#56-12 (OAL Decision: Not yet available online)

DELAWARE VALLEY SCHOOL FOR EXCEPTIONAL CHILDREN,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	
RESPONDENT.	:	

SYNOPSIS

The petitioner (DVSEC) appeals the Department's determination that petitioner – a private school for children with disabilities (PSD) which has been approved to educate students sent to it by public school districts – may not include in its tuition charges for the 2007-08 school year the undisputed amount of $10,360, which it incurred to provide student lunches. Respondent contends that the disallowance is justified pursuant to *N.J.A.C.* 6A:23A-18 *et seq.* The parties have filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there is no genuine issue of material fact, and the matter is ripe for summary decision; pursuant to *N.J.A.C.* 6A:23-4.2(a) (now codified as *N.J.A.C.* 6A:23A-18 (a)), a sending district may only be charged for allowable costs; non-allowable costs are defined by code and include the costs of meals for students, unless the PSD meets the criteria set forth in *N.J.A.C.* 6A:23-4.2(a)20; such criteria include receipt of two separate school board resolutions from a majority of the school districts that contracted to send students to the PSD in that fiscal year, the first resolution declaring that those districts do not require the PSD to apply for and receive funding from the State's Child Nutrition Program, and the second declaring that those district boards do not require the PSD to charge students for reduced and/or paid meals; the number of sending districts petitioner had for purposes of the regulation was seven; four, therefore, constituted a majority; and petitioner had only two valid resolutions for the 2007-2008 school year. The ALJ concluded that DVSEC did not meet its burden of proving that the respondent acted in an arbitrary and capricious manner when it disallowed $10,360 in food service costs incurred during the 2007-2008 school year, granted respondent's motion for summary decision, and dismissed the petition.

Upon a thorough and independent review of the record, the Commissioner found that, under the circumstances of this case, the number of sending districts under contract with the petitioner at the time designated by the regulations was five; three constituted a majority and only one district submitted the required resolutions. Consequently, the Commissioner concluded that the petitioner failed to show that respondent's disallowance of the food services fee as a component of tuition costs was arbitrary, capricious or unreasonable. The Initial Decision of the OAL was adopted as modified, and the petition was dismissed.

February 17, 2012

OAL DKT. NO. EDU 9326-10
AGENCY DKT. NO. 144-7/10

DELAWARE VALLEY SCHOOL FOR EXCEPTIONAL CHILDREN,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	
RESPONDENT.	:	

Before the Commissioner is an appeal from respondent's determination that petitioner – a private school for children with disabilities (PSD) which has been approved to educate students sent to it by public school districts – may not include in its tuition charges for the 2007-08 school year the undisputed amount of $10,360 which it incurred to provide student lunches. Upon review of the record, Initial Decision of the Office of Administrative Law (OAL), petitioner's exceptions and respondent's replies thereto, the Commissioner concludes that the petitioner has failed to show that respondent's disallowance of the food service fees as a component of tuition costs was arbitrary, capricious or unreasonable.

Governing the controversy is *N.J.A.C.* 6A:23-4.5(a) (now codified as *N.J.A.C.* 6A:23A-18.5(a)) which identifies "[c]osts that are not allowable in the calculation of the certified actual cost per student." This Department of Education (Department) regulation provides, in pertinent part, that a PSD may not fold the costs of student lunches into tuition fees unless certain conditions have been met. *N.J.A.C.* 6A:23-4.5(a)(20). Two of those conditions are at issue in the instant case.

The first condition, articulated in *N.J.A.C.* 6A:23-4.5(a)(20)(ii), requires that for lunch costs to be included in the tuition calculations a PSD must have received, on an annual basis prior to the start of the fiscal year, school board resolutions from a majority of the school districts that have contracted to send students to the PSD in that fiscal year, which resolutions declare that those district boards of education do not require the PSD to apply for and receive funding from the State's Child Nutrition Program (CNP). The second condition, set forth in *N.J.A.C.* 6A:23-4.5(a)(20)(iii), similarly requires that for lunch costs to be included in tuition calculations a PSD must have received, on an annual basis prior to the start of the fiscal year, school board resolutions from a majority of the school districts that have contracted to send students to the PSD in that fiscal year, which resolutions declare that those district boards of education do not require the PSD to charge students for a reduced and/or paid meal.

As a threshold matter, the parties have offered differing theories about the number of school board resolutions that petitioner needed in 2007 for it to satisfy the above stated conditions for including lunch costs in the tuition fees. Petitioner's number is three – constituting a majority of the five school districts that had – before the beginning of the 2008 fiscal year – contracted to send students to petitioner. Respondent contends that the number should be five, which constitutes a majority of the eight schools that actually sent students to petitioner during the 2007-08 school year.

While respondent's position is not without appeal, the date identified in *N.J.A.C.* 6A:23-4.5(a)(20) as the time at which school districts must weigh in about whether they will allow food service costs to be included in tuition fees is clear. As regards the present matter, that date was June 30, 2007. Thus, for petitioner to have been allowed to include food service

costs in its tuition fees, it would have had to have received the required board resolutions from three of the five districts that had entered into contracts with it by June 30, 2007.

The five districts in question were Bordentown, Trenton, South Brunswick, Rancocas Valley and South Orange-Maplewood. It is undisputed that Bordentown timely provided petitioner with the resolutions required both by *N.J.A.C.* 6A:23-4.5(a)(20)(ii) and (iii). It also appears undisputed that Trenton did not timely submit the required resolutions, and South Brunswick submitted no resolutions at all. Thus, the question of whether petitioner's food service cost for the 2007-08 school year was an allowable component of its tuition fees turns on whether the required resolutions were timely submitted by the Rancocas Valley and South Orange-Maplewood school districts.

The Commissioner concurs with the Administrative Law Judge (ALJ) that the South Orange-Maplewood board of education timely submitted only one of the two resolutions required by *N.J.A.C.* 6A:23-4.5(a)(20). It did not submit a resolution excusing petitioner from the requirement – set forth in *N.J.A.C.* 6A:23-4.5(a)(20)(ii) – to apply to the CNP for funding, and can therefore not be counted as a school board which exempted petitioner from the prohibitions of *N.J.A.C.* 6A:23-4.5(a)(20). Nor can the Commissioner impute to the South Orange Maplewood board of education an intent that is not – contrary to petitioner's suggestion – evident in the correspondence from the South Orange-Maplewood Board.

Thus, petitioner did not have the required resolutions from a majority of the five sending school districts with which it had contracted by June 30, 2007. It was consequently not arbitrary, capricious or unreasonable for respondent to disallow lunch costs as an element of the per-child tuition rate which petitioner was entitled to charge.

In light of the foregoing, the instant controversy may be resolved without reference to the parties' competing theories about whether the Rancocas Valley's submission[1] could be deemed to have satisfied the conditions set forth in *N.J.A.C.* 6A:23-4.5(a)(20). However, the Commissioner makes the following observations.

Petitioner urged the Commissioner not to elevate form over substance, and to determine that the Rancocas Valley submission substantially complied with the waivers referenced in *N.J.A.C.* 6A:23-4.5(a)(20). While it is often appropriate to ensure that the substantive legislative intent of a statute or regulation is not frustrated by technicalities, the task at hand is less to interpret *N.J.A.C.* 6A:23-4.5(a)(20), and more to assess Rancocas Valley's submissions.

Ultimately, it is only the cover letter by Board Secretary Robert L. Sapp that mentions an intent to allow petitioner to include lunch costs in its tuition calculations without charging lunch fees. Respondent reminds us that the representations of individual board members or administrators are insufficient to bind a board to a particular course of action and that a board can only be bound by official board action. *See, e.g. Robert Busler v. Board of Education of the Township of East Orange, Essex County*, Commissioner Decision No. 281-01 (August 30, 2001), *aff'd* State Board of Education Decision No. 38-01 (February 6, 2002); *Dorrington v. Board of Education of the Township of North Bergen, Hudson County*, 1982 *S.L.D.* 247, *aff'd*, 1982 *S.L.D.* 256. The foregoing canon is especially sensible when financial accountability is at issue. Thus, the Commissioner cannot regard as arbitrary, capricious or

[1] That submission included a board resolution which only absolved petitioner from applying for CNP funding but did not waive the requirement of charging fees for meals. A cover letter from the Rancocas Valley Board Secretary, however, stated that the Rancocas Valley Board waived both requirements.

unreasonable respondent's reluctance to rely on Sapp's cover letter in lieu of the formal resolution of the Rancocas Valley Board of Education.

In summary, petitioner failed to show that respondent's disallowance of food service costs as a component of petitioner's 2007-08 school year tuition calculations was an arbitrary, capricious or unreasonable act. Accordingly, the Initial Decision is modified as set forth herein above, and the petition is dismissed.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 17, 2012

Date of Mailing: February 21, 2012

[2] 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)