EDU #1147-99
C # 58-01
SB # 12-01

BOARD OF EDUCATION OF THE TOWNSHIP OF MINE HILL, MORRIS COUNTY, :

PETITIONER-APPELLANT, :

V. :

BOARD OF EDUCATION OF THE TOWN OF DOVER, MORRIS COUNTY, :

RESPONDENT-RESPONDENT. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, February 15, 2001

For the Petitioner-Appellant, Schwartz, Simon, Edelstein, Celso & Kessler, L.L.P. (Paul H. Green, Esq., of Counsel)

For the Respondent-Respondent, Sills, Cummis, Radin, Tischman, Epstein & Gross (Lester Aron, Esq., of Counsel)

This is an appeal from a determination of the Commissioner of Education which adopted the initial decision of the Administrative Law Judge ("ALJ") with modification and denied the request of the Board of Education of the Township of Mine Hill (hereinafter "Mine Hill") to withdraw its 7th and 8th grade middle school students from the Dover School District, where they had been attending school since 1963. The ALJ had determined that the doctrine of laches and waiver barred the application of an order issued by the Commissioner in 1981 that would have permitted withdrawal had the Mine

Hill Board met certain conditions. The ALJ further found that N.J.S.A. 18A:38-13 provided the applicable standard for deciding the matter, but concluded that, under that standard, Mine Hill had failed to meet its burden of proving that withdrawal would not have a substantial negative educational, financial or racial impact on the affected districts. The ALJ also rejected Dover's request for K-12 regionalization or a regionalization study on the grounds that the Dover School District would not be desegregated by such regionalization.

The Commissioner adopted the ALJ's determination that the Commissioner's 1981 order was not enforceable. While recognizing that N.J.S.A. 18A:38-13 by its terms applied only to sending-receiving relationships at the high school level, he found that the language of the statute "[did] not reflect a purposeful intent by the Legislature to omit elementary level relationships from the statute's dictates." Commissioner's Decision, slip op. at 73. Invoking his implied powers and relying on the State Board's decision in Board of Education of the Borough of Kinnelon v. Board of Education of the Borough of Riverdale, decided by the State Board of Education, April 4, 1984, aff'd, Docket #A-3857-83T2 (App. Div. 1985), the Commissioner directed that the requirements of N.J.S.A. 18A:38-13 were applicable. Under that standard, the Commissioner found that, although Dover had not established that there would be a substantial negative financial impact or a substantial negative impact on the educational programming of either district if withdrawal were permitted, there would be a substantial negative impact on the racial balance and the quality of education in both districts. Hence, the Commissioner adopted the ALJ's conclusion that Mine Hill should not be granted

permission to withdraw its 7th and 8th grade students from Dover. Similarly, he agreed that Dover's request for regionalization should be denied.

Mine Hill appealed, contending that the Commissioner's 1981 order is valid and enforceable. It further contends that the requirements of N.J.S.A. 18A:38-13 should not be strictly applied to sending-receiving relationships at the elementary level and that withdrawal of its 7th and 8th grade students would not result in a negative racial impact sufficient to override its right to educate its own students. Mine Hill also argues that the Commissioner's determination denies its rights under the Fourteenth Amendment of the United States Constitution because it is based on a racial classification.

We agree with the ALJ and the Commissioner that the Commissioner's 1981 order is not enforceable and, for the reasons expressed in their decisions, we affirm the Commissioner's determination of that issue. However, for the reasons that follow, we reverse the Commissioner's determination that the requirements of N.J.S.A. 18A:38-13 are applicable to sending-receiving relationships at the elementary level, and we remand the matter to him in order that he may review the matter under the appropriate standard.

As the Commissioner recognized, N.J.S.A. 18A:38-13, by its express terms, applies only to sending-receiving relationships at the high school level. Under the statutory scheme, a district board that does not have high school facilities must designate a high school outside the district for its students. Specifically, N.J.S.A. 18A:38-11 provides that:

> The board of education of every high school district which lacks high school facilities within the district and has not designated a high school or high schools outside of the district for its high school pupils to attend shall designate a

> high school or high schools of this state for the attendance of such pupils.

N.J.S.A. 18A:38-13 provides in pertinent part that:

> No such designation of a high school or high schools and no such allocation or apportionment of pupils thereto, heretofore or hereafter made pursuant to law shall be changed or withdrawn, nor shall a district having such a designated high school refuse to continue to receive high school pupils from such sending district except upon application made to and approved by the commissioner….

Similarly, N.J.S.A. 18A:38-13.1 (students permitted to complete secondary education in receiving district subsequent to severance after five year period), N.J.S.A. 18A:38-15 (attendance at special high school courses in another district), N.J.S.A. 18A:38-16 (attendance at evening high school in another district) specify by their terms that they apply to the high school level. In contrast, N.J.S.A. 18A:38-8, which authorizes district boards having necessary accommodations to receive students from other districts that do not have sufficient accommodations and provides that they may be required to do so by order of the State Board, does not include any such limitation. See also N.J.S.A. 18A:38-8.1 and N.J.S.A. 18A:38-8.2 (representation of sending district on board of receiving district). Likewise, N.J.S.A. 18A:38-19 concerns tuition for students of "any school district" and N.J.S.A. 18A:38-20 relates to the term of agreements where district boards "furnishing elementary and high school education" to students of another district provide additional facilities. See also N.J.S.A. 18A:38-21 (termination of such agreements). Finally, N.J.S.A. 18A:38-21.1, which provides for termination of sending-receiving relationships under specified conditions, applies to "any board of education which sends students to another school district."

Given that the express terms of N.J.S.A. 18A:38-13 are clear and unambiguous, we must follow them. Further, any doubt as to the intent of the Legislature in enacting this statute is eliminated by consideration of the Statement of the Senate Education Committee which accompanied the bill that amended the statute at issue in 1986. In its Statement, the Senate Education Committee stressed that:

> …this bill only applies to sending-receiving relationships at the high school level.

Senate Education Committee Statement to Assembly Bill 2072, October 2, 1986. (Emphasis added.)

The Committee then added that:

> Currently there are 83 districts in the State which receive pupils from 147 sending districts. Of these, 15 send pupils for all grades and a handful send pupils for grades 7-9. Most of the relationships are for high school pupils in grades 9-12. A sizeable majority of these sending districts are located in the shore area.

Id.

Hence, both the express terms of the statute and the legislative history clearly indicate the Legislature's intent that N.J.S.A. 18A:38-13 apply only to sending-receiving relationships at the high school level. Further, the Committee Statement clearly indicates that the Legislature was well aware of the fact that not all sending-receiving relationships were at the high school level when it determined that N.J.S.A. 18A:38-13 would continue to apply only to those relationships at the high school level.

Nor does our decision in Board of Education of the Borough of Kinnelon v. Board of Education of the Borough of Riverdale, supra, provide a basis for applying the standards of N.J.S.A. 18A:38-13 to sending-receiving relationships at the elementary level. In Kinnelon, Riverdale had been sending its students in grades 7 through 12 to

Kinnelon High School. However, when Kinnelon constructed a new middle school, Riverdale's 7th and 8th grade students were housed in the new middle school along with Kinnelon's 7th and 8th grade students. Riverdale then determined to withdraw its 7th and 8th grade students from Kinnelon's middle school and to educate them in its own school. Kinnelon sought a declaratory judgment from the Commissioner as to the applicability of several statutes, including N.J.S.A. 18A:38-13. The Commissioner found that N.J.S.A. 18A:38-13 did not control the sending-receiving relationship as to grades 7 and 8 and held that termination of the relationship as to those grades depended on whether any unreasonable financial hardship would result to either district and whether termination would be contrary to the educational interests of all the students involved.

The State Board reversed the Commissioner's decision. In doing so, it found that when the 7th and 8th grade students began attending the middle school rather than Kinnelon High School, a change in the allocation of Riverdale's students to Kinnelon High School occurred and that, with this change in allocation, N.J.S.A. 18A:38-13 became controlling. It was in this context that the State Board rejected Riverdale's contention that it had not been required to obtain the Commissioner's approval pursuant to N.J.S.A. 18A:38-13 before withdrawing its 7th and 8th grade students from Kinnelon and in which the State Board invoked its implied powers.

Hence, the critical factor in the State Board's determination that N.J.S.A. 18A:38-13 was controlling in that case was that all of the students who were attending school in Kinnelon had originally been attending Kinnelon High School. In stark contrast to that case, the 7th and 8th grade students in the case now before us were never part of the high school. Given the Legislature's clear expression of its intent when it amended

the statute subsequent to our decision in Kinnelon, as well as the express terms of the statute, we cannot hold that N.J.S.A. 18A:38-13 is controlling of sending-receiving relationships other than those at the high school level.

However, our conclusion that N.J.S.A. 18A:38-13 is not controlling in this case does not mean that Mine Hill is free to withdraw its 7th and 8th grade students without approval. Although the agreement between the districts that Dover would receive Mine Hill's 7th and 8th grade students is not supported by the authority conferred by N.J.S.A. 18A:38-11, it was authorized by N.J.S.A. 18A:38-8.[1] Again, that statute provides:

> The board of education of any school district having necessary accommodations may receive, or may be required to receive by order of the state board, pupils from another district not having sufficient accommodations, at rates of tuition fixed as in this article provided.

In contrast to those relationships formed under N.J.S.A. 18A:38-11, the Legislature has not established any statutory criteria for withdrawal from relationships formed pursuant to N.J.S.A. 18A:38-8. Nor have we been able to identify any decisional law that provides such criteria. However, given our responsibility for the general supervision and control of public education in this state, N.J.S.A. 18A:4-10, and that of the Commissioner, N.J.S.A. 18A:4-23, we could not allow such withdrawals to occur at the discretion of the sending district. In this respect, we stress that although the Commissioner has held that a district has the discretion to withdraw its elementary level students from a sending-receiving relationship, he has approved such withdrawal only after finding that no unreasonable financial hardship would result and that such withdrawal would not be contrary to the educational interests of the students involved.

[1] We note that the 1993 contractual agreement between the parties specifies that the sending-receiving relationship between the districts was being established pursuant to N.J.S.A. 18A:38-11 et seq. However such specification cannot expand the scope of the statutes that was established by the Legislature.

Board of Education of the Township of Haddon v. Board of Education of the Borough of Collingswood, decided by the Commissioner of Education, 1966 S.L.D. 207. That being the case, we remand this matter to the Commissioner in order that he may in the first instance identify those circumstances under which withdrawal from a sending-receiving relationship at the elementary school level should be permitted and to ascertain whether such circumstances are present in this case.

We retain jurisdiction.

August 1, 2001

Date of mailing _____