

**New Jersey Commissioner of Education**  
**Final Decision**

R.H., on behalf of minor child,

Petitioner,

v.

Board of Education of the Town of  
Hackettstown, Warren County,

Respondent.

**Synopsis**

Petitioner challenged the determination of the respondent Board that his minor child is not entitled to bus transportation because their home it is located less than two miles from the school his child attends. Following a Board hearing on April 21, 2021, the Board issued a final determination – via email dated April 22, 2021 – that petitioner’s home was not “remote” pursuant to *N.J.A.C. 6A:27-1.3(a)(1)(i)*. Despite multiple notifications that petitioner could appeal the final determination to the Commissioner of Education, the within appeal was not filed until October 25, 2021. The Board filed a motion to dismiss in lieu of an answer, contending that petitioner’s appeal was untimely.

The ALJ found, *inter alia*, that: pursuant to *N.J.A.C. 6A:3-1.3(i)*, petitioners must file a petition no later than the 90<sup>th</sup> day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual Party, or agency, which is the subject of the requested contested case hearing; here, the petitioner received notice of the Board’s final decision to deny his request for busing on April 22, 2021, but failed to perfect his appeal until October 25, 2021 – well beyond the 90 day limitations period set forth in *N.J.A.C. 6A:3-1.3*. Accordingly, the ALJ granted the Board’s motion to dismiss the petition.

Upon a comprehensive review, the Commissioner concurred with the ALJ that this matter is time-barred by the 90-day limitations period set forth in *N.J.A.C. 6A:3-1.3(i)*. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter and the petition was dismissed as untimely.

<p>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.</p>
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102-22

OAL Dkt. No. EDU 09183-21

Agency Dkt. No. 202-10/21

**New Jersey Commissioner of Education**

**Final Decision**

R.H., on behalf of minor child,

Petitioner,

v.

Board of Education of the Town of  
Hackettstown, Warren County,

Respondent.

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

In this matter, petitioner challenges the Board’s determination that his second-grade child is not entitled to bus transportation from their home to the Willow Grove Elementary School because they live under two miles from the school. Pursuant to *N.J.A.C. 6A:27-1.3(a)*, districts must provide transportation to students who live remote from school, which means beyond two miles for students in grades preschool through eight and two and one-half miles for high school students. Such distance is measured using the shortest route along public roadways between the entrance to the student’s home and the closest public entrance to the school. *N.J.A.C. 6A:27-1.3(a)(1)(ii)*.

Petitioner contends that his home is between 1.95 – 2.00 miles from the school, which would round up to two miles, and requires that his child receive transportation. The Board argues that the same route is 1.93 miles, resulting in its determination that the child is ineligible for busing. Petitioner raised this issue with the Board on or about April 10, 2021 and the matter was addressed at a Board hearing on April 21, 2021. The following day, April 22, 2021, the Board informed petitioner via email that it had not overturned its determination that his home was not eligible for transportation services. Nevertheless, the Board indicated that petitioner would be permitted to submit his measurements along the route in question so that the Transportation Specialist could confirm the determination. The Board further explained that if petitioner did not provide the supplemental information, it would consider the April 22, 2021 email to be the Board's final decision on the matter and that petitioner could appeal to the Commissioner of Education through the Office of Controversies and Disputes (Controversies and Disputes). Thereafter, petitioner sent follow-up communications, and the Board informed petitioner on April 27, 2021 that, upon review, it had confirmed that his home is ineligible for transportation and that the April 22, 2021 email constituted the final decision on the matter. Again, the Board informed petitioner that he could file an appeal with the Controversies and Disputes and provided a link to its website.

Thereafter, petitioner continued to send correspondence to various school officials, as well as the Executive County Superintendent, who informed him numerous times that the next step would be to file an appeal with the Commissioner. Petitioner maintained that he was waiting for information regarding the Board's distance calculations in order to appeal to the Commissioner, but on May 4, 2021, the Board Secretary recommended that he forward all of

his emails, information and attachments to Controversies and Disputes, and that if additional information was required for his appeal, he would be informed of such.

On May 14 and 18, 2021, an attorney representing petitioner sent correspondence to multiple parties seeking clarity on the busing dispute, and also acknowledged that she may need to appeal this to the Commissioner. Thereafter, on May 19, 2021, the Board's attorney sent petitioner's counsel a letter, informing her of the many communications that had already occurred on this matter; that petitioner's dispute had been heard and rejected by the Board; and that petitioner could appeal to the Commissioner.

Petitioner did not file an appeal, and on July 31, 2021, petitioner sent an email to multiple school officials indicating that he had obtained a professional survey, the results of which he attached to the email. The information was reviewed at the Board's August 11, 2021 committee meeting, and on August 13, 2021, the Board Secretary informed petitioner that he had previously been informed of his right to file an appeal, but that given the amount of time that had elapsed, the Board would submit the matter to the Department of Education for a decision. Thereafter, the Board sent a letter to the Office of School Finance summarizing the dispute and indicating that petitioner had not filed an appeal with the Commissioner. Ultimately, petitioner filed his appeal with the Commissioner on October 25, 2021.

The Administrative Law Judge (ALJ) found that the appeal was filed outside of the 90-day limitations period set forth in *N.J.A.C. 6A:3-1.3*. The ALJ found that petitioner had received notice of the Board's final decision to deny his request for busing on April 22, 2021 and failed to demonstrate that the rule should be relaxed. As such, the ALJ granted the Board's motion to dismiss the petition.

In his exceptions, petitioner argues that the Board never gave him the information he requested so that he could file a petition. Petitioner also argues that the Board indicated that it would be submitting the matter to the Commissioner on his behalf after he provided his certified land survey, but the Board's statement was misleading because it sent the information to the Office of School Finance instead. Petitioner maintains that he did not realize until a month later that the matter had not been filed with Controversies and Disputes. As such, petitioner requests that the Initial Decision be rejected.

In reply, the Board maintains that petitioner had all the information he needed to file an appeal, specifically the April 22, 2021 final determination. The Board contends that petitioner failed to file an appeal despite consistent advisement that he should do so. Additionally, the Board argues that petitioner's attempt to continue communications after the final decision did not invalidate that decision, and there is no support for recalculating the 90-day deadline based on the Board's communication to the Office of School Finance. The Board maintains that the ALJ appropriately weighed the timeline of communications and determined that the matter was out of time. As such, the Board urges the Commissioner to adopt the Initial Decision.

Upon review, the Commissioner agrees with the ALJ that this matter is time barred by the 90-day limitations period set forth in *N.J.A.C. 6A:3-1.3(i)*. At the latest, petitioner was informed on April 27, 2021 of the Board's final decision. The Board's April 22, 2021 communication provided a caveat that petitioner could submit additional information, but that otherwise it would be the final decision. After petitioner submitted additional correspondence, the Board informed him on April 27, 2021 that it had reviewed his additional submissions and confirmed that his home is ineligible for transportation. As such, the Board indicated that the

April 22, 2021 email constituted the final decision on the matter and that he could file an appeal of the determination with the Commissioner. There is no question that as of April 27, 2021, petitioner had been informed of a final decision of the Board, as well as his appeal rights, but he did not file an appeal until October 25, 2021 – almost six months later. While petitioner attempted to engage the Board in further communications, he was informed numerous times that his next recourse would be to file an appeal with the Commissioner. When petitioner maintained that he needed certain information to file an appeal, he was advised to submit all of his current documents and communications to Controversies and Disputes and he would be informed if anything else was needed. Furthermore, it appears that petitioner obtained the services of an attorney, who sent correspondence on his behalf and acknowledged that petitioner may need to file an appeal. In response, the Board attorney reiterated that the Board had already heard and rejected petitioner’s argument, and that the attorney could file an appeal. As such, it is clear that petitioner had been informed many times of his appeal rights, had obtained an attorney who was also aware of his appeal rights, but yet chose not to timely file the appeal.

The Commissioner does not find petitioner’s exceptions to be persuasive. *N.J.A.C. 6A:3-1.3* and *N.J.A.C. 6A:3-1.4* do not require that petitioner obtain records from the Board prior to filing a petition. Even if petitioner was not aware of what is required to initiate an appeal, he obtained an attorney who should have advised him, and he was also informed by the Board Secretary on May 4, 2021 that he should file an appeal with the communications and documents in his possession. Additionally, the Commissioner is not convinced by petitioner’s argument that he was misled because the Board Secretary indicated he would submit the

matter to the Commissioner through Controversies and Disputes for a decision after petitioner provided a certified land survey, but instead sent it to the Office of School Finance. The Commissioner notes that 90 days from April 27, 2021 is July 26, 2021. Petitioner did not submit his land survey to the Board until July 31, 2021, after the filing deadline had already passed. As such, any purportedly misleading statement by the Board Secretary did not cause petitioner to miss the opportunity to file a timely appeal because he had already sat on his rights.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed as out of time.

IT IS SO ORDERED.<sup>1</sup>

  
ANGELINA ALLEN McMILLAN, J.D.  
ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 19, 2022  
Date of Mailing: May 19, 2022

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<sup>1</sup> 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**

**DISMISSAL**

OAL DKT. NO. EDU 09183-2021

AGENCY DKT. NO. 202-10/21

**R.H., on behalf of minor child**

Petitioner,

v.

**Board of Education of the Town of**

**Hackettstown, Warren County,**

Respondent.

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**R.H.**, pro se, petitioner

**Raina M. Pitts**, Esq. for respondent (Methfessel & Werbel, attorneys)

Record Closed: January 24, 2022

Decided: February 17, 2022

BEFORE: **MATTHEW G. MILLER**, ALJ

**STATEMENT OF THE CASE**

Petitioner, R.H., the parent of minor child M.C.<sup>1</sup>, has challenged the determination made by the respondent, Board of Education of the Town of Hackettstown, Warren County (Respondent

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<sup>1</sup> Minor Child. There is no dispute that the child in question is currently attending the 2<sup>nd</sup> grade at Willow Grove Elementary School in Hackettstown, N.J.



or Board), that M.C. is not entitled to bus transportation from their home at Address "A"<sup>2</sup> to the Willow Grove Elementary School, located at 601 Willow Grove Street, per N.J.S.A. 18A:39-1 et seq.<sup>3</sup>

### **PROCEDURAL HISTORY**

On April 10, 2021<sup>4</sup>, Petitioner contacted Respondent about bus transportation for his child, M.C., from her home to the Willow Grove Elementary School. On April 13, Respondent notified Petitioner that M.C. was ineligible for bus transportation, since it had been determined that their residence was at least 2 miles from the school. The day after an April 21 Board of Education meeting, Petitioner was advised that no action to overturn the initial decision. On August 17, Respondent wrote to the Department of Education's Office of School Finance, asking it "to consider the matter". On September 29, Petitioner forwarded an e-mail to the Department of Education's Office of Controversies and Disputes and on October 25, Petitioner filed a Petition for Appeal and Motion for Emergent Relief with the Department of Education and the Department transmitted this matter to the Office of Administrative Law (OAL) on November 1, 2021, for a hearing as a contested case. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On November 9, 2021, Respondent filed a Cross Motion to Dismiss in Lieu of Answer and hearing on the Motion for Emergent Relief was scheduled for November 10, 2021. An initial conference was held on November 10, 2021 at which time it was stipulated by Petitioner that this matter was not emergent in nature.

Additional conferences were thereafter held on November 24, 2021, December 8, 2021 and January 18, 2022 and oral argument on the motion was conducted on January 21, 2022. Following oral argument, the record was held open briefly for the supplying of additional documentation and it was ultimately closed on January 24, 2022.

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<sup>2</sup> Redacted. There is no dispute as to Petitioner's address.

<sup>3</sup> All addresses are located in Hackettstown.

<sup>4</sup> Unless specified, all dates are 2021

**Factual Background**

The basic facts and nature of the case are not in dispute. Petitioner and M.C. (along with Petitioner's wife and another minor child) live at Address "A" in Hackettstown, which is located 2 miles, give or take, from Willow Grove Elementary School, where M.C. attends classes. It is that "give or take" which is at the core of the dispute.

The parties agree that per N.J.S.A. 18A:39-1 et seq. and N.J.A.C. 6A:27-1.3 et seq. Respondent is required to provide transportation to M.C. from her home to Willow Grove if she is determined to "reside remote from (her) school of attendance". N.J.A.C. 6A:27-1.3(a). For the purposes of eligibility for transportation;

- i. "Remote" shall mean beyond two and one-half miles for high school students (grades nine through 12) and beyond two miles for elementary school students (preschool through grade eight).

N.J.A.C. 6A:27-1.3(a)(1)(i).

The parties further agree on how that distance should be measured;

- ii. Distance shall be measured using the shortest route along public roadways or public walkways between the entrance of the student's residence nearest the public roadway or public walkway and the nearest public entrance of the school the student attends.

N.J.A.C. 6A:27-1.3(a)(1)(i).

Finally, the parties also agree that the measurement should be rounded to the nearest 1/10 of a mile per the Manual for Completion of 2021-2022 District Report of Transported Resident Students (DRTRS), published by the New Jersey Department of Education, Office of School Finance, Student Transportation Unit;

**4. One-Way Home to School Miles**

Enter the shortest one-way distance between the student's home and the school.

Mileage must be between 0.1 and 99.9 miles (round to the nearest tenth of a mile).

NOTE: The home to school mileage reported for each student shall be measured by the shortest route along public roadways or walkways between the entrance of the student's home nearest such public roadway or walkway and the nearest public entrance of the school which the student attends (NJAC 6A:27-1.2).

**(Exhibit R-DRTRS 27)**

The dispute arises over how that distance was measured. Petitioner argues that he has produced sufficient evidence, including a report from a licensed surveyor, demonstrating that the family home, using the “door-to-door” prescribed distance, is somewhere between 1.95 – 2.00 miles from the entrance to the school.

Respondent's position is that the vendor it utilized to determine transportation status for its students uses Google Distance Matrix API, Google Geocoding and Directions APIs to calculate mileage and that it has measured the same route at 1.93 miles, which giving the rounding directive noted above, would make M.C. ineligible for busing. **(Exhibit R-HBOE 13)**.

For all practical purposes the dispute ranges, depending on the measurement, from 105.6 feet to 369.6 feet.<sup>5</sup>

**MOTION**

The subject matter of the motion before the court, while obviously intertwined with the factual dispute between the parties, is, in reality, independent of it. Respondent argues simply that Petitioner failed to comply with the ninety-day time limit encoded in N.J.A.C. 6A:3-1.3(i) to appeal its denial of his request for busing.

If Respondent prevails on this motion, it is argued that the merits of the case are never reached and that the appeal must be dismissed.

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<sup>5</sup> 105.6 feet is the difference between 1.93 and 1.95 miles, while 369.6 feet is the difference between 1.93 and 2.00 miles.

Petitioner opposes the motion for reasons that will be set forth below and argues that its appeal was timely served.

I emphasize that the decision on this motion should in no way be interpreted as a reflection that any conclusions have been reached concerning the underlying merit of Petitioner's claims.

## **LEGAL ARGUMENT**

### **Petitioner**

Petitioner argues, in essence, that the actions of Respondent were never "final" and that they were misled into sleeping on his rights. Even then, he argues that an appeal was timely filed.

More specifically, he argues that a May 19, 2021 letter from Respondent's attorney may potentially be considered a final order. It was also argued that besides that letter, Respondent acted with "question(able) motives", since they were not "told there was an actual ticking clock against us", pointing in particular to the August 17, 2021 letter from the BOE Business Administrator to the Director of School Finance when combined with and August 13, 2021 e-mail advising that the BOE would "take...action on your behalf."

It was further argued that the "90 day timeline" should be reset by the " 'action' of bringing a new measurement" and that there were "constant 'actions' taking place".

During oral argument, R.H. emphasized that he felt misled and confused by Respondent's continued engagement after the April 21, 2021 Board meeting and that he was never made aware of any deadline to appeal, only the avenue to do so.

### **Respondent**

Respondent argues that Petitioner failed to comply with the with the ninety-day time limit encoded in N.J.A.C. 6A:3-1.3(i) to appeal its denial of his request for busing.

More specifically, it was argued that it is clear the final order was communicated to Petitioner on April 22, 2021 (as a result of the April 21, 2021 school board meeting) and that R.H. had ninety-days from then to file the appeal. It was also argued that Petitioner acknowledged that order/ruling/action on multiple occasions and failed to take any timely action.

Respondent also argued that despite continued interactions with Petitioner, including an August 17 letter to the Director of New Jersey Department of Education's Office of School Finance in which it requested that his office consider the dispute, the ninety-day deadline should be enforced and the appeal dismissed.

### **Key Participants**

Given the multitude of communications in this case, at the onset it would be helpful to identify the key participants. Many of the e-mails were forwarded or copied to other parties, but the below is a roster of the persons who were by far the most involved in the process.

RH – Petitioner

BOE – Hackettstown Board of Education

HPS – Hackettstown Public Schools

Mango – David C. Mango, Superintendent, HPS

Havlusch – Timothy Havlusch, Business Administrator/Board Secretary, HPS

Peck – Mark R. Peck, Esq. of Steinhardt Cappelli Tipton & Taylor, L.L.C., attorney for the “Town of Hackettstown”

Lamonte – Rosalie S. Lamonte, Ph.D., Interim Executive Warren County Superintendent

Herbst – Mike Herbst, President, Hackettstown BOE

Stewart – Raechel Stewart, Esq., attorney for RH

Toscano – Mark G. Toscano, Esq. of Comegno Law Group, P.C., attorney for the Hackettstown BOE

OCD - Department of Education's Office of Controversies and Disputes

Commissioner – Commissioner of the Department of Education

Logic 54 – Respondent’s busing vendor

Charles J. Kelly – Logic 54 representative

**Timeline**

Perhaps the best way to understand the issues raised by this motion is to create a detailed timeline from the onset of the dispute on April 10, 2021 through the time of the filing of appeal with OCD.

Please note that this timeline does not include each and every e-mail involving the parties, but only the ones relevant to the ninety-day appellate argument proffered by Respondent. Further, some of the times on the e-mails may not be 100% accurate, since some were forwarded and/or were parts of e-mail chains, which make it difficult to determine at exactly what time they were sent. The dates and order of receipt are, however, accurate.

Please note that only the portions of the e-mails reproduced/summarized below are those which concern the notice/appellate deadline issue.

**April**

04/10/21 – First e-mail sent by RH about transportation. **(Exhibit P-1)**

*04/13/21 (4:04 p.m.) – e-mail from Mango to RH - “At this time, both Mr. Havlusch and my office have provided adequate responses by way of email to your inquiry. As stated, there exists, no eligibility for transportation at your home address and location.” (Exhibit R-HBOE 1-2)*

04/15/21 (11:35 a.m.) – e-mail from Havlusch to RH – “After another review of the facts...13 Arthur Terrace is ineligible for transportation...” It was recommended that RH appear at the next scheduled BOE meeting on April 21. **(Exhibit R-HBOE 6)**

04/21/21 – BOE meeting involving RH.

*04/22/21 (11:02 a.m.) – e-mail from Havlusch to RH saying the “the Board took no action to overturn the determination that your home is not eligible to receive transportation services, the Board was willing to have its Transportation Specialist review this issue one more time in order to verify that its calculations were accurate and to take into account the information you shared with us last night.” (Exhibit R-HBOE 32)*

*04/27/21 (3:56 p.m.) – e-mail from Havlusch to RH saying that “the 4/22/21 email constitutes the Board’s final decision on this matter, which you can appeal to the Commissioner of Education*

*through the Department of Education's Office of Controversies and Disputes, which can be found here <https://www.nj.gov/education/cd/>.” (Exhibit R-HBOE 39)*

04/27/21 (5:54 p.m.) – e-mail from Mango to RH – “So, in your right to due process, I encourage you to contact the Commissioner of Education's Office of Controversies and Disputes.” (Exhibit R-HBOE 40)

04/27/21 (6:14 p.m.) – e-mail from RH to Mango – “For me to properly address the Commissioner of Controversies and Disputes, which I will assuredly do...” (Exhibit R-HBOE 42)

04/27/21(8:44 p.m.) – e-mail from Mango to RH – “I am encouraging you to appeal to the Commissioner, as did Mr. Havlusch.” (Exhibit R-HBOE 45)

04/28/21 (3:14 p.m.) – e-mail from Lamonte to RH – “your next step, should you choose to take it, is to file a petition with the NJ Department of Education's Office of Controversies & Disputes. There is information about this process at this link: <https://www.nj.gov/education/cd/> (Exhibit R-HBOE 67)

04/28/21 (3:43 p.m.) – e-mail from RH to Lamonte – “I am no lawyer by any means but I did find this to be the route I must go first.” (Exhibit R-HBOE 77)

04/28/21 (4:03 pm.) – e-mail from Lamonte to RH – “an appeal to Controversies & Disputes would be your next step.” (Exhibit R-HBOE 76a)

04/28/21 (4:17 p.m.) – e-mail from RH to Havlusch – “I fully intend in going to the Commissioner and county...” (Exhibit R-HBOE 137)

04/28/21 (7:01 p.m.) – e-mail from Lamonte to RH – “The correct next step is through Controversies and Disputes.” (Exhibit R-HBOE 76b)

04/30/21 (8:56 a.m.) – e-mail from RH to Havlusch – “I can not approach a Commissioner with information that doesn't specifically provide what is said to be true.” (Exhibit R-HBOE 140)

04/30/21 (4:26 p.m.) – e-mail from RH to Havlusch – “How am I to go about speaking with the Commissioner and debate my situation where there is no proof against our mileage?” (Exhibit R-HBOE 136)

04/30/21 (8:07 p.m.) – e-mail from Herbst to RH. “The District has rendered a decision and that decision is supported by the Board. You have also been provided an avenue to lodge a protest if you wish.” (Exhibit R-HBOE 134)

## **May**

05/03/21 (4:28 p.m.) – e-mail from RH to Havlusch – “Still currently awaiting the information asked for to approach the Commissioner.” (Exhibit R-HBOE 143-144)

05/04/21 (9:44 a.m.) – e-mail from Havlusch to RH – My recommendation at this time is to forward all of the prior e-mails, information and attachments that you have been sent to date on this matter to the Department of Education’s Office of Controversies & Disputes, which can be found here <https://www.nj.gov/education/cd/>...I would suggest that the sooner this information is provided to them, the sooner an opinion can be determined by the Office of Controversies and Disputes... **(Exhibit R-HBOE 143)**

05/04/21 (12:08 p.m.) – e-mail from Havlusch to RH – “All on this e-mail have implored you to continue your path of due process. In a prior e-mail, the Board President informed you that the district had exhausted all options based on evidence and that the Board rendered a final decision. So please, I ask that you move forward to the offices in Trenton if you believe strongly enough to do so. **(Exhibit R-HBOE 147-148)**

05/05/21 – LF<sup>6</sup> Peck to RH advising that the “town is not responsible for the transportation of your child”. **(Exhibit R-OPP 1)**

*05/14/21 – LF Stewart to Logic 54 seeking information and noting that; “We may need to appeal this to NJ Disputes and Controversies but we would like to resolve this issue at the local level if possible.” **(Exhibit R-HBOE 154)***

05/18/21 (12:32 p.m.) – e-mail from Stewart to multiple parties (but not OCD) – requesting clarity about the situation. **(Exhibit R-HBOE 153)**

05/19/21 – LF Toscano to multiple, including Stewart – “your client’s position and appeal has been heard and rejected by the Board. As advised by both the Board and the Warren County Office of Education, your client has the ability and can appeal that determination to the New Jersey Commissioner of Education, through the Department of Education’s Office of Controversies and Disputes.” **(Exhibit R-HBOE 156-157)**

## **June**

None

## **July**

07/19/21 – 90 days from April 22, 2021

*07/31/21 (10:33 a.m.) – e-mail from RH to multiple covering a survey from Joseph Messina, P.L.S. and asking that it be reviewed as well as noting that they would be “more than willing to bring our certified documentation of our findings to the courts if need be.” **(Exhibit R-HBOE 158)***

## **August**

08/03/21 (11:38 a.m.) – e-mail from RH to multiple – follow-up **(Exhibit R-HBOE Reply 1)**

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<sup>6</sup> Letter from



08/03/21 (12:24 p.m.) – e-mail from Mango to RH advising that the BOE had received his documentation and that it would be reviewed “at our August 11 committee meetings”. **(Exhibit R-HBOE Reply 1-2)**

08/11/21 (10:08 a.m.) – e-mail from RH – committee meeting **(Exhibit R-HBOE Reply 1a)**

08/11/21 – Board of Education committee meetings

08/12/21 (12:03 p.m.) – e-mail from RH – committee meeting **(Exhibit R-HBOE Reply 1b)**

08/13/21 (10:35 a.m.) – e-mail from Havlusch to R.H. quoting the appeal language of the 5/19/21 letter from Toscano. The e-mail also noted that Respondent “will be submitting all of the information pertaining to this matter to the Office of Controversies and Disputes so as to render a decision.” It was further noted that the Board would abide by this decision. **(Exhibit R-HBOE Reply 1c)**

08/13/21 (11:08 a.m.) – e-mail from R.H. to Havlusch responding to the 10:35 a.m. e-mail and stating; “We understand your point of reference to the attorneys letter and the time that has passed. However finding a professional representative who was willing to look into our situation and have the time to take an actual measurement has been a time consuming and costly process.” He also asked what need to be done “on our part if the district is taking this to the Disputes and Controversies?” **(Exhibit R-HBOE Reply 4)**

08/17/21 – 90 days from May 19, 2021

08/17/21 – LF Havlusch to Director, Office of School Finance, New Jersey Department of Education explaining the dispute, that RH had yet to file an Appeal through Controversies and Disputes and requesting that his office “consider this matter and let us know if there is any additional action or other avenue that (RH) and/or the Board can take at this point.” (cc. RH, various other parties) **(Exhibit P-2)**

### **September**

09/29/21 – RH original “appeal” e-mail sent to OCD. **(Exhibit P-3)**.

### **October**

10/23/21 – Pro se petition of appeal (verified date) **(Exhibit P-4)**.

10/25/21 – Pro se petition of appeal filed with supporting documentation. **(Exhibit P-5)**.

10/27/21 – e-mail from RH to OCD requesting emergency status. **(Exhibit P-3)**.

### **November**

11/01/21 – Case transmitted to OAL.

11/11/21 – 90 days from August 13, 2021

11/15/21 – 90 days from August 17, 2021

### **Law and Analysis**

The regulation concerning appeals is N.J.A.C. 6A:3-1.3(i), which reads as follows;

*Filing and service of petition of appeal - The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education, individual party, or agency, that is the subject of the requested contested case hearing. This rule shall not apply in instances where a specific statute, regulation, or court order provides for a period of limitation shorter than 90 days for the filing of a particular type of appeal.*

**(emphasis added)**

This rule (along with others in this chapter of the Administrative Code) can be “relaxed or dispensed with by the Commissioner, in the Commissioner’s discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice”. N.J.A.C. 6A:3-1.16.

In the case at bar, there are a multitude of factors that must be weighed before an informed decision can be made and that begins with a close look at the timeline and a determination of when the ninety-day appellate deadline was triggered. Respondent argues that this date is April 22, the day Petitioner was advised by Mr. Havlusch that the BOE “took no action to overturn the determination that your home is not eligible to receive transportation services”. It is further argued that this was confirmed in Mr. Havlusch’s April 27 e-mail, in which he noted;

“the 4/22/21 email constitutes the Board’s final decision on this matter, which you can appeal to the Commissioner of Education through the Department of Education’s Office of Controversies and Disputes, which can be found here <https://www.nj.gov/education/cd/>.”

**(Exhibit R-HBOE 39)**

This was followed by the e-mail from Mr. Mango later than day in which he encouraged R.H. to appeal to the Commissioner. **(Exhibit R-HBOE 40)**. These communications were acknowledged by Petitioner, who advised that he would “assuredly...address the Commissioner of Controversies and Disputes”. **(Exhibit R-HBOE 42)**.

In reviewing the totality of the circumstances, at least at this point, R.H. had been made aware of the BOE’s “final decision” that had been made on April 22 and had acknowledged same. He was separately advised of the “next step” (to file an appeal with OCD) on at least the following nine occasions;

1. 4/27/21 e-mail from Havlusch
2. 4/27/21 e-mail from Mango
3. 4/28/21 e-mail from Lamonte (1)
4. 4/28/21 e-mail from Lamonte (2)
5. 4/30/21 e-mail from Herbst
6. 5/4/21 e-mail from Havlusch (1)
7. 5/4/21 e-mail from Havlusch (2)
8. 5/14/21 letter from Stewart
9. 5/19/21 letter from Toscano

Further, RH acknowledged what the “next step” was on multiple occasions;

1. 4/27/21 e-mail to Mango
2. 4/28/21 e-mail to Lamonte
3. 4/28/21 e-mail to Havlusch
4. 4/30/21 e-mail to Havlusch
5. 4/30/21 e-mail to Havlusch
6. 5/3/21 e-mail to Havlusch

Petitioner argues that if there ever was a “final order” in this matter, it was the May 19 letter from Mr. Toscano, since in same he advised that “there will not be any further communication on this issue”. **(Exhibit R-HBOE 156-157)**. He also argues that he was, in essence, misled, by Respondent’s continued interactions with him and that he was unaware of the 90 day “ticking clock”.

Concerning the phrase ‘final order, ruling, or other action’, I **FIND** that the facts support a conclusion that same was made on April 21, 2021 when the BOE failed to overturn the initial decision to deny busing services to M.C. The clock started “ticking” the next day (April 22) when R.H. was advised of same in Mr. Havlusch’s e-mail. That this was a “final decision” was confirmed via e-mail by both Mr. Havlusch and Mr. Mango on April 27. Both of those e-mails provided specific instructions on how and where to appeal the decision and were acknowledged by Petitioner.

The language of Mr. Havlusch’s e-mails was direct and the message clear; that the BOE had made a final decision and that the next step for RH was to appeal same to the OCD.

While there was continuing dialogue between various parties, in none of those e-mails is R.H. advised that the April 21 decision was not a “final” one or had been rescinded. The May 19 letter from Mr. Toscano merely reiterated what R.H. had been told previously; that the appeal had already been rejected by the BOE and that R.H. can appeal same with the OCD. The contents of that letter do nothing to support Petitioner’s contention that it “finalized” anything or that the April 21 BOE decision was an interim or unofficial one.

The more interesting aspect of Petitioner’s argument concerns the events of July 31 through August 17. It was at this point that R.H. supplied the surveyor’s report and received an e-mail from Mr. Mango on August 3 that same would be reviewed during the August 11 Board of Education committee meetings. Following the meetings, on August 13 Mr. Havlusch e-mailed R.H. After quoting the May 19 Toscano letter, he then offered to submit the dispute to the OCD on R.H.’s behalf. **(Exhibit R-HBOE Reply 1)**. R.H. acknowledged that e-mail and specified that;

We understand your point of reference to the attorneys letter and the time that has passed. However finding a professional representative who was willing to look into our situation and have the time to take an actual measurement has been a time consuming and costly process.

**(Exhibit R-HBOE Reply 4)**

He also asked, however, what steps that he needed to take now that the BOE was submitting the matter to OCD.

As it turns out, however, Mr. Havlusch actually submitted same to the Director of the Office of School Finance for the New Jersey Department of Education and there was no subsequent action taken on same. It should be noted, however, that R.H. was copied on that letter and would have been aware that it had been submitted to the Office of School Finance and not OCD (despite his denial during oral argument). **(Exhibit P-2)**.

### **Exceptions to the 90 day “rule”**

With the finding above, we delve into an area that, unfortunately, went completely unbriefed by the parties, although it was raised during oral argument. As noted above, the ninety-day appellate deadline can be “relaxed or dispensed with by the Commissioner, in the Commissioner’s discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice”. N.J.A.C. 6A:3-1.16.

In exploring the case law surrounding the relaxation of the ninety-day rule, it becomes very apparent, very quickly, that the courts do not look indulgently on same. One of the most oft-cited cases involving this issue is Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572 (1993). Kaprow involved the termination of a tenured assistant superintendent effective June 30, 1981. After a rather complicated series of events involving RIF<sup>7</sup> rights and the “re-creation” of assistant superintendent positions year later, Kaprow filed a petition with the Commissioner on August 1, 1988 asserting a claim to one of the re-created positions. He amended that petition on December 16, 1988 to assert, for the first time, that the 1981 RIF was improper and had been made in bad faith. Id. at 576-78.

In the face of a partial victory for Kaprow in the underlying OAL case, the Commissioner dismissed the petition, finding, in part, “that the bad-faith claim was untimely instead of unsupported”. That decision was affirmed by the State Board of Education, which found that the August 1, 1988 petition “was time barred by the ninety-day limitations period of N.J.A.C. 6:24-1.2(c)” and the Appellate Division affirmed the Board’s decision. Id. at 578.

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<sup>7</sup> Reduction in force.

After discussing the validity of the ninety-day limitation period rule, the “statutory entitlement” argument<sup>8</sup> and due process rights, the court discussed the purpose of the rule as well as what constituted “adequate notice”. As for the purpose, the Court held that;

The first is to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims. Ochs v. Federal Ins. Co., 90 N.J. 108, 112, 447 A.2d 163 (1982). The second purpose is "to penalize dilatoriness and serve as a measure of repose" by giving security and stability to human affairs. Ibid. (quoting Farrell v. Votator Div., 62 N.J. 111, 115, 299 A.2d 394 (1973)).

As for “adequate notice”;

Adequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate. See Burns v. West Am. Corp., 137 N.J. Super. 442, 446, 349 A.2d 142 (Dist.Ct.1975). Moreover, adequate notice under the regulation must be sufficient to further the purpose of the ninety-day limitations period. See Apex Roofing Supply Co. v. Howell, 59 N.J. Super. 462, 467, 158 A.2d 49 (App.Div.1960). A limitations period has two purposes. The first is to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims. Ochs v. Federal Ins. Co., 90 N.J. 108, 112, 447 A.2d 163 (1982). The second purpose is "to penalize dilatoriness and serve as a measure of repose" by giving security and stability to human affairs. Ibid. (quoting Farrell v. Votator Div., 62 N.J. 111, 115, 299 A.2d 394 (1973)).

When a plaintiff knows or has reason to know that he has a cause of action against an identifiable defendant and voluntarily sleeps on his rights so long as to permit the customary period of limitations to expire, the pertinent considerations of individual justice as well as the broader considerations of repose, coincide to bar his action. [Farrell, supra, 62 N.J. at 115, 299 A.2d 394.]

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<sup>8</sup> The “statutory entitlement” argument is not applicable here. In essence, it concerns a request for an exception to the deadline in cases where the petitioner is seeking a denied benefit that to which they were statutorily entitled. Kaprow, supra, 131 N.J. at 584-585. See also, Lavin v. Hackensack Bd. of Ed., 90 N.J. 145 (1982), Polaha v. Buena Reg’l Sch. Dist., 212 N.J. Super. 628 (App. Div. 1986).

Kaprow, 131 N.J. at 586-87.

Kaprow also addressed the issue Petitioner's continued attempts to resolve the claim after the April 22 e-mail, citing to Riely v. Hunterdon Central Bd. of Educ., 173 N.J. Super. 109 (App. Div. 1980). Riely concerned the non-renewal of the contract of a non-tenured teacher. She had received notice of the non-renewal on April 13, 1976 and there had been an informal hearing before the school board on May 10, 1976. The next day, she was sent a letter informing her that the non-renewal decision remained unchanged. Then, in May, 1976, she filed a contract grievance, which she lost in a decision dated May 1, 1977, which led to her filing a petition of appeal with the Commissioner on June 20, 1977. Id. at 110.

While the Commissioner denied a motion to dismiss the petition, the State Board reversed, citing the ninety-day rule. The Court held that even though the rule did not come into effect until October 6, 1976, the limitation still applied, citing to Union Cty. Bd. of Ed. v. Union Cty. Teachers Ass'n, 145 N.J. Super, 435, 437 (App. Div. 1976), certif. den. 74 N.J. 248 (1977) where the Commissioner had ruled that given the rule changes, relief should have been requested from the Commissioner and not via arbitration and that the petitioner had 90 days from the adoption of the rule in which to file her appeal. Riely, 173 N.J. Super. at 112. See also, Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311, 326-327, n.4 (1979).

More specifically, the Kaprow court found that his "attempt to resolve his claim through negotiations with the Local Board is irrelevant. It does not negate the fact that he received adequate notice on February 23, nor does it toll the running of the limitations period." Id. at 587, cit. Riely, supra. It determined that Kaprow had;

(r)ceived adequate notice under N.J.A.C. 6:24- 1.2(c) on February 23, 1988, to trigger the ninety-day limitations period. On that day, he learned from the Local Board the existence of that state of facts that would enable him to file a timely claim. To insist under these circumstances that there be additional or more-specific notice will not further the objectives of the regulatory scheme, and would only defeat the considerations of repose and interfere with the efficient administration of the school laws. Because Kaprow received adequate notice on February 23, he was obligated to file his petition within the ninety-day period. Kaprow, however, did not file his petition until August 1, more than two months after the limitations period had expired. We therefore find that his claims are time-barred by N.J.A.C. 6:24-1.2(c).

Kaprow, 131 N.J. at 589.

Finally, Kaprow also addressed the other argument inferred by Petitioner; that by their actions, Respondent should be equitably estopped from asserting the statute of limitations. As noted by the court;

Equitable estoppel has been used to prevent a defendant from asserting the statute of limitations when the defendant engages in conduct calculated to mislead plaintiff into believing that it is unnecessary to seek civil redress. See W.V. Pangborne & Co. v. N.J. Dep't of Transp., 116 N.J. 543, 553, 562 A.2d 222 (1989). Although public entities have a heightened duty to "turn square corners," F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 427, 495 A.2d 1313 (1985), equitable estoppel is rarely invoked against public entities. O'Malley v. Department of Energy, 109 N.J. 309, 316, 537 A.2d 647 (1987).

Id. at 589.

The Court noted that there were no evidence that Mr. Kaprow had relied on the Local Board's misconduct and that it further made no misrepresentations that were "calculated to lull (him) into a false sense of security with respect to his right to take judicial action". Id. at 589. This, despite the Appellate Division deeming some the Local's Board's actions/inactions to be "stonewalling". The only part of the opinion that inures to RH's benefit is that, unlike Kaprow, here, the Board did indicate that it would take some action on his behalf via the August 13 e-mail. **(Exhibit R-HBOE Reply 4)**. Ibid.

The Kaprow court cited Friedman v. Friendly Ice Cream, Co., 133 N.J. Super. 333 (App. Div. 1975), where an insurance carrier was alleged to have intentionally protracted settlement negotiations with the intention of exhausting the statute of limitations in a case where the defendant had essentially admitted liability. The court held that given the "meager record" and the specific allegations made by Friedman, the matter was inappropriate for a summary judgment motion. Id. at 337-38.

With no indication of detrimental reliance, the Kaprow court declined to toll the ninety-day time limit on equitable estoppel grounds. Id. at 590. See also, Beltran v. Doe, 145 N.J. Super. 152 (App. Div. 1976), Peloso v. Hartford Fire Ins. Co., 56 N.J. 514 (1970), Petermann v. Duarte, 2019 N.J. Super. Unpub. LEXIS 807 (2019).



Here, with the finding above that R.H. received notice of the agency's "final action" on April 22, it is obvious that the delay in filing was unrelated to the actions of Respondent, particularly since there did not appear to be any communication between the parties from the May 19 Toscano letter until RH served the surveyor's report on August 31. **(Exhibits R-HBOE 156-157 and R-HBOE 158)**. In fact, R.H.'s reply to that e-mail clearly inferred that even at this point, he was not relying on anything Respondent had done thus far;

We understand your point of reference to the attorneys letter and the time that has passed. However finding a professional representative who was willing to look into our situation and have the time to take an actual measurement has been a time consuming and costly process.

**(Exhibit R-HBOE Reply 4)**

The court in Riely looked askance at such a course, noting;

Respondent had ample time to file the petition after promulgation of N.J.A.C. 6:24-1.2. it is evidence to us that she gambled on a favorable arbitration award and, having lost, then decided to seek furth relief at the hand of the Commission. By then, her petition was out of time.

Id. at 112. See also, Raymond v. Bd. of Ed. of Bor. of River Edge, 94 N.J.A.R.2d (EDU) 203.

This issue is also addressed in LeMee v. Bd of Ed. of Ridgewood, 1990 S.L.D. 663 (1990), which cites to Pacio v. Bd. of Ed of Lakeland Reg'l High Sch. Dist., 1989 S.L.D. 2060 (1989) in holding;

"Initially, the Commissioner notes that Pacio, supra, is clearly dispositive of the threshold question herein, in that it stands unequivocally for the proposition that in nonrenewal disputes the 90-day period for appealing to 10 the Commissioner is tolled from receipt of the nonrenewal notice, requests for reconsideration notwithstanding." See, also, Portee v. Newark Bd. of Ed., 94 N.J.A.R.2d (EDU) 381(1994).

Wise v. Bd. of Ed. of Trenton, 2000 N.J. AGEN LEXIS 1147, cit. LeMee, 1990 S.L.D. at 672. (emphasis added).

That leads us into the final area of analysis; situations where the ninety-day deadline has been relaxed. There are a multitude of reported court and administrative cases that explore this issue, one of the most cited being Pacio. While Pacio discusses multiple issues, there, a terminated high school teacher filed an action well past the ninety-day appellate deadline. In granting the defendant's motion for summary decision, the Court noted the strict standard applied by the Commissioner in relaxing that deadline. It would only happen;

Where a substantial constitutional issue was presented, where judicial review was sought of an informal administrative determination, and where a matter of significant public interest is involved. [citations omitted] Miller v. Morris School District 1980 S.L.D. \_\_\_\_ (February 25, 1980).

Pacio, supra, 1989 S.L.D. at 2063. See also, Morris-Union Jointure Commission v. Bd. of Ed. of South River, 92 N.J.A.R 2d (EDU) 453 (1992) and Balwierzczak v. Bd. of Educ. of Berkeley Heights, 1999 N.J. AGEN LEXIS 707 (Dec. 16, 1998).

The bar can also be relaxed "when strict adherence would possibly result in an injustice." Grompone v. State Operated Sch. Dist. Of Jersey City, 1999 N.J. AGEN LEXIS 786 (Dec. 20, 1999) at 17., app. denied, 1994 N.J. Super. Unpub. LEXIS 4, cit. Bogert v. East Orange Bd. of Educ., OAL DKT. NO. EDU 6245-82 (January 26, 1983), aff'd Commissioner of Education (March 14, 1983).

Morris-Union also confirmed that "it is petitioner's burden to show that it will suffer injustice if the 90-day rule is strictly enforced." Id. at 471. Further, "the fact that application of the rule may result in the dismissal of a meritorious claim does not warrant relaxation of the rule." K.B. v. Bd. of Ed. of Rancocas Valley Reg. High Sch. Dist., 2002 N.J. AGEN LEXIS 52 (March 1, 2002) at 43-44.

Cases where the rule is not relaxed are much more prevalent than those where it was;

1. Rule not relaxed when petition filed two days late while petitioner investigated appropriate grievance procedure. (Dreher v. Jersey City Bd. of Ed., 1987 S.L.D. 1706, aff'd St. Bd., 1988 S.L.D. 2439, rev'd o.g. App. Div. A-6120-82 (Feb. 28, 1988)
2. Rule not relaxed in teacher removal case where no claim of constitutional issue or issue of fundamental public policy made. Portee v. Bd. of Ed. of Newark, 1994 N.J.A.R.2d (EDU) 381 (1994). See also, Wise, supra.

3. Rule not relaxed in late filing case involving an alleged violation of N.J.S.A. 18A:37-2.1 accusing a school board of failing to commence expulsion proceedings against a student who assaulted a teacher. Markulin v. Bd. of Ed. of Neptune, 1992 N.J.A.R.2d (EDU) 406 (1992).
4. Rule not relaxed when the provisions of the Administrative Code were changed to now include a ninety-day appellate deadline where there was no such deadline previously. Riely, supra.
5. Rule not relaxed when school board committed misconduct and failed to respond to inquiries regarding the issue at hand. Kaprow, supra.
6. Rule not relaxed when teachers asserted a statutory claim to sick pay amounts in the absence of a clear “final decision” and employment terms were being negotiated, but when vouchers for less than expected amount were distributed. Nadasky v. Bd. of Ed. of Twp. of Clark, 2001 N.J. AGEN LEXIS 1385 (July 9, 2001). See also, Balwierczak, supra.

Cases where the ninety-day limitation was relaxed are relatively rare and involve circumstances much different than those presented here and even then, after the decision in some of these cases, that rule has been tightened. Bey v. Bd. of Educ. of the City of Newark, 93 N.J.A.R.2d (EDU) 288 (March 5, 1993) explores these matters in some detail, including a case where the rule was relaxed when the Commissioner concluded that petitioner had been discriminated against due to gender and pregnancy when sick leave was not granted. Shokey v. Bd. of Ed. of Cinnaminson, 1978 S.L.D. 919 (November 29, 1978). However, the court noted that the Shokey decision “might not be rendered today”, since Riely, supra, and Pacio, supra were both decided subsequently to it. Bey at 45.

Perhaps ironically, despite reviewing all the reasons why the rule should *not* be relaxed, the Bey court actually relaxed the rule in a case involving the delinquent filing of an appeal involving the assignment of “a teaching staff member who had been accused of misusing, mismanaging, and possibly misappropriating school funds entrusted to him in his capacity as school treasurer”. Id. at 43.

The court saw this case as unique since the prior cases discussed in the decision;

...ha(ve) dealt with an individual concern of the involved petitioner only, such as a refusal to re-employ. None of these precedents dealt with concerns that could affect a wider spectrum of the public.

Id. at 44.

Other “relaxation” cases involved a student expulsion where a *pro se* parent’s timely appeal was technically deficient [J.N. v. Elizabeth Bd. of Educ., 2005 N.J. AGEN LEXIS 814 (July 8, 2005)] and where illegal conduct was being alleged against the respondent, where that conduct was discovered after the expiration of the ninety-days [Eisenberg v. Fort Lee Bd. of Educ., 2008 N.J. AGEN LEXIS 45 (Jan. 9, 2008)].

Here, the evidence simply does not support a conclusion that this issue is anything but a personal one for Petitioner. There has been no argument that there is a figurative “class” of students that are impacted by this specific, limited issue. While the overall issue (the specific data utilized by the vendor in question to determine the distance in question) is not literally exclusive to Petitioner, it would only, at best, potentially impact a very limited number of persons who live on or near the two mile border, do not have access to courtesy or subscription busing and who challenge the measured distance from their home to the school. In other words, the result of this specific case would have a negligible impact, if any at all, on any persons other than Petitioner.

There is obviously no Constitutional issue at play here and there is no significant public interest involved. That leaves the “injustice” issue and, to a degree in conjunction with that, the “continuing violation” issue.

The issue of the continuing violation is the most appealing factually and facially for Petitioner. Not only does Respondent’s decision impact M.C., but it also has the very real potential to impact M.C.’s sibling, who is currently kindergartener in Respondent’s school system and where it is anticipated that he will attend the same school as his big sister in the 2023-24 school year.<sup>9</sup>

The concern is that by not addressing this issue in dispute regarding M.C., we will only revisit same in two years with her brother (who is not a party to this case).

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<sup>9</sup> Willow Grove educates students in Grades 2-4.

However, in Kallimanis v. Carlstadt Bd. of Educ. OAL DKT. EDU 868-80 (August 8, 1980), aff'd Comm'r of Ed. (September 26, 1980) aff'd State Bd. (March 4, 1981), where the petitioner alleged a continuing violation of his rights (such as here, where the refusal to offer M.C. busing occurs each school day), the court held that the ninety-day rule should not be relaxed. In fact, the Court in North Plainfield Educ. Ass'n v. Bd of Educ. of the Borough of North Plainfield, 96 N.J. 587 (1984), addressed the issue as well in the context of an allegedly improper withholding of an incremental salary increase. It noted that despite the plaintiff continuing to lag behind in salary, that lag was caused by a singular decision and did not constitute a new violation each year. Therefore, the ninety-day deadline from the date of the original denial should not be relaxed. Id. at 595. See also, Medford Investor Associates, L.L.C. v. Medford Bd. of Educ., 2013 N.J. AGEN LEXIS 271 (Oct. 8, 2013).

The only “continuing violation” cases where the ninety-day rule was relaxed appear to be in statutory rights claims, such as the improper reassignment of teacher in violation of her tenure rights [City Ass'n of Supervisors v. Newark Sch. Dist., 2014 N.J. AGEN LEXIS 515 (Aug. 27, 2014)] or the failure to properly credit service [Board of Ed. of Borough of Alpha v. Alpha Educ. Ass'n, 190 N.J. 34 (2006)].

In fact, the courts are practically unanimous in finding that “continuing violation” claims concern discrimination cases and little else. O'Donnell v. Hanover Tp. Bd. of Educ., 97 N.J.A.R.2d (EDU) 264 (1997), cit. North Plainfield Educ. Ass'n, supra.

Finally, there is simply no evidence that an “injustice” to the degree inferred by the courts would occur if this matter were procedurally dismissed. While in every “losing” case there may be some degree of “injustice”, the fact that Petitioner’s daughter remains ineligible for busing is not a sufficiently negative result as to warrant a relaxation of the ninety-day rule given its almost uniformly strict interpretation by the courts. See, generally, Eisenberg, supra.

Ultimately, I **FIND** that there is insufficient evidence to demonstrate that the ninety-day appellate deadline as delineated in N.J.A.C. 6A:3-1.16 should be relaxed.

**CONCLUSION**

Given the totality of the evidence, I **CONCLUDE** that Petitioner received notice that Respondent had issued a “final order” to deny his request that it provide M.C. with busing on April 22, 2021.

I further **CONCLUDE** that Petitioner’s appeal was filed out of time in violation of N.J.A.C. 6A:3-1.3 and I further **CONCLUDE** that Petitioner has supplied insufficient evidence to demonstrate that the rule should be relaxed per the dictates of N.J.A.C. 6A:3-1.16.

**ORDER**

Based on the foregoing, Respondent’s motion to dismiss Petitioner’s appeal be and is hereby **GRANTED** and;


It is hereby **ORDERED** that summary decision be **ENTERED** on behalf of respondent and that the Petitioner’s appeal be and is hereby **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.

February 17, 2022  
DATE

  
Matthew G. Miller, ALJ

Date Received at Agency:

February 17, 2022

Date Mailed to Parties:

February 17, 2022

MGM/mm

**APPENDIX**

**WITNESSES**

**For petitioner:**

None

**For respondent:**

None

**EXHIBITS**

**For petitioner:**

- P-1 April 10 e-mail from RH to Respondent
- P-2 August 17 letter from Havlusch to Office of School Finance
- P-3 September 29 e-mail from RH to OCD
- P-3a October 27 e-mail from RH to OCD requesting emergency status
- P-4 October 23 petition of appeal
- P-5 October 25 filed petition of appeal

**For respondent:**

- |            |   |
|------------|---|
| R-DTRS-27  | 2021-22 District Report of Transported Resident Students (DTRS) |
| R-HBOE 1-2 | April 13 e-mail from Havlusch to RH                             |
| R-HBOE 6   | April 15 e-mail from Havlusch to RH                             |
| R-HBOE 13  | April 15 e-mail from Havlusch to RH                             |
| R-HBOE 32  | April 22 e-mail from Havlusch to RH                             |
| R-HBOE 39  | April 27 e-mail from Havlusch to RH                             |
| R-HBOE 40  | April 27 e-mail from Mango to RH                                |
| R-HBOE 42  | April 27 e-mail from RH to Mango                                |
| R-HBOE 45  | April 27 e-mail from Mango to RH                                |
| R-HBOE 67  | April 28 e-mail from Lamonte to RH                              |
| R-HBOE 76a | April 28 e-mail from Lamonte to RH                              |



R-HBOE 76b	April 28 e-mail from Lamonte to RH
R-HBOE 77	April 28 e-mail from RH to Lamonte
R-HBOE 134	April 30 e-mail from Herbst to RH
R-HBOE 136	April 30 e-mail from RH to Havlusch
R-HBOE 137	April 28 e-mail from RH to Havlusch
R-HBOE 140	April 30 e-mail from RH to Havlusch
R-HBOE 143	May 4 e-mail from Havlusch to RH
R-HBOE 143-144	May 3 e-mail from RH to Havlusch
R-HBOE 147-148	May 4 e-mail from Havlusch to RH
R-HBOE 153	May 18 e-mail from Stewart to multiple
R-HBOE 154	May 14 letter from Stewart to Logic 54
R-HBOE 156-157	May 19 letter from Toscano to Stewart, multiple
R-HBOE 158	July 31 e-mail from RH to multiple
R-HBOE Reply 1	August 3 e-mail from RH to multiple
R-HBOE Reply 1-2	August 3 e-mail from Mango to RH
R-HBOE Reply 1a	August 11 e-mail from RH
R-HBOE Reply 1b	August 12 e-mail from RH
R-HBOE Reply 1c	August 13 e-mail from Havlusch to RH
R-HBOE Reply 4	August 13 e-mail from RH to Havlusch
R-OPP 1	May 5 letter from Peck to RH