

EDU # 9511-97 and 9512-97 (consolidated)
C # 313-99
SB # 43-99

MONTCLAIR EDUCATION ASSOCIATION, :
on behalf of itself and the member named :
herein, MOIRA PALISITS, :

PETITIONERS-APPELLANTS, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP :
OF MONTCLAIR, ESSEX COUNTY, :
DEPARTMENT OF HEALTH OF THE :
TOWNSHIP OF MONTCLAIR, AND THE :
TOWNSHIP OF MONTCLAIR, ESSEX :
COUNTY, :

STATE BOARD OF EDUCATION

RESPONDENTS-RESPONDENTS, :

DECISION

AND :

CYNTHIA SAMUEL, :

PETITIONER-APPELLANT, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP :
OF MONTCLAIR, ESSEX COUNTY, :
DEPARTMENT OF HEALTH OF THE :
TOWNSHIP OF MONTCLAIR, AND THE :
TOWNSHIP OF MONTCLAIR, ESSEX :
COUNTY, :

RESPONDENTS-RESPONDENTS. :

Decided by the Commissioner of Education, September 30, 1999

For the Petitioners-Appellants, Zazzali, Fagella, Nowak, Kleinbaum &
Friedman (Aileen M. O'Driscoll, Esq., of Counsel)

For the Respondent-Respondent Board of Education of the Township of Montclair, Schenck, Price, Smith & King, L.L.P. (Richard H. Bauch, Esq., of Counsel)

For the Respondents-Respondents Department of Health of the Township of Montclair and the Township of Montclair, Robert A. Hoonhout, Esq.

This matter arose on May 5, 1997, when the Board of Education of the Township of Montclair (hereinafter "Board") abolished the positions of two of its six school nurses for reasons of economy effective June 30, 1997. In September 1996, the Board had contracted with the Department of Health of Montclair ("DOH") for the provision of registered nurses to fill the equivalent of 3½ nursing positions. When the Board executed a new contract with DOH for 1997-98 subsequent to the reduction in staff, it contracted for the provision of registered nurses to fill the equivalent of eight nursing positions. It also contracted with DOH for the provision of registered nurses to fill the equivalent of the same number of positions for 1998-99. Although not all of the nurses provided by DOH possessed an Educational Services Certificate with an endorsement as a School Nurse, all were fully licensed by the New Jersey Board of Nursing.

In July 1997, petitioners challenged the Board's action, alleging that abolishing the two school nursing positions and contracting with DOH for the provision of nursing services was in violation of their tenure rights.¹ In addition to the Board, petitioners named both the DOH and the Township of Montclair as respondents. However, by order of June 5, 1998, the Administrative Law Judge ("ALJ") dismissed the DOH from the case because the Commissioner did not have the jurisdiction to grant relief against

¹ Petitioners Montclair Education Association and Moira Palisits filed their petition on July 23, 1997, and Cynthia Samuel filed a separate petition on July 29, 1997. Following transmittal to the Office of Administrative Law, the matters were consolidated at the request of the parties.

it. On June 30, 1999, as part of her initial decision, the ALJ dismissed the Township for the same reason.

The ALJ rejected petitioners' claim that the contract between the Board and DOH for the provision of nurses was in violation of the Interlocal Services Act, N.J.S.A. 40:8A-1 et seq. Petitioners had argued that N.J.S.A. 18A:40-1 and N.J.S.A. 18A:40-3.1 prohibited a school district from contracting out for nursing services. The ALJ rejected this argument, stressing that prior Commissioner's decisions had held that licensed health care professionals may provide nursing services that do not require educational certification. Hence, the ALJ concluded that as long as the nurses provided by DOH did not render services restricted to certificated nurses and so long as it was empowered to render the contracted services within its own jurisdiction, the contract between the Board and DOH was not in violation of the Interlocal Services Act.

Concluding that scoliosis screening and audiometric screening could be performed by contract nurses, the ALJ found that there was no evidence in the contract between the Board and DOH that some of the duties to be assumed by the contract nurses were restricted to certificated nurses. Further concluding that the individual petitioners had not suffered any injury by virtue of the Board's action and that the Montclair Education Association was entitled only to ensure that contract nurses were not performing duties reserved to certificated nurses under the education laws, the ALJ stressed that petitioners had not pointed to any specific duties assigned to contract nurses that should have been reserved for certificated nurses. In addition, because the contracts in question had already been performed, there was no relief that could have been granted to the Association as a result of the appeal. The ALJ therefore

recommended that summary decision be granted to the Board and that the petitioners' appeals be dismissed with prejudice.

The Commissioner adopted the ALJ's initial decision with modification. Although agreeing with the ALJ that petitioners were not entitled to any relief, the Commissioner stressed that contract nurses could not perform the school nursing services enumerated in Old Bridge Township Education Association v. Board of Education of the Township of Old Bridge, decided by the Commissioner, November 26, 1997, aff'd with clarification by the State Board, April 1, 1998. Accordingly, the Commissioner directed that, to the extent the Board had a contract with DOH for the current year, it was to review the contract and attendant job descriptions to ensure that the nursing duties being performed pursuant to the contract did not conflict with duties specifically reserved for certificated school nurses employed by the district. The Commissioner further directed the District to make such revisions as necessitated by the review and to submit the results to the Essex County Superintendent of Schools for review and approval.

Petitioners appealed to the State Board of Education. Petitioners argue that the language of N.J.S.A. 18A:40-3.1 requires that the Board employ, manage, and compensate its school nurses. They further argue that the statute's express provision for the continuance of contracts for school nursing services entered into prior to February 27, 1957 demonstrates the Legislature's intent to prohibit district boards from delegating by contracts initiated after that date the provision of school nursing services to any entity other than the board. They also contend that absent express statutory authority to permit a public entity such as a district board to delegate its obligations to another entity, such public entity cannot delegate a power or duty delegated to it by

statute. Petitioners maintain that contracting with DOH for the provision of nursing services does just that in violation of N.J.S.A. 18A:40-3.1, which both mandates and authorizes district boards to directly employ every person employed as a school nurse or performing any school nursing service in the public schools.

In addition, petitioners argue that the contract between the Board and DOH violates the Interlocal Services Act because although DOH may be authorized to provide general nursing services, it is not statutorily authorized to provide school nursing services. They also contend that even if it is permissible for DOH to provide nursing services to the District, the Commissioner's decision should be modified because it fails to recognize that the job descriptions of the contract nurses are identical to those specifying the duties of the school nurses. Finally, they urge that the DOH nurses be compelled to cease providing services requiring certification as a school nurse and argue that there were not a sufficient number of school nurses employed by the District to ensure that school nursing services were being provided by certified school nurses.

Resolution of this appeal requires a clear understanding of the distinctions between the terms "nurse" and "school nurse" and between "nursing services" and "school nursing services" as those terms are defined by the education laws. The starting point for developing such an understanding is a review of the education statutes pertaining to the provision of nursing services in the public schools.

N.J.S.A. 18A:1-1 defines a "school nurse" as "... any school nurse...or any other nurse performing school nursing services in the public schools." Pursuant to N.J.S.A.

18A:1-1, “school nurses” are teaching staff members. As defined by the statute, a “teaching staff member” is:

...a member of the professional staff of any district...holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate appropriate to his office, position or employment, issued by the state board of examiners and includes a school nurse.

Similarly, N.J.S.A. 18A:6-38 provides that the State Board of Examiners must issue appropriate certificates “to render...nursing service to, pupils in public schools operated by boards of education.” Consistent with that statute, N.J.S.A. 18A:26-2 provides that “no teaching staff member shall be employed in the public schools...unless he is a holder of a valid certificate to...render...nursing service to pupils in such public school.” In addition, N.J.S.A. 18A:28-5, which specifies the requirements for the achievement of tenure by teaching staff members, expressly provides that the services of all school nurses shall be under tenure if they meet the statutory criteria, one of which is to possess an appropriate certificate issued by the State Board of Examiners.

As the Commissioner of Education stressed in his decision in Old Bridge, supra, each school district is required by statute to employ at least one “school nurse” who must be appropriately certified and who is a teaching staff member. Furthermore, under the statutory scheme, it is the “school nurse” who provides “school nursing services.” As set forth by the Commissioner in Old Bridge, “school nursing services” encompass those duties expressly reserved to “school nurses” by statute or regulation and include: 1) lecturing teachers on the recognition and prevention of communicable disease and other health concerns (N.J.S.A. 18A:40-3); 2) maintaining pupil health records and

assisting the medical inspector with physical examinations, including vision and hearing examinations (N.J.S.A. 18A:40-4); 3) examining pupils for the presence of scoliosis (N.J.S.A. 18A:40-4.3); 4) recommending exclusion from school due to illness or exposure to disease (N.J.S.A. 18A:40-7 and -8); 5) reporting, receiving reports, and conducting examinations in instances of suspected substance abuse (N.J.S.A. 18A:40A-12); 6) audiometric screening (N.J.S.A. 18A:40-4); and, 7) where assigned, providing instruction to students within the limitations of the “school nurse” endorsement (N.J.S.A. 18A:26-2).

Under the education laws, services other than those specifically reserved for “school nurses” are characterized as “nursing services” rather than “school nursing services.” As the Commissioner emphasized in Old Bridge, the education laws do not preclude a district board from employing properly licensed health care professionals who are supervised as required by the Board of Nursing pursuant to N.J.S.A. 45:11-23 to provide “nursing services.” Nor is there any prohibition against employing such health care professionals to assist the “school nurse” in providing “school nursing services” so long as they do not actually provide the service except as delegated by the “school nurse.” Old Bridge, supra, slip op. at 14-15. Further, effective July 1, 1999, school districts have been expressly authorized to “supplement the services provided by the certified school nurse with non-certified nurses, provided that the non-certified nurse is assigned to the same school building or complex as the certified nurse.” N.J.S.A. 18A:40-3.3.

As previously stated, “school nursing services” must be provided by a “school nurse.” Pursuant to N.J.S.A. 18A:40-3.1, “every person employed as a school

nurse...or performing any school nursing service...shall be appointed by the board of education having charge of the school or schools in which the services are to be rendered and shall be under the direction of said board....” N.J.S.A. 18A:40-1 mandates that every district board must employ at least one school nurse.” Because the “school nursing services” delineated above are required by law and must be provided by a “school nurse,” the Commissioner has held that each district board must employ a sufficient number of “school nurses” to ensure the adequate provision of “school nursing services.” Old Bridge, supra, slip op. at 14. However, as the Commissioner concluded in Dover Education Association v. Board of Education of the Town of Dover, decided by the Commissioner, December 12, 1997, slip op. at 10, nothing in the education laws precludes a board from contracting for the services of non-certified nurses to perform duties consistent with the dictates of Old Bridge.

Applying these principles to the instant appeal, it is clear that the Commissioner was correct in concluding that the contract between the Board and DOH did not contravene the Interlocal Services Act, N.J.S.A. 40:8A-1 et seq., so long as the role played by the nurses provided pursuant to the contract did not include independently performing functions reserved for the “school nurse” as those functions were delineated in Old Bridge. Therefore, we affirm the Commissioner’s decision in that respect. In doing so, we fully concur with the Commissioner that nothing in the Interlocal Services Act precludes local governmental agencies other than school districts from providing nursing services other than “school nursing services” to school districts.

We also find that it was appropriate for the Commissioner to direct the Board to review any contract it had with DOH and the attendant job descriptions to ensure that

duties being performed by nurses provided by DOH did not conflict with those reserved by law for “school nurses” employed by the Board. Accordingly, we also affirm that directive.

In its Report that was mailed to the parties to this appeal, our Legal Committee concluded that we should reject petitioners’ contention that there were an insufficient number of “school nurses” employed by the Board to provide the requisite “school nursing services.” In reaching this conclusion, the Report found that petitioners had not shown that this was in fact the case. The Report also found that petitioners had not shown that the nurses provided pursuant to the contract with DOH independently performed functions reserved for the “school nurse” during the relevant period.

In their exceptions to the Legal Committee Report, petitioners point to the fact that following the reduction in staff that is the subject of this appeal the Board employed only three certified school nurses on a full-time basis and that these individuals were assigned to three specific schools. Petitioners argue that these facts demonstrate that the Board did not employ a sufficient number of “school nurses” to provide the District’s students with those services which must be provided by certified school nurses employed by the Board. While we are not prepared to accept this conclusion on the basis of these facts alone, we find that the proper course for resolving the issue is to remand the matter to the Commissioner to develop a record that is sufficient to make such a determination. We also find that in order to properly make this determination, the Commissioner must ascertain whether the Board complied with his directive to review any contract it had with DOH for the 1999-2000 school year and District staffing patterns to insure that the Board’s provision of school nursing services was consistent

with the parameters established in Old Bridge, supra, and Dover, supra, and that the Board submit the results of its review to the Essex County Superintendent of Schools.

In remanding this matter, we stress that while there is no relief that could be afforded to the Montclair Education Association even if the Commissioner were to find on remand that the Board's action in abolishing the positions of the individual petitioners was improper, the individual petitioners would be entitled to relief for the period relevant to this appeal. We also stress that although N.J.S.A. 18A:40-3.3 is not applicable to this appeal since it was not enacted until 1999, the Board is required to comply with its terms in the event that it is currently supplementing the nursing services provided by its "school nurses" by contracting for the provision of other nurses.²

We do not retain jurisdiction.

Attorney exceptions are noted.

November 6, 2002

Date of mailing _____

² As previously stated, N.J.S.A. 18A:40-3.3 authorizes a district board to supplement the nursing services provided by its "school nurses" with non-certified nurses provided that any non-certified nurse is assigned to the same school building or school complex as the certified nurse.