156-19

New Jersey Commissioner of Education

Final Decision

Board of Education of the City of Englewood,
Bergen County,

Petitioner,

v.

Board of Education of the Borough of
Englewood Cliffs, Bergen County, and
New Jersey State Department of Education,

Respondents.

Synopsis

The dispute herein concerns the payment of tuition for students from the Englewood Cliffs School District who attend the Academies@Englewood (Academies), a magnet school program that began in 2002 and is based at Dwight Morrow High School (Dwight Morrow), the Englewood Board of Education's (Englewood) only public high school. Since 1965, students from Englewood Cliffs have attended high school in Englewood under a send-receive agreement between Englewood and Englewood Cliffs – which does not operate a high school of its own. From 2002 until 2013, up to twenty-five Englewood Cliffs students attended the Academies each year. During that period of time, Englewood reported these pupils as "choice students" on its Application for State School Aid; therefore, the New Jersey State Department of Education (Department), and not Englewood Cliffs, paid tuition to Englewood for the education of these students. The Department recognized this anomaly in 2013, instructed Englewood to report the students in question as "received students" under the send-receive relationship going forward, and moved to stop providing Choice aid to Englewood for the Englewood Cliffs students who attend Academies. The Department filed a motion for summary decision in 2016, which was held in abeyance pending resolution of discovery matters; Englewood Cliffs filed opposition to the motion in 2018.

The ALJ found, *inter alia,* that: there are no material facts at issue, and the matter is ripe for summary decision; the fundamental dispute here is whether Englewood Cliffs students attending the Academies are "choice students" entitled to state aid under the Interdistrict Public School Choice Program; the purpose of the school choice program is to allow students to be educated in a district they otherwise would not be entitled to attend for free; here, Englewood Cliffs students are already entitled to attend Dwight Morrow for free under the send-receive agreement; the Department's determination that Englewood Cliffs students attending the Academies are not "choice students" and therefore not entitled to Choice aid is correct; and Englewood Cliffs' arguments that 1) the Supreme Court decision in *Board of Education of Englewood Cliffs v. Board of Education of Tenafly,* 170 *N.J.* 323 (2002) obligates the State to pay for Englewood Cliffs students to attend the Academies, and 2) that the Department's determination that the subject students are not "choice students" amounts to unlawful rulemaking under the Administrative Procedure Act, are without merit. Accordingly, the ALJ granted the Department's motion for summary decision and dismissed the petition.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ, and adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed with prejudice.

June 19, 2019

OAL Dkt. No. EDU 16167-15
Agency Dkt. No. 345-11/14

New Jersey Commissioner of Education

Final Decision

Board of Education of the City of Englewood, Bergen County,

Petitioner,

v.

Board of Education of the Borough of Englewood Cliffs, Bergen County, and New Jersey State Department of Education,

Respondents.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by the Borough of Englewood Cliffs (Englewood Cliffs), and the Department of Education's (Department) reply thereto have been reviewed and considered. The dispute in this matter concerns the payment of tuition for Englewood Cliffs students attending the Academies@Englewood (Academies), a magnet school program based at Dwight Morrow High School (Dwight Morrow) in Englewood. The Administrative Law Judge (ALJ) found that Englewood Cliffs students attending the Academies are not Choice students; therefore, Englewood Cliffs is required to pay tuition for those students pursuant to the pre-existing sending/receiving agreement between the two districts.

As a preliminary matter, the Commissioner notes that the Initial Decision addresses the Department's arguments that the matter is moot in light of the Department's decision to release Choice aid for Englewood Cliffs students attending the Academies for the 2013-14, 2014-15 and 2015-16 school years and that, to the extent a viable claim might remain despite the payment of

Choice Aid for those years, it is procedurally defective because it is essentially a Petition for a Declaratory Ruling that was not filed as such. The Department did not contest the ALJ's conclusions on these issues in its reply to Englewood Cliffs' exceptions. The Commissioner agrees with the ALJ that the matter is not moot due to the recurring need to determine who will pay for Englewood Cliffs students to attend the Academies. The Commissioner also agrees that, given that the dispositive issue has been squarely presented and adequately briefed, and the lack of any reasonable prospect that either party will change its position if Englewood Cliffs is required to refile this matter as a Petition for Declaratory Ruling, the matter should proceed to a decision based on the record as it stands.

Englewood Cliffs has filed exceptions to the ALJ's determination, which largely repeat arguments made in its filings before the ALJ. First, Englewood Cliffs argues that whether the Department provided Choice Aid for Englewood Cliffs students prior to 2013 intentionally or inadvertently is a material dispute of fact that the ALJ incorrectly resolved without a hearing. Englewood Cliffs contends that the Department directed the districts to report these students as Choice students[1] and that, accordingly, the ALJ should not have accepted the Department's

[1] On this point, Englewood Cliffs' exceptions cite to "Cross-Petition Ex. D." This exhibit includes an email from the Department to Englewood Cliffs, dated December 17, 2013, stating, "Since Englewood Cliffs and Englewood City have a formal send/receive relationship, Englewood Cliffs high school students attending Englewood City must be reported by Englewood Cliffs as sent to Englewood City. Englewood City must report these students as received from Englewood Cliffs. The students should not be reported as Choice students." Therefore, this exhibit does not support Englewood Cliffs' argument. However, Englewood Cliffs' brief in opposition to the Department's motion for summary decision, which makes this same argument, cites to a different document: Exhibit B to the Cross-Petition, which includes an email from Englewood to the Department, dated October 9, 2013, stating, "Previously, NJSMART has directed me to code the Englewood Cliffs residents in our Choice academy as Choice students," and an October 10, 2013 email response from the Department to Englewood, stating, "While we review this question, please report these students the same way that you've reported them in the past. Please follow NJSMART instructions." The Commissioner presumes, for the sake of argument, that Englewood Cliffs' exceptions intended to refer to Exhibit B rather than Exhibit D, but disagrees with Englewood Cliffs that this document proves prior instructions by the Department regarding the reporting of Englewood Cliffs students attending the Academies, as the description of the alleged instructions comes from Englewood staff and no other document is attached or referenced to show actual instructions from the Department. Moreover, regardless of any alleged prior instructions, this matter presents a purely legal question and the fact of the Department's prior instructions is irrelevant to the resolution of that question.

representation that it only learned of the practice of classifying the students as Choice students during a review of the Choice Program in the 2013-2014 school year.

Next, Englewood Cliffs argues that the applicable statutes and regulations provide for Choice Aid in these circumstances, citing to *N.J.A.C.* 6A:12-1.2(d), which provides, "District boards of education currently in a sending/receiving relationship are eligible to participate in the Choice Program unless otherwise legally prohibited," and *N.J.A.C.* 6A12-1.2(a), which provides, "A Choice district may accept non-resident students into an educational program in the Choice district at the expense of the State." Englewood Cliffs argues that these regulations mean it is eligible to participate in the Choice Program, and that the Choice district (Englewood) may accept non-resident students (from Englewood Cliffs) into a program in the Choice district (the Academies) at the expense of the Department. Englewood Cliffs further claims that because there is a competitive admissions process for the Academies, students are not admitted as a matter of right, and thus Englewood Cliffs cannot designate the Academies as the high school for its students.

Englewood Cliffs argues that the Department has an independent obligation to fund Englewood Cliffs students with Choice Aid under the New Jersey Supreme Court's decision in *Board of Education of Englewood Cliffs v. Board of Education of Englewood*, 170 *N.J.* 323 (2002). In particular, Englewood Cliffs relies on the concurrence in that case, which indicates that the State Board of Education bears the primary responsibility for providing financing to alleviate racial imbalance, *id.* at 345, as well as the Department's subsequent provision of funding to implement programs to address racial imbalance in Englewood, to conclude that the Department has assumed the obligation to finance the operation of the Academies.

Finally, Englewood Cliffs argues that the Department has violated the requirements of the Administrative Procedure Act. Specifically, Englewood Cliffs disputes the ALJ's findings regarding three prongs of the standard for determining whether administrative rulemaking is required, as set forth in *Metromedia, Inc. v. Director, Division of Taxation*, 97 *N.J.* 313 (1984). First,

Englewood Cliffs argues that the ALJ incorrectly found that the Department's action impacted a narrow and select group, because the action – although only applied in this matter to Englewood and Englewood Cliffs – could apply to any district in the Choice Program or in a sending/receiving relationship. Second, Englewood Cliffs argues that the ALJ incorrectly found that the action was clearly and obviously inferable from the enabling statutory authorization, because the language of the enabling statutes and regulations provides for Choice aid in these circumstances. Third, Englewood Cliffs notes that the ALJ found that the question of whether the action was a material and significant change from a past agency position was "a mixed bag," but argues that this factor should weigh in favor of requiring rulemaking because the Department allowed these students to be classified as Choice students for ten years.

In its reply, the Department argues that whether it made a mistake by providing Choice Aid in the past is not a material fact because the matter to be resolved is only the ongoing status of Englewood Cliffs students who attend the Academies. The Department further contends that Englewood Cliffs used the Choice Program improperly as a matter of law, and that the Department acted appropriately to correct it. As such, the Department contends that this matter was appropriately resolved by summary decision.

The Department argues that Englewood Cliffs students are not Choice students because they are entitled to go to Dwight Morrow, including the Academies, for free based on the sending/receiving agreement between Englewood and Englewood Cliffs. The Department notes that the Academies is "an academic program of Dwight Morrow High School," as indicated on the Academies' own website. Furthermore, the website treats Englewood and Englewood Cliffs students identically in its description and admission procedures, stating that the "Interdistrict Public School Choice Program allows students who live outside Englewood and Englewood Cliffs to apply" to the Academies, and that "Englewood and Englewood Cliffs residents are exempt" from the requirement that applicants must have been enrolled in a public school for at least one year prior to enrollment at

the Academies. In other words, the Department argues, Englewood Cliffs students admitted to the Academies are effectively Englewood resident students attending a program at their resident high school and are not converted to Choice students merely because the program has admissions criteria. The Department further notes that the Supreme Court's decision in *Englewood*, *supra*, does not obligate the Department to fund the Academies, and argues that other legislative appropriations to support integration efforts in Englewood are entirely separate from appropriations for the Choice Program.

Lastly, the Department maintains that it has not violated the Administrative Procedures Act because its correction of Englewood Cliffs' reporting error is a directive expressly provided by or obviously inferable from the enabling statutory authorization. The Department argues that it is obvious from the language and design of the Choice Program that Choice Aid is not available for students who are attending their designated high school. The Department further contends that Englewood Cliffs has not proven a contrary "clear past agency position" and that correcting statutory noncompliance of which the Department was previously unaware does not constitute a material change in position.

Upon a comprehensive review of the record, the Commissioner agrees with the ALJ's findings and determination of this matter. The case presents the purely legal question of whether Englewood Cliffs students attending the Academies are entitled to Choice Aid pursuant to the applicable statutes and regulations; therefore, the ALJ's disposition of this case via summary decision was proper.

The Commissioner is also in accord with the ALJ's determination that Englewood Cliffs students attending the Academies are not Choice students. While *N.J.A.C.* 6A:12-1.2(d) provides that districts participating in a sending/receiving relationship may also participate in the Choice Program, this provision should not be strained beyond its plain meaning: that districts such as Englewood may receive students from Englewood Cliffs through the established sending/receiving

relationship while also enrolling Choice students from other districts, just as Englewood Cliffs students may attend school in Englewood through the sending/receiving relationship or another participating district through the Choice Program. The regulatory permission to participate in both types of relationships does not in any way suggest that the Choice Program relieves a district of its obligation to pay tuition under a sending/receiving agreement simply because the receiving district also accepts Choice students from other districts. Moreover, pursuant to *N.J.S.A.* 18A:36B-20(a) and *N.J.A.C.* 6A:12-1.3, for purposes of the Choice Program, the "sending district" is defined as the district or school that the student "is required by law to attend." Englewood Cliffs students are required by law to attend high school in Englewood, making Englewood the sending district for Englewood Cliffs students for purposes of the Choice Program. It is illogical, and inconsistent with the purpose of the Choice Program, for Englewood to be both the Choice sending district and the Choice receiving district. Just as Englewood cannot report Englewood students attending the Academies as Choice students – because they are resident students attending a program within their resident high school – Englewood Cliffs cannot report students attending the Academies as Choice students, because they are effectively resident students attending a program within their designated high school.[2]

The Commissioner agrees with the ALJ's conclusion that the Supreme Court's decision in *Englewood*, *supra*, does not obligate the State to provide Choice Aid to Englewood Cliffs students attending the Academies. The majority opinion specifically notes that "no issue concerning funding of the proposed academy partnership is before the Court." *Englewood*, *supra*, at 344. As such, the decision cannot be the law of the case for this matter. The concurrence relied on by Englewood Cliffs for the proposition that the State bears primarily responsibility for providing

[2] This conclusion does not, however, mean that Englewood may not apply admissions criteria to Englewood Cliffs students applying to the Academies. It merely means that Englewood Cliffs students are in the same position as Englewood students for purposes of the Choice Program: both are ineligible to receive Choice Aid when attending the Academies.

financing holds limited weight compared to the majority opinion, and is balanced by a second concurrence that objects to any conclusion that the State Board's statements in previous decisions about its "power and responsibility to direct such measures as are necessary to remedy segregation in the schools [are] pronouncements on responsibility for the cost of such remedial actions." *Id.* at 345. Moreover, the fact that the State has provided other types of funding for the Academies does not establish any obligation to provide Choice Aid for Englewood Cliffs students attending the Academies

The Commissioner also agrees with the ALJ that the Department's decision to correct the reporting of Englewood Cliffs students attending the Academies did not require formal rulemaking. *N.J.S.A.* 18A:36B-20(a) and *N.J.A.C.* 6A:12-1.3 very clearly define a sending district, for purposes of the Choice Program, as the district that the student "is required by law to attend." Englewood Cliffs has designated Englewood as the district that Englewood Cliffs students are required to attend for high school and, as such, Englewood is their "sending district" for purposes of the Choice Program. To read the statutes and regulations of the Choice Program to allow Englewood to be both the Choice sending district and the Choice receiving district for Englewood Cliffs students attending the Academies, such that it could receive Choice Aid from the Department for those students, would be an absurd result, and one inconsistent with the goal of the Choice Program: to increase options for students to attend schools other than the ones that they would be entitled to attend for free. Englewood Cliffs' obligation to pay for its students to attend the Academies pursuant to the sending/receiving agreement is thus clearly and directly inferable from the enabling statute and regulations. Furthermore, the New Jersey Supreme Court has held that it is not a material and significant change in administrative policy for an agency to enforce a law that has not previously been enforced. *Airwork Service Division v. Director, Division of Taxation*, 97 *N.J.* 290, 200-01 (1984). While Englewood Cliffs received the benefit

of its reporting error for fourteen years, the Department is not required to continue to allow that error.

Accordingly, the Initial Decision is hereby adopted as the final decision in this matter; summary decision is granted in favor of the Department, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: June 18, 2019
Date of Mailing: June 19, 2019

[3] 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

GRANTING SUMMARY DECISION

OAL DKT. NO. EDU 16167-15

AGENCY DKT. NO. 345-11/14

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY, AND NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Mark Tabakin, Esq., petitioner, (Weiner Lesniak, LLP, attorneys)

Stephen R. Fogarty, Esq., for respondent, Englewood Cliffs Board of Education (Fogarty and Hara, attorneys)

Jennifer L. Cavin, Deputy Attorney General, for respondent, New Jersey State Department of Education (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: September 17, 2019 Decided: April 2, 2019

BEFORE **JEFFREY A. GERSON**, ALJ (Ret., on recall):

BACKGROUND

Englewood School District operates one public high school: Dwight Morrow High School. It educates students from Englewood and since 1965, it has been the designated high school for students from Englewood Cliffs School District, which chooses not to operate its own. Under this send-receive agreement, Englewood Cliffs students are entitled to attend Dwight Morrow and Englewood Cliffs is obligated to pay tuition to Englewood for each Englewood Cliffs student that chooses to attend. In 2002, a magnet school program called Academies@Englewood opened in Dwight Morrow. Students from Englewood, Englewood Cliffs, and any other school district in the State can apply for admission. Interested students must submit an application and sit for an entrance exam and interview.

Through a new initiative called the Interdistrict Public School Choice Program, the State agreed to fund the education of out-of-district students that attended Academies@Englewood. These students are "choice students." To receive state funding, school districts must submit an Application for State School Aid. The district must, among other things, report the number of "choice students" being educated in its district.

From 2002-2013, Englewood Cliffs students (up to twenty-five each year) attended Academies@Englewood. Englewood reported these students as "choice students" and thus the State, not Englewood Cliffs, paid the tuition to Englewood for their education.

In 2013, the New Jersey Department of Education (the Department) reviewed the school funding it had distributed for the 2013-14 school year. It discovered that Englewood had been reporting Englewood Cliffs students attending Academies@Englewood as "choice students." Believing this was an error, the Department instructed Englewood to report them as "received students" because, in its view, they attended Dwight Morrow pursuant to the send-receive agreement with Englewood Cliffs.

The Department withheld $414,225 in aid it was scheduled to release to Englewood for the 2013-14 school year. For the 2014-15 and 2015-16 school years, it did not provide funding to Englewood for the Englewood Cliffs students that attended Academies@Englewood. This litigation followed.

PROCEDURAL HISTORY

On November 25, 2014, Englewood filed a Petition of Appeal with the Commissioner of Education. It asked that the reduction in the school choice aid for the 2013-14 school year be reversed. It also requested an order declaring that Englewood Cliffs students attending Academies@Englewood be designated as "choice students." In the alternative, it asked that Englewood Cliffs be required to pay tuition for its students under the send-receive agreement.

On December 5, 2014, Englewood Cliffs filed an Answer and a Cross-Petition against the Department. In its Cross-Petition, it sought an order declaring that Englewood Cliffs students attending Academies@Englewood be declared as "choice students" and that the State is obligated to fund the cost of their education. In the alternative, it requested an order to prevent Englewood from seeking tuition reimbursement.

On October 5, 2015, the Department filed Answers to the Petition and Cross-Petition. The matter was thereafter transmitted to the Office of Administrative Law as a contested case and assigned to Hon. Michael Antoniewicz.

On October 7, 2015, the Department informed Englewood that it was prepared to release $1,242,675 in choice aid for students it educated from Englewood Cliffs for the 2013-14, 2014-15, 2015-16 school years. It reiterated its position, however, that Englewood is not eligible for school choice aid for Englewood Cliffs students that attend its schools effective July 1, 2016.

On November 30, 2015, Englewood withdrew its Petition of Appeal. Englewood Cliffs continued to pursue its Cross-Petition against the Department. On March 29, 2016, the Department filed a Motion for Summary Decision. That motion was held in abeyance for some time pending the resolution of outstanding discovery matters. On February 14, 2018, Englewood Cliffs filed it opposition. On April 30, 2018, the Department filed its reply brief. This matter was reassigned to the undersigned on September 17, 2018.

LEGAL DISCUSSION

The legal issue presented here is whether Englewood Cliffs students attending Academies@Englewood at Dwight Morrow High School are "choice students" entitled to State aid under the Interdistrict Public School Choice Program.

Before reaching the merits, however, the Department argues two procedural grounds on which to dismiss this case.

First, it argues that Englewood Cliff's Cross-Petition is moot in light of the decision to release school choice aid to Englewood for the 2013-14, 2014-15, and 2015-16 school years. "An issue is 'moot' when the decision sought in a matter, when rendered, can have no practical effect on the existing controversy." Greenfield v. N.J. Dep't of Corrections, 382 N.J. Super. 254, 258-59 (App. Div. 2006). "It is firmly established that controversies which have become moot or academic prior to judicial resolution ordinarily will be dismissed." Cinque v. N.J. Dep't of Corrections, 261 N.J. Super. 242, 243 (App. Div. 1993).

Englewood Cliffs agrees that any request for monetary relief for those school years are indeed moot. Yet there remains the fundamental dispute whether students from Englewood Cliffs attending Academies@Englewood are "choice students." If they are, the State must pay for their education. If not, Englewood Cliffs has that obligation. Because the parties do not agree on the answer, there is a controversy, the resolution of which will determine who must pay for these students to attend

Academies@Englewood going forward. Therefore, as Englewood Cliffs contends this case is not moot.

This leads directly to the Department's second ground for dismissal. It argues that to the extent Englewood Cliffs has a viable claim, it is for declaratory relief and as such, its Cross-Petition is procedurally defective because it was not filed with the Commissioner as a Petition for Declaratory Ruling. See N.J.A.C. 6A:3-2.1.

Englewood Cliffs fights the characterization that it seeks declaratory relief. Yet in the requested relief section of its Cross-Petition, it uses the verb "declaring" no less than three time. In any event, even if the Department is correct that the Cross-Petition is procedurally defective, any defects should be excused. See N.J.A.C. 6A:3-1.16 (providing that the rules "may be relaxed or dispensed with by the Commissioner, in the Commissioner's discretion, where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice.").

This case has been pending since 2015. The dispositive issue is squarely presented in this case; it has been adequately briefed; there are no material issues of fact; and there is no reasonable prospect that either party will change its position if the Cross-Petition is dismissed and restyled as a Petition for Declaratory Ruling.

Interdistrict Public School Choice

The Interdistrict Pubic School Choice Program of 1999 and 2010 transformed public education in the State of New Jersey by expanding children's access to a free public education in schools outside of their designated school districts.

In general, before this school choice program, children were entitled to a free public education in one of two places: either in the schools located in the school district in which they were domiciled; or, if their school district lacked the necessary educational facilities, the out-of-district schools designated through a send-receive agreement. See N.J.S.A. 18A:38-1; N.J.S.A. 18A:38-11.

Parents did have other options for their children's education. Short of moving into a different school district, they could enroll them in a private school or in a public school that accepted non-resident students. Neither option, however, was free. N.J.S.A. 18A:38-3. Parents that could not afford to pay tuition or move, therefore, had little to no choice where their children were educated.

Recognizing the need "to increase options and flexibility for parents and students in selecting a school that best meets the needs of each student," the Legislature empowered the Commissioner of Education to establish the Interdistrict Public School Choice Program – first as a Pilot Program in 1999 and later on a permanent basis in 2010. N.J.A.C. 6A:12-1.1; N.J.S.A. 18A:36B-16.

This school choice program allows students to attend certain public schools outside their designated school district at the State's expense. N.J.A.C. 6A:12-1.2(a). To be eligible for this program, school districts must apply to become a "choice district." N.J.A.C. 6A:12-1.2(b). If approved, choice districts can "enroll students across districts lines in designated schools of the choice district." N.J.S.A. 18A:36B-16. These out-of-district students that are accepted into a choice district are called "choice students" and their education is funded entirely by State aid. N.J.A.C. 6A:12-1.3; N.J.A.C. 6A:12-9.1.

In addition to increasing choice for students and parents, this program promotes the added virtues of "improving efficiency through a voluntary redistribution of students from overcrowded to under-enrolled school districts" and "creating healthy competition among school districts." N.J.A.C. 6A:12-1.1.

Englewood School District was one of the 21 original choice districts; today there are 125 throughout the State. See, N.J. Dep't of Educ., Interdistrict School Choice Program, https://www.state.nj.us/education/choice/ (last visited Mar. 14, 2019). Its status as a choice district allows Englewood to accept students from outside the district to attend Academies@Englewood at Dwight Morrow High School.

Students from Englewood Cliffs have attended Academies@Englewood since the program first started in 2002. The question is whether this program relieve Englewood Cliffs' of its obligation under the send-receive agreement to fund the education of its students attending Dwight Morrow.

Neither the enabling statute, N.J.S.A. 18A:36B-16, or the regulations, N.J.A.C. 6A:12 et seq., answer the question in explicit terms. There is but one mention of send-receive agreements. N.J.A.C. 6A:12-1.2(d) says that "[d]istrict boards of education currently in a sending/receiving relationship are eligible to participate in the choice program unless otherwise legally prohibited." This regulation, however, does nothing more than make Englewood eligible to be a choice district notwithstanding its send-receive agreement with Englewood Cliffs.

When one looks to the purpose of the school choice program, however, it becomes clear that it was not meant to cover the students at issue in this case. This program, as mentioned, was designed to open up school districts by allowing students to be educated in a district they otherwise would not be entitled to attend for free. This goal is in no way advanced if the State pays for Englewood Cliffs students to be educated at Academies@Englewood because Dwight Morrow is their designated high school under a send-receive agreement with Englewood. In other words, even before this program, these students were entitled to attend the school of their choice for free.

Englewood Cliffs argues that although Academies@Englewood is operated within Dwight Morrow, it has a competitive admissions process and therefore its students are not guaranteed admission. That may be true, but it is also true for students from Englewood. No one argues that Englewood students attending Academies@Englewood are "choice students." It would be anomalous to treat these students differently because the send-receive agreement puts Englewood students and Englewood Cliffs students in the same position with respect to public high school education: each is entitled to attend Dwight Morrow.

Indeed, on its website, Academies@Englewood consistently makes this distinction between Englewood and Englewood Cliffs students on the one hand, and students from other districts on the other. See e.g., Academies@Englewood, Admissions, www.academies-englewood.org/Admissions.html, (last visited Mar. 14, 2019) ("The Academies@Englewood serves the children of Englewood and Englewood Cliffs as well as students from over 30 Bergen County districts and districts outside Bergen County."); ("The Interdistrict Public School Choice Program allows students who live outside Englewood and Englewood Cliffs to apply to Academies@Englewood."); ("Englewood and Englewood Cliffs residents are exempt from this requirement."); see also Academies@Englewood, Frequently Asked Questions, www.academies-englewood.org/2023/Frequently_Asked_Questions_2023.pdf, (last visited Mar. 14, 2019) ("Approximately 135 seats will be filled. Approximately half will be from Englewood/Englewood Cliffs; the other half from out-of-Englewood.").

For all these reasons, the Department's determination that Englewood Cliffs students attending Academies@Englewood are not "choice students" and therefore not entitled to State aid is correct.

Englewood Cliffs offers two additional reasons why the State should pay for these students' education. First, it argues that notwithstanding the school choice program, the Department has an independent obligation to fund its students attending Academies@Englewood under the Supreme Court's decision in Bd. of Educ. of

Englewood Cliffs v. Bd. of Educ. of Tenafly, 170 N.J. 323 (2002). Second, it argues that the Department's determination is invalid because it failed to follow the formal rulemaking procedures required by the Administrative Procedure Act, N.J.S.A. 52-14B-1 to -15. Neither argument, is correct.

Segregation Remediation at Dwight Morrow

First, Englewood Cliffs argues that the Supreme Court's decision in Bd. of Educ. of Englewood Cliffs v. Bd. of Educ. of Tenafly, 170 N.J. 323 (2002) (Englewood II) obligates the State to pay for its students to attend Academies@Englewood. Some background information on the long-running legal dispute between Englewood, Englewood Cliffs, and the State Board of Education, is necessary to analyze and ultimately, reject this claim.

In 1965, Englewood and Englewood Cliffs entered into a send-receive relationship under which Englewood Cliffs agreed to pay tuition to Englewood for each of its students that chose to attend Dwight Morrow High School. It did not take long for Englewood Cliffs to regret this decision. School districts, however, cannot unilaterally "sever" a send-receive relationship; it must be approved by the Commissioner of Education. See N.J.S.A. 18A:38-13. In 1977 and 1985, Englewood Cliffs petitioned the Commissioner to sever the relationship. Englewood II, 170 N.J. at 327, 329. It withdrew the first petition and the second petition was denied. Id. at 327-29.

During this period, white families from Englewood and Englewood Cliffs increasingly avoided sending their children to Dwight Morrow. Id. at 330-31. Parents either enrolled their children in private schools or in other districts, most notably Tenafly School District, that accepted non-residents students on a tuition basis. Ibid. Some suspected that parents avoided Dwight Morrow for racial reasons; others thought it was because of the quality of education. Id. at 331. Either way, it caused Dwight Morrow's student population to suffer from severe racial imbalance. Id. at 332-33.

To help remedy this segregation problem, the State Board of Education enjoined Tenafly and all other school districts from admitting students from Englewood and Englewood Cliffs on a tuition basis or otherwise. Id. at 333. This injunction remained in force until 2003. There were also efforts to bring magnet and specialty programs to Dwight Morrow to increase the quality of education and thus make the school more attractive for students and parents. Id. at 335-35.

In Englewood II, the Supreme Court granted a petition for certification to resolve this question: what is "the appropriate allocation of specific responsibilities between the Commissioner of Education and the Englewood School District in relation to the development and implementation of a voluntary plan that is designed to achieve an appropriate racial balance and educational quality at Dwight Morrow High School by means of magnet and specialty schools." Id. at 325.

In answering this question, the Court held that "the Commissioner and State Board retain the ultimate responsibility for developing and directing implementation of a plan to redress the racial imbalance at Dwight Morrow." Id. at 343.

More importantly the court went on to discuss what was then an emerging partnership between Englewood and Bergen County Technical School, in which Bergen Tech would offer some of its academic programs at Dwight Morrow, with the goal "to significantly diminish the racial imbalance". Id. at 338-39. Though not mentioned in the Court's opinion, this partnership produced Academies@Englewood in September 2002. The court did not address the potential funding needs for Academies@Englewood. Indeed, it noted that "no issue concerning funding of the proposed academy partnership is before the Court." Id. at 344. The Court did, however, make some observations. It recognized that the State had already "accepted responsibility to fund initial start-up costs in the amount of $ 385,000." Id. at 344. "The amount of long-term funding required," the Court predicted, "obviously will depend on the specific costs to be incurred, the amount of Federal and other public and private grant money available, and the tuition revenues to be realized." Ibid.

In concluding, the court invoked optimism. It said that the "proposed academy partnership" appeared "both feasible and affordable" and "we are confident that the parties will not permit so promising a resolution of Dwight Morrow's racial imbalance to fail because of disagreement over a fair allocation of funding responsibility." Id. at 344.

Writing for himself, Justice Stein concurred in a brief opinion to address funding obligations for the proposed academy. He wrote that although the issue was not presented in the case, it was his "clear understanding" that the State Board had acknowledged that it "bears primary responsibility for providing or procuring financing for any plan designed to alleviate racial imbalance at Dwight Morrow." Id. at 345 (Stein, J., concurring).

Justice LaVecchia, also in a solo concurrence, registered her disagreement. In her view, previous statements by the State Board that it had the "power and responsibility to direct such measures as are necessary to remedy segregation in the schools" did not amount to "pronouncements on responsibility for the cost of such remedial actions." Id. at 345 (LaVecchia, J., concurring).

In the years since, the State has invested 23.3 million dollars in Academies@Englewood and the Integration Plan in Englewood. Motion for Summary Decision, p. 8. There is simply nothing in the Court's opinion, however, that obligates the State to fund Englewood Cliffs students attending Academies@Englewood.

Administrative Procedure Act

Second, Englewood Cliffs contends that the Department's determination that its students attending Academies@Englewood are not "choice students" amounts to unlawful rulemaking under the Administrative Procedure Act, N.J.S.A. 52-14B-1 to -15.

In Metromedia Inc. v. Dir., Div. of Taxation, 97 N.J. 313 (1984), the Supreme Court distilled from precedent a six-factor test to determine when an agency must comply with the rulemaking procedure of the Administrative Procedure Act. According to

the Court, "an agency determination must be considered an administrative rule when all or most of the relevant features of administrative rules are present and preponderate in favor of the rule-making process." Id. at 331. These features include whether the determination:

> (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a 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 331-32].

"These relevant factors can," the Court explained, "either singly or in combination, determine in a given case whether the essential agency action must be rendered through rule-making or adjudication." Id. at 332. The Court did acknowledge, however, that "in many cases the question of whether the agency determination is a rule

or an adjudication is a close one." Id. at 332. The challenger, here Englewood Cliffs, bears the burden of proving that an agency action falls on the wrong side of that line. In re N.J.A.C. 7:1B-1.1 Et Seq., 431 N.J. Super. 100, 133 (App. Div. 2013) (noting that "agency action is presumed valid and a challenger bears the burden of rebutting that presumption.").

On balance, the Metromedia factors weigh in favor of a finding that the Department did not engage in unlawful rulemaking because its determination that certain students are not eligible for State funding is limited to "a narrow select group," and its interpretation is "clearly and obviously inferable from the enabling statutory authorization" without amounting to "a material and significant change from a clear, past agency position." Id. at 331-32.

To start, Metromedia factor (1) is not implicated in this case. The Department's decision not to fund certain students under the school choice program applies only to "a narrow select group," not "a large segment of the regulated or general public." Id. at 331. Its decision, at this time, is limited to Englewood Cliffs students that attend Academies@Englewood at Dwight Morrow. Historically, there are no more than 25 such students each year.

Presumably, and this speaks to Metromedia factor (2), the Department intends to apply this decision "generally and uniformly to all similarly situated persons." Id. at 331. That is, the Department is likely to maintain its position that the State is not obligated to fund students that attend school in a "choice district" that is also their designated district under a send-receive agreement. On this record, it is not clear how many other students fit that description; though, if the numbers were considerable, the parties would have represented as much.

Metromedia factors (3) and (6) are the most easily satisfied. The Department's decision applies "prospectively" only. Id. at 331. It has not sought, and it has not indicated that it will seek reimbursement from Englewood Cliffs in the amount it paid to have its students educated at Academies@Englewood. In addition, it cannot be

disputed that the Department's determination "reflects a decision on administrative regulatory policy in the nature of the interpretation of law." Id. at 331-32.

In contrast, Metromedia factor (4) is not present here because the Department's "directive" is "clearly and obviously inferable from the enabling statutory authorization." Id. at 331. The school choice program, as previously explained, was enacted to allow students to attend school in a district they otherwise would not be entitled to attend for free because of their domicile. The goal of this program -- to encourage students to attend free of charge the school best suited for their needs regardless of where it is located -- is in no way promoted if the State pays for Englewood Cliffs students to attend a high school they are entitled to attend by virtue of a send-receive agreement. More to the point, there is nothing in the school choice program to suggest that it was meant to displace a sending district's funding obligations under a send-receive agreement.

Finally, Metromedia factor (5) is a mixed bag because, although the Department's position "was not previously expressed in any official and explicit agency determination, adjudication or rule," it also did not represent "a material and significant change from a clear, past agency position." Id. at 331. It is true that the Department unknowingly paid for Englewood Cliffs students to attend Academies@Englewood from 2002-2013, but that does not constitute "a clear, past agency position." Ibid. It was an oversight that the Department is free to correct.

For these reasons, the Department did not need to engage in formal rulemaking under Metromedia to make its determination.

CONCLUSION

The Department's Motion for Summary Decision is **GRANTED** and this matter is **DISMISSED**.

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.

April 2, 2019

DATE

JEFFREY A. GERSON, ALJ/Ret., on recall)

Date Received at Agency: April 2, 2019

Date Mailed to Parties:

sej