

New Jersey Commissioner of Education**Final Decision**

Board of Education of the Borough of Kinnelon,
Morris County,

Petitioner,

v.

Karen D'Amico,

Respondent.

Synopsis

In this matter on remand, the petitioning Board contended that respondent – a member of the Kinnelon Board of Education – violated *N.J.S.A. 18A:12-2*, which mandates that no one may serve on a board of education if they have a direct or indirect interest in a claim against the board on which he/she sits. The Board argued that respondent is disqualified from serving as a member because of a special education due process petition that respondent's husband filed against the Board, asserting that their child was being denied educational services for the 2020-2021 school year and seeking reimbursement for the cost of the child's attendance at a private school. Also at issue is a letter sent by respondent to the Board on August 13, 2021, notifying the Board of her intent to unilaterally place her child in a private school and reserving the right to seek reimbursement for the costs of that placement if the dispute between the parties over the child's services was not resolved amicably within 10 days. The parties filed cross motions for summary decision. Following an Initial Decision in December 2021, the Commissioner found that the status of the dispute between the parties was unclear, and remanded the matter to the OAL for further fact-finding.

On remand, the ALJ found, *inter alia*, that: the parties stipulated to a single fact, that respondent had unilaterally placed her child in a private school, and the parties further agreed to forego any additional briefs or submissions to the OAL on remand of this matter. The ALJ concluded that the 10-day letter did not violate *N.J.S.A. 18A:12-2*; accordingly, the ALJ granted the respondent's motion for summary decision and denied the Board's cross motion.

Upon review, the Commissioner, *inter alia*, disagreed with the ALJ's finding that the 10-day letter cannot be considered a "claim" against the Board, as the letter indicated that respondent would unilaterally place her child in a private school if the dispute over the child's educational placement was not resolved; further, the letter reflected respondent's intent to seek reimbursement for the cost of her child's placement, *i.e.*, a specific request for monetary relief in violation of *N.J.S.A. 18A:12-2*; the record shows that respondent followed through with the unilateral private school placement; therefore, the respondent has a claim for monetary relief against the Board that precludes her continued service as a Board member. Accordingly, the Commissioner granted the Board's motion for summary decision and denied the respondent's cross motion. The respondent was removed from the Board.

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.

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OAL Dkt. No. EDU 04830-21, 10023-21 (on remand)
Agency Dkt. No. 43-3/21

New Jersey Commissioner of Education

Final Decision

Board of Education of the Borough of
Kinnelon, Morris County,

Petitioner,

v.

Karen D'Amico,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by the Board pursuant to *N.J.A.C. 1:1-18.4*, and respondent's reply thereto, have been reviewed and considered.

In this matter, the Board contends that respondent, who is a member of the Board, has a direct or indirect interest in a substantial financial claim against the Board in violation of *N.J.S.A. 18A:12-2* and is therefore disqualified from serving as a Board member. At issue is a letter sent by respondent to the Board on August 13, 2021, in which respondent notified the Board of her intent to unilaterally place her child in a private school while reserving the right to seek reimbursement for the costs of that placement if the dispute between the parties over the child's special education services was not resolved amicably within 10 days (10-day letter). The Commissioner previously found that the status of the dispute between the parties was unclear and remanded the matter to the Office of Administrative Law for further fact-finding. Commissioner Decision No. 307-21 (Dec. 3, 2021). On remand, the parties stipulated to a single fact: that respondent had unilaterally placed

her child in a private school. The ALJ concluded that the 10-day letter did not violate *N.J.S.A. 18A:12-2*. Accordingly, the ALJ granted respondent's motion for summary decision and denied the Board's motion for summary decision.

In its exceptions, the Board argues that the ALJ's authority on remand was limited to fact-finding regarding the status of the dispute, and the ALJ exceeded that authority by making legal findings. Furthermore, the Board contends that the ALJ failed to follow the Commissioner's directive in Commissioner Decision No. 307-21, which clearly stated that if respondent followed through with the unilateral placement, respondent would have a claim for monetary relief that precludes her continued service as a board member. Finally, reiterating arguments made in prior stages of the proceedings, the Board argues that the 10-day letter created a claim resulting in a disqualifying conflict of interest.

In reply, respondent argues that the ALJ appropriately sought facts and applied those facts. Respondent contends that her 10-day letter did not make any specific monetary demands of the Board, nor has she filed a due process petition for reimbursement of her child's private school placement. Therefore, according to respondent, there is no disqualifying conflict.

Upon review, the Commissioner disagrees that the 10-day letter cannot be a "claim" against the Board. The Commissioner has previously held that a Notice of Tort Claim filed against a board of education constitutes a claim. *Bd. of Educ. of the Borough of Berlin, Camden Cty. v. Charlotte Lee*, Commissioner Decision No. 238-02 (June 14, 2002). In that matter, the Commissioner affirmed the Initial Decision, in which the ALJ noted that a "notice of tort claim is not merely an inchoate claim that may be pursued at some future date, but represents an actual claim against a public entity which may be subject to settlement and, failing that, may be the subject of a future court action against the public entity." *Bd. of Educ. of the Borough of Berlin, Camden Cty. v. Charlotte Lee*,

EDU 6050-01 (Apr. 29, 2002). Just as the law requires a Notice of Tort Claim to be filed prior to commencing legal action against a public entity, the law also requires parents seeking reimbursement from a board of education for a unilateral placement to send a 10-day letter. *N.J.A.C. 6A:14-2.10*. Such reimbursement is obtainable through litigation at the OAL. *Ibid.* While the requirements for a Notice of Tort Claim are more specific than those for a 10-day letter, the Commissioner does not find this distinction consequential. In both documents, one party is alerting another to the existence of a claim and fulfilling legal requirements necessary as a precondition to filing a formal action to pursue that claim. A 10-day letter, just like a Notice of Tort claim, is a claim that is subject to settlement and may be the subject of a future court action. *Bd. of Educ. of the Borough of Berlin, supra*.

The Commissioner is mindful of the findings of the New Jersey Supreme Court concerning disputes about special education services for the children of board of education members. In *Bd. of Educ. of City of Sea Isle City v. Kennedy*, 196 N.J. 1 (2008), the Court concluded that a board member should not be removed from office merely because she advanced a claim against the board involving her or her immediate family member's interest. *Id.* at 17-18. The Court recognized that disagreements between parents of special education students and the board of education may require effort to resolve, and multiple meetings or even mediation following the filing of a due process hearing request may not always be the type of conflict that requires removal. *Id.* at 21-22. The Court instructed the Commissioner to examine the nature of the dispute to determine "when a conflict over a child's educational program becomes so substantial that removal from office is required." *Id.* at 22. Finally, the Court concluded that when a due process claim includes a specific request for monetary relief, a substantial conflict has occurred, and removal is appropriate. *Ibid.*

Here, the 10-day letter indicated that respondent would unilaterally place her child in a private school if the matter was not resolved, and the record now reflects that respondent followed through with that placement. The letter also reflected respondent's intent to seek reimbursement for the cost of her child's placement – a specific request for monetary relief.¹ Accordingly, respondent has a claim for monetary relief against the Board that precludes her continued service as a board member.²

Accordingly, the Board's motion for summary decision granted, and respondent's motion for summary decision is denied. Respondent is hereby removed from the Board.

IT IS SO ORDERED.³



ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 1, 2022
Date of Mailing: April 1, 2022

¹ If respondent did not intend to pursue her claim for monetary relief, she could have executed a release of her claim. However, a status update provided by the parties following the Initial Decision demonstrates that respondent did not execute any release.

² The Commissioner disagrees with the ALJ that a disqualification in the absence of a pending due process petition would disqualify any parent of a child with disabilities from being a member of a board of education, as a parent always has the right to file a due process petition. First, case law holding that a Notice of Tort Claim is sufficient to disqualify a board member, as discussed herein, demonstrates that the filing of a formal action – a complaint or a due process petition – is not required for disqualification. Second, disqualifications are examined on a case by case basis, and here, respondent has asserted a specific request for monetary relief – conduct that the Supreme Court has found to be disqualifying.

³ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A. 18A:6-9.1*. Under *N.J.Ct.R. 2:4-1(b)*, a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 10023-21

AGENCY DKT. NO. 43-3/21

ON REMAND

OAL DKT. NO. EDU 04830-21

**BOARD OF EDUCATION OF THE BOROUGH
OF KINNELON, MORRIS COUNTY,**

Petitioner,

v.

KAREN D'AMICO,

Respondent.

Jarrid H. Kantor, Esq., for petitioner (Antonelli Kantor, attorneys)

Hillary D. Freeman, Esq., for respondent (Freeman Law Offices, attorneys)

Record Closed: February 8, 2022

Decided: February 18, 2022

BEFORE **KELLY J. KIRK, ALJ:**

STATEMENT OF THE CASE

Petitioner, Kinnelon Board of Education (Board or KBOE) requests, *inter alia*, that the Commissioner of Education construe the provisions of N.J.S.A. 18A:12-2 and determine and declare that Board Member Karen D’Amico has “a direct or indirect interest in a substantial financial claim” against the Board and is disqualified from serving as a member of the Board as a result of said financial claims, pursuant to N.J.S.A. 18A:12-2.

PROCEDURAL HISTORY

On or about April 13, 2021, the Board filed with the New Jersey Department of Education an amended Verified Petition for a Declaratory Ruling Pursuant to N.J.A.C. 6A:3-2.1 (Verified Petition).¹ On or about May 4, 2021, respondent filed an answer to the Verified Petition, which includes an affirmative defense that the Verified Petition “fails to state a claim upon which relief may be granted against Respondent.”

By letter dated June 1, 2021, the Acting Commissioner of Education notified the parties as follows:

I have reviewed the petition for declaratory ruling in the above-captioned matter, together with the respondent’s answer. Upon such review I have determined to exercise my discretion to decline the request pursuant to *N.J.S.A. 52:14B-8* and *N.J.A.C. 6A:3-2.1(a)1*, and instead direct that the matter shall proceed as a petition of appeal pursuant to *N.J.A.C. 6A:3-1.1 et seq.*

Accordingly, petitioner’s request for a declaratory ruling is declined and this matter shall be transmitted to the Office of Administrative Law.

The Department of Education (Department) transmitted the case to the Office of Administrative Law (OAL) where it was filed on June 11, 2021. The transmittal noted that

¹ Per Mr. Kantor’s April 12, 2021, letter to the Department of Education, it was amended to incorporate additional redactions and to remove the Board’s request for attorneys’ fees.

“Petitioner filed motion for summary decision following filing of answer (hard copy to follow due to size),” but the hard copy of the motion was not transmitted. On June 30, 2021, petitioner submitted a copy of the motion directly to the OAL, consisting of a statement of material facts and brief. On July 29, 2021, respondent filed a response/cross-motion for summary decision, consisting of a brief. Petitioner filed a reply letter brief on August 20, 2021. On August 25, 2021, petitioner supplemented its filing with a letter and attachment. On August 26, 2021, respondent replied thereto by way of an email.

An Initial Decision–Summary Decision denying petitioner’s cross-motion for summary decision, granting respondent’s cross-motion for summary decision, and dismissing the petition was issued on October 19, 2021. The Commissioner’s Final Decision, dated December 2, 2021, remanded the matter to the OAL “for further fact-finding regarding the current state of the dispute between the parties identified in the August 13, 2021 10-day letter sent by respondent to the Board.”

On February 8, 2022, the parties submitted a joint stipulation of facts, dated February 7, 2022, and waived submission of briefs.

JOINT STIPULATION OF FACTS

The parties’ joint stipulation of facts states as follows:

That, in connection with Respondent’s “10-Day” Letter to the Kinnelon Board of Education dated August 13, 2021, as referenced the Commissioner’s Final Decision dated December 2, 2021, that respondent Karen D’Amico has unilaterally placed S.D. in a private school.

The Parties further stipulate and agree to forego of any further briefs and/or submissions with the Office of Administrative Law on remand of this matter.

[J-1.]

LEGAL ANALYSIS AND CONCLUSION

This matter was transmitted to the OAL by the Department of Education Office of Controversies and Disputes, not the School Ethics Commission, and the statute at issue is N.J.S.A. 18A:12-2, which states:

No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board, nor, in the case of local and regional school districts, shall he hold office as mayor or as a member of the governing body of a municipality, nor, in the case of county special services school districts and county vocational school districts, shall he hold office as a member of the governing body of a county.

Thus, the pivotal issue is whether D'Amico, indisputably a Board member, was in violation of N.J.S.A. 18A:12-2 by being interested directly or indirectly in any claim against the Board².

The Commissioner's Final Decision, dated December 2, 2021, remanded the matter to the OAL "for further fact-finding regarding the current state of the dispute between the parties identified in the August 13, 2021 10-day letter³ sent by respondent to the Board." In this regard, the Final Decision stated, in pertinent part:

The Commissioner is unable to conclude, based on the current record, whether there is currently a substantial conflict between the parties. The 10-day letter indicates that respondent will unilaterally place her child in a private school if the matter is not resolved, but there is no further information regarding whether a resolution occurred. If a resolution did occur, then the dispute may not be substantial enough to warrant respondent's removal from the board. If a resolution did not occur, and respondent followed through with the unilateral placement, respondent has a claim for monetary relief against the Board that precludes her continued service as a board member.

² Per Respondent's attorney, D'Amico has been removed from the Board.

³ The Verified Petition was filed in April 2021, months before the 10-day letter was sent.

However, even though D'Amico unilaterally placed her child in a private school and despite the fact that the Final Decision states that the "Commissioner has previously held that a Notice of Tort Claim filed against a board of education constitutes a claim," for the reasons that follow, my decision on the merits remains unchanged.

It is the public policy of the State of New Jersey that public entities are only liable for their negligence within the limitations of N.J.S.A. 59:1-1 et seq., the "New Jersey Tort Claims Act." Regarding the time for presentation of a claim against a public entity, N.J.S.A. 59:8-8 (emphasis added) states, in pertinent part:

A *claim* relating to a cause of action for death or for injury or damage to person or to property shall be presented as provided in this chapter not later than the 90th day after accrual of the cause of action. After the expiration of six months from the date *notice of claim* is received, the claimant may file suit in an appropriate court of law. The claimant shall be forever barred from recovering against a public entity or public employee if:

- a. The claimant failed to file the *claim* with the public entity within 90 days of accrual of the *claim* except as otherwise provided in N.J.S.A. 59:8-9; or
- b. Two years have elapsed since the accrual of the *claim*; or
- c. The claimant or the claimant's authorized representative entered into a settlement agreement with respect to the *claim*.

A claim against a public entity must be presented by the claimant or by a person acting on his behalf and must include: (a) the name and post office address of the claimant; (b) the post-office address to which the person presenting the claim desires notices to be sent; (c) the date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted; (d) a general description of the injury, damage or loss incurred so far as it may be known at the time of presentation of the claim; (e) the name or names of the public entity, employee or employees causing the injury, damage or loss, if known; and (f) the amount claimed as of the date of presentation of the claim, including the estimated amount of any prospective injury, damage, or loss, insofar

as it may be known at the time of the presentation of the claim, together with the basis of computation of the amount claimed. N.J.S.A. 59:8-4.

Thus, a notice of tort claim against a public entity is not the equivalent of a 10-day letter. Pursuant to 20 U.S.C. § 1412(a)(10)(C)(i), and subject to 20 U.S.C. § 1412(a)(10)(A), a board of education is not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school if the board of education made free, appropriate public education (FAPE) available to the child and the parents elected to place the child in such private school. See also N.J.A.C. 6A:14-2.10(a). However, if the parents enrolled the child in a private school without the consent of or referral by the board of education, an administrative law judge may require the agency to reimburse the parents for the cost of that enrollment if the administrative law judge finds that the board of education has not made FAPE available to the child in a timely manner prior to that enrollment. 20 U.S.C. § 1412(a)(10)(C)(ii); see also N.J.A.C. 6A:14-2.10(b). The parents must provide notice to the board of education of their concerns and intent to enroll their child in a nonpublic school at public expense. N.J.A.C. 6A:2.10(c). Reimbursement may be reduced or denied for the reasons set forth at N.J.A.C. 6A:2.10(d), which include “If, at least 10 business days (including any holidays that occur on a business day) prior to the removal of the student from the public school, the parents did not give written notice to the district board of education of their concerns or intent to enroll their child in a nonpublic school.” N.J.A.C. 6A:2.10(d).

Unlike a 10-day letter, which is a notice of concerns or intent to enroll in a private school to avoid reduction or denial of reimbursement for the private school in the event a due process petition alleging a denial of a FAPE is ever filed, a notice of tort claim is a “claim” against a public entity, the entirety of which—including the specifics of the transaction which gave rise to the claim, a general description of the injury, damage or loss incurred and a computation of the amount claimed—must be filed within ninety days, or the claimant is barred from filing suit in an appropriate court of law.

All children with disabilities have the right to a FAPE and parents of a child with disabilities may file a claim against the board of education if the child was denied a FAPE. Further, if the child was denied a FAPE there are various other bases for financial claims for which no 10-day letter is required. Thus, to disqualify a parent of a student with disabilities from the board of education based upon N.J.S.A. 18A:12-2 only⁴, in the absence of a pending due process petition alleging a denial of FAPE and claim for reimbursement, would essentially disqualify any parent of a child with disabilities from being a board of education member, as the parent always has the right to file a due process petition.

For the reasons set forth hereinabove and in the Initial Decision, dated October 19, 2021, incorporated herein by reference, I **CONCLUDE** that the 10-day letter is not a violation of N.J.S.A. 18A:12-2, and further **CONCLUDE** that petitioner's motion should be denied, respondent's cross-motion should be granted, and the Verified Petition should be dismissed.

ORDER

It is hereby **ORDERED** that the petitioner's motion for summary decision is **DENIED**, the respondent's cross-motion for summary decision is **GRANTED**, and the Verified Petition 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

⁴ Although petitioner argued "a disqualifying conflict of interest under the School Ethics Act ("SEA"), N.J.S.A. 18A:12-2," this statute does not fall under the School Ethics Act, N.J.S.A. 18A:12-21 to -34, and the matter was transmitted to the OAL by the Department of Education Office of Controversies and Disputes, not the School Ethics Commission. Accordingly, this decision is limited to violation of N.J.S.A. 18A:12-2 and no determination is made as to conflict of interest or ethics.

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.



February 18, 2022

DATE

KELLY J. KIRK, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

db

APPENDIX

Exhibits in Evidence

J-1 Joint Stipulation of Facts