76-00

BOARD OF EDUCATION OF THE TOWNSHIP OF WINFIELD, UNION COUNTY,	:	
PETITIONER ,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
_____	:	

SYNOPSIS

Petitioning Winfield Board sought termination of its sending-receiving relationship with respondent Rahway Board to send its secondary students to David Brearley High School located in the Borough of Kenilworth's District.

The ALJ concluded that it was uncontested that severance would not have a substantial negative financial impact. He further found that severance would not have a negative impact on educational quality or the racial composition of the affected districts and ordered that Winfield is authorized to terminate its existing sending-receiving relationship with Rahway and to enter into a new sending-receiving relationship with Kenilworth for a minimum duration of five years.

The Commissioner affirmed the conclusion of the ALJ that termination of the sending-receiving relationship between Winfield and Rahway will not result in any substantial negative financial, educational or racial impact and, therefore, determined that severance must be granted pursuant to *N.J.S.A.* 18A:38-13. In so determining, the Commissioner concurred with the ALJ that it is uncontested in the record that severance of the sending-receiving relationship would have no substantial financial impact. Similarly, the Commissioner was persuaded, for the reasons outlined by the ALJ in his decision, that the requested severance will not have a substantial negative impact on educational quality for either Rahway or Winfield students, nor result in a negative racial impact. As such, the Commissioner granted the requested severance, subject to Winfield's entering into a new sending-receiving relationship with Kenilworth for a minimum duration of five years. Withdrawal shall be phased out over a four-year period, beginning with the incoming 9th grade class in September 2000.

March 2, 2000

OAL DKT. NO. EDU 7138-98
AGENCY DKT. NO. 109-4/98

BOARD OF EDUCATION OF THE TOWNSHIP OF WINFIELD, UNION COUNTY,	:	
PETITIONER ,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
_____	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of respondent, Rahway Board of Education (hereinafter "Rahway"), and replies of petitioner, Winfield Board of Education (hereinafter "Winfield"), were filed in accordance with the requirements of *N.J.A.C.* 1:1-18.4.

Rahway urges that the Administrative Law Judge's (ALJ) decision be rejected and the within sending-receiving relationship be continued. Its exceptions, presented verbatim, argue:

1. The Judge's Order fails to maintain the stability of Rahway High School's sensitive racial balance and instead would result in pushing it closer to an imbalanced status.

2. The Judge's conclusion that there was no submission of evidence of "symbolic loss" is correct in that there was no testimony or statements of students or teachers concerning same. However, the Respondent's expert witness, Dr. Judith A. Ferguson, both in her report dated May 31, 1999, Exhibit R-1, at page 11, and in her testimony (T 7/21/99, P78, Lines 12-22) stated that losing white

students has a negative impact on the remaining black students, and she continues at (T 7/21/99, P79, Lines 3-11) that it (the loss of white students) could negatively impact the achievement level of the black students.

3. The Judge concludes that the mere reduction and the degree of diversity may or may not be a negative impact in a vacuum, and there was no evidence that when the new receiving district is also diverse, the negative impact is substantial. However, Dr. Judith A. Ferguson testified (T 7/21/99, P84, Line 8) that Kenilworth is much less diverse than Rahway and at (T 7/21/99, P 100) that the exposure to black students would be dramactically [sic] reduced at David Brearley, factors which it is argued should most certainly be considered.

4. Contrary to the Judge's Order, the evidence clearly shows that permitting the severance would have a substantial negative impact on the racial composition of the affected Districts.

(Rahway's Exceptions at 1-2)

Winfield's reply exceptions, preliminarily, assert that the exceptions filed by Rahway are, as a matter of law, insufficient to provide the Commissioner with a basis for rejecting or in any way modifying the ALJ's Initial Decision in this matter. It cites *N.J.A.C.* 1:1-18.4(b)(3) for the proposition that a party opposing an ALJ's conclusions of law must cite in its exceptions the legal authority which forms the basis for its exceptions. Winfield urges that Rahway failed to offer a single authority in support of its exceptions but, rather, merely made blanket assertions that the ALJ was incorrect. Such assertions, it maintains, are insufficient to provide the foundation for reversing or modifying the ALJ's decision. (Winfield's Reply Exceptions at 1-2) Winfield also objects to Rahway's challenge to the ALJ's factual findings and credibility determinations, since Rahway failed to provide transcripts to the agency, as required by *Matter of Morrison,* 216 *N.J. Super.* 143 (App. Div. 1987), to allow the Commissioner to evaluate the correctness of its assertions in this regard. Winfield asserts that Rahway apparently wants the Commissioner to reverse the ALJ's decision based upon "para-phrased and isolated statements" advanced by its expert witness at hearing. Winfield maintains

that, without review of the entire transcript, including numerous contradictions of this expert's testimony revealed in cross-examination, "the Commissioner has no way of knowing that many of the statements provided by Rahway's expert lacked any meaningful evidential support." (Winfield's Reply Exceptions at 3)

Substantively, in response to Rahway's exception advancement that the ALJ's order failed to maintain racial stability, Winfield warrants that such a proposition "is false and against the clear weight of credible evidence presented at the hearing." (*Id.*) It argues:

> At the hearing, Rahway's expert relied upon a study that defined what is meant by a "balanced high school." Dr. Ferguson pointed out that the racial composition of Rahway High School is currently "in balance" (Exhibit R-1, p. 6). In her report, Dr. Ferguson cited Gray-Little and Carels' definition of a balanced high school as "40-60% of the school's population the same as the student's race" (Exhibit R-1, p. 9). Dr. Ferguson admitted that the racial balance of Rahway would remain within the 40% to 60% range with or without the Winfield students in its population (Ferguson – Cross, August 19, 1999, p. 17).*** Dr. Ferguson also agreed that the only way this balance could be disrupted would be by Rahway's own enrollment fluctuations (Ferguson – Cross, August 19, 1999, p. 17) Accordingly, Rahway's own expert and sole witness admitted that "racial balance" really was not at issue in this case. (*Id.* at 3-4)[1]

Further, Winfield advances, the ALJ, after acknowledging the realities and pitfalls of racially imbalanced schools, and exhaustively examining existing case law where such balance issues were critical in denying severance, determined that this particular concern did not come into play in the within matter, stating:

> It is difficult to deny severance in the present matter in light of the statute's preference for sending district choice absent evidence of racial concentrations like those described in *Englewood* and *Belmar*.

[1]Although Winfield's reply exceptions stated that, because it was using statements contained in Dr. Ferguson's cross-examination as a part of its argument, a copy of the transcript was being forwarded to the Commissioner with the hard copy of its reply exceptions, the referenced submission filed with the Commissioner did not include any transcripts.

> The percentage of minority students attending Rahway High School, currently 55%, cannot be characterized as imbalanced, particularly when compared to the obvious imbalance in Dwight Morrow (82.2%) and Asbury Park (83%). Further, Rahway's expert testified that any school between 40% and 60% non-white is "in balance." [Initial] Decision, pg. 41. (Winfield's Reply Exceptions at 4)

Winfield, therefore, contends that given the within record lacks any proof in substantiation of Rahway's contention of racial imbalance, its exception in this regard should be disregarded.

Winfield next states that it finds Rahway's exception with regard to "symbolic loss" perplexing, to say the least. While readily conceding that the ALJ correctly found that there was no objective evidence presented to establish any actual or potential psychological impact on Rahway minorities as a consequence of losing Winfield white students, Rahway contends that the ALJ "should have accepted its expert's speculation that severance *could* adversely impact Rahway students." (*Id*. at 5) (emphasis in original) Winfield advances that absent some objective proof tending to support its expert's conclusory statements which, it avers, Rahway had every opportunity to proffer but failed to do so, the mere "opinion" of this individual cannot serve to discredit the ALJ's ruling which is well supported in the record and case law. (*Id.*)

Responding to Rahway's argument that severance should be denied because Kenilworth is less diverse than Rahway and, therefore, Winfield students would not receive a culturally diverse education, Winfield avows that such a contention is categorically untrue. As recognized by the ALJ and fully evident in the record, it advances, "Kenilworth has a substantial minority population that comprises approximately 20% of its total student body." (*Id.* at 7) Winfield points out that the ALJ thoroughly and carefully addressed this very issue, in light of current case law stating:

> What distinguishes the proposed move of Merchantville students from Pennsauken to Haddonfield in *Merchantville* from the situation in the extant case is that here the proposed **new receiving district <u>is</u> diverse, just not <u>as</u> diverse as the current receiving district.** In *Merchantville*, the proposed receiving district was *not at all* diverse (described as "virtually all white" by the State Board [at 15]), and the current receiving district had a minority high school population of 25%.
>
> Thus the facts are clearly distinguishable on the educational impact issue. What *Merchantville* stands for is the proposition that a racially diverse environment is the preferred environment and I agree. **The mere reduction in the degree of diversity may or may not be a negative impact in a vacuum, but there was no evidence before me that when the new receiving district is also diverse (and apparently more diverse than the Winfield community) the negative impact is substantial.**
>
> I agree that severing a send-receive relationship with a diverse educational community to enter a relationship with a non-diverse educational community would result in a substantial negative impact on educational quality. I cannot, however, from the evidence before me, conclude that the proposed severance here would result in such a substantial negative impact.*** [Initial Decision], pp. 22-23.
>
> (*Id.* at 8; bolding emphasis in original)

Notwithstanding Rahway's unsupported declarations to the contrary, Winfield proffers, Kenilworth, where one out of every six students is from a different cultural, ethnic or religious background, would provide Winfield students with a very diverse education, and, therefore, Rahway's "specious" exception should be dismissed as meritless. (*Id.* at 8-9)

Finally, Winfield categorizes Rahway's last exception argument as "nothing more than a blanket statement that the Court was incorrect," which does not rise to the level of an exception. Because, it advances, at no time has Rahway persuasively established that any substantial negative impact would inure as a result of severance, Winfield urges that the Initial Decision be adopted. (*Id*. at 10)

Upon his careful and independent review of the record, including the exception submissions of the parties, the Commissioner affirms the conclusion of the ALJ that the

termination of the sending-receiving relationship between Winfield and Rahway will not result in any substantial negative financial, educational or racial impact and, therefore, severance must be granted pursuant to *N.J.S.A.* 18A:38-13. In so determining, the Commissioner concurs with the ALJ that it is uncontested in the record that the severance of the sending-receiving relationship would have no substantial financial impact. (Initial Decision at 19-20) Similarly, the Commissioner is persuaded, for the reasons outlined by the ALJ in his decision, that the requested severance will not result in a substantial negative impact on educational quality for either Rahway or Winfield students.

The pivotal issue in this case is whether negative racial impact arising as a consequence of a potential severance is "substantial" so as to defeat Winfield's application for severance. Rahway's exceptions dispute: 1) facts and conclusions of the ALJ with respect to the psychological effect that withdrawal of the white Winfield students could have on the remaining black students; 2) his finding that decrease in the white population at Rahway would not seriously affect the racial balance of Rahway; and 3) his finding that there was no evidence that, when moving to a receiving district which is also diverse, any negative impact is substantial. Rahway's exceptions request the Commissioner to overturn such determinations, claiming that they are belied by the testimony of its sole witness, Dr. Judith Ferguson, testimony to which, Rahway advances, the ALJ obviously failed to ascribe the proper weight and credence. However, the record before the Commissioner does not include transcripts of the five days of OAL hearings in this matter. It is axiomatic that challenges to the factual findings predicated upon testimony and resultant credibility determinations made by an ALJ require the party to supply the agency head with the relevant and necessary portion of the transcript. *See Matter of Morrison, supra*, at 158 (App. Div. 1987). Thus, without the ability to conduct a pertinent

transcript review from which to draw his own conclusions, the Commissioner defers to the determinations reached by the ALJ who was in a position to hear and adjudge the credibility of witnesses. *See Parker v. Dornbierer*, 140 *N.J. Super.* 185, 188 (App. Div. 1976) Upon his full review, the Commissioner determines that such findings and conclusions of the ALJ are well grounded in the record and such record, additionally, does not provide any cause to challenge the weight ascribed by the ALJ to the testimony of Rahway's expert. Consequently, Rahway's exception challenges to credibility assessments made by the ALJ and the factual findings predicated thereon, are rejected as being without merit.

The Commissioner finds the ALJ's analysis of the racial impact issue, wherein he thoroughly reviewed the governing case law (Initial Decision at 23-37) and applied its principles to the particular facts and testimonial and evidentiary proofs advanced by the parties in this matter (*Id.* at 37-42), to be comprehensive and cogent. The ALJ recognized that "severance here would result in an approximately 1.9% decrease in the proportion of white students attending Rahway and a gross percentage decrease in the overall white student population of 7.9%" (*Id*. at 39), statistical changes which, in and of themselves are not significant, and ones which, according to its own expert, would not leave Rahway a racially out-of-balance school. (*See* Initial Decision at 41.) After fully considering the State Board's pronouncement in this connection in *Board of Education of the Borough of Merchantville, Camden County v. Board of Education of the Township of Pennsauken, Camden County v. Board of Education of the Borough of Haddonfield, Camden County,* decided by the State Board January 7, 1998, wherein it stated at 7:

> we***reject the view that a statistical change in the racial composition of the current receiver is alone dispositive of whether a significant negative impact will result from severance. *Englewood, supra*. Rather, as mandated by the statute, it is imperative that the

> significance of the statistical change in a particular case be evaluated under "all of the circumstances"

the ALJ determined that, under the totality of the circumstances established here, this matter was clearly distinguishable from *Englewood, supra, Merchantville, supra,* and *Belmar, supra,* and he concluded that no *substantial* negative impact has been demonstrated here.

That some impact on Rahway and Winfield, both positive and negative, will follow from termination is a proposition implicitly recognized. However, the operative language of the controlling statute, *N.J.S.A.* 18A:38-13, requires that the Commissioner, in making a determination on a petition to terminate a sending-receiving relationship, shall grant the requested relief if no *substantial negative impact* be found to result. Also particularly pertinent here is the State Board's clarification of the allocation of the burden of proof in these matters:

> [W]e find that the initial burden of production on the petitioning party may be met by production of a feasibility study as required by the statute and the submission of appropriate proofs as to where its children are to be educated upon severance of the sending-receiving relationship. *See Absecon Bd. of Ed. v. Pleasantville Bd. of Ed.*, decided by the State Board of Education, October 7, 1988. Obviously, the feasibility study must address, at a minimum, all of the areas specifically set forth in the statute, and petitioner must establish in the proceedings the factual basis underlying the study so as to withstand challenge by the party contesting termination. Once the petitioning board has met its initial burden of production, the burden shifts to the party contesting termination to go forward with evidence that termination will result in a negative impact.***
>
> The allocation of the burden of production delineated above does not shift the ultimate burden of persuading the Commissioner that termination is mandated or warranted. That burden remains on the petitioning party. However, where a petitioner has met its initial burden of production in proceedings under *N.J.S.A.* 18A:28-13, ***the claim by the respondent that termination will have a substantial negative impact is in the nature of an affirmative defense. Thus, it is appropriate that the party asserting that claim bear the burden of showing that a negative impact outweighing any positive benefits of termination will result.

(*Board of Education of the Borough of Merchantville, Camden County v. Board of Education of the Township of Pennsauken, Camden County v. Board of Education of the Borough of Haddonfield, Camden County*, State Board of Education decision on motion, decided on Sept. 7, 1990, at 5-6)

The Commissioner finds, as did the ALJ, that Winfield has fulfilled its responsibility pursuant to the State Board's directive. On the other hand, the record is devoid of competent, credible evidence to substantiate the allegations and apparent speculations of Rahway and its expert that substantial negative impact will ensue from the granting of severance and, thus, the Commissioner concludes that Rahway has failed to meet its burden in this regard. Consequently, absent a showing of substantial financial, educational, or racial negative impact herein, the Commissioner is required to grant the requested severance.

Accordingly, the Initial Decision is adopted as the final decision in this matter for the reasons expressed therein. Winfield's application for severance of its sending-receiving relationship with Rahway is hereby granted, subject to its entering into a new sending-receiving relationship with Kenilworth for a minimum duration of five years. Withdrawal shall be phased out over a four-year period, beginning with the incoming 9th grade class in September 2000.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: March 2, 2000

[2] This decision, as the Commissioner's final determination, 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.