

BOARD OF EDUCATION OF THE	:	
GLOUCESTER COUNTY INSTITUTE	:	
OF TECHNOLOGY, GLOUCESTER	:	
COUNTY,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
LENAPE REGIONAL HIGH SCHOOL	:	
DISTRICT, BURLINGTON COUNTY,	:	
	:	
RESPONDENT.	:	

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SYNOPSIS

Petitioner, Gloucester County Institute of Technology (GCIT), alleged respondent Lenape owed tuition for nine Lenape students in attendance at GCIT’s Southern N.J. Academy for the Performing Arts (Academy) for the 1997-98, 1998-99, 1999-2000 school years and beyond. GCIT contended that the performing arts program at the Academy is approved vocational education, that Lenape concedes having no comparable program, that the students attended, and that tuition was due under *N.J.S.A.* 18A:54-20.1. Lenape contended the petition was untimely filed. Moreover, Lenape alleged the Academy was not approved to provide vocational education, that dance and theater programs do not qualify as vocational education under *N.J.A.C.* 6:43-1.1 to –8.2, and that the Academy’s recruitment policies make it resemble a private institution. Lenape did pay transportation costs for those students.

Citing *Kaprow*, the ALJ agreed with GCIT that the matter was not untimely filed since there was no indication in the record through a resolution, minutes, or otherwise that the Lenape Board ever formally passed on the GCIT demand for tuition. The letters from Lenape to GCIT might have served as notice of official action, had there been one, but no notice came from the Board as the ALJ found is required, pursuant to *Kaprow*. Also, in light of an exhibit from the Department of Education, the ALJ found that the Academy’s performing arts program is approved occupational education. Thus, Lenape was obligated to pay for the students in attendance in the approved program. The ALJ noted that if the Academy violated conditions of its approval, then that is a separate matter to be brought before the Commissioner as a licensing question. The ALJ denied Lenape’s motion for partial summary decision and granted GCIT’s motion for summary decision.

The Commissioner concurred with the ultimate conclusion of the ALJ that GCIT was entitled to summary decision in this matter, but he so found based upon a different analysis from that proffered in the Initial Decision. Commissioner found that the actions of the Lenape Board clearly satisfy the requirements envisioned by *Kaprow* sufficient to trigger the running of the 90-day timeline for filing of a petition by GCIT. Thus, the Commissioner found that GCIT’s petition was untimely filed. The Commissioner, however, was persuaded that this matter presents a compelling public interest sufficient to warrant relaxation of the 90-day rule. The Commissioner determined that although Lenape honored its obligation with respect to the transportation of these students, it refused to similarly honor its legal responsibility for tuition. The Commissioner found that Lenape’s defenses to its withholding of payment were without substance and irrelevant to its responsibility. The Commissioner cannot and will not countenance a local board’s refusal to honor its obligations to vocational students because the board does not agree with prevailing decisional interpretations. The Commissioner affirmed Initial Decision with modification. The Commissioner granted summary decision to GCIT and directed Lenape to remit the tuition owed GCIT for the attendance of its resident students at the Academy for the 1997-98, 1998-99, 1999-2000 school years and thereafter, pursuant to a mutually acceptable payment schedule. The Commissioner directed Gloucester County Superintendent of Schools to review GCIT’s student acceptance practices.

OAL DKT. NO. EDU 10120-98  
AGENCY DKT. NO. 444-9/98

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of the respondent Board of Education of the Lenape Regional High School District (hereinafter “Lenape”) and the reply thereto from petitioner Gloucester County Institute of Technology (hereinafter “GCIT”) were filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4.

Lenape’s exceptions initially urge that the Administrative Law Judge (ALJ) should have dismissed the within petition and amended petition as untimely as they were clearly filed outside of the 90-day timeframe for such filings. In this regard, Lenape proffers that GCIT had “adequate notice,” no later than February 12, 1998, that the Lenape Board had decided that it would not pay tuition for residents of the Lenape District to attend CGIT. Notwithstanding this notice, GCIT’s Petition of Appeal was not filed until September 24, 1998, and its Amended Petition on October 20, 1999. (Lenape’s Exceptions at p. 5) In finding GCIT’s petition timely, Lenape argues, the ALJ erred in three ways. First, it advances, he misconstrued *Kaprow, supra*,

“as requiring notice of ‘formal’ board action, in the form of a ‘resolution, minutes, or otherwise.’” *Kaprow*, it advances, makes no such requirement. (*Id.* at p. 7) Rather, Lenape asserts, *Kaprow* stands for the proposition that

[u]nder *N.J.A.C.* 6:24-1.2(c), the limitations period begins to run when a party has “adequate notice” of a final order, ruling or other action by a board of education. The Court has observed that notice is “adequate” where it is “sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate.” *Kaprow*, 131 *NJ* at 587 (citation omitted). Adequate notice should also stimulate litigants to pursue a right of action within a reasonable time so the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims...[while also] “penaliz[ing] dilatoriness and serv[ing] as a measure of repose” by giving security and stability to human affairs. *Id.* at 587. Where the notice satisfies these goals, the formality or informality of the notice is irrelevant. *Id.* at 588. And, where such notice is provided, failure to initiate a contested case within the 90-day period, warrants dismissal of the Petition. (Lenape’s Exceptions at p. 6)

Consequently, Lenape attests, “*Kaprow* did not, [as concluded by the ALJ], require the Lenape Board to give notice of any direct or formal action, \*\*\*on the GCIT demand for tuition, either through a ‘resolution, minutes, or otherwise’; *Kaprow* merely required that the Lenape Board inform GCIT of its decision on the tuition issue, which it did on three separate occasions during February, 1998, through its board secretary and solicitor.” (Lenape’s Exceptions at pp. 9-10)

Even assuming, *arguendo*, that *Kaprow* requires notice of “formal” or direct board action, the ALJ’s second error in finding GCIT’s petition timely, Lenape argues, was his failure to recognize that the Lenape Board took such action with regard to GCIT’s tuition demand. As recognized by the ALJ in his factual findings, the undisputed affidavit of Dr. Hicks stated:

[W]hen GCIT’s demand for tuition was first received in September 1997, [Dr. Hicks} took the matter up with the Board of Education and was authorized to contact Mr. Ridsen for an opinion. Based on that opinion, the Board felt no responsibility to

pay and Mr. Ridsen and Mr. Rende were directed to so inform GCIT. Opinion, at 3\*\*\*. (Lenape's Exceptions at p. 10)

As such, the ALJ's own factual findings clearly belie his conclusion that the Board failed to take action on GCIT's demand in that such findings establish "not only was the Lenape Board advised of GCIT's demand for tuition, but it determined that it would deny that demand, and through Dr. Hicks, directed Mr. Ridsen and Mr. Rende to inform GCIT of same, which they did in writing on February 2, February 6, and February 12, 1998." (*Id.*)

Finally, although recognizing that the February 1998 letters provided GCIT with adequate notice of the Board's decision regarding its tuition demand, (see Initial Decision at p. 5), the third error committed by the ALJ in finding the within petition timely, Lenape asserts, was when he concluded "that the notice of board action [must] actually come from the board, as opposed to staff or counsel. Opinion, at 4-5." (Lenape's Exceptions at p. 11) Lenape proffers that, not only did the court in *Kaprow* never indicate that counsel for a board of education, acting under board authority, cannot provide adequate notice of a board's decision, but, herein, GCIT also received notice of the Board's decision from the Board Secretary, the very individual deemed sufficient, pursuant to *Kaprow*, to trigger the 90-day limitation period. (*Id.* at p. 12)

Lenape's next exception objects to the ALJ's October 20, 1999 order permitting GCIT to file an amended Petition of Appeal in this matter to include claims for tuition for the 1998-99, 1999-2000, and future school years, claiming such order was "improvidently granted" in that the claims for these additional school years are, similarly to GCIT's original petition, time-barred by the 90-day limitations period. (Lenape's Exceptions at p. 12) It further proffers that the ALJ should have denied GCIT's Motion to Amend its petition to include these time-barred claims pursuant to the rationale of *Halpern v. Board of Education of the Township of Delran, Burlington County*, 94 N.J.A.R. 2d (EDU) 22. (*Id.*)

Finally, Lenape excepts to the ALJ's "erroneously" concluding that GCIT's Performing Arts Program is approved vocational education based exclusively on a letter from the Department of Education that the program is so approved. It proffers that such letter was insufficient to support GCIT's Motion for Summary Decision because it constituted hearsay, *i.e.*, it was offered for the truth of its contents, and it does not fall under any exception to the hearsay rule which might permit its admissibility. Further, Lenape maintains, the Department concedes that many of the files relating to the approval process for this institution are no longer available, thus making it impossible for either the DOE or GCIT to positively confirm that GCIT properly complied with the approval process. Lenape takes issue with the ALJ's determination that whether or not GCIT is violating the conditions of its approval is irrelevant to Lenape's obligation to pay for its students attending an approved program. (Initial Decision at p. 5) To the contrary, it asserts, if the program is not an "approved vocational program," Lenape has no obligation to pay tuition at all. (Lenape's Exceptions at pp. 13-14) The ALJ's sole reliance on the DOE letter to confirm that the Academy is vocational education was also incorrect because the court failed to consider and address one of Lenape's major arguments, that the Academy is "private" rather than a county vocational education. In this regard, Lenape advances that the particular characteristics of this program "strongly suggest" that it is a private vocational school, *i.e.*, it solicits out-of-county pupils through advertisements; Academy representatives go to out-of-county schools to recruit the most talented students; and rather than limiting acceptance of out-of-county students to spaces available after all in-county students have been accepted as required by regulation, the Academy uses an audition process to "test in" students to the program. This has the effect of rejecting in-county students in favor of "more talented" out-of-county students; and, finally, the tuition charged for the Academy program, \$8,500 for the 1999-2000 school year, far exceeds the tuition at a typical "vocational" school. (*Id.* at pp. 13-14)

Lenape asserts that the ALJ's failure to consider whether GCIT was private vocational education is a significant error, which, at a minimum, requires the Commissioner to remand this matter for consideration of this issue, as a board of education's responsibilities vis-a-vis private vocational education institutions are appreciably different from those for county institutions. (*Id.* at p. 14)

In reply, GCIT states that the ALJ properly "interpreted and applied the holding of *Kaprow*," when he concluded that, because there was no "final action" of the Lenape Board in this matter with respect to GCIT's tuition payment demand, the within Petition of Appeal was timely filed. It urges the Commissioner to adopt the ALJ's decision for the reasons set forth therein.

Upon careful and independent review, the Commissioner concurs with the ultimate conclusion of the ALJ that petitioner GCIT is entitled to summary decision in this matter, but he so finds based upon the analysis outlined below rather than that proffered in the Initial Decision. Initially, the Commissioner rejects the ALJ's interpretation of *Kaprow, supra*, as requiring formal board action by way of "a resolution, minutes, or otherwise" (Initial Decision at p. 4) and direct notice by the board, as opposed to actions of its designated representatives taken at its behest, as absolute prerequisites to the triggering of the 90-day limitations period of *N.J.A.C. 6:24-1.2*. Such a rigid interpretation does not comport with that Court's articulation of the underlying purpose of both the limitations period and "adequate notice." Essentially, the *Kaprow* Court found the limitations period begins to run when a party has adequate notice of a final order, ruling or action by a board of education, adequate notice being defined as one which is "sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate." *Kaprow at 587*. Moreover, it found that notice is "adequate" where it furthers the purpose of the 90-day limitations period,

[t]hat is, the notice requirement should effectuate concerns for individual justice by not triggering the limitations period until the

[affected persons] have been alerted to the existence of facts that may equate in law with [their] cause of action.\*\*\* At the same time, [the notice] should further considerations of repose by establishing an objective event to trigger the limitations period in order “to enable the proper and efficient administration of the affairs of government.” *Id.*

The *Kaprow* Court further opined that where the notice provided to an individual satisfies these underlying goals, the formality or informality of the notice is irrelevant. *Id.*

Here, as was recognized by the ALJ, the uncontroverted affidavit of Dr. Hicks, Lenape Superintendent of Schools, confirms that the Board was advised when GCIT’s tuition demand was received, it sought a legal opinion on the issue, and, based upon that opinion, it directed both its Board Secretary and its counsel to communicate to GCIT that Lenape would not accept responsibility for the payment of the requested tuition. The record confirms that such directed communications were transmitted to GCIT by Board counsel on February 2, 1998 and February 12, 1998 and by the Board Secretary on February 6, 1998. The Commissioner finds and determines that these actions clearly satisfy the requirements envisioned by *Kaprow* sufficient to trigger the running of the 90-day timeline in *N.J.A.C. 6:24-1.2(c)* for the filing of a petition of appeal. Consequently, having been adequately placed on notice as of mid-February 1998 that Lenape had no intention of paying the tuition of its resident students attending GCIT’s Academy, the within Petition of Appeal, filed on September 24, 1998 for students enrolled for the 1997-98 school year, must be deemed untimely.<sup>1</sup>

Notwithstanding the well-established maxim that the limitations rule of *N.J.A.C. 6:24-1.2(c)* is to be strictly applied, the Commissioner is cognizant that he may, pursuant to his authority under *N.J.A.C. 6:24-1.15*, relax this rule under exceptional

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<sup>1</sup>Based on the tenor and tone of the communications it received from Lenape, the Commissioner cannot accept, as was argued below, that GCIT could reasonably harbor a belief at this time that the within matter was not ripe for appeal in that the parties were moving cooperatively towards resolution of their differences and that, therefore, tuition payment from Lenape might be forthcoming by the July 1, 1998 final due date.

circumstances or if there is a compelling reason to do so. (See *Kaprow, supra*, at 590; also see *DeMaio v. New Providence Board of Education*, 96 N.J.A.R. 2d (EDU 449, 453.) Such authority, the Commissioner observes, is rarely invoked unless strict adherence thereto would be inappropriate, unnecessary or where injustice would occur, *DeMaio* at 453, or where he finds the presence of a substantial constitutional issue or other issue of fundamental public interest beyond that of concern only to the parties themselves. *Pacio v. Lakeland Regional High School District*, 1989 S.L.D. 2060, 2064. The Commissioner's reasoned review of the within matter persuades him that it presents a compelling public interest sufficient to warrant relaxation of the 90-day rule.

There is no question that Lenape was fully aware that, under N.J.S.A. 18A:54-20.1 and N.J.A.C. 6:43-3.11, as interpreted by the Commissioner of Education, *M.R. by his guardian ad litem, J.N. and K.K. by his guardian ad litem, F.K. v. Board of Education of the Borough of Pompton Lakes, Passaic County*, decided by the Commissioner July 29, 1997, remanded State Board of Education December 3, 1997, and *K.B., on behalf of minor child, H.B. and Gloucester County Institute of Technology v. Board of Education of the Rancocas Valley Regional High School District, Burlington County*, decided by the Commissioner December 29, 1997<sup>2</sup>, it was obligated to pay the tuition and transportation costs for resident students attending the Academy at GCIT. The within record reflects that although Lenape honored its obligation with respect to the transportation of these students, it steadfastly refused to similarly honor its responsibility for tuition. Like the ALJ, the Commissioner finds and determines that Lenape's "defenses" to its withholding of payment are without substance and irrelevant to its responsibility.<sup>3</sup> The

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<sup>2</sup>See also *D.F., on behalf of minor child, E.F. v. Board of Education of the Borough of Roselle Park, Union County, et al.*, decided by the Commissioner July 9, 1999.

<sup>3</sup>To the extent that Lenape attempts to argue that GCIT's Academy for the Performing Arts is not a DOE approved program, such issue was previously resolved in *K.B., supra*, where the Commissioner found that such program falls within the scope of vocational education as contemplated by N.J.S.A. 18A:54-1, having taken judicial notice of the program's inclusion in the Department of Education's Directory of Verified Occupational Programs (DOE



Commissioner cannot and will not countenance a local board's refusal to honor its legal obligations to vocational students because the board does not agree with prevailing decisional interpretations.

Accordingly, the Initial Decision of the OAL is affirmed as modified, and summary decision is hereby granted to GCIT. Lenape is directed to remit the tuition owed GCIT for the attendance of its resident students at the Academy for the 1997-98, 1998-99, 1999-2000 school years and thereafter, pursuant to a mutually acceptable payment schedule to be arranged by the parties.

Notwithstanding the result herein, the Commissioner takes note of Lenape's allegations with regard to GCIT's failure to limit acceptance of out-of-county students consistent with rule. By copy of this decision, the Gloucester County Superintendent of Schools is directed to review GCIT's student acceptance practices and take such action, if any, as may be necessary as a result of her findings.<sup>4</sup>

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 16, 1999

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Publication PTM No. 1123.00, Revised 1995), reflecting its status as a DOE approved trade and instructional program.

<sup>4</sup> This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C. 6:2-1.1 et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.