39-17

WEST CAPE MAY BOARD OF EDUCATION and SPRINGFIELD BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	DECISION
V.	:	
NEW JERSEY DEPARTMENT OF EDUCATION	:	
RESPONDENT.	:	

SYNOPSIS

The petitioning Boards challenged the respondent Department's imposition of a five percent cap on the number of new School Choice enrollments allowed in their school districts for the 2014-2015 school year. Petitioners alleged, *inter alia*, that the five percent limitation – above each program's 2013-2014 enrollment – was arbitrary, capricious and unreasonable, and was a rule change that should have gone through the required rulemaking procedures under the Administrative Procedure Act (APA). The Department filed a motion for summary decision, arguing that jurisdiction to review an agency decision belongs to the Appellate Division; that petitioners' requested relief is barred by the Fiscal Year 2015 Appropriations Act; and that the Department's decision was reasonable and does not amount to a rule change. Petitioners filed a cross-motion contending that they were not challenging the Commissioner's decision to impose a cap on enrollments across the entire School Choice Program, but rather that the Department breached the contracts with petitioners – i.e., their applications for the program, which allowed for more enrollments – when it imposed the five percent cap for 2014-2015; further, petitioners claimed that the Department is not entitled to summary decision in this matter because it did not comply with petitioners' discovery requests.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; the School Choice Program explicitly grants the right to appeal the Commissioner's decision in two instances, neither of which apply here; the Commissioner has jurisdiction over controversies and disputes arising under the school laws, but jurisdiction over contractual claims lies with the Superior Court; the Commissioner made a final agency decision when the five percent cap was imposed; final agency decisions are appropriately challenged in the Appellate Division; the Commissioner relies on the State Appropriations Act to fund the School Choice Program; the Commissioner acted within legislative authority by imposing the enrollment cap to keep the program funded when its projected cost for the 2014-2015 school year exceeded the budget afforded by the 2015 Appropriations Act; the imposition of the five percent cap was an exercise of the Commissioner's statutory authority, and cannot be considered to be rulemaking; and the Commissioner has already issued an interlocutory order on discovery. Accordingly, the ALJ granted the Department's motion for summary decision, and denied the cross-motions of the petitioners.

Upon review of the record and the Initial Decision of the OAL, the Commissioner adopted the ALJ's recommended decision as the final decision in this matter, for the reasons expressed therein. Accordingly, the petition was dismissed with prejudice.

February 2, 2017

OAL DKT. NO. EDU 04191-14
AGENCY DKT. NO. 49-3/14

WEST CAPE MAY BOARD OF EDUCATION AND SPRINGFIELD BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	DECISION
V.	:	
NEW JERSEY DEPARTMENT OF EDUCATION	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner adopts the Administrative Law Judge's recommended decision for the reasons expressed therein. Accordingly, the petition is dismissed with prejudice.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 2, 2017
Date of Mailing: February 2, 2017

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 04191-14

AGENCY DKT. NO. 49-3/14

WEST CAPE MAY BOARD OF EDUCATION AND SPRINGFIELD BOARD OF EDUCATION,

Petitioners,

v.

NEW JERSEY DEPARTMENT OF EDUCATION,

Respondent.

Kerri A. Wright, Esq., Esq., for petitioners (Porzio, Bromberg and Newman, P.C., attorneys)

Angela L. Velez, Deputy Attorney General**,** for respondent (Christopher Porrino, Attorney General of New Jersey, attorney)

Record Closed: October 17, 2016 Decided: December 1, 2016

BEFORE **JEFFREY R. WILSON**, ALJ:

STATEMENT OF THE CASE

The petitioners, West Cape May Board of Education (West Cape May) and Springfield Board of Education (Springfield), challenge the implementation of the five percent cap on new School Choice enrollments in the petitioners' districts by the respondent, New Jersey Department of Education (NJDOE).

PROCEDURAL HISTORY

On March 4, 2014, the petitioners, West Cape May and Springfield, filed a Verified Petition of Appeal with the Commissioner of Education, challenging NJDOE's implementation of a five percent cap on New School Choice enrollments on the petitioners' districts. The matter was transmitted to the Office of Administrative Law (OAL) on April 8, 2014, to be heard as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

On September 8, 2014, the NJDOE filed a motion for summary decision; on February 3, 2016, the petitioners, West Cape May and Springfield filed a cross-motion for summary decision.

ISSUES

Whether the NJDOE breached its contracts with petitioners' when it imposed a five percent cap on student enrollment in the School Choice Program.

1. Whether the decision to impose the five percent enrollment cap was arbitrary, capricious, or unreasonable.

2. Whether the five percent enrollment cap is a rule that was required to go through rulemaking procedures under the Administrative Procedure Act (APA).

3. Whether discovery disputes prevent the Court from granting the NJDOE's Motion for Summary Decision.

FINDINGS OF FACT

This matter arises out of the NJDOE decision to place a five percent cap on new student enrollments in the School Choice Program in petitioners' districts. Petitioners' Brief in Support of Cross-Motion for Summary Decision, 3.

Petitioner Springfield was admitted into the School Choice Program on April 13, 2011. Id. at 4. The NJDOE permitted Springfield to enroll twenty ninth-grade students for the 2011-2012 school year, with twenty new ninth-grade students to enroll each year thereafter. Id. Thus, by the 2014-2015 school year, Springfield could have enrolled up to eighty students under the School Choice Program. Id.

Petitioner West Cape May was admitted into the School Choice Program on May 24, 2011. Id. The NJDOE permitted West Cape May to enroll sixteen students at various grade levels for the 2011-2012 school year, with sixteen new students to enroll at various grade levels each school year thereafter. Id. Therefore, West Cape May could have enrolled up to sixty-four students under the School Choice program by the 2014-2015 school year. Id.

The NJDOE directed the petitioners to sign and return the forms that set forth petitioners' obligations under the School Choice Program. Id. Petitioners complied with the instructions. Id.

Petitioners and the NJDOE honored these obligations until October 3, 2013. Id. In the fall of 2013, the Office of Interdistrict School Choice (Choice Office) at the NJDOE learned that the budget for the School Choice Program for the 2014-2015 school year (fiscal year 2015) was likely to be an amount less than the projected cost of the program if eligible districts increased enrollment by the same rate as in previous years. Respondent's Brief in Support of Motion for Summary Decision, 8. The NJDOE determined that it could ensure that school districts received school choice aid for each student enrolled in the program if it limited the enrollment of choice students in each school choice district to a five percent growth "target enrollment" amount. Id. at 9. On

October 3, 2013, the Director of the Choice Office emailed all school choice administrators informing them that choice student enrollment for the 2014-2015 school year would be limited to five percent above each program's 2013-2014 enrollment. Id.

Because of the five percent cap on enrollment, Springfield faces an anticipated loss of $625,770 annually and West Cape May has been deprived of $640,000 with an additional loss of $414,687 expected annually. Petitioners' Brief in Support of Cross-Motion for Summary Decision, 5.

On March 4, 2014, petitioners filed a Petition of Appeal with the Commissioner of Education (the Commissioner) challenging the NJDOE's implementation of target enrollments. Respondent's Brief in Support of Motion for Summary Decision, 10. The NJDOE filed an answer and the matter was transmitted to the Law OAL as a contested case. Id.

On July 1, 2015, the State Appropriations Act for Fiscal Year 2015 became effective. This Appropriations Act allocated $49,246,000 for the Choice Program, up from $49,065,000 the previous year. Respondent's Brief in Opposition to Petitioners' Cross-Motion for Summary Decision, 6. However, if the NJDOE had not imposed the enrollment cap, the NJDOE estimated that the cost of the School Choice Program for the 2014-2015 year would have been $67,942,464. Id. at 7.

The NJDOE filed a Motion for Summary Decision claiming that jurisdiction to review an agency decision belongs to the Appellate Division, that petitioners' requested relief is barred by the Fiscal Year 2015 Appropriations Act, and that the NJDOE's decision was reasonable and does not amount to a rule. Id. at 1. Petitioners filed a Cross-Motion for Summary Decision claiming that the NJDOE breached its contracts with petitioners' when it limited enrollments under the School Choice Program. Petitioners' Brief in Support of Cross-Motion for Summary Decision, 2. Petitioners also claim that this limitation on enrollment is an unlawful promulgation of an agency rule. Id. Petitioners also claim that the NJDOE is not eligible for a grant of Summary Decision because it has not complied with petitioners' discovery requests. Petitioners' Brief in Opposition to Respondent's Motion for Summary Decision, 7.

LEGAL ANALYSIS

Summary Decision Standard

Under N.J.A.C. 1:1-12.5(b) a "motion for summary decision shall be served with briefs and with or without supporting affidavits." N.J.A.C. 1:1-12.5(b). A summary decision may be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Id.

A court should grant summary judgment when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-529 (1995). The Supreme Court of New Jersey has adopted a standard that requires judges to "engage in an analytical process to decide whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 533.

"When a motion for summary decision is made, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding . . . ." N.J.A.C. 1:1-12.5(b). A court should deny a motion for summary decision when the party opposing the motion has produced evidence that creates a genuine issue as to any material fact challenged. Brill, supra, 142 N.J. at 528-529. When making a summary decision, the "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 540.

Whether the Office of Administrative Law has jurisdiction over this matter.

NJDOE argues that the decision to impose the five percent cap on enrollment was an agency decision and, as such, review is within the exclusive jurisdiction of the Appellate Division of the Superior Court. Respondent Brief in Support of Motion for Summary Decision, 12. Petitioners claim that they are not challenging the Commissioner's decision to impose a cap on enrollments across the entire School Choice Program, but that they are challenging the imposition of the five percent cap on their enrollments in light of the petitioners' applications, which allowed for more enrollments. Petitioners' Brief in Opposition to Motion for Summary Decision, 6. Petitioners claim this constitutes a dispute arising under school laws. Id.

> Except as otherwise provided by R. 2:2-1(a)(3) (final judgments appealable directly to the Supreme Court), . . . appeals may be taken to the Appellate Division as of right . . .
> (2) to review final decisions or actions of any state administrative agency or officer, . . . except that review pursuant to this subparagraph shall not be maintainable so long as there is available a right of review before any administrative agency or officer, unless the interest of justice requires otherwise;
>
> [N.J. Court Rules, R. 2:2-3(a).]

The Commissioner has the authority to "establish an interdistrict public school choice program which shall provide for the creation of choice districts." N.J.S.A. 18A:36B-16. The State Appropriations Act for Fiscal Year 2015 specifically provided that "approved enrollment shall not exceed the district's maximum funded choice student enrollment as determined by the Commissioner of Education." L. 2014, c. 14, § 34.

The School Choice Program explicitly grants the right to appeal the Commissioner's decision in two instances, neither of which applies here. N.J.A.C. 6A:12-6.1. An appeal of any determination by the Commissioner not to grant an

application for participation in the choice program may be filed by an eligible choice district applicant) N.J.A.C. 6A:12-6.2. (An appeal of any denial of a choice student applicant for enrollment in a choice district may be filed by the parent or legal guardian with the Commissioner).

"In general, in cases involving only legal questions, the doctrine of exhaustion of remedies does not apply." Abbott v. Burke, 100 N.J. 269, 298 (1985). "A limited exception to this rule may be appropriate where the court perceives the agency to be in a special position to interpret its enabling legislation, but where the agency cannot definitively or conclusively resolve the issues, and further, cannot provide any relief for plaintiffs, any delay in confronting the merits will work an injustice." Id.

The Commissioner has jurisdiction over "all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the State board or of the commissioner." N.J.S.A. 18A:6-9. But jurisdiction over breach of contract claims resides in the trial court. N.J.S.A. 59:13-4; D.J. Miller & Associates, Inc. v. State, Dept. of Treasury, Div. of Purchase and Property, 356 N.J. Super. 187, 192 (App.Div. 2002). Generally, contractual disputes are not within the Commissioner of Education's jurisdiction, because an interpretation of contractual language, rather than school law is necessary to determine the outcome of a claim and the expertise of the agency is not needed. Picogna v. Bd. of Educ. of Cherry Hill Twp., 249 N.J. Super. 332, 335 (App. Div. 1991); Silver Fox Learning Ctr. V. Dist. of the City of Paterson, EDU 1014-03, Initial Decision, (June 27, 2003), adopted, Comm'r, (November 6, 2003) <http://njlaw.rutgers.edu/collections/oal/>.

Here, the decision to impose a five percent cap on enrollment was made by the Commissioner, who is an Officer of the Department of Education, a state administrative agency. Thus, this is a final decision by the agency that must be appealed directly to the Appellate Division.

Petitioners argue that the five percent cap resulted in a breach of contract between the NJDOE and the petitioners. However, the Commissioner does not have jurisdiction over contract disputes. These claims must be heard in the appropriate New

Jersey trial court. Because this forum is not empowered to grant the petitioner a remedy for breach of contract, the NJDOE's Motion for Summary Decision should be granted on these issues.

The Commissioner of Education made a final agency decision when the five percent cap was imposed for the 2014-2015 school year. A final decision by an administrative agency should be appropriately challenged in the Appellate Division. However, if the Commissioner's decision is not a final agency decision, then the Office of Administrative Law does have jurisdiction to decide whether the Commissioner acted arbitrarily, capriciously, or unreasonably by imposing a five percent cap on enrollment in the School Choice Program for the 2014-2015 school year.

Whether the five percent cap on enrollment in the School Choice Program for the 2014-15 school year was arbitrary, capricious, or unreasonable.

"An administrative agency's final quasi-judicial decision will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." In re Herrmann, 192 N.J. 19, 27-28 (2007) To determine whether the decision was arbitrary, capricious, or unreasonable, the court looks at:

> (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
> [Id; quoting Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995).]

When ruling on the appropriateness of an agency's decision, courts grant deference to agency expertise on technical matters "where such expertise is a pertinent factor." Campbell v. N.J. Racing Comm'n, 169 N.J. 579, 588 (2001). "When resolution of a legal question turns on factual issues within the special province of an administrative agency, those mixed questions of law and fact are to be resolved based on the agency's fact finding." Id.

In 2010, the New Jersey Legislature enacted the Interdistrict Public School Choice Program Act ("Choice Act"). N.J.S.A. 18A:36B-14. The Legislature granted the Commissioner the authority to "establish an interdistrict public school choice program which shall provide for the creation of choice districts." N.J.S.A. 18A:36B-16.

The purpose of the Choice Act is "to increase options and flexibility for parents and students in selecting a school that best meets the needs of each student, thereby improving educational opportunities for New Jersey citizens." N.J.A.C. 6A:12-1.1.

To provide funding for the School Choice Program, a choice student in a choice district is "counted in the resident enrollment of the receiving district" and the receiving district receives school choice aid "for each choice student equal to the adequacy budget local levy per pupil amount." N.J.S.A. 18A:7F-62. By these terms, the School Choice Program is entirely State funded, with no transfer of funding between the sending districts and the choice districts.

Funding for the School Choice Program is governed by the annual State Appropriations Act. See L. 2013, c. 77 § 34; L. 2012, c. 18, § 34. The State Appropriations Act for Fiscal Year 2014 allocated $49,065,000 for the School Choice Program. The DOE had projected that the program would grow in the 2014-25 school year to a cost of $67,943,464. Respondent's Brief in Opposition to Petitioners' Cross-Motion for Summary Decision, 7. However, the State Appropriations Act for Fiscal Year 2015 allocated $49,246,000 for the School Choice Program, and specifically provided that "approved enrollment shall not exceed the district's maximum funded choice student enrollment as determined by the Commissioner of Education." L. 2014, c. 14, § 34.

Here, the Commissioner was granted authority over the School Choice Program. To fund the program, the Commissioner relies on the State Appropriations Act. The court will likely grant deference to the Commissioner with regard to the amount required to fund the School Choice Program. The evidence shows that the NJDOE was expecting the program to grow larger than it could afford under the Appropriations Act.

Thus, to keep the program funded, the Commissioner decided to impose a five percent cap on enrollment for the 2014-2015 school year, which was governed by the Fiscal Year 2015 Appropriations Act. Because the Commissioner is tasked with establishing the School Choice Program in New Jersey, the Commissioner acted within legislative authority by imposing an enrollment cap to keep the program funded. Also, the record contains evidence supporting the decision to impose the enrollment cap because the projected cost of the program for the 2014-2015 school year exceeded the budget afforded by the Appropriations Act for the 2015 Fiscal Year. The Commissioner made a reasonable decision to ensure the School Choice Program remained funded. Therefore, the Commissioner's decision was not arbitrary, capricious, or unreasonable.

Whether the Commissioner's decision to impose a five percent enrollment cap constituted improper rulemaking.

Administrative agencies are afforded great latitude in selecting the appropriate procedures to effectuate their regulatory duties and statutory goals. St. Barnabas Med. Ctr. v. NJ Hosp. Rate Setting Comm'n, 250 N.J.Super. 132, 142 (App. Div. 1991); Metromedia, Inc. v. Dir., Div. of Taxation, 97 N.J. 313, 333 (1984). This flexibility does not allow the agency to overlook the requirements of the Administrative Procedure Act ("APA"). Therefore, an agency's discretion in selecting a procedure best suited to advance its regulatory objectives is not without parameters. Metromedia, supra, 97 N.J. at 333-34; Crema v. New Jersey Dep't of Envtl. Prot., 94 N.J. 286, 299 (1983).

The New Jersey Legislature enacted the APA to create and define procedures to be used by agencies and departments in their rule-making process. N.J.S.A. 52:14B-1 to –15. For any rule promulgated by an agency to be considered valid, the APA requires compliance with its standards and guidelines and specifically states, "[p]rior to the adoption, amendment, or repeal of any rule, except as may be otherwise provided, the agency shall...give … notice of its intended action . . . [and] [a]fford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing . . . ." N.J.S.A. 52:14B-4(a).

The APA defines an "administrative rule" as being, unless otherwise modified, "each agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of the agency." N.J.S.A. 52:14B-2(e). If an agency's action or determination falls within the contours of a rule it must comply with the specific procedures outlined in the APA. Metromedia, supra, 97 N.J. at 330-34. An important aspect of rulemaking that makes it the favored regulatory method is the quest for "general fairness and decisional soundness that should surround the ultimate agency determination." Id. at 331. Typically, when the agency action deals with broad policy issues that affect a significant segment of the regulated or general public, rulemaking is implicated. Id.

In Metromedia, the Supreme Court developed a six-factor test to determine if an agency is engaged in rulemaking or policy setting. A conclusion that the agency is engaged in rulemaking is warranted if it appears that the agency determination, in many or most of the following circumstances:

> 1. is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or narrow select group;
>
> 2. is intended to be applied generally and uniformly to all similarly situated persons;
>
> 3. is designed to operate only in future cases, that is, prospectively
>
> 4. prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization;
>
> 5. reflects an administrative policy that:
> i. was not previously expressed in any official and explicit agency determination, adjudication or rule, or
> ii. constitutes a material and significant change from a clear, past agency position on the identical subject matter; and
>
> 6. reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.
>
> [Id. at 331-332.]

These factors, either singly or in combination, determine in a given case whether agency action must be rendered through rulemaking procedures. Metromedia, supra, 97 N.J. at 332; Woodland Private Study Group v. Dep't of Environmental Protection, 109 N.J. 62, 67 (1987). "If the several relevant features that typify administrative rules and rulemaking weigh in favor of action that is quasi-legislative in character, rather than quasi-judicial or adjudicatory, that balance should determine the procedural steps required to validate the ultimate agency action." Metromedia, supra, 97 N.J. at 332.

Here, under the Metromedia six-factor test, the NJDOE's decision to impose a five percent cap on enrollment in the School Choice Program does not amount to a rule.

First, the cap only applies to the 2014-2015 school year. It is not designed to operate in all future cases. It was specifically designed for the 2014-2015 school year due to the budget constraints imposed by the Fiscal Year 2015 Appropriations Act.

Next, the Commissioner was granted the authority to establish enrollment parameters by statute and this decision does not materially change a clear, past agency decision. The School Choice Act grants the Commissioner authority to establish an interdistrict school choice program. This program is funded by the Appropriations Act each year. The Legislature granted the Commissioner authority to determine funding for the School Choice Program under the Appropriations Act. Thus, the decision to impose a five percent cap to fund the School Choice Program was within the Commissioner's statutory authority.

Also, the Fiscal Year 2015 Appropriations Act specifically stated that the districts were limited to enrollment in the amount determined by the Commissioner. Thus, the Commissioner acted within legislative authority to limit the enrollment by imposing a cap.

Finally, the enrollment cap does not change the policy behind the School Choice Program. Students may still apply and enroll in available seats in eligible districts. However, the funding for the program is limited by the Appropriations Act. The

enrollment cap is in place to ensure the schools in the program are funded in accordance with the appropriation. The cap still allows for school choice so long as the program can be funded. Therefore, it does not change the substance of the program.

These four factors weigh against the conclusion that the NJDOE engaged in rulemaking. Instead, these factors show that the decision is an exercise of the Commissioner's statutory authority. Therefore, the NJDOE's Motion for Summary decision should be granted on this issue.

Whether a discovery dispute prevents the OAL from granting the NJDOE's Motion for Summary Decision.

Petitioners claim that the NJDOE is not eligible for Summary Decision because it has not complied with their discovery requests. However, in an interlocutory decision, on August 26, 2015, the Commissioner reversed the Administrative Law Judge's decision granting Petitioners' Motion to Compel Discovery. In the decision the Commissioner asserted that the requested discovery was protected by the deliberative process privilege.

"Judicial review of administrative agency action is a constitutional right." Silviera-Francisco v. Board of Educ., 224 N.J. 126, 136 (2016). Rule 2:2-3(a)(2) also authorizes an appeal as of right to the Appellate Division from final decisions or actions of any state administrative agency or officer and to review the validity of any rule promulgated by a state administrative agency with the exception of certain tax matters. Id. "In the absence of a final judgment or order considered final by rule or law, an appeal from an interlocutory order or decision may only be taken by leave granted by the Appellate Division." R. 2:2-3(b).

Because the Commissioner has already issued an interlocutory order on discovery, petitioners' recourse is to request leave to appeal the decision to the Appellate Division or to continue until there is a final decision and then appeal to the Appellate Division as of right.

CONCLUSION

The Commissioner acted reasonably by imposing a five percent enrollment cap on the School Choice Program and this decision did not amount to improper rulemaking. The OAL does not have jurisdiction over petitioners' contracts claims and the Commissioner has already decided the discovery issues so Petitioners may appeal that decision to the Appellate Division.

ORDER

The NJDOE's motion for summary decision is hereby **GRANTED**. West Cape May's cross motion for summary decision is **DENIED**. Springfield's cross motion for summary decision is **DENIED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 1, 2016
DATE

JEFFREY R. WILSON, ALJ

Date Received at Agency:

Date Mailed to Parties:

JSK/dm

APPENDIX

WITNESSES

For petitioner:

None

For respondent:

None

EXHIBITS

Briefs and Certifications of petitioners' and respondent