

EDU #6082-96  
C # 156-97  
SB # 43-97

BOARD OF EDUCATION OF THE CITY OF:  
ASBURY PARK, MONMOUTH COUNTY,

PETITIONER-APPELLANT,

V.

STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE RED  
BANK REGIONAL HIGH SCHOOL  
DISTRICT, BOARD OF EDUCATION OF  
THE BOROUGH OF BRADLEY BEACH,  
BOARD OF EDUCATION OF THE  
BOROUGH OF BELMAR, BOARD OF  
EDUCATION OF THE BOROUGH OF  
ALLENHURST, BOARD OF EDUCATION  
OF THE BOROUGH OF AVON BY THE  
SEA, BOARD OF EDUCATION OF THE  
BOROUGH OF SOUTH BELMAR,  
MONMOUTH COUNTY,

DECISION

RESPONDENTS-RESPONDENTS :

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Decided by the Commissioner of Education, March 27, 1997

For the Petitioner-Appellant, Robin S. Perry, Esq. and Kim A. Fellenz,  
Esq.

For the Respondent-Respondent Board of Education of the Red Bank  
Regional High School District, Crowell & Otten (Robert H. Otten,  
Esq., of Counsel) and James P. Granello, Esq.

For the Respondent-Respondent, Board of Education of the Borough of  
Bradley Beach, Kenney & Gross (Michael J. Gross, Esq., of  
Counsel)

For the Respondent-Respondent Board of Education of the Borough of  
Belmar, Sinn, Fitzsimmons, Cantoli, West & Pardes (Kenneth B.  
Fitzsimmons, Esq., of Counsel)

For the Respondent-Respondent Board of Education of the Borough of  
Allenhurst (Cerrato, Dawes, Collins, Saker & Brown (Sanford D.  
Brown, Esq., of Counsel)

For the Respondent-Respondent Board of Education of the Borough of  
Avon By The Sea, Kramer, Kramer & Kilgallen (Honora O'Brien  
Kilgallen, Esq., of Counsel)

For the Respondent-Respondent Board of Education of the Borough of  
South Belmar, Carroll & Weiss (John E. Collins, Esq., of Counsel)

This matter was initiated by the Board of Education of the City of Asbury Park (hereinafter "Asbury Park"), which filed a petition of appeal with the Commissioner of Education alleging that the respondent boards, sending districts in a sending-receiving relationship with Asbury Park, were violating orders of the Commissioner and statutory provisions under which they were required to apportion high school pupils among their various receiving districts. Asbury Park sought a directive requiring the respondent districts to insure that the percentage of their students apportioned to Asbury Park would actually attend Asbury Park High School and to enjoin the Red Bank Regional High School District (hereinafter "Red Bank Regional") from receiving pupils from the respondent districts, as well as from Interlaken and Deal.

On January 10, 1997, following several days of hearings, Red Bank Regional filed a motion for summary decision, which was joined in by the other respondent districts.

On February 6, 1997, an Administrative Law Judge ("ALJ") recommended granting the motion and dismissing the petition. In arriving at his determination, the ALJ noted that the respondent districts had satisfied all of the discovery demands that had been made on them and that Asbury Park had been repeatedly late in supplying

discovery requests and filing responsive papers. Nonetheless, he concluded that this matter turned on substantive points, rather than procedural issues.

The ALJ found that, in contrast to other sending-receiving cases, the parents and pupils in the respondent districts herein were acting under the express authority of N.J.S.A. 18A:38-15, which allowed pupils to attend a specialized course of study not offered by their designated receiving district, and that Red Bank Regional was acting under the authority provided district boards by N.J.S.A. 18A:54-5 through 18A:54-7 to establish and maintain a vocational program. In so doing, the ALJ rejected Asbury Park's allegation that its performing arts program at Brookdale Community College was equivalent to the program offered by Red Bank Regional. The ALJ found that Asbury Park's contention had not withstood the unrebutted testimony of Red Bank Regional's experts that there was no equivalency between the programs. The ALJ also noted that the audition process required for admission to Red Bank Regional's program was part of a set of stringent criteria and that nearly half of those who had participated in the most recent auditions had not been accepted.

In addition, the ALJ found that the respondent districts had properly assigned the appropriate percentages of their high school-eligible pupils to Asbury Park High School. "Where parents decide actually to send their children," the ALJ stressed, "is beyond this tribunal's purview under the circumstances presented here." Initial Decision, slip op. at 10.

On March 27, 1997, the Commissioner adopted the findings and conclusions of the ALJ and dismissed the petition.

Asbury Park has filed the instant appeal to the State Board of Education.

After careful consideration of this matter, we affirm the determination of the Commissioner. While the State Board has long considered issues of racial imbalance to be of utmost importance, e.g., Board of Educ. of Englewood Cliffs v. Board of Educ. of the City of Englewood, decided by the State Board of Education, 1990 S.L.D. 1720, aff'd, 257 N.J. Super. 413 (App. Div. 1992), aff'd, 132 N.J. 327 (1993), cert. denied, 510 U.S. 991, 114 S.Ct. 547, 126 L.Ed.2d 449 (1993), we find that Asbury Park has not provided sufficient evidence in support of its allegations to withstand a motion for summary decision. See Brill v. Guardian Life Insurance of America, 142 N.J. 520 (1995).

In this respect, we concur with the ALJ that Asbury Park's contention that its performing arts program is equivalent to Red Bank Regional's program is untenable at this point. Quite simply, after carefully scrutinizing the brief submitted by Asbury Park in support of its appeal, we cannot identify any genuine issues of material fact that would justify extending discovery once again so as to allow Asbury Park the opportunity to now develop a more viable claim on some other basis. Further, while we can appreciate the difficulties experienced by Asbury Park in developing its case, we cannot ignore the fact that it was permitted to amend its petition several times and that it received five separate extensions for filing necessary papers. Moreover, Asbury Park had notice as early as November 27, 1996 that Red Bank Regional would be presenting expert testimony to rebut Asbury Park's contention that its performing arts program was equivalent to the program offered by Red Bank Regional and yet, at hearing on December 18, 1996, requested an additional delay so that it could consult an expert.

It also appears that all parties were in agreement that the only evidentiary question requiring resolution at the conclusion of the hearings on December 20, 1996 was whether the vocational courses offered by Red Bank Regional had been approved by the New Jersey Department of Education. Red Bank Regional subsequently submitted a written statement to the ALJ from the Monmouth County Superintendent of Schools confirming that such courses had, indeed, been approved.

In sum, for the reasons stated herein, as well as those articulated by the ALJ and Commissioner, we affirm the Commissioner's decision granting the respondent boards' motion for summary decision and dismissing the petition.

Wendel E. Daniels opposed.

September 3, 1997

Date of mailing \_\_\_\_\_