

EDU #5492-00  
C # 348-00L  
SB # 70-00

BOARD OF EDUCATION OF NORTHERN :  
HIGHLANDS REGIONAL HIGH SCHOOL :  
DISTRICT, BERGEN COUNTY, :  
RESPONDENT/APPELLANT, : STATE BOARD OF EDUCATION  
V. : DECISION ON MOTIONS  
NEW JERSEY DEPARTMENT OF :  
EDUCATION AND MICHAEL AZZARA, :  
ASSISTANT COMMISSIONER, :  
RESPONDENTS. :

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Decided by the Commissioner of Education, November 1, 2000

For the Appellants Hanns and Gertrudis Heiliger, Denbeaux & Denbeaux  
(Marcia W. Denbeaux, Esq., of Counsel)

For the Respondent/Appellant Board of Education of Northern Highlands  
Regional High School District, Strasser & Associates  
(William I. Strasser, Esq., of Counsel)

For the Respondents New Jersey Department of Education and Michael Azzara,  
Allison Colsey Eck, Deputy Attorney General (John J. Farmer, Jr.,  
Attorney General of New Jersey)

For the Intervenors/Respondents Russell and Kathleen Pepe,  
Harwood Lloyd, LLC (David Repetto, Esq., of Counsel)

In February 2000, Assistant Commissioner Michael Azzara notified the Northern  
Highlands Regional High School District that its request to the Department of Education

for review of its proposal to install lighting at the school's athletic field had been denied, concluding that such proposal did not fall under the purview of an "educational adequacy" review pursuant to N.J.A.C. 6:22-1.1 et seq. The Regional Board thereupon filed a petition with the Commissioner of Education challenging that determination. The Commissioner subsequently transmitted the case to the Office of Administrative Law.

In an oral decision rendered on October 6, 2000, the Administrative Law Judge ("ALJ") denied the requests by Russell and Kathleen Pepe and Hanns and Gertrudis Heiliger, whose homes abut the athletic field, to intervene in the matter. Both the Pepes and the Heiligers requested interlocutory review of the ALJ's determination by the Commissioner.

In a letter decision dated November 1, 2000, the Commissioner granted the Pepes' request to intervene, but denied the Heiligers' request.

On December 4, 2000, the Heiligers filed the instant motion with the State Board of Education for leave to appeal an interlocutory decision of the Commissioner, challenging the Commissioner's determination to deny their request to intervene. Since their motion was filed beyond the five-day filing period set forth in N.J.A.C. 6A:4-2.3, the Heiligers requested that their motion be considered nunc pro tunc.

On December 14, 2000, the Northern Highlands Regional Board filed a "cross-motion" for leave to appeal the Commissioner's interlocutory decision. Such motion challenged that portion of the Commissioner's decision granting the Pepes' request to intervene. By letter dated December 15, 2000, the Director of the State Board Appeals Office advised the counsel for the Regional Board that "the regulations governing appeals do not provide for a motion for leave to file a cross-appeal from an

interlocutory determination. N.J.A.C. 6A:4-2.3. Under the regulations, the State Board will be considering whether to grant your request for leave to appeal the Commissioner's interlocutory ruling nunc pro tunc."

After a careful review of the parties' submissions, we deny the instant motions.

N.J.A.C. 6A:4-2.3 requires that a "[m]otion for leave to appeal an interlocutory order, decision or action shall be made by filing a motion for leave to appeal to the State Board of Education within five days after the action or service of the interlocutory decision or order." In this case, the Heiligers' motion was filed on December 4, 2000, more than a month after the Commissioner's interlocutory decision was issued and mailed. The Regional Board's motion was filed ten days later on December 14.

Although the regulations permit relaxation of the rules governing appeals, N.J.A.C. 6A:4-1.19, we find that the parties have failed to provide sufficient cause in this case for relaxation. In a brief filed in support of the Heiligers' motion, their counsel contends that she had "erroneously regarded the [Commissioner's] order as final rather than interlocutory and filed a notice of appeal within the time for appeal." In a certification filed in support of her request to file the motion nunc pro tunc, counsel for the Heiligers avers that she had "not discovered a reference to support the five (5) day appeal deadline."

As previously indicated, N.J.A.C. 6A:4-2.3, which is contained in the regulations governing appeals to the State Board, is clear in providing a five-day filing deadline for a motion for leave to appeal an interlocutory decision. In addition, during the proceedings below, the Heiligers were expressly put on notice of the interlocutory nature of their challenge. On October 16, 2000, the counsel for the Heiligers was informed by the

Director of the Bureau of Controversies and Disputes that the Heiligers' letter to the Commissioner challenging the ALJ's October 6, 2000 oral ruling was "being construed as a request for interlocutory review." And, indeed, the Commissioner expressly indicated in his decision of November 1, 2000 that he had reviewed the submissions in connection with the Heiligers' request for interlocutory review of the ALJ's determination.

We stress, in addition, that the issue currently before the Commissioner is limited to whether the Regional Board's request for review of its lighting proposal involved "educational adequacy" issues so as to require review by the Department of Education. As pointed out by the Commissioner: "It should be clearly understood that this proceeding will not result in a determination as to whether the Board's application, if reviewable, is to be granted; rather, should the Board prevail at any level of inquiry outlined herein, the relief accorded would be an order directing the Department to review its application." Commissioner's Decision, slip op. at 2 (emphasis in original). Thus, the Heiligers' interest at this juncture of the proceedings is tenuous at best.

The Regional Board, which opposes the Heiligers' motion as untimely, has provided no basis for allowing its late filing other than to indicate that its motion had been "made necessary" by the Heiligers' motion. Under the circumstances, we can also find no justification for relaxing the rules so as to permit the Regional Board's motion.<sup>1</sup>

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<sup>1</sup> We agree in addition with the Pepes, who, in their brief in opposition to the Northern Highlands Regional Board's motion, dispute the Regional Board's characterization of its submission as a "cross-motion." The Regional Board's motion challenges the Commissioner's determination to grant the Pepes' request to intervene, while the Heiligers' motion challenged the Commissioner's determination to deny their request, an issue entirely distinct and unrelated to the ruling challenged by the Regional Board. Thus, even if cross-motions were authorized by the rules, the Regional Board's motion could not properly be characterized as such.

Consequently, we deny the instant motions for leave to appeal the Commissioner's interlocutory decision of November 1, 2000.

February 7, 2001

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