

SB #93-96

ARLENE MILLER, :  
 :  
 PETITIONER, :  
 :  
 V. :  
 :  
 LEO F. KLAGHOLZ, COMMISSIONER, : STATE BOARD OF EDUCATION  
 DEPARTMENT OF EDUCATION, :  
 COMMITTEE :  
 :  
 RESPONDENT, : DECISION  
 :  
 AND :  
 :  
 BOARD OF EDUCATION OF THE :  
 TOWN SHIP OF NEW HANOVER, :  
 BURLINGTON COUNTY, :  
 :  
 RESPONDENT. :  
 \_\_\_\_\_ :

Decided by the Commissioner of Education, November 25, 1996

For the Petitioner, Zazzali, Zazzali, Fagella & Nowak (Richard A. Friedman, Esq., of Counsel)

For the Respondent Leo F. Klagholz, Nancy Kaplen, Deputy Attorney General (John J. Farmer, Jr., Attorney General of New Jersey)

For the Respondent Board of Education of the Township of New Hanover, Hulse & Germano (Dennis Germano, Esq., of Counsel)

Arlene Miller (hereinafter "petitioner") was employed as a school psychologist by the Board of Education of the Township of New Hanover (hereinafter "Board") and was a member of the Board's basic child study team. Petitioner had achieved tenure when the Board abolished her position effective June 30, 1996 pursuant to N.J.S.A.

18A:28-9.<sup>1</sup> She challenged that action by filing a petition to the Commissioner of Education, and the matter was transmitted to the Office of Administrative Law.<sup>2</sup>

Subsequent to that filing, the petitioner was advised by letter dated December 9, 1996 from the Board's counsel that the Board had applied for and been granted a waiver of N.J.A.C. 6:28-1.1(f) and N.J.A.C. 6:28-5.1(c) so as to provide all basic child study team services by contracting with a private vendor.<sup>3</sup> The petitioner then appealed to the State Board of Education, challenging both the application and the grant of the waiver.

Petitioner contends that the waiver is invalid because basic child study team services required by N.J.S.A. 18A:46-5.1 cannot be provided by a district solely through a contractual arrangement with a private vendor. Petitioner argues that the Commissioner and the Board are creatures of the Legislature and, therefore, possess only the authority delegated to them by that body. Petitioner maintains that the waiver

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<sup>1</sup> N.J.S.A. 18A:28-9 provides in pertinent part that:

Nothing in...any...law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy....

<sup>2</sup> We note that the matter is still pending before the Office of Administrative Law.

<sup>3</sup> N.J.A.C. 6:28-1.1(f) provides that:

Each district board of education, independently or through joint agreements, shall employ child study teams, speech correctionists or speech-language specialists and other school personnel in numbers sufficient to ensure provision of required programs and services pursuant to this chapter.

N.J.A.C. 6:28-5.1(c) provides that:

Services which may be contracted shall be restricted to the following:

1. For public school pupils:
  - i. Independent child study team evaluations and/or child study team diagnostic services to supplement existing local district services;
  - ii. The related services of occupational and physical therapy; and
  - iii. Home instruction.

in question exceeds that authority because it conflicts with the underlying statutory scheme set forth in N.J.S.A. 18A:46-1 et seq. Petitioner claims that the language of N.J.S.A. 18A:46-5.1 requires boards of education to provide basic child study team services only through its own employees or by combining with other districts to provide such services through authorized public entities.

After careful review of the statutory framework and the underlying policy, we conclude that the petitioner's view is correct. Hence, the grant of the waiver in question was not a valid exercise of the authority which we delegated to the Commissioner in his capacity as the chief executive and administrative officer of the Department of Education, N.J.S.A. 18A:4-22, to grant administrative waivers pursuant to N.J.A.C. 6:3A-1.1 and N.J.A.C. 6:3A-1.5. Accordingly, for the reasons that follow, we declare that waiver to be invalid.

N.J.S.A. 18A:46-5.1, entitled "Basic child study team services; provision by boards of education and state operated programs," provides that:

Each board of education and State operated program shall separately or jointly with one or more boards of education or State agencies provide for basic child study team services. The basic child study team shall consist of a school psychologist, a learning disability teacher consultant and a school social worker, and for the purposes of evaluation and classification shall include pertinent information from certified school personnel making the referral....

N.J.S.A. 18A:46-5 specifies the functions of child study teams. These include:

- a. identification and diagnosis of children needing special educational services,
- b. development and approval of public school programs for handicapped pupils,

- c. supervision and coordination of public school programs for handicapped pupils,
- d. reporting and referral of children with handicaps,...
- e. social case work and psychological evaluation,
- f. remedial instruction,
- g. cooperative action with other state and county departments and lay professional organizations, and
- h. additional responsibilities as determined by the commissioner with the approval of the state board.

N.J.S.A. 18A:46-14 mandates that:

The facilities and programs of education required under this chapter shall be provided by one or more of the following:

- a. A special class or classes in the district...;
- b. A special class in the public schools of another district...;
- c. Joint facilities...to be provided by agreement between one or more school districts;
- d. A jointure commission program;
- e. A State of New Jersey operated program;
- f. Instruction at school supplementary to the other programs in the school...;
- g. Sending children capable of benefiting from a day school instructional program to privately operated day classes...;
- h. Individual instruction at home....

It is axiomatic that, as creatures of the Legislature, both this agency and district boards of education must act within the authority delegated to them by that body. E.g., In re Jamesburg High School Closing, 83 N.J. 540, 549 (1980); Remedial Educ. & Diagnostic Servs. v. Essex Cty. Educ. Servs. Commn., 191 N.J. Super. 524, 527 (App. Div. 1983). This means that an administrative waiver cannot legitimize an outcome that is not authorized by the applicable statutory scheme and that a district board cannot rely upon such waiver to assume authority not granted to it by the statutes or properly delegated to it by this agency.

Quite simply, the clear and unambiguous language of the applicable statutes precludes a district from providing basic child study team services solely by contracting with a private vendor. In re Jamesburg High School Closing, supra. As set forth above, N.J.S.A. 16A:46-5.1 provides the authority under which district boards must provide basic child study team services, and the terms of that statute require that such services must be provided through its own employees, in combination with another board of education, or by another public entity. See Impey v Board of Educ of Borough of Shrewsbury, 142 N.J. 388 (1995); Vicenzino v. Bedminster Twp. Bd. Of Educ., 312 N.J. Super. 243 (App. Div. 1998). Since the Legislature did not authorize the provision of basic child study team services through a contract with a private vendor, we cannot contradict the terms of the statute by attempting to provide such authority by waiving the administrative regulations which purport to implement the statute.

We therefore declare the waiver in question to be invalid.

Attorney exceptions are noted.

May 3, 2000

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