323-18

UNDER THE SUN LEARNING CENTER OF MARLTON, INC., A.M.P. LAND ENTERPRISES, L.P., AND THOMAS A. PETRUGGI,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF EVESHAM, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

This matter arose from a petition filed in 2014 before the Commissioner alleging, *inter alia*, that the respondent Board is operating a fee-based child care program during school hours for children aged six weeks to pre-kindergarten, which is available to District residents and non-residents alike, in violation of *N.J.S.A.* 18A:20-34(f). The Board filed a motion to dismiss in lieu of an answer, and the matter was transmitted to the OAL as a contested case. In 2015, ALJ Edward Delanoy issued a written opinion on the motion, dismissing three of five allegations in the petition. The matter was subsequently reassigned to ALJ Solomon Metzger, and the parties filed cross motions for summary decision on the remaining allegations, *i.e.,* whether the Board exceeded its delegated authority under *N.J.S.A.* 18A:20-34(a) through (f); and whether the Board violated New Jersey school laws regarding school budgets and appropriations.

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 Board operates the Evesham Child Care Program, a before and after school program for District students from kindergarten through fifth grade, available in the District's elementary schools; in 2014, the Board authorized a for-profit daycare center known as "Teddy Bear Academy" (TBA); TBA serves children aged six weeks to pre-kindergarten, whether or not they reside in the Evesham school district; TBA operates year-round from 6:45 am to 6 pm, from a space in the Marlton Middle School; petitioners asserted that the District's operation of TBA, which competes with their daycare businesses, is beyond the Board's authority; a plain reading of *N.J.S.A.* 18A:20-34 (f) excludes an enterprise like TBA that serves infants and toddlers during the school day and is open to non-residents; the Board's contention that subsection (f) be read as if its clauses were independently numbered or separated by semi-colons is without merit, as the plain language of the statute suggests that the Legislature intended to limit a Board's freedom to offer diverse child care opportunities; and the Board violated *N.J.S.A.* 18A:19-2 and *N.J.S.A.* 18A:11-1 when it received, expended and reported monies from the operation of TBA, which is unauthorized activity under *N.J.S.A.* 18A:20-34. Accordingly, the ALJ granted the petitioners' motion for summary decision and denied the Board's opposing motion; further, the ALJ ordered that the Board cease operating TBA within thirty days of the final decision in this matter.

Upon an independent review of the record, the Commissioner adopted the Initial Decision as the final decision in this matter, with the modification that the Board will have until June 30, 2019 to cease operation of TBA in order to provide affected parents and students with sufficient time to find alternate placements.

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.

October 19, 2018

OAL DKT. NO. EDU 13100-14
AGENCY DKT. NO. 258-9/14

UNDER THE SUN LEARNING CENTER OF MARLTON, INC., A.M.P. LAND ENTERPRISES, L.P., AND THOMAS A. PETRUGGI,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF EVESHAM, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions, as well as the exceptions filed by respondent and petitioners' reply thereto, have been reviewed pursuant to *N.J.A.C.* 1:1-18.4. Upon comprehensive review, the Commissioner is in accord with the Administrative Law Judge's (ALJ) findings and adopts the Initial Decision as modified herein.

In this matter, petitioners filed a petition of appeal with five counts alleging that by operating a fee-based child care program during school hours for children aged six weeks to pre-kindergarten, the Board: exceeded its delegated authority (Count I); violated New Jersey school laws regarding school budgets and appropriations (Count II); violated petitioner's constitutional rights (Count III); violated the requirement for provision of a "thorough and efficient" education (Count IV); and benefitted from operation of a fee-based program on tax exempt school district property (Count V).[1] The Board filed a motion to dismiss, arguing that the petition was not timely filed,

[1] The Board provides the following fee-based child care programs:

petitioners did not have standing, and petitioners failed to state a claim upon which relief could be granted. ALJ Delanoy determined that the petition was timely filed,[2] but dismissed Counts III and V for lack of jurisdiction, and Count IV for lack of standing. ALJ Delanoy found that petitioners had standing to pursue Counts I and II because the issue significantly impacts the public interest; TBA and ECC are subsidized by public funding; residents have an interest in access to quality daycare at reasonable rates; a tax-subsidized facility might result in local daycares being forced to reduce their standards of care to compete; and there is no precedent authorizing the operation of a for-profit business by a local school district.[3]

Following extensive discovery, the parties filed cross-motions for summary decision relating to the remaining counts. In Count I, petitioners maintained that the Board exceeded its authority under *N.J.S.A.* 18A:20-34(f) by operating TBA during school hours and providing child care services to children under school-age, including children who do not attend school in the District. In Count II, petitioners further maintained that the Board's payment of expenses for TBA and inclusion of income from the unauthorized operation of TBA in its annual budget was a violation of *N.J.S.A.* 18A:19-2 and *N.J.S.A.* 18A:11-1. Respondent contended that the Board is statutorily authorized to operate a program such as TBA, and that the Board had not violated *N.J.S.A.* 18A:19-2

- Evesham Child Care (ECC) – a before and after school program for students in Kindergarten through 5th grade who attend Evesham School District.
- Teddy Bear Academy (TBA) – an educational child care program for children aged 6 weeks old to pre-kindergarten, which operates during the school day and is open to the public.

[2] Respondent's claim that petitioners failed to file an action within ninety (90) days following the January 23, 2014 Board meeting is without merit and was properly determined by ALJ Delanoy; therefore, respondent's arguments and petitioners' contentions pertaining to same will not be addressed herein.

[3] In Count I, petitioners allege that the Board's actions exceeded the scope of *N.J.S.A.* 18A:20-34 and its delegated authority because there is no statutory empowerment for respondent to operate a child care facility or a for-profit business entity. In Count II, petitioners allege that the Board violated *N.J.S.A.* 18A:19 *et seq.* – and *N.J.S.A.* 18A:11-1 – because public funds were used for the purpose of paying the expenses associated with the operation and maintenance of TBA, which are unauthorized programs beyond the duties and powers of respondent. Petitioners further allege that including the income from TBA as part of its annual budget was also a violation of *N.J.S.A.* 18A:19 *et seq.* and *N.J.S.A.* 18A:11-1.

and *N.J.S.A.* 18A:11-1 because, pursuant to *N.J.A.C.* 6A:23A *et seq.,* the ECC and TBA are operated and accounted for as an enterprise fund.[4] [5] ALJ Metzger found that the plain reading of *N.J.S.A.* 18A:20-34(f) does not support the Board's expansive interpretation that a local board of education has the discretion to use its property for a variety of child care services.[6] ALJ Metzger found instead that the language of *N.J.S.A.* 18A:20-34(f) is precisely confined, and only authorizes before and after school child care for school age children attending the District's schools. ALJ Metzger further found that by virtue of the Board having received, expended and reported monies from an unauthorized activity, *i.e.*, the operation of TBA, it violated *N.J.S.A.* 18A:19-2 and *N.J.S.A.* 18A:11-1; further noting that petitioners sought no specific remedy pertaining to this claim and appeared content with the remedy that the District cease operation of TBA.[7] ALJ Metzger granted petitioners' motion for summary decision and directed the Board to cease operation of TBA within thirty days of the final agency decision.

[4] Enterprise fund may be used to account for any activity for which a fee is charged to external users for goods or services. The enterprise fund is required to be used for any activity whose principal revenue source meets any of the following criteria:

- Laws or regulations require the district to recover costs through fees and charges;
- The pricing policies of the activity establish fees and charges designed to recover its costs, including capital costs (such as depreciation or debt service); or
- Debt is backed solely by revenues from fees and charges (thus, not debt that is backed by the full faith and credit of the district).

[5] The Commissioner will not reiterate respondent's arguments pertaining to the Child Care Center Licensing Act, *N.J.S.A.* 30:5B *et seq.*, and the Department of Human Services (DHS) rules and regulations, as they are immaterial to the determination of this matter because the issue is whether the Board is authorized to operate a program such as TBA pursuant to *N.J.S.A.* 18A:20-34(f).

[6] The Board has proffered that the governing statute allows that either: (1) child care services can be provided – without restriction – by the board or a board approved sponsor; or (2) child care programs can be offered before or after school hours for any school-aged child who attends school within the district.

[7] The Commissioner is in accord with the findings of ALJ Metzger pertaining to *N.J.S.A.* 18A:19-2 and *N.J.S.A.* 18A:11-1. The Commissioner clarifies, however, that although a school district may operate certain programs under the "enterprise fund," respondent admittedly used the District's general fund for initial operational and administrative costs, and the Board potentially continues to bear the burden of certain expenses and liabilities related to the operation of TBA.

Petitioners' sole exception relates to the ALJ's direction that "[t]he District must cease operating the TBA…" Petitioners request that, for the purposes of clarity, the Commissioner modify the decision to reflect that "respondents," *i.e.*, the Board and the District, cease operating TBA. The Commissioner clarifies that the ALJ's use of "District" should be understood to include the Board; and as the body politic governing the District and its operations, any directive to the Board applies to the District – so reference to the "Board" as opposed to "respondents" is appropriate.

Respondent's exceptions substantially recast and reiterate the arguments made at the OAL. Respondent argues that ALJ Metzger's interpretation of *N.J.S.A.* 18A:20-34(f) is arbitrary, capricious and lacks legal reasoning. Respondent further argues that ALJ Metzger improperly divests the Board's authority to use and manage its properties. Respondent also argues that ALJ Metzger mischaracterized the District's operation of ECC and TBA as for-profit business ventures when, in fact, ECC and TBA are fee-based programs that are not funded by the Board and the revenues are accounted for by the District's "enterprise funds."[8] In reply, petitioners argue that the Initial Decision is not arbitrary or capricious and does not lack legal reasoning. Petitioners contend that ALJ Metzger correctly interpreted *N.J.S.A.* 18A:20-34(f) and the Board's authority under the statute. Petitioners further contend that TBA is a for-profit program that is funded by the Board's general fund while accounting for the revenue as part of respondent's annual budget.

The ultimate issue in this matter hinges on the interpretation of *N.J.S.A.* 18A:20-34(f), which states in relevant part:

> The board of education of any district may, pursuant to rules adopted by it, permit the use of any schoolhouse and rooms therein, and the grounds and other property of the district, when not in use for school purposes, for any of the following purposes:

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[8] In modifying the Initial Decision, the Commissioner considered respondent's argument that ALJ Metzger's directive to cease operation of TBA severely prejudices the District and the local community, as well as petitioners' contentions in response, as more fully addressed below.

. . . .

> f. Child care services provided by the board of education, or a board approved sponsor, or a child care program licensed pursuant to *P.L.* 1983, *c.* 492 (C. 30:5B-1 *et seq.*), before or after regular school hours, for any school aged child who attends school within the school district.

It is clear from the Board's arguments that it has read the commas as a delineation of separate provisions. *See* Footnote 6. The Commissioner finds, however, the plain meaning of the statute permits use of school property for child care services *only* before or after school, for school aged children who attend the district's schools. If the Legislature intended for school districts to provide child care services to children below the school age – *e.g.*, infants and toddlers from six weeks old through pre-Kindergarten – which are open to non-residents of the district and operated during regular school hours, the Legislature would not have drafted such limiting language. Significantly, the Assembly Education Committee's Statement in support of Assembly Bill No. A2077 states, in relevant part:

> The bill provides that a board of education may authorize the use of school facilities for the provision of child care services before or after school hours. The child care services would be available to any school aged child who resides within the school district and could be provided by the school district itself or any board approved sponsor.
>
> Assembly Education Committee Statement, No. A2077 (June 9, 1997).

The Commissioner, therefore, finds that *N.J.S.A.* 18A:20-34(f) precludes operation of programs such as TBA because it serves children who are not school aged, operates during regular school hours, and is open to non-residents.[9]

[9] The Commissioner affirms the legal analysis detailed by ALJ Metzger in the Initial Decision without further comment as the statutory language and intent are unambiguous; accordingly, the respondent's arguments that improperly rely upon *Resnick v. East Brunswick Twp. Bd. of Educ.*, 77 *N.J.* 88 (1978) will not be addressed herein.

In reviewing the ALJ's recommended directive to the Board to cease operations within 30 days following issuance of the final agency decision, the Commissioner has considered the reasonableness of same – primarily the potential hardship that it will pose for the students and parents of TBA.[10] The Commissioner has carefully considered the parties' arguments and finds that although the Board must absolutely cease operation of TBA, 30 days is not an appropriate timeline as it does not – among other considerations – provide affected parents and students with sufficient time to identify alternative child care options. Therefore, the Commissioner directs the Board to cease operation of TBA by June 30, 2019.

Accordingly, the recommended decision of the ALJ is adopted – as modified herein – as the final decision in this matter. Petitioners' cross-motion for summary decision is granted and respondent's cross-motion for summary decision is denied.

IT IS SO ORDERED.[11]

COMMISSIONER OF EDUCATION

Date of Decision: October 19, 2018

Date of Mailing: October 19, 2018

[10] Respondent has also noted that high school students from the Lenape Regional School District will be impacted by the closure of TBA because interested students participate in a work/study program in connection with TBA. While this fact has not been substantiated in the record, or been reviewed by the ALJ, if true, the Commissioner certainly would not want current high school students receiving credit for any work/study program at TBA to be adversely affected by a mid-school year closure.

[11] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 13100-14
AGENCY DKT. NO. 258-9/14

UNDER THE SUN LEARNING CENTER OF MARLTON, INC., A.M.P. LAND ENTERPRISES, L.P. AND THOMAS A. PETRUGGI,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EVESHAM, BURLINGTON COUNTY,

Respondent.

Joseph A. Marrazzo, Jr., Esq., for petitioners

Yolanda N. Melville, Esq., for respondent (Cooper Levenson, attorneys)

Record Closed: June 26, 2018

Decided: July 18, 2018

BEFORE **SOLOMON A. METZGER**, ALJ (Ret., on recall):

This matter arises out of a petition filed before the Commissioner of Education in September 2014 alleging that elements of the day care program undertaken by the Evesham Township Board of Education exceed its statutory authority and violate petitioners' rights. The District filed a motion to dismiss in lieu of an answer, seeking dismissal of each of five counts. The petition alleges that the District; exceeded its delegated authority, prepared inaccurate budget documents, infringed on petitioners'

business, violated the "thorough and efficient" clause of the New Jersey Constitution, and at least in part, is ineligible for property tax exemption. It sought injunctive relief and various forms of damages. The Commissioner transmitted the matter to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15. The motion was heard before the Honorable Edward Delanoy, ALJ and in a written opinion dated March 18, 2015, the last three counts of the petition were dismissed. Remaining is the claim that the District exceeded its delegation and prepared inaccurate budget documents. Discovery followed and the parties have now filed cross-motions for summary decision on these points, N.J.A.C. 1:1-12.5; Brill v. Guardian Life Ins. Co. of Amer., 142 N.J. 520 (1995).

The relevant facts are undisputed. The Board of Education operates the Evesham Child Care Program (ECC), a before- and after-school program for District students from kindergarten through fifth grade. The ECC is available in the District's seven elementary schools. In 2014, the Board authorized a for-profit daycare center known as "Teddy Bear Academy" (TBA), within the ECC structure. Children served are from age six weeks up to kindergarten and need not reside in-district. The program is housed in the Marlton Middle School and its hours of operation are 6:45 a.m. to 6:00 p.m. throughout the calendar year. Full and half-time options are available; approximately 100 children are enrolled in the TBA. Petitioners do not debate the District's right to offer the ECC; they complain rather that creation of the TBA, a competitor, was beyond the District's authority.

The central dispute revolves around the meaning of N.J.S.A. 18A:20-34 (a) through (f). There the legislature recognized that school premises might be put to additional good purposes when not needed for education. Some uses are enumerated, for example, school buildings may serve as polling places, lecture halls, gathering places for civic, social, artistic, and entertainment purposes, or as libraries. These undertakings may also be revenue producing. Subsection (f), governs child care, but in this instance the provision is drawn narrowly. The service may be provided:

> . . . by the board of education, or a board approved sponsor, or a child care program licensed pursuant to P.L. 1983, c. 492 (C.

> 30:5B-1 et seq.), before or after school hours, for any school-aged child who attends school within the school district.

A plain reading would exclude an enterprise like TBA that serves infants and toddlers, before, during and after school hours, and is open to non-residents.

The Board counters that a plain reading does not always lead to correct understanding, citing, New Jersey Pharmaceutical Assoc., v. Furman, 33 N.J. 121 (1960); San-Lan Builders, Inc. v. Baxendale, 28 N.J. 148 (1955). It posits that N.J.S.A. 18A:20-34 must be understood in the context of a statutory scheme that relies on boards of education to manage school resources, see, N.J.S.A. 18A: 11.1; N.J.S.A. 18A:20-1. As an element in this structure, N.J.S.A. 18A:20-34 confers discretion on school boards to respond to facilities' needs within their communities, citing, Resnick v. East Brunswick Twp. Bd. of Educ., 77 N.J. 88 (1978). The Court in Resnick, approved the temporary use of school property for religious purposes, though the statute makes no mention of worship services. The Court relied to a large extent on the language of subsection (c), which allows for ". . . social, civic and recreational meetings and entertainments and such other purposes as may be approved by the Board." Building on Resnick, the Board suggests that N.J.S.A. 18A:20-34 (a) through (e) encompass a variety of functions, both stated and implied. Moreover, there is no question that child care for infants and toddlers is a favored activity, see N.J.S.A. 30:5B-2. Marshalling this backdrop, the Board sees subsection (f) as focused on one form of child care—before and after school programs for in-district students—without curtailing its discretion under subsections (a) through (e). It is there and in the Board's more general authority to manage its property that the delegation for the TBA is to be found. In the alternative, the Board asserts that subsection (f) is itself expansive. The language concerning before and after school programs for in-district students should be seen either as an example of the permissions granted by the subsection, or as applying only when operated by a licensee under the Child Care Center Licensing Act, N.J.S.A. 30:5B-1 to -15. For these latter interpretations the Board suggests that subsection (f) be read as if the clauses were independently numbered or separated by semicolons. Taken as a whole, the Board's analyses find it improbable that the legislature limited its freedom to offer diverse child care opportunities.

The difficulty for this contention is that N.J.S.A. 18A:20-34(f), read plainly, suggests the Legislature did exactly that. The flexibility crafted into subsections (a) through (e) was obtainable in subsection (f), but instead the words are precisely confined. Though the parties have been thorough, no legislative history was presented. Thus, we may not know exactly why the Legislature configured subsection (f) as it did, but the words address us clearly. Neither is there reason to infer the TBA from general language in subsections (a) through (e) given that subsection (f) is explicitly focused on child care. Subsection (f) played no role in Resnick and the Board's reliance on this precedent would be more persuasive had there been no subsection (f). The District enlarges the inquiry in order to contextualize the troublesome language. Yet nothing about N.J.S.A. 18A:20-34 is internally inconsistent; the Legislature may write expansively in one category and carve tightly in another. Subsection (f) does not interfere with the Board's general authority to manage school property. It authorizes before and after school child care in phrasing that must be avidly coaxed to encompass non-school age children. In the absence of ambiguous words, or competing intentions, the language chosen by the Legislature should be given its natural meaning, see, e.g., Merin v. Maglaki, 126 N.J. 430 (1992).

The Board draws as well upon language in the Child Care Center Licensing Act, N.J.S.A. 30:5B-1 to -15. There, the renamed Department of Children and Families, regulates child care centers, but the statutory scheme specifically exempts such programs when operated by school districts, N.J.S.A. 30:5B-3(b)(7); N.J.A.C. 3A:52-5.1. This because school buildings are already required to meet strict health and safety requirements. The Board appears to bond ECC and TBA together to suggest that since both are exempt under the Licensing Act, both are also authorized. This does not follow. The Licensing Act's exemption simply avoids redundancy of oversight; it does not purport to expand the District's authority.

Petitioners also raise the question of whether the Board has satisfied the N.J.S.A. 18A:20-34 requirement that it adopt "rules" when using school property for non-school activities. During discovery petitioners obtained the concession that there are no adopted rules as that term is generally understood, but there is a parent guide and there

are contracts, and budget documents that set out the parameters of the TBA. Beyond these basic facts; however, the legal arguments were not developed, as the parties focused their clash on the implications of subsection (f). I did not seek supplemental submissions given my view that the matter resolves before this issue is reached.

The remaining count in the petition charges that the District has prepared inaccurate budgets relating to the TBA. Petitioners do not assert that the accounting is faulty, but that monies have been received, expended and reported on behalf of an unauthorized activity. This is necessarily true if my reading of N.J.S.A.18A:20-34 is accurate. Petitioners seek no specific remedy regarding this issue and in the current pared down posture of the case, seem content to demand that the activity stop.

Based on the foregoing, petitioners' motion for summary decision is **GRANTED**; the Board's motion is **DENIED**. The District must cease operating the TBA within thirty days of final agency action, affording parents some opportunity to locate alternate child care options.

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.

July 18, 2018
DATE

SOLOMON A. METZGER, ALJ (Ret., on recall)

Date Received at Agency: ____________________

Date Mailed to Parties: ____________________

mph