

ARCHWAY PROGRAMS, INC.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	PARTIAL DECISION ON REMAND
RESPONDENT.	:	

SYNOPSIS

The petitioner, Archway Programs (Archway) is a non-profit corporation which operates a private school for the handicapped (PSH) authorized to educate handicapped public school students pursuant to *N.J.S.A. 18A:46-14(g)*, and receives tuition from sending districts commensurate with its actual cost per pupil as determined by a certified audit. Pursuant to governing regulations, certain specified items may not be included in the computation of a tuition rate chargeable to the sending districts. The controversy herein involves five audits conducted by the respondent Department on Archway's accounts for the school years from 1994-1995 through 1998-1999, in which the Department disallowed approximately \$9 million in non-allowable costs and expenses and ordered these tuition overcharges returned to the sending districts. Archway appealed this conclusion. In September 2008, the ALJ issued an Initial Decision recommending resolution of legal issues concerning methodologies and allowable costs in connection with the five contested audits, and further recommended that the Commissioner compute and present final mathematical calculations as to disallowances based upon these resolutions. In a final decision dated December 5, 2008, the Commissioner adopted the ALJ's recommendations regarding resolution of legal issues, but rejected the proposal regarding computation and presentation of final mathematical calculations. The Commissioner remanded the matter to the OAL for such further proceedings as were necessary to allow the ALJ to conclude these consolidated cases by making the requisite calculations and recommended determination of monies due and owing.

On remand, the ALJ found that it was appropriate to initially resolve only the audit for the 1994-1995 school year – and to reserve recommendation on the remaining years – as resolution of this particular audit will have a carryover effect on the remaining later audits, and ordered that DOE prepare a new audit of the 1994-1995 school year. Based on that audit, and the fact that Archway indicated no objections to the mathematical calculations contained therein, the ALJ determined that the revised DOE audit dated June 25, 2010 (Exhibit B) includes the amount that petitioner is obligated to return to the sending districts, and ordered Archway to reimburse these districts the amount of their overpayments for the 1994-1995 school year.

Upon a thorough and independent review of the record, the Commissioner adopted the Partial Initial Decision of the OAL as the final decision as to the 1994-1995 school year, and ordered Archway to return – within 60 days of this decision – a total of \$2,315,855.51 to the districts which sent students to its PSH during the 1994-1995 school year. The matter was returned to the OAL for further action deemed necessary by the ALJ in order to make the requisite calculations and recommended determination of monies due and owing for the remaining audit years.

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 10474-08
(OAL DKT. NOS. EDU 6956-00, EDU 8646-00, EDU 4834-01, and EDU 4607-03, ON REMAND)
AGENCY DKT. NOS. 271-7/00, 381-10/00, 227-8/99, and 392-12/02

(CONSOLIDATED)

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Archway Programs, Inc. (hereinafter “Archway”) filed exceptions in accordance with the provisions of *N.J.A.C. 1:1-18.4*. The New Jersey Department of Education (hereinafter “Department”) sought and received an extension of time within which to submit reply exceptions, which were filed in accordance with the extended timeline. Both submissions were fully considered by the Commissioner in reaching her determination herein.

By way of background, the essence of the underlying controversy in this matter is as follows: The petitioner in this matter – Archway – is a non-profit corporation which provides educational and human service programs for individuals with special needs. This matter, however, is solely concerned with its programs at its private school for the handicapped (PSH), which is authorized – pursuant to *N.J.S.A. 18A:46-14(g)* – to educate handicapped public school students. Archway is allowed to charge the public school districts in which the handicapped students reside (sending districts) tuition commensurate with its actual cost per pupil pursuant to a certified audit. There are, however, certain specified items which – pursuant to the governing regulations – may not be included in the computation of a tuition rate chargeable to the sending

districts (codified during the time period at issue here at *N.J.A.C.* 6:20-4.4) As a consequence of audits conducted by the Department on Archway's accounts for the 1994-95, 1995-96, 1996-97, 1997-98, and 1998-99 school years, the Department concluded that approximately \$9 million included in Archway's calculated tuition rate represented non-allowable costs and expenses and ordered that these tuition overcharges be returned to the sending districts. Archway is appealing this conclusion.

On September 2, 2008, the Administrative Law Judge (ALJ) issued an Initial Decision recommending resolution of a myriad of legal issues concerning methodologies and allowable costs vis-à-vis particular account schedules in connection with the five contested audits. Such decision further recommended that the Commissioner, in her final decision, should compute and present the final mathematical calculations as to all disallowances subsequent to her resolution of the numerous disputed issues in this matter. By decision dated December 5, 2008,¹ the Commissioner adopted the ALJ's recommended determinations with respect to the various disputed issues relating to non-allowable costs, but rejected her recommendation that the Commissioner's final decision in this matter was the appropriate vehicle for the necessary recalculations, along with presentation of the specific amounts of money that Archway was required to return to its sending districts. Rather, the Commissioner found that the equitable resolution of this matter and the interests of the parties and the sending districts would be optimally furthered by the Commissioner's ability to review calculations recommended by the ALJ subsequent to the parties' ability to be heard at the OAL and on exception with respect to application of the Commissioner's substantive findings made in this decision.² Therefore, the

¹ *Archway Programs, Inc. v. New Jersey State Department of Education and Board of Education of the Township of Pemberton, Burlington County v. Archway Programs, Inc. and Archway Programs, Inc. v. Board of Education of the Township of Ewing, Mercer County*, Commissioner's Decision No. 470-08.

² The Commissioner also found that – given the nature of the petitions of appeal in this matter – such computations by the OAL were compelled by a provision of the Administrative Procedure Act (*N.J.S.A.* 52:14B-10(c)).

Commissioner remanded this matter to the OAL for such further proceedings as were necessary to conclude these consolidated cases by making the requisite calculations and recommended determination of monies due and owing.

On remand, the ALJ determined it was appropriate to initially resolve only the audit for the 1994-95 school year – and to reserve recommendation on the remaining years – as resolution of this particular audit will have a carryover effect on the remaining later audits. Consequently, this partial decision on remand solely resolves the amount of money due and owing its sending districts by Archway as a consequence of the Department’s 1994-95 audit.

Archway’s exceptions here state that “within the context of [the ALJ’s] interlocutory rulings since remand,” it concedes “that the actual dollar calculations in the [Partial Initial Decision] before the Commissioner are correct.” However, it argues, it is the correctness of these interlocutory decisions which Archway disputes. Specifically, Archway contests the ALJ’s interlocutory determination 1) to allow the Department to submit new evidence to the record; 2) her refusal to allow such new evidence to come in by hearing rather than by written submissions; and 3) her rejection of Archway’s interpretation of N.J.A.C. 6:20-4.1. (Archway’s Exceptions at 3) With respect to its first and second objections here, Archway argues that the Commissioner’s December 5, 2008 remand to the OAL directed that the ALJ calculate the amounts due by Archway. On remand, the ALJ directed the Department to submit a recalculation of the five audits to determine the exact amounts Archway had to return to the sending districts. By so doing, it argues, the ALJ impermissibly allowed the Department to do her job by reopening the record to present new evidence through revised calculations. It further contends that only the Commissioner has the authority to reopen the record, and points out that the Commissioner’s remand decision did not so direct. Moreover, accepting *arguendo*, that new evidence could be submitted to the record, Archway maintains that it should have been allowed

to contest such evidence by way of a hearing. (*Id.* at 2) Finally, Archway charges that in her May 6, 2010 Order rejecting Archway's interpretation of N.J.A.C. 6:20-4.1(d), the ALJ merely reviewed the arguments of the parties and then – with no analysis – simply concluded that Archway failed to show its interpretation of this regulation was correct. (*Id.* at 3-4)

In reply, the Department proffers that Archway's exceptions are meritless and fail to recognize the purpose of the Commissioner's December 5, 2008 remand. In that remand decision, the Department points out, the Commissioner returned the matter to the OAL for "further proceedings as are necessary to allow the ALJ to conclude these consolidated cases by making the requisite calculations and recommended determination of monies due and owing. Commissioner's Decision (December 5, 2008) at 21." Archway's argument now that the record could not be opened for new calculations but, rather, had to utilize the calculations of its expert below "directly contradicts the Commissioner's finding that 'the ALJ properly rejected utilizing the calculations submitted by Archway's expert. *Id.* at 17'" (Department's Reply Exceptions at 2) Most importantly, however, it argues that adopting Archway's advocated position that the remand proceedings should solely utilize the calculations already in the initial record would lead to unfair results. The calculations advanced during the initial hearing do not reflect the findings and conclusions of the Commissioner in her December 5, 2008 decision and, therefore, there is no question that these must be recalculated. (*Ibid.*) Furthermore, the Department contends, Archway's charge that the ALJ has abrogated her responsibility to make recommended mathematical calculations or to resolve legal disputes in the instant matter is wholly disingenuous. At no time, it advances, has the ALJ delegated such authority to either party. Rather, it maintains, she has provided each party with an opportunity to present its arguments at each stage of the recalculation process. Finally, in this connection, the Department contends there is no requirement that the recalculations had to be based on live testimony. Such a process,

the Department avers, is merely Archways preference and would only serve to prolong final resolution of this matter. (*Id.* at 2-3)

As to the ALJ’s May 6, 2010 Order finding the Department’s interpretation of *N.J.A.C.* 6:20-4.1(d) to be correct, despite Archway’s assertion to the contrary, the Department argues, such order clearly stated the basis for the ALJ’s determination in this regard. Specifically, “the ALJ explained that the ‘rule of deference [to the agency] is followed unless it is shown that the agency’s interpretation is plainly unreasonable. (ALJ’s May 6, 2010 Order at 7). In support of her conclusion, the ALJ found that Archway ‘failed to show that a reasonable interpretation of *N.J.A.C* 6:20-4.1(d)2 included the latitude to create different methods of the calculations of the schedules in issue.’ *Ibid.*” (*Id.* at 3)

The Commissioner has conducted an independent review of the full record here, including the two interim orders of the ALJ – that of March 17, 2009 and that of May 6, 2010 – which form the sole basis of the exceptions advanced in this matter. Upon such review, the Commissioner finds Archway’s exception arguments with respect to these interlocutory orders without merit. Initially, the Commissioner concurs with the ALJ’s March 17, 2009 Order denying Archway’s motion to preclude the re-opening of the record, which motion was subsequently renewed and again denied by the ALJ’s May 6, 2010 Order, along with Archway’s request for a hearing. In light of the Commissioner’s determination in her December 8, 2008 decision with respect to allowable and disallowable charges – which rejected portions of the Department’s audits as well as portions of the changes advanced by Archway’s expert – there was an inherent recognition that, consequently, the calculations in the record at that time would need to be re-worked.³ As such, whether or not reopening of the record was specifically directed

³ Additionally, the body of the Commissioner’s decision stated “the Commissioner finds and concludes that the ultimate equitable resolution of this matter and the interests of the parties and the sending districts are optimally furthered by the Commissioner’s ability to review calculations recommended by the ALJ subsequent to the parties’

by the Commissioner's decision, it was obvious that such reopening would be required. As to the ALJ's denial of Archway's request for a hearing, it is noted that the record reflects that early-on in the remand proceedings the ALJ reserved the right to decide if, in her judgment, a hearing was necessary. Upon her determination that there were no factual disputes and that she could make a determination based upon the parties' legal arguments in their briefs, the Commissioner concludes that her denial of Archway's request was entirely appropriate. Finally, for the reasons presented on pages 5-8 of her May 6, 2010 Order, the Commissioner determines that the ALJ's rejection of Archway's interpretation of N.J.A.C. 6:20-4.1(d) was correct. The Commissioner, therefore, adopts the ALJ's two interlocutory orders and attaches and incorporates them into this decision.

Accordingly, the recommended Partial Initial Decision of the OAL is adopted as the final decision as to the 1994-95 school year audit. Archway is hereby directed – within 60-days of this decision – to return a total of \$2,315,855.51 to the districts which sent students to its PSH during the 1994-95 school year as detailed in Exhibit B. This matter is being returned to the OAL for further action deemed necessary by the ALJ in order to make the requisite calculations and recommended determination of monies due and owing for the remaining audit years.

IT IS SO ORDERED.⁴

ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 28, 2010
Date of Mailing: October 28, 2010

ability to be heard at the OAL and on exception with respect to application of the Commissioner's findings here." *Archway Programs, Inc. v. New Jersey State Department of Education and Board of Education of the Township of Pemberton, Burlington County v. Archway Programs, Inc. and Archway Programs, Inc. v. Board of Education of the Township of Ewing, Mercer County*, Commissioner's Decision No. 470-08, decided December 8, 2008 at 17-18.

⁴ 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)