Initial Decision and find instead that its actions were proper in all respects. Hammonton asserted that the ALJ misapplied the standard for summary decision in numerous ways, including: accepting as a matter of law claims made solely by affidavit; failing to address the involved school administrators' lack of legal authority to bind their respective boards of education; ignoring the absence of evidence on record with respect to purported prior agreements and issues of waiver or estoppel; and not giving appropriate weight to written opinions from Department of Education (Department) staff members that support Hammonton's position. (Respondent's Exceptions at 3-4 and 15-16) Hammonton further identified – and proposed alternatives to – the specific findings of fact and conclusions of law with which it took issue

[1] The court left open any issue of untimely filing based on the Folsom Board of Education's receipt of a May 14, 2007 letter from the Department of Education; however, no such issue was raised at any point during proceedings, either before the Commissioner or on appeal.

[2] The file on remand in this matter was received by the Commissioner on September 14, 2009.

(*Id.* at 4-7), supporting its stance with arguments previously raised at the OAL (*Id.* at 7-14 and 17-38).[3]

In reply, petitioners countered that the ALJ decided the matter correctly and urged the Commissioner to adopt the Initial Decision. Substantially relying on prior submissions, petitioners additionally stressed that their respective business administrators did not act without board authority, since they apprised the boards of the proposed agreements with Hammonton and these were subsequently endorsed through board approval of annual tuition contracts for the years at issue. (Petitioners' Reply at 1-2)

Having now considered the record of this matter on the merits and the arguments of the parties on exception, the Commissioner concurs with the ALJ – for the reasons set forth in the Initial Decision as modified and clarified below – that summary decision is appropriately granted to petitioners.

Initially, there is no dispute that this matter is controlled by the statutory and regulatory scheme set forth in the Initial Decision, whereby petitioners as sending districts are obliged to pay tuition to Hammonton "not in excess of the actual cost per pupil as determined under rules prescribed by the Commissioner and approved by the State Board," *N.J.S.A.* 18A:38-19, and that such payment is to be effectuated through a standard form of written contract establishing a tentative tuition charge based on estimated costs per pupil, subject to adjustment upon certification of actual costs by the Commissioner – with amounts over and above estimated costs payable to the receiving district in full, in part or not at all, as specified in the contract, in the third school year following the contract year. *N.J.A.C.* 6A:23-3.1.

Moreover – as previously noted by the Commissioner, and as stressed by Hammonton and acknowledged by the ALJ – the Commissioner has already held that a sending

[3] These arguments are reproduced, essentially verbatim, in the Initial Decision at 13-20 and 29-50.

district is obliged, when demanded as part of the above-referenced three-year reconciliation process, to pay the difference between tentative and certified tuition charges for a given year when the tentative charge did not include costs which the certified charge does but the parties' contract provides on its face – as do the contracts at issue herein – for full payment of actual certified costs per pupil. *Board of Education of the Borough of Spotswood, Middlesex County v. Board of Education of the Borough of Milltown, Middlesex County*, Commissioner of Education Decision No. 179-99, decided June 7, 1999.

However, contrary to the contention of Hammonton and the apparent perception of the ALJ, the holding of *Spotswood* is not applicable to this matter. Bearing in mind that the term "actual cost per pupil" – as referenced in the controlling statute and required standard form of contract – is specifically defined by regulation, the facts of this matter and those of *Spotswood* differ in one salient respect: whereas the building use charge at issue in *Spotswood* is *included* within the regulatory definition, the resource room costs at issue in this matter are specifically *excluded* and required, if they are to be charged at all, to be added as a separate item over and above the charge for tuition. In this regard, the rule is clear on its face:

> **6A:23-3.1 Method of determining tuition rates for regular public schools**
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> ***
>
> (b) The term "actual cost per student" for determining the tuition rate or rates for a given year referred to in *N.J.S.A.* 18A:38-19 and 18A:46-21 means the local cost per student in average daily enrollment, based upon audited expenditures for that year for the purpose for which the tuition rate is being determined and consistent with the grade/program categories in *N.J.S.A.* 18A:7F-13 and 18A:7F-19, that is, regular education classes: preschool and kindergarten, grades one through five, grades six through eight, and grades nine through 12; and special class programs as defined in *N.J.A.C.* 6A:14-4.7.
>
> 1. *The receiving district board of education shall include in its calculation all expenditures for each purpose* ***except*** *Federal and State special revenue fund expenditures and* ***those specifically excluded in (e)5 below****.*
>
> ***

(e) The receiving district board of education shall determine the share of each item of expenditure for each grade/program category on the report in (c)1 above on a pro rata or actual basis as follows:

***

5. *Expenditures that are* ***excluded from the actual cost per student for tuition purposes*** for the following items:

***

vi. *Resource rooms* which are determined pursuant to (e)9 below and ***permitted as a separate charge over and above tuition*** *for general education classes*;

***

9. *In addition to the tuition charged* for each grade category, a receiving district board of education *may charge* for students receiving services in a resource room *an additional amount* up to the actual direct instructional cost per student for such services calculated on an hourly basis (an example of the calculation is contained in Policy Bulletin: 100-1 issued by and available from the Division of Finance, State Department of Education, PO Box 500, Trenton, New Jersey 08625-0500).

(*Emphasis supplied*)[4]

Based on these excerpts viewed within the larger context of the budgeting-reconciliation process set forth in the chapter from which they are taken, it is clear that where – as here – there is no reference to resource room charges in the tuition contract or its required supporting calculations, the regulatory framework neither contemplates nor permits that a receiving district may later seek payment for them through the tuition adjustment process, notwithstanding that costs may actually have been incurred and the proposed charge for them may have been duly calculated in accord with pertinent Department policy. Where controlling law provides for a sending district to pay charges *not in excess* of the receiving district's actual cost per pupil and implementing regulations are clear that charging for resource room costs is discretionary rather than mandatory, there can be no conclusion but that the question of whether such charge will, in fact, be incurred by the sending district is left to the contracting parties and

[4] The current rules (as quoted) have not changed from those in effect during the period at issue. See 36 *N.J.R.* 1313(a), 36 *N.J.R.* 3895(a), 38 *N.J.R.* 2333(a), and 38 *N.J.R.* 4178(b).

controlled by the terms of their contract; so that, while a receiving district is undoubtedly entitled to charge a sending district for resource room costs, what it may *not* do is fail to include such charge in its tuition contract and then invoke the tuition reconciliation process to seek cost recoupment. Indeed, to allow the contrary would defeat the entire purpose of a regulatory framework designed to provide certainty, stability and fairness in the sending-receiving tuition process – wherein tentative charges are established for budgetary purposes and final charges are certified based on expenses actually incurred in accordance with the definitions of rule, with adjustments to be made (or not) as previously agreed by the parties via written contract.

In the present instance, there is no dispute that Hammonton did not charge petitioners for resource room costs during the years in question. Regardless of why this may have been so, the fact remains that such costs were not included in the parties' tuition contracts for these years – all of which are plain on their face, duly executed by the contracting boards of education, and required to be implemented in accord with applicable law. Thus, to any extent that Hammonton contends it has incurred costs not reimbursed by its sending districts as contemplated by the Legislature, its dilemma has arisen entirely as a result of its own failure to include a separate additional resource room charge in its tuition contracts for the years in question as clearly permitted by implementing rule.

In so holding, the Commissioner is not unmindful of Hammonton's assertion that its actions were supported by the Department through various communications culminating in a March 14, 2007 letter from the Department's Director of School Funding (Notice of Motion for Summary Judgment, Affidavit of Barbara Prettyman, Exhibits E-G). While the Commissioner finds these communications to be far from unequivocal in their support of Hammonton's position, to whatever extent they do suggest that a receiving district may seek to recoup resource

room costs through the tuition reconciliation process notwithstanding the absence of any reference to such costs in the tuition contract in place for the year in question, such suggestion is clearly contrary to the regulatory scheme as set forth in *N.J.A.C.* 6A:23-3.1 and must be rejected as a matter of law.

Accordingly, as modified and clarified herein, the Initial Decision of the OAL – concluding that the petitioning boards of education are not responsible for payment of Hammonton's resource room charges for the years in question – is adopted as the final decision in this matter. A copy of this decision, together with that of the Appellate Division, will be forwarded to the Department's Division of Finance with the directive that the Division prepare, for presentation to the State Board of Education in an ensuing readoption of Chapter 23 of the Administrative Code (*N.J.A.C.* 6A:23), such revisions as it deems appropriate in response to the court's recommendation (slip opinion at 7) that current regulations be "reconsidered and amended to better address the relationship between the time for appeal and the required mediation process" where a tuition rate dispute arises between a sending and receiving district pursuant to *N.J.A.C.* 6A:23-3.1(f)5.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: October 29, 2009
Date of Mailing: October 30, 2009

[5] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Appellate Division of the Superior Court.