

WENDE BAER, PATTY BIETH, COLLEEN :
DOOLEY, DIANNE VASQUEZ, NEW
JERSEY PROTECTION AND ADVOCACY, :
INC., STATEWIDE PARENT ADVOCACY
NETWORK, JERSEY CITY SPECIAL :
EDUCATION PARENTS COUNCIL, AND
ALLIANCE FOR THE BETTERMENT OF :
CITIZENS WITH DISABILITIES,

APPELLANTS,

V.

LEO KLAGHOLZ, COMMISSIONER,
DEPARTMENT OF EDUCATION AND :
STATE BOARD OF EDUCATION,

RESPONDENTS.

STATE BOARD OF EDUCATION

DECISION

For the Appellants, Education Law Center (Elizabeth Athos, Esq., and Ellen M. Boylan, Esq., of Counsel), Rutgers Special Education Clinic (Mary F. Hartnett, Esq., of Counsel), New Jersey Protection & Advocacy, Inc. (Linda D. Headley, Esq., of Counsel) and Cole, Schotz, Meisel, Forman & Leonard (Rebecca Spar, Esq., of Counsel)

For the Respondents, Arlene G. Lutz, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

On August 20, 1998, the appellants in this matter filed a notice of appeal to the Appellate Division pursuant to R. 2:2-3 challenging the final agency rules governing the provision of an appropriate public education to students with disabilities which had been adopted by the State Board of Education on July 3, 1998. On the same date, appellants filed a motion with the State Board seeking either: 1.) a free transcript of the proceedings before the State Board pursuant to 20 U.S.C. 1415(h)(3), or 2.) an order

pursuant to R. 2:5-3(c)(2) limiting the record before the Appellate Division to the written testimony submitted to the State Board during the adoption process and any other written records of those proceedings. The motion is opposed by the Deputy Attorney General who is representing the State Board in the appeal now before the Appellate Division.

After considering the arguments of the parties and reviewing the provisions of 20 U.S.C. 1415(h)(3), we conclude that the Individuals with Disabilities Education Act, 20 U.S.C.A. 1400 et seq. (“IDEA”) does not provide the appellants with an entitlement to the production of a free transcript of the public comment sessions conducted on behalf of the State Board as part of the administrative rulemaking process. The express terms of 20 U.S.C.A. 1415(h), including the right to a transcript, apply only to due process hearings conducted pursuant to 20 U.S.C.A. 1415(f), appeals therefrom as delineated by 20 U.S.C.A. 1415(g), and hearings for the change in placement of a child with disabilities under 20 U.S.C.A. 1415(k). In short, the IDEA confers the right to a transcript on parents involved in proceedings to determine or change the appropriate placement of individual students with disabilities, and such right does not extend to the administrative rulemaking process of state agencies.

Further, review of the pertinent court rule which specifies what must be included in the record in matters on appeal to the Appellate Division indicates that appellants are not required to produce a transcript of the public comment sessions in order to proceed with their appeal. Rather, R. 2:5-4 specifies that:

The record on appeal shall consist of all papers on file in the court or courts or agencies below, with all entries as to matters made on the records of such courts and agencies, the stenographic transcript or statement of the proceedings

therein, and all papers filed with or entries made on the records of the appellate court.

The State Board's public comment sessions are not required to be part of the administrative rulemaking process by the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. ("APA"), and the State Board does not routinely transcribe these sessions. While tape recordings of the sessions are available, only written comments submitted to the State Board, either in conjunction with public comment or submitted separately, are required by the Administrative Procedure Act and are considered by our agency during the adoption process.¹ In short, the record in an appeal from the adoption of administrative rules would not ordinarily include a transcription of the State Board's public comment sessions. Hence, there is no need for the State Board to direct that the transcript be abbreviated pursuant to R. 2:5-3(c) in order to relieve the appellants of an obligation to produce transcripts of the public comment sessions.

Similarly, R. 2:5-4 does not necessarily require the appellants to produce a transcript of the State Board meetings at which we considered the rules under challenge. However, the appellants must bear the cost of producing a transcript of any portions of those meetings upon which it seeks to rely in its appeal to the court.

November 4, 1998

Date of mailing _____

¹ The rules of the Office of Administrative Law only require an agency to retain a record of any oral or written comments received in response to a proposal for a period of one year to demonstrate compliance with the procedural requirements of the APA. N.J.A.C. 1:30-3.4(a).