EDU #2782-02
C # 360-02
SB # 44-02

B.P., on behalf of minor child, B.P.,	:	
PETITIONER-RESPONDENT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	
RESPONDENT-APPELLANT.	:	

Decided by the Deputy Commissioner of Education, October 7, 2002

For the Petitioner-Respondent, Ronald B. Thompson, Esq.

For the Respondent-Appellant, Archer & Greiner (John B. Comegno, Esq., of Counsel)

On March 28, 2001, the petitioner's son, B.P., a student at Shawnee High School in the Lenape Regional High School District, tested positive for the use of marijuana. B.P. was suspended for violation of the district's drug policy, and, in September 2001, he transferred to the district's Sequoia Transition High School. On September 26, 2001, B.P. was suspected of being under the influence of substances and again referred for drug screening. B.P. refused to participate in the screening. On October 4, 2001, the petitioner and B.P. met with the district's Superintendent of Schools and other district personnel, at which time the petitioner and B.P. agreed that he would enter a drug treatment program in order to avoid disciplinary proceedings.

On November 2, 2001, B.P. again tested positive for marijuana and was suspended for a third violation of the district's drug policy. On December 19, 2001, prior to an expulsion hearing scheduled before the Board of Education of the Regional District (hereinafter "Board"), the petitioner agreed in writing to withdraw B.P from the district's schools. Under the terms of the agreement, however, the Board agreed that B.P. could attend the Lenape District Adult Evening High School.

On or about April 19, 2002, the petitioner filed a petition of appeal with the Commissioner of Education seeking to nullify that agreement and to have B.P. readmitted to Sequoia Transition High School.

On August 16, 2002, an Administrative Law Judge ("ALJ") recommended dismissing the petition, finding no evidence of fraud on the part of the Board nor clear and convincing proof of other compelling circumstances to vacate the settlement agreement. The ALJ concluded that the Board's denial of the petitioner's request that B.P. be permitted to return to Sequoia Transition High School was not arbitrary, capricious or unreasonable.

On October 7, 2002, the Deputy Commissioner of Education modified the ALJ's recommendation. Considering the petitioner's appeal within the framework of B.P.'s statutory and constitutional entitlement to a free public education, the Deputy Commissioner concluded that B.P. was legally entitled to attend school in the district. The Deputy Commissioner declined to rule on the enforceability of the settlement agreement, asserting that he lacked subject matter jurisdiction to resolve disputes over the interpretation and enforcement of contracts where such interpretation was primary to the issue in question. Nonetheless, the Deputy Commissioner noted his "serious reservation about the enforceability of an agreement wherein a party waives a student's

statutory and constitutional right to a free education." Deputy Commissioner's Decision, slip op. at 8, n.1. Accordingly, he directed the Board to readmit B.P. and to make immediate arrangements to assess his educational needs and identify an appropriate educational program for him. The Deputy Commissioner added that the Board could seek enforcement of the agreement in the appropriate forum while continuing to provide an appropriate educational program for B.P.

The Board filed the instant appeal to the State Board, seeking enforcement of the settlement agreement. After a careful review of the record, we affirm the ultimate determination of the Deputy Commissioner directing the Board to provide B.P. with an appropriate alternative education program. However, we modify the Deputy Commissioner's analysis.

Initially, we agree with the ALJ and the Deputy Commissioner that the petition was filed in a timely manner. N.J.A.C. 6A:3-1.3(d). We concur that the 90-day period for filing the petition commenced when the Board rejected the petitioner's request to withdraw her consent to the agreement at issue. In this case, there is no dispute that the petitioner filed her petition within 90 days after the Board notified her of such rejection.

However, although we agree with the Deputy Commissioner's ultimate determination in this matter, we conclude that the Commissioner does have incidental jurisdiction to review the settlement agreement between the petitioner and the Board. N.J.S.A. 18A:6-9 provides the Commissioner with jurisdiction to hear and determine all controversies and disputes arising under the school laws. Although the Commissioner does not have jurisdiction over disputes which are purely contractual in nature, e.g., Salley v. Board of Education of the City of Newark, decided by the Commissioner of

Education, November 4, 1984, he does have jurisdiction over contractual claims which are incidental to his obligation to resolve education claims that are the subject of litigation. E.g., Paladino v. Board of Education of the Township of Lacy, decided by the State Board of Education, February 1, 1989. In this instance, the petitioner contends that enforcement of the settlement agreement would deny her son a free public education in violation of the New Jersey Constitution and the education laws. Given the underlying basis for the petitioner's claim, we conclude that this agency has incidental jurisdiction over the agreement as it pertains to her education claims.

Turning to the merits of this matter, we fully agree with the Deputy Commissioner that B.P. is entitled to an alternative education program. As we stressed in P.H. and P.H., on behalf of minor child, M.C. v. Board of Education of the Borough of Bergenfield, decided by the State Board of Education, July 2, 2002, remanded for supplemental findings, Docket #A-006566-01T3 (App. Div. 2003), the New Jersey State Constitution requires that a child excluded from the regular classroom for disciplinary reasons be provided with an alternative education program until he either graduates from high school or reaches his nineteenth birthday, whichever comes first.[1] In that regard, we reject the Board's argument that the petitioner, by entering into the settlement agreement, knowingly waived her son's right to a free public education in the district. Waiver involves the intentional relinquishment of a known right and must be evidenced by a clear, unequivocal and decisive act from which an intention to relinquish the right

[1] On September 16, 2003, the Appellate Division remanded P.H. to the State Board for "additional submissions by the parties and supplemental findings by the Board" on the question of whether the domicile statute, N.J.S.A. 18A:38-1, applied to the case. By decision today, the State Board amended its decision of July 2, 2002, which was grounded in the education clause of the New Jersey State Constitution, holding that N.J.S.A. 18A:38-1 requires a district board to provide a student permanently expelled from its regular education program with a free public education until his twentieth birthday. P.H., supra, decision on remand by the State Board of Education, December 3, 2003.

can be based. Country Chevrolet v. North Brunswick Planning Bd., 190 N.J. Super. 376, 380 (App. Div. 1983). It must be shown that the party charged with the waiver knew of his or her legal rights and deliberately intended to relinquish them. Shebar v. Sanyo Business Sys. Corp., 111 N.J. 276, 291 (1988). "Waiver 'presupposes full knowledge of the right and an intentional surrender.'" County of Morris v. Fauver, 153 N.J. 80, 104-105 (1998) (quoting West Jersey Title & Guar. Co. v. Industrial Trust Co., 27 N.J. 144, 153 (1958)).

There is nothing in the settlement agreement or elsewhere in the record that provides any basis for concluding that the petitioner had full knowledge of the constitutional and statutory rights at issue and that she knowingly relinquished those rights on behalf of her son. Thus, notwithstanding the terms of the agreement, we direct that the Board provide B.P. with an appropriate alternative education program in the district. We add in that regard that the Board has the obligation to determine and provide an appropriate program for B.P. and that such choice will not be disturbed unless the petitioner can demonstrate that it does not provide her son with an appropriate alternative education. A.M. and S.M., on behalf of minor child, M.M. v. Board of Education of the Township of Livingston, decided by the State Board of Education, April 3, 2002.

Accordingly, we affirm the ultimate determination of the Deputy Commissioner directing the Board to provide B.P. with an appropriate alternative education program.

December 3, 2003

Date of mailing _____