State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENT RELIEF

OAL DKT. NO. EDU 12765-15

AGENCY DKT. NO. 228-8/15

BOARD OF EDUCATION OF THE HIGH POINT REGIONAL HIGH SCHOOL DISTRICT, SUSSEX COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTAGUE, SUSSEX COUNTY, AND PORT JERVIS CITY SCHOOL DISTRICT BOARD OF EDUCATION, ORANGE COUNTY, NEW YORK,

Respondents.

Gregory F. Kotchick, Esq., and **M. Murphy Durkin**, Esq. for petitioner, Board of Education of the High Point Regional High School District, Sussex County (Durkin & Durkin, attorneys)

Daniel M. Perez, Esq., and **Gary A. Kraemer**, Esq., for respondent, Board of Education of the Township of Montague, Sussex County (Daggett & Kraemer, attorneys)

Thomas Scapoli, Esq., for respondent, Port Jervis City School District Board of Education, Orange County, New York, (Ingerman Smith, attorneys)

BEFORE **EVELYN J. MAROSE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, the Board of Education of the High Point Regional High School District (hereinafter High Point), seeks an order enjoining students from the Township of Montague (hereinafter Montague) from enrolling in Port Jervis City School District, Orange County, New York (hereinafter Port Jervis), except as permitted by approved transition plan and other related relief. Opposition was filed on behalf of Montague. Both High Point and Montague appeared for oral argument on August 31, 2015, and submitted supplemental papers on September 1, 2015.

Port Jervis was not represented at oral argument. Both counsel for High Point and counsel for Montague indicated at oral argument that they had not received any papers from counsel for Port Jervis regarding the Petition for Emergent Relief. Today, on September 1, 2015, I received a fax from Thomas Scapoli, Esq., indicating that it was faxed August 31, 2015. Counsel, on behalf of Point Jervis, opposes High Point's request for emergent relief. The fax does not indicate that it was served upon either Montague or High Point and accordingly was not considered by me. However, based upon my determination, Point Jervis is not prejudiced.

FACTUAL DISCUSSION AND FINDINGS

The underlying facts relevant to this decision are not in dispute. For perhaps eighty-five years Montague has provided educational programs for its elementary students and has sent its seventh- through twelfth-grade students to other schools, including those in Port Jervis. A Sending-Receiving Tuition Contract Agreement, between Montague and Port Jervis, dated September 19, 2000 (hereinafter Montague/Port Jervis Agreement), provides among other things that Port Jervis will provide educational services on a nonexclusive basis to some of Montague's students. The Montague/Port Jervis Agreement expressly notes that some students may attend private, vocational-technical, charter, parochial, or other public schools rather than

attend school in Port Jervis. The term of the Montague/Port Jervis Agreement is perpetual, with cancellation upon a minimum of five years written notice by either party. The agreement is expressly noted to be governed by and construed in accordance with the laws of the State of New Jersey. (Perez Certification, Exhibit A.)

In late 2012/early 2013, Montague and High Point began to communicate regarding the possibility of a sending/receiving relationship. Montague's counsel wrote a letter to the New Jersey Commissioner of Education on March 4, 2013. Counsel advised the Commissioner that, while Montague had been in a long-term relationship with Port Jervis, the goal of the Montague Board of Education was "ultimately to return all of its students to New Jersey for grades pre-K to 12." Counsel asked for guidance as to the ability to withdraw from a sending/receiving relationship with an out-of-state district upon reasonable notice. Counsel inquired if it would be possible for the Commissioner to withdraw consent for the out-of-state relationship, and, if not, what process should Montague follow in replacing an out-of-state sending relationship with a sending/receiving relationship in-state. Copies of the March 4, 2013, letter sent to the Commissioner were forwarded to the Montague Board President, the Montague Chief School Administrator, the Montague Business Administrator, and Sussex Executive County Superintendent. (Perez Certification, Exhibit F.)

Approximately three months later, Montague's counsel wrote a second letter to the Commissioner, on June 18, 2013, regarding Montague's long-term sending relationship with Port Jervis. Counsel noted that the district and the community had continued concerns about paying tuition to an out-of-state district with an inability to provide a New Jersey diploma to Montague students and a district that relied upon New York assessments and educational standards. The Commissioner was informed that Montague and High Point had agreed upon terms for a sending/receiving agreement that they were interested in memorializing within a month or two. Counsel made "an application to the Department of Education to facilitate the withdrawal of consent and potential return of its [Montague's] high school age students to New Jersey beginning as of September 2013" pursuant to N.J.S.A. 18A:38-10. In particular, it was noted that the initial decision to seek permission to contract for out-of-state educational services was first signed over sixty year ago. Since then the New Jersey County roads at issue were

developed, maintained, and upgraded for safety. In the event of inclement weather, Montague and administrators of the nearby schools consulted with each other regarding inclement weather closings or delayed openings. In the case of inclement weather, two routes were available between the High Point and Montague Districts. The shorter route involved travel over "the mountain" and was 14.48 miles in length. The longer route did not involve travel over "the mountain" but was 21.29 miles in length. Counsel also provided the Commission with details regarding mileage between Montague and other relevant schools that Montague students were attending. Copies of the June 18, 2013, letter sent to the Commissioner were also forwarded to the Montague Board President, the Montague Chief School Administrator, the Montague Secretary/Business Administrator, and the Interim Executive Sussex County Superintendent. (Perez Certification, Exhibit F.)

On June 24, 2013, the Commissioner of Education wrote a letter to Montague's counsel stating as follows:

> Please be advised that the application submitted on behalf of the Montague Board of Education, dated June 18, 2013, requesting that the Commissioner withdraw his consent for the attendance of pupils in grades 9 through 12 at the public schools of Port Jervis, New York, pursuant to N.J.S.A. 18A:38-10, is hereby granted. After carefully considering the information submitted, including a historical description of the circumstances that led to the creation of the out-of-State send-receive relationship and an explanation of the improved road and travel conditions in the geographic area served by the Montague Board of Education and the surrounding school districts, I conclude that the reasons for the initial consent now cease to exist. As such, the Montague Board of Education may enter into a send-receive relationship with the High Point Regional School District for the education of its students in grades 9 through 12.

The Commissioner also was forwarded copies of his determination to the Montague Board President, the Montague Chief School Administrator, the Montague Secretary/Business Administrator, and Interim Executive Sussex County Superintendent. (Perez Certification, Exhibit F.)

Thereafter, High Point and Montague executed a Sending-Receiving Agreement, dated August 13, 2013 (Montague/High Point Agreement). This Agreement was signed on behalf of High Point by the Vice President of the High Point Board of Education and on behalf of Montague by the President of the Montague Board of Education. The Montague/High Point Agreement concerned the provision of educational services only to Montague pupils in grades nine through twelve and was effective only for ninth-grade students beginning last September 1, 2014. (Perez Certification, Exhibit E.)

On November 12, 2013, Montague made a further application to the Commissioner requesting that he withdraw his consent for Montague seventh- and eighth-grade students to be educated at Point Jervis pursuant to the Montague/Point Jervis Agreement. Counsel forwarded copies of this application to the Montague Board President, the Montague Chief School Administrator, the Montague Secretary/Business Administrator, and the Interim Executive Sussex County Superintendent. (Verified Petition of Appeal, Exhibit E.) On November 19, 2014, the Commissioner granted Montague's request to terminate its send-receive relationship with Port Jervis for its seventh- and eighth-grade students. The Commissioner also forwarded copies of his determination to the Montague Board President, the Montague Chief School Administrator, the Montague Secretary/Business Administrator, and the Interim Executive Sussex County Superintendent. (Verified Petition of Appeal, Exhibit F.)

By letter dated April 10, 2015, High Point sought confirmation from Montague that Montague students would be attending High Point, in according with the Montague/High Point Agreement. (Verified Petition of Appeal, Exhibit G.) By letter dated April 20, 2015, the Interim County Executive for the Sussex County Board of Education advised Montague that it had come to her attention that several Montague parents were intending to enroll their children in Port Jervis. In fact, the Interim County Executive was advised that the Montague Board President may have indicated at Port Jervis Board Meetings that Montague students should be able to continue to attend schools in Port Jervis. The Interim County Executive advised Montague that such actions were not in compliance with the Commissioner's prior decisions and the Montague/High Point Agreement, by which Montague was obligated to abide. The Interim County Superintendent stated that she had unsuccessfully attempted to meet

with the Montague Board President and Montague school administration on several occasions and remained willing to meet with them. A copy of her letter was sent to the Assistant Commissioner, the Deputy Chief Legal and External Affairs, the Executive County Business Office, the Montague Superintendent, the Montague School Business Administrator/Board Secretary, the High Point Superintendent, the High Point Business Administrator/Board Secretary, the Port Jervis Superintendent, and the Port Jervis Assistant Superintendent for Business. (Verified Petition of Appeal, Exhibit H.)

A Notice of Motion for Emergent Relief was filed by High Point on August 19, 2015, seeking to enjoin Montague from enrolling any students in Port Jervis, except as permitted by the transition plan. Emergent relief is opposed by Montague who asserts that injunctive relief is inappropriate.

LEGAL ARGUMENT AND CONCLUSIONS OF LAW

N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief. The regulation instructs in salient part:

> (b) A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
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> 2. The legal right underlying petitioner's claim is settled;
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> 3. The petitioner has the likelihood of prevailing on the merits of the underlying claim; and
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> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

Emergent relief should not be granted except "when necessary to prevent irreparable harm." Crowe, supra, 90 N.J. at 132. The moving party bears the burden of proving irreparable harm. More than a risk of irreparable harm must be demonstrated.

"The requisite for injunctive relief has been characterized as a 'clear showing of immediate irreparable injury,' or a 'presently existing actual threat; [emergent relief] may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by the common law.'" Cont'l Group v. Amoco Chems. Corp., 614 F.2d 351, 359 (D.N.J. 1980) (citations omitted). Injunctive relief is only appropriate where money damages are not readily calculable. United Board and Carton Corp. v. Britting, 63 N.J. Super. 517, 533 (Ch. Div. 1959).

After hearing the arguments of High Point and Montague and considering their documents submitted, I **CONCLUDE** that the law regarding High Point's Claim is settled. There is a statute on point as to a sending/receiving agreement between a New Jersey district and out-of-state district. Such an agreement must be approved by the New Jersey Commissioner of Education, who may withdraw his consent upon reasonable notice, wherever the reason or reasons for the consent shall cease to exist.

I **CONCLUDE** that High Point is likely to prevail on the merits of its underlying claim. As detailed above, approximately eight months prior to execution of the Montague/High Point Agreement, an inquiry was made to the Commissioner of Education regarding the possibility of educating Montague's students in New Jersey rather than New York State, where they would receive a New York diploma that relies upon New York assessments and standards. Subsequently, after being provided with more of a factual basis for the request, the Commissioner withdrew his consent for Montague's ninth- through twelfth-grade students to enroll in Port Jervis. Thereafter, Montague made a further request to be able to terminate its send/receive relationship with Port Jervis as to its seventh- and eighth-grade students. After the review of that supplemental request and with the input of the County Superintendent, the Commissioner then withdrew his consent for Montague's seventh- and eighth-grade students to be enrolled in Port Jervis. All of the determinations were made pursuant to transition plans. All requests and determinations, including those made by Montague's then counsel were carbon copied, among others, to the Montague Board of Education and County Superintendent. No appeal of either determination of the Commissioner was ever filed.

The cited cases by Montague are not on point. In both matters, the decision of the Montague Board was affirmed, against a parent of Montague student. In this case, a current Montague Board of Education is seeking to act in opposition to the actions of a former Montague Board of Education. Further, both decisions were made some time ago—one in 1994 and one in 2000.

Despite the foregoing, High Point has not met all four prongs necessary for any emergent relief. Essentially, in determining its staffing needs, High Point has relied upon the High Point and Montague Sending/Receiving Agreement, dated August 13, 2013, which provides a schedule for the sending/receiving relationship that began in September 1, 2014. The parties agreed upon a flat per pupil rate from 2014 to 2024. The per pupil rate for the 2015-2016 school year is $14,796. Thus, the damage at issue is the monies that would have been paid to High Point for the education of Montague students who are presently enrolled to attend school in Port Jervis for the 2015-2016 school year. Based, solely for purposes of this Petition, upon the representations of High Point in their supplemental papers, High Point's damage is the loss of seventeen pupils (6 - 47 = 17) times the per pupil rate, or $251,532. (Ripley Certification, Paragraph 5, and Exhibit A.) Thus, I **CONCLUDE** that High Point has not presented any credible evidence that it will suffer any irreparable harm if the requested relief is not granted, with the exception of calculable monetary damages.

While the equities favor High Point, I further **CONCLUDE** that neither party will suffer greater harm than the other if emergent relief is denied. As noted in detail above, after many years of a sending/receiving relationship with Port Jervis, the Montague Board of Education, sitting in 2012-2013 asked the New Jersey Commissioner of Education to determine if he would withdraw his consent to have Montague pupils educated out of state in Port Jervis. Subject to transition plans, the Commissioner withdrew his consent. All correspondence at issue, though at times addressed to or by Montague's counsel, was carbon copied to the Montague Board President, the Montague Chief School Administrator, the Montague Secretary/Business Administrator, and the Interim Executive County Superintendent, who did not object to the substance of the communications nor to the determinations of the Commissioner. In fact, the Commissioner's determinations were never appealed. The Montague/High Point

Sending/Receiving Agreement took effect last year, September 2014. In equity, it is reasonable for High Point to believe that Montague should act in accordance with the Montague/High Point Agreement's terms. In equity, it is unreasonable for the current Montague Board of Education and Montague citizens to not be obligated to comply with an Agreement entered by a former Board. No evidence was presented by Port Jervis that Port Jervis objected to the implementation of the Montague/High Point Agreement last year. Further, documentation was presented at Oral Argument that indicates that the Port Jervis Board Of Education was aware, at least as early as July 2, 2013, of a transition plan for Montague pupils to begin being educated at High Point as of September 2014. (Port Jervis City School District, Board of Education Meeting Minutes, July 2, 2013.)

Based on the foregoing, I **CONCLUDE** that High Point has failed to meet the requirements set forth in N.J.A.C. 6A:3-1.6(b) and is not entitled to emergent relief.

I further **CONCLUDE** and the parties have confirmed and I **AGREE** that there are no further issues left to be determined.

ORDER

I hereby **ORDER** that the High Point's request for emergent relief is **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

Sept. 2, 2015
DATE

EVELYN J. MAROSE, ALJ